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## Stock Transfer Restrictions in Closely Held Corporations

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## NOTES

### STOCK TRANSFER RESTRICTIONS IN CLOSELY HELD CORPORATIONS

When the partners in a small firm build up their business to the point that continued operation with individual liability becomes undesirable, they often seek to insulate their personal fortunes through the limited liability incident to a corporate status. Limited liability, which is often regarded as "the corporation's most precious characteristic,"<sup>1</sup> is quite simply achieved by the almost perfunctory process of "incorporating."<sup>2</sup> Why, then, should not all business organizations pluck this corporate plum? The traditional answer, of course, lies in the fact that the feature of limited liability comes inextricably bound to the so-called corporate norms.<sup>3</sup> In other words, the price of limited liability is compliance with the standard patterns of corporate procedure. Some of the practices that are a part of the corporate pattern are wholly incompatible with the operation of a small, closely held firm, and for this reason any attempt to create a "close corporation"<sup>4</sup> is necessarily confronted with the problem of limiting in some degree the operation of certain corporate norms.

The four attributes of the corporate form that prove to be most noxious to the entrepreneurs in a small venture are centralized management in a board of directors, rule by majority vote, continuity of organizational life despite the death or withdrawal of a participant, and free transferability of ownership shares. As a general rule, the courts have, in the absence of corrective legislation, offered resistance to attempts to deviate from the first three mentioned norms.<sup>5</sup> Ap-

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<sup>1</sup>This remark, attributed to President Eliot of Harvard, is quoted in Cook, *"Watered Stock" — Commissions — "Blue Sky Laws" — Stock Without Par Value*, 19 MICH. L. REV. 583 (1921).

<sup>2</sup>Sec FLA. STAT. §608.03 (1) (a) (1955).

<sup>3</sup>E.g., *Seitz v. Michel*, 148 Minn. 80, 181 N.W. 102 (1921); *Jackson v. Hooper*, 76 N.J. Eq. 592, 75 Atl. 568 (Ct. Err. & App. 1909).

<sup>4</sup>ROHRlich, *ORGANIZING CORPORATE AND OTHER BUSINESS ENTERPRISES* 96 (rev. ed. 1953), defines the close corporation as "one wherein all the outstanding stock (there being no publicly held securities of any other class) is owned by the persons (or members of their immediate families) who are active in the management and conduct of the business." He admits, however, that any definition is necessarily vague and arbitrary.

<sup>5</sup>*Long Park, Inc. v. Trenton-New Brunswick Theatres Co.*, 297 N.Y. 174, 77

parently the judicial conservatism in this area is founded on a belief that public policy is best to be served by disallowing a departure from the normal practice. In marked contrast to the courts' refusal to allow modifications of these practices stands the judicial attitude with respect to the allowance of stock transfer restrictions. It is a settled principle that "reasonable"<sup>6</sup> restrictions on the alienation of ownership shares can be successfully imposed.<sup>7</sup>

The reason for the "close" incorporators' insistence on a restrictive transfer agreement becomes obvious when the generic term "corporation" is closely inspected. Although ownership and management are separate functions in a typical corporate structure, in a closely held corporation all of the duties of ownership and management are performed by one group — the shareholders. The result is in effect an "incorporated partnership."<sup>8</sup> Consequently, as in a partnership, the initial complement of owners represents a planned combination of congenial and specially skilled personalities. One stranger to this arrangement can do violence to the entire scheme of operation, and quite clearly the stockholders will desire to prevent such an intrusion.

#### STATUTORY AUTHORITY FOR RESTRAINTS ON ALIENATION

If the corporation laws of a particular jurisdiction specifically authorize the inclusion of a charter provision supporting restrictions on the transfer of stock,<sup>9</sup> the draftsman may proceed to draft the pro-

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N.E.2d 633 (1948) (stockholders' agreement conferring broad managerial powers on an individual shareholder held invalid); *Benintendi v. Kenton Hotel, Inc.*, 294 N.Y. 112, 60 N.E.2d 829 (1945) (bylaw requiring that directors be elected by unanimous consent held invalid); *Flanagan v. Flanagan*, 273 App. Div. 918, 77 N.Y.S.2d 682 (2d Dep't), *aff'd mem.*, 298 N.Y. 787, 83 N.E.2d 473 (1948) (unanimous agreement by stockholders that the corporation be dissolved when one of the parties dies held invalid).

<sup>6</sup>The determinative factors in a finding of reasonableness are discussed *infra* under "Nature of the Restriction."

<sup>7</sup>*E.g.*, *Lawson v. Household Finance Corp.*, 17 Del. Ch. 343, 152 Atl. 723 (Sup. Ct. 1930); *Weissman v. Lincoln Corp.*, 76 So.2d 478 (Fla. 1954); *Doss v. Yingling*, 95 Ind. App. 494, 172 N.E. 801 (1932); *Bloomington v. Bloomington*, 107 Misc. 646, 177 N.Y. Supp. 873 (Sup. Ct. 1919).

<sup>8</sup>*Cuppy v. Ward*, 187 App. Div. 625, 639, 176 N.Y. Supp. 233, 243 (1st Dep't) (dictum), *aff'd mem.*, 227 N.Y. 603, 125 N.E. 915 (1919).

<sup>9</sup>*E.g.*, KAN. GEN. STAT. ANN. §17-2803 (F) (1949); OHIO REV. CODE ANN. §1701.11 (Page Supp. 1956).

vision unfettered by fears of an argument that the provision runs contrary to public policy. In the absence of express authority, however, the draftsman is forced to examine the statutory provisions and judicial decisions construing them in search for implied authorization.<sup>10</sup>

*Weissman v. Lincoln Corp.*,<sup>11</sup> the only Florida case in which the validity of a stock transfer restriction has been tested, held that Florida statutory law, combined with an express charter provision authorizing transfer restriction agreements, was ample authorization for "the imposition by agreement of the stockholders of any reasonable restraints upon the transfer or alienation of shares."<sup>12</sup> The Court quoted two statutes that were in effect at the time the corporation was organized and the stockholders' agreement executed. These statutes provided that the certificate of incorporation might include "any provision . . . limiting and regulating . . . the powers of . . . the stockholders . . . provided, such provisions are not contrary to the laws of this state"<sup>13</sup> and that "every corporation . . . shall have power to . . . make by-laws . . . for . . . the transfer of its stock . . ."<sup>14</sup>

The former statute has been retained in substantially the same form.<sup>15</sup> The latter statute, however, was amended in 1953.<sup>16</sup> It now provides that "every corporation shall . . . have power to . . . adopt . . . by-laws . . . for . . . the transfer on its records of its stock . . ."<sup>17</sup> Therefore, the draftsman who relies on the *Weissman* case for his authority for the inclusion of a restrictive provision should realize that a portion of the express statutory language upon which that decision was based has been materially altered. An advocate of free alienation of shares of ownership may seize on this omission as evidence of an intentional removal of authority to limit the transfer of stock. There remains, however, the broad optional clause provision<sup>18</sup> relied upon by the Court in the *Weissman* case, and in all probability the Florida Supreme Court will continue to find that stock transfer

<sup>10</sup>See *Mason v. Mallard Tel. Co.*, 213 Iowa 1076, 240 N.W. 671 (1932); *Longyear v. Hardman*, 219 Mass. 405, 106 N.E. 1012 (1914).

<sup>11</sup>76 So.2d 478 (Fla. 1954).

<sup>12</sup>*Id.* at 481.

<sup>13</sup>FLA. STAT. §612.03 (10) (1951). Emphasis added.

<sup>14</sup>FLA. STAT. §610.03 (6) (1951).

<sup>15</sup>FLA. STAT. §608.03 (2) (j) (1955).

<sup>16</sup>Fla. Laws 1953, c. 28170, §1.

<sup>17</sup>FLA. STAT. §608.13 (5) (1955). Emphasis added. The 1953 amendment purported to replace §610.03; however, §610.03 was not repealed until 1955, Fla. Laws c. 29615, §7.

<sup>18</sup>FLA. STAT. §608.03 (2) (j) (1955).

restrictions are impliedly authorized by the Florida general corporation law.<sup>19</sup>

#### NATURE OF THE RESTRICTION

Since shares of stock are classified as personal property by statute<sup>20</sup> in Florida, they are subject to the usual rules pertaining thereto, one of which is a requirement of freedom of alienation. Any attempt to limit the right of free alienation will be looked on with disfavor unless the court is satisfied that it is a reasonable restraint.<sup>21</sup> Any restriction that categorically takes away from the shareholder the right to transfer his shares is per se unreasonable.<sup>22</sup>

The underlying test of reasonableness is whether the restraint is sufficiently needed by the corporation to justify overriding the general policy against restraints on alienation of personal property.<sup>23</sup> Some of the factors courts usually consider are the size of the corporation,<sup>24</sup> the extent of restraint contained in the restriction,<sup>25</sup> the length of time it is to remain in effect,<sup>26</sup> the method of determining the price of the shares subject to the restriction,<sup>27</sup> and the likelihood of its contributing to the attainment of corporate objectives.<sup>28</sup>

In most corporations the choice of type of restriction will narrow

<sup>19</sup>See O'Neal, *Molding the Corporate Form to Particular Business Situations: Optional Charter Clauses*, 10 VAN. L. REV. 1 (1956); cf. FLA. STAT. §614.17 (1955). But see BALLANTINE, CORPORATIONS §16 (rev. ed. 1946).

<sup>20</sup>FLA. STAT. §608.42 (1955).

<sup>21</sup>E.g., *Bloomington v. Bloomington*, 107 Misc. 646, 177 N.Y. Supp. 873 (Sup. Ct. 1919); *Rychwalski v. Baranowski*, 205 Wis. 193, 236 N.W. 131 (1931); *Brown v. Little, Brown & Co.*, 269 Mass. 102, 110, 168 N.E. 521, 525 (1929) (dictum).

<sup>22</sup>*Baumohl v. Goldstein*, 95 N.J. Eq. 597, 599, 124 Atl. 118, 119 (Ch. 1924) (dictum); *Bloomington v. Bloomington*, 107 Misc. 646, 656, 177 N.Y. Supp. 873, 878 (Sup. Ct. 1919) (dictum). From a study of the cases this is apparently true regardless of the duration of the restraint. An example of a limited duration of time is a restriction placed on the transferability to insure the launching of the corporation on a sound financial basis.

<sup>23</sup>See 87 U. PA. L. REV. 482 (1939).

<sup>24</sup>See *People ex rel. Rudaitis v. Galskis*, 233 Ill. App. 414, 420 (1924) (dictum).

<sup>25</sup>See *People ex rel. Malcom v. Lake Sand Corp.*, 251 Ill. App. 499, 504 (1929) (dictum).

<sup>26</sup>See *Tracey v. Franklin*, 30 Del. Ch. 407, 61 A.2d 780 (Ch. 1948), *aff'd*, 31 Del. Ch. 477, 67 A.2d 56 (Sup. Ct. 1949).

<sup>27</sup>See *Security Life & Acc. Ins. Co. v. Carlovitz*, 251 Ala. 508, 38 So.2d 274 (1949).

<sup>28</sup>See *Lawson v. Household Finance Corp.*, 17 Del. Ch. 343, 152 Atl. 723 (Sup. Ct. 1930).

down to one of the three most widely used today: the "first option," the "consent restraint," or the "buy-and-sell" arrangement.

### *The First Option*

This form of restriction prevents the transfer of shares by the selling stockholder without first giving a purchase option to the company, to other shareholders, or to other designated optionees, who often are directors or officers of the corporation. This is the most satisfactory and currently the most popular form of restriction. Although at one time this form was usually held invalid as unreasonable and an arbitrary restraint on alienability,<sup>29</sup> its validity is now established beyond doubt in most jurisdictions.<sup>30</sup>

As shall be demonstrated in the "Planning and Drafting" section of this paper, it is sometimes of great importance whether the opportunity for refusal goes first to the corporation and then to the stockholders, or vice versa.

### *The Consent Restraint*

A requirement that a shareholder obtain the consent of some other person before disposing of his stock was the first restraint device used extensively in this country. This form of restriction was imported from England, where it has been consistently upheld in the courts.<sup>31</sup> The early American courts, however, held<sup>32</sup> almost without exception that such a requirement was an unreasonable restraint on the alienability of property. Although most of the later cases<sup>33</sup> uphold consent re-

<sup>29</sup>*E.g.*, *Victor G. Bloede Co. v. Bloede*, 84 Md. 129, 34 Atl. 1127 (1896); *Brinkerhoff-Farris Trust & Sav. Co. v. Home Lumber Co.*, 118 Mo. 447, 24 S.W. 129 (1893); *Ireland v. Globe Milling Co.*, 21 R.I. 9, 41 Atl. 258 (1898).

<sup>30</sup>*See, e.g.*, options to shareholders: *Sterling Loan & Inv. Co. v. Litel*, 75 Colo. 34, 223 Pac. 753 (1924); *Evans v. Dennis*, 203 Ga. 232, 46 S.E.2d 122 (1948); options to the corporation: *Lawson v. Household Finance Corp.*, 17 Del. Ch. 232, 152 Atl. 723 (Sup. Ct. 1930); *Baumohl v. Goldstein*, 95 N.J. Eq. 597, 124 Atl. 118 (Ch. 1924); *Cowles v. Cowles Realty Co.*, 201 App. Div. 460, 194 N.Y. Supp. 546 (1st Dep't 1922); options to directors: *Barrett v. King*, 181 Mass. 476, 63 N.E. 934 (1902).

<sup>31</sup>*See Annot.*, 2 A.L.R.2d 745, 766 (1948).

<sup>32</sup>*E.g.*, *Morris v. Hussong Dyeing Mach. Co.*, 81 N.J. Eq. 256, 86 Atl. 1026 (Ch. 1913); *In re Klaus*, 67 Wis. 401, 29 N.W. 582 (1886); *accord*, *Feckheimer v. National Exchange Bank*, 79 Va. 80 (1884).

<sup>33</sup>*Mason v. Mallard Tel. Co.*, 213 Iowa 1076, 240 N.W. 671 (1932); *Baum v. Baum Holding Co.*, 158 Neb. 197, 62 N.W.2d 864 (1954); *Wright v. Iredell Tel. Co.*,

straints, their validity is still in some doubt in many jurisdictions because of the earlier decisions declaring them invalid. In the *Weissman* case the part of the stockholders' agreement limiting the shareholder's power to pledge his shares was of the consent restraint type.<sup>34</sup> This portion of the agreement was not an issue in the case, however, and the Court did not pass on its validity.

An advantage of the consent restraint over the first option method is that it can be used to exclude undesired outsiders without tying up funds of the corporation or those of the remaining shareholders. On the other hand, the consent restraint is a detriment to the one wishing to sell, because he will be under the thumb of the person or persons whose approval he must obtain. It is true that the power to withhold consent must be exercised reasonably and in good faith, but the one wishing to sell must go through expensive and often extensive litigation in order to prove the faith, good or bad, of the one withholding consent.

If the consent restraint does not include some alternative for the one desiring to transfer in case consent is refused, the restriction may be held unreasonable as an absolute prohibition and thus invalid.

### *The Buy-and-Sell Agreement*

An agreement in which one party agrees to sell and another party agrees to buy on the happening of a stated occurrence is, in its simplest form, a buy-and-sell agreement. Such agreements typically are conditioned on the death of a shareholder, at which time the estate of the deceased will be obligated to sell its shares and the surviving stockholders will be obligated to purchase them in proportion to their holdings. A variation of this form of agreement is one that makes all the shareholders obligated only in the event no one of them desires to purchase all the shares. There has been very little litigation on the legality of options conditioned on the occurrence of events other than a stockholder's simple desire to sell. In one case an option to purchase on the death of the owner was successfully defended from a claim that it was invalid as "in the nature of a wager upon the life of a party . . ."<sup>35</sup>

Agreements wherein the corporation, rather than the surviving

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182 N.C. 308, 108 S.E. 744 (1921).

<sup>34</sup>76 So.2d 478, 479 (Fla. 1954).

<sup>35</sup>*Scruggs v. Cotterill*, 67 App. Div. 583, 587, 73 N.Y. Supp. 882, 885 (1st Dep't 1902).



shareholders, is to purchase the shares frequently run into the situation present in a well-known New York case.<sup>36</sup> An agreement under which a corporation was to purchase the shares of one of its employees on the termination of his employment was held unenforceable against the employee because the contract was lacking in mutuality of obligation. The court said that the corporation might not be able to perform at the time of the termination of the employment, because it might not have the funds available at that time from which it could legally purchase shares, and that therefore its promise to purchase the shares was illusory.<sup>37</sup> This rationale is equally applicable to stock purchase agreements by the corporation conditioned on the death of a shareholder.

Choice of the right restriction is a common problem in the field; it is seldom feasible to draft an agreement to suit the corporation's needs without incorporating more than one form of restriction. One or more of the infinite number of variations that are possible by manipulating the three basic types set forth above will usually cover the needs of any close corporation. In the *Weissman* case, for example, a first option restriction on sale of the stock was combined with a consent restraint on the power to pledge.

#### NOTICE OF THE RESTRICTION

What are the rights of a transferee who has acquired stock in violation of a restriction that the court considers to be reasonable?

Section 15 of the Uniform Stock Transfer Act,<sup>38</sup> which was designed to protect innocent purchasers of stock,<sup>39</sup> provides:

"There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any by-laws of such corporation, or otherwise,

<sup>36</sup>*Topken, Loring & Schwartz, Inc. v. Schwartz*, 249 N.Y. 206, 163 N.E. 735 (1928), criticized in 42 HARV. L. REV. 829 (1929).

<sup>37</sup>*Id.* at 210, 163 N.E. at 736. *But see* Greater N.Y. Carpet House, Inc. v. Herschmann, 258 App. Div. 649, 17 N.Y.S.2d 483 (1st Dep't 1940) (availability of funds assured by life insurance on stockholders).

<sup>38</sup>FLA. STAT. §614.17 (1955). All states have adopted the Uniform Stock Transfer Act; §15 has been omitted in Kansas and North Dakota and appears in a modified form as §2479 of CAL. CORP. CODE (1953). 6 U.L.A. 97 (Cum. Supp. 1955).

<sup>39</sup>*Baumohl v. Goldstein*, 95 N.J. Eq. 597, 604, 124 Atl. 118, 121 (Ch. 1924) (*dictum*).

unless the right of the corporation to such lien or the restriction is stated upon the certificate.”

The peculiar wording of this section has created the problem of what actually has to be printed on the certificate in order to conform to the statute. In the *Weissman* case the information printed on the stock certificate was:<sup>40</sup>

“The original of this stock is subject in all respects to the terms of a stockholders’ agreement made under date of March 13, 1946, the text of which is included among the minutes of the meeting of the Board of Directors and Stockholders held on March 13, 1946, and all persons to whom these presents may come are referred to the said minutes for the text of said stockholders’ agreement.”

In holding that this information was adequate to comply with the statute the Florida Court said:<sup>41</sup>

“It will be noted that the controlling statute required only that ‘the *right \* \* \** to \* \* \* the restriction’ be stated on the certificate. The language of the statute is significant in the light of appellant’s contention that the terms of the restriction itself must be set forth on the certificate and that nothing less will suffice. We have the view that the right to the restriction did appear on the certificate and was sufficiently stated to put Weissman on notice of the terms of the stockholders’ agreement and to bind him thereby.”

All courts have not been so lenient as the Florida Court; some might go so far as to say that the entire restriction must be reproduced verbatim on the face of the certificate.<sup>42</sup>

The printed statement on the certificate is constructive notice to prospective purchasers; a transferee cannot claim that he was ignorant of the restriction because he failed to read the stock certificate.<sup>43</sup>

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<sup>40</sup>76 So.2d 478, 483 (Fla. 1954).

<sup>41</sup>*Ibid.*

<sup>42</sup>See *Citizens Bank v. Bank of Penfield*, 24 Ga. App. 435, 101 S.E. 203 (1919); *Chandler v. Blanke Tea & Coffee Co.*, 183 Mo. App. 91, 165 S.W. 819 (1914).

<sup>43</sup>See *Weissman v. Lincoln Corp.*, 76 So.2d 478, 483 (Fla. 1954) (dictum); STEVENS, CORPORATIONS §129 (2d ed. 1949).

Because the purpose of the statement is to provide effective notice to transferees, failure to set out the notice does not help a transferee who through other sources had actual notice.<sup>44</sup> But neither actual nor constructive notice will validate a restriction that is otherwise unreasonable.<sup>45</sup>

### PLANNING AND DRAFTING

The draftsman of a stock transfer restriction must realize that its efficacy arises only out of the express language employed in the instrument and that the restriction will not be enlarged by implication.<sup>46</sup> This practice of strict construction makes it essential that all possible ambiguities be eliminated through precise and detailed specification.<sup>47</sup>

There are numerous areas of dispute and possible litigation that can easily escape the attention of the draftsman. This note does not purport to exhaust the possibilities; however, a few of the areas that have given rise to seemingly avoidable litigation will be discussed. For simplicity's sake, this discussion will be couched in terms of a first option restriction; most of the problems described are equally germane when other restrictive methods are employed.

#### *Locating the Provision*

Assuming that a draftsman, pursuant to clear statutory authority, has prepared a restrictive provision that will withstand the test of reasonableness, he must then decide upon a proper instrument in which to locate the provision. The cautious draftsman, for reasons presented in the following discussion, should utilize a combination of four instruments: the articles of incorporation, a shareholders' agreement, the bylaws of the corporation, and the individual stock certificates issued.

A reasonable stock transfer restriction placed in the articles of incorporation is valid and enforceable against a purchaser who has constructive notice or actual knowledge of the restriction. There are several salient reasons, however, why the draftsman should not rely

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<sup>44</sup>See *Tomoser v. Kamphausen*, 307 N.Y. 797, 121 N.E.2d 622 (1954). *But see* *Sorrick v. Consolidated Tel. Co.*, 340 Mich. 463, 65 N.W.2d 713 (1954).

<sup>45</sup>*People ex rel. Malcom v. Lake Sand Corp.*, 251 Ill. App. 499 (1929).

<sup>46</sup>*McDonald v. Farley & Loetscher Mfg. Co.*, 226 Iowa 53, 283 N.W. 261 (1939).

<sup>47</sup>See *Oakland Scavenger Co. v. Gandi*, 51 Cal. App.2d 69, 124 P.2d 143 (1942); *Guaranty Laundry Co. v. Pulliam*, 198 Okla. 667, 181 P.2d 1007 (1947).

on this one instrument. The interests of a minority stockholder under this arrangement are protected only to the extent that a majority of the stock is not voted to amend or repeal the provision. In other words, a restraint provision in the articles, without more, is no assurance to a shareholder who is powerless to prevent the provision from being amended or repealed.

A study of the provisions of various state corporation statutes pertaining to the amendment procedure reveals that a frequent practice is to provide that a majority vote, or such greater amount as may be required by the certificate of incorporation, shall be required to effectuate an amendment to the articles.<sup>48</sup> If such statutory provisions are construed to allow the articles to provide for unanimous vote, there would seem to be no objection to providing along with the restriction of transfer provision an additional clause providing that the restriction cannot be amended or repealed except by unanimous vote of the stock. Amendment of this latter clause must also be subject to the same requirement of unanimity. These provisions, if valid, would of course afford ample protection to the holder of any portion of the stock.

The Florida corporation laws provide that "every amendment shall be . . . approved at a stockholders' meeting by such proportion, not less than a majority, of the stock entitled to vote thereon as may be provided in the certificate of incorporation."<sup>49</sup> Although the language of the statute apparently permits the charter to provide for some proportion of votes other than a bare majority, it is doubtful that this could be extended to a unanimity requirement.<sup>50</sup> The Florida Court has not yet been called upon to rule on the validity of a charter provision requiring a unanimous vote to amend or repeal. The uncertainty in this area should serve as a signal to the draftsman that a provision in the articles requiring unanimity in their amendment may not alone efficaciously serve its intended purpose.

The entire provision contained in the articles should also be made the basis of a shareholders' agreement, which would survive as a binding contractual commitment between agreeing parties after a successful attempt to amend away the charter provision. This share-

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<sup>48</sup>See, e.g., IND. ANN. STAT. §25-223 (Supp. 1956); KY. REV. STAT. §271.445 (1955); NEV. COMP. LAWS §1606 (Supp. 1941).

<sup>49</sup>FLA. STAT. §608.18 (1) (1955).

<sup>50</sup>See *Sellers v. Joseph Bancroft & Sons Co.*, 23 Del. Ch. 13, 2 A.2d 108 (Ch. 1938) (unanimity requirement separate issue from the mere greater-than-a-majority requirement); *Benintendi v. Kenton Hotel, Inc.*, 294 N.Y. 112, 60 N.E.2d 829 (1945).

holders' agreement might also provide the answer to the amendment problem by containing promises not to vote in such a way as to effect an amendment to the charter provision restricting the transfer of stock.<sup>51</sup> After executing a shareholders' agreement and incorporating the terms into the articles of incorporation, the restriction should be repeated verbatim in the corporate bylaws. This measure will afford another source of notice of the restriction and will preclude any challenge of the restriction based on the statutory requirement that the corporation be governed according to its bylaws.<sup>52</sup>

Of course, it must be remembered that all of this may go for naught if a reference to the restriction is not noted on the actual stock certificates allotted.<sup>53</sup>

### *Dispositions Subject to the Restraint*

If the intended purpose of the restriction is to provide for the exercise of the option prior to any mode of disposition by a stockholder, the instrument must clearly indicate these terms. The draftsman is inviting litigation and a thwarting of the purpose of the restraint if he neglects to anticipate the numerous ways by which a stock certificate might be voluntarily or involuntarily transferred or encumbered by a party to the agreement. The draftsman should expressly provide that the restraint shall apply to transfers by sale, assignment, pledge, will, inter vivos gift, or any other attempt to transfer or encumber the stock.<sup>54</sup> The option should be made exercisable in the event that a creditor<sup>55</sup> or the unsought operation of law<sup>56</sup> threatens

<sup>51</sup>See O'Neal, *Restrictions on Transfer of Stock in Closely Held Corporations: Planning and Drafting*, 65 HARV. L. REV. 773 (1952).

<sup>52</sup>See FLA. STAT. §608.07 (1955).

<sup>53</sup>FLA. STAT. §614.17 (1955); see "Notice of the Restriction," *supra*.

<sup>54</sup>See *Stern v. Stern*, 146 F.2d 870 (D.C. Cir. 1945) (in absence of enumeration of specific types of dispositions covered by the restriction, a transfer by will is not subject to the restriction); *Weissman v. Lincoln Corp.*, 76 So.2d 478, 482 (Fla. 1954) (pledgee's right to foreclose his lien inoperative to defeat the first option provision; if the draftsman had specifically included "pledge" in the first option provision, this litigation might have been avoided). *But see Boston Safe Deposit and Trust Co. v. North Attleborough Chapter*, 330 Mass. 114, 111 N.E.2d 447 (1953).

<sup>55</sup>*Weissman v. Lincoln Corp.*, 76 So.2d 478, 482 (Fla. 1954) (dictum) (recognizing as a general rule that an unmodified restriction against sales does not apply to judicial sales).

<sup>56</sup>See *McDonald v. Farley & Loetscher Mfg. Co.*, 226 Iowa 53, 283 N.W. 261 (1939) (in absence of specific provision covering transfers by operation of law, a transfer to a receiver in insolvency is not subject to the restriction).

to effect a transfer by sale under levy of execution, attachment, seizure by a trustee in bankruptcy, the laws of intestacy, or any other transfer that can happen regardless of the will of the owner.

Express provision should be made if transfers to existing shareholders or members of their families are to be excluded from the operation of the restriction. The draftsman must determine the style of this provision on the basis of the purpose to be served by the restraint. If the objective of the restraint is merely to prevent outsiders from becoming shareholders, there appears to be no reason for subjecting transfers to existing shareholders to the restriction. If, however, the purpose of the restriction is dual and includes as an additional objective a freezing of the existing balance of control, it may be desirable expressly to include transfers to existing shareholders in the scope of the restriction.

#### *Identity and Relative Rights of Optionees*

Who may exercise the option? What is the priority among several optionees? In what proportion can the optionees purchase? Failure to answer these queries adequately in the provisions of the stock transfer restriction could easily plunge a closely held corporation into a course of ruinous squabbling. On the other hand, clear and unambiguous answers in the provisions will operate to secure the delicate balance of control so essential to most closely held corporations.

Who may exercise the option? It may be conferred upon the corporation, the existing shareholders, or upon some other class of optionees. If the corporation is an optionee, an additional consideration arises. Assurance must be had that the corporation has the power to purchase its own shares. Corporation laws usually provide for this power, but generally the purchase can only be made from the surplus of assets over liabilities.<sup>57</sup> The intent of the restriction may be frustrated if a shareholder desires to dispose of his stock at a time when the available funds will not support a purchase. This situation becomes especially acute if the corporation is the sole optionee.

The corporation may be omitted as an optionee, thus allowing the option to run directly to the existing shareholders. Under this plan, the necessity of maintaining a sufficient corporate fund to meet the event of a sale by a retiring shareholder is eliminated. A similarly objectionable feature arises, however, in that a vendor may choose to

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<sup>57</sup>FLA. STAT. §608.13 (9) (1955).

force the option at a time when some of the shareholders consider it inexpedient to purchase. Yet the failure to exercise their options would serve to dilute their interests in derogation of the objective of the stock transfer restriction. The advantages of both plans can be preserved and certain of the disadvantages eliminated by granting the option to both the corporation and the existing shareholders.

What is the priority as among several optionees? The optimum results are obtained by granting the option to the corporation and then, in the event of its refusal, to the shareholders. The disadvantage of naming the corporation as the sole optionee no longer exists, and the burden on the individual shareholder to be continually in a financial position to buy on the occasion of any other shareholder's whim to sell is removed.

In what proportions can the shareholders purchase? Thus far the discussion has simply spoken of sales "to the shareholders." Although this provision will serve to disallow intrusions by strangers, the choice of this nondescript phrase is an invitation to dispute. On the basis of such a restriction a selling shareholder can offer his shares to any one or any combination of the remaining shareholders without violating the restriction.<sup>58</sup> Therefore, the desire to maintain a balance of control in the firm dictates that the draftsman precisely delineate the proportionate extent to which each of the shareholders may participate in the purchase of the optioned stock. A provision that will serve the needs of most restrictions is one that allows the shareholders to purchase "pro rata, in the proportion of their present holdings."

#### *Predetermined Sales Price*

The detailed consideration given to the problem of evaluating stock in a closely held corporation for federal tax purposes<sup>59</sup> should serve as a warning that the task is not an easy one. The problem is doubly complicated when it becomes necessary to project the assayed price into the future.

The details incident to a satisfactory job of drafting this portion of a stock transfer restriction are beyond the purview of this note. Mention will be made, however, of several vital considerations. First,

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<sup>58</sup>*Serota v. Serota*, 168 Misc. 27, 5 N.Y.S.2d 68 (Sup. Ct. 1938); *Guaranty Laundry Co. v. Pulliam*, 198 Okla. 667, 181 P.2d 1007 (1947); *Rychwalski v. Baranowski*, 205 Wis. 193, 236 N.W. 131 (1931).

<sup>59</sup>Rev. Rul. 77, 1954-1 CUM. BULL. 187.

even a cursory understanding of human nature warns the draftsman against a policy of postponing the sales price negotiations to a time when identified buyers and sellers must agree. Agreement at this point is extremely unlikely. At the time of drafting the transfer restriction agreement, however, it should not be overly difficult to agree on a scheme for future price determination. At this stage, the agreeing parties are not hampered by knowledge of the terms that will prove most advantageous to their now undetermined positions in a future sale. The draftsman should take advantage of this period of objectivity and provide for a binding formula to settle anticipated disputes.<sup>60</sup>

The possibility of affecting tax consequences by the price-fixing provisions of the restriction are of primary importance, and they must be thoroughly investigated prior to the adoption of any method.<sup>61</sup> A final consideration in the formulation of a method of evaluation is the possibility that the prescribed method may be held to be incapable of enforcement if the terms are indefinite, incomplete, or vague.

#### CONCLUSION

Businessmen, seeking to mould a business form to their needs, crossed a corporation with a partnership and bred the answer — the close corporation. This was achieved by steadily pounding against a judicial intolerance of this hybrid offspring. Despite some vestigial resistance, there seems to be little doubt that the close corporation is now a firmly rooted member of the mercantile world and that a major contributor to this success was the gradual breakdown of the once jealously guarded concept of free alienability of shares of corporate ownership. Draftsmen who are aware of the areas in which a policy of strict construction will militate against nonspecific language should be able to formulate successfully a stock transfer restriction that will serve the needs of the small entrepreneur.

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<sup>60</sup>See the methods suggested for estate planning purposes in Anderson, *Disposition of Business Interests*, 9 U. FLA. L. REV. 459, 485 (1956).

<sup>61</sup>See O'Neal, *Restrictions on Transfer of Stock in Closely Held Corporations: Planning and Drafting*, 65 HARV. L. REV. 773 (1952).