CORPORATIONS EVENLY DIVIDED: JUDICIAL REMEDIES FOR EQUAL SHAREHOLDERS

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Controversies between and among shareholders in closely held corporations are currently decided in New Jersey under section 14A:12-7 of the New Jersey Statutes.[1] These disputes generally fall into two categories: minority oppression cases, in which a majority is able to flex its corporate muscle allegedly to the detriment of the minority,[2] and deadlock situations, in which two factions or two shareholders are evenly divided and oppose each other. In both types of cases, for reasons running the gamut from differences over business policy to incompatible personalities, the shareholder "family" is unable to live in the same corporate "house."

I. DEADLOCK AND MINORITY OPPRESSION DISTINGUISHED

New Jersey Statutes Annotated section 14A:12-7 deals reasonably well with cases of minority oppression where there is a clear majority and a distinct minority. These cases often involve one or both of the following fact patterns: (1) a minority shareholder be-

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[1] N.J. STAT. ANN. § 14A:12-7 (West Supp. 1992). This statute, substantially in its present form, was enacted as L.1973, c.366, § 67. It became part of New Jersey corporate law as a result of the Final Report of the Corporation Law Revision Commission (1972), which included a proposal to amend N.J. STAT. ANN. § 14A:12-7, part of The New Jersey Business Corporation Act, N.J. STAT. ANN. § 14A:1-1 *et seq.* (1969), to incorporate the concept of minority oppression. The amendment became effective May 1, 1974. Prior thereto, N.J. STAT. ANN. § 14A:12-7 was substantially similar to N.J. REV. STAT. § 14:13-15 (1938) which dealt essentially with deadlock. Deadlock is the inability of a corporation to function because of an equal division of directors and an equal division of voting shares. N.J. STAT. ANN. § 14A:12-7 was again amended by L.1988, c.94, effective December 1, 1988, which effected two changes more fully described *infra* at note 6. There are, of course, controversies between and among shareholders in which N.J. STAT. ANN. § 14A:12-7 is not involved. See Gershaw v. Ther-A-Pedic Sleep Prods. Inc., 218 N.J. Super. 350 (App. Div. 1987). Similar, although not identical, statutes exist in other jurisdictions.

[2] "Minority shareholder" is defined flexibly. One may own more than 50% of the corporation but nonetheless be a minority shareholder for purposes of N.J. STAT. ANN. § 14A:12-7(1)(c) if the shareholder does not have voting control. *See* Berger v. Berger, 249 N.J. Super. 305, 592 A.2d 321 (Ch. Div. 1991).

lieves he or she is being treated unfairly or "unequally" and has become a corporate pariah; (2) the majority perceives a minority shareholder as not pulling his or her weight or the majority senses that it has "outgrown" the minority and thus no longer sees the need to continue to share the profits of the business with the minority. In either situation, when the minority seeks relief under New Jersey Statutes Annotated section 14A:12-7, the majority will likely move to buy out the minority pursuant to New Jersey Statutes Annotated section 14A:12-7(8).[3] If the motion is granted, the court determines the fair value of the minority's shares and, depending upon one's point of view, the corporate wound is either healed or excised. When the majority is running the corporation, and the minority "wants out" with the value of its investment, the mechanisms offered by the statute can generally accommodate the parties.[4]

Where there is deadlock,[5] however, and each of two equal shareholders or factions wish to be the buyer[6] and neither wishes to be the seller, the statute does not offer a ready solution. Consider the following hypothetical.

Ilene Inventor has an idea for a new product, but doesn't have the expertise to get it to market. Mark Marketeer, recently the vic-

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[3] Whether because of economics (the minority must necessarily come up with more consideration than the majority to buy out the shares of the other), political realities of the situation within the corporation, pressure asserted by the court, or the realization by counsel or the litigants that the parties must be "divorced" in one way or another, minority oppression cases are often resolved by a buy-out. *See* Harry J. Haynsworth, *The Effectiveness of Involuntary Dissolution Suits as a Remedy For Close Corporation Dissension*, 35 CLEV. ST. L. REV. 25, 53 (1987). For additional supporting statistics, see J.A.C. Hetherington & Michael P. Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 VA. L. REV. 1, 33 (1977).

[4] Haynsworth, *supra* note 3, at 53; Hetherington & Dooley, *supra* note 3, at 33.

[5] One of the definitions of deadlock is a state of inaction or neutralization caused by the opposition of persons or factions. Hendley v. Lee, 676 F. Supp. 1317, 1323 (D.S.C. 1987) (citing Callier v. Callier, 378 N.E.2d 405, 408 (Ill. 1978)). The court in *Hendley* acknowledged that there was little testimony concerning the inability of the corporation to function, but recognized this is what would probably have occurred had the court not intervened. *Id.* It was clear that the mutual dislike of the parties had divided the management of the corporation. *Id.*

[6] Prior to L.1988, c.94, which amended N.J. STAT. ANN. § 14A:12-7, effective December 1, 1988, only the plaintiff could be forced to sell his or her shares. Gershaw v. Ther-A-Pedic Sleep Prods. Inc., 218 N.J. Super 350, 356, 527 A.2d 923, 926 (App. Div. 1987). The amendment now permits any party to the action to move to buy out any other party. Bostock v. High Tech Elevator Indus., Inc., 260 N.J. Super. 432, 445, 616 A.2d 1314, 1321 (App. Div. 1992). The other change to N.J. STAT. ANN. § 14A:12-7 effected by L.1988, c.94 is that whereas formerly the buy-out had to be in cash, now the court may determine the method of payment of the purchase price. The statute states that a cash price is preferable and terms should be determined only if an all cash payment is "not practicable." N.J. STAT. ANN. § 14A:12-7(8)(e).

tim of downsizing at a major corporation, steps into the picture. Ilene's idea and production knowledge and Mark's business experience and marketing skills seem a perfect match. A lawyer fills in some blanks in a form certificate of incorporation, names Ilene and Mark as the corporation's two directors, and files the certificate with the Secretary of State thereby creating Ilemark, Inc. The lawyer draws two stock certificates, one for Ilene and one for Mark, each for 100 shares. The lawyer neglects to provide Ilemark, Inc., with by-laws, does not suggest the need for a shareholders' agreement, and fails to discuss the potential pitfalls of corporate marriage.[7]

Eighteen months later, Ilene is producing, Mark is selling, Ilemark, Inc., is beginning to be profitable, and Ilene and Mark cannot stand each other. Ilene does not think Mark is doing enough to increase sales; Mark does not think Ilene is doing enough to improve the product. Each suspects everything the other does, and neither respects anything the other does. Each acts as he or she thinks best for the corporation, and each disagrees with what the other is doing.

The controversy might be resolved amicably by a division of the business, a buy-out by one shareholder (or the corporation) of the other, or if the two shareholders were able to agree to an independent board of directors. If the parties cannot come to an amicable resolution, the unhappy shareholder may elect to subordinate his or her views and desires to the acts and practices of the other. The unhappy shareholder could also walk out, leaving the daily activity of the business but continuing to own the shares as an asset over which he or she has no practical control and as to which there will be no current return. If these choices are unpalatable, the unhappy shareholder must press for the ultimate remedy: dissolution.[8]

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[7] "Where the stock of a corporation is divided into two equal parts, human nature being what it is, it is necessary and advisable for the parties to anticipate the possibility of a deadlock." *In re* Evening Journal Ass'n, 7 N.J. Super. 360, 375, 71 A.2d 158, 167 (Ch. Div. 1950). In that case the two equal shareholders had adopted by-laws peculiarly adapted to their circumstances and designed to facilitate the corporation's business conduct in the event of disagreement. *Id.*

[8] F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S CLOSE CORPORATIONS § 9.03, at 10 (3d ed. 1988).

Although dissolution is the ultimate remedy expressly provided by the statute, the appellate division recently instructed:

> [W]hen a cause of action has been established under the Oppressed Minority Shareholder Statute, and when the remedies provided for in that statute fail to afford the *injured party* with adequate relief, a court of equity undoubtedly has the authority and flexibility to fashion a remedy,

Ilene and Mark have reached stalemate. In corporate law terms they are deadlocked.[9] Each consults counsel, not to get out of the corporation, but to get the other out. Counsel will look to New Jersey Statutes Annotated section 14A:12-7(1)(b) as an avenue through which to seek relief.[10]

New Jersey Statutes Annotated section 14A:12-7 authorizes a court to grant four express forms of relief: (i) appointment of a provisional director, (ii) appointment of a custodian, (iii) an order directing a buy-out on the motion of a party, and (iv) dissolution of the corporation.[11] The first two forms of relief are merely interim measures. A provisional director or a custodian may help guide

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> which may include monetary damages, in order to ameliorate the *wrong*. This result obtains not from the express terms of the statute, but from the long established principle that equity will not suffer a *wrong* without a remedy.

Walensky v. Jonathan Royce Int'l., 264 N.J. Super. 276, 279, 824 A.2d 613, 615 (App. Div. 1993) (emphasis added); *see also* Brenner v. Berkowitz, 261 N.J. Super. 63, 617 A.2d 1225 (App. Div. 1992), *certif. granted*, 133 N.J. 435, 627 A.2d 1141 (1993). Note the underscored words "injured party" and "wrong." In *Walensky*, "a legal right was clearly infringed" and plaintiffs demonstrated "oppressive" conduct by defendants. *Walensky*, 264 N.J. Super. at 282, 624 A.2d at 617. In the hypothetical there is neither an injured party nor a wrong; the two shareholders are simply incompatible business partners.

9 Stalemate or deadlock is also possible in corporations that have adopted high or unanimous vote requirements. *See* N.J. STAT. ANN. §§ 14A:5-12(1), 14A:6-7.1(4). *See* Haynsworth, *supra* note 3, at 34-35 (1987).

10 Eventually the requirements of N.J. STAT. ANN. § 14A:12-7(1)(a) will also probably be met. N.J. STAT. ANN. § 14A:12-7(1)(c) probably does not apply. By hypotheses, neither of the two shareholders has acted fraudulently or illegally, nor mismanaged the corporation, nor abused his or her authority, even though each may think the other is acting oppressively or unfairly. In Bostock v. High Tech Elevator Indus., 260 N.J. Super. 432, 616 A.2d 1314 (App. Div. 1992), the trial court had found that neither of the two 55%-45% shareholders had acted in an oppressive fashion toward the other. *Id.* at 438, 616 A.2d at 1317. The appellate division denied relief under N.J. STAT. ANN. § 14A:12-7, but affirmed relief under the terms of a shareholder's agreement. *Id.* at 446, 616 A.2d at 1322.

11 A court is not necessarily limited to the four remedies expressly authorized by N.J. STAT. ANN. § 14A:12-7. *Brenner v. Berkowitz* instructs that equity has no limit on its "flexibility in devising a variety of remedies and shaping them to fit the circumstances of a particular case." *Brenner*, 261 N.J. Super. at 80, 617 A.2d at 1233; *see Walensky*, 264 N.J. Super. at 279, 624 A.2d at 615. *Baker v. Commercial Body Builders, Inc.* suggests a number of possible additional remedies; including an injunction against wrongful conduct, an order for a declaration of a dividend, or an award of damages. Baker v. Commercial Body Builders, Inc., 507 P.2d 387 (Or. 1973). The court in *In re Rappaport* also suggested reducing excess salaries of those in control. *In re* Rappaport, 487 N.Y.S.2d 376 (App. Div. 1985). These solutions may be feasible in minority oppression cases, and in deadlock cases where one shareholder operates the business and the other does not. Where control of the operation of the business is at issue, they will probably miss the mark. *See* Note, *Deadlock in a Close Corporation: A Suggestion for Protecting a Dissident, Co-Equal Shareholder*, 1972 DUKE L.J. 653, 660 (1972) [hereinafter DUKE Note].

the corporate ship while the litigation is pending, but if the mutual dislike between the shareholders is so pervasive, the relationship is probably irreparably damaged.[12] Divorce through a buy-out of one shareholder by the other, a sale of the whole business by both shareholders to a third party, or dissolution of the enterprise is inevitable.

II. THE DEADLOCK DILEMMA

An analysis of the cases deciding disputes between two equal shareholders requires some historical perspective, first at common law, then under the early, strictly construed, deadlock statutes,[13] and finally under the broader authority of statutes such as New Jersey Statutes Annotated section 14A:12-7.[14]

At common law there was some doubt whether a court of equity, absent statutory authority, had inherent power to dissolve a deadlocked corporation which, despite the deadlock, was solvent

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[12] The function of a provisional director is to act as a mediator or conciliator, cast a deciding vote on the director level, and use his or her persuasiveness in pressing new ideas or alternatives. One treatise suggests that if "the participants' views on policy are basically incompatible and are firmly held, the appointment of a provisional director may only be a temporary measure that postpones more drastic remedies." F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS, § 7.23, at 125 (2d ed. 1991). A dispute that is serious enough to necessitate the appointment of a provisional director will likely result in a buy-out or dissolution. Harold D. Field, *Resolving Shareholder Disputes and Breaking Deadlocks in the Close Corporation*, 58 MINN. L. REV. 985, 1005 (1974).

It is important to remember that "[c]onscientious disagreements with respect to corporate business management and policy are more or less inevitable and ordinarily reconcilable." RKO Theatres v. Trenton-New Brunswick Theatres Co., 9 N.J. Super. 401, 403, 74 A.2d 914, 915 (Ch. Div. 1950). If the disagreements between two shareholders are purely on matters of business judgment with each respecting, while disagreeing with, the other's point of view, a provisional director may solve the problem. In that case, however, the parties will likely have the good sense to agree upon a third person to help them "call the shots" without the intervention of lawyers or the court. The third party should be someone not only capable of mediating the shareholders' differences, but also a person with sufficient knowledge of the industry to be able to make sound management policy decisions. Field, *supra*, at 999.

[13] *See, e.g.*, N.J. STAT. ANN. § 14:13-15 (West 1938).

[14] There are minority oppression and deadlock statutes in most states. *See* 3 MODEL BUSINESS CORPORATION ACT ANNOTATED, § 14.30, at 1535 (1993 Supp.). Caution must be exercised, however, in comparing cases under statutes in different jurisdictions because the language of the statutes is not uniform. *See* Post-Standard Co. v. Evening Journal Ass'n, 15 N.J. Super. 58, 68, 83 A.2d 38, 43 (Ch. Div. 1951) (citation omitted) (rejecting a New York decision because of the particular language of the New York statute). Despite the fact that Delaware does not have a minority oppression statute, § 273 of Delaware General Corporation Law specifically deals with certain corporate disputes between 50-50 shareholders. *See In re* Venture Advisors, Inc., 14 DEL. J. CORP. L. 1192 (Del. Ch. 1989) (not officially reported).

or functioning.[15] Not all jurisdictions limited equity's inherent power, particularly where it was shown that one, or a group, of the shareholders had engaged in wrongdoing.[16] Some courts strove to find a rationale under which they could act. For example, the Michigan Supreme Court[17] acknowledged the then-prevailing rule that absent a statute, equity was powerless to dissolve a corporation, but found an exception where substantial dissension rendered it impossible for the corporation to carry out the purposes for which it had been formed.[18]

The New Jersey Legislature in 1938 offered some relief to the limitations of the common law by enacting New Jersey Revised Statutes section 14:13-15 to deal with certain deadlock situations. If, however, the facts of a given case did not squarely meet the statutory requirements, relief could not be granted.[19]

By the time New Jersey Statutes Annotated section 14A:12-7 was amended in 1974 to provide expressly, in subsection 9, that where the statutory prerequisites were met, a court had the authority to dissolve a corporation even though profitable, case law in New Jersey had already recognized that equity, independent of statutory authority, could allow for the appointment of a receiver and the dissolution of a corporation.[20] In *In re Collins-Doan Co.*,[21] the

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15 *See* Dorf v. Hill Bus Co., 140 N.J. Eq. 444, 54 A.2d 761 (1947); Sternberg v. Wolff, 56 N.J. Eq. 389, 29 A. 397 (1898).

16 *See* Saltz v. Saltz Bros., 84 F.2d 246 (D.C. Cir. 1936); Nashville Packet Co. v. Neville, 235 S.W. 64 (Tenn. 1921) (where one 50% shareholder physically attacked the other, the court appointed a receiver and wound up the corporation); Burleson v. Hayutin, 273 P.2d 124 (Colo. 1954) (where one 50% shareholder assumed control of the corporation for his benefit and excluded the other, the court found plaintiff's "ouster" to be a wrong to be remedied by the appointment of a receiver). *Cf.* Gidwitz v. Lanzit Corrugated Box Co., 170 N.E.2d 131 (Ill. 1960) (conduct similar to that in *Burleson* was treated as oppression of the excluded 50% family).

17 Flemming v. Heffner & Flemming, 248 N.W. 900 (Mich. 1933).

18 *Id.* In *Levant v. Kowal* the court suggested that perhaps insolvency had to be shown in minority shareholder oppression cases before the court could dissolve the corporation. Levant v. Kowal, 86 N.W.2d 236 (Mich. 1957). In a 50-50 deadlock case, however, the court had inherent power to dissolve even in the absence of insolvency. *Id.* at 343 (citing *In re* Collins-Doan Co., 3 N.J. 382 (1949)).

19 Dorf v. Hill Bus Co., 140 N.J. Eq. 444, 54 A.2d 761 (1947). *See also* Costabile v. Essex Linoleum and Carpet Co., 98 N.J. Super. 224, 236 A.2d 625 (Ch. Div. 1967). In *Dorf*, the court denied relief where one 50% shareholder operated the corporation as his own to the exclusion of the other 50% shareholder because there was not an even number of directors. *Dorf*, 140 N.J. Eq. at 447-48, 54 A.2d at 763. Hence, the facts did not fit within the terms of the statute. *Id.* Common law, as it then existed in New Jersey, did not authorize the court to dissolve a profitable corporation independent of statute. *Id.* at 448, 54 A.2d at 763.

20 *See* Bostock v. High Tech Elevator Indus., 260 N.J. Super. 432, 443, 616 A.2d 1314, 1320 (App. Div. 1992), and cases cited therein.

21 3 N.J. 382 (1949).

Supreme Court of New Jersey acknowledged that irreconcilable differences between two independent classes or groups of shareholders with equal voting power had to be recognized.[22]

Prior to 1974, even with the common law's liberalization of a court's authority to dissolve corporations racked by dissension, courts were faced with a choice between dismissing the action or directing dissolution of a viable corporation.[23] The courts' frustration may be sensed from a case in which a defendant refused plaintiff's offer to buy or sell for a set price, and the court could do no more than allow the parties fifteen days to effect a "harmonious solution" before entering an order of dissolution.[24] Forced buy-out, as we shall see, was later authorized by statute[25] and, in some jurisdictions, found to be an inherent equitable remedy.[26]

To understand the judicial preference for buy-out and the reasons why dissolution is viewed as an unsatisfactory remedy, the mechanisms of dissolution and its consequences must be understood. Dissolution generally means the appointment of a receiver to wind up the business, sell its assets, pay its debts, and, if anything is left, distribute the balance ratably to the shareholders.[27] It is the

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22 *Id.* at 391-92, 70 A.2d at 164. *See also* Justice Jacobs's pithy statement in Stark v. Reingold: "[R]elations between the Starks and the Reingolds have been too seriously breached to suggest future agreement and decent corporate operation." *Stark*, 18 N.J. 251, 266 (1955).

23 Whether, absent statutory authority, a court has inherent power to order one shareholder or the corporation to buy out another shareholder has not been directly answered in New Jersey. *See infra* text at notes 77-81. Cases in other jurisdictions indicate that courts do have inherent equitable authority to order a buy-out. *See infra* note 81. This appears to be a relatively recent development. *Id.* In the New Jersey decisions prior to the enactment of N.J. STAT. ANN. § 14A:12-7(8) in 1974, there appears to be no discussion of equity's inherent power to order a buy-out as a remedy in shareholder dispute cases. Courts either granted dissolution when the case met the requirements of the statute, *In re* Collins-Doan Co., 3 N.J. 382, 70 A.2d 159 (1949); Post-Standard Co. v. Evening Journal Ass'n, 15 N.J. Super. 58, 83 A.2d 38 (Ch. Div. 1951); RKO Theatres v. Trenton-New Brunswick Theatres Co., 9 N.J. Super. 401, 74 A.2d 914 (Ch. Div. 1950), or denied relief when the statutory requirements were not met, Dorf v. Hill Bus Co., 140 N.J. Eq. 444, 54 A.2d 763 (1947). *See also* Costabile v. Essex Linoleum and Carpet Co., 98 N.J. Super. 224, 236 A.2d 635 (Ch. Div. 1967).

24 RKO Theatres v. Trenton-New Brunswick Theatres Co., 9 N.J. Super. 491, 410 (Ch. Div. 1950).

25 *See infra* text at note 34.

26 *See infra* text at note 81.

27 *See* 68th St. Apts., Inc. v. Lauricella, 142 N.J. Super. 546, 362 A.2d 78 (Law Div. 1976), *aff'd*, 150 N.J. Super. 47, 374 A.2d 1222 (App. Div. 1977). A corporate dissolution involves a liquidation of assets and winding up of the business. Hendley v. Lee, 676 F. Supp. 1317, 1319, 374 A.2d 1222 (D.S.C. 1987). In *In re Surchin*, the court appointed the lawyers for the parties as co-receivers to determine how long the business would continue, what employees would be engaged and other questions dealing with the preservation of the property and carrying on of the business. *In re* Surchin,

"ultimate remedy,"[28] fraught with unsatisfactory consequences. Dissolution's likely result is that none of the shareholders will realize the full value of his or her investment.[29] The consequences may spill over to others, such as the corporation's employees.

There is also an inherent unfairness to dissolution if one of the two shareholders can recommence the business alone in another form, while the other shareholder is unable to do so. This is possible, for example, where in a sales or service business, one shareholder has all of the customer contact.[30]

It is not surprising that dissolution is viewed with disfavor by courts and will be ordered only as a last resort. In *Petition of Levitt*,[31] the court posited that a buy-out is "far preferable to the potential destructive impact attending dissolution of the corporation."[32] Even after the case has been tried, the court may stay its order to permit a buy-out motion to be made.[33]

III. THE BUY-OUT REMEDY

A court ordered buy-out, as an alternative to dissolution in

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286 N.Y.S.2d 580, 586 (Sup. Ct. 1967). The receivers were also charged with the responsibility of presenting to the court a plan for orderly dissolution and disposition of the property including its name and goodwill. *Id.*

In *In re T.J. Ronan Paint Corp.*, the court directed approval of a plan of dissolution to the extent it directed a public sale of the corporation unless the parties were able to agree to all of the terms of a private sale. *In re* T.J. Ronan Paint Corp., 469 N.Y.S.2d 931 (App. Div. 1983).

28 Gershaw v. Ther-A-Pedic Sleep Prods., 218 N.J. Super. 350, 355, 527 A.2d 923, 925 (App. Div. 1987).

29 DUKE Note, *supra* note 11, at 659-60. The writer stated that:

> Winding-up a close corporation is a drastic remedy which will deny the shareholder-officers the opportunity to participate in an enterprise which has likely provided participants with their primary source of income. Depending on local economic conditions, a court-appointed receiver may be unable to find a buyer willing to purchase the enterprise as a going concern at a reasonable price. Failure to find such a buyer will necessitate the piecemeal selling of the corporation's assets, a disposition which ordinarily results in the realization of an amount substantially less than if the business were sold as a going concern.

Id. (footnotes omitted).

30 *Cf. In re* Cantelmo, 88 N.Y.S.2d 604 (App. Div. 1949).

31 492 N.Y.S.2d 736 (App. Div. 1985).

32 *Id.* at 740.

33 *See* Brenner v. Berkowitz, 261 N.J. Super. 63, 617 A.2d 1225 (App. Div. 1992), *certif. granted*, 133 N.J. 435, 627 A.2d 1141 (1993); Hughes v. Sego Int'l. Ltd., 192 N.J. Super. 60, 469 A.2d 74 (App. Div. 1983). *See also* Levant v. Kowal, 86 N.W.2d 336 (Mich. 1957). In *In re Kemp & Beatley, Inc.*, the court said that every order of dissolution must be conditioned on permitting any shareholder to elect to purchase the complaining shareholder's stock at fair value. *In re* Kemp & Beatley, Inc., 484 N.Y.S.2d 799 (1984).

shareholder dispute cases, appears to have first been authorized by statute in Section 210 of the English Companies Act of 1948.[34] Prior to enactment of New Jersey Statutes Annotated section 14A:12-7(8) in 1974, four other states, California, Connecticut, South Carolina, and West Virginia, had statutorily authorized the buy-out as an alternate remedy to dissolution.[35]

Under New Jersey Statutes Annotated section 14A:12-7(8) in its current form,[36] any shareholder who is a party to a court proceeding, or the corporation, may move to buy out any other shareholder who is a party. The court is not to grant the motion unless it determines that to do so will be fair and equitable to "all parties under all of the circumstances."[37] A party cannot move to be bought out; that is, to force another party to buy his or her shares. The motion may be made only to force another party to sell to the movant.[38] In other words, litigation under New Jersey Statutes Annotated section 14A:12-7(8) gives every party, subject to the court's discretion, a call on the shares of any other party, but not a put.

When a shareholder brings an action under New Jersey Statutes Annotated section 14A:12-7, he or she takes the risk that the defendant will move to buy the plaintiff's shares. The court will

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34 The concept of a forced buy-out is not new to business law. The Uniform Partnership Act, adopted in New Jersey at N.J. STAT. ANN. § 42:1-38.2.b, provides that partners who have not caused dissolution wrongfully may continue the business provided they pay to any partner who has caused the dissolution wrongfully the value of his partnership interest less any damages recoverable for his act of wrongful dissolution. For an application of this principle, see the description of the Chancery Division judgment in *Stark v. Reingold.* Stark v. Reingold, 18 N.J. 251, 258, 113 A.2d 679, 682-83 (1955). The supreme court reversed and directed dissolution of the partnership because it found the other partner had also engaged in serious misconduct. *Id.* at 263, 113 A.2d at 685.

In *In re Astey,* what appears to be two equal groups of shareholders had agreed to submit their disputes to arbitration. *In re* Astey, 189 N.Y.S.2d 2 (Sup. Ct. 1959). The arbitrators awarded one group the option to buy out the other. *Id.* If that option was not exercised within a fixed time, the other group then had the option to buy out the first group at the same price. *Id.* If neither side exercised either option, the arbitrators ruled that the first group would then be obligated to buy out the second group at the fixed price. *Id.* The court affirmed the arbitrators' award saying that under the arbitration rules, the arbitrators were authorized to grant relief which they deemed just and equitable even though it might not be proper if the controversy were before the court. *Id.*

35 *See* The Commission's Comments to N.J. STAT. ANN. § 14A:12-7, *in Final Report of the Corporation Law Revision Commission* (1972).

36 For a discussion of the statute, *see supra* note 6.

37 N.J. STAT. ANN. § 14A:12-7(8).

38 Brenner v. Berkowitz, 261 N.J. Super. 63, 79, 617 A.2d 1225, 1232-33 (App. Div. 1992), *certif. granted,* 133 N.J. 435, 627 A.2d 1141 (1993); Bostock v. High Tech Elevator Indus., 260 N.J. Super. 432, 444, 616 A.2d 1314, 1320-21 (App. Div. 1992).

welcome a buy-out motion[39] even if the defendant denies the allegations of the complaint.[40] Not only is dissolution a remedy disfavored by the courts,[41] but a buy-out will likely avoid all issues except valuation.[42] If plaintiff prefers to be the buyer rather than the seller, he or she must be prepared to cross-move.

Defendant may elect not to move to buy out plaintiff. In a minority oppression case there is always the possibility that the plaintiff may fail to prove a cause of action, and the court will dismiss the suit.[43] Even where the case before the court is one where the court believes the parties should be "divided," the court may not order a buy-out unless the litigation has been brought under New Jersey Statutes Annotated section 14A:12-7,[44] and a predicate, such as proof of deadlock or minority oppression,[45] is established.[46] In a true deadlock situation, where the objective facts meet the requirements of New Jersey Statutes Annotated section 14A:12-7(1)(b), it is unlikely that neither party would move to buy out the other unless both were prepared to face the consequences

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39 The majority of shareholders disputes are resolved by a buy-out. See the statistical analyses offered in Haynsworth, *supra* note 3, at 53, and Hetherington & Dooley, *supra* note 3, at 33. It is the most likely remedy a court will impose. Haynsworth, *supra* note 3, at 92. By moving under N.J. STAT. ANN. § 14A:12-7(8), the defendant, in effect, is saying: "Judge, if the plaintiff doesn't want to be in business with me, I'll buy him (her) out." In *In re Levitt*, the court overrode the plaintiff's objection to defendant's buy-out application, noting that the plaintiff had not been active in the daily operation of the business. *In re* Levitt, 492 N.Y.S.2d 736 (App. Div. 1987). Consequently, the court proclaimed that the plaintiff's "legitimate goal in this litigation should be to secure a fair value for his interest in the business, not to feed the fire of discontent between the parties." *Id.* at 741.

40 *See In re* Cristo Bros., Inc., 478 N.E.2d 176 (N.Y. 1985).

41 *See supra* text at notes 27-33.

42 Practical problems may follow from a buy-out, particularly where the seller has been involved in the operation of the business. To a greater or lesser degree a court may be required to become involved in the transfer of ownership or to provide some guidelines to the parties for an orderly transition. Hendley v. Lee, 676 F. Supp. 1317, 1331 (D.S.C. 1987).

43 In cases where there was no deadlock and plaintiff was unable to establish a claim for oppression, defendant was under no pressure to buy plaintiff's shares, and in some cases, chose not to do so. *See* Hetherington & Dooley, *supra* note 3, at 34. *See also* Exadaktilos v. Cinnaminson Realty Co., Inc., 167 N.J. Super. 141, 400 A.2d 554 (Law Div. 1979), *aff'd*, 173 N.J. Super. 559, 414 A.2d 994, (App. Div. 1980), *certif. denied*, 85 N.J. 112, 425 A.2d 273 (1980); Bostock v. High Tech Elevator Indus., Inc., 260 N.J. Super. 432, 616 A.2d 1314 (App. Div. 1992) (finding that plaintiff had not proven any of the prerequisites for relief under N.J. STAT. ANN. § 14A:12-7, but, instead, granting relief based on the parties' agreement).

44 Gershaw v. Ther-A-Pedic Sleep Prods., 218 N.J. Super. 350, 527 A.2d 923 (App. Div. 1987).

45 N.J. STAT. ANN. § 14A:12-7(1)(a), (b), or (c).

46 *Bostock*, 260 N.J. Super. at 442-43, 616 A.2d at 1319-20.

of dissolution.[47]

In New Jersey, prior to December 1, 1988, only the defendant could move to buy out the plaintiff.[48] As a result of one of the amendments to New Jersey Statutes Annotated section 14A:12-7, effective December 1, 1988,[49] a plaintiff can now move to buy out a defendant. If, promptly after filing for relief under New Jersey Statutes Annotated section 14A:12-7(1), plaintiff moves to buy out defendant under New Jersey Statutes Annotated section 14A:12-7(8), should the consideration of the motion by the court be any different than when the defendant is the moving party?

Consider an overbearing aggressive 50% plaintiff seeking to force an inoffensive 50% defendant to sell. Should not the plaintiff be required to make some showing that he or she has the better right to the corporation before the court grants the motion as an expedient end to the litigation?[50]

The statute instructs that before a court may grant a motion, it must determine "in its discretion that such an order would be fair and equitable to all parties under all of the circumstances of the case."[51] Of course an aggrieved plaintiff who is the victim of an overbearing defendant may ask the same question when the defendant files the buy-out motion, but it is more likely that unless plaintiff can show that a forced buy-out would be inequitable, the court will view plaintiff as the unhappy and dissatisfied partner who "wants out," and will welcome defendant's motion.[52]

When two 50-50 shareholders move to buy the other out, they resemble warring parents in a custody battle. Each shareholder seeks to own the "corporate child" to the exclusion of the undesired "partner." The court may deny both motions, grant both motions, or grant one motion and deny the other. On what basis is the court to make the Solomonic judgment as to whom to award the baby?

If the court chooses to deny both motions, it may either leave the parties where it found them[53] or determine that plaintiff is en-

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47 When both parties wish to continue a business and neither moves to buy out the other and dissolution is ordered, both can bid when the business is sold. *See* Hetherington & Dooley, *supra* note 3, at 28.

48 *See supra* note 6.

49 L.1988, c.94, § 69.

50 *See* Hetherington & Dooley, *supra* note 3, at 34-35.

51 N.J. STAT. ANN. § 14A:12-7(8) (West Supp. 1992).

52 *See* Haynsworth, *supra* note 3, at 34-35.

53 *See, e.g.*, Springborn v. Anita Land Co., 101 N.E.2d 238 (Ohio Ct. App. 1951) (where the inability or unwillingness of the two shareholders to work in harmony resulted in all of the corporate assets being lost, the court left the parties where it

titled to dissolution or other relief.[54] If the court grants both motions, it might conduct an auction in the courtroom,[55] which would be an advantage to the party with greater financial resources.[56] If the court denies both motions and orders dissolution, the result might also be an auction, but one conducted by a receiver at which third parties would be invited to bid on the corporation as a whole before it is sold off in pieces.[57]

IV. NEW JERSEY CASES DISCUSSING THE BUY-OUT REMEDY

There are no reported New Jersey decisions dealing with disputes between 50-50 shareholders after 1974, when New Jersey Statutes Annotated section 14A:12-7 was amended to authorize a court ordered buy-out.[58] Buy-out, however, was the subject of two recent appellate division decisions,[59] rendered by different panels, decided within three weeks of each other, neither of which involved a deadlocked corporation. In *Bostock v. High Tech Elevator Industries, Inc.*,[60] although the business and personal relationship between a 45% shareholder and a 55% shareholder had deteriorated, the trial court found that neither had acted in an oppressive fashion.[61] Nonetheless, the trial court ordered a buy-out. The trial court

found them, granted no equitable relief, and dismissed the claims of both shareholders). *See also* Haynsworth, *supra* note 3, at 75-78.

54 *See supra* text accompanying note 11.

55 *See* Dear Publications & Radio, Inc. v. Commissioner, 274 F.2d 656, 657 (3d Cir. 1960), which describes a competitive bidding arrangement voluntarily arranged by the parties after the court had ordered dissolution in Post-Standard Co. v. Evening Journal Ass'n, 15 N.J. Super. 58, 83 A.2d 38 (Ch. Div. 1951).

56 If both motions are granted, the only real issue is which party will be the higher bidder and thus able to continue the business. Hetherington & Dooley, *supra* note 3, at 29.

57 *See* Haynsworth, *supra* note 3, at 55. *See also In re* T.J. Ronan Paint Corp., 469 N.Y.S.2d 931, 937 (App. Div. 1984). In *Sternberg v. Osman*, the court directed that, if the parties could not agree on a buy-out plan or the sale of the business to a third party as a whole within a reasonable period of time, there would be a public sale of the corporation's assets. Sternberg v. Osman, 582 N.Y.S.2d 208 (App. Div. 1992).

58 N.J. STAT. ANN. § 14A:12-7(8) (West Supp. 1992). *68th St. Apts., Inc. v. Lauricella* involved two equal shareholders, but buy-out was not an issue. 68th St. Apts., Inc. v. Lauricella, 142 N.J. Super. 546, 362 A.2d 78 (Law Div. 1976), *aff'd*, 150 N.J. Super. 47, 374 A.2d 1222 (App. Div. 1977). *68th St.* concerned claims by each party against the other to recover his individual loss as a shareholder, and derivatively, the loss sustained by the corporation, arising as a result of an earlier proceeding in which a receiver had been appointed to wind up the deadlocked corporation's affairs. *Id.* at 549-54, 362 A.2d at 80-83.

59 Brenner v. Berkowitz, 261 N.J. Super. 63, 617 A.2d 1225 (App. Div. 1992), *certif. denied*, 133 N.J. 435, 627 A.2d 1141 (1993); Bostock v. High Tech Elevator Indus., Inc., 260 N.J. Super. 432, 616 A.2d 1314 (App. Div. 1992).

60 260 N.J. Super. 432, 616 A.2d 1314 (App. Div. 1992).

61 *Id.* at 438, 616 A.2d at 1317.

based its order on both New Jersey Statutes Annotated section 14A:12-7 and a shareholders agreement between the parties that provided for a buy-out. The Appellate Division ruled that the court below was without authority to order a buy-out under New Jersey Statutes Annotated section 14A:12-7 without a showing of oppression or any other predicate under New Jersey Statutes Annotated section 14A:12-7(1).[62] The order for a buy-out predicated upon the shareholders' agreement was, however, affirmed.[63]

Brenner v. Berkowitz[64] involved a plaintiff holding 40% of the stock in a corporation and husband and wife defendants (the wife being plaintiff's sister) holding 60%. In *Brenner*, the defendant husband ran the business and the plaintiff was apparently not active in the business.[65] The trial court found that defendants had committed acts which were fraudulent, illegal and oppressive,[66] but ordered only moderate relief.[67]

In her amended complaint, plaintiff had sought alternate relief in the form of an order permitting her to purchase defendants' stock, or directing the corporation or defendants to purchase her stock, or dissolution.[68] Because one litigant cannot force another to buy her shares,[69] and because defendants did not move to force plaintiff to sell, the trial court said it was powerless to order defendants to buy out the plaintiff.[70]

The appellate division expressed its clear preference for a buy-out of either party by the other as the most appropriate remedy. Although it agreed with the trial court that under New Jersey Statutes Annotated section 14A:12-7(8), "the motion must be made by a party to the litigation to buy the shares of another party to the litigation,"[71] it apparently found enough in the record to authorize the trial court to order a buy-out in spite of the absence of a formal motion.

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62 *Id.* at 442-46, 616 A.2d at 1319-22.

63 *Id.* at 440-41, 446, 616 A.2d at 1318-19, 1321-22. The court found that pursuant to the shareholders' agreement, the corporation had exercised its option to purchase plaintiff's shares and could not subsequently renege on its commitment. *Id.* at 446-47, 616 A.2d at 1321-22.

64 261 N.J. Super. 63, 617 A.2d 1225 (App. Div. 1992).

65 *Id.* at 66, 617 A.2d at 1226.

66 *Id.* at 67, 617 A.2d at 1226-27.

67 *Id.* The trial court ordered that plaintiff be reinstated as a member of the corporation's board of directors, and enjoined defendants from engaging in further misconduct. *Id.*

68 *Id.*

69 *See supra* text accompanying note 38.

70 261 N.J. Super. at 79, 617 A.2d at 1232-33.

71 *Id.*

The appellate division first relied on a pre-trial settlement conference at which defendants had made the commitment that if the court found a basis for affording plaintiff relief under the statute, defendants would file a motion to buy out plaintiff.[72] The appellate court also ruled that the trial court could have ordered dissolution and then stayed its order to permit the defendants the opportunity to move to buy out the plaintiff.[73] Third, it suggested that plaintiff, who had asked in her complaint for an order to buy out defendants, could have been directed to file a motion to that effect.[74]

One statement of the *Brenner* court, however, is unusual and somewhat unclear:

> In view of our holding that plaintiff established more than one of the grounds for relief specified in [New Jersey Statutes Annotated section] 14A:12-7(1)(c), and the fact that plaintiff wanted to sell her shares or to buy the majority's shares and the defendants do not wish to have the corporation dissolved, *the judge could have directed defendants to file a motion* pursuant to [New Jersey Statutes Annotated section] 14A:12-7(8) seeking to purchase plaintiff's shares to avoid possible dissolution of the corporation.[75]

This sentence can be interpreted in at least three ways. First, it may be argued that because defendants had agreed at a pre-trial settlement conference to move to buy out plaintiff, the court could have ordered defendants to do what they had agreed to do. That, however, had already been said.

Next, it may be assumed that something in the record formed the basis for the court's statement that defendants did not want the corporation to be dissolved. If so, the quoted sentence could be viewed merely as a signal to the trial court that it should have prompted defendant's counsel to file a buy-out motion. In *McCauley v. Tom McCauley & Sons, Inc.*,[76] where minority oppression was found, the court gave the majority three choices: liquidate, partition and reorganization, or buy out plaintiff.

A third interpretation is that the court is saying that even though

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[72] *Id.* at 80, 617 A.2d at 1233.

[73] *Id.* (citing Hughes v. Sego Int'l. Ltd., 192 N.J. Super. 60, 65, 469 A.2d 74, 77 (App. Div. 1983)).

[74] 261 N.J. Super. at 80, 617 A.2d at 1233. Even though the complaint requested that plaintiff be permitted to buy out defendant, it is not surprising that plaintiff, a 40% inactive shareholder, did not move to buy out defendants' 60%.

[75] *Id.* at 80-81, 617 A.2d at 1233-34 (emphasis added).

[76] 724 P.2d 232 (N.M. Ct. App. 1986). *See also In re* Kemp & Beatley, Inc., 473 N.E.2d 1172, 1180-81 (N.Y. 1984).

the statute says that a buy-out requires a motion by a party, a court, nonetheless, has the inherent authority to order a party to make the motion. This would break new ground in shareholder dispute cases in New Jersey. Although *Gershaw*[77] holds that a buy-out cannot be ordered when a case is not brought under New Jersey Statutes Annotated section 14A:12-7, and *Bostock*[78] instructs that deadlock or minority oppression must be shown as a prerequisite to a court ordered buy-out under New Jersey Statutes Annotated section 14A:12-7(8), *Brenner*[79] can be read to hold that when a case is brought under New Jersey Statutes Annotated section 14A:12-7 and minority oppression (or deadlock) has been proved, a court, by directing a party to make the prerequisite motion, can order a buy-out despite the fact that neither party voluntarily sought that remedy.

On one hand, this is a strained reading because New Jersey Statutes Annotated section 14A:12-7, unlike the buy-out provisions in statutes in some other jurisdictions,[80] expressly envisions a motion by a party, not by the court sua sponte. Each party may prefer to suffer dissolution of the corporation rather than be compelled individually to increase his or her investment in the enterprise. On the other hand, cases in several other jurisdictions have held that courts, absent express statutory authority, do have inherent equitable power to force a buy-out when neither party seeks that form of relief.[81]

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77 Gershaw v. Ther-A-Pedic Sleep Prods., 218 N.J. Super. 350, 527 A.2d 923 (App. Div. 1987).

78 Bostock v. High Tech Elevator Indus., Inc., 260 N.J. Super. 432, 616 A.2d 1314 (App. Div. 1992).

79 Brenner v. Berkowitz, 261 N.J. Super. 63, 617 A.2d 1225 (App. Div. 1992), *certif. denied*, 133 N.J. 435, 627 A.2d 1141 (1993).

80 *See* Meiselman v. Meiselman, 307 S.E.2d 551, 564 (N.C. 1983) (discussing N.C. GEN. STAT § 55-125.1(a)(4)); Hendley v. Lee, 676 F. Supp. 1317, 1319 (D.S.C. 1987) (discussing S.C. CODE ANN. § 33-21-155(a)(4) (Law. Co-op. 1976)).

81 New York law appears to authorize a court to order a buy-out even when no application for a buy-out has been made. *See In re* Wiedy's Furniture Clearance Ctr., 487 N.Y.S.2d 901, 904 (App. Div. 1985). In *Alaska Plastics, Inc. v. Coppock*, the court referred to its inherent power to order a buy-out as an equitable remedy. Alaska Plastics, Inc. v. Coppock, 621 P.2d 270 (Alaska 1980). The court based its ruling on Baker v. Commercial Body Builders, Inc., 507 P.2d 387 (Or. 1973), which lists buy-out as one of the alternative remedies in shareholder dispute cases.

In *Maddox v. Norman*, the court, as to its inherent power to order a buy-out, said: "Plaintiff has not cited, nor does our independent research disclose, any authority to the contrary. Indeed, the cases cited do not seriously question that courts have such power, only whether its exercise is appropriate in the particular case." Maddox v. Norman, 669 P.2d 230, 238 (Mont. 1983). *See also* Davis v. Sheerin, 754 S.W.2d 375, 379-80 (Tex. Ct. App. 1988); Balvik v. Sylvester, 411 N.W.2d 383, 388-89 (N.D. 1987); Stefano v. Coppock, 705 P.2d 443, 446 (Alaska 1985); Sauer v. Moffit, 363 N.W.2d 269 (Iowa Ct. App. 1984); Delaney v. Georgia-Pacific Corp., 564 P.2d 277 (Or. 1977).

In *Orchard v. Covelli*, the court acknowledged that there was no express Penn-

In a case brought under New Jersey Statutes Annotated section 14A:12-7, does the trial court have the authority to direct a buy-out where neither party has voluntarily applied for that relief? The cases to date do not provide a clear answer. *Walensky v. Jonathan Royce Int'l.*,[82] decided after *Brenner*[83], which affirmed an award of damages and other compensatory relief, also emphasizes equity's authority and flexibility to fashion an appropriate remedy in "oppressed" minority shareholder cases. The *Brenner* opinion on this issue is confusing. The court remanded the case to the chancery division "to entertain a motion from either party for a buy-out,"[84] expressing its clear preference for that remedy by adding: "it will indeed be difficult not to order a buy-out given the compelling record in this case."[85]

Whether or not the court may direct one party to move to buy out another, the clear lesson of both *Bostock* and *Brenner* is that where there is dissension between shareholders in a close corporation, the court will strive to find a basis on which a buy-out can be ordered to separate the parties.

V. THE CHOICE BETWEEN EQUAL SHAREHOLDERS

If both 50% shareholders move to buy out the other, what should the court consider in making its choice as to which party goes home with the business and which must accept fair value for his or her half? Should the court hold a hearing to determine which of the two is less at fault and which is more to blame for the existence of the dissension?[86] Should the court seek to find who cast the first stone? Will the trial resemble a matrimonial proceed-

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sylvania statutory authority for it to order defendant, over defendant's objection, to buy out plaintiff, but did so nevertheless because it found dissolution unnecessary and not in the best interests of the shareholders, and also because a buy-out would be a fair method of compensating plaintiff. Orchard v. Covelli, 590 F. Supp. 1548 (W.D. Pa. 1984), *aff'd*, 802 F.2d 448 (3d Cir. 1986). *But see* Giannotti v. Hamway, 387 S.E.2d 725 (Va. 1990).

82 264 N.J. Super. 276, 624 A.2d 613 (App. Div. 1993).

83 261 N.J. Super. 63, 617 A.2d 1225 (App. Div. 1992).

84 *Id.* at 81.

85 *Id.* The New Jersey Supreme Court has granted a petition for certification in *Brenner*, 133 N.J. 435, 627 A.2d 1141. The parties, apparently, have agreed that if the supreme court rules that plaintiff is entitled to relief under N.J. STAT. ANN. section 14A:12-7, defendants will move to buy out plaintiff. 135 N.J. L.J. 338 (Sept. 20, 1993).

86 In *Burleson v. Hayutin*, a fifty-fifty shareholder case in which a receiver was appointed, the court compared plaintiff's innocence with defendant's wrongful conduct. Burleson v. Hayutin, 273 P.2d 124 (Colo. 1954). In *Hendley v. Lee*, the court declared: "Under generally established equitable principles, fault is a factor to be considered by a court in fashioning equitable relief under the [deadlock] statute." Hendley v. Lee, 676 F. Supp. 1317, 1323 (D.S.C. 1987). *See also* Orchard v. Covelli, 590 F. Supp. 1548 (W.D. Pa. 1984), *aff'd*, 802 F.2d 448 (3d Cir. 1986).

ing in the New Jersey Superior Court, Family Part, with incident after incident of intra corporate bickering being aired?[87] Will the demeanor and attitude of the respective litigants become a crucial factor?

One factor a court might consider is which of the two shareholders will be better able to continue the operation of the business without the other. One author poses a hypothetical highlighting the dilemma between an efficient solution and an equitable one.[88] The hypothetical assumes that one of two equal shareholders is a superior but dishonest business person, and the other is merely an average business person, who is fair in his or her dealings. It is probably more efficient to compel the average business person to sell to the superior manager who will be able to maximize the value of the corporation, yet this result is not equitably appealing.

Another factor which might be considered is the role taken by each of the parties within the corporate structure. If, for example, one shareholder is active in the business and the other is not, the former may be the more appropriate buyer. If one has the loyalty of the employees, customers, or suppliers, perhaps he or she should be the buyer.

There are few reported decisions to guide court and counsel as to how to make the choice between equal shareholders. In *Van Kirk v. Young*,[89] the court had to resort to dissolution because under the terms of the governing West Virginia statute neither party in a 50-50 corporation could force the sale of the shares from the other party. It appears that neither the parties nor the court addressed the issue of whether the court had inherent power, beyond that authorized by statute, to order a buy-out.

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87 Compare, for example, *Bostock v. High Tech Elevator Indus., Inc.*, where during the rapidly deteriorating personal relationship between the two shareholders, one insulted the other's wife, and as a result, was suspended from employment. Bostock v. High Tech Elevator Indus., Inc., 260 N.J. Super. 432, 437, 616 A.2d 1314 (App. Div. 1992). In *In re T.J. Ronan Paint Corp.*, where dissolution rather than buy-out was the remedy, the court asserted:

> At this stage, where dissolution is sought, the underlying reason for the dissension is of no moment; nor is it at all relevant to attempt to ascribe fault to either party. Rather, the critical consideration is the fact that dissension exists and has resulted in a deadlock precluding the successful and profitable conduct of the corporation's affairs.

In re T.J. Ronan Paint Corp., 469 N.Y.S.2d 931 (App. Div. 1983).

88 Steven C. Bahls, *Resolving Shareholder Dissension: Selection of the Appropriate Equitable Remedy*, 15 J. CORP. L. 285, 319 (1990).

89 375 S.E.2d 196 (W. Va. 1988).

Schaub v. Kortgard[90] is illustrative of the two person corporation which turns out to be a poor marriage. Soon after the start of a business, the parties in *Schaub* were not on speaking terms with each other. Plaintiff began a court action and both shareholders moved to buy out the other. The court chose Kortgard because it appeared that Schaub had earlier accepted a buy-out offer from Kortgard although no price and terms had been agreed upon.

Several factors are addressed in *Hendley v. Lee*,[91] in which the court described what it considered in deciding which of two equal shareholders should be the buyer. The corporation was a profitable and exceptionally well run service business.[92] The evidence painted a positive picture of both parties. The background, experience, know-how, reputation and contacts of one of the plaintiffs were instrumental in the initial success of the corporation. Defendant's managerial abilities were highly rated, and it was acknowledged that he had done an excellent job as the corporation's chief executive officer.[93] Each side sought to blame the other for the dispute which had arisen between them.[94] The court found that both sides had contributed equally to the disharmony which led to the lawsuit.[95]

Plaintiffs (holding 50%) originally sued for dissolution or to force the defendant (holding 50%) to sell his shares to them.[96] Defendant agreed that the corporation was hopelessly deadlocked, and indicated his desire to purchase plaintiffs' shares.

During the litigation both sides reversed their positions. Plaintiffs sought to have defendant buy them out; defendant sought to force the plaintiffs to purchase his stock.[97] The court rejected plaintiffs' proposed division of the corporation because it would result in the court being called upon to decide numerous collateral issues such as use of the corporation's name, questions relating to creditors, and assignability of contracts.[98] The court also rejected

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90 372 N.W.2d 427 (Minn. Ct. App. 1985).

91 676 F. Supp. 1317 (D.S.C. 1987).

92 *Id.* at 1322.

93 *Id.*

94 *Id.* at 1323.

95 *Id.*

96 The South Carolina statute empowers the court to order purchase of the shares of any shareholder either by the corporation or the other shareholders. *Id.* at 1319. The court recognized that neither party actually desired dissolution, and that asking for it was merely a jurisdictional prerequisite to the court's granting other relief. *Id.* at 1324.

97 *Id.* at 1319.

98 *Id.* at 1324.

dissolution as a drastic and unnecessary remedy,[99] and said its only remaining alternative was to order a buy-out of one side by the other.[100]

The court ordered that plaintiffs buy out defendant, and gave the following as reasons for its order:

1. The relative financial positions of the parties differed. One could easily afford the purchase; the other could not.
2. The defendant had a restrictive covenant with the corporation which the court expanded to protect plaintiffs' greater investment.
3. The ability of the plaintiffs to operate the corporation, coupled with the fact that defendant, as a capable manager, would be able to adapt to a different vocation.
4. The defendant would suffer less tax consequences than plaintiffs.
5. Because plaintiffs were operating a related company, confusion between the companies would be reduced.
6. A purchase by plaintiffs would more likely avoid future disputes between the two individuals.[101]

CONCLUSION

In a general partnership, absent anything to the contrary in the partnership agreement, any partner may dissolve the partnership. The other partner or partners are then faced with the choice of either winding up the business (liquidation and termination) or buying out the interest of the partner who has caused the dissolution.

When business people seek the protection and attributes of doing business in a corporate form, they necessarily accept (unless the certificate of incorporation, by-laws, or a shareholders' agreement provides to the contrary) the norms of corporate democracy. In a corporation, unlike a partnership, if a minority shareholder disagrees with the majority or cannot get along with his or her "partner" or "partners," he or she is not able to "pull the plug" on the enterprise and force a buy-out absent some form of oppression or wrongdoing by the majority.

The machinery of corporate democracy does not function, however, when there are two equal opposing shareholders. Relief

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99 *Id.*

100 *Id.* at 1325.

101 *Id.* at 1326-27.

must be afforded either in the traditional form of dissolution or the more difficult choice of forcing one shareholder to sell out to the other for a fair price. When the more frustrated shareholder seeks relief from the court, he or she must recognize the risk that even if one succeeds in breaking up the business marriage, the divorce may take an undesirable form.