

Materials for the Second Meeting of
the ULC Unincorporated Organization Acts Committee
January 26, 2021

First Issue
Rescinding Dissolution of a General Partnership
Issue # 2 of the JEB Report

Summary of the Issue: If dissolution occurs at the behest of a person that has rightfully dissociated as a partner, does rescission of dissolution require consent from that person? UPA (1997) did not provide for rescinding dissolution, so the issue did not arise. UPA (2013) does so provide and does not require the consent of the former partner.

Explanation of the Issue: UPA (1997) did not provide for rescinding dissolution; Harmonization added a rescission provision to parallel those already existing in the limited partnership and LLC acts. Under those acts, rescinding dissolution (in the default mode) requires the unanimous consent of the partners/members, and UPA (2013) does likewise. However, under all three acts, partner/member is defined to exclude a person that has dissociated.

Thus, the unanimous consent requirement for rescission excludes any former partner/member. The exclusion is fine under ULPA and ULLCA, because neither statute contemplates dissolution at the behest of a person that has dissociated.

In contrast, UPA (2013) § 801(1) so contemplates, as did UPA (1997) § 801(1). Thus, under UPA (2013) a person might rightfully dissociate as a partner, rightfully cause dissolution under Section 801(1), and yet but be powerless to prevent rescission of the dissolution.¹

Reporter's recommendation: revise UPA (2013) § 803(b) to take into account the former partner issue, as follows:

(b) Rescinding dissolution under this section requires:

(1) the affirmative vote or consent of each partner;

(2) if the dissolution occurred under Section 801(1), the affirmative vote or consent of the person whose express will to withdraw as partner caused Section 801(1) to apply {{caused dissolution to occur under Section 801}};²

¹ For additional information, see the JEB Report, Issue #2.

² Double brackets indicate alternate language.

and

(~~2~~3) if the partnership has delivered to the [Secretary of State] for filing a statement of dissolution

Excerpts from Uniform Acts

UPA (2013)

SECTION 102. DEFINITIONS. In this [act]:

(10) “Partner” means a person that:

(A) has become a partner in a partnership under Section 402 or was a partner in a partnership when the partnership became subject to this [act] under Section 110; and

(B) has not dissociated as a partner under Section 601.

SECTION 601. EVENTS CAUSING DISSOCIATION. A person is dissociated as a partner when:

(1) the partnership knows or has notice of the person’s express will to withdraw as a partner, but, if the person has specified a withdrawal date later than the date the partnership knew or had notice, on that later date;

(2) an event stated in the partnership agreement as causing the person’s dissociation occurs;
(3) the person is expelled as a partner pursuant to the partnership agreement;
(4) the person is expelled as a partner by the affirmative vote or consent of all the other partners
if:

(A) it is unlawful to carry on the partnership business with the person as a partner;
(B) there has been a transfer of all of the person’s transferable interest in the partnership,
other than:

(i) a transfer for security purposes; or
(ii) a charging order in effect under Section 504 which has not been foreclosed;
(C) the person is an entity and:
(i) the partnership notifies the person that it will be expelled as a partner because

the person has filed a statement of dissolution or the equivalent, the person has been administratively dissolved, the person's charter or the equivalent has been revoked, or the person's right to conduct business has been suspended by the person's jurisdiction of formation; and

(ii) not later than 90 days after the notification, the statement of dissolution or the equivalent has not been withdrawn, rescinded, or revoked, or the person's charter or the equivalent or right to conduct business has not been reinstated; or

(D) the person is an unincorporated entity that has been dissolved and whose activities and affairs are being wound up;

(5) on application by the partnership or another partner, the person is expelled as a partner by judicial order because the person:

(A) has engaged or is engaging in wrongful conduct that has affected adversely and materially, or will affect adversely and materially, the partnership's business;

(B) has committed willfully or persistently, or is committing willfully or persistently, a material breach of the partnership agreement or a duty or obligation under Section 409; or

(C) has engaged or is engaging in conduct relating to the partnership's business which makes it not reasonably practicable to carry on the business with the person as a partner;

(6) the person:

(A) becomes a debtor in bankruptcy;

(B) signs an assignment for the benefit of creditors; or

(C) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the person or of all or substantially all the person's property;

(7) in the case of an individual:

(A) the individual dies;

(B) a guardian or general conservator for the individual is appointed; or

(C) a court orders that the individual has otherwise become incapable of performing the individual's duties as a partner under this [act] or the partnership agreement;

(8) in the case of a person that is a testamentary or inter vivos trust or is acting as a partner by virtue of being a trustee of such a trust, the trust's entire transferable interest in the partnership is distributed;

(9) in the case of a person that is an estate or is acting as a partner by virtue of being a personal representative of an estate, the estate's entire transferable interest in the partnership is distributed;

(10) in the case of a person that is not an individual, the existence of the person terminates;

(11) the partnership participates in a merger under [Article] 11 and:

.....

SECTION 801. EVENTS CAUSING DISSOLUTION. A partnership is dissolved, and its business must be wound up, upon the occurrence of any of the following:

(1) in a partnership at will, the partnership knows or has notice of a person's express will to withdraw as a partner, other than a partner that has dissociated under Section 601(2) through (10), but, if the person has specified a withdrawal date later than the date the partnership knew or had notice, on the later date;

SECTION 803. RESCINDING DISSOLUTION.

....

(b) Rescinding dissolution under this section requires:

(1) the affirmative vote or consent of **each partner**; and

(2) if the partnership has delivered to the [Secretary of State] for filing a statement of dissolution ...

ULPA (2013)

SECTION 102. DEFINITIONS. In this [act]:

....

(7) “General partner” means a person that:

(A) has become a general partner under Section 401 or was a general partner in a partnership when the partnership became subject to this [act] under Section 112; and

(B) has not dissociated as a general partner under Section 603.

....

(11) “Limited partner” means a person that:

(A) has become a limited partner under Section 301 or was a limited partner in a limited partnership when the partnership became subject to this [act] under Section 112; and

(B) has not dissociated under Section 601.

SECTION 801. EVENTS CAUSING DISSOLUTION.

(a) A limited partnership is dissolved, and its activities and affairs must be wound up, upon the occurrence of any of the following:

....

(3) after the dissociation of a person as a general partner:³

(A) if the partnership has at least one remaining general partner, the affirmative vote or consent to dissolve the partnership not later than 90 days after the dissociation by partners owning a majority of the rights to receive distributions as partners at the time the vote or consent is to be effective; or

(B) if the partnership does not have a remaining general partner, the passage of 90 days after the dissociation, unless before the end of the period:

(i) consent to continue the activities and affairs of the partnership and admit at least one general partner is given by limited partners owning a majority of the rights to receive distributions as limited partners at the time the consent is to be effective; and

(ii) at least one person is admitted as a general partner in accordance with the consent;

....

SECTION 803. RESCINDING DISSOLUTION.

(a) A limited partnership may rescind its dissolution, unless a statement of termination applicable to the partnership has become effective, [the appropriate court] has entered an order under Section 801(a)(6) dissolving the partnership, or the [Secretary of State] has dissolved the partnership under Section 811.

³ This provision is not on point with the issue and is included only because the provision refers to dissociation.

(b) Rescinding dissolution under this section requires:

(1) the affirmative vote or consent of each partner;

....

ULLCA (2013)

SECTION 102. DEFINITIONS. In this [act]:

....

(11) “Member” means a person that:

(A) has become a member of a limited liability company under Section 401 or was a member in a company when the company became subject to this [act] under Section 110; and

(B) has not dissociated under Section 602.

....

SECTION 701. EVENTS CAUSING DISSOLUTION.

(a) A limited liability company is dissolved, and its activities and affairs must be wound up, upon the occurrence of any of the following:⁴

(1) an event or circumstance that the operating agreement states causes dissolution;

(2) the affirmative vote or consent of all the members;

(3) the passage of 90 consecutive days during which the company has no members unless before the end of the period:

(A) consent to admit at least one specified person as a member is given by

⁴ None of these events are relevant to this issue. The language is included in case someone wishes to confirm the irrelevancy.

transferees owning the rights to receive a majority of distributions as transferees at the time the consent is to be effective; and

(B) at least one person becomes a member in accordance with the consent;

(4) on application by a member, the entry by [the appropriate court] of an order dissolving the company on the grounds that:

(A) the conduct of all or substantially all the company's activities and affairs is unlawful;

(B) it is not reasonably practicable to carry on the company's activities and affairs in conformity with the certificate of organization and the operating agreement; or

(C) the managers or those members in control of the company:

(i) have acted, are acting, or will act in a manner that is illegal or fraudulent; or

(ii) have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant; or

(5) the signing and filing of a statement of administrative dissolution by the [Secretary of State] under Section 708.

SECTION 703. RESCINDING DISSOLUTION.

(a) A limited liability company may rescind its dissolution, unless a statement of termination applicable to the company has become effective, [the appropriate court] has entered an order under Section 701(a)(4) dissolving the company, or the [Secretary of State] has dissolved the company under Section 708.

(b) Rescinding dissolution under this section requires:

(1) the affirmative vote or consent of each member; and....

Second Issue
Merger Provisions in UPSA
not mentioned in JEB Report

Summary and Explanation of the Issue: It has been suggested that a conflict exists in the Uniform Protected Series Act ("UPSA") between §§ 602(3) and 607(2). Section 602(3) states that a protected series may not *inter alia* be established in "a transaction substantially like a

merger....” Section 607(2) states that when a merger becomes effective, any protected series to be established as a result of the merger is “established”. Also, Section 605(d)(2) contemplates the establishment of a protected series as a result of a permitted merger involving a series limited liability company.

Reporter’s Recommendation: This conflict is more apparent than real, because a merger under UPSA is not “substantially like” a merger; the transaction *is* a merger. A revised comment can clarify. (Revising Section 602(3) to apply “except as provided in Sections 605(d)(2) and 607(2)” would imply that a merger falls within the category of “substantially like a merger”.

Statutory Sections and Comments

SECTION 602. PROTECTED SERIES MAY NOT BE PARTY TO ENTITY

TRANSACTION. A protected series may not:

- (1) be an acquiring, acquired, converting, converted, merging, or surviving entity;
- (2) participate in a domestication; or
- (3) **be** a party to or be formed, organized, **established**, or created **in a transaction**

substantially like a merger, interest exchange, conversion, or domestication.

Comment

The protected series is still novel, and this act is the first to comprehensively address the multitude of issues raised by the construct. Juxtaposing protected series with entity transactions raises a plethora of additional issues. For example, during the Drafting Committee’s discussions of this subject, a commissioner created a set of Power Point slides diagramming 11 possible merger transactions involving protected series. Adding conversions, domestications, and interest exchanges would have added countless more permutations.

The Drafting Committee decided to move slowly in this area and to provide a very narrow channel for entity transactions involving protected series. As its first step in creating the narrow channel, the Committee rejected allowing a protected series itself to be a party to any entity transaction.

Paragraphs (1) and (2) – Uniform Limited Liability Company Act (2006) (Last Amended 2013), Section 1001 defines the terms listed in Paragraph (1) but with regard to domestications refers to a domesticating or domesticated limited liability company. Hence the need for Paragraph (2).

Paragraph (3) – This paragraph, with its reference to “a transaction substantially like a

merger”, does not conflict with Sections 605(d)(2) and 607(2), which each contemplate establishment of one or more protected series as a result of a permitted merger of a series limited liability company. A permitted merger is not merely “substantially like a merger”; a permitted merger *is* a merger.

SECTION 604. MERGER AUTHORIZED; PARTIES RESTRICTED.

Comment

....

The following chart shows what may happen to a protected series of a series limited liability company that is party to a merger under this provision.

post-merger status of merging company	fate of existing protected series	possible to create protected series as part of the merger?
non-surviving	relocated protected series or dissolved, wound up, and terminated Section 605 (2)(A)	no
surviving	continuing protected series or dissolved, wound up, and terminated Section 605(2)(B)	yes Section 605(2)(D)

SECTION 605. PLAN OF MERGER. In a merger under Section 604, the plan of merger must:

(2) state in a record:

....

(D) for any protected series to be established by the surviving company as a result

of the merger:

- (i) the name of the protected series;
- (ii) any protected-series transferable interest to be owned by the surviving company when the protected series is established; and
- (iii) the name of and any protected-series transferable interest owned by any person that will be an associated member of the protected series when the protected series is established;

SECTION 607. EFFECT OF MERGER. When a merger under Section 604 becomes effective, in addition to the effects stated in [cite the provisions of this state’s limited liability company act stating the effect of a merger]:(2) any protected series to be established as a result of the merger is established;

....

Third Issue
Definition of Domestication (and related definitions)
JEB Report, Issue # 4

Context of the Issue: Article 2 of the Uniform Business Organization Codes (“UBOC”) describes:

- “domestication” as a transaction involving solely a change in an entity’s jurisdiction of formation; and
- a “conversion” as a transaction necessarily a change in an entity’s type and possibly also involving a change in the entity’s jurisdiction of formation.⁵

In contrast, some jurisdictions use solely the term “conversion”, describing or defining a

⁵ UPA, ULPA, ULLCA (2013) each contains comparable provisions for a jurisdiction that has enacted UBOC or the Model Entity Transactions Act (2007) (the source of UBOC, Article 2).

conversion as a transaction involving change of jurisdiction, change of entity type, or change of both jurisdiction and entity type (“umbrella approach”).

Summary of the Issue: When an entity form under the law of an enacting state seeks solely to change its jurisdiction of formation to a jurisdiction that uses the umbrella approach, will the transaction satisfy UBOC § 2-501(a) and (b) (authorizing domestication out [to a different jurisdiction] and domestication in [from a different jurisdiction] in each case “if the domestication is authorized by the law of the foreign jurisdiction.” Put another way: does a statute that authorizes domestication without using the term satisfy Sections 2-501(a) and (b)?

Explanation of Issue: Certainly, reasonable minds may differ as to which approach is better. Indeed, in 2001 the ULC adopted the umbrella approach. See ULPA (2001), § 1102, cmt. (“In a statutory conversion an existing entity changes its form, the jurisdiction of its governing statute or both.”). More generally, jurisdictions are divided. See LPUE ; 2016 Conversion-Domestication [sic] Survey Results 4820-0414-6261 v.1.xlsx, to be posted under Documents at the Committee’s webpage at <https://uniformlaws.org/committees/community-home/librarydocuments?communitykey=721aeb0d-b7bc-40e6-93af-02e21a5164e5&tab=librarydocuments&LibraryFolderKey=&DefaultView=> .

Reporter’s recommendation: Add clarifying language to the uniform act provisions on domestication.

[UBOC] SECTION 2-501. DOMESTICATION AUTHORIZED.

(a) Except as otherwise provided in this section, by complying with this [part], a domestic entity may become a domestic entity of the same type of entity in a foreign jurisdiction if ~~the domestication is authorized by~~ the law of the foreign jurisdiction authorizes a transaction with results comparable {substantially identical} to the results provided in Section 2-506(a).⁶ .regardless of the name that law {the law of the foreign jurisdiction} applies to the transaction,

.

(b) Except as otherwise provided in this section, by complying with the provisions of this [part] applicable to foreign entities a foreign entity may become a domestic entity of the same

⁶ Query whether to include other subsections of Section 2-506.

type of entity in this state if ~~the domestication is authorized by the law of the foreign entity's~~
jurisdiction of formation authorizes a transaction with results comparable {{substantially
identical}} to the results provided in Section 2-506(a), regardless of the name that law {{the law
of the foreign jurisdiction}} applies to the transaction.

Statutory Provisions -- UBOC⁷

SECTION 2-102. DEFINITIONS.

(a) In this [article]:

....

(4) “Conversion” means a transaction authorized by [Part] 4.

(5) “Converted entity” means the converting entity as it continues in existence
after a conversion.

(6) “Converting entity” means the domestic entity that approves a plan of
conversion pursuant to Section 2-403 or the foreign entity that approves a conversion pursuant to
the law of its jurisdiction of formation.

(7) “Domesticated entity” means the domesticating entity as it continues in
existence after a domestication.

(8) “Domesticating entity” means the domestic entity that approves a plan of
domestication pursuant to Section 2-503 or the foreign entity that approves a domestication
pursuant to the law of its jurisdiction of formation.

(9) “Domestication” means a transaction authorized by [Part] 5.

⁷ UPA, ULPA, and ULLCA (2013) each contains comparable provisions, which are not printed here.

....

SECTION 2-501. DOMESTICATION AUTHORIZED.

(a) Except as otherwise provided in this section, by complying with this [part], a domestic entity may become a domestic entity of the same type of entity in a foreign jurisdiction if the domestication is authorized by the law of the foreign jurisdiction.

(b) Except as otherwise provided in this section, by complying with the provisions of this [part] applicable to foreign entities a foreign entity may become a domestic entity of the same type of entity in this state if the domestication is authorized by the law of the foreign entity's jurisdiction of formation.

(c) If a protected agreement contains a provision that applies to a merger of a domestic entity but does not refer to a domestication, the provision applies to a domestication of the entity as if the domestication were a merger until the provision is amended after [the effective date of this [article]].

[(d) This [part] does not apply to the domestication of:

(1) [a business corporation, if the state has adopted Subchapter 9B of the Model Business Corporation Act]; [or]

(2) [a nonprofit corporation, if the state has adopted Subchapter 9B of the Model Nonprofit Corporation Act];

SECTION 2-506. EFFECT OF DOMESTICATION.

(a) When a domestication becomes effective:

(1) the domesticated entity is:

(A) organized under and subject to the organic law of the domesticated entity; and

(B) the same entity without interruption as the domesticating entity;

(2) all property of the domesticating entity continues to be vested in the domesticated entity without transfer, reversion, or impairment;

(3) all debts, obligations, and other liabilities of the domesticating entity continue as debts, obligations, and other liabilities of the domesticated entity;

(4) except as otherwise provided by law or the plan of domestication, all of the rights, privileges, immunities, powers, and purposes of the domesticating entity remain in the domesticated entity;

(5) the name of the domesticated entity may be substituted for the name of the domesticating entity in any pending action or proceeding;

(6) if the domesticated entity is a filing entity, its public organic record is effective;

(7) if the domesticated entity is a limited liability partnership, its statement of qualification is effective simultaneously;

(8) the private organic rules of the domesticated entity that are to be in a record, if any, approved as part of the plan of domestication are effective; and

(9) the interests in the domesticating entity are converted to the extent and as approved in connection with the domestication, and the interest holders of the domesticating entity are entitled only to the rights provided to them under the plan of domestication and to any

appraisal rights they have under Section 2-109 and the domesticating entity's organic law.⁸

(b) Except as otherwise provided in the organic law or organic rules of the domesticating entity, the domestication does not give rise to any rights that an interest holder, governor, or third party would have upon a dissolution, liquidation, or winding up of the domesticating entity.

(c) When a domestication becomes effective, a person that did not have interest holder liability with respect to the domesticating entity and becomes subject to interest holder liability with respect to a domestic entity as a result of the domestication has interest holder liability only to the extent provided by the organic law of the entity and only for those debts, obligations, and other liabilities that are incurred after the domestication becomes effective.

(d) When a domestication becomes effective, the interest holder liability of a person that ceases to hold an interest in a domestic domesticating entity with respect to which the person had interest holder liability is subject to the following rules:

(1) The domestication does not discharge any interest holder liability under the organic law of the domesticating domestic entity to the extent the interest holder liability was incurred before the domestication became effective.

(2) A person does not have interest holder liability under the organic law of the domestic domesticating entity for any debt, obligation, or other liability that is incurred after the domestication becomes effective.

(3) The organic law of the domestic domesticating entity continues to apply to the release, collection, or discharge of any interest holder liability preserved under paragraph (1) as if the domestication had not occurred.

⁸ Note that the proposed revision refers solely to subsection (a).

(4) A person has whatever rights of contribution from any other person as are provided by other law or the organic rules of the domestic domesticating entity with respect to any interest holder liability preserved under paragraph (1) as if the domestication had not occurred.

(e) When a domestication becomes effective, a foreign entity that is the domesticated entity may be served with process in this state for the collection and enforcement of any of its debts, obligations, and other liabilities in accordance with applicable law.

(f) If a domesticating entity is a registered foreign entity, the registration to do business in this state of the domesticating entity is canceled when the domestication becomes effective.

(g) A domestication does not require the entity to wind up its affairs and does not constitute or cause the dissolution of the entity.

Fourth Issue
Protected Agreements
JEB Report, Issue # 11

Background to Issue: Domestications and conversions are relatively recent innovations,⁹ but each produces results that have long been possible through two steps, the second of which is a merger.¹⁰ The innovation is merely to substitute one step (domestication, conversion) for the two steps.

⁹ Interest exchanges are not novel but when, via the Model Entity Transactions Act (2007), the ULC began comprehensively contemplating entity transactions, few jurisdictions authorized interest exchanges and the authorization applied only to corporations. Outside those few jurisdictions, few practitioners were conversant with the construct. The ULC's decision to include interest exchanges in the uniform acts raised the construct's profile significantly.

¹⁰ Here is simplified illustration: XYZ LLC, a Minnesota LLC, wishes to become an Iowa LLC. Step 1 – XYZ forms NewCo, LLC, a brand new limited liability company under Iowa law. XYZ is the sole member of NewCo. Step 2 – XYZ merges into NewCo, which changes its name to XYZ, LLC. Effectuating an interest exchange would be more complicated and involve more steps.

Because a business organization is a legal person but not an individual, many issues arise with business organizations that could not arise with an individual. In particular, mergers generate numerous issues, and, as a matter of customary practice, merger-related provisions exist in many agreements:

- to which an entity is a party; or
- which govern relations inter se an entity's owners and managers.

Back in the day (circa 2007 or earlier), when domestications and conversions were novel,¹¹ the ULC was concerned that persons could use the novel approaches to circumvent merger-related provisions which drafters had included in agreements long before the effective date of the relevant uniform act. To prevent this occurrence, the ULC adopted the concept of a "protected agreement."

Summary of the Issue: Has the protected agreement concept outlived its usefulness? If not, should the ULC nonetheless amend the relevant acts to sunset at some point after a state's adoption of domestication/conversion/interest exchange legislation?

Reporter's recommendation: To be determined after listening to Committee discussion.

Statutory Provisions

[UBOC] SECTION 2-102. DEFINITIONS

(a)

(19) "Protected agreement" means:

(A) a record evidencing indebtedness and any related agreement in effect on [the effective date of this [article]];

(B) an agreement that is binding on an entity on [the effective date of this [article]];

(C) the organic rules of an entity in effect on [the effective date of this [article]]; or

(D) an agreement that is binding on any of the governors or interest

¹¹ And interest exchanges were little known – see note 9.

holders of an entity on [the effective date of this [article]].

....

Comment

....

“Protected agreement” [(a)(19)] – The term “protected agreement” refers to evidences of indebtedness and agreements binding on the entity or any of its governors or interest holders that are unpaid or executory in whole or in part on the effective date of this article. Thus a revolving line of credit from a bank to a corporation would constitute a protected agreement even if advances were not made until after the effective date of this article. If a protected agreement has provisions that apply if an entity merges, those provisions will apply if the entity enters into an interest exchange, conversion, or domestication even though the agreement does not mention those other types of transactions. *See* Sections 2-301(d) (interest exchanges), 2-401(c) (conversions), and 2-501(d) (domestications).

SECTION 2-401. CONVERSION AUTHORIZED.

....

(c) If a protected agreement contains a provision that applies to a merger of a domestic entity but does not refer to a conversion, the provision applies to a conversion of the entity as if the conversion were a merger until the provision is amended after [the effective date of this [article]].¹²

¹² UBOC § 2-501(c) contains a parallel provision pertaining to domestications. UBOC § 2-401(c) contains a parallel provision pertaining to interest exchanges. Comparable provisions appear in the entity transaction article of each of the stand-alone acts (general partnership, limited partnership, limited liability company).