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Client Bulletin



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WHAT ARE “RECORDS OF A LIMITED LIABILITY COMPANY” AND ARE YOU REALLY A MEMBER OF A LIMITED LIABILITY COMPANY IF YOUR NAME DOES NOT APPEAR IN THOSE RECORDS?

Recently, a law firm client, when informed of the fee for forming a limited liability company, indicated that his children just formed their own limited liability company (LLC) online on the Ohio Secretary of State’s website. The Ohio Secretary of State’s website’s online forms for the formation of an Ohio LLC are forms that can be filled out online and printed or downloaded, printed, and filled out. The forms available are limited to a submission cover letter and the Articles of Organization for a Domestic Limited Liability Company, which includes an original appointment of statutory agent and an acceptance of appointment by the statutory agent (collectively the “Articles”). The Articles set forth that the form must be signed by a “member, manager or other representative.” No place within the Articles is there a listing of the names of the members of the LLC being formed, nor anywhere else in the records of the Ohio Secretary of State is there information regarding the members of an LLC. At this point, you may be thinking “so what?” This article answers that question.

Ohio Rev. Code § 1705.01(G) says that a “member” of an LLC is “a person whose name appears on the records of the limited liability company as the owner of a membership interest in that company,” and Ohio Rev. Code § 1705.01(H) defines “membership interest” as “a member’s share of the profits and losses of a limited liability company and the right to receive distributions of that company.” At issue in a case decided in December 2017 by the First District Court of Appeals, *Stanfield v. On Target Consulting*, 2017-Ohio-883 (the Stanfield case), was whether a person, Robert A. Davis, was a member of three limited liability companies, all three of which held liquor licenses. Presented as evidence of Mr. Davis’s ownership in the three LLCs were his 2014 income tax return and records from the Ohio Department of Commerce, Division of Liquor Control (“Liquor Control”) for the years 2011 through 2016 which records, when the LLCs were renewing liquor licenses, listed Mr. Davis alternatively as “owner,” “manager,” and “partner.” The trial court held that these documents were records of the LLCs and established that Mr. Davis was a member of each LLC. However, the Court of Appeals reversed the trial court, ruling that income tax forms filed with the IRS and applications filed with Liquor Control were not, under Ohio Rev. Code Chapter 1705, records of a limited liability company.

The Appeals Court in the Stanfield case followed a decision of the Tenth District Court of Appeals (Franklin County), *Matthews v. D’Amore*, 2006-Ohio-5745 (the Matthews case), which held that although Articles and statutory agent appointment forms filed with the Ohio Secretary of State may qualify as “company records,” such forms were not records of an LLC listing a person’s name as one who shares in the company’s profits and losses and has a right to receive distributions from the LLC. The court in the Matthews case had ruled that a limited liability company’s operating agreement was the record that sets forth membership interests and was the appropriate document to consider when determining the identity of the members of the LLC. The Appeals Court in the Stanfield case looked at Ohio Rev. Code § 1705.28(A), which mandates that an LLC keep at its principal office: (1) a current list, in alphabetical order, of the full names with last known business or residence address of each member, (2) a copy of the Articles and amendments thereto and copies of any powers of attorney used for the signing

of the Articles or amendments, (3) a copy of the written operating agreement and all amendments thereto and copies of written powers of attorney used to execute the operating agreement or amendments, (4) copies of federal, state and local tax returns and reports for the three most recent years, (5) copies of financial statements for the three most recent years, and (6) unless set forth in the written operating agreement, a writing setting forth all of each member's capital contribution, the nature of each capital contribution, in what circumstances additional capital contributions were agreed to, information regarding the right for distribution which include a return of all or part of capital contribution, and any event upon the occurrence of which the LLC is to be dissolved and its affairs wound up. The Appeals Court held that these records that an LLC is required to maintain at its principal office pursuant to Ohio Rev. Code § 1705.28(A) were "corporate governance" documents that provide the most reliable information regarding the structure and operation of the LLC and constituted the "records of the limited liability company" from which records, and only from which records, the identity of the members of the LLC can be determined.

The decision in the Stanfield case holding that the documents listed in Ohio Rev. Code §1705.28(A) constitute the "records of the limited liability company" can have consequences beyond the question of who the members of an LLC are. It can be anticipated that attorneys seeking to hold individuals liable for debts or wrongful acts of an LLC will point to the decision in the Stanfield case to support an argument for individual liability on the basis that the LLC was not truly formed notwithstanding the filing of Articles with the Ohio Secretary of State because the "records of the limited liability company," its so-called "corporate governance" documents, were never created and maintained as required by statute, an argument that the failure to maintain the statutorily required "records" permits "piercing the corporate veil" and holding members personally liable, and/or an argument that because the "records of the limited liability company" do not show the individual as a member or manager of the LLC, the individual was signing and acting not as a member or manager of the LLC, but, rather, individually and is therefore personally liable.

Unquestionably, taking "shortcuts" in forming an LLC and thereafter not creating and maintaining its "records" can potentially have significant adverse consequences.

COLUMBUS CEO'S LEGAL GUIDE

Each year Columbus CEO includes in one of its monthly issues a Legal Guide of central Ohio law firms containing basic information on practice areas, number of partners, number of full-time equivalent attorneys, etc. Of the 125 listed law firms, Manos, Martin & Pergram is only one of three listing a Delaware County address. The Legal Guide generally is published about six months after the publication of Columbus CEO's "Top Lawyers" listing, which is comprised of only AV® Preeminent™ law firms as rated in Martindale-Hubbell based on peer review by attorneys and judges. Manos, Martin & Pergram was again listed among Columbus CEO's "Top Lawyers."

DELAWARE COUNTY FOUNDATION "EVENING OF GENEROSITY"

The Delaware County Foundation's sixth annual "Evening of Generosity" was held on October 25, 2018. This year's honorees were: Big Walnut Middle School Student Leadership Council-Outstanding Youth Group; Charles and Betty Sheets-Spirit of Philanthropy; Foertmeyer and Sons Greenhouse-Outstanding Business; and Jeff Robinson-Outstanding Volunteer. The firm was a silver sponsor of the event.

This bulletin provides general information and is not legal advice. Please contact us if you need legal advice.

If you have friends or associates who you think would enjoy receiving a copy of this Client Bulletin, please feel free to forward it on. Thank you.

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