

Characteristics of a Sole Proprietorship
Liability of the Sole Proprietor
Taxation of a Sole Proprietorship
Formation and Operation of a Sole Proprietorship
Termination upon Death of the Proprietor

SOLE PROPRIETORSHIP

CHARACTERISTICS OF A SOLE PROPRIETORSHIP

The **sole proprietorship** (also called an “individual proprietorship”) is the simplest and most common form of business enterprise. In the sole proprietorship organization, the individual proprietor owns all business properties and carries on business as sole owner. The typical individual proprietor is a merchant in a small retail store or corner grocery, but even a youngster who mows lawns during summer vacation is an individual proprietor. Some sole proprietorships may also become very large, successful businesses. The distinguishing characteristic of the sole proprietorship is that it is owned and managed by one person and thereby exists as an extension of that person. The single owner operating the business as an individual activity is a key element. If the business is conducted by co-owners, it is most likely a partnership. Unlike the corporation, a sole proprietorship requires no grant or charter from the state to exist as a going concern.

The greatest advantages to a sole proprietorship are the ease by which it may be formed and the degree of flexibility in managing the business. As sole owner, the individual proprietor may operate the business as he or she chooses. While the owner may hire employees and agents to assist in the operation of the business, he or she is vested with ultimate responsibility for all decisions affecting the business. Consequently, management is usually flexible and informal.

The disadvantages of the sole proprietorship all flow from the fact that the business has complete identity with the proprietor. As a practical matter, this individual’s personal strengths and weaknesses are, necessarily, superimposed upon the business operations. Since management functions are vested in the proprietor, the proprietor’s management ability has a direct effect on the success or failure of the business, which alone may explain why sole proprietorships are most frequently used for small limited businesses. The larger the scope of a business, the more that organization requires specialized business talent that few individuals could supply alone. Similarly, the identity of the individual with the business limits available business capital and thereby may limit the size of the business. Unlike a corporation, the sole proprietorship has no shares that can be sold to outside investors. The only available methods of obtaining funds for this form of business are personal contributions of the individual proprietor and loans from financial

institutions or other private sources. Further, the proprietor's ability to borrow money is limited by the potential of the business and the extent of the proprietor's personal assets, which may have to be pledged as collateral to secure a loan.

LIABILITY OF THE SOLE PROPRIETOR

The law imposes certain disadvantages on the sole proprietorship, again equating the identity of the proprietor with the business. The proprietor is personally responsible for all business losses and must bear them to the full extent of available personal resources. The proprietor is personally liable for all business liabilities. In contrast with a corporate shareholder or a limited partner, a proprietor carries a financial risk that is not limited to his or her investment in the enterprise but may extend to all personal assets, including the proprietor's home, car, furniture, and similar property. This risk of **unlimited liability** may be diminished to some extent by insurance, but it may be impossible, and is at least costly and impracticable, to insure against every conceivable business hazard. In matters involving contracts with the sole proprietorship, it is possible to provide by agreement that any liability on the contract shall be limited to the business assets and shall not extend to the personal assets of the proprietor. Such an agreement provides little advantage, however, if the proprietor has contributed personal assets for use in the business or as collateral to secure business loans.

The unlimited liability of a sole proprietorship may be a severe disadvantage to an entrepreneur with extensive personal wealth who would prefer that he or she not be subjected to the risks of the business, since absent insurance or agreement to the contrary, all personal assets must be made available to satisfy business liabilities. The problem is further compounded if the business is unusually speculative or hazardous.

On the other hand, the individual proprietor has full control over the extent of the business liability by virtue of his or her individual right to manage the business. While the law permits all partners to obligate a partnership and the officers to obligate a corporation, only the proprietor, or individuals personally selected by the proprietor, may obligate the sole proprietorship.

TAXATION OF A SOLE PROPRIETORSHIP

The federal and state laws regarding taxation of a sole proprietorship may constitute an advantage in some cases. The law provides that all business income or loss will be treated as individual income or loss and taxed accordingly. The sole proprietor declares the business income on a separate schedule of an individual tax return. Once total income, including business income or loss, is computed, the individual income tax rates are applied. If the business is small and the owner has little income from other sources, the individual tax rates as applied to income from a sole proprietorship may be significantly lower than corporate tax rates. Similarly, if the business operates at a loss, the loss will be applied directly to offset other active personal income of the sole proprietor and will thereby result in direct tax savings.

Federal and state taxing authorities frequently change their tax rates for individuals and corporations to place greater burdens on or produce more desirable tax advantages for various business enterprises. For many years, certain individual tax rates were higher than corporate rates for larger amounts of income. The federal government has since increased the corporate rates so an individual's taxable income is almost always taxed at a lower rate than is a corporation's taxable income. Selections of a particular business entity requires careful tax planning to ensure that the income earned by the business will be taxed at rates that are not surprising to the owners. Effective business managers use the tax on income as a planning tool for determining both the sources of cash and the availability of deductions for predictable business expenses.

As a matter of tax planning, when individual rates are on a graduated basis so that they eventually reach or exceed corporate tax rates, it is possible to commence a business as a sole proprietorship to enjoy the lower tax rates or other tax benefits in the early stages of development, and to subsequently incorporate the business for more favorable tax rates as profits increase and as the graduated individual tax rates surpass the corporate rate. As long as the individual tax rates are less than the corporate rate, the tax incurred in a sole proprietorship

will be less than the tax incurred in a corporation. Furthermore, corporate income may be subjected to *double taxation*: once as corporate income, and, if distributed as dividends to the shareholders, a second time as income to the shareholder.¹ Sole proprietors report the profits of their businesses on Schedule C to their personal federal income tax returns. (See Exhibit 2-1, Schedule C to Form 1040.)

In addition to tax benefits, which are a major consideration, many other factors should be considered in selecting a form of business enterprise.

FORMATION AND OPERATION OF A SOLE PROPRIETORSHIP

Virtually no formalities are required in the formation and operation of a sole proprietorship, which gives this form of business a distinct advantage over other forms. The sole proprietor

Exhibit 2-1.

Schedule C to Form 1040

<p>SCHEDULE C (Form 1040)</p> <p>Department of the Treasury Internal Revenue Service (99)</p>	<p>Profit or Loss From Business (Sole Proprietorship)</p> <p>Partnerships, joint ventures, etc., must file Form 1065 or 1065-B. Attach to Form 1040 or 1041. See Instructions for Schedule C (Form 1040).</p>	<p>OMB No. 1545-0074</p> <p>2003</p> <p>Attachment Sequence No. 09</p>
Name of proprietor		Social security number (SSN)
A Principal business or profession, including product or service (see page C-2 of the instructions)		B Enter code from pages C-7, 8, & 9
C Business name. If no separate business name, leave blank.		D Employer ID number (EIN), if any
E Business address (including suite or room no.) City, town or post office, state, and ZIP code		
F Accounting method: (1) <input type="checkbox"/> Cash (2) <input type="checkbox"/> Accrual (3) <input type="checkbox"/> Other (specify)		
G Did you "materially participate" in the operation of this business during 2003? If "No," see page C-3 for limit on losses <input type="checkbox"/> Yes <input type="checkbox"/> No		
H If you started or acquired this business during 2003, check here <input type="checkbox"/>		
Part I Income		
1 Gross receipts or sales. Caution. If this income was reported to you on Form W-2 and the "Statutory employee" box on that form was checked, see page C-3 and check here <input type="checkbox"/>		1
2 Returns and allowances		2
3 Subtract line 2 from line 1		3
4 Cost of goods sold (from line 42 on page 2)		4
5 Gross profit. Subtract line 4 from line 3		5
6 Other income, including Federal and state gasoline or fuel tax credit or refund (see page C-3)		6
7 Gross income. Add lines 5 and 6		7
Part II Expenses. Enter expenses for business use of your home only on line 30.		
8 Advertising	8	
9 Car and truck expenses (see page C-3)	9	
10 Commissions and fees	10	
11 Contract labor (see page C-4)	11	
12 Depletion	12	
13 Depreciation and section 179 expense deduction (not included in Part III) (see page C-4)	13	
14 Employee benefit programs (other than on line 19)	14	
15 Insurance (other than health)	15	
16 Interest:		
a Mortgage (paid to banks, etc.)	16a	
b Other	16b	
17 Legal and professional services	17	
18 Office expense	18	
19 Pension and profit-sharing plans	19	
20 Rent or lease (see page C-5):		
a Vehicles, machinery, and equipment	20a	
b Other business property	20b	
21 Repairs and maintenance	21	
22 Supplies (not included in Part III)	22	
23 Taxes and licenses	23	
24 Travel, meals, and entertainment:		
a Travel	24a	
b Meals and entertainment		
c Enter nondeductible amount included on line 24b (see page C-5)		
d Subtract line 24c from line 24b	24d	
25 Utilities	25	
26 Wages (less employment credits)	26	
27 Other expenses (from line 48 on page 2)	27	
28 Total expenses before expenses for business use of home. Add lines 8 through 27 in columns	28	
29 Tentative profit (loss). Subtract line 28 from line 7	29	
30 Expenses for business use of your home. Attach Form 8829	30	
31 Net profit or (loss). Subtract line 30 from line 29. If a profit, enter on Form 1040, line 12, and also on Schedule SE, line 2 (statutory employees, see page C-6). Estates and trusts, enter on Form 1041, line 3. If a loss, you must go to line 32.	31	
32 If you have a loss, check the box that describes your investment in this activity (see page C-6). If you checked 32a, enter the loss on Form 1040, line 12, and also on Schedule SE, line 2 (statutory employees, see page C-6). Estates and trusts, enter on Form 1041, line 3. If you checked 32b, you must attach Form 6198.		32a <input type="checkbox"/> All investment is at risk. 32b <input type="checkbox"/> Some investment is not at risk.
For Paperwork Reduction Act Notice, see Form 1040 instructions.		Schedule C (Form 1040) 2003

may simply commence business by the exercise of initiative. However, if the sole proprietor operates a regulated business that might require a license, hires employees, uses a **trade name**, or expands into other states, certain formalities are imposed.

If the proprietor intends to sell goods, a sales tax license is required in most jurisdictions. Any other license peculiar to the particular business also must be obtained. For example, doctors must be licensed to practice medicine, and a liquor license is required to sell alcoholic beverages.

If employees are contemplated, the sole proprietor must apply for a tax identification number from the Internal Revenue Service office and make arrangements to contribute to social security and unemployment compensation on behalf of the employees. The tax and employee benefit authorities require the business of a proprietor to be treated separately from the owner's personal tax affairs for payments to and withholding from employees. (See Exhibit 2-2, Application for Employer Identification Number.)

Exhibit 2-2.

Application for Employer Identification Number

Form SS-4 (Rev. December 2001) Department of the Treasury Internal Revenue Service		Application for Employer Identification Number (For use by employers, corporations, partnerships, trusts, estates, churches, government agencies, Indian tribal entities, certain individuals, and others.) See separate instructions for each line. Keep a copy for your records.		EIN OMB No. 1545-0003	
1 Legal name of entity (or individual) for whom the EIN is being requested					
Type or print clearly.	2 Trade name of business (if different from name on line 1)		3 Executor, trustee, "care of" name		
	4a Mailing address (room, apt., suite no. and street, or P.O. box)		5a Street address (if different) (Do not enter a P.O. box.)		
	4b City, state, and ZIP code		5b City, state, and ZIP code		
	6 County and state where principal business is located				
7a Name of principal officer, general partner, grantor, owner, or trustee			7b SSN, ITIN, or EIN		
8a Type of entity (check only one box)					
<input type="checkbox"/> Sole proprietor (SSN) _____					
<input type="checkbox"/> Partnership					
<input type="checkbox"/> Corporation (enter form number to be filed) _____					
<input type="checkbox"/> Personal service corp.					
<input type="checkbox"/> Church or church-controlled organization					
<input type="checkbox"/> Other nonprofit organization (specify) _____					
<input type="checkbox"/> Other (specify) _____					
<input type="checkbox"/> Estate (SSN of decedent) _____					
<input type="checkbox"/> Plan administrator (SSN) _____					
<input type="checkbox"/> Trust (SSN of grantor) _____					
<input type="checkbox"/> National Guard <input type="checkbox"/> State/local government					
<input type="checkbox"/> Farmers' cooperative <input type="checkbox"/> Federal government/military					
<input type="checkbox"/> REMIC <input type="checkbox"/> Indian tribal governments/enterprises					
<input type="checkbox"/> Group Exemption Number (GEN) _____					
8b If a corporation, name the state or foreign country _____ State _____ Foreign country _____ (if applicable) where incorporated					
9 Reason for applying (check only one box)					
<input type="checkbox"/> Started new business (specify type) _____					
<input type="checkbox"/> Banking purpose (specify purpose) _____					
<input type="checkbox"/> Changed type of organization (specify new type) _____					
<input type="checkbox"/> Purchased going business					
<input type="checkbox"/> Hired employees (Check the box and see line 12.)					
<input type="checkbox"/> Created a trust (specify type) _____					
<input type="checkbox"/> Compliance with IRS withholding regulations					
<input type="checkbox"/> Created a pension plan (specify type) _____					
<input type="checkbox"/> Other (specify) _____					
10 Date business started or acquired (month, day, year)				11 Closing month of accounting year	
12 First date wages or annuities were paid or will be paid (month, day, year). Note: If applicant is a withholding agent, enter date income will first be paid to nonresident alien. (month, day, year)					
13 Highest number of employees expected in the next 12 months. Note: If the applicant does not expect to have any employees during the period, enter i-0-i					
			Agricultural	Household	Other
14 Check one box that best describes the principal activity of your business.					
<input type="checkbox"/> Construction <input type="checkbox"/> Rental & leasing <input type="checkbox"/> Transportation & warehousing <input type="checkbox"/> Accommodation & food service <input type="checkbox"/> Wholesale-agent/broker					
<input type="checkbox"/> Real estate <input type="checkbox"/> Manufacturing <input type="checkbox"/> Finance & insurance <input type="checkbox"/> Other (specify) _____					
15 Indicate principal line of merchandise sold; specific construction work done; products produced; or services provided.					
16a Has the applicant ever applied for an employer identification number for this or any other business? <input type="checkbox"/> Yes <input type="checkbox"/> No Note: If i/Yes, please complete lines 16b and 16c.					
16b If you checked "Yes" on line 16a, give applicant's legal name and trade name shown on prior application if different from line 1 or 2 above. Legal name _____ Trade name _____					
16c Approximate date when, and city and state where, the application was filed. Enter previous employer identification number if known. Approximate date when filed (mo., day, year) _____ City and state where filed _____ Previous EIN _____					
Third Party Designee	Complete this section only if you want to authorize the named individual to receive the entity's EIN and answer questions about the completion of this form.				
	Designee's name		Designee's telephone number (include area code) _____		
Address and ZIP code		Designee's fax number (include area code) _____			
Under penalties of perjury, I declare that I have examined this application, and to the best of my knowledge and belief, it is true, correct, and complete.					
Name and title (type or print clearly)					Applicant's telephone number (include area code) _____
Signature _____					Applicant's fax number (include area code) _____
Date _____					()
For Privacy Act and Paperwork Reduction Act Notice, see separate instructions.					
				Cat. No. 16055N Form SS-4 (Rev. 12-2001)	

A sole proprietor may conduct business under a name other than his or her own, and state statutes usually require registration of a trade (or assumed) name by the filing of an affidavit or certificate for that purpose with a court or public official. (See Exhibits 2–3, Assumed Business Name Registration, and 2–4, Certificate of Assumed Name.) These statutes usually also provide that the name used cannot be the same as, or deceptively similar to, another registered or well-known name, such as a trademark used by another. The circumstances under which a particular name must be filed are subject to some fine distinctions. Generally, a firm name that contains the proprietor's surname and does not imply that other owners are associated with the business need not be registered. For example, Smith Auto Parts or Lyons Retail Goods usually would not require filing. On the other hand, the use of the word *Company* or *Associates* implies other owners, and the name should be registered. State and local governments apply different rules and restrictions on trade names, and the local requirements must always be reviewed. In any questionable case, it is a good practice to register the name and avoid the problems associated with failure to file. Various penalties are prescribed for failure to register a trade name, but the usual sanction is refusal to allow the proprietor to pursue any litigation in state courts until filing has been accomplished. The filing procedure may vary by jurisdiction. Some states require a single



SECRETARY OF STATE
Corporation Division
Business Registry
158 12th Street NE
Salem, OR 97310-0210
(503) 378-4166

ASSUMED BUSINESS NAME REGISTRATION GENERAL INFORMATION

WHAT IS AN ASSUMED BUSINESS NAME?

An assumed business name is a name other than the real and true name of each person operating the business. A real and true name becomes an assumed business name with the addition of any words which imply the existence of additional owners. Examples include "Company," "Associates," and "Daughters."

A real and true name is the surname of an individual with the individual's given name(s) or initial(s), or a corporate name or limited partnership name already filed with Business Registry.

The Division **does not** register real and true names because they are not **assumed** business names.

WHY REGISTER AN ASSUMED BUSINESS NAME?

The purpose of registering an assumed business name is to let the public know who is transacting business under that business name.

Failure to register an assumed business name may preclude you from maintaining a lawsuit for the benefit of your business. Also, conviction for failure to register is punishable by a fine up to \$100.

Registration of an assumed business name does not grant you the right to use or to exclude others from using any trademark, service mark, or trade name.

WHO MUST REGISTER AN ASSUMED BUSINESS NAME?

Any person who uses an assumed name to identify the business that the person transacts must register that name unless the real and true name of each person transacting the business is conspicuously disclosed.

WHAT IS TRANSACTING BUSINESS?

The term "transacting business" means to sell, lease, or purchase real estate, goods, intangible property, or services; to solicit an investment in or a donation to a business; or to apply for an extension of credit.

WHAT COUNTIES MUST BE REGISTERED?

An assumed business name must be registered in every county in which the business or a facility of the business is located or an employee is stationed.

RENEWAL OF YOUR REGISTRATION


Renewal applications are sent to the authorized representative. Therefore, you must amend your registration if there is a change in the address of the authorized representative. Your registration must be renewed two years from the date of registration and every two years thereafter.

Exhibit 2–3.

Assumed Business Name Registration

Exhibit 2-3.

(continued)



Phone: (503) 986-2200
Fax: (503) 378-4381

Secretary of State
Corporation Division
255 Capitol St. NE, Suite 151
Salem, OR 97310-1327
FilingInOregon.com

Assumed Business Name—New Registration

REGISTRY NUMBER: _____

In keeping with Oregon Statute 192.410-192.595, the information on the application is public record.
We must release this information to all parties upon request and it may be posted on our website. For office use only

Please Type or Print Legibly in **Black Ink**. Attach Additional Sheet if Necessary.

1) **ASSUMED BUSINESS NAME** (To be registered)

2) **DESCRIPTION OF BUSINESS** (Primary business activity) 4) **AUTHORIZED REPRESENTATIVE** (One name only)

3) **PRINCIPAL PLACE OF BUSINESS** (Address, city, state, zip) 5) **MAILING ADDRESS FOR BUSINESS**

6) **REGISTRANTS/OWNERS** (List name and street address of each person who will conduct or transact business under the assumed business name.)
(Attach a separate sheet if necessary.)

NAME	STREET ADDRESS	CITY/STATE/ZIP

7) **COUNTIES**

<input type="checkbox"/> Baker	<input type="checkbox"/> Crook	<input type="checkbox"/> Harney	<input type="checkbox"/> Lake	<input type="checkbox"/> Morrow	<input type="checkbox"/> Union
<input type="checkbox"/> Benton	<input type="checkbox"/> Curry	<input type="checkbox"/> Hood River	<input type="checkbox"/> Lane	<input type="checkbox"/> Multnomah	<input type="checkbox"/> Wallowa
<input type="checkbox"/> Clackamas	<input type="checkbox"/> Deschutes	<input type="checkbox"/> Jackson	<input type="checkbox"/> Lincoln	<input type="checkbox"/> Polk	<input type="checkbox"/> Wasco
<input type="checkbox"/> Clatsop	<input type="checkbox"/> Douglas	<input type="checkbox"/> Jefferson	<input type="checkbox"/> Linn	<input type="checkbox"/> Sherman	<input type="checkbox"/> Washington
<input type="checkbox"/> Columbia	<input type="checkbox"/> Gilliam	<input type="checkbox"/> Josephine	<input type="checkbox"/> Malheur	<input type="checkbox"/> Tillamook	<input type="checkbox"/> Wheeler
<input type="checkbox"/> Coos	<input type="checkbox"/> Grant	<input type="checkbox"/> Klamath	<input type="checkbox"/> Marion	<input type="checkbox"/> Umatilla	<input type="checkbox"/> Yamhill

ALL COUNTIES (Statewide)

8) **EXECUTED/SIGNED BY:** (All registrants/owners must sign.)

FEES

Required Processing Fee	\$20
Confirmation Copy (Optional)	\$5

Processing Fees are nonrefundable.

Please make check payable to "Corporation Division."

NOTE:
Fees may be paid with VISA or MasterCard. The card number and expiration date should be submitted on a separate sheet for your protection.

9) **CONTACT NAME** (To resolve questions with this filing.) **DAYTIME PHONE NUMBER** (Include area code.)

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filing with a county or state official. Others, such as California, require filing plus publication once a week for four weeks in a local newspaper. The appropriate statute should be consulted for guidance on local procedure.

While more complex businesses, such as corporations, limited partnerships and limited liability companies, must register or “qualify” to do business in other states,² sole proprietorships are permitted to do business in more than one state without additional formalities for **qualification** to do business. Of course, local licensing and assumed name statutes must be observed.

The operation of a sole proprietorship is extremely flexible and personal to the individual. Governmental regulation of such a business is found only in licensing requirements and periodic reports that may be required for certain types of business. The individual proprietor personally determines the complexity or simplicity of the business records, the need for expansion and capital improvements, salaries, and other matters affecting the policy and daily operations of the business. Compared with owners in other forms of business, the sole proprietor has considerable freedom in these matters.

Exhibit 2-4.Certificate of Assumed
Name (New York)

<p>Certificate of Assumed Name Pursuant to General Business Law, §130</p>	<p>NYS Department of State Division of Corporations, State Records and UCC 41 State Street, Albany, NY 12231-0001 www.dos.state.ny.us</p>					
<hr/>						
1. NAME OF ENTITY						
<hr/>						
1a. FOREIGN ENTITIES ONLY. If applicable, the fictitious name the entity agreed to use in New York State is:						
<hr/>						
2. NEW YORK LAW FORMED OR AUTHORIZED UNDER (CHECK ONE):						
<input type="checkbox"/> Business Corporation Law	<input type="checkbox"/> Limited Liability Company Law					
<input type="checkbox"/> Education Law	<input type="checkbox"/> Not-for-Profit Corporation Law					
<input type="checkbox"/> Insurance Law	<input type="checkbox"/> Revised Limited Partnership Act					
<input type="checkbox"/> Other (specify law):						
<hr/>						
3. ASSUMED NAME						
<hr/>						
4. PRINCIPAL PLACE OF BUSINESS IN NEW YORK STATE (MUST BE NUMBER AND STREET. IF NONE, INSERT OUT-OF-STATE ADDRESS)						
<hr/>						
<hr/>						
5. COUNTIES IN WHICH BUSINESS WILL BE CONDUCTED UNDER ASSUMED NAME						
<input type="checkbox"/> ALL COUNTIES (if not, circle county[ies] below)						
Albany	Clinton	Genesee	Monroe	Orleans	Saratoga	Tompkins
Allegany	Columbia	Greene	Montgomery	Oswego	Schenectady	Ulster
Bronx	Cortland	Hamilton	Nassau	Otsego	Schoharie	Warren
Broome	Delaware	Herkimer	New York	Putnam	Schuyler	Washington
Cattaraugus	Dutchess	Jefferson	Niagara	Queens	Seneca	Wayne
Cayuga	Erie	Kings	Oneida	Rensselaer	Steuben	Westchester
Chautauqua	Essex	Lewis	Onondaga	Richmond	Suffolk	Wyoming
Chemung	Franklin	Livingston	Ontario	Rockland	Sullivan	Yates
Chenango	Fulton	Madison	Orange	St. Lawrence	Tioga	
<hr/>						
6. INSERT THE ADDRESS OF EACH LOCATION WHERE BUSINESS WILL BE CARRIED ON OR TRANSACTED UNDER THE ASSUMED NAME. Use a continuous sheet, if needed. (The address must be set forth in terms of a number and street, city, state and zip code. Please note that the address(es) reflected in paragraph 6 must be within the county(ies) circled in paragraph 5. If the entity does not have a specific location where it will conduct business under the assumed name please check the box.)						
<input type="checkbox"/> No New York State Business Location						
<hr/>						
<hr/>						
<hr/>						
<hr/>						

DOS-1338 (Rev. 5/03)

TERMINATION UPON DEATH OF THE PROPRIETOR

With very few exceptions specifically authorized by state statutes,³ the sole proprietorship terminates by law upon the death of the proprietor. It is possible (but rare) to enter into an agreement with an employee or relative to buy and continue the business upon the death of the proprietor. The owner is also entitled to will the business to relatives or to an employee. But, absent such an agreement or estate planning, there is no assurance of continuity of the business after death. If the owner managed the business,

and no relatives or associates are willing to continue, the business probably will be liquidated. Liquidation must be accomplished by a legal representative of the deceased owner, such as a trustee or an executor, and cannot be done by agents appointed by the owner during the owner's lifetime because, with the exception of a few administrative acts authorized by specific statutes,⁴ agents are powerless to act after the death of their principal.⁵ Since the business will be included in the personal estate of the deceased owner, a number of estate-planning considerations for the sole proprietor become essential. Generally, some authority must be granted to the proprietor's personal representatives to permit them to continue the business as necessary until it may be conveniently and profitably liquidated, to employ persons to assist in liquidation, and to execute all necessary documents incident to liquidation.⁶ If the beneficiary of the deceased owner is willing to continue the business, a new sole proprietorship is created and will be governed by these same rules.

KEY TERMS

sole proprietorship
unlimited liability

trade name

qualification

WEB RESOURCES

The primary issues in operating a sole proprietorship involve use of an assumed name, which probably will have to be registered in a public office, and licensing issues relating to professions and occupations upon which states have imposed licensing and regulatory requirements.

Access to state laws regarding licensing and regulatory requirements may be obtained through the Legal Information Institute maintained at the Cornell Law School:

<<http://www.law.cornell.edu>>

The National Association of Secretaries of State maintains links directly to the offices of the Secretaries of State in all states. Many of the state Web sites offer information concerning local treatment of sole proprietorships and issues relating to that business structure:

<<http://www.nass.org>>

The Small Business Administration offers on-line information and assistance in the formation, operation, and financing of the activities of a sole proprietorship:

<<http://www.sba.gov>>

The American Bar Association collects Internet sites that are important to lawyers. This site has links to and descriptions of the latest resources available to the legal profession:

<<http://www.abanet.org>>

Searching and locating trade names can be accomplished through various services offered on the Internet. Most of these services charge a fee for useful searches. They include the following:

<<http://www.tmexpress.com>>

<<http://www.trademark-search-services.com>>



CASES

SHELDON v. VERMONTY

1999 WL 1096043 (D.Kan.)

Nov. 29, 1999.

LUNGSTRUM, DISTRICT J.

Plaintiff Dave Sheldon brought this action against defendants alleging violations of the federal and state securities laws as well as various common law claims.

* * *

Presently before the court is the issue of dismissal of the plaintiff's case as set forth in the show cause order and plaintiff's amended motion for default judgment against defendants Power Phone, Inc., Noah Steinberg, Dr. Enrique R. Carrion, T.M.C. Agroworld, Inc., The Montecristi Group,

Manhattan Transfer Registrar Company, Princeton Research, Inc., and Jack Savage (doc. 85). For the reasons set forth below, plaintiff's motion is denied and the case is dismissed.

* * *

Defendant Hector Cruz opposes the entry of default judgment against Manhattan Transfer Registrar Company on the ground that, because Manhattan Transfer Registrar Company is a sole proprietorship of Hector Cruz, Mr. Cruz and Manhattan Transfer Registrar Company are not separate legal entities, but instead merely alter egos, and, therefore, an entry of default judgment against Manhattan Transfer Registrar Company would be improper and void on its face. The court agrees.

It is well-settled that "sole proprietors of unincorporated businesses . . . by definition, have no separate legal existence" from the proprietorship itself. *Vega v. National Life Ins. Servs.*, 188 F.3d 287, 294 (5th Cir.1999); see also *State v. ABC Towing*, 954 P.2d 575, 577 (Alaska Ct.App.1998) ("[A] sole proprietorship is not a legal entity. [It] has no legal significance apart from its sole proprietor. It cannot incur debts, conduct business, sue or be sued, or incur or pay taxes apart from its sole proprietor."); *Vernon v. Schuster* 688 N.E.2d 1172, 1776-77 (Ill.1997) ("It is well settled that a sole proprietorship has no legal identity separate from that of the individual who owns it"). As a result, a "default judgment entered against a sole proprietorship is void on its face." *Paul Revere Life Ins. Co. v. Rasul*, 1998 WL 259922 at *4 n. 3 (D.Md. May 18, 1998) (quoting *Dowis v. Watson*, 289 S.E.2d 558, 559 (Ga.App.Ct.1982)).

In the caption of his amended complaint, plaintiff lists the following persons and entities as defendants: Jay and Carmen Vermonty, Power Phone, Inc., Noah Steinberg, Gershon Tan-

nenbaum, Dr. Enrique Reyes Carrion, T.M.C. Agroworld, Inc., The Montecristi Group, Manhattan Transfer Registrar Company, and Hector Cruz. Amended Compl. at 1-2. In his second and third amended complaints, plaintiff failed to list the defendants individually in the case caption, instead choosing to delineate the defendants as "Jay Vermonty et al."

In their original motion to dismiss plaintiff's amended complaint, citing Mr. Cruz's declaration dated August 12, 1998, defendants noted that "Manhattan Transfer Registrar Company, named as a defendant in the caption of this action, is a sole proprietorship of Defendant Cruz, has no separate legal existence, and is not a proper party to this action." Def. Mem. in Supp. Mtn. to Dismiss Amended Compl. at 1 n. 1. In his response to defendants' motion to dismiss the amended complaint, plaintiff did not oppose, contradict, or otherwise acknowledge this assertion. In their motion to dismiss plaintiff's third amended complaint, moving defendants Jay and Carmen Vermonty, Gershon Tannenbaum, and Hector Cruz reiterated their previous assertion that Manhattan Transfer Registrar Company is a sole proprietorship of defendant Cruz, and, as such, is not a proper party to this action. Def. Mem. in Supp. of Mtn. to Dismiss Third Amended Compl. at 2 n. 1. Nowhere in his third amended complaint does plaintiff set forth facts indicating that Manhattan Transfer Registrar Company was not a sole proprietorship, and plaintiff again failed to address this contention in his response to defendants' motion to dismiss plaintiff's third amended complaint. Thus, because plaintiff has failed to present any facts to indicate that Manhattan Transfer Registrar Company is not the sole proprietorship of defendant Hector Cruz, an entry of default judgment against Manhattan Transfer Registrar Company would be void on its face. Accordingly, plaintiff's motion for the entry of default judgment against Manhattan Transfer Registrar Company is denied.

STATE OF ALASKA v. ABC TOWING

954 P.2d 575

Feb. 20, 1998

MANNHEIMER, JUDGE

This case involves the law of "vicarious responsibility"—the law defining when one person can be held criminally responsible for the conduct of another. More specifically, this case presents the question of whether a business run by a sole proprietor is an "organization" under AS 11.16.130(a), a statute which declares that organizations are criminally responsible for certain acts of their agents. We hold that a sole proprietorship is not an "organization" for purposes of AS 11.16.130(a).

Rodney E. Lewis does business as "ABC Towing". When one of Lewis's employees discharged gasoline on the ground, the State brought criminal charges against both the employee and ABC Towing; both defendants were charged with violating an anti-pollution statute, AS 46.03.710.

Under Alaska law, organizations face broader vicarious criminal responsibility than do individuals. Generally speaking, an individual can be held criminally responsible for the conduct of another only if the individual asks or encourages the other person to commit the offense or if the individual helps to plan or commit the offense. See AS 11.16.110(2). The State presented no evidence that Lewis asked his employee to discharge the gasoline, or that Lewis aided or abetted the employee's act. However, an organization can be held accountable for criminal conduct that its owners, members, officers, or directors did not know about until afterwards. Under AS 11.16.130(a)(1), an organization is criminally responsible for an offense committed by one of its agents if the agent was acting in behalf of the organization and within the scope of the agent's employment, or if the organization subsequently ratified or adopted the agent's conduct. The State charged ABC Towing with the pollution violation, alleging that Lewis's employee had been acting within the scope of

his employment, and in behalf of ABC Towing, when he discharged the gasoline on the ground.

The case against ABC Towing was tried to District Court Judge Natalie K. Finn on stipulated facts. The parties agreed that ABC Towing's employee had violated the anti-pollution statute and that the employee had been acting within the scope of his employment and in behalf of ABC Towing when he committed this violation. There was only one disputed issue, and that was an issue of law: was ABC Towing an "organization" for purposes of AS 11.16.130(a), so that it could be held liable for its employee's discharge of gasoline?

AS 11.81.900(b)(39) defines the term "organization" for purposes of Title 11. Under that definition, "organization" means:

a legal entity, including a corporation, company, association, firm, partnership, joint stock company, foundation, institution, government, society, union, club, church, or any other group of persons organized for any purpose.

Lewis's attorney contended that ABC Towing was not an "organization" because it was a sole proprietorship—an unincorporated business owned solely by Lewis. In a well-reasoned opinion, Judge Finn concluded that this contention was correct—that sole proprietorships are not "organizations" under the statutory definition. Judge Finn wrote:

[A] sole proprietorship is not a legal entity. [It] has no legal significance apart from its sole **proprietor**. It cannot incur debts, conduct business, sue or be sued, or incur or pay taxes apart from its sole proprietor. Legally, it makes no difference whether the business is named ABC Towing or Rodney E. Lewis. The accountability of ABC Towing is therefore no different from that of an individual. . . . This court finds that ABC Towing, a sole proprietorship, is not an organization within the meaning of AS 11.81.900(b)(39) and is therefore not legally accountable [for acts of its agents under] AS 11.16.130.

Judge Finn therefore dismissed the complaint against ABC Towing, and the State now appeals Judge Finn's decision.

Under AS 11.81.900(b)(39), "organization" (for purposes of Title 11) "means a legal entity." The statute does not define "legal entity" except by example, and the term "legal entity" is not further defined in Title 11 or, indeed, anywhere else in the Alaska statutes. However, the term "legal entity" does have a common-law meaning, and that meaning presumptively governs our interpretation of AS 11.81.900(b)(39). *See* AS 01.10.010 (the common law remains the rule of decision in this state unless it is inconsistent with the laws passed by the Alaska legislature or inconsistent with the federal or Alaska constitutions).

The concept of "legal entity" is a useful fiction employed by the law to distinguish an ongoing human endeavor from the people who presently own or control that endeavor. As Judge Finn correctly pointed out in her decision, the defining characteristic of a "legal entity" is its separate legal existence apart from its owners, officers, and directors.

At common law, sole proprietorships are not "legal entities." Neither are partnerships (for most purposes: *compare Pratt v. Kirkpatrick* 718 P.2d 962, 967-68 (Alaska 1986)). Rather, sole proprietorships and partnerships are deemed to be merely the alter egos of the proprietor or the partners (as individuals). In a sole proprietorship, all of the proprietor's assets are completely at risk, and the sole proprietorship ceases to exist upon the proprietor's death.

* * *

With this background, we return to our definitional statute, AS 11.81.900(b)(39), and we find that it contains troublesome ambiguities. The statute declares that the term "organization" means a "legal entity." If the legislature had stopped there, then neither a sole proprietorship nor a partnership would be considered an "organization," because neither form of business is a legal entity. However, the statute then adds that the term "legal entity" includes "partnerships" as well as "associations," "societies," "clubs," and "any other group of persons organized for any purpose." This is a marked expansion of what the common law would recognize as a "legal entity" for other purposes (suing or being sued, holding title to property, employing workers, etc.).

The legislature undoubtedly has the authority to enlarge the definition of "legal entity" beyond its common-law boundaries. *See State v. Erickson*, 574 P.2d 1, 15 (Alaska 1978) (in statutes regulating drugs, the legislature can define "narcotic" differently from its normal pharmacological meaning). It appears that AS 11.81.900(b)(39) was intended to modify the common-law definition of "legal entity" by broadening it to include partnerships, informal associations and clubs, and (in general) "any other group of persons organized for any purpose." However, the statutory roster of "legal entities" does not specifically include sole proprietorships.

The State argues that a sole proprietorship becomes a "firm" or an "association" or a "group" under AS 11.81.900(b)(39) whenever the sole proprietor hires other people to assist in the conduct of the business. We think that this is a strained interpretation of the statute.

Under the State's reading of the statute, an ice cream vendor or a house painter who employed a part-time helper during the summer would suddenly become a "firm," an "association," or a "group." In fact, under the State's wide-ranging construction of the phrase "group of persons organized for any purpose," home owners would seemingly become "organizations" whenever they hired someone to clean their house or maintain their lawn. Such a construction of the statute conflicts with the fact that employees generally do not direct the conduct of a business. Their contract of employment does not make them partners of the persons or entities who hire them, and they do not have the same legal rights and responsibilities as their employers. Based on the wording of AS 11.81.900(b)(39) and its legislative history, we doubt that the legislature intended the results advocated by the State.

Moreover, two rules of statutory construction counsel us to uphold the trial court's decision in this case. The first rule is that statutes in derogation of the common law should be construed strictly. That is, when courts are presented with a question involving the proper construction of a statute that modifies the common law, the normal rule of interpretation is that such statutes are construed so as to preserve the pre-existing common law unless the legislature has clearly indicated its purpose to change that law. *See Roeck* 885 P.2d at 1074; *University of Alaska v. Shanti*, 835 P.2d 1225, 1228 n. 5 (Alaska 1992). The second rule is that statutes imposing criminal liability should be construed narrowly. When the scope of a criminal statute is unclear, courts should normally construe the statute against the government—that is, construe it so as to limit the scope of criminal liability. *See Magnuson v. State*, 843 P.2d 1251, 1253 (Alaska App.1992).

The question in this appeal is whether sole proprietorships are to be treated as legal entities apart from their proprietors,

so that the government can prosecute sole proprietorships for the acts of their agents under the theory of vicarious responsibility codified in AS 11.16.130(a). Under the common law, sole proprietorships are not legal entities. The expanded definition of legal entities in AS 11.81.900(b)(39) does not include a specific reference to sole proprietorships. The State has presented some inventive arguments as to why sole proprietorships should be viewed as “associations” or “firms” for purposes of Title 11, but in the end those arguments are only colorable, not convincing. On this point, the statute remains, at best, ambiguous.

This being so, we construe AS 11.81.900(b)(39) to preserve the pre-existing common law rule that sole proprietorships are not legal entities, and to narrowly construe the scope of vicarious criminal responsibility imposed by AS 11.16.130(a). We conclude that sole proprietorships are not “organizations” for purposes of AS 11.16.130(a). The district court therefore correctly granted the defendant's motion to dismiss.

CRANE CONSTRUCTION COMPANY v. KLAUS MASONRY, LLC

114 F.Supp.2d 1116
July 6, 2000

WESLEY E. BROWN, SENIOR DISTRICT JUDGE

This matter is before the court on the defendant's motion to dismiss the complaint. The motion raises a question of “successor liability.” Specifically, the issue is whether the defendant Klaus Masonry, LLC, can be held responsible for an alleged liability of Klaus Masonry, a sole proprietorship that was owned by George Klaus until his death in 1994. The plaintiff alleges that Klaus Masonry, LLC is “a continuation of and successor to Klaus Masonry” and is liable for the alleged obligation. The defendant denies it can be held liable under this continuation theory and argues that plaintiff has failed to state a claim upon which relief can be granted. The court finds that oral argument would not assist in deciding the issues presented.

* * *

II. Facts

Crane is a general contractor that, in the early 1990's, was hired by Wal-Mart Stores, Inc., to build numerous stores throughout the southern United States. In 1992 Crane entered a contract with Wal-Mart to build a Sam's Club store located in Wichita, Kansas (the “Wichita Project”). Crane subcontracted the project masonry to an entity that identified itself as “Klaus Masonry.” George Klaus, identified as the owner, signed the subcontract for Klaus Masonry. At that time, Klaus Masonry was a sole proprietorship owned by George Klaus.

In 1993, Crane sued Wal-Mart, alleging nonpayment on portions of the Wichita project and other projects. Wal-Mart counterclaimed, alleging defects in the construction

on several jobs, including the Wichita project. The action was maintained in U.S. District Court in Memphis, Tennessee. In November of 1994, Crane notified Klaus Masonry of the suit and demanded, pursuant to an indemnity clause in the subcontract, that Klaus Masonry indemnify Crane for losses associated with Wal-Mart's claims.

* * *

George Klaus, the owner of Klaus Masonry, died on December 2, 1994. On December 19, 1994, Crane received notice of George Klaus's death in a letter sent by an insurance carrier. The letter identified Klaus Masonry as “a small family-operated concern,” and identified George Klaus as “the company's president.” The letter did not advise Crane that the company was a sole proprietorship or that Crane's claims needed to be pursued against the estate of George Klaus. Crane was not informed that Klaus Masonry was a sole proprietorship or that there were allegedly no assets in the estate of George Klaus until June of 1996, which was after the expiration of the non-claim statute.

In April of 1995, Michael Klaus, George Klaus's son, formed Klaus Masonry, LLC, a domestic limited liability company, headquartered in Hays, Kansas. The headquarters of the sole proprietorship had also been in Hays. Klaus Masonry, LLC, continued in the same business of masonry construction as the sole proprietorship, and assumed the trade name of the sole proprietorship. There was also a transfer of assets from the sole proprietorship to Klaus Masonry, LLC, including the goodwill of the sole proprietorship. Michael Klaus had been one of the principal employees of the sole proprietorship, and had performed some of the masonry work challenged by Wal-Mart.

In August of 1996 Crane and Wal-Mart settled their respective claims against each other. In November 1997, Crane commenced an action against “Klaus Masonry” in the

U.S. District Court for the District of Kansas, Case No. 97-1502-MLB (the “Klaus action”), based upon the indemnity clause in the subcontract. In that action, Crane alleged that Klaus Masonry was either a sole proprietorship or a partnership. Service of process was obtained on Mike Klaus at his place of business in Hays. An answer was filed on December 22, 1997, on behalf of “Klaus Masonry (actually George Klaus d/b/a Klaus Masonry),” and Klaus defended the action for nearly two years. On October 7, 1999, Judge Belot dismissed the claim, holding that Crane had sued the sole proprietorship, which was not a legal entity under Kansas law. [FN2 See *Crane Constr. Co. v. Klaus Masonry* 71 F.Supp.2d 1138, 1140 (D.Kan.1999). The court further found that Crane had not sued the estate of George Klaus, and that any such claim against the estate was now barred.

Crane filed the instant action against Klaus Masonry, LLC on November 19, 1999. The complaint alleges in part:

4. Klaus Masonry, LLC continued in the same business of masonry construction as Klaus Masonry and assumed the trade name and goodwill of Klaus Masonry. Upon information and belief, certain corporate assets, in addition to the corporate goodwill, passed from Klaus Masonry to Klaus Masonry, LLC.
5. Upon information and belief, Klaus Masonry, LLC paid no consideration for the use of Klaus Masonry trade name, corporate goodwill, or other assets.
6. Michael Klaus was a key employee of Klaus Masonry and supervised much of the masonry work at issue in this case.
7. The transfer of the trade name, goodwill, and other assets from Klaus Masonry to Klaus Masonry, LLC [affected] a dissolution of Klaus Masonry, such that claims of Klaus Masonry’s creditors could not be paid. Accordingly, Klaus Masonry, LLC is the continuation of Klaus Masonry, a sole proprietorship. . . .

III. Summary of Arguments

The defendant contends that after George Klaus’s death, Crane’s exclusive remedy as an alleged creditor of the sole proprietorship was against Klaus’s estate, and that any such claim is now barred. According to the defendant, Crane is attempting to circumvent the no-claim statute by asserting successor liability against the LLC. The defendant further argues that Crane’s allegations fail to show there were common officers or directors between the sole proprietorship and the LLC, or that the transfer of the sole proprietorship’s assets rendered it incapable of paying its creditors’ claims because of dissolution, and that in the absence of such facts no claim of successor liability may be maintained.

For its part, Crane contends that successor liability may be imposed whenever the successor entity is merely a continuation of the predecessor, and that the only finding essential to such a claim is that “substantial continuity” exists between the two entities. Crane believes this presents a question of fact requiring an evaluation of numerous factors. According to Crane, liability may be imposed in the absence of common officers or directors because that is merely one factor to be weighed in the balance. Crane also asserts that it has adequately alleged that the transfer of assets to the LLC af-

fecting a dissolution of the sole proprietorship such that claims by its creditors could not be paid. Crane thus contends it has stated a valid claim for relief against the defendant.

IV. Discussion

In *Comstock v. Great Lakes Distributing Co.*, 209 Kan. 306, 310, 496 P.2d 1308 (1972), the Kansas Supreme Court recognized the general framework governing successor liability of corporations:

Generally, where one corporation sells or otherwise transfers all of its assets to another corporation, the latter is not liable for the debts and liabilities of the transferor, except: (1) where the purchaser expressly or impliedly agrees to assume such debts; (2) where the transaction amounts to a consolidation or merger of the corporation; (3) where the purchasing corporation is merely a continuation of the selling corporation; or (4) where the transaction is entered into fraudulently in order to escape liability for such debts.

Id. In this case, Crane contends the defendant is liable under the third exception as a “mere continuation” of the sole proprietorship operated by George Klaus under the trade name “Klaus Masonry.”

* * *

The “mere continuation” rule is based upon the notion that corporate entities cannot escape valid claims merely by undergoing some insignificant change in form:

The “mere continuation” of business exception reinforces the policy of protecting rights of a creditor by allowing a creditor to recover from the successor corporation whenever the successor is substantially the same as the predecessor. The exception is designed to prevent a situation whereby the specific purpose of acquiring assets is to place those assets out of reach of the predecessor’s creditors. In other words, the purchasing corporation maintains the same or similar ownership but wears a “new hat.” To allow the predecessor to escape liability merely by changing hats would amount to fraud. Thus, the underlying theory of the exception is that, if [a] corporation goes through a mere change in form without a significant change in substance, it should not be allowed to escape liability.

Fletcher Cyc. Corp. § 7124.10 (Perm.Ed.1999).

Although these rules were designed to govern corporate liability, most courts have applied them “regardless of whether the predecessor or successor organization was a corporation or some other form of business organization.”

* * *

Thus, the “mere continuation” exception has been applied where the predecessor was a sole proprietorship and the successor was a limited liability company. *LiButti*, 178 F.3d at 124.

* * *

When all of the elements are considered in view of the facts alleged by Crane, however, the court must conclude as a matter of law that Crane has failed to state a claim upon which relief can be granted. Three facts in particular combine to support this conclusion.

First, it is difficult to see how one could argue that the death of Mr. Klaus and his son's formation of an LLC to operate the masonry business was "a mere change in form without a significant change in substance" or that these two entities had "the same or similar ownership." *Cf.* Fletcher, *supra*. There is no allegation that the son had any ownership interest in the business prior to his father's death, and the transfer thus brought about a real and complete change in ownership. The *Stratton* court noted that "[t]he common identity of officers and shareholders in both predecessor and successor entities is a commonly cited criterion in determining the existence of continuity." *Id.* 9 Kan.App.2d at 265, 676 P.2d 1. *See also* *Vernon V. Schuster* 179 Ill.2d 338, 228 Ill.Dec. 195, 688 N.E.2d 1172 (1997) (a majority of courts emphasize "a common identity of officers, directors, and stock between the selling and purchasing corporation as the key element of a 'continuation'"). Although sole proprietorships do not have officers, directors or stock as corporations do, at a minimum this element indicates that common ownership is significant in determining whether one entity is a mere continuation of another. Under the facts alleged by Crane, there was no common ownership between the two entities in this case. *Cf. Vernon*, *supra* (son who operated proprietorship after his father's death was not liable under a continuation theory).

A second factor weighing against Crane is that it can fairly be said it was Crane's failure to pursue a claim against the estate of George Klaus, rather than the fact of dissolution of the proprietorship and transfer of assets, that prevented Crane from recovering against the predecessor business. This is not a case of a transfer that left a creditor unprotected and without a remedy against the transferor entity. *Cf.* Fletcher, *supra*. Crane does not (and cannot) dispute that the law provided a claim against Klaus' estate and could have recovered against any assets found to properly belong to the estate. Given the availability of this remedy, the facts do not establish the fifth element of a "mere continuation" claim—i.e., that the transfer rendered the transferor incapable of paying its creditors' claims because it was dissolved in either law or fact. Assuming the claim was valid, Crane could have taken action to require the estate to pay the claim out of George Klaus' assets. *Cf. Gillespie v. Seymour*, 19 Kan.App.2d 754, 762, 876 P.2d 193, 200 (1994) (availability of other remedy weighed against finding of successor liability).

A third factor, related to the second, likewise weighs against Crane. Where a successor entity arises after the death of a **sole proprietor**, application of the "mere continuation" exception could conflict with the laws governing the administration of decedents' estates. As the defendant points out, a sole proprietorship has no legal significance apart from its sole proprietor. *See Sheldon v. Vermonty*, No. 98-2277-JWL, 1999 WL 1096043, *1 (D.Kan., Nov.29, 1999). When Crane contracted with "Klaus Masonry" it was in fact contracting with George Klaus, and when Mr. Klaus died Crane was a creditor with a contingent claim against Mr. Klaus' estate (including the assets of Klaus Masonry). Upon Mr. Klaus' death the probate laws governed Crane's right to assert a claim against Klaus' estate and his assets. Those laws clearly favor swift resolution of all claims against a decedent's estate. K.S.A. § 59-2239 provides in part that "No creditor shall have any claim against or lien upon the property of a decedent other than liens existing at the date of the decedent's death, unless a petition is filed for the probate of the decedent's will . . . or for the administration of the decedent's estate . . . within six months after the death of the decedent. . . ." Crane concedes that any claim against Klaus' estate is now barred because no such petition was filed. Nevertheless, Crane is attempting to follow the assets of the estate into the hands of the LLC, and to recover against the LLC because those assets were allegedly transferred from the estate without consideration. To recognize such a claim would, in the court's view, sanction an end-run on the nonclaim statute and would embroil the parties in a controversy over what assets belonged to the estate, whether Crane was a creditor with a valid claim against those assets, and whether the estate received adequate compensation upon the transfer of the assets. Such matters clearly could have—and should have—been addressed in a timely petition to probate George Klaus' estate. To litigate these issues now would circumvent the limitations of the probate code and would undermine the policy favoring swift resolution of claims against decedents' estates.

Under the circumstances, the court concludes that Crane's claim for successor liability against the defendant cannot be sustained and that the allegations fail to state a claim upon which relief can be granted.

PROBLEMS

1. Describe at least two ways to limit the personal liability of a sole proprietor.
2. Considering your local laws, which of the following names, if used by a sole proprietor named James M. Lyons, would require the filing of a trade name affidavit or registration of an assumed business name:

James M. Lyons and Sons

James M. Lyons and Daughters

Lyons Company

Lyons' Gas Station

The Gas Station

Lyons Limited

3. Describe at least two advantages and two disadvantages of operating a business as a sole proprietorship, and make recommendations concerning how the disadvantages can be mitigated.

PRACTICE ASSIGNMENTS

1. Prepare a list of appropriate and necessary documents for the formation and operation of a sole proprietorship in your state, county, and city. Assume this proprietorship is engaged in the hair salon and manicure business.
2. Obtain and prepare the following documents from the governmental authorities that require them:
 - a. trade name affidavit or assumed business name registration;
 - b. tax identification number application;
 - c. sales or use tax license application; and
 - d. application to operate a licensed business of your choice (such as a liquor store, beauty shop, bail bonds office, pharmacy, etc.).
3. Select a business that is operating as a sole proprietorship, interview the proprietor, and observe the business operation. List the advantages and disadvantages you observe in the following areas:
 - a. management and control,
 - b. personal liability exposure of the proprietor,
 - c. the need for capital and the ability to raise it,
 - d. continuity of the business, and
 - e. taxation.
4. Prepare forms in Exhibits 2–5, Application for Registration of Fictitious Name; and 2–6, Application for Renewal of Fictitious Name. Use your best friend as your client.

Exhibit 2–5.

Application for Registration of Fictitious Name (Florida)

APPLICATION FOR REGISTRATION OF FICTITIOUS NAME
 Note: Acknowledgements/certificates will be sent to the address in Section 1 only.

Section 1

1. _____
Fictitious Name to be Registered (see instructions if name includes "Corp" or "Inc")

Mailing Address of Business _____

City _____ State _____ Zip Code _____

3. Florida County of principal place of business: _____
(see instructions if more than one county)

4. FEI Number: _____

This space for office use only

Section 2

A. Owner(s) of Fictitious Name If Individual(s): (Use an attachment if necessary):

<p>1. Last _____ First _____ M.I. _____ Address _____ City _____ State _____ Zip Code _____</p>	<p>2. Last _____ First _____ M.I. _____ Address _____ City _____ State _____ Zip Code _____</p>
---	---

B. Owner(s) of Fictitious Name If other than an individual: (Use attachment if necessary):

<p>1. Entity Name _____ Address _____ City _____ State _____ Zip Code _____ Florida Registration Number _____ FEI Number: _____ <input type="checkbox"/> Applied for <input type="checkbox"/> Not Applicable</p>	<p>2. Entity Name _____ Address _____ City _____ State _____ Zip Code _____ Florida Registration Number _____ FEI Number: _____ <input type="checkbox"/> Applied for <input type="checkbox"/> Not Applicable</p>
--	--

Section 3

I (we) the undersigned, being the sole (all the) party(ies) owning interest in the above fictitious name, certify that the information indicated on this form is true and accurate. In accordance with Section 865.09, F.S., I (we) understand that the signature(s) below shall have the same legal effect as if made under oath. (At Least One Signature Required)

_____ Signature of Owner Date	_____ Signature of Owner Date
Phone Number: _____	Phone Number: _____

Section 4

**FOR CANCELLATION COMPLETE SECTION 4 ONLY:
 FOR FICTITIOUS NAME OR OWNERSHIP CHANGE COMPLETE SECTIONS 1 THROUGH 4:**

I (we) the undersigned, hereby cancel the fictitious name _____
 _____, which was registered on _____ and was assigned
 registration number _____

_____ Signature of Owner Date	_____ Signature of Owner Date
---	---

Mark the applicable boxes Certificate of Status — \$10 Certified Copy — \$30
FILING FEE: \$50

CR4E001E (1/02)

Exhibit 2–5.*(continued)***Instructions for Completing Application for Registration of Fictitious Name**

- Section 1:** **Line 1:** Enter the name as you wish it to be registered. A fictitious name may not contain the words "Corporation" or "Incorporated," or the abbreviations "Corp." or "Inc.," unless the person or business for which the name is registered is incorporated or has obtained a certificate of authority to transact business in this state pursuant to chapter 607 or chapter 617 Florida Statutes. Corporations are not required to file under their exact corporate name.
- Line 2:** Enter the mailing address of the business. This address does not have to be the principal place of business and can be directed to anyone's attention. **DO NOT USE AN ADDRESS THAT IS NOT YET OCCUPIED. ALL FUTURE MAILINGS AND ANY CERTIFICATION REQUESTED ON THIS REGISTRATION FORM WILL BE SENT TO THE ADDRESS IN SECTION 1.** An address may be changed at any future date with no charge by simply writing the Division.
- Line 3:** Enter the name of the county in Florida where the principal place of business of the fictitious name is located. If there is more than one county, list all applicable counties or state "multiple".
- Line 4:** Enter the Federal Employer Identification (FEI) number if known or if applicable.
- Section 2:** **Part A:** Complete if the owner(s) of the fictitious name are individuals. The individual's name and address must be provided.
- Part B:** Complete if the owner(s) are not individuals. Examples are a corporation, limited partnership, joint venture, general partnership, trusts, fictitious name, etc. Provide the name of the owner, their address, their registration number as registered with the Division of Corporations, and the Federal Employer Identification (FEI) number. An FEI number must be provided or the appropriate box must be checked.
- Owners listed in Part B must be registered with the Division of Corporations or provide documentation as to why they are not required to register. Examples would be Federally Chartered Corporations, or Legislatively created entities.
- Additional owners may be listed on an attached page as long as all of the information requested in Part A or Part B is provided.
- Section 3:** Only one signature is required. It is preferred that a daytime phone number be provided in order to contact the applicant if there are any questions about the application. Since the Department indexes fictitious names on a central database available on the internet, it is no longer required to advertise the intention to register a fictitious name.
-
- Section 4:** **TO CANCEL A REGISTRATION ON FILE:** Provide fictitious name, date filed, and registration number of the fictitious name to be cancelled.
- TO CHANGE OWNERSHIP OF A REGISTRATION:** Complete section 4 to cancel the original registration. Complete sections 1 through 3 to re-register the fictitious name listing the new owner(s). An owner's signature is required in both sections 3 and 4.
- TO CHANGE THE NAME OF A REGISTRATION:** Complete section 4 to cancel the original registration. Complete sections 1 through 3 to re-register the new fictitious name. An owner's signature is required in both sections 3 and 4.

An acknowledgement letter will be mailed once the fictitious name registration has been filed.

If you wish to receive a certificate of status and/or certified copy at the time of filing of this registration, check the appropriate box at the bottom of the form. PLEASE NOTE: Acknowledgments/certificates will be sent to the address in Section 1. If a certificate of status is requested, an additional \$10 is due. If a certified copy is requested, an additional \$30 is due.

The registration and reregistration will be in effect until December 31 of the fifth year.

Send completed application with appropriate fees in the enclosed envelope to:

Fictitious Name Registration
PO Box 1300
Tallahassee, FL 32302-1300


Internet Address:
<http://www.sunbiz.org>

The fee for registering a fictitious name is \$50. Please make a separate check for each filing payable to the Department of State. Application must be typed or printed in ink and legible.

Exhibit 2-6.

Application for Renewal of Fictitious Name (Florida)

**FILE TO RENEW NOW:
FICTITIOUS NAME WILL EXPIRE ON 12/31/03**

SECRETARY OF STATE		FLORIDA DEPARTMENT OF STATE DIVISION OF CORPORATIONS
APPLICATION FOR RENEWAL OF FICTITIOUS NAME		
REGISTRATION # 1. Name and Mailing Address <small>If above mailing address is incorrect in any way, line through incorrect information and enter correction in Block 2.</small>		
2. Mailing Address change if applicable: Suite, Apt. #, etc. City State Zip Code		

CHECK HERE IF MAKING CHANGES

3. FEI Number	5. County of Principal Place of Business
4. Date Registered	6. Certificate of Status Desired \$10 Additional Fee Required

AN OWNER THAT IS A CORPORATION, LIMITED PARTNERSHIP OR OTHER BUSINESS ENTITY MUST BE REGISTERED AND ACTIVE WITH THIS OFFICE.

7. CURRENT OWNER (S)			8. ADDITIONS / CHANGES TO OWNERS		
DOCUMENT #		DELETE	DOCUMENT #		
FEI #			FEI #		Change Addition
NAME			NAME		
STREET ADDRESS			STREET ADDRESS		
CITY - ST - ZIP			CITY - ST - ZIP		
DOCUMENT #		DELETE	DOCUMENT #		Change Addition
FEI #			FEI #		
NAME			NAME		
STREET ADDRESS			STREET ADDRESS		
CITY - ST - ZIP			CITY - ST - ZIP		
DOCUMENT #		DELETE	DOCUMENT #		Change Addition
FEI #			FEI #		
NAME			NAME		
STREET ADDRESS			STREET ADDRESS		
CITY - ST - ZIP			CITY - ST - ZIP		
DOCUMENT #		DELETE	DOCUMENT #		Change Addition
FEI #			FEI #		
NAME			NAME		
STREET ADDRESS			STREET ADDRESS		
CITY - ST - ZIP			CITY - ST - ZIP		

(CR4E003) 10/02

9. I (we) the undersigned, being the sole (all the) party(ies) owning interest in the above fictitious name, certify that the information indicated on this form is true and accurate. I (we) understand that the signature(s) below shall have the same legal effect as if made under oath. I further certify that the names of individuals listed on this form do not qualify for an exemption under section 119.07(3)(f), F.S. (At least one signature required)

Signature of Owner _____	Date _____	Signature of Owner _____	Date _____
Daytime Phone Number: _____		Daytime Phone Number: _____	

MAKE CHECK PAYABLE TO DEPARTMENT OF STATE**FILING FEE \$50.00**

PLEASE READ ALL INSTRUCTIONS CAREFULLY BEFORE COMPLETING THE FORM. IF YOU NEED ASSISTANCE, PLEASE CALL (850) 488-9000.

INSTRUCTIONS FOR COMPLETING THE APPLICATION FOR RENEWAL

- Block 1. Block is preprinted with the fictitious name, the registration number, and mailing address of the business as it was originally registered with this office. The name of the business cannot be changed on the statement of renewal. A cancellation/re-registration must be filed. Please call (850) 245-6058 for the appropriate form.
- Block 2. If the mailing address printed in block 1 is incorrect, enter the correct mailing address in block 2. This address does NOT have to be the principal place of business and can be directed to anyone's attention. DO NOT USE AN ADDRESS THAT IS NOT YET OCCUPIED. ALL FUTURE MAILINGS AND ANY CERTIFICATION REQUESTED ON THIS RENEWAL FORM WILL BE SENT TO THE ADDRESS IN BLOCK 1 OR AS CHANGED IN BLOCK 2. WE WILL NOT SEND CERTIFICATION TO ANY OTHER ADDRESS OR REDIRECT MAIL RETURNED TO THIS OFFICE.
- Block 3. Block is preprinted with the Federal Employer's Identification (FEI) number. If blank, enter the FEI number if known. For FEI number assistance, call the IRS at (800) 829-1040.
- Block 4. Block is preprinted with the date filed in this office; if blank enter the correct file date, if known.
- Block 5. Block is preprinted with the county of the principal place of business. "MULTIPLE" may be preprinted if more than one county was reported when original registration was filed; change if necessary.
- Block 6. Should you desire a certificate of status, please check the box in block 6 and include an additional \$10.00 with the filing fee. The certificate of status will be sent to address in block 1 or in block 2, if changed.
- Block 7. Block 7 contains the Fictitious Name owner(s), their addresses, document number and Federal Employer Identification Number (FEI) if applicable. (Due to space limitations only four owners are printed.) If there are additional owners, please list them on an attached sheet or in block 8 as additions. Do not make any changes in block 7 unless deleting an owner. Owners listed that are not individuals must be registered and active with this office or provide documentation as to why they are not required to register. Examples would be Federally Chartered Corporations or Legislatively created entities. NOTE: If the fictitious name indicated in block 1 contains the word(s) "corporation" or "incorporated", or the abbreviation "corp." or "Inc.", the owner(s) must be a corporation registered or incorporated with this state.
- Block 8. Block 8 is for changes or additions to the owners in block 7. Changes must be typed or printed in ink and legible. Owners that are not individuals must be registered and active with this office or provide documentation as to why they are not required to register. Examples would be Federally Chartered Corporations or Legislatively created entities. NOTE: If the fictitious name indicated in block 1 contains the word(s) "corporation" or "incorporated", or the abbreviation "corp." or "Inc.", the owner(s) must be a corporation registered or incorporated with this state.
- Block 9. This renewal must be signed in block 9 with an original signature by at least one owner that is listed in block 7, block 8 if a change, or on an attachment.

If this Application for Renewal of Fictitious Name is not filed on or before December 31, 2003, the fictitious name will be cancelled and removed from the records of the Department of State.

This renewal application must be post-marked by December 31, 2003.

After the Application for Renewal is filed, the effectiveness of the fictitious name registration is continued until December 31, 2008.

MAILING ADDRESS:
Fictitious Name Renewal
Division of Corporations
Post Office Box 1300
Tallahassee, Florida 32302-1300

Other Correspondence:
Division of Corporations
P.O.Box 6327
Tallahassee, Florida 32314

Courier Service Address:
Division of Corporations
409 East Gaines Street
Tallahassee, Florida 32399

Internet Address:
www.sunbiz.org

Phone Number: (850) 488-9000
Hearing/Voice Impaired may call (850) 245-6096 (TDD)

Exhibit 2-6.*(continued)***ENDNOTES**

1. See "Taxation of Corporation" in Chapter 6.
2. See "Corporations in Foreign Jurisdictions" in Chapter 14.
3. Some states provide statutory authority for the continuity of a sole proprietorship by a

proper testamentary distribution. E.g., McKinney Consol. Laws of N.Y.S.C.P.A. § 2108.

4. E.g., a bank is authorized to continue to pay checks of a deceased sole proprietor after death under U.C.C. § 4-405 until the bank

learns about the death and has a reasonable opportunity to act on it.

5. See "Agency Authority" in Chapter 1.
6. See C. Rohrlich, *Organizing Corporate and Other Business Enterprises* § 13.02 (1967).