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Suggestions for Modernizing the Kentucky General Corporation Law to Meet the Needs of Close Corporations

By Willburt D. Ham

The renewed interest in the close corporation,¹ which has become so increasingly evident since World War II,² is now finding expression in legislative revisions of corporation codes. Heretofore, lawyers have found it necessary to rely heavily on their own initiative or on that of the judiciary to supply gaps in close corporation law left open in corporation statutes.³ Sometimes these statutes have been so framed as to lead to judicial opinions thwarting efforts on the part of lawyers to mold the internal organizational structure of a closely held corporation to meet the legitimate business desires of its members.⁴ However, legislative recognition that the close corporation has distinctive characteristics which call for special treatment in corporation statutes is becoming increasingly apparent.

¹ The term “close corporation” is not easily defined. Such a corporation is characterized by its limited membership, by the active participation of its members in the management of corporate affairs, and by the lack of active trading in its stock.

² This interest was highlighted by the appearance in 1958 of the excellent treatise on close corporations written by Professor F. Hodge O’Neal. See O’Neal, Close Corporations: Law and Practice (2 vols. 1958).

³ See Hornstein, Judicial Tolerance of the Incorporated Partnership, 18 Law & Contemp. Prob. 435 (1953), in which the author says: Clearly, the law of corporations never was and is not entirely statutory. In a no-man’s land unoccupied by the legislature, the ‘incorporated partnership,’ for example, is a reality. Its vitality is conclusively demonstrated by flourishing practices, office files, and judicial opinions. Not the legislature, but the judges (who must deal with lawyers) and the lawyers (who must deal with clients) have quickened into life a type of business organization needed to meet the exigencies of the market place.

Provisions designed to meet the special needs of the close corporation are particularly evident in the new Business Corporation Law of New York,5 effective September 1, 1963, and the new Business Corporation Act of South Carolina,6 which became effective on January 1, 1964. Such provisions also dominate the present North Carolina Business Corporation Act, which became effective on July 1, 1957.7 To a lesser extent close corporation provisions appear in the American Bar Association Model Business Corporation Act,8 which has been enacted in substantially its recommended form in some thirteen jurisdictions,9 and in the existing statutes of such important commercial states as California,10 Illinois,11 and Ohio.12 During 1963, the Florida legislature responded to the renewed interest in the close corporation by adopting an act relating to close corporations.13 This "act" consists of a series of special provisions designed to relax the legal restrictions applicable to close corporations in Florida.14

In a recent article the present writer suggested that, while there was no reason to view with alarm the status of the close corporation in Kentucky, nevertheless there was room for improvement in the provisions of the Kentucky general corporation statute aimed at clarifying existing areas of uncertainty in close corporation law and at establishing a firmer legislative foundation for this type of corporation in Kentucky.15 Therefore, it seems appropriate at this time to offer a few specific suggestions as to ways in which Kentucky might "modernize" its corporation statute so as to reflect recent legislative trends in adapting corpo-

5 N.Y. Bus. Corp. Law §§ 101 to 1401.
9 These jurisdictions are: Alaska, Colorado, District of Columbia, Iowa, Mississippi, Nebraska, North Dakota, Oregon, Texas, Utah, Virginia, Wisconsin, and Wyoming. The Model Business Corporation Act is a product of the Committee on Corporate Laws of the Section of Corporation, Banking and Business Law of the American Bar Association. For the history of the preparation and publication of this act, see 1 Model Bus. Corp. Act Ann. § 1, ¶ 4.02 (1969).
14 See 2 P-H Corp. Serv., Fla. 15-16A (1963). The "act" defines a close corporation as "a corporation for profit whose shares of stock are not generally traded in the markets maintained by securities dealers or brokers."
ration codes more precisely to the practical needs of the close corporation. These suggestions will be discussed in relation to three phases of corporate life—organization, operation, and dissolution.

**Organization**

1. *Single incorporator*

At the outset, in connection with organizational procedures, it is significant to note that in 1954 Kentucky moved to the forefront in relation to one aspect of close corporation law. In that year the Kentucky General Assembly amended the corporation statute so as to permit the use of a single incorporator for a Kentucky corporation. Kentucky thereby became the fourth state to grant such a privilege. At that time, the only other states recognizing a single incorporator were Iowa, Michigan, and Wisconsin. Since then Illinois, Nebraska, New York, Oregon, South Carolina, and Wyoming have joined this list of states, and it is reasonable to assume that the list of states permitting use of the single incorporator will continue to grow. These new enactments provide additional confirmation for the viewpoint that the one-man company is a “legitimate” corpora-

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16 Dean Daniel J. Dykstra of the University of Utah College of Law, in pointing out the significance of a corporation statute providing definitive answers to questions which tend to reoccur in the organization and functioning of corporations, commented that “it is not enough that answers to such questions can be found in the recesses of judicial opinions, for the facts of life are such that lawyers too frequently look only to statutes as their source of aid in advising corporations, and if the desired guidance is not to be found therein demands on time and energy cause them to ‘play by ear.’” Dykstra, Gaps, Ambiguities and Pitfalls in the Utah Corporation Code, 4 Utah L. Rev. 439, 440 (1955).


21 The change from the former requirement of a minimum of three incorporators became effective in Illinois on July 1, 1963. See 3 P-H Corp. Serv., Ill. 65 (1963).


23 N.Y. Bus. Corp. Law § 401.


27 The likelihood that this will occur has been increased by recognition of the single incorporator in the 1962 revision of the section on incorporators in the Model Business Corporation Act. See ABA-ALI Model Bus. Corp. Act § 47 (1959, 1962 Addendum) (hereinafter cited as Model Bus Corp. Act).
tion, and they remove the necessity for the use of "accommodation" incorporators, a practice which is not altogether free from the possibility of unexpected legal responsibilities on the part of the accommodation parties.

Although Kentucky is one of the states that now gives recognition to the use of the single incorporator, an anomalous situation for Kentucky attorneys existed until recently by the retention in the corporation statute of the requirement that the articles of incorporation be acknowledged by at least three of the incorporators. This obvious inconsistency with the concept of the single incorporator can no doubt be traced to legislative oversight at the time of the 1954 amendment eliminating the requirement of a minimum of three incorporators, and the attorney general of Kentucky had expressed the opinion that since one person may now form a corporation in Kentucky, only that person (as incorporator) needs to acknowledge the articles of incorporation.

The 1964 General Assembly corrected this situation by changing the acknowledgment requirement so as to permit the articles of incorporation to be acknowledged by only one of the incorporators.


31 Ops. Att'y Gen. No. 42,878 (February 27, 1959).

2. Conditions precedent to beginning business

Perhaps one of the most troublesome features of the present Kentucky corporation statute with respect to organizational matters is the provision pertaining to liability in case of violation of the section prescribing the conditions precedent to beginning business. This provision states that if a corporation transacts any business without having complied with such conditions precedent, the participating officers and the directors, except those directors who dissent, are to be treated as severally liable for the debts or liabilities of the corporation arising from such business. Since one of the conditions precedent to be complied with is the election of the first board of directors by the shareholders and since the important corporate officers, such as the president, vice-president, secretary, and treasurer, are elected by the board of directors, it is entirely possible that there will be no directors or officers in the technical legal sense to whom the liability provision can be made to apply. Yet business may have been transacted in violation of the section. Although the Kentucky Court of Appeals made use of the “de facto officer” concept in a recent case to fill this gap, it appears that a legislative modification of the liability provision would be the most effective solution to the problem.

Ohio came to grips with a somewhat similar problem in the 1955 revision of its corporation statute. Prior to that time the Ohio statute had imposed a liability for debts of a corporation up to the amount of the initial unpaid stated capital on directors participating in a corporate transaction before such initial capital had been paid in. Despite the limitation on total liability speci-

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33 KRS 271.095(2).
34 The other conditions precedent which must be complied with are (1) filing of an original of the articles of incorporation with the county clerk, (2) paying in the initial stated capital, and (3) establishing the registered office and process agent as prescribed by KRS 271.385.
35 KRS 271.355.
36 Tri-State Developers, Inc. v. Moore, 343 S.W.2d 812 (Ky. 1961).
37 Another approach would be to name the first board of directors in the articles of incorporation, such as required by the Uniform (Model) Business Corporation Act, from which the Kentucky liability provision was taken. The Uniform Act, promulgated in 1928 by the National Conference of Commissioners on Uniform State Laws and later redesignated as a Model Act, was withdrawn from active promulgation by this group in 1957. See 9 U.L.A. 115 (1957, Supp. 1965, at 48).
fied by this provision, an intermediate Ohio appellate court held incorporators of a defectively formed corporation fully liable on a tort obligation attributable to the corporation. In the 1955 revision of the corporation statute the language of this provision was changed to cover "incorporators participating in such transaction before the election of directors, and directors participating therein," the purpose apparently being to limit the liability of incorporators as well as directors to the amount of the deficiency in stated capital.

A similar revision in language could be adopted in Kentucky by specifying that if a corporation has transacted any business without having complied with the conditions precedent to beginning business, "the incorporators participating therein before the election of directors, and officers and directors participating therein" shall be severally liable for the debts and liabilities of the corporation arising from such business. However, use of the term "incorporators" would still leave a potential gap in the Kentucky statutory provision since persons other than incorporators (or other than directors or officers) may be responsible for the challenged transactions. An even more satisfactory solution for Kentucky, therefore, would appear to be that contained in the new South Carolina Business Corporation Act. It is there stated that if a corporation transacts any business in violation of the section prescribing the conditions precedent for doing business "any person (whether a promoter, incorporator, shareholder, subscriber, or director) who has participated therein, shall be jointly and severally liable for the debts or liabilities of the corporation

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41 See Emerson, The New Ohio General Corporation Law: Some Comments and Some Comparisons, 24 U. Cinc. L. Rev. 463, 470-71 (1955). There may be some question whether the amended language actually reaches the Beck case itself, since that case involved no "transaction" but rather an injury to a third party growing out of failure to maintain premises in proper condition and there was arguably not a "debt," which denotes a contractual obligation, but instead a "liability." A similar problem may lurk in the Kentucky statutory language since it refers to transaction of business and liability for the debts or liabilities of the corporation arising therefrom. See KRS 271.055(2).
42 This approach is used in the Connecticut Stock Corporation Act, which provides that if a corporation commences business before it has received the minimum stated capital with which it is to commence business "the directors, or, if the directors have not then been elected, the incorporators, who assent thereto shall be jointly and severally liable to the corporation for such part thereof has not been received before commencing business." Conn. Gen. Stat. § 33-295 (Rev. to 1962).
arising therefrom." This language, or language similarly broad in scope, would give to the Kentucky liability provision a coverage more consistent with its apparent meaning.

3. Organizational meetings

Corporation statutes typically provide for an organizational meeting or meetings to complete the organization of a corporation after the filing of the articles of incorporation. The Kentucky statute provides for two such meetings. There is provision for a first meeting of the shareholders for the purpose of electing directors, for the purpose of making bylaws (unless the articles give this power to the directors), and for such other purposes as shall be stated in the notice of the meeting. Provision is then made for an organization meeting of the board of directors for the purpose of adopting bylaws (if this power has been given to the board), for the purpose of electing officers, and for the transacting of such other business as comes before the meeting.

These provisions, like those of a similar nature in other corporation statutes, assume that actual meetings will be held for such purposes. However, in the organization of the typical close corporation, there is likely to be considerable temptation to ignore the formal ritual of holding actual "meetings" for these purposes. To meet this situation, New York has provided in its new Business Corporation Law that any action permitted to be taken at the organization meeting, which under the statute consists in a meeting of the "incorporator or incorporators," may be taken without a meeting "if each incorporator or his attorney-in-fact signs an instrument setting forth the action so taken."

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44 See, e.g., Wis. Stat. Ann. § 180.93 (1957), which imposes liability on "the incorporators and the subscribers for stock, shareholders and officers transacting such business or authorizing the same, or consenting to the incurring of any debt or liability."

45 The opportunity for dissent could be retained as in the present provision. The South Carolina statute, for example, provides: "No such person shall be personally liable if he (1) dissented from such violation and caused his dissent to be recorded in the records of the corporation, or (2) being absent, recorded and filed his dissent promptly upon learning of the action." S.C. Code Ann. § 21-14.6(b) (Supp. 1962).

46 KRS 271.345(2).

47 KRS 271.345(3).

48 N.Y. Bus. Corp. Law § 404(b).
While the Kentucky statute presently contains a general provision which permits action by shareholders to be taken without a meeting, no such similar privilege is extended to directors. Thus, although the need for an organization meeting of shareholders might be considered as dispensed with by this statutory provision, no such informal action by the board of directors would carry statutory approval. The addition of a specific provision to the Kentucky statute dispensing with the need for holding actual organizational meetings, such as has been done in New York, would serve to remove all possible doubt as to the validity of informal action at the organizational stage, whether involving shareholders or directors. Such a statutory provision, if enacted in Kentucky, would also be consistent with the recognition in Kentucky of the one-man company with its single incorporator-owner.

4. Corporate purposes

The Kentucky corporation statute states that a corporation may be formed for “any lawful purpose,” and states that the articles of incorporation shall set forth the “purpose” for which the corporation has been formed. This language taken literally suggests that a Kentucky corporation must confine itself to a single line of business activity. Since such a restriction would run counter to the customary authorization in modern corporation statutes for corporations to be formed for any lawful “purpose or purposes,” an amendment to the Kentucky corporation statute seems to be needed so as to make it clear beyond doubt that Kentucky corporations, as corporations elsewhere, may be formed to engage in one or in several lines of business activity. While it is true that diversification is more likely to be a characteristic of the large publicly held corporation than the small closely held corporation, nevertheless the proper framing of the purpose clause in the articles of incorporation remains of importance in all corporations, whether large or small.

49 KRS 271.405.
50 KRS 271.025.
51 KRS 271.035(1)(b).
53 In five states, Iowa, Nevada, Oregon, Wisconsin, and Wyoming, the corporation statutes authorize use of a statement in the articles of incorporation to the effect that the corporation shall have power to engage in any lawful

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1. The board of directors

There is probably no principle of corporation law which has been repeated more frequently or which has influenced judicial opinions more directly than that which states that the business management of a corporation shall be vested in a board of directors.54 Indeed, so basic is this management concept that it has long been customary to include a provision to this effect in corporation codes.55 The entrenched nature of this concept easily leads to an assumption that the use of a board of directors is an inherent characteristic of corporateness. However, it has been persuasively argued that there is no historical basis for such an assumption and that the shareholders of a corporation should be allowed to decide for themselves whether they wish the corporate business to be managed by a board of directors.56 Nevertheless, there is little evidence in either existing or new corporation statutes that the board of directors can be completely by-passed,57 although there is increasing evidence in the new statutes that arrangements restricting the powers of the board are to be considered as proper.

New York has given special attention to this aspect of close corporation law in its new Business Corporation Law. It is there provided that "subject to any provision in the certificate of

(Footnote continued from preceding page)


54 See Ballantine, Corporations § 42 (rev. ed. 1946).
55 See, e.g., KRS 271.345.
57 In his study of the board requirement, Kessler found only three states that did not expressly require a board of directors. These were the states of Arizona, Iowa (under its old law), and Mississippi. Kessler, supra note 56 at 712, n. 76 (1960). Mississippi can no longer be considered as a member of this group of states since the adoption of its new Business Corporation Act, effective January 1, 1963, which contains the Model Act requirement of a board of directors. See Miss. Code Ann. § 5309-71 (Supp. 1962). Likewise, the new Iowa Business Corporation Act contains the Model Act requirement. See Iowa Code Ann. § 496A.34 (Supp. 1961). However, persons may still elect to incorporate under the old Iowa general corporation statute. The new Florida close corporation "act" provides that the articles of incorporation of a close corporation may make provision for management by the stockholders instead of by a board of directors, provided that "there be not less than three stockholders." See 2 P-H Corp. Serv., Fla. 15 (1963).
incorporation authorized by paragraph (b) of section 620 \(^{58}\) . . . the business of a corporation shall be managed by its board of directors. . . .” \(^{59}\) Section 620(b) authorizes the inclusion of a provision in the certificate of incorporation restricting the powers of the board of directors if such provision is authorized by the incorporators or holders of record of all outstanding shares (including non-voting shares) even though the provision would be “otherwise prohibited by law as improperly restrictive of the discretion or powers of the board in its management of corporate affairs.” \(^{60}\) The section further provides that the existence of such a provision must be noted conspicuously on the face or back of every certificate for shares issued by the corporation \(^{61}\) and that such a provision remains valid only so long as the shares of the corporation are not listed on a national securities exchange or regularly quoted on an over-the-counter market. \(^{62}\) This latter requirement emphasizes the applicability of the section to the close corporation and removes the availability of the section for use in a corporation that loses its closely held characteristics.

The new South Carolina Business Corporation Act, which also permits departures from the “corporate norm” of director control, \(^{63}\) bases permission for such departures, as in New York, on

\(^{58}\) The term “certificate of incorporation” is used in the New York statute to refer to the document which in Kentucky and other states is called the “articles of incorporation.” The term “certificate of incorporation” is used in Kentucky to refer to the document issued by the Secretary of State upon the filing of the articles of incorporation with him as prescribed by law. See KRS 271.055. For the variety of terms used in corporation statutes to describe the “articles of incorporation,” see 1 Hornstein, Corporation Law & Practice § 74 (1959).

\(^{59}\) N.Y. Bus. Corp. Law § 701. Dean Stevens has suggested that this section is susceptible to interpretation as meaning either (1) that the certificate may provide for management otherwise than by a board of directors, or (2) that there must be a board of directors but § 620(b) permits the creation of a sterilized board. Stevens, Close Corporations and the New York Business Corporation Law of 1961, 11 Buffalo L. Rev. 481, 490 (1962).

\(^{60}\) In Hoffman, New Horizons for the Close Corporation in New York Under Its New Business Corporation Law, 28 Brooklyn L. Rev. 1, 10 (1961), the author says: “It is clear . . . that there are no limitations, if section 620 is satisfied, on the extent to which the authority of the board can be invaded. Presumably, the board can be deposed of authority entirely and ‘put to bed.’”

\(^{61}\) N.Y. Bus. Corp. Law § 620(g).

\(^{62}\) N.Y. Bus. Corp. Law § 620(c). Validity is further dependent on the requirement that any subsequent transfer or issuance of stock after the initial adoption of the certificate provision be made only to persons who have knowledge or notice of the provision or who have consented in writing to such provision. N.Y. Bus. Corp. Law § 620(b)(2).

\(^{63}\) S.C. Code Ann. § 12-18.1 (Supp. 1962). A South Carolina writer points out that while this section does not specifically authorize the abolition of the board of directors, there is no clear mandate with which such abolition would
unanimous shareholder approval.64 However, under the South Carolina statutory provision, the agreement does not need to be set forth in the articles of incorporation if its existence (whether in the bylaws or in a written side agreement) is clearly referred to in the articles.65

In contrast with the New York and South Carolina statutory provisions, both of which require any departure from director control to carry the approval of all the shareholders, the North Carolina Business Corporation Act broadens the departure privilege to include agreements among “all or less than all” of the shareholders which interfere with the discretion of the board of directors.66 This North Carolina provision is significant in view of the judicial tendency to look with disfavor on agreements among less than all the shareholders which limit board control.67

In Haldeman v. Haldeman,68 the Kentucky Court of Appeals refused to uphold an agreement among three of four shareholders in a closely held corporation involving an attempt to control action at the director as well as at the shareholder level. While the Kentucky court would be in a position to distinguish this case from one in which all the shareholders were parties to the agreement,69 there would still remain the question as to how far such unanimous shareholder agreements may go in “sterilizing” the board of directors.70 The addition of a specific provision to the

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be inconsistent. Folk, The Model Act and The South Carolina Corporation Law Revision, 18 Bus. Law 351, 363 (1963). This same writer suggests that one advantage which may exist in continuing the use of a board is its usefulness in underscoring the separate legal entity of the corporation and minimizing the likelihood of undue confusion between corporate and personal business affairs. Id. at 363-64.

65 S.C. Code Ann. § 12-16.22(b)(1)(Supp. 1962). The term of the agreement, however, cannot exceed ten years, subject to renewal. S.C. Code Ann. § 12-16.22(b)(3). This time limitation keeps such agreements in line with similar time restrictions of ten years on voting trusts, irrevocable proxies, and shareholder voting agreements.
68 176 Ky. 635, 197 S.W. 376 (1917).
70 In Long Park, Inc. v. Trenton-New Brunswick Theatres Co., 297 N.Y. 174, 77 N.E.2d 633 (1948), the New York Court of Appeals struck down an agreement among all the shareholders of a theatre corporation because the infringement on the power of the directorate was too drastic.
Kentucky statute establishing a legislative foundation for shareholder agreements restricting director control, even if based on a requirement of unanimous shareholder consent as in New York and South Carolina, would help to eliminate uncertainties as to the legality of such agreements which otherwise will no doubt continue to exist in the absence of statute or judicial decision.

Assuming that a board of directors is to remain a requirement for all corporations, whether large or small, relief is needed in the two-man and one-man corporation from the customary requirement that the board consist of a minimum of three persons. Use of "dummy" directors carries risks not only for the owner or owners of the business should such directors suddenly assert themselves and thwart the wishes of the true owners but also for the directors themselves in the form of personal liabilities never contemplated by them. A recent California case illustrates this latter risk. Defendant, an attorney-at-law, had assisted in the organization of a corporation to operate a public swimming pool and, according to his statements, had assumed the position of an officer and director of the corporation temporarily as an accommodation to his clients. Plaintiffs' daughter drowned in the pool and plaintiffs obtained a judgment against the corporation for wrongful death. However, the judgment remained unsatisfied because the corporation had been organized without any substantial assets. Plaintiffs then brought an action against the defendant to hold him personally liable for the judgment against the corporation. On appeal from a judgment entered by the trial court for plaintiffs, Justice Traynor of the California Supreme Court observed:

It is immaterial whether or not he [the defendant] accepted the office of director as an "accommodation" with the understanding that he would not exercise any of the duties of a director. A person may not in this manner divorce the responsibilities of a director from the statutory duties and powers of that office.

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71 See, e.g., KRS 271.345(1): "The business of every corporation shall be managed by a board of at least three directors. . . ."

72 See 1 O'Neal, Close Corporations § 3.13 (1958).


75 364 P.2d 473, 475-76 (1961). The court nevertheless reversed the judgment of the trial court because plaintiffs had not alleged or presented any (Continued on next page)
Obviously, this judicial attitude toward "accommodation" directors lessens the desirability of using such persons as a means of satisfying the statutory requirement pertaining to the minimum number of directors. In 1961, Delaware amended its general corporation statute so as to provide that where all the shares of a corporation are owned by less than three persons, the number of directors may be less than three but not less than the number of shareholders. A similar provision has been included in the newly enacted statutes of Nebraska, New York, and South Carolina, and has been added to the Illinois Business Corporation Act by a 1963 amendment to that act. In the same year as the Delaware amendment, the new Iowa Business Corporation Act was amended to make it clear that the board of directors may consist of "one or more" persons. A 1964 amendment to the Kentucky corporation statute permits a Kentucky corporation to be organized with a board composed of only one member. This new provision, similar to the one in Iowa, is somewhat broader in scope than the Delaware statute in that any corporation regardless of the number of shareholders can have a one-man board.

2. Election or appointment of officers

In the closely held corporation, one of the most critical aspects of control is likely to be that concerned with the election or

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evidence as to the corporation's negligence or as to the amount of damages sustained by plaintiffs, issues which the court felt defendant had a right to relitigate since defendant had not been a party to the original suit against the corporation.

Justice Schauer disagreed with that part of the majority opinion in the Minton case which had treated as immaterial whether defendant had accepted the office of director as an "accommodation." He said that he dissented from any implication that "mere professional activity by an attorney at law, as such, in the organization of a corporation, can constitute any basis for a finding that the corporation is the attorney's alter ego or that he is otherwise personally liable for its debts, whether based on contract or tort." 364 P.2d 473, 477 (1961).


N.Y. Bus. Corp. Law § 702.


3 P-H Corp. Serv., Ill. 51 (1963).


H.B. 164, Ky. General Assembly, Reg. Sess. § 3 (1964). This change in the Kentucky statute may call for an amendment to the provision dealing with the minimum quorum for a meeting of the board of directors which states that the quorum shall not be "less than one-third of the total number of directors nor less than two directors." KRS 271.345(4)(c). The prefatory clause at the beginning of paragraph (4) of this section which states "except as otherwise provided in the articles or bylaws" does not seem strong

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appointment of the officers of the corporation since the members frequently expect to receive regular remuneration in the form of salaries by serving the corporation as officers.\textsuperscript{84} Even if the members do not serve in such capacities, they may still wish to retain for themselves the power to elect or appoint the officers. However, exercise of this power, at least as related to the important corporate offices, is normally treated in corporation statutes as a function of the board of directors.\textsuperscript{85} As a means of relaxing the statutory requirement that officers be elected by the board of directors, the New York Business Corporation Law authorizes the inclusion of a provision in the articles of incorporation providing for the election of officers by the shareholders rather than by the directors.\textsuperscript{86} A similar provision appears in the corporation statutes of several other states.\textsuperscript{87} The inclusion of such a provision in the Kentucky statute would seem appropriate as a concession to the special needs of the participating shareholders in a close corporation.\textsuperscript{88}

As a further concession to the realities of the one-man company, Kentucky should perhaps consider whether to retain the present requirement which prevents the office of president from being combined with any other of the statutory offices.\textsuperscript{89} In the preparation of the new Iowa Business Corporation Act, the Model Act provision\textsuperscript{90} that one man cannot be both president and secretary was discarded in favor of the existing Iowa rule allowing one man to hold all the offices.\textsuperscript{91} However, as a practical matter,

\textsuperscript{84} 1 Hornstein, Corporation Law & Practice § 179 (1959).
\textsuperscript{85} See note 35 supra.
\textsuperscript{86} N.Y. Bus. Corp. Law § 715(b).
\textsuperscript{87} See 1 Hornstein, Corporation Law & Practice § 179, n. 94 (1959).
\textsuperscript{88} To protect against the possible removal of such officers by the board of directors, both the New York and South Carolina statutes contain special provisions pertaining to removal of officers elected by the shareholders. In New York, such officers may be suspended by the board for cause but may be removed only by the shareholders. N.Y. Bus. Corp. Law § 716(a). Likewise, in South Carolina, such officers may be removed only by the vote of the shareholders, unless the shareholders have given the power of removal to the directors. S.C. Code Ann. § 12-18.14(b) (Supp. 1962).
\textsuperscript{89} See KRS 271.355(1), which states that “any two of the offices of vice-president, secretary and treasurer may be combined in one person.”
\textsuperscript{90} Model Bus. Corp. Act § 44 (1959).
the need for use of two officers remains a necessity under most corporation statutes even in the case of the one-man company due to the presence of a requirement in these statutes that formal corporate documents be executed by two officers, typically by the president and by the secretary. In recognition of such long established practice, the requirement that a corporation have at least two officers was retained in the drafting of the recent Wyoming Business Corporation Act,\textsuperscript{82} despite the fact that Wyoming is now one of the states recognizing the single incorporator.\textsuperscript{83} South Carolina hedged somewhat in its treatment of this problem by providing that “any two or more offices may be held by the same person, but no officer may act in more than one capacity where action by two or more officers is required.”\textsuperscript{84}

The 1964 Kentucky General Assembly amended the section on corporate officers in the Kentucky corporation statute so as to remove the requirement that “the board of directors shall elect a president, a secretary and a treasurer, and may elect one or more vice-presidents.” In its place a new provision has been inserted which reads: “Such officers and agents as may be necessary for the business of the corporation may be appointed by the board of directors or in the manner provided in the bylaws.”\textsuperscript{85} This new provision would appear to contemplate the possibility of one officer. The provisions in the present statute that “no officer need be a director” and that “any two of the offices of vice-president, secretary and treasurer may be combined in one person” have been retained. Since it appears that the office of president still cannot be combined with any of the other corporate offices mentioned in the statute, it may be that further steps need to be taken to make it clear that any statutory requirements as to the execution of formal documents by two officers could be satisfied by the execution of these documents by one person serving in both capacities.

3. \textit{Shareholder voting agreements}

Shareholders in a closely held corporation sometimes seek to pool their voting strength through agreements among themselves

to vote their respective stock interests as a unit. Although such shareholder pooling agreements are today generally upheld as valid if made for proper purposes, provisions in several of the recent statutory revisions recognize the inherent validity of such agreements and provide a legislative foundation in those jurisdictions for their enforceability.

As an indication of this new legislative development, reference may be had to a 1961 amendment to the Texas Business Corporation Act which added to that act a section on voting agreements. This new section restricts such agreements to ten years, requires a counterpart of the agreement to be deposited with the corporation, and requires a statement on each certificate representing shares held by parties to the agreement that the shares are subject to such an agreement. The section then adds that "upon such deposit of the counterpart of the agreement and endorsement of the prescribed statement upon the certificates representing shares, the agreement shall be specifically enforceable in accordance with the principles of equity."

A less restrictive provision is that contained in the New York Business Corporation Law which states broadly that an agreement between two or more shareholders may provide that "the shares held by them shall be voted as therein provided, or as they may agree, or as determined in accordance with a procedure agreed upon by them." There is, however, no statement concerning enforceability such as that contained in the Texas provision. The provision on voting agreements in the South Carolina statute, which is similar in wording to the New York provision, goes on to provide that "such agreement shall be valid and enforceable as between the parties thereto, for a period not to exceed ten years from the date of its execution." This language, which

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96 O'Neal, Close Corporations § 5.08 (1958).
97 See Roberts v. Whitson, 188 S.W.2d 875 (Tex. Civ. App. 1945), for an example of judicial opposition to such agreements.
98 See Ringling Bros.—Barnum & Bailey Combined Shows, Inc. v. Ringling, 29 Del. Ch. 610, 53 A.2d 441 (Sup. Ct. 1947), for an example of judicial reluctance to grant specific performance of such agreements.
100 Ibid.
101 It has been suggested that this particular clause may run into trouble because of the judicial reluctance to enforce an "agreement to agree." See Hoffman, New Horizons for the Close Corporation in New York Under Its New Business Corporation Law, 28 Brooklyn L. Rev. 1, 8-9 (1961).
102 N.Y. Bus. Corp. Law § 620(a).
also appears in the North Carolina statute, apparently would preclude enforcement of the agreement against the corporation if votes were cast by a record owner contrary to the agreement. Despite this possible limitation on enforceability contained in the North Carolina and South Carolina statutory provisions, these provisions, like those in New York and Texas, carry legislative assurance that shareholder voting agreements are a legitimate form of shareholder activity.

In view of the fact that the Kentucky Court of Appeals in the Haldeman case cast doubt on both the validity and enforceability of agreements among shareholders restricting their voting freedom, there is lacking in Kentucky a solid legal foundation for these agreements. The addition of a provision to the Kentucky corporation statute recognizing the validity (and enforceability) of the shareholders' voting agreement would help to offset any adverse effect which the opinion of the court in the Haldeman case might continue to have on such agreements and would help to “legitimize” this form of shareholder activity in Kentucky.

4. Irrevocable proxies

One of the most effective means of implementing a shareholders' voting agreement so as to make it self-executing is through the use of irrevocable proxies whereby a designated person or persons are empowered to vote the stock in accordance with the terms of the agreement. However, the attractiveness of this implementing technique has been lessened somewhat under present law because of the uncertainty as to the require-

105 The North Carolina statute specifically states in § 55-73(a) that “nothing herein shall impair the privilege of the corporation to treat the shareholders of record as entitled to vote the shares standing in their names. . . .” However, if the agreement involves all the shareholders, then under § 55-73(b) it appears the agreement would bind the corporation as well as the parties thereto. The official comments to § 55-73 state: “Subsection (a) makes such an agreement among less than all the shareholders binding on them but not on the corporation. Subsection (b), in substance, makes such an agreement among all the shareholders binding on them and the corporation.” 4 P-H Corp. Serv., N.C. 270 (1963). The provision on voting agreements in the new Connecticut Stock Corporation Act follows a similar pattern by providing that a voting agreement complying with the requirements of the statute is “valid, irrevocable and specifically enforceable” as among the parties to the agreement. Conn. Gen. Stat. § 33-339 (Rev. to 1962).
106 See note 68 supra.
ments for treating proxies as irrevocable\textsuperscript{108} and the possibility that the presence of such proxies in the agreement may result in it being treated as an invalid voting trust.\textsuperscript{109}

The New York Business Corporation Law contains a specific provision enumerating the situations in which proxies stated to be irrevocable are entitled to be so treated.\textsuperscript{110} One of the enumerated situations is when the proxy is held by a person designated by or under a shareholders' voting agreement.\textsuperscript{111} The new South Carolina statute follows New York law in this respect.\textsuperscript{112} Thus in ment may use proxy provisions with assurance that on the one hand they will accomplish the result intended by making the agreement binding and on the other hand will not destroy the agreement by moving it into the field reserved for the voting trust.

The Kentucky corporation statute states that "a proxy, unless coupled with an interest, shall be revocable at will."\textsuperscript{113} However, the word "interest" as used in this statutory language remains undefined either in the statute or by judicial decision. The "interest" thereby referred to is open to interpretation as consisting of anything from an interest in the shares of stock themselves at one extreme\textsuperscript{114} to an interest in the "subject matter upon which the power is to be exercised" at the other extreme.\textsuperscript{115}

Since each shareholder under a shareholders' voting agreement retains title to his shares of stock, the requisite interest necessary to support an irrevocable proxy would be lacking under the first possible interpretation and a draftsman, therefore, would have no assurance that he could make effective use of proxy provisions as a means of implementing such an agreement. A revamping of

\textsuperscript{108} See 1 O'Neal, Close Corporations § 5.36 (1958).
\textsuperscript{109} See, e.g., Abercrombie v. Davies, 130 A.2d 338 (Del. Sup. Ct. 1957), in which the Supreme Court of Delaware invalidated a shareholders' voting agreement on the broad ground that the agreement was so drawn as to occupy the field reserved for the statutory voting trust.
\textsuperscript{110} N.Y. Bus. Corp. Law § 609(f).
\textsuperscript{111} N.Y. Bus. Corp. Law § 609(f)(5).
\textsuperscript{112} S.C. Code Ann. § 12-16.14(f) (Supp. 1962). Under both statutes the proxy becomes revocable by a purchaser of the shares without knowledge unless notice of the proxy and its irrevocability appears plainly on the stock certificates. See N.Y. Bus. Corp. Law § 609(h); S.C. Code Ann. § 12-16.14(h) (Supp. 1962). These two states the draftsman of a shareholders' voting agree-
\textsuperscript{113} KRS 271.315(3).
\textsuperscript{114} See, e.g., In re Chilson, 19 Del. Ch. 398, 168 Atl. 82 (Ch. 1933).
the proxy provisions of the Kentucky statute so as to spell out with greater particularity the instances in which a proxy may be considered as irrevocable would undoubtedly strengthen the usefulness of the proxy as a control device in Kentucky.

If such a revamping of the proxy provisions were to be undertaken, it may be doubted whether the enumeration of instances in which a proxy is to be considered irrevocable should be made exclusive, as in New York, since this would have the undesirable effect of precluding judicial development in Kentucky of the concept of a "proxy coupled with an interest." Judicial development of this concept may be needed as a means of meeting new corporate situations where treatment of a proxy as irrevocable becomes necessary as a means of protecting the interests of the proxy holder.116

Flexibility in the statutory concept of the irrevocable proxy could be obtained by use of a general statutory provision establishing the basic concept of irrevocability followed by a specific enumeration of the particular situations thought to be deserving of special mention as coming within this basic concept. Such an approach has been used in the section on irrevocable proxies contained in the new Connecticut Stock Corporation Act.117 Subsection (a) of this section provides that a duly executed proxy is to be treated as irrevocable if it specifies that it is irrevocable and if "it is coupled with an interest sufficient in law to support an irrevocable power coupled therewith." Subsection (b) then goes on to provide that "without limiting the generality of subsection (a) of this section and subject thereto, a proxy is coupled with an interest and irrevocable if it is held by any of" certain designated classes of persons (or their nominees) enumerated in the subsection. These classes of persons include (1) a pledgee, (2) a purchaser under an executory contract of sale, (3) a creditor (or creditors) extending credit to the corporation in consideration of the proxy, and (4) a person performing personal services for the corporation under a contract of employment calling for such a proxy. This list of persons parallels the enumeration contained in the New York statute, except for the addition to the list in

New York of those persons holding proxies under a shareholders’ voting agreement. Specific enumeration of this latter category of persons would seem particularly desirable in view of the significance which the irrevocability of proxies may have to such persons under a voting agreement.

5. Voting trusts

Another control device available to the participating shareholders in a close corporation is the voting trust. Under this arrangement shareholders in a corporation execute an agreement transferring their shares to a voting trustee (or trustees) for the purpose of conferring on the trustee (or trustees) the right to vote the shares. Modern corporation statutes customarily contain a section recognizing the validity of such voting trust agreements and regulating to some extent the structure and operation of the trust. The Kentucky general corporation statute contains such a section. While this section compares favorably with voting trust provisions in the corporation statutes of other jurisdictions, some further “modernization” of the section appears possible in the light of recent statutory developments.

The Kentucky provision, for example, states that “any other shareholder may transfer his shares to the same trustee upon the terms and conditions stated in said agreement, and thereupon shall be bound by all of the provisions of said agreement.” The privilege thus granted to “outsiders” to join the trust has a potentially adverse effect on the effectiveness of the trust as a control device if the terms of the trust permit the depositors to instruct the trustees in their voting of the stock. It provides a means whereby such “outsiders” could nullify the desires of the original “inside” group, if such “outsiders” owned enough stock to outvote the “insiders.” It is significant that a similar privilege granted in the former New York Stock Corporation Law has been omitted from the voting trust provisions in the new Business...
Corporation Law of that state, thereby removing what has been said to have been in New York "an obstacle to the utilization of the voting trust device."  

One of the by-products resulting from the creation of a voting trust is the change in the relationship which may occur between the depositors of such a trust and the corporation. Technically, the depositors are no longer shareholders in the corporation after transfer of their stock on the corporate books to the trustees, and, as a consequence, they may be deprived of rights which are given to shareholders by corporation statutes. There is, for example, the right of shareholders to inspect the books and records of the corporation and their right to vote on fundamental corporate changes such as merger or consolidation, sale of assets, amendment of the articles of incorporation, and voluntary dissolution. Since these rights generally have no relationship to the reasons prompting the creation of the voting trust, there would ordinarily seem to be, as the late Professor Ballantine once said, "no justification for such a complete stripping of the shareholder of all the safeguards provided by law for his protection." The draftsmen of the North Carolina Business Corporation Act met this problem by providing that trust certificate holders are to have a direct right to vote on fundamental corporate changes and by providing that such certificate holders are to be treated as shareholders with respect to the right to inspect corporate books and records. The new South Carolina statute, which also permits trust certificate holders to exercise certain rights possessed by shareholders, provides that, as to fundamental corporate changes, the trustees retain the right to vote unless the voting trust agreement otherwise provides. Nevertheless, these two states appear to have taken the lead in

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124 N.Y. Bus. Corp. Law § 621.
125 See Ballantine, Corporations § 184b (rev. ed. 1946).
126 KRS 271.395(4).
127 KRS 271.470.
128 KRS 271.415(2).
129 KRS 271.445(2).
130 KRS 271.500.
softening the impact of the voting trust on the relationship of the shareholder-depositor to his corporation.\textsuperscript{130}

The South Carolina voting trust statute contains a provision which would make a worthwhile addition to other voting trust statutes, including the Kentucky statute. It is a provision stating that a voting trust agreement created for a period in excess of the ten-year period prescribed by the statute is not to be treated as adversely affected during a period of ten years from the date of its creation but is merely to be considered as inoperative after the expiration of the ten-year period.\textsuperscript{137} The addition of such a provision to the Kentucky statute would obviate the necessity for a judicial interpretation by the Kentucky Court of Appeals as to the legal effect of a voting trust created for a period in excess of that prescribed by the statute, a matter of considerable practical importance since courts in other jurisdictions have held invalid voting trusts whose duration exceeded or could have exceeded the prescribed statutory period.\textsuperscript{138}

6. Transactions with interested directors

In the area of director action, a development which has been occurring with increasing frequency in the revisions of corporation codes relates to the addition of statutory provisions dealing with transactions between corporations and their directors or officers.

While transactions involving interested directors are by no means peculiar to the close corporation,\textsuperscript{139} this type of corporation provides a fertile opportunity for such transactions due to the typical close identity between directors and officers and the likeli-

\textsuperscript{130} The Indiana voting trust statute provides for inspection of books and records by voting trust certificate holders. Ind. Stat. Ann. § 25-256 (Burns repl. vol. 1960). In Florida, the section of the corporation statute entitled "voting trusts" provides that the trustee shall have no right to vote the stock for the purpose of either increasing or decreasing the capital stock unless the agreement expressly gives him such right. However, the "voting trust" there provided for resembles closely the shareholders' voting agreement since the statute provides that the trustees "shall not acquire the legal title to the stock but shall be vested only with the legal right and title to the voting power which is incident to the ownership of the stock." Fla. Stat. Ann. § 608.45 (1956).


\textsuperscript{138} Perry v. Missouri-Kansas Pipe Line Co., 22 Del. Ch. 33, 191 Atl. 833 (Ch. 1937); Christopher v. Richardson, 394 Pa. 425, 147 A.2d 375 (1959).

\textsuperscript{139} See, e.g., the emphasis placed on the existence of a disinterested board by the Supreme Court of Delaware in upholding the validity of the stock option plan of American Airlines, Inc. in Beard v. Elster, 160 A.2d 731 (Del. Sup. Ct. 1960).
hood that the directors will find it necessary or expedient to approve matters pertaining to their capacities as officers, such as, for example, their claim to compensation for serving in an executive capacity. The dual position in which directors may thus find themselves poses a serious problem of fiduciary responsibility. Under the prevailing rule at common law, any transaction involving an interested director is treated as voidable if his presence is necessary to make a quorum or his vote is necessary to secure approval of the transaction, irrespective of the fairness of the transaction.\textsuperscript{140} Recent corporate statutory revisions have followed the lead of California\textsuperscript{141} in removing the taint of adverse interest if the transaction is fair and reasonable to the corporation.\textsuperscript{142} This legislative adoption of the "liberal" rule as to directors' contracts places the emphasis where it has been said rightfully to belong, that is, on the nature and effects of the transaction, rather than on the mere presence of the adverse interest itself.\textsuperscript{143}

In addition to including general provisions on transactions with interested directors similar to those in California, the section on interested directors in the New York Business Corporation Law contains a paragraph specifically related to the compensation of directors. This paragraph states that "unless otherwise provided in the certificate of incorporation or the bylaws, the board shall have authority to fix the compensation of directors for services in any capacity."\textsuperscript{144} This particular provision has been criticized as involving "a significant relaxation of the fiduciary duty of corporate directors" because it is "absolutely unqualified except for the right of the certificate or by-laws to forbid such self-dealing."\textsuperscript{145} A comparable provision which would appear to meet this objection is one adopted in Wisconsin as a result of a

\textsuperscript{140} Ballantine, Corporations § 68 (rev. ed. 1946).
\textsuperscript{143} Stevens, Corporations § 148, at 683 (2d ed. 1949).
\textsuperscript{144} N.Y. Bus. Corp. Law § 713(c).
\textsuperscript{145} Kessler, The New York Business Corporation Law, 36 St. John's L. Rev. 1, 77 (1961). Compare Hoffman, The Status of Shareholders and Directors Under New York's Business Corporation Law: A Comparative View, 11 Buffalo L. Rev. 496, 569 (1962), wherein the author says that "the legislature in enacting paragraph (c) has given evidence of its faith in the essential integrity of the average board, and of its understanding that competition for talented managers is so keen in the current corporate market that boards of domestic corporations must have the necessary flexibility to compete successfully."
judicial decision in that state invalidating a directors’ resolution fixing executive compensation on the ground of self-interest.\textsuperscript{146} The Wisconsin enactment provides that the board of directors shall have authority to establish \textit{reasonable} compensation for the directors for services rendered by them as directors, officers or otherwise unless the articles of incorporation or bylaws otherwise provide.\textsuperscript{147} Similar legislation has been enacted in Illinois\textsuperscript{148} and Ohio.\textsuperscript{149}

In 1953, a provision was added to the Model Business Corporation Act which authorizes the board of directors to fix the compensation of directors.\textsuperscript{150} However, this provision seems open to the same objection as the New York provision since the authority granted to fix compensation is not qualified by any requirement of reasonableness. Utah, which adopted a new Business Corporation Act in 1961 based on the Model Act, has added a sentence to the Model Act provision on director compensation which states that “such compensation so fixed, shall be reported to the shareholders, except in the case of a corporation subject to proxy rules issued by the Federal Securities and Exchange Commission under the Securities Act of 1934.”\textsuperscript{151} The thought behind such a reporting requirement appears to be that through publicity of the amount of compensation voted by directors to themselves there is an opportunity for shareholders to keep themselves informed as to executive compensation and to take appropriate action if such compensation becomes excessive.

7. \textit{Informal board action}

Informal action by the board of directors of a close corporation is likely to present as much (or more) of a problem than that concerned with informal action by the shareholders in such a corporation. Yet, as previously mentioned, Kentucky by statute provides only for informal action at the shareholder level.\textsuperscript{152} Provision is made for such informal action if all the shareholders who would have been entitled to vote upon the action to be

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{146}] Stoiber v. Miller Brewing Co., 257 Wis. 13, 42 N.W.2d 144 (1950).
\item[\textsuperscript{147}] Wis. Stat. Ann. § 180.31 (1957).
\item[\textsuperscript{149}] Ohio Rev. Code Ann. § 1701.60 (Page Supp. 1962).
\item[\textsuperscript{150}] Model Bus. Corp. Act § 33 (1959).
\item[\textsuperscript{151}] Utah Code Ann. § 16-10-33 (repl. vol. 1962).
\item[\textsuperscript{152}] KRS 271.405.
\end{enumerate}
\end{footnotesize}
taken give their consent to such action in writing.\textsuperscript{153} A similar approach is used in the Model Business Corporation Act\textsuperscript{154} and has likewise been followed in the drafting of the New York Business Corporation Law.\textsuperscript{155} Indeed, in New York the importance of the requirement that directors act collectively rather than individually has been underscored by a specific provision in the new law which states that "any reference . . . to corporate action to be taken by the board shall mean such action at a meeting of the board."\textsuperscript{156}

This statutory requirement that the board of directors act "at a meeting" has evoked the observation that it "protects the deliberative function of the board, at the expense of what may be considerable inconvenience in close corporations."\textsuperscript{157} It is significant, therefore, that today in almost one-half the states, steps have been taken to authorize informal action by directors as well as by shareholders.\textsuperscript{158} The usual requirement is that the directors have given their unanimous consent in writing.\textsuperscript{159} In some instances these provisions appear as departures from the Model Act;\textsuperscript{160} in other instances, the provisions appear as amendments to existing statutes.\textsuperscript{161} In any event, the frequent appearance of these provisions in recent years attests to a growing

\textsuperscript{153} Exceptions from this broad authorization include (1) voluntary transfer of assets, and (2) merger or consolidation. See KRS 271.405.
\textsuperscript{155} N.Y. Bus. Corp. Law § 615.
\textsuperscript{156} N.Y. Bus. Corp. Law § 708.
\textsuperscript{159} The North Carolina statute recognizes informal board action not only where all the directors have given their consent in writing but also where all the shareholders know of the action and make no prompt objection to it or where the directors with the knowledge of the shareholders are accustomed to take informal action and no director makes prompt objection to the action. N.C. Gen. Stat. § 55-29 (repl. vol. 1960). The South Carolina statutory provision on informal action by directors, as amended by the 1963 legislature, follows a similar pattern. See 5 P-H Corp. Serv., S.C. 168 (1963). See also the new Connecticut Stock Corporation Act which appears to sanction informal action by less than all the directors if the number of directors giving their consent in writing constitutes a quorum for such action. Comm. Gen. Stat. § 33-316(d)(Rev. to 1982).
recognition that a board of directors may find it expedient or necessary to act informally, especially in the close corporation.\textsuperscript{162} The time would appear to have come for Kentucky to "modernize" its statute by joining the growing list of states recognizing this privilege of informal director action.

Dissolution

1. **Deadlock statutes—In general**

No aspect of the close corporation has perhaps given rise to as much concern as that relating to dissolution of the corporation when dissension and deadlock occur among its members. Courts of equity early adopted the position that there was no inherent equitable jurisdiction to decree the dissolution of a corporation,\textsuperscript{163} and this is sometimes still asserted as a general principle of corporation law.\textsuperscript{164} However, certain well-recognized exceptions to this principle have developed where the purposes of the corporation are no longer possible of attainment\textsuperscript{165} or where there has been fraud or mismanagement on the part of those in control of the corporate affairs.\textsuperscript{166}

Speaking of the increased frequency with which courts of equity have been called upon to exercise their traditional powers to correct abuses in corporate management, including dissolution of the corporation itself, the Michigan Supreme Court made the pertinent observation that "there is a noticeable trend, in cases decided since the turn of the century, toward recognizing the inherent power of a court of equity to grant relief in proper cases."\textsuperscript{167} Despite this relaxation in the judicial attitude toward

\textsuperscript{162} It is interesting to note that Michigan has placed itself in the anomalous position of providing for informal action by directors but not by shareholders. See Mich. Stat. Ann. § 21.13(c) (Supp. 1961).
\textsuperscript{163} See 2 Hornstein, Corporation Law & Practice § 816 (1959). In Oldham v. Mt. Sterling Improvement Co., 103 Ky. 529, 532, 45 S.W. 779, 780 (1898), the Kentucky Court of Appeals, in denying a request for dissolution on the part of a subscriber to the capital stock of a corporation, said that "courts of equity have, in the absence of statutory power, no jurisdiction over corporations for the purpose of decreeing their dissolution."
\textsuperscript{164} 16A Fletcher, Cyclopedia Corporations § 8098 (perm. ed. rev. vol. 1962); Annot., 13 A.L.R.2d 1260 (1950).
\textsuperscript{165} 16A Fletcher, Cyclopedia Corporations § 8081 (perm. ed. rev. vol. 1962).
\textsuperscript{166} Id. § 8082.
\textsuperscript{167} Levant v. Kowal, 350 Mich. 232, 86 N.W.2d 336, 340 (1957). In Oscar C. Wright Co. v. Steeman, 254 Ky. 381, 389, 71 S.W.2d 991, 995 (1934), the Kentucky Court of Appeals made the statement that "a court of equity has inherent jurisdiction at the instance of stockholders (or creditors) where the (Continued on next page)
equitable relief for the “distressed” corporation, there remains a strong judicial reluctance to grant a decree of dissolution to a prosperous corporation merely on the ground of internal strife, dissension, and deadlock. Yet, as Professor Lattin has observed, “in the absence of a statute authorizing dissolution when there is a deadlock of the board or of the shareholders, approach through equity seems particularly desirable, for it is rare in such a case to find less than serious consequences if the deadlock continues.”

Deadlock statutes are rapidly becoming a standard feature of modern corporation codes. However, it is an open question whether many of these statutes will accomplish anything more than to put at rest whatever continued reluctance courts might otherwise have had to entertain petitions for receivership and dissolution of deadlocked corporations. Recent decisions have made it clear that even under these statutes a disgruntled faction in a corporation cannot necessarily expect to secure from a court an order decreeing dissolution (or liquidation) of the corporation based on the existence of dissension and deadlock among the members unless the court is otherwise convinced that the equities of the case warrant resort to this drastic form of equitable relief.

Furthermore, the deadlock statutes themselves frequently make relief dependent upon a showing that deadlock has resulted in “irreparable injury to the corporation” or upon a showing that dissolution would be “beneficial to the shareholders.” To the extent that relief is thus qualified, an individual shareholder in a close corporation faced with the spectre of irreconcilable dissension with his associates may find himself at the mercy of the

(Footnote continued from preceding page)

facts call for the exercise of its jurisdiction to appoint a receiver of either a solvent or insolvent corporation “on the ground of fraud, gross mismanagement or dissension among the stockholders, directors or officers, if there is no other adequate remedy.”

See, e.g., Reid Drug Co. v. Salyer, 268 Ky. 522, 105 S.W.2d 625 (1937).


See 2 Hornstein, Corporation Law & Practice § 789, at 388, wherein the author says that in his opinion “the deadlock statutes neither enlarge upon nor cut down the inherent power of equity to dissolve or wind up a corporation.”


faction whose members happen at the time to hold the key executive positions in the corporation.

Kentucky enacted a deadlock statute in 1952. The statute reads:

A corporation may be dissolved by the decree of the circuit court of the county in which the registered office of the corporation is situated when it is made to appear that the corporation has an even number of directors who are equally divided respecting the management of its affairs, and that the voting shares of such corporation are equally divided into two independent ownerships or interests, and one-half thereof is owned or controlled by persons favoring the course of views of part of the directors and one-half is owned or controlled by persons favoring the course or views of other directors, or that the persons owning or controlling the voting shares are unable to agree on, or vote for, the election of a board of directors consisting of an uneven number. ...  

It will be observed that this statutory provision contains no special language qualifying the scope of the power thereby granted to the circuit court. However, the language used is that a corporation may be dissolved by court decree. It does not say that the court must grant such a decree when deadlock exists. Similar language under the Delaware deadlock statute has been held to be permissive rather than mandatory. If this interpretation should be adopted in Kentucky, then a court could still refuse dissolution to a solvent corporation despite the existence of deadlock.

The emphasis which courts have given to the economic condition of a corporation in cases involving corporate deadlock was underscored a few years ago in the leading New York case of In re Radom & Neidorff, Inc. In that case a majority of the New York Court of Appeals, speaking through Judge Desmond, denied as a matter of law a petition for dissolution of a profitable corporation under the New York deadlock statute despite allegations of serious and irreconcilable deadlock between the two

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175 KRS 271.570(2).
176 Ibid. The statute goes on to state that "in any such case suit for the appointment of a receiver ... shall be brought by the holders of shares entitling them to exercise one-half or more of the voting power of the corporation."
fifty per cent owners. The statute provided that, if, after hearing, it should appear that a dissolution would be “beneficial to the stockholders . . . and not injurious to the public,” the court must make a final order dissolving the corporation. Judge Desmond, referring to the continued prosperity of the corporation, failed to find in the petitioner’s allegations of management deadlock the necessary “benefit” to shareholders required by the statute.

As a matter of substantive law, Judge Fuld made it clear in his dissenting opinion that he did not equate “benefit” to purely monetary considerations. “The sole issue,” he said, “is whether there is a deadlock as to the management of the corporation, not whether business is being conducted at a profit or loss.” Further, he argued, “it would certainly be ‘beneficial’ to dissolve the corporation if the court were to find that there is a continuing, irreparable stalemate in the corporate management, for which petitioner is not primarily at fault.”

The new Business Corporation Law of New York attempts to overcome the effects of the Radom decision by providing that in the case of a petition based on deadlock among directors or shareholders “dissolution is not to be denied merely because it is found that the corporate business has been or could be conducted at a profit.” Dissolution, however, still remains discretionary with the court. The new deadlock section provides that fifty per cent of the shareholders entitled to vote in an election of directors may petition for dissolution on one or more of the following grounds:

(1) That the directors are so divided respecting the management of the corporation’s affairs that the votes required for action by the board cannot be obtained.

(2) That the shareholders are so divided that the votes required for the election of directors cannot be obtained.

(3) That there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders.

179 From a procedural standpoint, Judge Fuld, dissenting in the Radom case, took the position that once the court had entertained an application for dissolution based on deadlock, it was mandatory for a hearing to take place and that the court was powerless to order a dismissal until the facts had been heard and the issues decided. 119 N.E.2d 563, 565-66.


181 Id. at 569.

182 N.Y. Bus. Corp. Law § 1111(b)(3).

183 N.Y. Bus. Corp. Law § 1104(a).
A comment to this section states that "the purpose of subparagraph (a)(3) is to make clear that dissension between factions of shareholders, particularly in small corporations, which makes continued association unworkable and the continuance of the corporate business no longer advantageous to the shareholders, is also a reasonable ground for dissolution."\(^{184}\)

In addition to providing for petition by fifty per cent of the shareholders, the new deadlock statute in New York provides that any holder of shares entitled to vote at an election of directors of a corporation, may present a petition for its dissolution on the ground that the shareholders are so divided that they have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election and qualification of their successors.\(^{185}\)

Provisions similar to this permitting petitions for involuntary dissolution (or liquidation) to be filed by a single shareholder appear in the statutes of a number of other states, particularly those that have used the Model Business Corporation Act as a basis for corporate law revisions. The pertinent portions of the Model Act provision state that courts shall have full power to liquidate the assets and business of a corporation:

(a) In an action by a shareholders when it is established:

(1) That the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or is threatened by reason thereof; or

... (3) That the shareholders are deadlocked in voting power, and have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election of their successors... \(^{186}\)

A question which has arisen under paragraph (a)(3) of the Model Act provision is whether a court must order liquidation if the factual deadlock described in the paragraph exists or whether

\(^{184}\) Revision Note, N.Y. Bus. Corp. Law § 1104.
\(^{185}\) N.Y. Bus. Corp. Law § 1104(c).
the court has discretion to refuse such an order despite the existence of a deadlock.

A persuasive argument can be made that dissolution should be automatic if the deadlock described by paragraph (a)(8) exists, particularly since no qualifying words appear in this paragraph such as appear in paragraph (a)(1) which requires that there be a showing that "irreparable injury to the corporation is being suffered or is threatened by reason" of the deadlock. The Wisconsin Supreme Court adopted this reasoning with reference to such a provision added to the Wisconsin deadlock statute by amendment in 1953. Argument had been made that an order of forced liquidation should depend upon a showing that liquidation would be beneficial to the shareholders. After pointing to the make-up of the Illinois deadlock statute, which omits any qualifying language in a similar paragraph devoted to shareholder deadlock, and after commenting that the committee which had sponsored the Wisconsin amendment must be assumed to have been familiar with qualifying language which appears in the deadlock statutes of other states, the court concluded that

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187 The comparable paragraph in the new South Carolina Business Corporation Act to paragraph (a)(1) of the Model Act provides for a decree of involuntary dissolution upon a showing either that the corporation will suffer irreparable injury or that "the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally." S.C. Code Ann. § 12-22.15(a)(1)(Supp. 1962). A South Carolina writer has commented that "the desirability of a looser alternative test is shown by extreme judicial reluctance to dissolve a hopelessly deadlocked corporation which may still be able to drift along at some profit, although the shareholders are at each other's throats." Folk, The Model Act and the South Carolina Corporation Law Revision, 18 Bus. Law. 351, 391 (1963). To ward off the judicial tendency to emphasize profits, the South Carolina Act adds a provision, similar to the one in New York, that "in determining whether dissolution shall be ordered on petition of a shareholder under subsection (a), dissolution shall not be denied solely because it is found that the business of the corporation has been or could be conducted at a profit." S.C. Code Ann. § 12-22.15(f) (Supp. 1962). North Carolina has completely discarded the language of "irreparable injury" in the paragraph of its statute concerned with director deadlock and has demanded only a showing that "the business can no longer be conducted to the advantage of all the shareholders." N.C. Gen. Stat. § 55-125(a)(1) (repl. vol. 1960). On the other hand, Virginia, a Model Act state, has retained the language of "irreparable injury" not only in the paragraph on director deadlock but also in the paragraph on shareholder deadlock. The latter paragraph provides for a decree of involuntary dissolution when it is established that "as shown by the proceedings at any meeting of the stockholders the stockholders are deadlocked in voting power and that irreparable injury to the corporation is being suffered or is threatened by reason thereof." Va. Code Ann. § 13.1-94(a)(3) (repl. vol. 1956).


whether or not a liquidation will be beneficial or detrimental to the shareholders should not be treated as a material factor in exercising the power of liquidation conferred by this paragraph of the deadlock statute."⁹¹

Subsequently, however, the Oregon Supreme Court rejected this conclusion with regard to an identical provision on shareholder deadlock which became a part of Oregon law as the result of the adoption by that state of the Model Business Corporation Act in 1953.¹⁹² The Oregon court was unimpressed with the argument that because a showing of "irreparable injury to the corporation" is a prerequisite to liquidation under the deadlocked directorate provision, the absence of this requirement from the shareholder deadlock provision precluded a consideration of benefit or detriment to the stockholders, saying:

We do not understand the statute in this way. We can not equate 'irreparable injury' and 'benefit to the shareholders.' The former is a much more restrictive idea. The absence of a requirement of 'irreparable injury' from the jurisdictional facts which must be proven in a petition for dissolution by reason of shareholder deadlock certainly does not indicate that we must dismiss from our consideration of the equities of the case any showing of actual benefit to the stockholders from the operation of the company. We think that it is only persuasive of the fact that 'irreparable injury' is not properly a decisive factor.¹⁹³

The Oregon court conceded that it would have been inclined to agree with the Wisconsin court as to the immateriality of "benefit" if "benefit" related to mere insolvency, but concluded that it could not accept the Wisconsin viewpoint if "benefit" were to be treated as also including actual benefits to the shareholders in the form of such matters as payment of dividends.¹⁹⁴

The opinion of the Oregon court illustrates once again the

¹⁹¹ 77 N.W.²d 389, 395 (1956). As an alternative ground for its decision reversing the trial court, the Supreme Court of Wisconsin held that the trial court had abused its discretion in refusing to order liquidation since there was "no alternative corrective remedy" other than dissolution in view of the fact that a vacancy existed on the board of directors of the company and the company by-laws contained a provision prohibiting the board of directors from transacting any business until such vacancy had been filled by the shareholders.


¹⁹³ Id. at 20.

¹⁹⁴ Id. at 19.
importance which the judiciary has tended to place on economic factors in exercising its statutory power to decree dissolution in cases of deadlock. If, as seems likely, the primary purpose of the paragraph on shareholder deadlock which appears in both the Oregon and Wisconsin corporation statutes is to protect the right to participate in management, then it appears that the interpretation given to the paragraph by the Wisconsin court is more nearly in conformity with its basic purpose.\textsuperscript{195} However, as one commentator has observed, “regardless of the purpose of existing deadlock statutes, none suffices adequately to define and protect the recommended right of participation.”\textsuperscript{196}

Perhaps one of the clearest judicial recognitions of the importance of management participation is that contained in the New Jersey case of \textit{Petition of Collins-Doan Co.},\textsuperscript{197} which arose under a deadlock statute similar to the Kentucky statute. Dissolution under the New Jersey statute is authorized in the case of a company which has an even number of directors who are divided equally respecting the management of its affairs and whose voting stock is similarly divided or whose voting shareholders are unable to elect a directorate of an uneven number.\textsuperscript{198} A deadlock situation such as described by the statute developed whereby for a period of over ten years the management of the business was assumed by a controlling member of one of the two equally divided factions. In approving dissolution of the corporation under such circumstances as serving the interests of the shareholders as well as public policy, the court said:

There is no corporate function here. The business is under the management of one who happened to be serving in that capacity when the deadlock occurred; and the direction has become personalized to the exclusion of all other interests. If the statute has no efficacy here, then it can have no practical


\textsuperscript{196} Tingle, \textit{The Stockholder's Remedy of Corporate Dissolution} 195 (1959). His recommendation would be for a specific statutory provision calling for dissolution “when participation in the executive management of the corporate business is denied to a plaintiff (or plaintiffs voting continuously as a unit) owning a percentage of the corporation's stock sufficient to cause a stalemate in an election of directors.” \textit{Id.} at 196.

\textsuperscript{197} 3 N.J. 382, 70 A.2d 159 (1949).

utility or meaning. Such interposition is justifiable in the public interest where, as here, corporate action cannot be had.\(^1\)

Although recent decisions in other jurisdictions also reflect an awareness by the courts in those jurisdictions of the importance of management participation,\(^2\) there remains the undercurrent of judicial emphasis on economic factors in resolving petitions for the dissolution and liquidation of deadlocked corporations. Therefore, a special statutory provision, such as in New York, specifically directing that dissolution is not to be denied merely because the corporation is being operated at a profit seems useful as a means of encouraging greater emphasis by courts on non-economic factors in passing on the merits of such petitions. Furthermore, a statutory provision of this nature is consistent with the growing recognition that the relationship of shareholders in a close corporation is analogous to that of partners in a partnership.\(^3\)

If an unincumbered “way-out” is provided the minority shareholder in the close corporation either by clear statutory mandate or by shift in judicial emphasis, then it may well be that the remaining shareholding interests should be given the alternative privilege of buying out the minority interest as a means of preserving going concern values. The merit of such buy-out arrangements in situations involving corporate dissolution has been recognized by the Kentucky Court of Appeals\(^4\) as well as

\(^1\) 70 A.2d 159, 165 (1949). In two states the statutory language carries overtones of the “corporate function” referred to by the New Jersey court. See Mont. Rev. Code Ann. § 15-1120 (repl. vol. 1955, supp. 1963) (corporate powers have been materially impaired); S.D. Code § 37.2601(5) (Supp. 1990) (corporation unable to exercise its corporate function).


\(^3\) See Hoffman, New Horizons for the Close Corporation in New York Under Its New Business Corporation Law, 28 Brooklyn L. Rev. 1, 16 (1961), wherein the author, in commenting on the majority opinion in the Radom case, said:

If the analogy between the close corporation and the partnership be kept in clear perspective—and no realistic solution to the dissolution problem of the deadlocked corporation would seem possible otherwise—the position of the majority in the Radom case seems excessively concerned with profit and loss as an essential ingredient of the “beneficial to shareholders” standard and insufficiently concerned with the interpersonal relationship of the “partners.”

by courts in other states. Furthermore, several states have seen fit to add such buy-out provisions to their corporation codes.

The new South Carolina Business Corporation Act contains a section devoted to relief other than dissolution which provides that, in an action filed by a shareholder to dissolve a corporation, "the court may make such order or grant such relief, other than dissolution, as in its discretion it deems appropriate." This relief may include an order providing for the purchase at their fair value of shares of any shareholder by the corporation or by other shareholders. In addition, such relief may also include an order (1) cancelling or altering provisions contained in the articles of incorporation or bylaws, or (2) cancelling, altering, or enjoining resolutions or other acts of the corporation, or (3) directing or prohibiting acts of the corporation or of its shareholders, directors, officers or other persons party to the action.

2. Deadlock resulting from veto arrangements

By its terms the Kentucky deadlock statute appears to be directed primarily at deadlock resulting from an equally divided vote of directors or shareholders. However, deadlock may result not only because of the presence of equally divided voting factions in a corporation but also because of the presence in the articles (or bylaws) of unanimous or high vote requirements for shareholder or director action. New York made special pro-

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206 Two states, California and Missouri, make provision for the appointment of a "provisional director" when a corporation has an even number of directors who are equally divided. See Cal. Corp. Code Ann. § 819 (Deering 1962); Mo. Rev. Stat. § 351.323 (1959). However, while use of a provisional director may have utility in cases of temporary stalemate, appointment of such a director is not likely to provide a satisfactory substitute for dissolution in cases of serious and extended deadlock. See Tingle, The Shareholder's Remedy of Corporate Dissolution 135 (1959).
207 The Kentucky corporation statute appears to contemplate charter (or bylaw) provisions requiring high vote or high quorum requirements for shareholder or director action. See Ham, The Close Corporation Under Kentucky Law, 50 Ky. L.J. 125, 157-64 (1961). The only particular problem with such veto arrangements would appear to be the technical one as to whether changes in the quorum requirement for directors' meetings may appear in either the articles or bylaws or only in the bylaws. This ambiguity stems from the wording of KRS (Continued on next page)
vision for this possibility in its former deadlock statute and has continued to recognize such a possibility in the deadlock provisions of the new Business Corporation Law. Dissolution is made available even in the presence of veto arrangements causing deadlock. On the other hand, North Carolina, by amendment to its corporation statute in 1959, took steps to curtail the availability of dissolution in such circumstances. The provision on shareholder deadlock, as amended, permits dissolution when it is established that "the shareholders are deadlocked in voting power, otherwise than by virtue of special provisions or arrangements designed to create veto power among the shareholders, and for that reason have been unable at two consecutive annual meetings to elect successors to directors whose terms had expired."

It is possible that the portion of the Kentucky deadlock statute concerned with shareholder deadlock might apply to deadlock growing out of veto arrangements. This portion of the statute refers to inability of the persons owning or controlling the voting shares "to agree on, or vote for, the election of a board of directors consisting of an uneven number." Unanimity or high vote requirements could result in the condition of voting inability

(Footnote continued from preceding page)

209 N.Y. Bus. Corp. Law § 1104(b).
211 This action by the North Carolina legislature may seem somewhat surprising in view of a comment made by Dean Elvin R. Latty of the Duke University Law School in 1956, shortly after enactment of the new North Carolina Business Corporation Act, that "it would be a serious matter to give to associates in close corporations a partner-like veto through statutory tolerance of unanimity requirements, high vote and high quorum requirements and other partner-like co-control features and yet, despite the deadlocks thereby arising, to provide no 'out' by dissolution or otherwise." Latty, The Close Corporation and the New North Carolina Business Corporation Act, 34 N.C. L. Rev. 432, 447-48 (1956). However, the new statutory provision does help to preserve the integrity of shareholder veto arrangements. Furthermore, the limitation thereby imposed on the power of the court to dissolve a deadlocked corporation applies only to the paragraph of the statute devoted to shareholder deadlock and does not apply to the paragraph involving deadlock of both directors and shareholders.
referred to by the statute. However, the portion of the statute concerned with complete deadlock clearly contemplates voting deadlock resulting from equally divided factions of directors and shareholders. Any revision of the Kentucky deadlock statute should no doubt make clear whether dissolution is to be available under the statute despite veto arrangements, as in New York, or is to be subject to such veto arrangements, as in North Carolina. On the merits, it can be persuasively argued that “the statutes should be phrased to permit dissolution whenever for the requisite period the shareholders are unable to hold an effective election of directors in compliance with the requirements of any applicable statute, article or by-law.”

3. Directorate composed of an uneven number

The emphasis in the portion of the Kentucky deadlock statute concerned with shareholder deadlock on the inability of shareholders to elect a board of directors consisting of an uneven number makes it possible for a “holdover” board to continue in office indefinitely despite deadlock among the shareholders if the board is an odd-numbered board. Florida, which also has a deadlock statute based on equally divided ownership interests, amended its statute in 1955 so as to authorize a petition for involuntary dissolution “where the ownership is equally divided and the number of directors is uneven, but the two halves of the ownership are unable to agree on or elect successor directors and the old directors are holding over.” This provision had previously predicated the petition for dissolution, as in Kentucky, on a showing that “the holders of the two halves of stock voting power are unable to agree on the election of a board of directors consisting of an uneven number.” If the present Kentucky

213 Under such circumstances owners of one-half or more of the voting stock would appear to be eligible to bring a suit to obtain appointment of a receiver as provided for in KRS 271.570(2), despite presence of the veto provision, since paragraph (7) of KRS 271.315 permitting the articles or bylaws to specify the votes necessary for the transaction of business is prefaced by the clause “subject to the provisions of this chapter with respect to the vote that shall be required for a specific action.”


deadlock statute is retained, then it would appear desirable to amend it so as to make dissolution available in cases of shareholder deadlock despite the existence of a "holdover" board.\textsuperscript{217}

One advantage to a shareholder deadlock provision of the type found in the Model Business Corporation Act is that dissolution is made available regardless of the number of directors if the shareholders are unable for a period covering two consecutive annual meeting dates to elect successors to directors whose terms would have expired.\textsuperscript{218} Furthermore, if dissolution under this provision is construed as unqualified by any outside commercial limitations, then it would be available to cover situations of prolonged complete deadlock which under the director deadlock paragraph of the Model Act carries the legislative qualification that irreparable injury to the corporation be established.\textsuperscript{219}

4. Shareholders' agreements for dissolution

Several of the recently enacted corporation statutes afford an additional solution to the problem of the "locked-in" minority shareholder by giving specific statutory recognition to shareholders' agreements for dissolution. North Carolina pioneered in this respect by providing in its new Business Corporation Act that a court shall have power to liquidate the assets and business of a corporation in an action by a shareholder when it is established that "all of the present shareholders are parties to, or are transferees or subscribers of shares with actual notice of a written agreement, whether embodied in the charter or separate therefrom, entitling the complaining shareholder to liquidation or dissolution of the corporation at will or upon the occurrence of some event which has subsequently occurred."\textsuperscript{220} A statutory pro-

\textsuperscript{217} In a 1961 revision of the dissolution sections of the Maine general corporation law, provisions were added authorizing dissolution at the suit of a shareholder in corporations having no more than ten shareholders (regardless of whether the corporation is solvent or earning profits) whenever it is made to appear that the shareholders and directors are equally divided or that "the number of directors is uneven, but the 2 factions of the ownership are unable to agree on or elect successor directors and the old directors are holding over." Me. Rev. Stat. Ann. ch. 53, § 104 (Supp. 1961). See also Md. Code Ann. Art. 23, § 52(e) (1957); Mass. Laws Ann. ch. 155, § 50 (1959); Ohio Rev. Code Ann. § 1701.91(A)(4) (Page Supp. 1962).


vision such as this enables shareholders in a close corporation to make arrangements in advance for dissolution in the case of pro-
longed deadlock. Furthermore, such statutory authority removes any question as to the validity of such arrangements, a matter of potential importance since it is not entirely clear that such arrangements, at least if made a part of the corporate structure by appearing in the articles or bylaws, would be upheld as valid in the absence of statute.221

A possible weakness in the North Carolina statutory provision is the fact that it appears in the section of the corporation statute devoted to involuntary dissolution by decree of court and there is thus no assurance that dissolution agreements made pursuant to the statutory authority thereby given will be treated as self-executing if the circumstances calling for dissolution as prescribed by the agreement should develop.222 New York has modified the North Carolina approach by authorizing the inclusion of a provision in the articles of incorporation giving to any shareholder (or to any specified number or proportion of shares or of any class or series thereof) the power to require the dissolution of a corporation “at will or upon the occurrence of a specified event.”223 If the articles contain such a provision, dissolution can be accomplished by the filing of a certificate of dissolution with the department of state as prescribed by the statute.224 In other words, this is made a form of nonjudicial dissolution in New

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221 Compare Hornstein, Stockholders' Agreements in the Closely Held Corporation, 59 Yale L.J. 1040, 1047 (1950), with Israels, The Sacred Cow of Corporate Existence: Problems of Deadlock and Dissolution, 19 U. Chi. L. Rev. 778, 791-92 (1952). Professor William L. Cary, now Chairman of the Securities and Exchange Commission, has expressed the opinion that, under Illinois law, a provision in the articles calling for dissolution at the will of a single shareholder would likely be fruitless because it would conflict with the procedure for voluntary dissolution prescribed by the Illinois Business Corporation Act, which provides for such dissolution either by written consent of all the shareholders or by resolution of the board of directors accompanied by at least a two-third's vote of the shares. Cary, How Illinois Corporations May Enjoy Partnership Advantages: Planning for the Closely Held Firm, 48 Nw. U.L. Rev. 427, 437-38 (1953). The situation in Kentucky would be similar since voluntary dissolution under the Kentucky general corporation statute follows the same general pattern as in Illinois, except that the requisite shareholder vote is a “majority of the voting power” instead of a two-third’s vote and except that a shareholders’ meeting for the purpose of voting on the question of dissolution may be called by twenty per cent of the voting stock as well as by the board of directors. See KRS 271.500.


223 N.Y. Bus. Corp. Law § 1002.

224 N.Y. Bus. Corp. Law § 1003.
York rather than a form of judicial dissolution as in North Carolina.

In New York, any such advance arrangement must be incorporated in the articles. Moreover, by the express terms of the statute, the existence of any such provision in the articles must be noted conspicuously on the face or back of all certificates for shares issued by the corporation.225 The requirements for use of such shareholder agreements are thus more rigid than in North Carolina. However, whatever the technical differences may be between the New York and North Carolina statutory approaches, the important point is that in both of these states advance shareholder arrangements for dissolution carry statutory sanction and do not depend on the uncertainty of judicial approval independently of statute.

CONCLUSION

The intent of the foregoing discussion has been to focus attention on recent legislative developments in close corporation law which if reflected in the Kentucky general corporation statute would make it more responsive to the needs of the close corporation. It has been remarked that "legislation designedly applicable to the closely held corporation has been conspicuously absent, leaving the courts without legislative guidance as to appropriate policy."226 However, there is reason to believe that this hiatus in corporation statutes will gradually disappear as more and more state legislatures respond to the renewed interest by the legal profession in the affairs of the close corporation. No doubt considerable impetus for such legislative response will come from the newly enacted New York Business Corporation Law with its numerous provisions oriented to the practical needs of the closely held enterprise.

Although the legislative gap in close corporation law has already been narrowed in New York as well as in several other states, the opportunity still remains for Kentucky to become one of the first states to "modernize" its corporation statute in this respect. It may be arguable, of course, whether this modernization should come piecemeal by way of amendments to the present

225 N.Y. Bus. Corp. Law § 1002.
226 1 Hornstein, Corporation Law and Practice § 157, at 190 (1959).
general corporation statute or should come as part of an overall revision of the entire statute. The present Kentucky general corporation statute was enacted in 1946. Although the passage of seventeen years may not be a long period of time in terms of legal history, it marks a period of significant developments in corporate legislation. During this period the American Bar Association Model Business Corporation Act made its appearance and the corporation statutes of some twenty-three states were either completely or substantially revised.\footnote{227 See 1 Model Bus. Corp. Act Ann. § 1, ¶ 4.01 (1960, Supp. 1962).} During 1963, the Oregon legislature approved extensive amendments to the Oregon Business Corporation Act, which had been adopted just ten years previously. These amendments have been described as amounting “almost to a complete revision” of the act,\footnote{228 1 P-H Corp. Serv., Rep. Bull. No. 3, July 31, 1963, ¶ 3.8.} illustrating the rapidity with which a supposedly “modern” corporation statute can become outdated even in a single state.

Corporation law is a dynamic subject and corporation statutes must of necessity be continually “modernized” if they are to keep pace with the changes in the law required to enable businessmen to utilize most effectively the corporate device as the vehicle for their business activities. It is believed that the legislative trends with respect to the close corporation reflected in the foregoing discussion are trends in which Kentucky should cultivate a genuine interest if the Kentucky general corporation statute is to serve the citizens of Kentucky as well as the corporation statutes of other states are being made to serve the citizens of those states.