DIVORCE CORPORATE STYLE: DISSENSION, OPPRESSION, AND COMMERCIAL MORALITY

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INTRODUCTION

The marriage of two or more individuals in a corporate setting is commonplace today. As long as the participants can "live" with each other, the "marriage" endures. Where the relationship between the partners or their heirs deteriorates, the burden to adjudicate rights of the shareholders in a "corporate divorce" may fall upon the judiciary.

For many years, the rules in this area of law were uncertain; the very power of the courts to deal with corporate divorce was questioned.[1] Accordingly, New Jersey's initial statutory authority was limited in scope.[2] As a result of increased use of the corporate form by small businesses, and by individuals who at one time would have functioned as partnerships, the problem of corporate divorce expanded.[3] Recognizing the need for both procedural and substantial guidelines, the New Jersey legislature in 1974 amended section 14A:12-7 of the New Jersey Business Corporation Act.[4]

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[1] For a history of states' reactions to the problems of corporate dissolution, *see generally* Israels, *The Sacred Cow of Corporate Existence—Problems of Deadlock and Dissolution*, 19 U. CHI. L. REV. 778 (1952).

[2] *See* N.J. REV. STAT. § 14:13-15 (1938).

[3] The first jurisdiction to initiate legislation in this area was Illinois in 1933. ILL. REV. STAT. ch. 32, § 157.86 (1953). By 1965, twelve states had drafted enactments permitting minority shareholders alleging oppression by those in control to bring an action for dissolution of the corporation; almost all states offered some statutory ground for involuntary dissolution. Comment, *Oppression as a Statutory Ground for Corporate Dissolution*, 1965 DUKE L.J. 128, 128 (1965). The majority of statutes which provide "oppression" as a basis for dissolution have been patterned on the Model Business Corporation Act which, in turn, was structured upon the Illinois Business Corporation Act. ABA-ALI MODEL BUS. CORP. ACT. § 90 (1953).

[4] N.J. STAT. ANN. § 14A:12-7 (West Cum. Supp. 1979-1980). The revised law was proposed in the *Final Report of the Corporation Law Revision Commission* (1972) [hereinafter cited as *Report*]. The commission was formed in 1958 to modernize New Jersey's corporation laws. N.J. STAT. ANN. § 1:14-1 to -10 (West 1958). Accompanying the amended law is a "Commissioners' Comment" [hereinafter cited as *Comment*], analyzing the statute by sections. N.J. STAT. ANN. § 14A:12-1 to -18 (West Cum. Supp. 1979-1980).

New Jersey's 1974 provisions are similar to those found in many other jurisdictions. Exadaktilos v. Cinnaminson Realty Co., 167 N.J. Super. 141, 150, 400 A.2d 554, 559 (Law Div. 1979); *see* Note, *Oppression of Minority Shareholders: A Proposed Model and Suggested Remedies*, 47 MISS. L. J. 476, n.1 (1976).

This change added a new and powerful weapon to the arsenal of the corporate practitioner by redefining what was commonly known as the "deadlock provision."[5] Encompassing more than a corporate deadlock in the strict historical sense of the term, the amendment provides versatility: it can be used both offensively and defensively, by both shareholder and corporation, by both minority and majority.[6] Under section 14A:12-7, the court before which an application is made is afforded not only comprehensive powers, but also a variety of methods by which a conflict can be justly resolved.[7] Although the corporation is a popular and widespread form of business in New Jersey,[8] there has been little interpretation of this statute to date.[9] Since other jurisdictions have witnessed the development of a body of law based on their older deadlock statutes,[10] a similar evolution may be anticipated in this state.

THE PROBLEM

It is not uncommon for one person with capital, another with sales ability, and a third with production skills to pool their talents in a business venture. For purposes of illustration we will assume that three such individuals, Cash, Sales and Insider, sensing opportunity in Atlantic City, form a corporation for the manufacture and sale of decorative good luck charms. Enthusiastic about their new venture, the three close friends (or relatives) envision a bright future. They obtain a basic certificate of incorporation, adopt "form" by-laws, and execute organizational meeting minutes. There is no shareholders' agreement.

The business grows rapidly, but one of the following disputes arises. Sales desires flashier packaging and a larger advertising budget

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[5] *See Comment*, N.J. STAT. ANN. § 14A:12-7 (West Cum. Supp. 1979-1980).

[6] *See* N.J. STAT. ANN. § 14A:12-7(2) (West Cum. Supp. 1979-1980), which provides that "[a]n action may be brought under this section by one or more directors or by one or more shareholders" and *id.* § 14A:12-7(8), under which "the court may order the sale by the plaintiff or plaintiffs of all shares of the corporation's stock held by them to either the corporation or the moving shareholders. . . ."

[7] *Id.* § 14A:12-7(1). For a detailed discussion of the revised statute by section, see notes 55–74 *infra* and accompanying text.

[8] One of the reasons advanced for the 1969 statutory amendment to N.J. STAT. ANN. § 14A:12-7 was the promotion of corporate activity in New Jersey. Report of the Corporation Law Revision Commission at X (1968).

[9] Exadakitlos v. Cinnaminson Realty Co., 167 N.J. Super. 141, 400 A.2d 554 (Law Div. 1979) is the first New Jersey reported decision to interpret this legislative provision. *Id.* at 150, 400 A.2d at 559. *See* notes 97–101 *infra* and accompanying text.

[10] *See generally* Comment, *Oppression as a Statutory Ground for Corporate Dissolution*, 1965 DUKE L.J. 128 (1965).

to which Cash and Insider are opposed. Or, Cash and Sales become displeased at Insider's recent inattention to plant supervision. Or, Insider and Sales resent sharing profits with Cash, who is away on a lengthy vacation. Dissatisfaction leads to frustration, anger, and confrontation. These examples of conflict may eventually cause the majority of two and the minority of one to seek separate counsel.[11]

Historically, the opinion prevailed that minority stock in a closely held corporation[12] was of minimum value absent a shareholders' agreement, protective charter, or by-law provision.[13] A lawyer for the minority, in the illustrations above, would likely have reminded his client of the majority's voting strength and advise accession to majority demands. Another alternative might have been a series of harassing tactics, such as complaints to regulatory agencies. Today, however, the 1974 revision to the New Jersey Statutes Annotated section 14A:12-7 virtually assures the minority some measure of relief.[14] The underlying intent of the statute is to achieve substantial justice by invoking a degree of fairness in the corporate body politic.[15] It is designed to prevent a minority shareholder from being concurrently frozen out of his corporate expectation and frozen into an inalienable equity interest.[16] Simultaneously, it attempts to protect management (the majority) from individual disgruntled shareholders who seek to harass company directors and former business associates.[17]

Just as the 1971 New Jersey legislature recognized the importance of avoiding the "deadlock" of a moribund marriage where

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[11] It is believed that the "motivating factors" which underlie these disputes include "lust for power, jealousy, fear and greed." Elson, *Shareholders Agreements, A Shield for Minority Shareholders of Close Corporations*, 22 BUS. LAW. 449, 450 (1967).

[12] Some states define the close corporation by statute. *See* O'Neal, *Close Corporations: Existing Legislation and Recommended Reform*, 33 BUS. LAW. 873, 875–78 (1978).

In 68th St. Apts., Inc. v. Lauricella, 142 N.J. Super. 546, 557, 362 A.2d 78, 84 (Law Div. 1976), *aff'd*, 150 N.J. Super. 47, 374 A.2d 1222 (App. Div. 1977), it was observed that a close corporation is one " 'where management and ownership are substantially identical to the extent that the independent judgment of directors is, in fact, a fiction' " (quoting Israels, *supra* note 1, at 778). It has also been described as one in which "the stock is held in a few hands, or in a few families, and wherein it is not at all, or only rarely, dealt in by buying or selling." Lavene v. Lavene, 162 N.J. Super. 187, 192, 392 A.2d 621, 623 (Ch. Div. 1978).

[13] *See generally* Elson, *supra* note 11.

[14] *See Comment*, N.J. STAT. ANN. § 14A:12-7 (West Cum. Supp. 1979-1980); note 6 *supra* and accompanying text.

[15] *Report*, *supra* note 4, at 12; N.J. STAT. ANN. § 14A:12-7(1)(c) (West Cum. Supp. 1979-1980).

[16] *See, e.g.*, N.J. STAT. ANN. § 14A:12-7(8) (West Cum. Supp. 1979-1980), dealing with forced sale of plaintiff's stock.

[17] *Id.* For a discussion of majority protection under the California statute, see Stumpf v. C.E. Stumpf & Sons, Inc., 47 Cal. App. 3d 230, 120 Cal. Rptr. 671 (Ct. App. 1975).

neither partner had committed a matrimonial offense,[18] the 1974 legislature acknowledged that corporate relationships should be severed when the spirit of partnership has died.[19] Accordingly, judges sitting in general equity have been expressly granted a wide range of power and means to arrive at equitable solutions to corporate disharmony.[20]

HISTORICAL PERSPECTIVE

Common law did not provide for corporate divorce. In *Benedict v. Columbus Construction Co.*,[21] the court stated that "[i]t is well settled that the shareholders in a corporation cannot extinguish its charter or dissolve it, and that a court of equity cannot dissolve it at their instance."[22] The concept of corporate breakdown developed through cases where innovative counsel sought relief additional to receivership appointments in dissension-wracked businesses. In *Edison v. Edison United Phonograph Co.*,[23] an action involving the famed inventor, Edison's petition for dissolution was denied because the directors were not evenly divided and the plaintiffs had not shown the

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[18] N.J. STAT. ANN. § 2A:34-2 (West 1971).

[19] *See id.* § 14A:12-7. The analogy to marriage is not new. As depicted in Howe, *Corporate Divorce: Deadlocks in the Close Corporation*, 22 BUS. LAW. 469 (1967), both divorce and dissolution are "expensive and painful." *Id.* at 469. Borodinsky v. Borodinsky, 162 N.J. Super. 437, 393 A.2d 583 (App. Div. 1978), presents an interesting combination of factors applicable to both matrimonial and corporate divorce: "[i]f the parties cannot get along as husband and wife, it is not likely they will get along as business partners." *Id.* at 443, 393 A.2d at 586.

The analogy to partnership is also not uncommon. *See e.g.*, Donahue v. Rodd, 367 Mass. 578, 328 N.E.2d 505 (1975).

A New York court, noting the similarity between a partnership and a close corporation, held that when trust, faith, and confidence are no longer enjoyed by owners of equal value in a corporation, that enterprise ceases to be beneficial to the shareholders. Application of Pivot Punch & Die Corp., 15 Misc. 2d 713, 716, 182 N.Y.S.2d 459, 463 (Sup. Ct. 1959), *modified on other grounds*, 9 A.D.2d 861, 193 N.Y.S.2d 34 (App. Div. 1959). *See* Flemming v. Heffner & Flemming, 263 Mich. 561, 568, 248 N.W. 900, 902 (1933).

The analogy to partnership is limited, however. Courts have rejected the proposition that a corporate minority has the right to dissolve the entity at will or on demand. Baker v. Commercial Body Builders, Inc., 264 Or. 614, 630, 507 P.2d 387, 394 (1973); Stumpf v. C.E. Stumpf & Sons, Inc., 47 Cal. App. 3d 230, 235, 120 Cal. Rptr. 671, 674 (Ct. App. 1975). *But see* Flemming v. Heffner & Flemming, 263 Mich. at 568, 248 N.W. at 902; Application of Pivot Punch & Die Corp., 15 Misc. 2d at 716, 182 N.Y.S. 2d at 463.

[20] N.J. STAT. ANN. § 14A:12-7(1) (West Cum. Supp. 1979-1980). This may be compared to the broad authority given matrimonial judges to make equitable distribution of property. *See, e.g.*, Painter v. Painter, 65 N.J. 196 (1974).

[21] 49 N.J. Eq. 23, 23 A. 485 (Ch. 1891).

[22] *Id.* at 36, 23 A. at 489. *Accord*, Jackson v. Nicolai-Neppach Co., 219 Or. 560, 571, 348 P.2d 9, 14 (1959).

[23] 52 N.J. Eq. 620, 29 A. 195 (Ch. 1894).

corporation to be insolvent.[24] However, the court noted that it had power to appoint a receiver where "there [is] such dissensio[n] in [the] governing body as to make it impossible for the corporation to carry on its business with advantage to its stockholders . . . ."[25] In *Sternberg v. Wolff*,[26] the court assumed that chancery was without jurisdiction to dissolve a *solvent* corporation merely to relieve dissension among the body's stockholders.[27]

The common law approach, in short, was that the judiciary could interfere in cases of disharmony among the board of directors by appointing a receiver, but only when the dissension made it impossible for the corporation to function in the beneficial interests of the stockholders.[28] Even then, the appointment power was exercised infrequently, terms of appointment were limited, and the solvency of the enterprise remained an important issue.[29]

It was not until 1938 that the New Jersey legislature enacted its first statute dealing with involuntary dissolution and deadlock.[30] This provision was similar to the restrictive common law from which it was drawn. Narrowly drafted, the measure enumerated certain prerequisites to a judicial grant of relief: (1) an even number of directors; (2) an equal division of directors; (3) an equal division of voting shares into two opposing camps; and (4) dissolution sought by one-half of the shareholders.[31]

The first reported decision which construed the 1938 enactment was *Dorf v. Hill Bus Co.*[32] Here, the Court of Errors and Appeals indicated that it had both inherent power and statutory authority to grant relief in a proper case.[33] Nevertheless, although the tribunal was persuaded that the relationship between the shareholders' families was plagued by dissension, the petition to dissolve was dismissed.[34] The court deemed itself without jurisdiction under the statute since there were not an even number of directors in the

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[24] *Id.* at 622–24, 29 A. at 196–97.

[25] *Id.* at 625, 29 A. at 197.

[26] 56 N.J. Eq. 389, 39 A. 397 (Ct. Err. & App. 1898).

[27] *Id.* at 393, 39 A. at 398.

[28] Sternberg v. Wolff, 56 N.J. Eq. 555, 564, 42 A. 1078, 1081 (Ch. 1898).

[29] 56 N.J. Eq. at 395, 39 A. at 399.

New Jersey decisions are reviewed in *In re* N.J. Refrigerating Co., 95 N.J. Eq. 215, 221–22, 122 A. 832, 834 (Ct. Err. & App. 1923) and in Appleton v. Worne Plastics Corp., 140 N.J. Eq. 324, 335–37, 54 A.2d 612, 619–20 (Ch. 1947).

[30] N.J. REV. STAT. § 14:13-15 (1938).

[31] *See Comment*, N.J. STAT. ANN. § 14A:12-7 (1969).

[32] 140 N.J. Eq. 444, 54 A.2d 761 (Ct. Err. & App. 1947).

[33] *Id.* at 447–48, 54 A.2d at 762–63.

[34] *Id.*

company.[35] Further, because the corporation had been operating gainfully, the tribunal refused to exercise its intrinsic equitable power where "the situation falls far short of demanding the intervention of the court to protect the stockholders' interest."[36] Thus, relief was denied even though half of the shareholders were unable to formulate policy and direct management, while one 50% stockholder operated the company as his own.[37] It is precisely this sort of gordian knot which the 1974 statute was designed to avoid.[38]

Dorf was followed shortly by In re *Collins-Doan Co.*[39] This case involved a petition for dissolution which was granted in the chancery division since all of the requirements for implementation of the deadlock statute had been met.[40] A divided appellate court reversed.[41] Judge Colie, author of the *Dorf* opinion, and Judge McGeehan interpreted the statute as containing an additional requirement that the deadlock relate to certain key issues.[42] These would include the following: (1) problems which would result in an inability to properly manage corporate affairs; (2) problems which would prevent the attainment of objectives for which the corporation existed; or (3) issues which would seriously endanger rights of the shareholders.[43] Without deadlock over such issues, it was concluded that relief should be denied.[44] However, the supreme court reversed and affirmed the decree of the chancery division.[45] Justice Heher, speaking for the court, rejected the appellate tribunal's distinction between types of issues over which corporate directors must be deadlocked in order for relief to be afforded under the statute.[46] The supreme court acknowledged that the irreconcilable differences between two inde-

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[35] *Id.* at 447–48, 54 A.2d at 763.

[36] *Id.* at 448, 54 A.2d at 763.

[37] *Id.* at 446–47, 54 A.2d at 762.

[38] *See Comment*, para. 3, N.J. STAT. ANN. § 14A:12-7 (West Cum. Supp. 1979-1980) where it stated that "the principals of a business enterprise, even if profitable, should not be joined irrevocably together if there is substantial dissension among them . . . ."

[39] 1 N.J. Super. 441, 61 A.2d 913 (Ch. Div. 1948), *rev'd*, 4 N.J. Super. 385, 67 A.2d 353 (App. Div. 1949), *rev'd*, 3 N.J. 382, 70 A.2d 159 (1949).

[40] 1 N.J. Super. at 446, 61 A.2d at 916.

[41] 4 N.J. Super. at 390, 67 A.2d at 355.

[42] *Id.* at 389, 67 A.2d at 355.

[43] *Id.* Applying corporate law with strict formality, the majority also noted that despite the 50/50 split among both shareholders and directors, relief could not be granted because formal directors' meetings had not been convened. *Id.* Additionally, the court could not presume what the situation would have been had the directors met. *Id.*

[44] *Id.* at 389–90, 67 A.2d at 355. The dissent pointed out that Collins had run the business as his own, in disregard of the will of one-half of the directors. *Id.* at 391–92, 67 A.2d at 357.

[45] 3 N.J. 382, 396, 70 A.2d 159, 167 (1949).

[46] *Id.* at 392, 70 A.2d at 164.

pendent classes or groups of stockholders with equal voting power had to be recognized.[47]

After the *Collins-Doan* decision, it was no longer a defense to a petition for dissolution that the ordinary business of the corporation was conducted without financial loss; rather, the test was whether there was "a paralysis of corporate function."[48] Still, the dichotomy of a dissolution under the statute or a dissolution under the common law dominion of equity remained.[49] Hence, even where statutory prerequisites were not fulfilled, it was held that a court of equity possessed implicit authority to dissolve a corporation because of dissension.[50]

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[47] *Id.* at 391–92, 70 A.2d at 164. Justice Heher's opinion is especially noteworthy for its scholarly historical study of the sovereign's power to dissolve corporations. *Id.* at 393–95, 70 A.2d at 165–66.

The concept of minority oppression, part of the foundation of the current N.J. STAT. ANN. § 14A:12-7, was not distinctly formulated by the supreme court in *Collins-Doan*. However, the court did foreshadow issues of modern corporate litigation:

> In the case at hand, there is a want of that *community of interest* essential to corporate operation. Dissolution will serve the *interests of the shareholders* as well as public policy. The interests of the shareholders are so discordant as to preclude efficient management for the *welfare of all*, not to mention the complete lack of direction in the corporate form. It would seem that this particular statutory provision for dissolution is but a declaration of a power existing at common law. And, if the statutory authority be deemed discretionary in essence, there is no ground for withholding its affirmative exercise here, for there is *no alternative corrective remedy*. Redress for the corporate omissions may be had only by dissolution. The dissension is such as to *defeat the end for which the corporation was organized*. The deadlock in the corporation's internal management is fatal to its existence.

3 N.J. at 396, 70 A.2d at 166 (emphasis supplied).

Justice Heher's underlying emphasis upon the lack of an "alternative corrective remedy" presaged the current version of N.J. STAT. ANN. § 14A:12-7. 3 N.J. at 396, 70 A.2d at 166.

[48] Post-Standard Co. v. Evening Journal Ass'n, 15 N.J. Super. 58, 67, 83 A.2d 38, 42 (Ch. Div. 1951). For a review of other decisions in the lengthy *Post-Standard–Evening Journal* litigation dealing with New Jersey corporate deadlock law, see Dear Publication & Radio, Inc. v. C.I.R., 274 F.2d 656 (3d Cir. 1960).

In Stark v. Reingold, 18 N.J. 251, 113 A.2d 679 (1955), Justice Jacobs offered a simple practical application of the statute: "[t]he relations between the Starks and the Reingolds have been too seriously breached to suggest future agreement and decent corporate operation." *Id.* at 266, 113 A.2d at 686–87.

[49] *See* Freidus v. Kaufman, 35 N.J. Super. 601, 612, 114 A.2d 751, 756–57 (Ch. Div. 1955), *aff'd*, 36 N.J. Super. 321, 115 A.2d 592 (App. Div. 1955).

[50] *Id.* Had the *Dorf* case arisen a few years later, it might have been decided under the more liberal interpretation of Equity's intrinsic power to dissolve.

As Justice Heher asserted in *Collins-Doan*, the theory of the deadlock statute as "but a declaration of a power existing at common law" raises an important issue. 3 N.J. at 396, 70 A.2d at 166. Where a corporation has twenty-six or more shareholders, and one or more shareholders invoking the provisions of N.J. STAT. ANN. § 14A:12-7 seek dissolution, must shareholders prove all of the prerequisites of subsections (1)(a) or (b) of the statute or will the equitable authority of the court suffice to grant relief? In their comment, the commissioners implied that the doctrine of dissension and minority oppression is not intrinsically limited to a corporation of

In 1969, the New Jersey Revised Statutes section 14:13-15 was altered as part of the state's general modernization of corporate law under the New Jersey Business Corporation Act.[51] Legislative change was effected in two significant ways. For the first time, an individual shareholder, rather than one-half of the board or one-half of the voting shares, was permitted to seek relief under the statute.[52] In addition, the requirement of an even number of directors was abandoned.[53] Yet, with the exception of these two modifications, the statute remained essentially traditional.[54]

THE 1974 AMENDMENT

Section 14A:12-7 of the New Jersey Statutes Annotated is the product of sweeping legislative revision.[55] It is an attempt to incorporate some of the better features of minority-relief statutes in other jurisdictions.[56] Whereas the 1938 statute tended to contract the in-

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twenty-five or fewer shareholders as provided by N.J. STAT. ANN. § 14A:12-7(1)(c) (West Cum. Supp. 1979-1980). "This new ground for action is limited to closely-held corporations because of the greater danger of 'strike suits' in the case of larger, publicly-held corporations . . . . Moreover, under some of the circumstances enumerated in paragraph 14A:12-7(1)(c), our courts of equity, independent of statutory authority, may . . . cause the dissolution of a corporation." *Comment*, N.J. STAT. ANN. § 14A:12-7 (West Cum. Supp. 1979-1980). Surely the inherent jurisdiction of equity is not to be restricted or denied in the appropriate case. *See* Afterman, *Statutory Protection for Oppressed Minority Shareholders: A Model for Reform*, 55 VA. L. REV. 1043, 1067 (1969); *but see* Exadaktilos v. Cinnaminson Realty Co., 167 N.J. Super. at 152, 400 A.2d at 560. Jurisdictions are divided with respect to whether there is an implied equitable power to dissolve a corporation absent statutory authority. Israels, *supra* note 1, at 787–88.

[51] N.J. STAT. ANN. § 14A:1-1 to 16-4 (West 1969).

[52] *Id.* § 14A:12-7.

[53] *Comment*, N.J. STAT. ANN. § 14A:12-7 (West 1969). It was recognized that there may be as serious a deadlock with an odd number of directors as there may be with an even number. *Id.*

[54] *See generally* Comment, *Oppression as a Statutory Ground for Corporate Dissolution*, 1965 DUKE L.J. 128 (1965).

[55] To the extent that *Stark v. Reingold*, In re *Collins-Doan Co.*, and *Freidus v. Kaufman* established the integral power of a court of equity to dissolve a corporation where dissension seriously threatens stockholders' relationships, the statute does not introduce a new legal concept. However, "[t]he 'oppressed shareholder' is a litigant newly created by Legislative amendment to the New Jersey Corporation Act." Exadaktilos v. Cinnaminson Realty Co., Inc., 167 N.J. Super. at 144, 400 A.2d at 556. N.J. STAT. ANN. § 14A:12-7(1) (West Cum. Supp. 1979-1980) provides for appointment of a custodian, appointment of a provisional director, sale of stock, or dissolution of the corporation, upon proof that:

> (c) in the case of a corporation having 25 or less shareholders, the directors or those in control have acted fraudulently or illegally, mismanaged the corporation, or abused their authority as officers or directors or have acted oppressively or unfairly toward one or more minority shareholders in their capacities as shareholders, directors, officers or employees.

[56] *Comment*, N.J. STAT. ANN. § 14A:12-7 (West Cum. Supp. 1979-1980). Section 14A:12-7(1)(c) is patterned upon the Model Act and upon the California, Minnesota, and South Carolina acts. *Id.*

herent equitable powers of the court, the 1974 enactment clearly signals a trend toward liberalization.[57] It enlarges the grounds upon which an action may be commenced and seeks to provide an array of remedies.[58]

The amendment touches three concerns. The corporation's inability to function in the best interests of its shareholders is no longer a condition precedent to invocation of the statute.[59] Where the corporation is closely held, a minority's proof of oppressive behavior by those in control constitutes a cause of action.[60] Finally, in addition to dissolution, three alternative forms of relief are available: appointment of a provisional director,[61] appointment of a custodian,[62] and a judicially-ordered sale of stock.[63] The new statute gives the court, as well as the parties, some middle ground between the Hobson's choice of deadlock or dissolution.

Assume that minority shareholders (or shareholder) claim that the majority is acting oppressively, for which relief is sought under the statute.[64] The court may appoint a provisional director[65] and probably will do so where the Board of Directors is evenly divided. Where day-to-day operations of the company are proceeding despite disagreement, a representative may still be appointed in order to ensure an honest majority, protect the minority, and provide the court

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[57] It has been noted that courts may consider a liberal dissolution policy as a frame of reference when dealing with other corporate problems, such as disputes over shareholders' agreements or by-law provisions. Chayes, *Madame Wagner and the Close Corporation*, 73 HARV. L. REV. 1532, 1547–48 (1960). In other areas of the law, liberal dissolution standards have had an indirect effect on the resolution of the controversy in question, as demonstrated in Borodinsky v. Borodinsky, 162 N.J. Super. at 442, 393 A.2d at 586 (divorce).

[58] N.J. STAT. ANN. § 14A:12-7(1)(c) (West Cum. Supp. 1979-1980).

[59] *Comment*, N.J. STAT. ANN. § 14A:12-7 (West Cum. Supp. 1979-1980). The court may, in its discretion, consider such factors, but cannot deny dissolution solely on the basis of profitable corporate operations. N.J. STAT. ANN. § 14A:12-7(9) (West Cum. Supp. 1979-1980).

[60] N.J. STAT. ANN. § 14A:12-7(1)(c) (West Cum. Supp. 1979-1980).

[61] *Id.* § 14A:12-7(1)(3).

[62] *Id.* § 14A:12-7(1)(4).

[63] *Id.* § 14A:12-7(1)(8).

[64] The statute prohibits oppression of minority shareholders not only in their stockholding capacity but also in their capacities as directors, officers, or employees. N.J. STAT. ANN. § 14A:12-7(1)(c) (West Cum. Supp. 1979-1980). "In this regard New Jersey is almost unique because most oppression provisions limit the examination to the effect of corporate conduct on a minority shareholder in his guise of shareholder and no more." Exadaktilos v. Cinnaminson Realty Co., Inc., 167 N.J. Super. at 153, 400 A.2d at 560. This part of the New Jersey provision was borrowed from South Carolina's statute, S.C. CODE § 12-22.15(a)(4). The idea is that in a closely held corporation, oppressive behavior is often expressed through a freeze-out of a minority shareholder by terminating his office, reducing his salary, or diminishing his authority. *Comment*, N.J. STAT. ANN. § 14A:12-7 (West Cum. Supp. 1979-1980).

[65] N.J. STAT. ANN. § 14A:12-7(3) (West Cum. Supp. 1979-1980). The appointment is to be made "in the best interests of the corporation and its shareholders." *Id.*

with a closer connection to the company, the parties, and their interpersonal relationships.[66] If it is impossible for the business to function due to strained relationships among the parties or lack of leadership, a custodian may be appointed, endowed with all the powers of the corporation's board of directors and officers.[67] Both the provisional director and the custodian may submit to the court, if so instructed, periodic recommendations for "appropriate disposition of the action."[68]

Once the plaintiff commences an action and invokes section 14A:12-7 of the New Jersey Statutes Annotated, either the corporation or the holder or holders of 50% or more of the outstanding voting shares may petition the court for an order directing the plaintiff to sell all of his shares in the corporation.[69] The court, in its discretion, may deny the motion.[70] If the application is granted, the issue is narrowed to a determination of the fair value of plaintiff's shares.[71] This finding may be assuaged through equitable adjustments; the court may allow interest from a fixed date, or, if convinced that the majority has acted unfairly toward the minority, award the selling shareholder reasonable fees and expenses of counsel and experts.[72] As prescribed by statute, the purchase price must be paid in cash within

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[66] *See id.*

[67] N.J. STAT. ANN. § 14A:12-7(4) (West Cum. Supp. 1979-1980). Similarly, a provisional director obtains all rights possessed by a duly elected director of the corporate body. N.J. STAT. ANN. § 14A:12-7(3) (West Cum. Supp. 1979-1980).

[68] N.J. STAT. ANN. § 14A:12-7(6) (West Cum. Supp. 1979-1980). The provisional director or custodian can, as a practical matter, serve as a referee of minor disputes. A good provisional director, like a marriage counselor, may even aid the parties to reach a settlement. *See id.*

[69] N.J. STAT. ANN. § 14A:12-7(8) (West Cum. Supp. 1979-1980). In this way, the statute balances the right of the litigants. The minority is given an opportunity for judicial attention in spite of the fact that it lacks "votes"; the majority may be able to excise the minority through implementation of the buyout provision. N.J. STAT. ANN. § 14A:12-7(8) (West Cum. Supp. 1979-1980). The fact that the majority can buy out the plaintiff will cause a complaining shareholder to contemplate carefully a potential suit to compel dissolution. A majority shareholder, aware that it may be required to purchase plaintiff's stock at high cost or risk dissolution, may be deterred from engaging in oppressive conduct.

New Jersey's buyout provision is less flexible than South Carolina's. *See* S.C. CODE ANN. § 33-21-230(a)(4) (1977). That state permits the court to order the purchase of shares of any shareholder, at fair value, by the corporation or by any other shareholder or shareholders. *Id.* Under the New Jersey statute, a buyout may be judicially ordered only if the corporation or shareholders holding at least 50% of the shares apply for such relief. N.J. STAT. ANN. § 14A:12-7(8) (West Cum. Supp. 1979-1980). Further, it would appear from the language of N.J. STAT. ANN. § 14A:12-7(8) that only a plaintiff or plaintiffs may be forced to sell out. *See* Kessler, *The New Jersey Business Corporation Act: Some Effects of the 1974 Amendments on Close Corporations*, 28 RUTGERS L. REV. 96 (1974).

[70] N.J. STAT. ANN. § 14A:12-7(8) (West Cum. Supp. 1979-1980).

[71] *Id.* § 14A:12-7(8)(a).

[72] *Id.* § 14A:12-7(8)(d).

thirty days after the determination of fair value.[73] If the court believes that any party has acted arbitrarily, vexatiously, or in bad faith, it may award reasonable expenses, including counsel fees, to the injured litigant.[74]

ABUSE OF THE STATUTE

Although the very term "oppressed minority" generates sympathy, it is sometimes difficult to distinguish the oppressed from the oppressor.[75] Consider again the three entrepreneurs—Cash, Sales, and Insider. Initially, each works avidly in the corporate interest and the business achieves success. With the passage of time, however, Cash and Sales grow wary that Insider has become negligent in performing his tasks. Insider maintains he can properly execute his duties working fewer hours. Cash and Sales commence management of Insider's job as well as their own, for Insider's failure to attend to his responsibilities has caused the company economic harm. Cash and Sales wish to purchase Insider's shares, but the latter demands an exorbitant price.

Adhering to the requirements of law, certificate of incorporation, and company by-laws, Cash and Sales give notice of a formal combined shareholders' and directors' meeting. The majority, as directors, adopt a resolution to terminate Insider's employment with the corporation. As shareholders, the majority holds an annual meeting at which Insider is not re-elected to the board of directors.

Insider brings suit under section 14A:12-7 of the New Jersey Statutes Annotated and applies for interlocutory relief. His affidavit accu-

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[73] *Id.* § 14A:12-7(8)(e). This section detracts from the discretionary powers of the court in that it does not permit the court to arrange terms of purchase at a fair return to plaintiff and within the purchaser's capabilities. *See generally*, Kessler, *supra* note 69, at 106–09, where the author discusses the statute's shortcomings. Where the tribunal is sympathetic to plaintiff and wishes to accord relief, but defendants are unable or unwilling to meet terms of payment, or elect to "stonewall" against the plaintiff, the court should be unfettered in its power to require an appropriate buyout. *See* Jackson v. Nicolai-Neppach Co., 219 Or. at 587, 348 P.2d at 22 (buyout, not dissolution, as proper solution of deadlock).

[74] N.J. STAT. ANN. § 14A:12-7(10) (West Cum. Supp. 1979-1980).

[75] The impression a litigant makes can be a substantial factor when the court must determine who is oppressing whom. While the superior ability of the trial judge to observe witnesses is stressed by appellate courts in all types of cases, the importance of demeanor is especially true in intra-corporate disputes. A defendant's "imperious attitude" when questioned about his salary will certainly provide no aid to his cause. Compton v. Paul K. Harding Realty Co., 6 Ill. App. 3d 488, 495, 285 N.E.2d 574, 581 (Ill. App. 1972). A majority shareholder's dilatory response to minority requests can influence the decision of the court. *Id.* The flagrant breach of a fiduciary duty may also be a marked consideration. Callier v. Callier, 61 Ill. App. 3d 1011, 1015, 378 N.E.2d 405, 409 (Ill. App. 1978).

rately reveals that Cash and Sales have united against him. Although counsel for the majority files answering papers, the court will likely be more solicitous of Insider at this preliminary stage of the litigation. As a result of initial relief granted Insider, Cash and Sales are forced to perform his functions while paying him a full or partial salary. In addition, the substantial time and energy they must devote to litigation is detrimental to business. Pending final determination, the company may also be obligated to pay a provisional director appointed by the court.[76]

Counsel probably will advise the majority that Insider's stock may be purchased pursuant to statute.[77] However, if neither Cash, Sales, nor the corporation has access to the requisite funds,[78] this suggestion offers little comfort. It has been asserted, therefore, that "[m]inority shareholders may use the threat of dissolution to force the majority to accede to their demands or . . . to pay sizeable sums in 'settlement' . . . ."[79]

A different set of facts may alter one's perspective of the statute. Assume that Insider has been cast out of the corporation due to his partners' greed, or due to his own genuine fear that current corporate policy is harmful to the interests of the business. In such instances, Insider's recourse furnished by the statute may be viewed in a more positive light.

Abuse is inherent in any legislation, particularly where remedial in nature. Hopefully, a proper and just resolution is fashioned at trial. The Corporation Law Revision Commission espoused this belief by indicating that remedies under Section 14A:12-7 of the New Jersey Statutes Annotated are discretionary.[80]

WHAT CONSTITUTES MINORITY OPPRESSION

Courts have struggled to formulate a clear conception of minority oppression. The first case to define oppression in the corporate sense was an English decision, *Scottish Co-Operative Wholesale Society, Ltd. v. Meyer*.[81] The House of Lords posited that oppression may

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[76] N.J. STAT. ANN. § 14A:12-7(7) (West Cum. Supp. 1979-1980).

[77] *Id.* § 14A:12-7(8).

[78] *See id.* § 14A:12-7(8)(e).

[79] Comment, *Corporate Dissolution for Illegal, Oppressive or Fraudulent Acts: The Maryland Solution*, 28 MARYLAND L. REV. 360, 372 (1968).

[80] *Comment*, N.J. STAT. ANN. § 14A:12-7 (West Cum. Supp. 1979-1980). In its study of the English Companies Act and the potential for abuse, the Jenkins Committee's conclusions paralleled those of the New Jersey Commission. *See* Afterman, *supra* note 50, at 1068–69, n.104.

[81] [1958] 3 All E.R. 66 (H.L.).

assume various forms but is generally "a lack of probity and fair dealing in the affairs of the company to the prejudice of some portion of its members."[82] It has been ruled that oppression suggests conduct which is "burdensome, harsh, and wrongful;"[83] "arbitrary, overbearing and heavyhanded."[84] It is "a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely."[85] Oppression tends to be generated by the majority's continuing course of conduct;[86] a single action in breach of the fiduciary duty owed the minority may not always suffice.[87] Even persistent conduct

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[82] *Id.* at 86 (quoted with approval in White v. Perkins, 213 Va. 129, 134, 189 S.E.2d 315, 319–20 (1972)).

[83] [1958] 3 All E.R. at 71.

[84] Compton v. Paul K. Harding Realty Co., 6 Ill. App. 3d at 495, 285 N.E.2d at 581 (oppression includes failure of defendant to call meetings of board of directors or consult plaintiff with respect to management of corporate affairs).

[85] Elder v. Elder & Watson, Ltd., (1952) Sess. Cas. 49, 55 (quoted with approval in White v. Perkins, 213 Va. 129, 134, 189 S.E.2d 315, 319–20 (1972)). This case involved construction of the English Companies Act of 1948 which authorizes dissolution if company affairs are being carried out in a manner that is "oppressive to some part of the members." The English Companies Act of 1948, 11 & 12 Geo. 6, c. 38, § 210.

In another English decision, Re H.R. Harmer, Ltd., [1958] 3 All E.R. 689 (C.A.), the court concluded that oppression must be given an ordinary and practical interpretation. *Id.* at 698. Since the circumstances which give rise to oppression are so diverse, the term escapes precise definition. *Id.*

Oppression has been recognized in the following representative cases: Stumpf v. C.E. Stumpf & Sons, 47 Cal. App. 3d 230, 120 Cal. Rptr. 671 (Ct. App. 1975) (one of two hostile shareholder brothers receives no revenue from his investment in corporation); Gidwitz v. Lanzit Corrugated Box Co., 20 Ill. 2d 208, 170 N.E.2d 131 (1960) (plaintiff excluded from management); Scottish Co-operative Society, Ltd. v. Meyer, [1958] 3 All E.R. 66 (H.L.) (parent corporation, as majority shareholder, diverts to itself subsidiary's business); Re H.R. Harmer, Ltd., [1958] 3 All E.R. 689 (C.A.) (majority shareholder in family corporation manifests "overweening" desire for power).

[86] Central Standard Life Ins. Co. v. Davis, 10 Ill. 2d 566, 571, 141 N.E.2d 45, 50 (1957). *See* Gidwitz v. Lanzit Corrugated Box Co., 20 Ill. 2d 208, 170 N.E.2d 131 (1960). In *Gidwitz*, two families owned equal stock in a closely-held corporation, but there was evidence of continuing conduct of the president to control the corporation without majority stock support, so that members of the other family were deprived of rights and privileges. *Id.* at 216, 170 N.E.2d at 138. The supreme court of Illinois found that such behavior was oppressive and warranted dissolution. *Id.* at 220–21, 170 N.E.2d at 138.

In Central Standard Life Ins. Co. v. Davis, 10 Ill. 2d 566, 141 N.E.2d 45 (1957), the Supreme Court of Illinois defined oppression by stating what it is not: "[t]he word 'oppressive' does not carry an essential inference of imminent disaster . . . does not necessarily savor of fraud, and . . . [even] the absence of 'mismanagement' . . . does not prevent a finding that the conduct of the [directors] has been oppressive." *Id.* at 571, 141 N.E.2d at 50. *Accord,* Fix v. Fix, 538 S.W.2d 351, 358 (Mo. App. 1976) (oppression is independent ground of relief not requiring a showing of fraud, illegality or mismanagement although such factors are usually present).

[87] *See* note 85 *supra. Cf.* Baker v. Commercial Body Builders, Inc., 264 Or. 614, 507 P.2d 387 (1973) (where defendant prevented plaintiff from examining corporate records and failed to

must typically be accompanied by severe detriment to the interests of the minority, or proof that those in control cannot supervise impartially the concerns of all shareholders.[88]

Courts may distinguish between two kinds of hardship: personal and economic. The former is typified by cases where the minority shareholder is deprived of decision-making power or is voted out of office.[89] The latter is represented by cases where the majority operates a failing business and drains corporate assets at the expense of the minority.[90] In general, continuance of a corporation's existence absent prospective profit or other minority benefit constitutes oppression.[91]

It has also been reasoned, however, that an abstract formulation of oppressive conduct does not aid the application of law to facts in a specific case.[92] Rather, it may be preferable to focus upon the nature of shareholder expectations which preceded corporate dissension.[93] In *Wilkes v. Springside Nursing Home*,[94] for example, each

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notify plaintiff of meetings, such conduct was oppressive but did not warrant dissolution where behavior stopped after one year).

[88] Leibert v. Clapp, 13 N.Y.2d 313, 315, 247 N.Y.S.2d 102, 104 (1963); J. TINGLE, THE STOCKHOLDER'S REMEDY OF CORPORATE DISSOLUTION 42–43 (1959).

The minority bears a burden of proof that fairness compels dissolution. Stumpf v. C.E. Stumpf & Sons, Inc., 47 Cal. App. 3d at 235, 120 Cal. Rptr. at 674. Even where the dominant of two equal shareholders seeks dissolution, he must show more than refusal to cooperate and refusal to reach terms acceptable to the other shareholder for redemption of shares. *See* Callier v. Callier, 61 Ill. App. 3d at 1015, 378 N.E.2d at 408.

[89] *See, e.g.*, Wilkes v. Springside Nursing Home, Inc., 76 Mass. Adv. Sh. 2053, 353 N.E. 2d 657 (Sup. Jud. Ct. 1976) (plaintiff's severence from payroll caused not by neglect of duties but by personal desire of majority shareholders).

[90] Leibert v. Clapp, 13 N.Y.2d at 315, 247 N.Y.S.2d at 104 (complaint that directors looting corporate assets at expense of minority stockholders).

[91] *Id.*; Kruger v. Gerth, 16 N.Y. 802, 803, 263 N.Y.S.2d 1, 3 (1965). *But see* Central Standard Life Ins. Co. v. Davis, 10 Ill. 2d at 572, 141 N.E.2d at 51 (plaintiff has no cause of action for dissolution based upon solvent, though not profitable, venture).

[92] Baker v. Commercial Body Builders, Inc., 264 Or. at 628, 507 P.2d at 394. The Supreme Court of Oregon preferred to define oppression through an illustration. Where one group of shareholders uses its position in a corporation for private gain at the expense of another group of shareholders, the court would deem oppression to exist. *Id.* at 629, 507 P.2d at 394. Thus, a case is made out where the majority siphons off profits to itself through excessive salaries or bonus payments. *Id.* However, a minority's mere apprehension of future misconduct is insufficient grounds for dissolution. *Id.* at 630, 507 P.2d at 394. Similarly, a minority's desire to extricate itself from a poor investment will not necessitate dissolution of the corporation. *Id.*

[93] *See* Comment, *Oppression as a Statutory Ground for Corporate Dissolution*, 1965 DUKE L.J. 128 (1965). "The logical point of departure for determining what those rights [of a minority shareholder] are would seem to be the shareholder's reasonable expectations, which will differ depending upon the nature of the corporation and other circumstances." *Id.* at 141. Whereas one shareholder may expect to participate in management, another may merely hope the corporation will be run honestly, for the benefit of all. *Id.* Continual frustration of such anticipated goals may give rise to oppression. *Id. See generally* Afterman, *supra* note 50.

[94] 76 Mass. Adv. Sh. 2053, 353 N.E.2d 657 (Sup. Jud. Ct. 1976).

shareholder had anticipated a position as director with active involvement in management of corporate affairs.[95] Therefore, when the majority terminated plaintiff's employment and severed his positions as director and officer, it effectively frustrated his very purpose in entering the original venture.[96]

In *Exadaktilos v. Cinnaminson Realty Co.*,[97] the first New Jersey decision to interpret the revised statute,[98] Judge Haines distinguished large corporations from closely-held ones in terms of the shareholder expectation that each engenders.[99] The judge reasoned that the type of personal stockholder relationships peculiar to a closely-held corpo-

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[95] *Id.* at 2056, 353 N.E.2d at 559–60.

[96] *Id.* at 2060, 353 N.E.2d at 664–65. *See* Central Standard Life Ins. Co. v. Davis, 10 Ill. 2d at 577, 141 N.E.2d at 51 (plaintiff's recent acquisition of shares indicated view to speculation).

[97] 167 N.J. Super. 141, 400 A.2d 554 (Law Div. 1979).

[98] *Id.* at 150, 400 A.2d at 559.

The plaintiff in this case was the owner of a 20% interest in a corporation which owned and operated a restaurant. *Id.* at 144, 150, 400 A.2d at 556, 559. There was evidence that his employment with the defendant corporation was to lead eventually to a management position. *Id.* at 155, 400 A.2d at 561. However, the plaintiff failed to cooperate with other personnel and left the job, without giving notice, on more than one occasion. *Id.* The court found that plaintiff's subsequent discharge from such employment was caused by his inadequate performance and did not constitute oppression by the controlling shareholders. *Id.* at 155, 156, 400 A.2d at 561, 562.

The court remarked that although statutory provisions exist in many jurisdictions, few cases actually discuss the theory of oppression. *Id.* at 150, 400 A.2d at 559. Judge Haines, in an attempt to set forth his own concept of the term, contemplated the definitions offered by other jurisdictions. *Id.* at 150–52, 400 A.2d at 559–60; *see* Baker v. Commercial Body Builders, Inc., 264 Or. at 628–31, 507 P.2d at 393; White v. Perkins, 213 Va. at 134, 189 S.E.2d at 319–20; Gidwitz v. Lanzit Corrugated Box Co., 20 Ill. 2d at 214–15, 170 N.E.2d at 135; Central Standard Life Ins. Co. v. Davis, 10 Ill. 2d at 573–74, 141 N.E.2d at 50; Scottish Co-op Wholesale Soc'y, Ltd. v. Meyer [1958] 3 All E.R. at 86 (H.L.); Elder v. Elder & Watson, Ltd., [1952] Sess. Cas. at 55.

In regard to interpretation of New Jersey provisions, the court suggested as follows:

> While the terminology employed by both the statute and case law certainly provides the court with the latitude necessary to deal with all the circumstances peculiar to any case brought to its attention, it fails to suggest any perspective from which to judge what is oppressive or unfair. Such perspective can be attained through a reading of the statute as a whole and of comments pertaining to it and similar enactments.

167 N.J. Super. at 152, 400 A.2d at 560.

Judge Haines reasoned that the statute was advanced to protect the shareholder from a "freeze out" situation. *Id.* Since such a problem does not generally arise in a large corporation where shareholders can sell their stock, the statutory remedy was limited to plaintiffs in corporations with less than twenty-five shareholders. *Id.*; N.J. STAT. ANN. § 14A:12-7(1)(c) (West Cum. Supp. 1979–1980). A freeze out is defined as "a manipulative use of corporate control . . . to eliminate minority shareholders from the enterprise, or to reduce to relative insignificance their voting power or . . . earnings . . . or advantages." 2 O'NEAL, CLOSE CORPORATIONS § 8.07 at 43 (2d ed. 1971).

[99] 167 N.J. Super. at 153–54, 400 A.2d at 560–61.

ration prevented judicial conjecture of a fixed set of expectations common to all such minority shareholders.[100] However, inquiry into the nature of shareholder expectation was deemed crucial to a determination of the presence of minority oppression:

> These expectations preclude the drawing of any conclusions about the impact of a particular course of corporate conduct on a shareholder without taking into consideration the role that he is expected to play. Accordingly, a court must determine initially the understanding of the parties in this regard. Armed with this information, the court can then decide whether the controlling shareholders have acted in a fashion that is contrary to this understanding or in the language of the statute, "have acted oppressively . . . toward one or more minority shareholders."[101]

In the final analysis, it is evident that there is no fixed standard which, when met, signifies minority oppression.[102] The ultimate question, perhaps, is whether majority behavior is sufficiently improper to constitute a breach of "commercial morality."[103]

REMEDIES

Courts are hesitant to order dissolution, even where express statutory authorization exists for such relief.[104] One reason is the

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[100] *Id.* at 154, 400 A.2d at 561. *See* Note, *Relief to Oppressed Minorities in Close Corporations: Partnership Precepts and Related Considerations*, 1974 ARIZ. ST. L.J. 409, 411–13 (1974). In close corporations, shareholder expectation may include employment accompanied by payment or participation in management. 167 N.J. Super. at 154, 400 A.2d at 561.

The court believed that the intent of N.J. STAT. ANN. § 14A:12-7 was to outlaw freeze out strategems in close corporations. 167 N.J. Super. at 154, 400 A.2d at 561. Such maneuvers were deemed to be an "abuse of corporate power" outside the protection of the business judgment rule. *See id.* Moreover, the court advised that "[t]o implement the intent of the Legislature, a method must be developed whereby it can be decided when a particular course of corporate conduct has resulted in the oppression of a minority shareholder." *Id.*

[101] 167 N.J. Super. at 154–55, 400 A.2d at 561. The court concluded that termination of plaintiff's employment in the instant case did not constitute oppression. *Id.* at 156, 400 A.2d at 561–62. The plaintiff's expectation that he would eventually participate in management was undermined by his own unsatisfactory work record rather than by unfair tactics of majority shareholders. *Id.* at 156, 400 A.2d at 562.

[102] *See* Comment, *Oppression as a Statutory Ground for Corporate Dissolution*, 1965 DUKE L.J. 128, 134 (1965), where it is posited that to define "oppression" is not unlike the difficulty courts face in attempting to explain "fiduciary duty" or the meaning of "unfair."

[103] *See* Adolph Gottscho, Inc. v. American Marking Corp., 18 N.J. 467, 475 (1955); Sun Dial Corp. v. Rideout, 16 N.J. 252, 108 A.2d 442 (1954). Although these are trade secret cases, they are not without relevance to a discussion of abuse of corporate power. The court in *Sun Dial* noted that there have been marked changes in the attitude of the law toward the need for commercial morality. 16 N.J. at 261, 108 A.2d at 447.

[104] *See generally* Folk, *Corporation Statutes: 1959–1966*, 1966 DUKE L.J. 875, 952 (1966).

awareness that a business entity can often be revived if the deadlock breaks.[105] Another consideration is that it may be inequitable to compel dissolution where the company is one which trades on its good will or deals in services, and would bring negligible value upon liquidation.[106] Alternatively, it may be feared that a decree of dissolution would result in the minority oppressing the majority.[107] In measuring appropriate relief, the court will weigh as factors whether both parties possess sufficient funds to ensure competitive bidding;[108] whether lack of managerial skill needed to continue the business will preclude one of the parties from bidding;[109] whether dissolution will benefit all of the shareholders;[110] and whether it will adversely affect innocent employees.[111] Even where oppression is clearly proven, remedies short of dissolution may be preferred.[112] The court in

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[105] *See* Jackson v. Nicolai-Neppach Co., 219 Or. at 587, 348 P.2d at 15 (in denying relief to plaintiff, court expressed its hope that differences between parties might be harmonized); *cf.* RKO Theatres v. Trenton-New Bruns. Theatres Co., 9 N.J. Super. 401, 410, 74 A.2d 914, 918 (Ch. Div. 1950) ("[h]ope never deserts, but unless some harmonious solution is effectively formulated within fifteen days . . . a judgment . . . for the dissolution of the corporation will be entered.").

[106] *See* Afterman, *supra* note 50, at 1068. For a discussion of factors which may justify the loss of value rendered by liquidation, see Comment, *Oppression as a Statutory Ground for Corporate Dissolution*, 1965 DUKE L.J. 128, 140 (1965).

[107] Polikoff v. Dole & Clark Bldg. Corp., 37 Ill. App. 2d 29, 36, 184 N.E.2d 792, 795 (Ill. App. 1962) (overbroad application of statute would result in evil of oppression of majority by minority); Baker v. Commercial Body Builders, Inc., 264 Or. 630, 507 P.2d at 393 (remedy of forced dissolution may be equally oppressive to majority stockholders).

[108] *See* Kessler, *supra* note 69, at 109. If the defendants are in a strong financial position, they may consent to dissolution in order to buy out the plaintiffs at a distressed price. *Id. See* Wollman v. Littman, 35 A.D.2d 935, 935, 316 N.Y.S.2d 526, 527 (App. Div. 1970) (court denied dissolution where plaintiffs were the only interested purchasers financially strong enough to take advantage of the situation).

[109] *See* Chayes, *supra* note 57, at 1547. The author discusses In the Matter of Radom & Neidoriff, Inc., 307 N.Y. 1, 119 N.E.2d 563 (1954). This case involved two sole and equal shareholders in a music-printing and lithography company. Chayes, *supra* note 57, at 1547. Mrs. Neidorff assumed her husband's shares upon his death. *Id.* Chayes commented that in a forced dissolution, Mrs. Neidorff would have obtained one-half the liquidating value of the corporate assets, whereas Radom would have had control of the business because he had the necessary skill and associations to continue. *Id.* "[T]he law is clear-cut that a majority shareholder will not be permitted to siphon off going-concern value by exercising his power to bring about voluntary dissolution of the company." *Id.* (footnote omitted).

[110] Jackson v. Nicolai-Neppach Co., 219 Or. at 582, 348 P.2d at 19 (actual benefit to stockholders is factor which may properly be considered in determining whether dissolution is to be granted).

[111] *Id.* at 586, 348 P.2d at 22 (where plant employs sixty-five persons there is a public interest in preserving it as a going concern). *See generally* Comment, *Corporate Dissolution for Illegal, Oppressive or Fraudulent Acts: The Maryland Solution*, 28 MARYLAND L. REV. 360, 372 (1968).

[112] *See generally* Re H.R. Harmer, [1958] 3 All 689 (C.A.).

Baker v. Commercial Body Builders, Inc.,[113] listed several alternatives to dissolution: an injunction against the oppressive conduct; an order reducing excessive salaries or bonuses; an order of affirmative relief, such as the declaration of a dividend; and an award of damages.[114]

CONCLUSION

The 1974 amendment to section 14A:12-7 of the New Jersey Statutes Annotated is a product of total legislative revision. The measure offers expansive guidelines to both the practitioner and the court. It is a statement of policy which provides the basis from which innovative petitions may be drawn and imaginative relief to corporate divorce may be granted. Simply, the statute empowers the chancery division to fulfill its traditional role in New Jersey, to fashion remedies which accommodate an ever-changing province of social relationships.

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[113] 264 Or. 614, 507 P.2d 387 (1973).

[114] *Id.* at 632–33, 507 P.2d at 395–96. Damages were sought and awarded in Wilkes v. Springside Nursing Home, 76 Mass. Adv. Sh. 2053, 353 N.E.2d 657 (Sup. Jud. Ct. 1976).