



Bifurcating management and economics in LLCs - by Thomas Kearns

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Limited Liability Company (LLC) statutes are known to expressly permit business people to separate the right to manage a particular LLC from the right to receive the profits of the business. LLC managers may be appointed who have no or limited rights to receive the profits of the LLC. While this concept is well known and commonly used by transactional lawyers, to what extent might a court upend the careful plans of the business people and grant management rights to the majority profits holder in the name of equity. But *Bich v Bich*, a recent New York court opinion interpreting Delaware LLC law in a case where the facts could hardly have been more favorable to the holder of a 99% interest in profits, flatly refused to grant the 99% holder any management rights. *Bich* involved a marital agreement that called for the wife to receive a 99% “interest” in a certain LLC that owned valuable stock and a Paris apartment. The agreement governing the LLC, however, granted full and exclusive management rights to the husband.

The wife triggered the marital agreement property settlement procedures and, after the husband subsequently died, the children took steps to cement the management of the LLC in their hands as the husband’s successor thereby freezing out the wife from all management decisions. The marital agreement was not necessarily a model of clarity: there was no mention of the lack of transfer of the management rights. However, the court had no trouble holding that the express terms of the marital and LLC agreements must be read together and would control. Since the marital agreement referred to a transfer of the 99% “interest” in the LLC and the LLC agreement itself defined “interest” as meaning only the rights to profits and losses and did not refer to management rights, the husband and his successors were entitled to continue to exclusively manage the LLC. The decision was upheld by the appellate division on appeal which modified other parts of the decision that do not effect the holding being discussed.

Management provisions in LLC agreements are often written to permit third party managers who hold no (or minority) economic interest to continue to manage the LLC no matter what happens to the economic interests in the LLC. Examples include: where for IRS Section 1031 exchange purposes, parties use separate LLCs to purchase a replacement property as tenants in common with different economic interests among the TICs but where all of the LLC TICs grant management rights to one party; the express or implied promise to a younger partner to permit him or her to manage the LLC after the death of the older majority profits holder; and where the seller of a part of an assemblage of properties wants to keep ownership of a share of the new project but the overall project developer insists on full management rights. The *Bich v Bich* precedent should assist business people and courts in confirming that those arrangements are all acceptable even where full clarity may be lacking.

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