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DEADLOCK AND DISSOLUTION IN FLORIDA CLOSED CORPORATIONS: LITIGATING AND PLANNING*

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I. INTRODUCTION

Today the use of the corporation as the mode in which to conduct business has reached fad proportions. Lawyers advise incorporation for its supposed tax advantages and limited liability, but without due regard for the problems that continuity and permanence of corporate existence may create when conflict among the parties arises. This is reflected in the increasing number of cases involving dissension among corporate directors and shareholders that have been taken to court. Another indication of the incidence of these cases has been the adoption by many states of "deadlock" statutes to meet the rising need for relief in such matters.

Conflicts in control and conduct of corporations most often arise in "closed" corporations. Though these are often those of only a few shareholders, the best working definition of closed corporation for present purposes is that of close identification of ownership and management.¹ It is in such corporations that personality clashes most often reflect themselves in ways that impair the proper functioning of the corporation. The clearest situation is the deadlock resulting from evenly split corporate ownership and/or control. When the two sides come to a prolonged disagreement, the result is fairly obvious: the ability of the board to make policy is ended, the stockholders have no ability to elect successors, and the operation of the corporation, if any, is left in the hands of the officers, removed from the supervision of the stockholders.^{1a}

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1. *Israels, The Close Corporation and the Law*, 33 *CORN. L. Q.* 488 (1948).

1a. As to the power of a president to act for a corporation when the board is deadlocked, see Note, 9 *SYRACUSE L. REV.* 296 (1958); and 2 *FLETCHER, CORPORATIONS* § 619.1 (rev. vol. 1954).

A less obvious but no less important cause of corporate paralysis is the stalemate which arises when more than a majority is required for corporate or shareholder action, and a fraction of less than 50% can "veto" such actions. Despite a lack of case or statutory authority, very possibly super-statutory majorities for shareholder and director action are valid in Florida. Under section 608.03(2)(j) of the Florida statutes, a corporate charter can include anything the parties desire.² But, section 608.09 requires that a corporation act through its board of directors, and specifies that the board acts by a majority. If this clause is mandatory, it would override the general language of 608.03(2)(j). The sentence on director action is preceded by a like provision for quorums, with an introductory proviso to this sentence specifically allowing the charter to provide for more than a majority to make up quorums, if desired.³ The explicitness of the requirement that a board acts by a majority, and the juxtaposed clause specifying that a quorum can be had by other than a majority, if desired, casts doubt on the ability to subject board action in Florida to a super-majority proviso. But, of course, the extra-majority quorum in itself may provide a method by which the incorporators can require vetoes for board action. And veto provisions might still be made for shareholder action. The chance that vetoes can and will be used at board and shareholder level as a control device is sufficient to justify treating them as a potential problem in Florida.⁴

Other possible sources of dissension are those statute sections that allow extra-majority approval by the shareholders for certain types of corporate action. If, for example, the corporation is set up to buy and sell a particular asset, section 608.19 would allow the charter to specify a super-majority for approval of the asset's sale, and the chance of a stalemate is clear.⁵

2. FLA. STAT. § 608.03 (2)(J) (1957).

(2) The articles of incorporation shall contain:

(J) any provision which the incorporators may choose to insert for the regulation of the business and for the conduct of the affairs of the corporation and any provisions creating, dividing, limiting and regulating the powers of the corporation, the directors, and the stockholders . . .

As we shall see later in discussing "planning," this may not mean what it says. BALLANTINE CORPORATIONS § 16 (rev. ed. 1946).

3. FLA. STAT. § 608.09 (1957):

(1) The business of every corporation shall be managed and its corporate powers exercised by a board of not less than three directors. . . . unless the certificate of incorporation or by-laws provide otherwise, the presence of a majority of all the directors shall be necessary at any meeting to constitute a quorum to transact business. The act of a majority of directors present at a meeting where a quorum is present shall be the act of the board of directors. . . .

4. See O'Neal, *Moulding the Corporate Form to Particular Business Situations: Optional Charter Clauses*, 10 VANDERBILT L. REV. 1 (1956) on the permissible content of such "optional clauses" provisions as FLA. STAT. § 608.03 (2)(J). On the allowability of vetoes generally, see O'Neal, *Giving Shareholders Power to Veto Corporate Decisions: Use of Special Charter and By-law Provisions*, 18 LAW & CONTEMP. PROB. 451 (1953).

5. Other Florida provisions specifically allowing a charter to require super-majorities include: FLA. STAT. § 608.18 (amendments), § 608.10(4) (quorum for shareholder-meeting) § 608.27 (approval of director resolution for voluntary dissolution), § 608.42 (stock transfer).

Yet a fourth possible type of conflict is that of long continued and smouldering friction and disagreement over corporate policy, which never attains the dignity of a stalemate or deadlock, and so never paralyzes the corporation, but does in fact sap its strength and vitiate much of its effectiveness.⁶ It is submitted that this is one of the most important of the problems in the field, and also the one least likely to be solved judicially or legislatively. The statutes will not cover this situation until it actually paralyzes the corporation, and little aid is available to an aggrieved minority in equity. It is here that relief must come through planning, if at all.

It is the purpose of this paper to survey the status of closed corporation discord in Florida. It will first consider the relief available in equity, and by statute, and then suggest methods of avoiding such conflicts or making relief more certain by advance planning.⁷ Borrowing from the Maryland court, the term "deadlock" will be used all through the paper to signify the situation in which a corporation "because of the decision or indecision of the shareholders, cannot perform its corporate powers."⁸

Assuming that the parties to a Florida corporation have managed, through use of an appropriate control device and subsequent disagreement, to attain a posture of deadlock, the question becomes what relief is available to them. In Florida, their judicial aid must stem either from the Legislature's "deadlock" statute, or from the power inherent in a court of equity. For the present it can be assumed that the statute has not occupied the field and so divested equity of its jurisdiction, nor covered all the possible deadlock situations.

II. INHERENT EQUITY POWER

When a corporation becomes the victim of discord, its shareholders may seek their relief in a court of equity, petitioning the chancellor's intervention to preserve their property interests even though shrouded in corporate form. The basic difficulty in invoking this equity jurisdiction is that the courts are reluctant to interfere with the internal management of a corporation. This is not to say that they will not intervene in a proper case, but insofar as the relief sought is a substitution of a receiver's judgment for that of the dissension-ridden owner's in order to obviate the paralysis, but continue the corporation, the court seldom intervenes.⁹ And when the relief sought is not a continuation of the corporation free from

6. Cf. *Israels, The Sacred Cow of Corporate Existence: Problems of Deadlock and Dissolution*, 19 U. OF CHI. L. REV. 778, 781 (1952).

7. Arbitration as a solution to the problems of corporate deadlock will not be handled by this paper, though it has been suggested as a very feasible way to handle prospective dissension. O'Neal, *Resolving Disputes in Closely Held Corporations: Intra-Institutional Arbitration*, 67 HARV. L. REV. 786 (1954). The Florida Legislature in 1957 substantially revised the Florida Arbitration Code, and the new statute, 57-502, seems closer to the Uniform Arbitration Act and deserves independent study.

8. *Surgical Instrument Co. v. Requardt*, 180 Md. 245, 253, 23 A.2d 697, 700 (1942).

9. Cf. FLETCHER, CORPORATIONS § 7712 (perm. ed. 1942).

deadlock, but a wiping clean of the slate by giving the owners back their investment, and freeing them from the corporate form, the very harshness of the remedy gives the court pause.¹⁰

Several types of relief are available to an aggrieved shareholder. The emphasis of this discussion will be on the appointment of an equity receiver, a) for dissolution, b) for winding up and liquidation, and c) *pendente lite* to preserve the corporate assets. Almost always joined in the plea for relief are requests for injunction, to forestall further improper activity in regard to corporate assets; and for accounting to force a regurgitation of that improperly taken. To the extent that such relief is itself adequate to solace the complained of ills, it will usually preclude the appointment of a receiver.¹¹

The several types of receivership must be distinguished as to scope and effect. That most commonly invoked in a deadlock situation is for winding up and liquidation. This leaves the corporate form existent, but distributes the assets to the shareholders, and so amounts to a *de facto* dissolution.¹² The *de jure* dissolution as such, entailing the legal death of the corporation by the cancellation of its right to exist, and termination of its charter, is almost always unavailable due to a judicial misconception of the nature of the corporation.¹³

Originally corporations were the result of special grants from the legislature. Accordingly, the courts took the view that what the sovereign had given, only the sovereign could take away. They refused to end a corporate life except in response to action by the state itself, or by authority of statute.¹⁴ The rationale of this view is subject to serious doubt in this era of general corporate enabling statutes,¹⁵ changes in business customs that make equity more active to correct corporate abuses,¹⁶ and the ready ability of other business forms to dissolve at will.¹⁷ Perhaps the final blow to its logic is the existence of voluntary dissolution statutes, like Florida's 608.27 which allows shareholders to dissolve a corporation without even a judicial decree.¹⁸ Nevertheless, rarely, if at all, will a court actually order dissolution

10. See Note, *Receivership and Dissolution as Remedies for Management Deadlock*, 47 MICH. L. REV. 684, 689-92 (1949).

11. *News-Journal Corp. v. Gore*, 147 Fla. 217, 2 So.2d 741 (1941), *Hammond v. Hammond*, 216 S.W.2d 630, 633 (Tex. Civ. App. 1948). See *Patton v. Nicholas*, 154 Tex. 385, 279 S.W.2d 848 (1955).

12. BALLANTINE, CORPORATIONS § 304 (rev. ed. 1946).

13. Hornstein, *A Remedy for Corporate Abuse—Judicial Power to Wind Up a Corporation at the Suit of a Minority Stockholder*, 40 COLUM. L. REV. 220 (1940).

14. *Ibid.*

15. *Lichens Co. v. Standard Commercial Tobacco Co.*, 28 Del. Ch. 220, 251, 40 A.2d 447, 452 (1944).

16. *Levant v. Kowal*, 350 Mich. 232, 86 N.W.2d 336 (1957).

17. See *Lieberbaum v. Levine*, 54 So.2d 159 (Fla. 1951); *Reed v. Beale*, 77 Fla. 801, 82 So. 234 (1919).

18. See Note, *Dissolution at Suit of a Minority Stockholder*, 41 MICH. L. REV. 714 (1943).

of a solvent going corporation.¹⁹ Instead, the courts somewhat hypocritically grant a liquidation of the corporation, and distribution of its assets to the shareholders in situations where the logical remedy is dissolution altogether.²⁰

In years past, it was generally considered that a court of equity, absent statutory authority, had no power to liquidate a solvent, going corporation on the suit of a minority shareholder.²¹ Exceptions to this rule have come to be recognized. In Florida, it would seem that equity will liquidate a corporation when a) it has disposed of its principal business or otherwise accomplished all its purposes,²² b) the officers are wasting assets, mismanaging the corporation and no other remedy will protect the shareholders,²³ c) there has been a complete frustration of the corporate purpose and inability to continue its functions—in short, where the corporation is unable for some reason to operate.²⁴

As these exceptions developed in the several jurisdictions, it has been increasingly held that dissension and deadlock is itself an independent ground for liquidation.²⁵ But it would seem that this is still by far the minority view, despite the logic of recognizing that dissolution can as effectively vitiate the usefulness of the corporate form as can the better known "exceptions."²⁶ In any case this dissension must be more than dissatisfaction; it must be paralysis.

Today, equity courts generally recognize their power to liquidate a going concern, even absent statutory authority, though few will actually decree dissolution. The real question today is whether a sufficient case has been made out to justify the granting of such a stringent remedy.²⁷ Generally equity discretion will not honor a petition based on deadlock alone.²⁸

19. 4 AM. JUR. *Corporations* § 1322. For cases where dissolution seemingly was granted, see *Cowin v. Salmon*, 248 Ala. 580, 28 So.2d 633 (1946), *Green v. National Advertising & A. Co.*, 137 Minn. 65, 162 N.W. 1056 (1917).

20. *Bowen v. Flour Mills Corp.*, 114 Kan. 95, 217 Pac. 301 (1923); *Nashville Packet Co. v. Neville*, 144 Tenn. 698, 235 S.W. 64 (1921).

21. 4 AM. JUR. *Corporations* § 1323.

22. See *Tampa Waterworks v. Wood*, 97 Fla. 495, 121 So. 789 (1929).

23. See *Tampa Waterworks v. Wood*, *supra* note 22, and *Mills Development Co. v. Shipp and Head, Inc.*, 126 Fla. 470, 171 So. 533 (1936).

24. See *Mills Development Co. v. Shipp and Head, Inc.*, *supra* note 23, and *Finn Bondholders v. Dukes*, 157 Fla. 642, 26 So. 802 (1946).

25. Such seems to be the holdings in the following cases. Nevertheless, the value of "boiler-plate" allegations should not be gainsaid, since the courts still prefer to talk in terms of oppression, frustration, or fraud. *Levant v. Kowal*, *supra* note 16, *Bowen v. Flour Mills*, *supra* note 20, *Cowin v. Salmon*, *supra* note 19, *Flemming v. Heffner & Flemming*, 263 Mich. 561, 248 N.W. 900 (1953). See *Krall v. Krall*, 141 Conn. 325, 106 A.2d 165 (1954) (Under general receivership statute).

26. See cases cited note 25 *supra*.

27. See Note, *Receivership and Dissolution as Remedies for Management Deadlock*, 47 MICH. L. R51. 684 (1949).

28. *Ibid.* and *Freedman v. Fox*, 67 So.2d 692 (Fla. 1953); *Hanes v. Watkins*, 63 So.2d 625 (Fla. 1953): Note that these Florida cases may only be holding that on the facts of each, the deadlock is not sufficiently severe, since each recognizes a right to liquidate a corporation that is unable completely to function.

But if the dissension ground is joined with one of the better recognized grounds, such as frustration of corporate purpose, relief is more often granted.²⁹

The Florida court has often acknowledged its power to liquidate, albeit framing instances of such as exceptions from the general rule.³⁰ However, as is generally held in American cases, dissension alone is not a sufficient reason to justify a winding up.³¹ Actually it would seem that a severe deadlock is only another form of waste of the corporate assets, since it causes corporate inaction, stagnation, and idleness of the assets, while taxes eat into the capital.³² Perhaps the courts may also come to explicitly recognize that a serious deadlock can effectively frustrate the corporate purpose or halt its ability to function.³³ By this process of pouring new wine into old bottles, the reluctance to recognize dissension as such might be overcome.

It should be noted that the rules for deadlocks are often thought to be the same as those applied in a minority stockholder suit. But in an even deadlock, the petitioner is not an actual minority owner.³⁴ And even if he were factually such, as in a stalemate case, he seems entitled to the higher consideration of a shareholder able to affect corporate action. As a countervailing consideration, some courts invoke "clean hands," demanding that the plaintiff not be maliciously inclined or more responsible than the defendant for the deadlock.³⁵ Neither of those factors is uniformly recognized, and one can only guess at their weight in a particular case.

The Florida court has twice in recent years denied liquidation in suits based on deadlock and dissension. In *Hanes v. Watkins*,³⁶ a 49% shareholder asked for dissolution of a prosperous and going corporation, claiming only disruptive dissension. The court denied such relief, saying:

"[There has been] . . . no showing that the corporation has reached such a stage that the purposes for which it was formed are impossible of attainment, or that the corporation has practically discontinued all its business, or that there is such a deadlock between shareholders that the affairs of the corporation may not be legally transacted."³⁷

29. See notes 27 and 28 *supra*.

30. *Tampa Waterworks v. Wood*, 97 Fla. 493, 121 So. 789 (1929); *News-Journal v. Gore*, 147 Fla. 217, 2 So.2d 741 (1941).

31. Not, at least, until it attains the status of paralysis. See note 28, *supra*.

32. See *Guaranty Laundry v. Pulliam*, 200 Okla. 185, 191 P.2d 975 (1948).

33. In *Levant v. Kowal*, *supra* 350 Mich. 232, 86 N.W.2d 336, 342-3 (1957), the Michigan court recognizes that dissension rarely, if ever, stands alone, but is normally "accompanied by circumstances of financial loss, corporate paralysis, mismanagement and deterioration of property."

34. *Bowen v. Flour Mills*, 114 Kan. 95, 217 Pac. 301 (1923); *Levant v. Kowal* 350 Mich. 232, 86 N.W.2d 336 (1957); *Flemming v. Heffner & Flemming*, 263 Mich. 561, 248 N.W. 900 (1953).

35. See 47 MICH. L. REV. at 691; *Reid Drug Co. v. Saly*, 268 Ky. 522, 105 S.W.2d 625 (1937) and *cf. Stott Realty v. Orloff*, 262 Mich. 375, 247 N.W. 698 (1953).

36. 63 So.2d 625 (Fla. 1953).

37. *Id.* at 628.

In *Freedman v. Fox*,³⁸ liquidation was denied the one half owner of a solvent hotel corporation who claimed no majority vote of the board could be achieved because of internal dissension between the two shareholding families as to: repair of the lobby TV set, manner of treating guests, and apportionment of the work load. Again the court noted that such a showing of discord is not sufficient for liquidation. The corporate affairs must be such that its purposes cannot be achieved and it cannot be made to function.

The court in the *Freedman* case also noted that it was too late then to treat the corporation as a partnership, and so make available to the parties the dissolution they would automatically be entitled to as partners.³⁹ Since the corporation was chartered by the state, contracted and incurred debts as such, and in all respects operated in a corporate capacity, the court chose not to allow the parties to disregard the corporate fiction at that late stage.

This reluctance to consider the shareholders as parties may well reflect the Florida court's general attitude toward affording partnership advantages to the parties in a closed corporation. Several courts in other jurisdictions have recognized that in a dissolution situation the parties can be treated as partners.⁴⁰ There is some Florida authority supporting this view,⁴¹ but the court is evidently determined to be eclectic in handling this factor.

It is submitted that most of those ensnarled in the web of disillusion would have gone into a partnership, "but for" the tax and limited liability advantages inherent in the corporate form. It seems more realistic to regard these people as partners in a deadlock situation, and not to shrug off their predicament with the high sounding maxim, *non fit volenti injuria*. As partners they would be entitled to dissolution on request, and no valid reason suggests itself for now binding them to a business life of turmoil and unrest and penalizing them for utilizing the corporate form.⁴²

There are two Florida cases which granted a liquidation form of relief in a deadlock situation, but not as such. The peculiar means used in these cases to effectuate a desirable end was to continue the corporate form but partition the assets and distribute them among the shareholders. In *Wofford v. Wofford*,⁴³ two brothers owned the shares of a hotel corporation. The business was actually conducted as a partnership and the corporation used only for the issuance of bonds. In a suit claiming only deadlock, the

38. 67 So.2d 692 (Fla. 1953).

39. *Lieberbaum v. Levine*, 54 So.2d 159 (Fla. 1951); *Read v. Beals*, 77 Fla. 801, 82 So. 234 (1919).

40. *Flemming v. Heffner & Flemming*, 265 Mich. 561, 248 N.W. 900 (1953); *Green v. National Advertising & A. Co.*, 137 Minn. 65, 162 N.W. 1056 (1917). Application of *Pivot Punch & Die Corporation*, 182 N.Y.S. 2d 459 (Sup. Ct. 1959).

41. *Wofford v. Wofford*, 129 Fla. 445, 176 So. 499 (1937).

42. Cf. *Hornstein, A Remedy for Corporate Abuse — Judicial Power to Wind Up a Corporation at the Suit of a Minority*, 40 COLUM. L. REV. 220 (1940); Note, 36 TEXAS L. REV. 660 (1958).

43. See note 41 *supra*.

court granted a decree of partition, ordering the property to be sold intact and its proceeds divided. The court found such dissension that it concluded that the purpose of organization had ceased; and that since joint future management of the property was hopeless, the assets could only be preserved by in effect distributing them pro rata. Clearly the result is the same as if the chancellor had merely appointed a receiver to liquidate the corporation and distribute its assets. Nevertheless the court chose to label its remedy as partition, and it is still unclear what weight this case had as precedent in a less appealing factual context not susceptible to partition and in which the corporate form was actually used as such.

In *Kay v. Key West Development Co.*,⁴⁴ the court again explicitly preserved the corporate entity, and on the authority of *Wofford*, granted relief to the deadlocked shareholders as if they were tenants in common. This case involved a realty corporation whose purpose was to hold and sell land, and its shareholders could not reach agreement on the disposition of the land it held for sale. The court declared that since it was impossible for the parties to reach an agreement, and since they were both desirous of disposing of the asset as the corporation was designed to do, partition should be as available to the parties as if they were legal concurrent owners who could not agree on the method of disposition, and this legal title in the corporation should not stymie them. Yet the court said "it is not necessary in granting such relief to dissolve the corporation. Neither do we feel that intervention . . . is in any way meddling with the internal affairs of corporate management."⁴⁵ The state of the law in Florida seems to be this: equity will grant liquidation when it is confronted with a corporation whose purpose is completely frustrated, or which cannot be made to function—in short, one that is so paralyzed as to be in its death throes. In addition, equity may grant partition of assets for less reason and a smaller amount of dissension, if the parties never used the corporate form, or if the corporate purpose had the same objective of sale and distribution of the assets that the partition furnishes.⁴⁶

For a corporation torn by dissension, yet a third type of receiver may be available in Florida. Although it is a general rule that equity will not interfere with the internal management of a corporation, in cases where the acts complained of are of such a nature as to pose a serious immediate threat to the safety of the corporate assets, equity will appoint a receiver *pendente lite* to preserve the interests of the shareholders pending liquida-

44. 72 So.2d 786 (Fla. 1954).

45. *Id.* at 789.

46. Cf. *Application of Fulton-Washington Corporation*, 3 Misc. 2d 277, 151 N.Y.S.2d 417 (1956), *aff'd*, 2 A.D.2d 981, 157 N.Y.S.2d 894 (1956) (noting that dissolution of a corporation set up only to buy, improve, and sell land, and then be dissolved is not so drastic a remedy as it would be to a corporation intended to live indefinitely).

tion, or until the cause of the danger is obviated.⁴⁷ This is a delicately used power which is applied in equity discretion only to prevent fraud or imminent harm to the members' interests.⁴⁸ Generally it is an ancillary remedy, and not available unless: a) the principal relief sought is sufficiently meritorious to overcome equity's reluctance to interfere in the normal operation of a corporation,⁴⁹ b) the individual defendant is insolvent,⁵⁰ c) no other remedy will adequately preserve the status quo.⁵¹ The Florida court has repeatedly emphasized that even such a temporary receiver is not available for mere insolvency of a corporation,⁵² or just because it can do no harm,⁵³ or for some indefinite purpose.⁵⁴ Although no Florida case seems to grant a *pendente lite* receiver for dissension alone,⁵⁵ it might be more readily available in such a situation than a winding up receiver because it is "weaker medicine."⁵⁶

One other possible theory of equity relief to deadlocked stockholders should be noted. The directors occupy at least a quasi fiduciary relationship to the shareholders. Among their duties is that of conducting the business honestly, and in the shareholders' best interests. Though business judgment is theirs alone, and generally not reviewable, they must not act arbitrarily, oppressively, or to their own advantages.⁵⁷ Under the voluntary dissolution statute,⁵⁸ the board can adopt a dissolution resolution for shareholder approval. This resolution of dissolution is itself a transaction of corporate business,⁵⁹ and the board must handle this power with as much regard for the shareholder's rights as, for example, payment of compensation. If the board deliberately fails to dissolve the corporation in

47. *West Coast Hospital Ass'n. v. Hoare*, 64 So.2d 293 (Fla. 1953); *Apalachicola N. Ry. v. Sommers*, 79 Fla. 816, 85 So. 361 (1920).

48. *Macon Lumber Co. v. Bishop & Collins*, 229 F.2d 305 (6th Cir. 1956); *McAllister Hotel v. Schatzberg*, 40 So.2d 201 (Fla. 1949).

49. *Savageau v. Savageau*, 132 Colo. 75, 285 P.2d 810 (1955).

50. *McAllister Hotel v. Schatzberg*, note 48 *supra*; *Jones v. Harvey*, 82 So.2d 371 (Fla. 1955).

51. *McAllister Hotel v. Schatzberg*, *supra* note 50. (No difficulty finding or collecting a judgment from the individual defendant, G. David Shine, Sr., and injunction otherwise sufficient); *Strong v. Broward County Kennel Club*, 65 F. Supp. 407 (S.D.Fla. 1946) (allows injunction and accounting, denies receiver); *Akers v. Corbett*, 138 Fla. 130, 190 So. 28 (1939) (accounting sufficient to effectuate parties' rights).

52. *Armour Fertilizer Works v. First Nat'l Bank*, 87 Fla. 436, 100 So. 362 (1924).

53. *Apalachicola N. Ry. v. Sommers*, 79 Fla. 816, 85 So. 361 (1920).

54. *Akers v. Corbett*, 138 Fla. 130, 190 So. 28 (1939).

55. Compare *Boyle v. Superior Court*, 176 Cal. 671, 170 Pac. 1140 (1917), where dissension among the parties made it impossible for the corporation to carry on its business at all, and a *pendente lite* receiver was upheld; and *Southern Maryland Agricultural Ass'n v. Magruder*, 198 Md. 274, 81 A 2d 592 (1951).

56. *Sternberg v. Wolff*, 56 N.J. Ch 555, 52 Atl. 1078 (1898); *Tampa Waterworks v. Wood*, *infra* note 57; 47 Mich. L. Rev. 684 (1949). Cf. *Patton v. Nicholas*, 154 Tex. 385, 279 S.W.2d 848 (1955).

57. *Flight Equipment & Engineering Corp. v. Shelton*, 103 So.2d 615 (Fla. 1958); *Orlando Orange Groves v. Hale*, 107 Fla. 304, 144 So. 674 (1932); See *Tampa Waterworks v. Wood*, 97 Fla. 493, 120 So. 789 (1929).

58. FLA. STAT. § 608.27 (1957).

59. *Bourne v. Muskegon Circuit Judge*, 327 Mich. 175, 190, 41 N.W.2d 515 (1950).

the situations where that is the only proper action, they have breached their duty to the shareholders. The conclusion of the argument is that corporate deadlocks on the board or among the shareholders are such a threat to the utility of the corporation that the only proper course for the directors to take is to vote to dissolve. Thus the shareholders would be able to force equity to have them so act by an appropriate decree. Some decisions have accepted this theory in breach of trust situations,⁶⁰ but despite its appealing logic, it would be without precedent in a Florida deadlock case.

On balance, it would seem that a court should decree liquidation for dissension that does or inevitably must completely disrupt the corporation's affairs. Weighed against the traditional equity reluctance to interfere with corporate operations should be a realistic appraisal of the ability of the parties to reconcile their differences and make the corporation work as such. Ultimately, little is gained by forcing "partners" to live together in a business that no longer fits their needs. Today's courts are inclined to base their decisions as to liquidation on the conduct of the parties and the condition of the corporation.⁶¹ They might do well to also appraise the people involved, and their need of an opportunity to start over.

III. THE FLORIDA DEADLOCK STATUTE

In 1953 The Florida Legislature adopted what has become popularly known as a deadlock statute.⁶² This statute seems basically designed to

60. Compare *Kroger v. Jaburg*, 231 App. Div. 641, 248 N.Y. Supp. 387 (1931) (business obsolete and couldn't be run at a profit, directors still taking salaries and depleting assets); and *Lennan v. Blakely*, 273 App. Div. 767, 75 N.Y.S.2d 331 (1947) (directors continuing existence of corporation for sole purpose of benefiting those in control at expense of other shareholders), with *Fontheim v. Walker*, 283 App. Div. 373, 122 N.Y.S.2d 642 (1953); denying relief for disagreement on business judgment. The court distinguished the earlier New York cases as involving breaches of trust by the majority and noted the dissolution of the corporation was not more in the stockholder interest than its continuation. See *Israels, The Sacred Cow of Corporate Existence: Problems of Deadlock and Dissolution*, 19 U. OF CHI. L. REV. 778, 799 (1952). "The fact that in New York and in Michigan directors alone can file for dissolution without shareholder approval has led the courts of those states to require the directors so to file in cases where the facts showed both recurring losses and abuse of managerial prerogatives." It is submitted that the difference in the Florida statutory scheme does not vitiate the force of the theory.

61. N.Y. LAW REV. COMM. REPORT, DOC. 65k (1944).

62. FLA. STAT. § 608.28 *Dissolution Where Opposing Ownership Interests Evenly Divided*.

When the total stock voting power is evenly divided into two independent ownerships or interests, and the number of directors is even and equally divided respecting the management of the corporation with one-half of the ownership favoring the course advocated by one-half of the directors, and the other half of the ownership favoring the course of the other half, or 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, the circuit court, sitting in chancery, may entertain a petition from any stockholder for involuntary dissolution of the corporation. If, after hearing thereon, the court finds that the division of ownership is equal and cannot be reconciled, he may appoint a receiver or trustee of the corporation and enter an order that it be dissolved. . . .

meet the situation of equally divided opposing ownership interests, and is probably modeled after such statutes as that in New Jersey,⁶³ the old New York statute,⁶⁴ or the Uniform Business Corporation Act.⁶⁵ It has not as yet been definitely explained by the Florida courts and it would seem that there are several real questions as to its coverage and application yet to be answered.⁶⁶

Occupation of the Field

Since the scope of the statute's coverage seems narrow, it is altogether likely that parties desiring relief who cannot fit themselves under the exact statutory language will continue to seek relief from equity's inherent receivership power. This leads into the puzzling question of whether the statute has "occupied the field." In other words, has the legislature intended the statutory remedy for a dissension-ridden corporation to be the only and exclusive remedy available to the shareholders, thereby divesting equity of its general power to wind up a corporation, or is it just a cumulative remedy added to that already available at equity?

Decisions in other jurisdictions are split on this point. The New York Appellate Division has held that actions for dissolution of a deadlocked corporation must be brought in a proceeding under the deadlock statute, and are not the proper subject of an equity action, since the statutory method of effecting corporate dissolution is exclusive and must be substantially followed.⁶⁷ On the other hand, the New Jersey Court of Errors and Appeals has found inherent equity power to dispose of a cause that could not be made to fit within the statute.⁶⁸

"Black letter law" is of little aid in deciding this question, since the determinative factor is probably the question of whether the legislature *intended* to occupy the field, and absent legislative history, the answer must lie in the words and context of the statute.⁶⁹ It is arguable that the legislature has only created a "new remedy for an existing common law cause of action," and has manifested no intention whatsoever of providing an exclusive remedy.⁷⁰ But one queries that at common law in Florida there was a remedy for simple deadlock.⁷¹ It might be said in favor of the continued existence of equity jurisdiction that the new deadlock statute provides for involuntary dissolution of the corporation, something clearly

63. N. J. REV. STAT. § 14; 13-14 (1937).

64. N. Y. GEN. CORP. LAW, § 172 (1896).

65. UNIFORM BUSINESS CORPORATION ACT, § 51.

66. It probably applies to pre-existing corporations, see *In re Collins-Doan Co.*, 61 A.2d 913 (N.J. Super. 1948). But see FLA. STAT. § 608.01 and Wright, *Introduction to the Statutory Corporation Law of Florida*, 28 F.S.A. 51, 52 (1957).

67. *Cachules v. Finkelstein*, 279 App. Div. 173, 109 N.Y.S.2d 272 (1951).

68. *Dorf v. Hill Bus Co.*, 140 N.J. Eq. 444, 54 A.2d 761 (1947).

69. Compare FLETCHER, CORPORATIONS § 7977 with 1 AM. JUR. ACTIONS § 12.

70. 1 AM. JUR. ACTIONS § 12.

71. See Part II *supra* on Equity Receivers.

never available before, and so deals with an entirely new area of relief. But this cuts both ways; insofar as it is not a "new remedy for an existing common law cause of action," there is a better case for exclusiveness. In light of what little Florida law there is on the exclusiveness of statutory remedies,⁷² and the very narrow coverage of this statute, it would seem the Florida courts would reach a better conclusion by holding the deadlock statute cumulative only, and not to preclude relief from inherent equity power. The Florida legislature has not specifically said it desired to pre-empt the field for the statutory remedy, and no implied negative should be read into the statute in light of the pressing need for relief to parties in this situation.⁷³

Coverage of The Statute

In dealing with the relief available under the statute, the discussion will consider first the situations that the statute by its language does and does not cover, and secondly, the factors that will govern its being applied in any particular case. The statutory scheme seems (a) to give the "circuit court, sitting in chancery," jurisdiction over deadlock causes, and (b) to subject the plaintiff to a requirement of showing that "the division of ownership is equal and cannot be reconciled," and otherwise leaves the granting of relief in the unbridled discretion of the chancellor.

The thrust of the statutory language is clearly at situations where there is the division of fifty-fifty shareholders, or the deadlock of an even board. The statute makes no requirement as a prerequisite to jurisdiction that "irreparable injury" threaten the corporation, as does the Illinois statute,⁷⁴ nor does it require that the court only act if its action is "beneficial to the stockholders . . . and not injurious to the public" as the New York statute does.⁷⁵ The statute specifically allows a petition to be brought by "any shareholder," and so differs from several statutes which require a certain percentage of shareholders in addition to other conditions before suit is allowed.⁷⁶ As we shall later see, however, the numerical small

72. See *McDaniel v. McElvy*, 91 Fla. 770, 108 So. 820 (1926) (holds that a statute is only cumulative by its express terms and does not divest equity courts of pre-existing remedy of bill to quiet title); *Soreno Hotel Co. v. State Ex Rel Otis Elevator Co.*, 107 Fla. 195, 114 So. 339 (1932) (Statute requiring secretary to keep corporate books ready for inspection by specified persons held not to abrogate common law right of stockholder to inspect records at proper time and place for proper purpose). *But see Therrell v. Rinaman*, 107 Fla. 110, 144 So. 327 (1952) (legislature by providing plain, complete, adequate method of bank receivership has made such liquidation purely statutory and divested chancery of its jurisdiction, at least until statutory method proves inadequate to protect rights).

73. One queries the wisdom of a court ever acting so as to completely divest a party of a remedy without a specific and explicit legislative command to that effect. *But see* LA. STAT. 12:558 (1950), where the Louisiana Legislature thought it necessary to expressly state that the deadlock statute does not impair shareholder rights under a general receivership statute.

74. ILL. STAT. ch. 32, § 157.86 (a)(1) (1954).

75. N. Y. GEN. CORP. LAW, § 117 (1943).

76. See e.g. LA. STAT. 12:56 A(1) (1950), and MASS. GEN. LAWS (1958) ch. 155, § 50.

percentage of the holdings of the petitioning parties may be a factor entering into the exercise of the chancellor's discretion.

It would seem that this statute applies *either* when the board is deadlocked, or when the shareholders cannot agree on a board so that the old directors hold over. The disjunctive "or" between the first and second clauses should be decisive to make these alternative remedies,⁷⁷ and avoid such decisions as *Cook v. Cook*, where the Massachusetts court, under a statute since amended, held that both shareholder and board deadlock are vital to dissolution.⁷⁸

The decisions seem to make it clear that dissolution for deadlock cannot be avoided by the directors reelecting themselves, nor by their own action filling a vacancy on the board; they cannot usurp the power of the shareholders, and thus prevent the application of the shareholder deadlock clause of the Florida statute.⁷⁹ Likewise dissolution is available when there is no actual deadlock on the board, when those in control of the corporation avoid a deadlock by violating the provisions of the charter.⁸⁰ An aggrieved shareholder does not lose his right to relief because the misconduct of the defendant prevents there actually being a deadlock.

It would seem that the requirement that "the old directors are holding over" means that the shareholders must have passed an annual election period without successfully electing a new board, and so a delay of up to one year, after the inception of shareholder dissension, but before the parties would become eligible for relief under the statute, may ensue, assuming no management deadlock.⁸¹ The words "management of the corporation" in the director deadlock clause probably will have no effect on the application of the statute, since almost any conceivable director dispute would by definition concern the affairs and management of the corporation. In practice, it seems fair to predict that any question as to this language will express itself in the chancellor's accepting jurisdiction, but applying his discretion to deny relief because he considers the dispute non-vital to the functioning of the corporation.⁸²

The statute as drafted seems to have made one vital omission: it does not cover "vetoes," and/or the situations where board or director activity is stalemated by a charter or statutory requirement for supermajority.⁸³ It is submitted that the statute cannot be read so as to cover these situations. "Evenly" and "equally" are virtually synonymous as herein

77. See *Petition of Collins-Doan Co.*, 3 N.J. 382, 70 A.2d 159, (1949).

78. 270 Mass. 534, 170 N.E. 455 (1930).

79. *Petition of Williamson*, 85 N.Y.S.2d 93 (Sup. Ct. 1948).

80. *Application of Bankhalter*, 128 N.Y.S.2d 81 (Sup. Ct. 1953).

81. Florida directors seemingly must be elected annually, see FLA. STAT. § 608.08, and *Orlando Orange Groves v. Hale*, 107 Fla. 304, 144 So. 674 (1932). As to whether there must have been an actual attempt and failure to elect directors, see text p. 410 *infra*.

82. See text p. 410 *infra*.

83. BALLANTINE, *CASES AND MATERIALS ON CORPORATIONS* 1057 (1953); O'NEAL, *CLOSE CORPORATIONS, LAW & PRACTICE*, 9.29 (1958).

used, and that they mean nothing less than fifty-fifty splits is reinforced by the reiterated use of "one-half" in the statute in discussing the necessary division.⁸⁴ In a veto situation, the petitioning shareholder must find his relief, if any, at equity.⁸⁵

It would seem clear that the director deadlock clause does not cover the case of an uneven board of directors, stalemated by a veto requirement. Probably this clause would not cover the situation where the plaintiff claims the board is in fact even, since the oddman is just a "dummy." Several New York cases have discussed this problem and reached no definite conclusions,⁸⁶ but in light of the fact that the Florida statute refers to an "uneven" board in the shareholder deadlock clause, an even board probably must be shown to invoke the director deadlock clause, since the legislature knew how to use "uneven" when it wanted to, and in the director clause, must have deliberately chose not to. By parity of reasoning, probably the statute will not apply when some directors on an uneven board are incapacitated, or other events occur which happen to leave the corporation with an even board at a particular moment.⁸⁷

The *Kay* case is the sole judicial discussion of the statute as yet.⁸⁸ There the court granted partition of the assets of a corporation holding land for sale, on which the shareholders could not agree as to disposition. In a dictum, the court noted the existence of 608.28, saying that this statute recognizes "the necessity for providing for relief in instances of this kind . . . [and] . . . would afford the [plaintiff] the relief he seeks . . . [but for its effective date]."

Speculation is appropriate on several other matters which fall outside the exact language of the statute. When the corporation has an even number of directors who are not deadlocked but are holding over because the shareholders are unable to elect successors, the shareholder deadlock clause would not seem to apply because "the number of directors is [not] uneven." Again one wonders at the result when the board is even and deadlocked, but the shareholders are not quite evenly divided. Would the shareholders have to wait until the next election passes to get relief upon failure to

84. New York has amended its deadlock statute so as to specifically handle veto cases arising under § 9. N.Y. GEN. CORP. LAW, § 103 (Supp. 1957).

85. *Cf. Bator v. United Sausage Co.*, 138 Conn. 18, 81 A.2d 442 (1951), where the court seems to deny dissolution because of its distaste for extra-majority control devices.

86. See *e.g.*, *In re McLoughlin*, 176 App. Div. 653, 163, N.Y.S. 547 (1917) (Directors can't be deadlocked even though one of three is a dummy); *Petition of Binder*, 172 Misc. 634, 15 N.Y.S.2d 40 (1939) (dummy director is director nonetheless), *rev'd*, 258 App. Div. 1041, 17 N.Y.S.2d 1020 (1939) (remanded to determine if the odd director was actually functioning as such).

87. *In re Freidlieb*, 184 N.Y.S. 753 (Sup. Ct. 1920).

88. *Kay v. Key West Development Corp.*, 72 So.2d 786, 789 (Fla. 1954). See however *In re Fredcris, Inc.*, 101 So.2d 49 (Fla. App. 1958), where a receiver was appointed pursuant to § 608.28, but in which the court does not need to explain the statute.

elect successor directors? Would it even then be available, in the light of the fact that the board *ex hypothesi*, is not uneven? In answering such questions, it is submitted that remedial statutes of this sort would be better construed liberally to afford relief,⁸⁹ unless the case, like the veto, is clearly outside the statutory ken.

Discretion of the Chancellor

It is generally assumed that statutes of this type do not operate automatically to dissolve corporations upon a petition which meets the jurisdictional requirements. Whether a decree of dissolution will issue is within the discretion of the chancellor.⁹⁰ This view is consistent with the Florida statutory language that "the court . . . may entertain a petition . . . [and] . . . may appoint a receiver . . ." (emphasis added). This part of the discussion will consider the standards and factors that a Florida chancellor should consider in deciding how to exercise his discretion.

It could be argued that because the statute requires that the court find the ownership division to be "equal," and that it "cannot be reconciled," the discretion of the court extends only to these two elements, and once the court is satisfied on these two points, it cannot exercise its discretion further.⁹¹ It is submitted that the better reading of the statute is that the court must be *at least* satisfied on these two items, and it may consider others, in view of (a) the fact that the legislature has specifically given the administration of this statute to the "court, sitting in chancery" and chancery is by tradition a discretionary court, and (b) the reading of the statute itself: ". . . if . . . the court finds that the division of ownership is equal and cannot be reconciled, he may appoint a receiver".^{91a} (Emphasis added.)

So far as the requirement of reconciliation is concerned, it seems to express a legislative desire for flexibility in the exercise of the dissolution power and the shaping of decrees.⁹² The statute seems to suggest, over and above the legislative desire to avoid corporate paralysis, that the legislature recognizes that it is promulgating a drastic remedy.⁹³ Accordingly the chancellor must be completely satisfied that the deadlock before him is a permanent one, and not the result of a temporary falling out. This seems

89. Cf.: *Neville v. Leamington Hotel Corp.*, 47 So.2d 786, 789 (Fla. 1954).

90. Symposium, *The Close Corporation*, 52 Nw U. L. Rev. 345 (1957), note 75 *supra* at 410; *Strong v. Fromm Laboratories*, 273 Wis. 159, 77 N.W.2d 389 (1956); *Petition of Collins-Doan Co.*, 3 N.J. 582, 70 A.2d 159 (1949), *Paulman v. Kritzer Radiant Coils Inc.*, 143 A.2d 272 (Del. Ch. 1958).

91. *Expressio unius est exclusio alterius*.

91a. See *Paulman v. Kritzer Radiant Coils, Inc.*, 143 A.2d 272 (Del. Ch. 1958).

92. Cf. *Handlan v. Handlan*, 360 Mo. 1150, 232 S.W.2d 944 (1950); showing the flexibility of decrees under deadlock statutes.

93. See BALLANTINE, *CASES & MATERIALS ON CORPORATIONS* 1056-7 (1953).

a clear instance of the legislature giving a remedy that it wants cautiously used.

It seems to be the purport of this statutory language that an actual, not potential deadlock is required. The statute seems to expressly state, by requiring that the parties "cannot be reconciled," the usual requirement under deadlock statutes even without such language; namely that equity will not dissolve for reason only of the threat of a future stymie.⁹⁴ There must be either a present board or shareholder deadlock, though some cases give relief in a situation where there is no question whatsoever that such would be the result of a board or shareholder meeting.⁹⁵

A related question, which will depend in each case on the facts presented, and on which the decisions of the court often turns, is that of how pervasive a deadlock the chancellor will require before granting relief. The courts treat dissolution as a harsh and drastic remedy, and it is doubtful that they will dissolve the corporation unless they are convinced that a director deadlock goes to a vital and material aspect of corporate operation.⁹⁶ It is very questionable whether disagreement on a relatively minor matter would be considered sufficient to invoke the chancellor's action. Needless to say, when facts of usurpation of corporate control, misuse of corporate property, and mismanagement of corporate affairs are added to deadlock, the courts will be quicker to exercise their discretionary power than when it appears that the conflict is peripheral to the operation of the corporation and may be eventually reconciled.⁹⁷

The New York and Illinois courts have seized on language in their statutes, that does not appear in the Florida statute, to give them restricted applications. The New York statute requires that a dissolution be "beneficial to the stockholders, . . . and not injurious to the public."⁹⁸ Relying on this language, the courts in that state have followed the leading case of *Matter of Cantelmo*⁹⁹ seemingly into laying down a rule that a solvent, going corporation can never be dissolved, because such action is ipso facto not beneficial to *all* the shareholders, but only favors he who sues; and in any case, the courts show an extreme reluctance to consider dissolution for a solvent corporation.¹⁰⁰ The Wisconsin, New Jersey, and Missouri courts have recently rejected this requirement under statutes, which like

94. See *e.g.*, Application of Landau, 185 Misc. 876, 51 N.Y.S.2d 651 (1944).

95. *Stark v. Reingold*, 18 N.J. 231, 113 A.2d 679 (1955). (Though the case may go on the fact that the court was granting dissolution of a partnership intertwined in operation with the corporation, and felt the whole thing "one ball of wax".)

96. See *e.g.*, Application of Bankhalter, 128 N.Y.S.2d 81 (Sup. Ct. 1953); Application of Landau, 183 Misc. 876, 51 N.Y.S.2d 651 (1944).

97. See *e.g.*, Application of George W. Anderson Inc., 104 N.Y.S.2d 184 (Sup. Ct. 1951), *aff'd*, 279 App. Div. 594, 107 N.Y.S.2d 556 (1951). (Marital difficulties that have not deadlocked operation of corporation are not ground for dissolution.)

98. N.Y. GEN. CORP. LAW, § 117 (1943).

99. 275 App. Div. 231, 88 N.Y.S.2d 604 (1949).

100. See Note, 50 COLUM. L. REV. 100 (1950); but see *Israels*, *supra* note 6, at 783-86.

Florida's, do not use the word "benefit."¹⁰¹ It is submitted that the solvency of a corporation is but one factor for the chancellor to consider.¹⁰² It is admittedly easier to exercise discretion in favor of dissolving if the corporation is obviously of no possible use to anyone, and should be wound up to prevent further waste of assets. Nevertheless, the courts should not allow this consideration to blind them and prevent recognition of the fact that a deep and pervading conflict would lead almost *ex necessitate* to the reduction of value of the ownership interest. Therefore, in a severe enough case, dissolution, by freeing paralyzed assets, would of itself be an ipso facto benefit to the shareholders.¹⁰³

Another aspect of this reluctance to dissolve a going corporation may be that the court will carry over the concepts that it has previously applied in equity situations to proceedings under the deadlock statute. The courts may well tend to require facts of frustration and paralysis of function and purpose before allowing dissolution. Some courts have declined to dissolve deadlocked corporations while there is yet a chance of profitability, or otherwise place excess consideration on this factor.¹⁰⁴ This may well be a more stringent test than the statute was designed to promulgate, and it is submitted that under the statute, the court should balance any such inclination by giving weight to the obvious legislative interest in furnishing *some* relief in deadlock situations as such.¹⁰⁵

The Illinois courts have also been strict in application of that state's deadlock statute, placing a restrictive reading on the requirement of "irreparable injury to the corporation."¹⁰⁶ Although this language does not appear in the Florida statute, it is quite possible that the Florida courts, in exercising their discretion, will instigate some vestige of it into their decisions. Again it is submitted that this factor should weigh far less than in a state where the statute contains that explicit language. Indeed, arguably the consequences of deadlock are themselves a threat of "irreparable injury" to the corporation.¹⁰⁷

Some courts have given effect to a vague requirement of good faith and clean hands on the part of the petitioning party.¹⁰⁸ It may be that

101. *Handlan v. Handlan*, 360 Mo. 1150, 232 S.W.2d 944 (1950); *Petition of Collins-Doan Co.*, 3 N.J. 382, 70 A.2d 159 (1949); *Strong v. Fromm Laboratories*, 273 Wis. 159, 77 N.W.2d 389 (1956).

102. See dissent in *In re Radom & Neidorff, Inc.*, 307 N.Y. 1, 119 N.E.2d 563 (1954); and see cases cited note 101 *supra*.

103. See Note, 19 *FORD. L. REV.* 287 (1949).

104. See *e.g.*, *In re Radom & Neidorff, Inc.*, note 102 *supra*.

105. *Cf.* *Israels*, note 6 *supra*.

106. *Lush'us Distributors v. Ft. Dearborn Lith. Co.*, 330 Ill. App. 216, 70 N.E.2d 737 (1946).

107. See *e.g.*, *Handlan v. Handlan*, 360 Mo. 1150, 232 S.W.2d 944 (1950); *Petition of Collins-Doan Co.*, 3 N.J. 382, 70 A.2d 159 (1949).

108. See *Petition of Adler*, 277 App. Div. 861, 98 N.Y.S.2d 383 (1950); *Matter of Cantelmo*, 275 App. Div. 231, 88 N.Y.S.2d 604 (1949); and see Ballard, *Arrangements for Participation in Corporate Management Under the Pa. Bus. Corp. Law*, 25 *TEMP. L. Q.* 131, 154 (1951). *But see In re Jamison Steel Corp.*, 322 P.2d 246 (Cal. App. 1958) (intimating that the question of clean hands may be irrelevant under a deadlock statute, the question being *whether* there is a deadlock, not *why*).

dissolution is harder to obtain when the petitioner is seeking the dissolution for his own aggrandizement. Although it seems that every plaintiff stands to profit from the dissolution (else he would not so petition),¹⁰⁹ there are cases where desire for dissolution goes beyond an understandable wish to protect one's own interest. One such instance might be the "freeze out," where the desire is to take out the assets, and reincorporate minus the undesired party. But this could happen through voluntary dissolution, and even there the courts do not uniformly enforce a requirement of good faith on the majority.¹¹⁰ It would seem that equity will not regard kindly one who has voted to make a deadlock and now petitions for dissolution where it is clear that he has not acted in good faith with regard to the other shareholders, but how much good faith is required is not clear.

Some miscellaneous matters affecting equity discretion are worthy of note. It may be that the adequacy of other available remedies may forestall a dissolution. Considering the flexibility that the legislature has granted him, and the harshness of the statutory remedy, a Florida chancellor would be very likely to dismiss a petition if he could decree some less drastic remedy to obviate the situation.¹¹¹ This is not to say that a less than adequate alternative would be sufficient to deter dissolution, or that a defendant could stall a receiver with a cross action to stay relief pending consideration of some stop-gap remedy.¹¹²

The percentage of stockholders bringing the suit may be important to the chancellor. While the statute allows suit by "any stockholder" in a deadlock situation, it is possible that the court will look askance at anything resembling a minority "blackmail" suit.¹¹³ It may be much clearer that the dissolution will not accrue to the benefit of all the shareholders (for whatever that's worth) when the petitioner is a very minority shareholder.¹¹⁴

In applying this statute, it is suggested that the Florida chancellor would do well to emphasize two factors. The first is that the legislature, by enacting the statute, has taken a therapeutic approach to the problem of deadlock. It has recognized that such situations debilitate and demoralize a vital business form, and a remedy has been specifically provided in an area where it was questionable that one existed before. This militates toward a sympathetic reading of the statute and its application whenever possible to remedy the evil aimed at. On the other hand, there is something to be said for a consideration of the parties' original intent. They entered into a close corporation with their eyes open. In light of their original

109. See note 102 *supra*.

110. BALLANTINE, CORPORATIONS § 303 (rev. ed. 1946).

111. See *Petition of Collins-Doan*, 3 N.J. 382, 70 A.2d 159 (1949).

112. See *Petition of Acker*, 124 N.Y.S.2d 298 (Sup. Ct. 1953), *aff'd*, 282 App. Div. 941, 126 N.Y.S.2d 194 (1953).

113. Cf. Note, 28 CALIF. L. REV. 219 (1940).

114. Cf. *Schmidt Realty and Investment Co. v. Monks*, 32 Ohio App. 403, 168 N.E. 213 (1929).

understanding, the court might well consider in a particular case whether dissolution is really in the best interest of all concerned.¹¹⁵

IV. PLANNING TO HANDLE DEADLOCK PROBLEMS

It seems clear that the best way to handle deadlock situations in Florida closed corporations is to plan ahead to meet them. This conclusion is dictated, first, by the uncertainty of result in any given instance from application of either equity's inherent power, or Florida's deadlock statute.¹¹⁶ To achieve a clear solution to the problems of embattled "partners," it is imperative that as little reliance as possible be placed on the ability to predict in advance how the courts will decide, and as much reliance as possible on private advance planning by the parties, even as they plan to meet future tax or business expansion situations. Indeed, several situations fraught with danger for the wellbeing of a corporation and its stockholders, such as continual dissension which never attains the dignity of a deadlock, are simply not susceptible of judicial relief as the law today stands. Secondly, planning affords a chance to actually give the parties what they desire. Neither the statutes nor equity make a strong pretense of according with the parties' intent or original understanding. Rules of law are general rules, to be generally applied. If the parties consider their situation peculiar (and every closed corporation has a different peculiar problem), then insofar as legally possible, it should be discussed, thought out, and some attempt at reconciliation made in advance. Litigation is costly and uncertain, particularly for small investors, and its consequences on the parties in a family-held corporation speak for themselves.

Practical Aspects of Planning

It must be emphasized that the problems of each corporation must be considered separately. There is not and cannot be any one plan to handle deadlock situations that is universally applicable. Each group of people will have different business, financial and personality problems, and these must be determinative of the substance of each plan.¹¹⁷

The lawyer who counsels the corporate form has the responsibility to his clients of considering all the facets of the parties' situation, and bringing to their attention both the chances of deadlock and dissension, and plans to ameliorate the effect of such difficulties on the corporation. There are a plethora of relevant problems. It will be vital to determine what the parties have contributed to the business and what they expect

115. Cf. Latty, *The Close Corporation and the New North Carolina Business Corporation Act*, 34 N.C. L. REV. 432, 449 (1956).

116. See discussion under Parts II and III *supra*, and see O'NEAL, *CLOSED CORPORATIONS* 9.03 (1958).

117. Cf. O'NEAL, *supra* note 116 at 9.06.

to get out of it.¹¹⁸ When one of the parties expects to donate his personal services, and the other risk capital, they will be inclined to have different ideas as to control, and the aftermath of deadlock. It will be no less important to evaluate the nature of the corporation and the type of business that it will be. A relatively inactive corporation, as one set up to sell a particular asset, is less likely to be adversely affected by dissension than a manufacturing or merchandising corporation which requires daily decisions. Indeed, the more active the corporation, the more likely it is to engender the friction that can lead to corporate paralysis,¹¹⁹ since much depends on the people themselves who will be involved. The lawyer is not expected to be a clinical psychologist, but he must make allowances in his planning for at least the most obvious possible sources of difficulty. His function is to detect the trouble spots, and help the parties to avoid them.

The truly basic question may be whether the clients really want control devices with a high potential for deadlocks. Some parties will demand a voice in the business even if it threatens a future paralysis. Others are certain that no matter what their personal relations, they can continue to operate the business. People are notoriously unable to forecast the future, and if the nature of the business and interests of the parties is in any way conducive to future dissension, the attorney would be well advised to plan for the parties at least some compromise solution for future trouble. The parties may recoil at the idea of making it easier to break up a prosperous business, but they will almost surely have other objectives than just business permanence, and a tailor-made planning device will be necessary to aid them to attain these other objectives.

Basically there are three types of planning devices that are useful in this close corporation context: a) those that make dissolution easier, b) those that make it harder, c) those that preserve to corporation as a going concern, perhaps through buy-and-sell agreements. Combinations of these may be necessary in any particular case. Solution (a) looks to the ending of the corporate life. This can involve both problems of a "freeze out" of the minority,¹²⁰ and minority "blackmail," when the small owner oppresses the majority by holding over them, as a veritable Sword of Damocles, his power to force an end to the corporate existence.¹²¹ Indeed the prospect of planning to allow the dissolution of a solvent and prosperous corporation always seems distasteful to some. That it makes the business unstable is likely to differ in importance in the plans of the parties. A clash in their interests will probably necessitate a compromise

118. It may be very helpful to even plan in advance the distribution of assets upon dissolution. See *Mohawk Carpet Mills v. Delaware Rayon Co.*, 110 A.2d 305 (Del. Ch. 1954).

119. See Note, *Voluntary Dissolution of a Close Corporation in New York*, 1 SYRACUSE L. REV. 489, 92-3 (1949).

120. See Hornstein, *Voluntary Dissolution — A New Development in Intra-Corporate Abuse*, 51 YALE L.J. 64, 67 (1941).

121. Cf. Note, 28 CALIF. L. REV. 219 (1940).

plan, such as use of a buy-out. A partial solution may be a well drafted plan for distribution of the corporate assets on dissolution, so that each party will get back as nearly as possible what he has put in,¹²² though it goes without saying that one who has put in personal energy and services can never recover them to full value on corporate dissolution.

Approach (b) making it harder to dissolve the corporation, has the basic drawback of fostering, or at least not relieving, deadlocks. It does have the advantage of preventing "blackmail" by small shareholders. The buy-out approach (c) may be the most feasible, particularly when used with some combination of the first two. Its virtue is that it gives those shareholders who desire to continue the corporation an opportunity to acquire the other's stock at a mutually acceptable price.¹²³ This is a particularly feasible provision when the option accrues in favor of a group of more than a majority, though one perhaps not large enough to control the corporate operation and avoid the deadlock, since many of the problems with the buy-out will be financial.¹²⁴ It may be asking too much to expect the parties to be able to muster sufficient capital to buy the other out at some indefinite time in the future. One solution to the financial problems may be for the corporation to buy the shares of the party who desires to leave the corporation,¹²⁵ an advantage of continuing the going corporation is that it will insure each stockholder of getting a better return on his investment than if he were to receive only a pro rata share of tangible assets. One problem in the buy-out that may arise is the delightful quandary of which shareholder gets to buy the other out when they are fifty-fifty owners and deadlocked.¹²⁶

It is suggested that the basic solution for the problems of dissension and deadlock should be for the draftsman to approach the parties as if they were partners, which they would probably be "but for" utilization of the corporate form. Partners can generally leave at will, and no reason of philosophy or practical necessity militates a contrary result in a closed corporation. If a shareholder "wants out," he should be able to have the other shareholders buy him out, or be allowed to dissolve the corporation,¹²⁷ nor need this be on the sole contingency of deadlock. A desire to leave

122. See note 118 *supra*.

123. A fair formula price should be stated in the charter. A convenient one may already be there for stock restrictions, and it can be incorporated by reference. Another solution might be to incorporate the procedure set out in FLA. STAT. § 608.23 for payment to dissatisfied shareholders upon merger.

124. Hays, *Shareholder Rights in the Iowa Corporation*, 40 IOWA L.REV. 459, 485 (1956).

125. But a corporation may be able to purchase its own shares only if it does not thereby impair its capital, and this may take a promise to purchase by the corporation illusory, and preclude the enforcement of the agreement. Topken, Loring and Schwartz, Inc. v. Schwartz, 249 N.Y. 206, 163 N.E. 735 (1928), and see FLA. STAT. § 608.13 (9)(b), allowing purchases only from "surplus".

126. Hays, *supra* note 124.

127. See Winer, *Proposing a N.Y. "Close Corporation" Law*, 28 CORN. L. Q. 313 (1943).

may well anticipate or itself be a cause of deadlock and should be independently allowed for. Exceptions to this general rule might be made in cases where the other shareholders are so totally committed in resources to the corporation that disaster to their interests would ensue if a disgruntled shareholder had the right to force a buy-out or dissolution. This points up the need to plan for individual cases, and to balance the corporate permanence against individual desires.

Legal Aspects of Planning

The pervading legal problem in this area is the lack of direct precedent.¹²⁸ Many of the devices that will be herein explained are untested and innovations. They may run into trouble in the courts (a) because of an express or implied conflict with the corporate scheme, or (b) because of a judicial reluctance to grant even closed corporations the partnership-type advantages that these devices entail.¹²⁹ Nevertheless, they are supported by analogy to authority in related areas, and to a degree, lawyers and their clients will have to "assume the risks," depending on how badly they need to use a particular plan.

Since many of the same legal problems are applicable to several of the devices, some of the possible plans that seem most feasible in Florida will be set forth, and the legal objections to them will be discussed seriatim. Those planning for Florida corporate dissension might consider the following:

1. One of the best and most versatile of the suggestions is that of an agreement between the shareholders, or a by-law and charter provision, that upon the happening of certain contingencies, an option to purchase the stock of some of the shareholders would accrue in favor of the others. Among the operative contingencies might be a prolonged period of deadlock on the board or among the shareholders, death of a stockholder, inactivity in corporate affairs of a shareholder, dissension of any kind among the parties; or the buyout might be used as a prerequisite to dissolution by any party. The price should be set by a fair formula in the original agreement, both because it will thereby earn wider support among

128. See e.g., O'NEAL, *CLOSE CORPORATIONS* 9.05 (1958).

129. See Hornstein, *Judicial Tolerance of the Incorporated Partnership*, 18 *LAW & CONTEMP. PROB.* 435 (1953). Concern for the rights of creditors may also sway the courts against these plans, Symposium, *The Close Corporation*, 52 *Nw. U. L. REV.* 345, 351-352 (1957). The new North Carolina statute specifically provides that such an agreement should not be "invalid as between the parties thereto, on the ground that it is an attempt by the parties thereto to treat the corporation as if it were a partnership or arrange their relationship in a manner that would be appropriate only between partners . . ." N.C. STAT. 55-736.

130. See Cary, *How Illinois Corporations May Enjoy Partnership Advantages: Planning for the Closely Held Firm*, 48 *Nw. U. L. REV.* 427, 59 (1953). The CAL. CORP. CODE, § 4658, provides by statute for a buy-out in case of deadlock.

the stockholders, and because it will make the scheme appear more reasonable in the court's eyes.

2. Another popular device is that of a shareholder agreement making it easier or harder to get dissolution. This could take the form of an agreement that all would vote their shares for dissolution upon a future contingency, or that only in limited instances would anyone attempt to dissolve the corporation.¹³¹ Since the Florida voluntary dissolution statute requires a preliminary board resolution, the agreement for easier dissolution should also contain a "best efforts" clause in which the shareholders agree to attempt to influence the decision of the board.¹³²

3. As a separate device, the agreements described above might be inserted in the charter and by-laws of the corporation itself.

4. Florida's voluntary dissolution statute¹³³ specifically allows the certificate of incorporation or by-laws to require more than a majority vote of the shareholders for the approval of a resolution of dissolution. By requiring a high percentage for approval, a Florida draftsman can effectively stay the threat of a majority "freeze-out," and give a small shareholder the means of continuing to enjoy corporate prosperity.¹³⁴

5. At the time of incorporation, the board, as an initial act, might pass an undated resolution of dissolution, and at the same time the shareholders would agree that if at any time in the future dissension arose, they would vote to approve such resolution and assure its adoption.¹³⁵

6. The voting trust may be a means of avoiding the harm of a deadlock or preventing dissolution by a minority.¹³⁶ The corporate stock would be transferred to voting trustees with power in them to vote shares for dissolution upon occurrence of specified events, or on a simple determination that dissolution is in the best interest of all shareholders. The beneficial owner would have all the rights of shareholders except the right to vote for dissolution, and the agreement is set forth in the shares of the voting

131. *Israels*, note 6 *supra*, at 791-2. Compare *Hornstein*, *Stockholder Agreements in the Closely Held Corporation*, 59 *YALE L. J.* 1040, 1046-1047 (1950). The agreement might alternatively take the form of an irrevocable proxy. See *Smith v. San. F. & N. P. Ry.*, 115 *Cal.* 584, 57 *Pac.* 582 (1897); *Deibler v. The Chas. A. Elliott Co.*, 368 *Pa.* 267, 81 *A.2d* 557 (1951).

132. See *BALLANTINE, CORPORATIONS* § 43 (rev. ed. 1946).

133. *FLA. STAT.* § 608.27 (1957).

134. Indeed, in view of the explicit language of the statute, this may be one of the few planning devices clearly available in Florida. See the discussion on waiver and mandatory statutes *infra*. Cf. *Cary*, note 130 *supra*, at 438-9.

135. Comment, *Rights of the Minority Shareholders to Dissolve the Closely Held Corporation*, 43 *CAL. L. REV.* 514, 520 (1955). Note that under *FLA. STAT.* § 608.27, the Secretary of State, with whom the resolution of dissolution must be filed, must satisfy himself that the statutory requirements have been met before he allows the corporation to dissolve. Whether he could disapprove of this technique is an unanswered question.

136. *O'NEAL, CLOSE CORPORATIONS* 9.07 (1958); *De Marco v. Paramount Ice Co.*, 102 *N.Y.S.2d* 692 (Sup. Ct. 1950). See Comment *The Incorporated Partnership and the Problem of the Deadlocked Board*, 3 *VILL. L. REV.* 196 (1958).

trust certificates, and it is there clearly provided that transfers are subject to the contract.¹³⁷

Such a voting trust seems valid in Florida, in light of section 608.43 of the Florida statutes, which provides for such agreements for a maximum period of ten years, and for such "conditions, limitations, and instructions as to the manner in which the vote shall be cast upon any proposition" as is provided in the voting trust agreement. There might be some questions as to statutory interpretation here,¹³⁸ but it would seem that a voting trust to solve the horrors of dissension and deadlock is one for a legitimate business purpose and will promote the best interests of the corporation.¹³⁹

The accrual of an option, or buy-out, technique seems clearly valid. Several cases have explicitly upheld the validity of a buy-out on a specified contingency.¹⁴⁰ When such a buy-out is reasonable and fair, it should be as readily upheld as are the like restrictions on stock transfers, which are valid in Florida.¹⁴¹

Probably the major attack that these planning devices will have to meet is the charge that they alter the results available by statute, and since the statute is mandatory, not permissive, in prescribing methods of dissolution and handling of deadlocks, such plans cannot be allowed. Conversely, the Florida courts will have to decide whether a shareholder can waive the benefits of such a statutory scheme and this will turn on whether the statute is one enacted for the protection of the public generally, or whether it is designed solely for the protection of individual rights.¹⁴²

The leading case in this area is *Leventhal v. Atlantic Finance Corporation*.¹⁴³ There two sole shareholders and the corporation agreed (a) that the corporation could be dissolved by notice of one shareholder to the other unless the one notified should purchase the other's shares at a designated price, and (b) for a right of dissolution in one on the

137. A voting trust might also be used to break an existing deadlock by having the parties assign all their stock to it with the voting trustees managing the company. *Peck v. Horst*, 175 Kan. 479, 264 P.2d 888 (1953), *aff'd on rehearing*, 176 Kan. 581, 272 P.2d 1061 (1954).

138. The question has been raised as to whether the statute provides for a true voting trust, or a voting pool. Wright, *Introduction to the Statutory Corporation Law of Florida*, 18 F.S.A. 51, 94-5, but its use in this context seems valid. See discussion of Florida Statute in Watkins, *The Development of Voting Trust Legislation*, 35 U. DET. L. REV. 595, 610-11 (1958).

139. BALLANTINE, *CORPORATIONS* § 184 (rev. ed. 1946).

140. *Lewis v. H. P. Hood & Sons*, 331 Mass. 670, 121 N.E.2d 830 (1954) (stockholder must sell stock to corporation when board of directors decides to redeem); *Thompson v. J. D. Thompson Carnation Co.*, 279 Ill. 54, 116 N.E. 648 (1917) (transfer of control on death); *N. England T. Co. v. Abbott*, 162 Mass. 148, 38 N.E. 432 (1849) (sale at death). See *Greater New York Carpet House v. Herschmann*, 258 App. Div. 649, 17 N.Y.S.2d 483 (1940).

141. *Weissman v. Lincoln Corporation*, 76 So.2d 478 (Fla. 1954).

142. 12 AM. JUR. *Contracts* § 166; Annot., *Waiver or Limitation by Contract Between Shareholders of their Statutory Right to Cause Dissolution of a Corporation*, 154 A.L.R. 269.

143. 316 Mass. 194, 55 N.E.2d 20 (1944).

happening of certain contingencies. The court held this valid though it waived the provisions of Massachusetts General Laws chapter 155, section 50, relating to both voluntary and deadlock dissolution. The court found the statute permissive; that a waiver of it was not violative of public policy; and that corporate dissolution could be controlled by private agreement. It should be emphasized that the statute in question had the introductory clause: "unless otherwise provided in the agreement of association," and though the charter in this case did *not* contain this agreement, the court felt that such language in the statute indicated legislative approval of private agreements on dissolution.¹⁴⁴ Such language is lacking in the Florida statutes on voluntary and involuntary dissolution.¹⁴⁵ but the *Leventhal* holding is broad enough to retain high persuasiveness in Florida.¹⁴⁶

A Florida case that may be helpful in this dissolution planning area is *Clearwater Citrus Growers Ass'n v. Andrews*,¹⁴⁷ going on a theory of estoppel that seems very close to waiver. The Florida court held that former members of a corporation who had previously attempted to dissolve it by methods foreign to the statutory plan would not be later heard to ask for dissolution in accord with the statute, notwithstanding that they could have obtained dissolution by acting properly in the first instance. The logic here reaches the same result as a waiver. One who acts in a preconceived way in regard to planning for dissolution should not be heard later to deny such a plan's validity.¹⁴⁸

Another problem that may arise involves the question of whether the statutory scheme for dissolution is mandatory and exclusive or merely directory and permissive. The law in this area is vague and uncertain, and the decision must turn on the court's determination of the intended coverage of the Florida statute. The language of the statutes is admittedly explicit, but absent any clear legislative intent to usurp the field,¹⁴⁹ there is strong authority, and also strong policy reasons supporting private planning in this area. The *Leventhal* case is solid authority for holding such statutes merely permissive, and allowing the parties to contract to vary them,¹⁵⁰

144. *Accord*, *RKO Theatres v. Trenton — New Brunswick Theatres*, 8 N.J. Sup. 404, 72 A.2d 914 (1950).

145. FLA. STAT. §§ 608.27, 608.28 (1957).

146. Florida also seems to hold that one can waive a statutory remedy. See *e.g.*, *Bellaire Securities Corp. v. Brown*, 124 Fla. 47, 83, 168 So. 625, 648 (1956); though the question has never arisen in a dissolution context.

147. 81 Fla. 299, 87 So. 903 (1921).

148. See Note, 43 CALIF. L. REV. 514, 521 n. 35.

149. Note, 43 CALIF. L. REV. 514, feels the mandatory statute argument very strong in California. But it should be noted that their statutes are extremely detailed and comprehensive, while FLA. STAT. § 608.27-28 are rather sketchy.

150. *Accord*, *St. John of Vizzine v. Cavallo*, 134 Misc. 152, 234 N.Y.S. 685 (1929) (percentage for voluntary dissolution only permissive, since this is not a mandatory statute to carry out public policy).

though there are cases going the other way.¹⁵¹ The Florida statutes seem designed to protect shareholders, not the public at large,¹⁵² and the problem really boils down to the same question at issue in waiving statutory benefits; whether private arrangements to affect dissolution are against public policy. It would seem that the policy argument strongly favors such arrangements, rather than disapproving them.¹⁵³ Conceptions of the corporate entity have changed, and it is now often recognized that closed corporations are but "chartered partnerships". As such, the parties are entitled to the greater freedom to chart their own fate than they would have in actual partnership. By planning, they are taking reasonable steps to solve problems really not adequately handled by the statutes or court decisions.¹⁵⁴ In short, the parties have indeed chosen the corporate form, but this choice is not sufficient reason for requiring them to continue in it to their detriment. With no stronger reason than the language of the statutes for holding them exclusive in regard to dissolution, private intentions should be honored.

It should be noted that there may be a difference in the courts' approach to the validity of such plans, depending on whether they expand or limit the right to dissolve.¹⁵⁵ Generally the expanded right to dissolve must still be in terms of the statutory methods, since there is no private method of dissolution. The parties might agree to liquidate the corporate assets,¹⁵⁶ and leave the shell to be forfeited for failure to pay taxes.¹⁵⁷ It has been suggested that courts will treat more severely those agreements that limit the right to obtain dissolution.¹⁵⁸ It is thought that the judicial trends relaxing the right to obtain liquidation and dissolution, and the spirit of the deadlock statutes mitigate against such schemes. It would not seem that this reasoning would extend to invalidate an agreement that requires one who desires dissolution to first offer shares to the other shareholders.¹⁵⁹ While this is but one aspect of the general question of waiving statutory

151. See *Shrage v. Portsmouth Steel Corp.*, 207 F.2d 497 (6th Cir. 1953) (Ohio statute that only a certain percentage of shareholders can petition for dissolution is exclusive); *Merlino v. Fresno Macaroni Mfg. Co.*, 64 Cal. App.2d 462, 148 P.2d 884 (1944) (California buy-out on deadlock statute is mandatory).

152. See O'NEAL, *CLOSE CORPORATIONS* 9.06 (1958).

153. Supporting the view that shareholder agreements for dissolution are not violative of public policy, see *Fish v. Nebraska City Barb-Wire Fence Co.*, 25 Fed. 795 (C.C.D. Neb. 1885); and *Wolf v. Arant*, 88 Ga. App. 568, 77 S.E.2d 116 (1953).

154. Cf. *Ringling Bros. Barnum & Bailey Comb. Shows v. Ringling*, 53 A.2d 441, 447 (Del. 1946).

155. Hornstein, *Judicial Tolerance of the Incorporated Partnership*, 18 *LAW & CONTEMP. PROB.* 435, 448-449 (1953). See cases cited in note 169 *infra*.

156. BALLANTINE, *CORPORATIONS* § 301 (rev. ed. 1946).

157. FLA. STAT. § 608.36 (1957).

158. Note 155 *supra*. Re *Peveril Gold Mines 1898* 1 Ch. (Eng.) 122, C.A. (shareholders' statutory right to dissolve can't be limited by the articles of association, since the right to dissolve is a condition of incorporation. But the question whether there could be a valid contract between the company and individual shareholders limiting the right to dissolve is reserved.)

159. See Note, *Deadlock Dissolution in New York* 27 N.Y.U. L. REV. 300, 305 (1952).

remedies, it is an area in which the court may be quicker to find public policy objections. Even if this dichotomy in judicial approach is true, provisions requiring that a party seeking dissolution show a grave difference of opinion as to management might be valid while broader limitations would be in more danger of being invalidated.¹⁶⁰

An important problem for the draftsman will be that of where to place the plan. In the context in which we are discussing such planning, it is assumed that all the shareholders agree in advance on the proposition. The draftsman must choose between the by-laws, the charter and a shareholder agreement for the effective document. As we shall see, there are certain legal objections to each. It has therefore been suggested that arrangements of this sort should be placed in all the instruments, with the corporation joining in the shareholder agreement.¹⁶¹

For a deadlock plan to be placed in the charter, it must be of the type authorized by the Florida "optional clauses" statute, 608.03 (2)(j). The language there is broad, and the 1953 deletion of the clause formerly contained therein to the effect that it does not authorize provisions "contrary to the law of the State"¹⁶² may be a significant factor in support of inclusion of plans for dissolution.¹⁶³ But, such a provision is at the least unusual in a charter,¹⁶⁴ and to the extent that it appears to conflict with the statutory language of dissolution, it invites invalidation.¹⁶⁵

The scope of matter that can be included in a by-law is of course greater, but many of the same objections are applicable. A by-law does have the advantage, however, of possibly being held a valid contract, even though bad as a by-law.¹⁶⁶

The legal status of a shareholder agreement on dissolution in Florida is uncertain. Probably such an agreement could bind the parties to the extent of specific performance.¹⁶⁷ It is unclear how the Florida courts will handle the objections that such an agreement is an attempt to make a

160. See note 155 *supra*.

161. Cf. Note, *Stock Transfer Restrictions in Closely Held Corporations*, 10 U. FLA. L. REV. 54 (1957).

162. FLA. STAT. § 612.03 (10) (1953); and see present text FLA. STAT. § 608.03 (2)(j) (1957) *supra* note 2.

165. O'Neal, 10 VAND. L. REV. 1, *supra* note 4. Though the mere presence of an optional clause statute doesn't prove the statute is not exclusive. 43 CALIF. L. REV. 519-20 (1955), and see note 135 *supra*.

164. 10 VAND. L. REV. 1, 24 (1956), and see note 4 *supra*. See BALLANTINE, CORPORATIONS § 16 (rev. ed. 1946); casting doubt on the value of the "optional clause" section.

165. See 48 N.W. U. L. REV. note 130 *supra*, at 427, 437-8.

166. *Palmer v. Chamberlin*, 191 F.2d 552 (5th Cir. 1951).

167. Such Florida cases as *Goldfarb Novelty Co. v. Vann*, 94 So.2d 845 (Fla. 1957) assume that shareholder agreements are enforceable against all parties concerned; and see *Bohnsack v. Detroit Tool Co.*, 292 Mich. 167, 290 N.W. 367 (1940) granting specific performance of a buy and sell agreement on death of a shareholder. See also Trau, *Florida's Corporate Code: Draftsmanship and Practice*, 12 U. MIAMI L. REV. 43, 69, 72 (1958), counseling use of shareholder agreements for restrictions on stock transfer. Cf. *Blanchard v. Commonwealth Oil Co.*, 91 So.2d 803 (Fla. 1956) (*semble*).

partnership out of a corporation.¹⁶⁸ Courts in other states have split on the validity of such agreements.¹⁶⁹

Two New York decisions illustrate the problem. *In Re Blocks Will*¹⁷⁰ held that an agreement between sole shareholders requiring dissolution under certain circumstances was valid. *Flanagan v. Flanagan*¹⁷¹ held an agreement between two shareholders, owning 58/60 of the corporate stock, that on the happening of certain contingencies the corporate assets would be distributed between them was contrary to public policy and unenforceable. The court denied the parties the right to deal with the property as if it were owned individually, or as partners. Mr. Hornstein thinks shareholder agreements for dissolution are difficult to support in light of the latter case,¹⁷² but Mr. Israel disagrees, noting that the agreement at issue in the *Flanagan* case was not phrased in terms of shareholder voting for dissolution, but in terms of requiring distribution of corporate property. He thinks a better drawn agreement would have been upheld.¹⁷³

A planner would be wise to place notice of an existent dissolution agreement on the stock certificate to insure all subsequent shareholders taking with notice.¹⁷⁴ It should be noted that in placing provisos in the charter and by-laws, a risk of administrative limitation is incurred, in that the secretary of state may decline to approve a charter containing such unusual clauses.¹⁷⁵ Indeed he may be an obstacle to dissolution, for 607.27 seems to give him discretion in accepting dissolutions.

The more clearly that a plan conflicts with the Florida statutory scheme for dissolution, the poorer are its chances for survival.¹⁷⁶ The buy-out seems clearly valid, and a good case can be made out that shareholder agreements on dissolution violate no public policy, and should be sustained in a closed corporation even if they do give some partnership advantages.¹⁷⁷

The problems of dissesion and deadlock are vital to Florida's closed corporations. To a limited extent, relief is available through litigation.

168. See note 129 *supra*.

169. See *e.g.*, *Fish v. Nebraska City Barb-Wire Fence Co.*, 25 Fed. 795 (C.C.D.Neb. 1885) (agreement to dissolve if majority of board decides business not profitable is valid); *Wolf v. Arant*, 88 Ga. App. 568, 77 S.E.2d 116 (1953) (agreement to vote for dissolution valid); *Application of Cohen*, 183 Misc. 1034, 53 N.Y.S.2d 671 (contract to arbitrate can't stay right to dissolve).

170. 60 N.Y.S.2d 639 (Supp. Ct. 1946).

171. 273 App. Div. 918, 77 N.Y.S.2d 682 (1948).

172. 59 YALE L. J. 1040, 1047 (1950).

173. 19 U. CHI. L. REV. 778, 792 (1952).

174. Though notice need not be more than incorporation by reference. See Note, *Stock Transfer Restrictions in Closely Held Corporations*, 10 U. FLA. L. REV. 54, 60-2 (1957).

175. See FLA. STAT. § 608.04, on administrative approval for the beginning of corporate existence, and 10 VAND. L. REV. 1, 22-3 (1956), *supra* note 4.

176. Requiring that the majority act in good faith in dissolving, for instance, might well be good even if the language of the statute is mandatory, since the right to dissolve is not absolute. See BALLANTINE, *CORPORATIONS* § 305 (rev. ed. 1946).

177. Cf. Israel, 19 U. CHI. L. REV. 778 1952, *supra* note 6.

Though the law on planning is uncertain, to the extent possible, problems should be anticipated and disposed of at the time of incorporation. It is hoped that the courts and bar will come to recognize parties in a closed corporation as partners in a dissension situation, and deal with them accordingly.¹⁷⁸

178. Cf. note, 36 TEXAS L. REV. 660 (1958).