UNCERTAINTY IN DEATH AND TAXES—THE NEED TO REFORM LOUISIANA'S LIMITED LIABILITY COMPANY LAWS

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Despite our founding father Benjamin Franklin's observation about the certainty of death and taxes in this world, the Louisiana statutory scheme governing the limited liability company (LLC) has rendered death and taxes entirely uncertain. This uncertainty can paralyze business, stall successions, and negatively impact tax consequences. The cause of this uncertainty is specific state statutory provisions in Title 12, Chapter 22, Part IV of the Louisiana Revised Statutes, which are rooted in now-stale federal law and are due for reform by the Louisiana legislature.

This Article is divided into three parts. Section I explains the rights of heirs as assignees upon the death of a member of a Louisiana LLC and presents examples of inequities that can occur as a result of the current statutory framework. Section II traces the origins of treating heirs of an LLC member as assignees and explains how the original reasoning was based on prior, subsequently overruled, federal tax law. Finally, Section III proposes legislative changes to address the LLC in the modern era.

I. LOUISIANA LLCS AND ASSIGNEE STATUS: IN GENERAL

A. INTRODUCTION

A membership interest in an LLC is comprised of two sets of rights: financial rights and management rights.[1] Management rights include a right to vote,[2] a right to inspect the books, and a right to review the records of the company.[3] Financial rights

1. *See* LA. REV. STAT. ANN. § 12:1330(A) (2010).

2. *Id.* § 12:1318(B). Voting rights include the right to vote on the dissolution and winding up of the LLC; the sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all of the assets of the LLC; the merger or consolidation of the LLC; the incurrence of indebtedness by the LLC other than in the ordinary course of its business; the alienation, lease, or encumbrance of any immovables of the LLC; and an amendment to the articles of organization or the operating agreement. *Id.*

3. LA. REV. STAT. ANN. § 12:1319.

entitle the member "to receive such distribution or distributions . . . and to receive such allocation of income, gain, loss, deduction, credit, or similar item."[4] The division of rights comes from the "pick your partner" principle, which originated under general partnership law.[5] Partnership law generally prohibits one partner from unilaterally conveying a partnership interest to an outsider because partners are jointly and severally liable for the actions of their other partners.[6]

Louisiana law permits a member of a limited liability company to assign all or a portion of that member's membership interest.[7] The assigning member retains management rights in the LLC, while the assignee receives the assignor's financial interest.[8] The assignment effectively separates the original

4. *See* LA. REV. STAT. ANN. § 12:1330(A) (2010).

5. CARTER G. BISHOP & DANIEL S. KLEINBERGER, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW ¶ 8.03[1][b][iii] (2005); *see* Daniel S. Kleinberger, *The LLC as Recombinant Entity: Revisiting Fundamental Questions Through the LLC Lens*, 14 FORDHAM J. CORP. & FIN. L. 473, 474 ("The 'pick your partner' principle and the bifurcation of ownership interests into financial and governance rights originates in partnership law, while corporate law provides the complete 'liability shield'—*i.e.*, the conceptual 'non-conductor' that protects owners from automatic liability for the debts of the enterprise." (footnote omitted)); *see also In re* Albright, 291 B.R. 538, 541 (Bankr. D. Colo. 2003) ("However, the charging order, as set forth in Section 703 of the Colorado Limited Liability Company Act, exists to protect other members of an LLC from having involuntarily to share governance responsibilities with someone they did not choose, or from having to accept a creditor of another member as a co-manager. A charging order protects the autonomy of the original members, and their ability to manage their own enterprise.").

6. Daniel S. Kleinberger, *The Closely Held Business Through the Entity-Aggregate Prism*, 40 WAKE FOREST L. REV. 827, 833-34 (2005) (citing Sunshine Cellular v. Vanguard Cellular Sys., Inc., No. 92 Civ. 3194 (RLC), 1993 WL 212675, at *4 n.8 (S.D.N.Y. June 14, 1993) (referring to "fundamental right of partnership law, the right to choose one's partners")); *see also* Kellis v. Ring, 155 Cal. Rptr. 297, 300 (Cal. Ct. App. 1979) ("Personality is the very essence of a general partnership and although not as inherently pervasive in a limited partner, it is clear that . . . the nature of this legal entity does not place a premium on personality."); S. Stacy Eastland, *The Art of Making Uncle Sam Your Assignee Instead of Your Senior Partner: The Use of Partnerships in Estate Planning*, SK069 A.L.I.-A.B.A. 999, 1008 (2005) ("One of the reasons why partnership law is so different from corporate law with respect to transferability [of ownership interests] is that, under state law, it is assumed that the essence of partnerships is a personal relationship. Since it is a personal relationship, you should have the freedom to be able to choose your partners. No one can force you to be a partner with someone with whom you do not wish to be a partner. This lack of free transferability . . . is the essence of partnership law . . . .").

7. LA. REV. STAT. ANN. § 12:1330(A).

8. *See id.* (stating the financial interest includes the right to distributions, to

member's interest into two sets of rights: a management interest and a financial interest. Because Louisiana's default statutory scheme treats the death of a member of an LLC as an assignment of the decedent's interest, only the financial interest—but not the management interest—is transferred to the estate.[9]

This bifurcation of membership rights occurs when a member (the assignor) transfers an interest in the LLC, whether by voluntary sale, seizure, or death.[10] The recipient of a transferred interest (the assignee) is immediately vested with the financial rights associated with that interest.[11] The assignee is only entitled to the financial rights that the assignor was entitled to receive, unless and until the assignee is admitted as a member to the LLC.[12] As a result, the management rights remain vested with the assignor, even if deceased, until the assignee is admitted as a member to the LLC. Such admission requires the unanimous consent of the remaining members.[13]

B. PROBLEMS PRESENTED BY ASSIGNMENT

1. THE PRACTICAL PROBLEMS WITH ASSIGNMENT OF MEMBERSHIP INTERESTS AT DEATH

Under Louisiana's current statutory regime, the death of an LLC member creates problems with respect to the decedent's management interest.[14] Reading Louisiana Revised Statute § 12:1332 *in pari materia* with § 12:1333 illustrates the current conundrum in the law:

> § 12:1332(A)(2): Until the assignee of an interest in a limited liability company becomes a member, the assignor shall continue to be a member.
>
> § 12:1333: If a member who is an individual dies . . ., the member's membership [interest] ceases and the member's executor . . . shall be treated as an assignee of

share in profits and losses, and to receive the member's allocation of income, gain, loss, deduction, credit, etc.).

9. Susan Kalinka, *Death of a Member of an LLC*, 57 LA. L. REV. 451, 451-52 (1997).

10. David Phillip Hamm, Jr., *Rethinking the Entity Selection Calculus in the Small Business Context*, 31 MISS. C. L. REV. 451, 454-55 (2013).

11. *See* LA. REV. STAT. ANN. § 12:1330(A) (2010).

12. *Id.*

13. *See id.* § 12:1332(A).

14. *See* § 12:1329-1333; *see also* Kalinka, *supra* note 9, at 452-53.

such member's interest in the limited liability company.[15]

Put simply, although § 12:1332(A)(2) provides that the assignor of a membership interest remains a member, § 12:1333 terminates a deceased assignor's membership interest in the LLC. The conflicting treatment of the assignor's interest in the two Statutes produces inconsistencies. Also, the legal effects resulting from the death of a member do not fit within the general concept of assignment of membership interests, as the assignor is no longer alive and therefore is not a member of the LLC.

2. DEATH OF A MEMBER

The first problem created by the inconsistencies in these Statutes arises upon the death of a majority or minority owner of an LLC. Under Louisiana law, the decedent's membership ceases upon death, and the decedent's executor is treated as the assignee of that interest.[16] The assignee receives limited rights and lacks ability to manage the decedent's interest in the LLC.[17] Specifically, because the assignee is not granted full membership rights (unless and until admitted to the LLC), the assignee has no ability to control the decedent's bequeathed ownership interest. To acquire control over the inherited interest, the executor of the estate of the LLC's majority owner (e.g., 90%) is in the peculiar position of seeking permission from the minority owner(s) (e.g., 10%) for admission to the LLC.[18] Additionally, because the executor is not entitled to management rights unless and until admitted as a member to the LLC, the executor of the majority owner has no ability to vote or even to inspect the books and records.[19] Conversely, the minority owner(s) tacitly assumes the power to dissolve and wind up the LLC, sell or encumber substantially all of the LLC's assets, enter into a merger, incur indebtedness outside the ordinary course of business, or amend the articles of organization or operating agreement.[20] Depriving the executor of the decedent's management interest in an LLC not only seems unfair—especially when in the case of a deceased

15. *Compare* LA. REV. STAT. ANN. § 12:1332(A) (2010), *with* LA. REV. STAT. ANN. § 12:1333.

16. *See* LA. REV. STAT. ANN. § 12:1333.

17. *See supra* Section I(B)(1).

18. *See* LA. REV. STAT. ANN. § 12:1333, 12:1332.

19. *See id.* § 12:1332(A)(1), § 12:1318(A), § 12:1319(B).

20. *See* LA. REV. STAT. ANN. § 12:§1318(B) (2010).

majority owner—but it produces inequitable and unworkable results. Although the executor of the majority owner's estate will acquire the decedent's financial rights, the executor is denied all management rights.

The Louisiana Third Circuit Court of Appeal's decision in *Kinkle v. R.D.C., L.L.C.* aptly illustrates the inequities that result under the current statutory regime.[21] Prior to his death, the decedent, Kinkle, was a member of the company R.D.C., LLC (R.D.C.).[22] Following Kinkle's death, R.D.C. stopped paying distributions to the decedent's estate.[23] The executor of Kinkle's estate filed a petition for declaratory judgment and accounting against R.D.C.[24] Defendant R.D.C. responded with an exception of no right of action on the basis that the executor was not entitled to the requested relief because she had not been admitted as a member of the LLC.[25] One of the issues presented to the court was whether the estate, as an assignee pursuant to § 12:1333 of the Louisiana Revised Statutes, was entitled to receive an inspection or accounting of the LLC's books and records.[26] The court held that the executor, as a mere assignee, was not entitled to inspect R.D.C.'s records, since such an action is reserved only for members of the LLC and there was no evidence that the surviving members of the LLC had unanimously consented to allow the executor to participate in the management of the LLC.[27] Thus, the *Kinkle* executor was allowed to inspect neither the books nor the records and therefore could not accurately value the decedent's membership interest. This ruling not only impeded the orderly disposition of Kinkle's succession, but likewise impacts similar Louisiana successions today.

The current statutory scheme also creates outright dysfunction upon the death of the sole member of a single-member LLC. As seen in *Kinkle*, when a member of an LLC dies, the executor is treated as an assignee, unless and until the

21. Kinkle v. R.D.C., L.L.C., 2004-1092, p. 14 (La. App. 3 Cir. 12/8/04); 889 So. 2d 405, 413.

22. *Id.* at 406.

23. *Id.*

24. *Id.* at 406-07.

25. *Id.* at 407.

26. Kinkle v. R.D.C., L.L.C., 2004-1092, p. 3-4 (La. App. 3 Cir. 12/8/04); 889 So. 2d 405, 407; *see also id.* at 412-13.

27. *Id.* at 413.

assignee is admitted as a member to the LLC. This occurs even when the LLC consists of only one member. Thus, just as in a multi-member LLC, the executor of the estate of a sole member is treated as an assignee, *but there are no remaining members to admit the executor as a member*. Because an assignee does not have management rights unless admitted to the LLC, there is no one available to manage the company, wind up affairs, or make distributions. Not only is this result inequitable, it is nonsensical.

3. INCOME TAX REPORTING

Louisiana's assignment of interest rules also complicate income taxes. What is an assignee for tax purposes? Is an assignee of an interest in an LLC treated as a member and issued a Schedule K-1 Form (K-1)[28] to report gains and losses? The answer depends on whether or not an assignee is a "partner" for purposes of federal income tax.

Per the Internal Revenue Service's (the Service) Revenue Ruling 77-137, an assignee of a limited partnership interest must report income or loss for tax purposes if the assignee acquired "dominion and control" over the interest.[29] If the assignor retained substantial rights not to be exercised on behalf of the assignee, then the assignee does not report the income or loss as attributable to the assignee's ownership interest in the partnership because the assignee does not have dominion and control of the partnership interest.[30] Even assuming these principles also apply to the assignment of membership interests, application of Revenue Ruling 77-137 rules is not so straightforward upon the death of a member of an LLC.

Under Louisiana law, a creditor with a judgment charged against a membership interest has "only the rights of an assignee of the membership interest."[31] The creditor has the

28. In general, every domestic partnership (and any foreign partnership who engages in a trade or business within the United States or has gross income from United States sources) must file a partnership tax return (commonly referred to as a Form 1065) with the IRS and furnish to each partner a return (commonly referred to as a Form K-1) containing the information required to be shown on his individual income tax return. *See* 26 U.S.C. § 6031(a), (e)(2).

29. Rev. Rul. 77-137, 1977-1 C.B. 178.

30. *See id.*

31. LA. REV. STAT. ANN. § 12:1331 (2010).

right to the member's distributions, but since the creditor does not acquire dominion and control over the interest, the member must still report the income for tax purposes.[32] This result seems to make sense if the member is deemed to have received the income and subsequently paid it to the creditor.[33] However, this logic does not apply in instances where the assignment is a result of a member's death. When a member dies, the deceased member/assignor does not retain any substantial rights, and under the current state of Louisiana law, the executor/assignee clearly does not acquire dominion and control unless the executor/assignee is admitted as a member. Thus, because the assignee does not acquire dominion and control, and because the assignor does not retain substantial rights, Revenue Ruling 77-137 cannot be applied to determine whether the executor should receive a K-1 and report the income.[34]

32. *See* Lucas v. Earl, 281 U.S. 111 (1930).

33. *See*, *e.g.*, Comm'r v. Banks, 543 U.S. 426 (2005) (holding plaintiffs who hire attorneys on a contingency fee must include the attorney's fee in income under the assignment of income doctrine).

34. It should be noted that a large part of the reasoning underlying Revenue Ruling 77-137 was that the assignor agreed to exercise the residual rights retained solely in favor of the assignee. I.R.S. Gen. Couns. Mem. 36,960 (Dec. 20, 1976) ("[The fact that assignees generally have limited rights,] taken in conjunction with the absence of any cases giving tax effect to the assignment of a partnership interest to a stranger, leads us to the conclusion that, in the absence of some specific provision for the exercise of these residual rights in favor of and solely in the interest of the assignee, the assignor should continue to be taxed on the partnership distributive shares as still having dominion and control over the assigned interest. In other words, to the extent that an assignor retains residual rights that may not be exercised on behalf of the assignee, the assignee may be said to lack dominion and control over the assigned interest. Such obligations may be evidenced by terms of the assignment or by the relationship of the parties. Ordinarily it should be easier to transfer dominion and control with respect to a limited partnership interest than with respect to a general partnership interest because of the smaller 'bundle of rights' associated with limited [partnership] interests. In *Evans* and in the instant case [the subject of GCM 36,960], when the assignment was to the assigning partner's controlled corporation, it is not unreasonable to conclude that any residual rights retained by the assignor are to be exercised on behalf of the assignee, thereby, providing the assignee with the requisite dominion and control." (citing Treas. Reg. § 1.704-1(e)(2)(ix) (2012); Evans v. Comm'r, 447 F.2d 547, 551 (7th Cir. 1971)). While GCM 36,960 might seem helpful to taxpayers, in fact taxpayers are barred from relying on GCM's in determining whether substantial authority exists. Therefore, the status of the law is unclear. *See* Susan Kalinka, *Assignment of an Interest in a Limited Liability Company and the Assignment of Income*, 64 U. CIN. L. REV. 443, 546-49 (1996) (discussing uncertainty of assignment of income for assignee/heirs upon the death of a member).

Requiring the executor to report the income is potentially inequitable; a profitable company might create a significant tax burden but not make any distributions from which the executor or heir would be able to pay the tax obligation.[35] Additionally, the LLC might report to the Service that the assignee owes tax, but the assignee has no rights to inspect the books and records or inspect the tax returns to verify the accuracy of the reported tax liability.

4. LIMITED ADVANTAGES OF ASSIGNEE STATUS

The federal estate tax is an excise tax imposed on the fair market value of property transferred, less allowable deductions.[36] The tax is calculated by multiplying the applicable estate tax rate by the value of the property actually transferred (as opposed to the value held by the decedent at death).[37] The decedent's interest is worth substantially less in the assignee's hands than in the member's because of the assignee's limited rights.[38] The diminished value in the interest results in minority discounts being applied to the membership interest in the LLC.[39]

The benefits produced by the application of minority discounts are not substantial enough to compensate for the negative aspects of the default statutory scheme. First, the estate tax savings is negligible for heirs of modest estates and those within the present $5 million exclusion ($10 million for married couples),[40] especially when that savings is compared to the costly effects of being treated as an assignee of the LLC interest. Second, assignee discounts may be unnecessary

35. The penalty, however, is one solely of timing and character of income. Assuming the assignee would be required to include in income his or her share of partnership income, despite not having received a distribution, the inclusion of income would increase the basis in the LLC interest. 26 U.S.C. § 705(a)(1) (2012). When the LLC is dissolved, assuming the assignee received no distributions and the other members received draws (or were allocated losses), the liquidating distribution to the assignee could produce a long-term capital loss. *See id.* § 731(a)(2).

36. Estate of Bright v. United States, 658 F.2d 999, 1001 (5th Cir. 1981).

37. *Id.*

38. 9 SUSAN KALINKA, LOUISIANA CIVIL LAW TREATISE § 1.17 (3d ed. 2001).

39. Albert O. "Chip" Saulsbury, IV, Comment, *Catch You on the Flip Side: A Comparative Analysis of the Default Rules on Withdrawal from a Louisiana Limited Liability Company*, 71 LA. L. REV. 675, 675 (2011).

40. I.R.C. § 2010(c) (2011). The $5 million exclusion is adjusted annually for inflation for all years after 2011. *Id.* § 2010(c)(3)(B). For estates of decedents during in 2014, the basic exclusion amount is $5,340,000. Rev. Proc. 2013-35, 2013-47 I.R.B. 537.

considering other valuation discounts long recognized by courts and the Service. For example, shareholders who own a minority interest in a company are permitted to take minority interest discounts because, as the Tax Court recognizes, "a minority interest holder lacks control over company policy, cannot direct payment of dividends, and cannot compel a liquidation of company assets."[41] Likewise, the Tax Court permits shareholders in closely-held organizations to take marketability discounts to reflect the absence of active buyers for interests in closely held businesses.[42]

The relatively few individuals who are impacted by the estate tax are more likely to regularly seek competent counsel in transacting business because, as high net worth individuals, the nature of their affairs tends to be more complex. The problems presented by this statutory regime can be avoided with a properly drafted operating agreement.[43] If unrelated individuals wish to take advantage of assignee marketability discounts, transfer restrictions can be incorporated into the LLC's operating agreement to the extent permitted under state law.[44] Proper policy should provide common sense results in the *absence* of an operating agreement while remaining flexible to allow parties to engage in sophisticated planning by agreement.

II. ORIGINAL REASONING FOR ASSIGNEE STATUS IN A LLC

A. BRIEF TAX BACKGROUND

Corporate income tax is generally understood to be a system of "double taxation" whereby the corporation pays a tax on income when it is earned,[45] and the shareholders pay tax on distributions when they are made.[46] The system of double taxation creates a higher effective tax rate for individuals operating their

41. Estate of H.A. True v. Comm'r, 82 T.C.M. (CCH) 27, 78 (2001), *aff'd*, 390 F.3d 1210 (10th Cir. 2004).

42. *Id.* at 81.

43. *See* LA. REV. STAT. ANN. § 12:1330(C) (2010) ("*Unless otherwise provided in a written operating agreement* and except to the extent assigned by agreement, until an assignee of a membership interest becomes a member, the assignee shall have no liability as a member solely as a result of such assignment." (emphasis added)).

44. LLC members who are related, however, would need to comply with the requirements of I.R.C. § 2703.

45. I.R.C. § 11(a) (2011).

46. *See id.* § 301.

businesses through corporations.

Business owners often seek to be taxed as partnerships because only a single level of tax is imposed, and the provisions are very flexible. However, with greater flexibility comes greater complexity, and partnership taxation has "a well-earned reputation as one of the most complex areas of the tax law."[47] This Article's explanation of Subchapter K of Volume 26 of the United States Code, which governs partnership taxation, is therefore limited to a rudimentary explanation of the mechanics necessary to understand the arguments contained herein.[48]

Because the partnership entity itself is not directly subject to taxation, there is only a "single layer" of taxation.[49] Each partner is taxed on that partner's respective share of income, commonly referred to as a "distributive share."[50] The partners are required to pay their respective distributive shares regardless of whether any actual distributions are made by the partnership. If the partnership does not make a distribution equal to the amount of the partner's distributive share in a given year, the partner recognizes no gain to the extent that the partner has already been taxed on that income in the year it was earned.[51] Therefore, distributions from the partnership are received tax-free.[52] Because the partnership is not subject to taxation as an entity, and because the partners ultimately pay the tax, the partnership is allowed to determine how much tax each partner is required to pay. The flexibility of the provisions under Subchapter K allows the partners to determine, at the partnership level, the amount of partnership income, gain, loss, deduction, or credit that each

47. LAURA E. CUNNINGHAM & NOËL B. CUNNINGHAM, THE LOGIC OF SUBCHAPTER K : A CONCEPTUAL GUIDE TO THE TAXATION OF PARTNERSHIPS 1 (4th ed. 2011) ("Subchapter K has a well-earned reputation as one of the most complex areas of the tax law; while a flow-through regime sounds simple enough in concept, implementing that regime is another matter."). The combination of great flexibility and great complexity has also led to substantial abuses within the provisions of Subchapter K. *See* United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836 (2012) (involving the Son-of-BOSS tax shelter); TIFD III—E, Inc. v. United States, 666 F.3d 836 (2d Cir. 2012) (involving highly questionable debt/equity structuring).

48. Assume that this is a service partnership requiring no capital contributions (therefore the initial capital accounts of the partners begin at $0) that produce a profit (and never losses) annually.

49. *See* I.R.C. § 701 (2011).

50. *See id.*

51. *See id.* §§ 705(a)(1), 733, 741.

52. *See id.* § 741.

partner is required to include on such partner's income tax return as long as the allocations have "substantial economic effect."[53]

Although Congress has enacted systems governing both the taxation of corporations and partnerships, it has yet to enact a regime regulating the taxation of LLCs. This absence of federal authority means that LLCs may be taxed as either corporations or partnerships, provided that the LLC has at least two members.[54]

B. ENTITY CLASSIFICATION: HISTORICAL DEVELOPMENT OF CORPORATIONS AND PARTNERSHIP CLASSIFICATION, THE ADVENT OF THE LLC, AND THE CHECK-THE-BOX REGULATIONS

1. *MORRISSEY* AND *KINTNER*

The first statute authorizing a corporate tax was enacted in 1909.[55] It imposed a 1% tax on income exceeding $50,000 earned by a "joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States."[56] As the tax was imposed on "associations" (not just entities labeled "corporations" under state law), the threshold question was whether an entity constituted an "association" for federal tax purposes.

In the 1935 case of *Morrissey v. Commissioner*, the Supreme Court of the United States identified certain traits that would render an entity an association and thereby subject it to corporate

53. *See* I.R.C. § 704 (2011). The determination of whether or not an allocation has substantial economic effect is highly complex and outside the scope of this Article. For an excellent discussion of the provision of § 704, see WILLIAM S. MCKEE ET AL., FEDERAL TAXATION OF PARTNERSHIPS AND PARTNERS ¶11.02 (Warren, Gorham, & Lamont 2014).

54. *See* Treas. Reg. § 301.7701-3(a).

55. Revenue Act of 1909, ch. 6, § 38, 36 Stat. 11. The tax on corporate income is actually an excise tax placed on the "carrying on or doing business." *See* Flint v. Stone Tracy Co., 220 U.S. 107, 144 (1911). The first attempted tax on corporate income was found to be a direct tax, which would have required the tax to be apportioned among the states in proportion to the states' population. 2 BORIS I BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶1.2.2 (2000); *see also* U.S. CONST. art. I, § 8, cl. 4; Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895).

56. Revenue Act of 1909, ch. 6 § 38, 36 Stat. 11, 112.

taxation.[57] The Court noted: "[I]t is impossible in the nature of things to translate the statutory concept of 'association' into a particularity of detail that would fix the status of every sort of enterprise or organization which ingenuity may create."[58] The Court observed that the "associations" Congress intended to tax were entities that resembled traditional corporations[59] and it was therefore necessary to determine whether an entity embodied certain traditional corporate characteristics. The *Morrissey* Court identified seven characteristics that would support such corporate characterization:

1. the opportunity for centralized management;
2. continuity of the business, notwithstanding the death of an owner;
3. free transferability of ownership interests;
4. the ability to limit the liability of the owners;
5. the presence of associates;
6. the carrying on of a trade or business and sharing of profits and losses; and
7. the ability for the entity to hold title to property.[60]

Although the Court did not indicate the weight that should be given to each factor in deciding whether an entity was an association, the Court did emphasize the relevance of the following four corporate factors: "centralized management," "continuity," "free transferability," and "limited liability."[61] The Court distinguished these four corporate factors because the other three factors are common to all multi-member business

57. Morrissey v. Comm'r, 296 U.S. 344 (1935). In *Morrissey*, a group of investors formed a trust for the purpose of developing a golf course. *Id.* at 347. Under the terms of the trust, "trustees" were given full management authority to construct and operate the golf course, the investors in the trust were protected from personal liability, the interests held by the trust were freely transferable, and the death of a trustee did not terminate the trust. *Id.* at 347-48. Based on these traits, the court found that the entity ought to be deemed an association properly taxed as a corporation. *Id.* at 361-62.

58. *Id.* at 356.

59. *Id.* at 357-58 ("The inclusion of associations with corporations implies resemblance; but it is resemblance and not identity.").

60. *Id.* at 356-59.

61. *See id.* at 359-60.

entities, regardless of taxation. After articulating this multi-factor test, the Court found that all four corporate factors were present in the trust at issue in *Morrissey*; thus, the Court classified it as an association subject to corporate taxation.[62]

2. THE *KINTNER* DECISION

Courts continued to apply the imprecise and inconsistent factors described in *Morrissey* until 1960.[63] During this time, treasury regulations specified that entities in borderline cases were to be classified as associations subject to corporate taxation.[64] However, the Service changed its position in 1960 as a result of the decision *Kintner v. United States*, rendered by the United States Court of Appeals for the Ninth Circuit.[65] In order to understand the *Kintner* decision, two historical notes must be made. First, when *Kintner* was decided in 1954, most states prohibited professional service providers, such as doctors, lawyers, accountants and engineers, from operating under corporate protection.[66] Second, at that time, employees of corporations were eligible to participate in retirement programs unavailable to employees of partnerships.[67] *Kintner* involved a group of physicians who had attempted to circumvent those two obstacles.[68] In *Kintner*, this physicians' group attempted to form a state law partnership (in compliance with state law) with enough corporate characteristics to warrant classifying their entity as an association for federal tax purposes, thereby also rendering the entity eligible for corporate retirement benefits.[69] The *Kintner* court sided with the taxpayer-physicians and held that the partnership could be taxed as an association due to the

62. Morrissey v. Comm'r, 296 U.S. 344, 360-61 (1935).

63. *See* Steven A. Dean, *Attractive Complexity: Tax Deregulation, the Check-The-Box Election, and the Future of Tax Simplification*, 34 HOFSTRA L. REV. 405, 425-26 (2005).

64. *Id.* (citing Stephen B. Scallen, *Federal Income Taxation of Professional Associations and Corporations,* 49 MINN. L. REV. 603, 709 (1965) ("For 50 years the regulations consistently tended to classify borderline cases as associations.")).

65. *Id.* at 426; *see* United States v. Kintner, 216 F.2d 418, 423 (9th Cir. 1954).

66. Patrick E. Hobbs, *Entity Classification: The One Hundred-Year Debate*, 44 CATH. U. L. REV. 437, 488-89 (1995).

67. Burgess J.W. Raby & William L. Raby, *Substance vs. Form: The Taxpayer Catch-22*, 109 TAX NOTES, Nov. 21, 2005, *available at* http://taxprof.typepad.com/taxprof_blog/files/2005-23384-1.pdf.

68. *See Kintner*, 216 F.2d at 419-21.

69. *Id.* at 419-20; WILLIAM S. MCKEE ET AL., FEDERAL TAXATION OF PARTNERSHIPS AND PARTNERS ¶ 3.06 (3d ed. 1997).

presence of sufficient corporate characteristics.[70]

3. THE (ANTI-) *KINTNER* REGULATIONS

After *Kintner*, the United States Department of the Treasury issued regulations—known as the "*Kintner* Regulations"—in an attempt to limit corporate tax treatment of non-corporate entities.[71] Under the *Kintner* Regulations, all entities fell into one of the following categories: associations (taxed as corporations), partnerships, or trusts.[72] This entity classification for federal tax purposes would be wholly independent of the state law label of that entity, but local law would be applied in determining the legal rights between the owners.[73] Under the new regulations, the four traditional "corporate characteristics" identified in *Morrissey* were to be given equal weight, and an entity with more than half of the corporate characteristics was to be classified as an association subject to corporate taxation.[74] Thus, in order to be taxed as a partnership, an entity could embody no more than two corporate factors. Understanding these corporate factors marking the grey area between corporations and partnerships helps to shed light on the need that LLCs were created to meet.

As to the "continuity" factor, the regulations provided that an organization had the corporate characteristic of "continuity" if the organization did not dissolve upon "the death, insanity, bankruptcy, retirement, resignation, or expulsion of any member."[75] In addition, a general or limited partnership formed under a statute conforming to the Uniform Partnership Act or

70. United States v. Kintner, 216 F.2d 418, 422-23 (9th Cir. 1954) (discussing the partnership's corporate characteristics were "continuity, centralized control and limitation of liability").

71. MCKEE ET AL., *supra* note 69, at ¶ 3.06[1] ("For many years the Service and the Treasury aggressively supported an expansive definition of 'association' in order to protect the corporate tax base. This approach began to change in 1960, when Regulations were published that made it much easier for noncorporate entities to avoid association status. This change was not motivated by a desire to erode the corporate tax base; rather, it was motivated by a desire to prevent professional service providers . . . who traditionally had operated in partnership form, from obtaining retirement benefits that at the time were available only to employees of corporations."); Hobbs, *supra* note 66, at 485.

72. Treas. Reg. § 301.7701-1(b) (1960) (stating that entities must fall into one of three categories for tax purposes).

73. *Id.* § 301.7701-1(c).

74. *See id.* § 301.7701-2(a)(3).

75. *Id.* § 301.7701-2(b)(1).

Uniform Limited Partnership Act lacked continuity of life because, under those statutes, the remaining partners were required to consent to the continuation of the partnership upon the occurrence of such an event.[76]

With regard to the characteristic of "centralized management," an organization had "centralized management" if "any person . . . [had] continuing exclusive authority to make the management decisions necessary to the conduct of the business for which the organization was formed."[77] Thus, an entity was characterized as having centralized management if it had an exclusive management group.[78] However, if each member could unilaterally bind the others, then that entity lacked centralized management.[79]

The regulations further provided that "limited liability" existed if no member was personally liable for the debts of the entity or claims against the entity.[80]

Finally, an organization's membership interests were deemed "freely transferable" if each of the entity's members had the ability to transfer that membership interest to an individual without consent from the other members.[81] If a member was only able to transfer that member's rights to share in the profits and losses, but was unable to transfer managerial rights without the consent of the other members, the organization's membership interests were not freely transferable.[82]

4. UNITED STATES LLC STATUTES

The use of the limited liability company form within the United States is relatively new, although the *concept* of an LLC has existed for more than one hundred years internationally.[83] Because the *Kintner* Regulations required the default state

76. Treas. Reg. § 301.7701-2(b)(1) (1960).
77. *Id.* § 301.7701-2(c)(1).
78. *See id.*
79. *See id.* § 301.7701-2(c)(4).
80. *Id.* § 301.7701-2(d)(1).
81. Treas. Reg.§ 301.7701-2(e)(1) (1960).
82. *Id.*
83. Steven C. Bahls, *Application of Corporate Common Law Doctrines to Limited Liability Companies*, 55 MONT. L. REV. 43, 46-48 (1994) (noting the German equivalent of an L.L.C., the Gesellschaft mit beschrankter Haftung, was first authorized in 1892).

statutes governing all non-corporate entities to have less than three of four corporate characteristics in order to be taxed as a partnership, states were initially reluctant to enact LLC statutes due to the uncertainty of their classification under federal tax law.[84] Thus, the LLC form was not widespread in the U.S. until the turn of this century. Specifically, with the exception of front-runners such as Florida and Wyoming, the other forty-eight states enacted their LLC statutes from 1988 to 2006.[85]

The swift and widespread adoption of the LLC form within the United States is attributed largely to Revenue Ruling 88-76, which discussed whether entities formed under the Wyoming Limited Liability Act (Wyoming Act) would be taxed as a corporation or a partnership.[86] Because the very *raison d'être* of an LLC requires shielding its members from personal liability, the Wyoming legislature recognized that the entities could be endowed with only one other corporate characteristic to qualify for partnership treatment for federal income tax purposes.[87] Policymakers in Wyoming permitted an LLC organized under the Wyoming Act to have limited liability and centralized management, but restricted free transferability and continuity.[88] To avoid imbuing LLCs with the continuity characteristic, Wyoming drafters required the unanimous consent of all members to continue business should an event triggering dissolution occur.[89] Likewise, directly following the guidance laid out in the *Kintner* Regulations,[90] the Wyoming Act provided that

84. *See* Bahls, *supra* note 83, at 47.

85. *Id.* at 47-48; Saulsbury, *supra* note 39, at 678.

86. Rev. Rul. 88-76, 1988-2 C.B. 360; *see* Wyoming Limited Liability Company Act, ch. 158, 1977 Wyo. Sess. Laws 577 (repealed 2010).

87. *See* Rev. Rul. 88-76, 1988-2 C.B. 360.

88. *See* Alice G. Abreu, *Paradise Kept: A Rule-Based Approach to the Analysis of Transactions Involving Disregarded Entities*, 59 SMU L. REV. 491, 506 (2006).

89. Rev. Rul. 88-76, 1988-2 C.B. 360. The events of dissolution include "the death, retirement, resignation, expulsion, bankruptcy, dissolution of a member or occurrence of any other event that terminates the continued membership of a member." *Id.*

90. The *Kintner* Regulations, at the time, provided:

> An organization has the corporate characteristic of free transferability of interests if each of its members or those members owning substantially all of the interests in the organization have the power, without the consent of other members, to substitute for themselves in the same organization a person who is not a member of the organization. In order for this power of substitution to exist in the corporate sense, the member must be able, without the consent of other members, to confer upon [the member's] substitute all the attributes of [the member's] interest in the organization. Thus, the characteristic of free transferability of interests does not exist in a case in which each member can,

transferees of a membership interest in a Wyoming LLC were mere assignees whose interest was limited to receiving distributions.[91] Additionally, members of Wyoming LLCs were not permitted to privately contract around the "continuity of life" or "free transferability" restrictions.[92] As the Wyoming Act permitted only two of the four corporate characteristics, the Service ruled that entities formed under the Wyoming Limited Liability Act were taxable as a partnership.[93]

After the Service's approval of the Wyoming Act, the next question was whether the Service would allow a "flexible" LLC statute—one allowing LLC organizers to "cherry-pick" two corporate characteristics. Five years later, the Service issued Revenue Ruling 93-38, wherein the Service blessed Delaware's LLC statute, which allowed the organizers flexibility in choosing whether the entity would have corporate characteristics.[94]

5. CHECK-THE-BOX REGIME OF "SELF-CLASSIFICATION"

In 1995, the U.S. Treasury announced that it was considering drastically simplifying the classification of domestic, non-corporate entities as partnerships.[95] The Service recognized that the difference between partnerships and corporations was largely the result of historical and formalistic state law provisions.[96] To remedy the problem, in final regulations promulgated January 1997, the Service abandoned its *Kintner* Regulations and proposed the flexible, self-classification model enjoyed today, whereby non-corporate business owners choose

> without the consent of the other members, assign only his right to share in the profits but cannot so assign his rights to participate in the management of the organization.

Treas. Reg. § 301.7701-2(e)(1) (1988).

91. WYO. STAT. § 17-15-122 (Michie 1988) (repealed 2010).

92. *See id.* §§ 17-15-122, 17-15-123; *see also* Wayne M. Gazur, *The Limited Liability Company Experiment: Unlimited Flexibility, Uncertain Role*, 58 LAW & CONTEMP. PROBS. 135, 141 (1995) ("To ensure favorable partnership characterization by the IRS, several key provisions supporting that result were included in the Wyoming act, and those provisions could not be modified by the organizers.").

93. Rev. Rul. 88-76, 1988-2 C.B. 360.

94. *See* Rev. Rul. 93-38, 1993-1 C.B. 233 ("[T]herefore, M must be classified as either an association or a partnership. M is classified as a partnership for federal tax purposes unless the organization has a preponderance of the remaining corporate characteristics of continuity of life, centralization of management, limited liability, and free transferability of interests.").

95. I.R.S. Notice 95-14, 1995-14 I.R.B. 7.

96. *Id.*

whether to be taxed as a partnership or a corporation.[97]

Under the current regime of "self-classification," a domestic non-corporate entity (entities not labeled "corporations" under state law) formed under state law that has two or more members is taxed as an "eligible entity."[98] An "eligible entity" is taxed as a partnership by default, but the entity may choose to be taxed as a corporation.[99] Accordingly, an LLC consisting of more than one member will be taxed under the flexible, single-tiered partnership provisions of Subchapter K, unless the owners unanimously elect for that entity to be taxed as an association.[100] In sum, the law currently in effect pays no heed to formalistic counting of characteristics and instead relies on "self-classification."

6. LLC STATUTES POST "CHECK-THE-BOX"

Despite the Service's 1995/1997 repeal of its anachronistic *Kintner* Regulations, state legislatures have failed to follow suit. As previously mentioned, nearly every state LLC statute imposes limitations on transferability, continuity, and management in order to avoid corporate taxation of LLCs. Since partnership treatment is currently available under federal tax law for all non-corporate entities, regardless of the level of corporate characteristics, the state statutory schemes enacted prior to the Service's "check-the-box" regulations are outdated and therefore ripe for amendment.

7. PROPOSED REFORM TO THE LOUISIANA LLC STATUTES

The following proposals will help to resolve the problems that arise under the current statutory scheme; namely, the restricted rights of an executor granted assignee status, the unaddressed issue of the death of the sole member of an LLC, and the issues resulting from income tax reporting.

97. T.D. 8697, 1997-1 CB 215.

98. Treas. Reg. § 301.7701-3(a) (as amended in 2006) ("A business entity that is not classified as a corporation under [§ 301.7701-2] can elect its classification for federal tax purposes as provided in this section. An eligible entity with at least two members can elect to be classified as either an association (and thus a corporation under § 301.7701-2(b)(2)) or a partnership . . . .").

99. *Id.* § 301.7701-3(b)(1)(i).

100. *See id.* § 301.7701-3(a).

III. LEGISLATIVE SOLUTIONS

A. TREAT AN LLC MEMBERSHIP INTEREST AS A HERITABLE ASSET

To most effectively remedy the issues present in the current system, the optimal course of action is to repeal and replace Louisiana Revised Statute § 12:1333. In its current form, § 1333 treats the deceased member's executor as an assignee of the decedent's membership interest in the LLC, and the law of assignment is insufficient in this context. The language of the current Statute should be replaced with a provision effectively treating the membership interest as a heritable asset. This proposal is consistent with present statutory treatment of stock in a corporation, which is heritable, and thus, allows for the transfer of the deceased shareholder's rights and powers to the shareholder's heirs or executor.[101] An amendment to the LLC statute could be made that would retain elements of the "pick your partner" regime, but allow membership interests in LLCs to pass freely at death while still allowing the owners to alter the default provision through the LLC's articles of organization or operating agreement. This proposed statute would read as follows:

> *Except as otherwise provided in the articles of organization or an operating agreement, upon the death of a natural person who is a member of a limited liability company, the member's membership interest, including his rights and duties as a member, may pass to his successors by will or applicable law.*[102]

The problems previously described would be remedied if the decedent's full membership interest could be transferred to the executor or heirs. Because the executor's rights would no longer be restricted, the executor would be in a substantially better position to protect and preserve the estate's share from the remaining member(s). The executor would have the decedent's

101. LA. REV. STAT. ANN. § 12:603 (2010); 9 SUSAN KALINKA, LOUISIANA CIVIL LAW TREATISE § 1.42 (3d ed. 2001).

102. This proposed statute was partially adopted from title 7, § 86.491 of the Nevada Revised Statutes Annotated, which provides that upon the death of the sole member of a limited liability company, the status of the member, including the member's interest, may pass to the heirs, successors, and assigns of the member, and the successor then becomes a member. NEV. REV. STAT. ANN. § 86.491(5) (West 2013).

voting rights, the right to inspect the books and records, and the ability to direct the LLC to make timely distributions. The income tax reporting concern discussed above is also resolved by this change. The executor would have the same rights and powers previously held by the deceased member and would be (rightfully) the proper party to report the deceased member's share of income and losses. This proposed provision would eliminate the financial concern of a tax obligation being owed without distributions from the company to cover the tax. Finally, the proposed law would resolve the inherently problematic result of the death of the sole member of a single-member LLC because the executor would continue the role of the deceased member. Additionally, because this amendment would apply only to transfers at death, it arguably retains elements of the "pick your partner" principle because the members would be unable to transfer their shares during their lifetime—to a buyer or otherwise. Adoption of this approach would resolve the inequities created by the current statute. Moreover, by enacting such an amendment, Louisiana would lead its sister states with an equitable, functional resolution in this area of the law.

B. GRANT THE EXECUTOR FULL, IF LIMITED OR TEMPORARY, AUTHORITY OVER THE DECEDENT'S LLC INTEREST

Another option is to amend the current Louisiana statutes to provide the executor or assignee with powers limited to the accomplishment of a certain purpose or with a time restraint. This approach is similar to that of other jurisdictions, which grant executors and heirs temporary management rights to settle the decedent's estate or administer the decedent's property.[103] Some states also address the specific issue relating to the transfer upon death of a single-member LLC.[104] For instance,

103. *See, e.g.*, ALA. CODE § 10A-5-6.04 (2011); CAL. CORP. CODE § 17705.04 (West 2014); CONN. GEN. STAT. ANN. § 34-173(a) (West 2011); DEL. CODE ANN. tit. 6, § 18-705 (2011); D.C. CODE § 29-805.04 (2012); FLA. STAT. ANN. § 608.434 (West 2011); GA. CODE ANN. § 14-11-506 (2012); IDAHO CODE ANN. § 30-6-504 (West 2011); IOWA CODE ANN. § 489.504 (West 2011); KAN. STAT. ANN. § 17-76, 115 (West 2011); ME. REV. STAT. ANN. tit. 31, § 1574 (2011); MASS. GEN. LAWS ANN. ch. 156C, § 42 (West 2011); MISS. CODE ANN. § 79-29-709(2) (West 2011); N.H. REV. STAT. ANN. § 304-C:105-a (2011); N.J. STAT. ANN. § 42:2B-46(d) (West 2011); N.Y. LTD. LIAB. CO. LAW § 608 (McKinney 2011); OHIO REV. CODE ANN. § 1705.21 (West 2011); R.I. GEN. LAWS ANN. § 7-16-38 (West 2011); UTAH CODE ANN. § 48-3a-504 (West 2012); VT. STAT. ANN. tit. 11, § 3075 (West 2011); WYO. STAT. ANN. § 17-29-504 (West 2011).

104. *See, e.g.*, ARIZ. REV. STAT. ANN. § 29-731(B)(4) (2011); COLO. REV. STAT. ANN. § 7-80-701(2) (West 2012); IND. CODE ANN. § 23-18-6-4.1 (West 2011); MD. CODE

New Hampshire provides that "[u]nless the operating agreement provides otherwise, a person who succeeds to the limited liability company interest of a deceased member of a single-member limited liability company is admitted as the member of the limited liability company."[105]

Amending Louisiana Revised Statute § 12:1333 as follows[106] would resolve the problems regarding the death of a member of an LLC under the default provisions:

> *A. Except as otherwise provided in the articles of organization or an operating agreement:*
>
> (I) If a member who is an individual dies or a court of competent jurisdiction adjudges him to be incompetent to manage his person or property, the member's executor, administrator, guardian, or other legal representative *may exercise all of the member's rights for the purpose of settling the member's estate or administering the member's property, including any power the member had to give an assignee the right to become a member.*
>
> (2) If a member is a corporation, trust, or other entity and is dissolved or terminated, the member's legal representative or successor *may exercise the powers of that member.*
>
> *B. Except as otherwise provided in the articles or organization or an operating agreement, if the last member of a limited liability company dies or a court of competent jurisdiction adjudges him to be incompetent to manage his person or property, the member's executor, administrator, guardian, or other legal representative may become a member of the limited liability company.*

This proposed amendment is influenced by provisions in the Revised Uniform Limited Partnership Act then in effect.[107] This

ANN., CORPS. & ASS'NS § 4A-604(a)(3) (West 2011); MICH. COMP. LAWS ANN. § 450.4506(1) (West 2012); MISS. CODE ANN. § 79-29-707 (West 2011); N.H. REV. STAT. ANN. § 304-C:153 (2013); N.J. STAT. ANN. § 42:2B-46(d) (West 2011); OR. REV. STAT. ANN. § 63.245(2)(c) (West 2012); VA. CODE ANN. § 13.1-1038.1(A)(4) (West 2011).

105. N.H. REV. STAT. ANN. §§ 304-C:153 (2013).

106. The proposed changes are italicized.

107. REVISED UNIF. LTD. P'SHIP ACT § 705 (1976) ("If a partner who is an individual dies or a court of competent jurisdiction adjudges him [or her] to be

approach would solve the issues previously identified by giving the executor more power to protect the decedent's interest and by addressing the death of a member in a single-member LLC. Further, granting the executor full, albeit temporary, membership rights would enable the executor to address the income tax issues present under the current regime.

Under this approach, the personal representative's powers as a member would be effective as long as the estate were open. In the only decision addressing language akin to the proposed clause, the Supreme Court of Ohio affirmed a lower court's ruling that the executor's power as a member exists only while the estate is under administration.[108] Presumptively, if the estate is closed and the personal representatives/heirs were not admitted as member(s) during the administration, the recipients of the interest from the probate proceeding would be treated as assignees. The dissenting justice in the Ohio case, arguing that the representative should only be afforded assignee status, questioned what powers the representative should have and criticized the court for failing to provide guidance on that issue.[109]

Such a limitation arguably has some potential for abuse. For example, another LLC member could strategically wait to vote on the admission of the heir until the administration is fulfilled. This risk (which would require an extremely cunning party on one side, an uncounseled party on the other, as well as the absence of a well-drafted operating agreement) is both minimal and preferable to the potential for paralysis under the current regime.

incompetent to manage his [or her] person or his [or her] property, the partner's executor, administrator, guardian, conservator, or other legal representative may exercise all the partner's rights for the purpose of settling his [or her] estate or administering his [or her] property, including any power the partner had to give an assignee the right to become a limited partner. If a partner is a corporation, trust, or other entity and is dissolved or terminated, the powers of that partner may be exercised by its legal representative or successor." (alterations in original)).

108. Holdeman v. Epperson, 857 N.E.2d 583, 588 (Ohio 2006) ("Accordingly, we affirm the judgment of the Clark County Court of Appeals and hold that an executor of the estate of a deceased member of a limited liability company has all rights that the member had prior to death, for the limited purpose of settling the member's estate or administering his property."); *see* Holdeman v. Epperson, No. Civ.A.2004-CA-49, 2005 WL 1714210, at *8 (Ohio Ct. App. July 22, 2005) ("Mrs. Holdeman is simply entitled to exercise the member powers that Mr. Holdeman had before death, during the period of her administration and for purposes of settling the estate.").

109. *Holdeman*, 857 N.E.2d at 588 (Lundberg Stratton, J., dissenting).

IV. CONCLUSION

The default rules of any state's statutory scheme governing its business entities should promote the very policies that underlie the rationale for establishing such entities and should address all scenarios that can be reasonably anticipated. In the absence of human immortality, the death of members of LLCs is inevitable; the consequences should be neither uncertain nor unworkable. It follows that one priority of the default LLC rules should be the orderly transfer of a decedent's interest, consistent with the policy rationale underlying the business form itself.

At present, Louisiana's default rules are deficient in this regard. As currently written, membership interests require an agreement in order to protect heirs or other transferees from being subject to a seemingly arbitrary system of transferability whereby heirs, in the absence of a contract, are prohibited from essentially exercising the rights of the property inherited. This is why Louisiana's "assignment of membership interests" Statutes at Louisiana Revised Statute § 12:1330 *et seq.* are in need of reform. Specifically, the problem is that current default rules mandate a bifurcation of the decedent's financial interest from the decedent's management interest, leaving at best a tension and at worst a void in the orderly succession of both the estate and the business entity. This bifurcation of interests mandated by present law inhibits Louisiana LLCs from conducting business, with potentially damaging consequences to both individual stakeholders and the Louisiana economy.

Given this substantial, foreseeable negative impact, and considering that this law is based on now-outdated federal income tax principles, Louisiana lawmakers should amend the default rules regarding death of a member of an LLC to remedy the inequities caused by bifurcating the transfer of management and financial interests. The ideal option would be to treat an LLC membership interest as a heritable asset. Alternatively, the executor or assignee should be granted full, if limited in time or scope, authority over the decedent's LLC interest. By adopting one of the legislative proposals set forth in this Article, Louisiana would maintain the restrictions on voluntary assignments, while still protecting the membership interest in involuntary assignments. Moreover, Louisiana would forge a new path of equitable resolution of a common issue involving "death and taxes" facing many jurisdictions.