1973

The Close Corporation-Comparing The Separate Statutory Treatments of Florida, Delaware and Maryland with Virginia's Version of The Model Act

Follow this and additional works at: http://scholarship.richmond.edu/lawreview

Part of the Business Organizations Law Commons

Recommended Citation


Available at: http://scholarship.richmond.edu/lawreview/vol7/iss3/8

This Comment is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.
COMMENTS

THE CLOSE CORPORATION—COMPARING THE SEPARATE STATUTORY TREATMENTS OF FLORIDA, DELAWARE AND MARYLAND WITH VIRGINIA’S VERSION OF THE MODEL ACT

In a trend beginning before the turn of the nineteenth century and accelerating during the period after the Second World War, state corporation laws have evolved into enabling acts recognizing and catering to modern business practices. The restrictions retained in these acts remain both to protect the public and balance the relationships between interested parties within the corporation. Despite these remaining restrictions, the philosophy of the modern acts is to create a climate favorable for corporate activity.

Notwithstanding this evolutionary process, the statutes have only recently recognized that the corporate system that their provisions attempt to define and regulate is not uniform, but rather two separate systems—the public issue and the close corporation—struggling to live under one set

---

4 Since first statutory recognition of the special needs of the close corporation in New York in 1948, many states have made some statutory concessions with three states enacting separate acts. See, e.g., 1 F. O’Neal, Close Corporations §§ 1.14 and 1.14a (1971) [hereinafter cited as O’Neal].
6 A. Berle & G. Means, The Modern Corporation and Private Property 4-6 (1936). For the purposes of this article, a public issue corporation is characterized by the separation of control from ownership brought about by the sale of its securities to the “investing public” on the open market.
of rules. The conflict exists because of the inherent differences in the two corporate forms. As a general rule, those who form a close corporation seek limited liability but do not share the public issue corporation's interest in the assurance of a ready source of new capital. Thus, the close corporation is characterized by restrictions on the free alienability of its shares and carefully drawn agreements designed to govern the relationship between the owners and the affairs of the corporation. Its genesis in a contractual relationship between the parties coupled with the lack of a market for its securities distinguishes the close corporation from the public issue corporation. What similarity there is between the two stems from the form imposed on the close corporation by statutes created with the publicly held corporation in mind.

The argument for special statutory treatment of the close corporation is not new. Indeed, that most modern corporation statutes today make some concessions to the close corporation is the result of an intense lobbying effort which began before World War II and continues today. Proponents have urged that because the close corporation is really only a partnership seeking limited liability, conformity to the normal statutory formalities designed for the publicly held corporation is a triumph of form over substance. Remaining debate on the subject boils down to a difference of opinion on what price a business association should pay in exchange for state granted life and limited liability. Those who champion special statutory treatment argue that the decision to grant limited liability should turn on economic and public policy issues, not form. Those few who urge

---

[A] close corporation is a business organization in normal corporate form with shares not generally traded in security markets and few shareholders, all of whom are generally known to one another, who wish to somehow participate in the management of affairs in a partnership sense, but who have limited liability. Id. at 247.

11 For a complete discussion of the distinctive needs of the close corporation, see O'Neal §§ 1.01-1.16.
12 Cataldo, Limited Liability with One-Man Companies and Subsidiary Corporations, 18 Law & Contemp. Prob. 473 (1953). For an excellent discussion of the public policy
caution and due consideration before disregarding restrictions point out that, with few restrictions other than an internal agreement between the parties, it might be too easy for enterprises to begin and fail, transferring the ultimate risk of failure to their creditors and the public. For purposes of this article, however, it is assumed that the modern statutory provisions recognizing the special needs of the close corporations are justified.

This article will examine briefly the experience and provisions in the three states that have attempted separate statutory treatment, Florida, Delaware, and Maryland, and compare what some think has been the best effort with the current law in Virginia.

I. The Statutory Definition

The most persistent difficulty in drafting separate close corporation statutes, determining a suitable definition, has been compounded by the fact that scholars seldom agree on a single definition. The drafter must find a description that readily distinguishes the corporate form that the act will govern from those that it will not. At the practical level, it is essential that lawyers know and understand what is included in order to either bring their clients within the coverage, or equally important, to avoid it.

Having weighed the alternatives, the drafters of the Florida act seized upon one of the general characteristics of a close corporation—restrictions on share transferability—to form their definition.
As used herein, close corporation means a corporation for profit whose shares of stock are not generally traded in the markets maintained by securities dealers or brokers. ¹⁸

The "not generally traded" test has been used most frequently in acts making special concessions to the close corporation. ¹⁹ Despite its wide use, the definition represents one of the weaker parts of the Florida act, because its use of indefinite language undermines the essential function of the definition. As pointed out in a criticism of the act, the "not generally traded" language could apply to any corporation, whether or not intended to be public issue, before a public offering of its stock is made. ²⁰ In addition, such language must rely on court interpretation to delineate the permissible limits. Thus, by focusing on the result, limited trading, instead of the cause, an agreement among the parties limiting the transferability of shares, the statute leaves the door open for confusion as to what the act regulates. ²¹

In addition to these problems, the act is not clear as to whether its provisions automatically apply to corporations that fit the definition, or whether applicability must be elected. Equally unclear is whether once the status is acquired, can it be lost by other than stockholder action?

Therefore, despite the recognized difficulty in arriving at any suitable definition, the Florida "experiment" seems to have fallen short.

The Delaware statute adopts a functional rather than a descriptive definition of the close corporation. To be governed by its provisions, the corporation must include the following provisions in its certificate of incorporation:

(1) All of the corporation's issued stock of all classes, exclusive of treasury shares, shall be held of record by not more than a specified number of persons, not exceeding thirty; and
(2) All of the issued stock of all classes shall be subject to one or more of the restrictions on transfer permitted by section 202 of this title; and
(3) The corporation shall make no offering of any of its stock of any class which would constitute a "public offering" within the meaning of the United States Securities Act of 1933, as it may be amended from time to time. ²²

¹⁸ Fla. § 608.70 (emphasis added).
²² Del. § 342.
The Delaware definition avoids many of the problems encountered with the Florida statute. It is clear which corporations are governed by the act, because those affected must affirmatively bring themselves within its provisions by adopting the requisite elements in their certificates of incorporation. The act specifically avoids the "not generally traded" test by providing that the securities will be subject to limitations on transferability, and that no public offering can be made within the ascertainable standards set by the Securities Act of 1933.

While avoiding some of the problem areas, the numerical limitation in the Delaware definition has been criticized as too arbitrary and not a true limitation on the number of stockholders. Despite these arguments, it appears that some limitation on the number of stockholders is a legitimate prerequisite for close corporation status, based on the concept that the separate provisions should not be available to what in effect would be public issue corporations. Moreover, the functional definition explains that special close corporation status can be lost by removing the necessary elements from the charter. However, the definition is weak in that it permits the status to be acquired or given up by a two-thirds vote of the stockholders, thus providing little comfort to a minority that opposes either move.

Maryland has adopted the most novel approach to the problem of definition. Any corporation may become subject to the act by the unanimous vote of its stockholders.

---

23 For an argument that Delaware has traded the unacceptable "not generally traded" test for "an equally elusive and uncertain element in the form of a ban on a 'public offering'" see Bradley, A Comparative Evaluation of the Delaware and Maryland Close Corporation Statutes, 1968 Duke L.J. 525,532. For additional attack on the public offering restriction, see Comment, Delaware's Close-Corporation Statute, 63 Nw. U.L. Rev. 230, 239-43 (1968).


25 The Delaware Code actually authorizes at least 60 stockholders, since § 342(c) permits jointly held stock to be treated as if held by one stockholder.


27 The number used [ten] is not altogether arbitrary, for we do know that businessmen and their counsel today are heavily influenced by the Subchapter S provisions. Hence the number ten has relevance as no other number has. Id. at 1190.


Without statutory recognition of the close corporation, public issue corporations could avail themselves of provisions which for reasons of public policy should not be applicable to such enterprises. Id. at 708.


28 Del. § 344.
election of the stockholders to become a close corporation, and by the insertion of a statement to that effect in the articles of incorporation. This approach is sufficient, and in many ways preferable, to the Florida and Delaware examples, because of its insistence on unanimity for all major questions affecting the corporation. Not only does the requirement recognize the partnership-like nature of the close corporation, but it also renders selection of close corporation status totally unacceptable to a public issue corporation, thus accomplishing the purpose of a definition and avoiding the difficulties inherent in most attempts to define the close corporation.

II. STATUTORY TREATMENT OF CONTROL MECHANISMS

A. Stockholder Agreements

The Florida statute permits the stockholders of a close corporation to enter into written agreements, either by inclusion in the articles of incorporation or by-laws, or by simple side agreement, relating to any phase of the affairs of the corporation, including but not limited to:

(a) Management of the business of the corporation.
(b) Declaration and payment of dividends as division of profits.
(c) Who shall be officers or directors, or both, of the corporation.
(d) Restrictions on the transfer of stock.
(e) Voting agreements, including the requirements of unanimous voting of stockholders or directors.
(f) Employment of stockholders by the corporation.
(g) Arbitration of issues as to which the stockholders are unable to break the deadlock.

The sweeping language of this and similar sections in Delaware and Maryland is necessary to overcome whatever lingering effect earlier adverse decisions might still have on these agreements. Specifically, the Delaware provision provides:

29 Md. § 100.
30 Unanimity is required by section 100 to adopt or give up close corporation status; by section 101(a) to transfer the shares of the close corporation; by section 102(a) to issue additional shares (unless otherwise agreed by all in the stockholder agreement); by section 104(b) to amend the stockholder agreement; and by section 110 to sell, exchange, lease, etc., the corporation assets.
31 Fla. § 608.75.
32 Del. § 354.
33 Md. § 104.
34 Abercrombie v. Davis, 35 Del. Ch. 599, 123 A.2d 893 (1956); Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling, 29 Del. Ch. 610, 53 A.2d 441 (Sup. Ct. 1947). For a note on the enforceability of stockholder agreements in Vir-
No written agreement among stockholders of a close corporation, nor any provision of the certificate of incorporation or of the by-laws of the corporation, which agreement or provision relates to any phase of the affairs of such corporation, including but not limited to the management of its business or declaration and payment of dividends or other division of profits or the election of directors or officers or the employment of stockholders by the corporation or the arbitration of disputes, shall be invalid on the ground that it is an attempt by the parties to the agreement or by the stockholders of the corporation to treat the corporation as if it were a partnership. ... \(^{35}\)

While the provisions in both statutes leave little doubt as to the validity of stockholder agreements, by not including language authorizing the courts to enforce their terms specifically, the two statutes have missed an opportunity to clarify the effectiveness of this important planning tool.\(^{36}\)

Again, the Maryland act seems to provide a preferable scheme. It authorizes stockholder agreements covering every facet and function of the corporation;\(^{37}\) it includes authorization for the courts to enforce their terms specifically;\(^{38}\) and its requirement for unanimity reduces the opportunity for minority oppression inherent in the Florida and Delaware acts. For example, the acts of the latter two states authorize stockholder agreements among less than all the stockholders and with outsiders to limit the discre-

---

\(^{35}\) Del. § 354. See also Del. § 350, which provides:

A written agreement among the stockholders of a close corporation holding a majority of the outstanding stock entitled to vote, whether solely among themselves or with a party not a stockholder, is not invalid, as between the parties to the agreement, on the ground that it so relates to the conduct of the business and affairs of the corporation as to restrict or interfere with the discretion or powers of the board of directors. . . .

\(^{36}\) For an argument that the new Delaware provisions eliminate the uncertainty in this area see Note, The New Delaware Corporation Law, 5 Harv. J. Legis. 413, 415 (1968).

\(^{37}\) The stockholder agreement may include but is not limited to:

1. The management of the business and affairs of the corporation;
2. Restrictions on the transfer of stock;
3. The right of one or more stockholders to dissolution of the corporation at will or upon the occurrence of a specified event or contingency;
4. The exercise or division of voting power;
5. The terms and conditions of the employment of any officer or employee regardless of the length of the period of such employment;
6. The persons who shall be directors and officers of the corporation;
7. The payment of dividends or division of profits.

\(^{38}\) Md. § 104 (a).

Hall, The New Maryland Close Corporation Law, 27 Md. L. Rev. 341 (1967). "This section is included solely for the purpose of insuring that the courts entertain no doubt as to their broad power under the new statute." Id. at 357.
tion of the board of directors.\footnote{39}{DEL. \S 350. FLA. \S 608.75 (3).} Under these circumstances, a minority stockholder caught without a market for his shares may find "that the power to manage the corporation not only is no longer in the hands of his fellow incorporators but is held by a party who as a creditor has interests contrary to those of the minority stockholder."\footnote{40}{Note, The New Delaware Corporation Law, 5 HARV. J. LEGIS. 413, 416 (1968).} By contrast, the Maryland insistence on unanimity in all stockholder agreements makes the most complete accommodation of the partnership characteristics\footnote{41}{UNIFORM PARTNERSHIP ACT \S 31 (1) (c).} of the close corporation.

The purpose of this provision is to afford protection to the minority stockholder against any change in the agreement which he has negotiated and upon the basis of which he has invested.\footnote{42}{Hall, The New Maryland Close Corporation Law, 27 Md. L. Rev. 341, 356 (1967).}

\textbf{B. Management by the Stockholders}

All three states\footnote{43}{FLA. \S 608.72; DEL. \S 351; MD. \S 105.} have specific provisions allowing the stockholders to manage the corporation without directors.\footnote{44}{Kessler, The Statutory Requirement of a Board of Directors: A Corporate Anachronism, 27 U. Chi. L. Rev. 696 (1960).} Delaware, in an interesting contrast to its section limiting the board's discretion, requires that the decision to do without a board of directors be incorporated into the charter by a unanimous vote of all stockholders.\footnote{45}{For an argument that a "freeze-out" could be avoided by reading the term "stockholder" in section 354 of the Delaware act to mean all the stockholders, see Bradley, \textit{A Comparative Evaluation of the Delaware and Maryland Close Corporation Statutes}, 1968 DUKE L.J. 525, 537-38.} However, the act shrinks from this protection for minority holders, providing that once incorporated in the charter, the management provision can be removed only by a majority vote!\footnote{46}{DEL. \S 351. For an opinion that the effect of this statute can create a classic "freeze-out" of the minority holders, see Bradley, \textit{A Comparative Evaluation of the Delaware and Maryland Close Corporation Statutes}, 1968 DUKE L.J. 525.} The Maryland approach has also received criticism because the section is not as permissive as it could have been, with the result that the stockholders must conform to the formalities imposed on a board of directors.\footnote{47}{MD. \S 105. The criticism stems from the fact that the stockholders in abolishing the board of directors do not abolish the corporate formalities surrounding the functioning of a board. Under the provision of section 105 the formalities are transferred to the shareholders.}
III. PROVISIONS FOR CONFLICT AND DISSOLUTION

A separate close corporation statute is not complete without provisions for dealing with the conflict that can develop among the stockholders when the glow of harmony wears off. Remedies for this problem are particularly necessary in light of the absence of a ready market for the shares of a close corporation. When deadlock develops, the minority stockholder will look for a way out through either: (1) an equitable process to break deadlock, (2) a sale of his shares at a fair price to other interested parties within the corporation, or (3) dissolution.

The Florida act offers no alternative to dissolution unless arbitration is agreed to in the stockholders agreement. Empowering the court to dissolve the corporation on the petition of any stockholder if either the directors or stockholders is deadlocked, the statute does nothing to overcome the existing case authority in Florida which refuses dissolution unless "deadlock has progressed to the point where the corporate purpose is impossible of attainment." Therefore, it appears that Florida has not provided a viable way out for the minority stockholder.

The Delaware act introduces a novel approach to breaking deadlock: the provisional director. This procedure can be a valuable alternative to dissolution in that it allows the business to continue without a sellout. The provisional director is appointed by a chancery court upon the petition of either one-half the directors or one-third the stockholders eligible to elect directors, unless a petition by a lesser proportion is permitted by the articles of incorporation. The court will appoint the director if it finds that the business of the corporation can no longer be conducted to the advantage of the stockholders.

The supposed advantages of this remedy are thus predicated both upon his power to cast a deciding vote to break deadlock on the director level and upon his persuasiveness in pressing new ideas or alternatives or by acting as mediator or conciliator.

---

48 FLA. § 608.77.
50 DEL. § 353.
51 If the corporation has different classes of stock, section 353 also allows petition by two-thirds of the holders of any one class of stock. In addition, under section 352(b), a provisional director can be appointed as an alternative to a custodian if, in the court's determination, it would be in the best interest of the corporation. The standards governing the court's discretion seem to be different.
52 Folk, Corporation Statutes: 1959-1966, 1966 DUKE L.J. 875, 953. Professor Folk goes on to point out that the basic reason for deadlock is usually the incompatibility of the principals and the provision "may only postpone the day when more drastic remedies must be invoked." Id. at 953.
The Delaware statute also empowers the court, upon the petition of any stockholder, to appoint a custodian with power to dissolve the business. The act also allows dissolution upon the happening of a specified event, pursuant to a stockholder agreement, thus completing a variety of alternatives for the oppressed stockholder.

Section 79 A(a) of the Maryland Corporation Code, a section available to the public issue corporation, provides that twenty-five percent of the stockholders of any corporation may appeal to the court for dissolution if the directors or stockholders are deadlocked. The electing close corporation has the additional benefit of the more liberal language of section 109.

The standard under which a Section 109 dissolution is to be granted is deliberately broad in order to allow the courts the widest possible latitude in reaching fair and sensible results in a wide variety of cases.

Under section 109, any stockholder may petition for and receive dissolution if the court is convinced that the dissension is such that "the business and affairs of the corporation can no longer be conducted to the advantage of the stockholder generally." If the stockholder agreement contains a clause calling for the dissolution of the corporation upon the happening of an event, or establishes some standard other than the code's, then it might not be necessary to resort to a section 109 proceeding. As an alternative to dissolution, the Maryland Act establishes a right in the majority stockholders to purchase the shares of the petitioner, thereby barring his right to dissolution. This section assures a fair, court determined value for the seller's stock.

IV. SUMMARY

Of the three statutes examined, the Florida attempt seems the least desirable. Its problem with a suitable definition and failure to provide real guidance for the settlement of internal disputes renders this first attempt at separate treatment a poor model for future legislation.

The fact that Delaware's provisions for the public issue corporation, contained in the separate subchapter, provide many of the same advantages

---

53 Del. 352(a). There is some question whether the provisional director remedy is really an alternative to the court appointed custodian. Since the custodian has the power to wind up the affairs of the corporation, it seems logical that the director be tried first, because his authority is to steer the corporation through a temporary impasse. In reality, both these remedies best serve the public issue corporation and make more sense in that context.

54 Del. § 355(a); Md. § 104(a) (3).
56 Md. § 109(a).
57 Md. § 104(a) (3).
58 Md. § 109(c).
to all corporations casts doubt on the necessity for stringent rules governing the attainment of close corporation status. In addition, Delaware's failure to require unanimity on certain key issues tends to make it appear less desirable than the Maryland act. It remains to be seen if the Maryland model can provide guidance as one reviews the statutory treatment of the close corporation in Virginia.\footnote{For a recent evaluation of the Florida, Delaware and Maryland acts, see O'Neal, \textit{Close Corporation Legislation: A Survey and an Evaluation}, 1972 \textit{Duke L.J.} 867.}

V. THE CLOSE CORPORATION AND VIRGINIA'S VERSION OF THE MODEL ACT

The Virginia Corporation Code is an adaptation of the Model Business Corporation Act [hereinafter referred to as the Model Act].\footnote{For a section by section analysis of the ABA-ALI \textit{MODEL BUSINESS CORPORATION ACT}, see the ABA \textit{Model Bus. Corp. Act ANN.} 2d prepared by the Committee on Corporate Laws (Section of Corporation, Banking and Business Laws of the American Bar Association) published by the American Bar Foundation. \textit{See also note 2 supra.}} Prior to 1969, the Model Act made few concessions to the close corporation. In the 1969 revision, the drafters of the Model Act chose to amend the existing sections rather than prepare a separate integrated chapter for the close corporation.

A. Definition

The Model Act does not concern itself with the definition problem because its sections designed for the close corporation are available to all corporations as their needs require. Thus, it is argued that a public issue corporation will not organize under these provisions because they are totally inappropriate.

B. Control Mechanisms

1. Stockholder Agreements

Section 4(1) of the Model Act authorizes the corporation to "make and alter by-laws, not inconsistent with its articles of incorporation or with the laws of this state, for the administration and regulation of the affairs of the corporation."\footnote{ABA-ALI \textit{MODEL BUS. CORP. ACT § 4 (1).} [hereinafter cited as \textit{Model Act} § 4].} This concession, along with section 35, which permits the corporation to establish its own management scheme free of the requirement for a board of directors,\footnote{\textit{The business and affairs of a corporation shall be managed by a board of directors except as may be otherwise provided in the articles of incorporation.} \textit{Model Act} § 35.} section 50, which grants authority to the stockholders to establish the duties and responsibilities of corporate officers,\footnote{\textit{All officers and agents of the corporation, as between themselves and the corporation, shall have such authority and perform such duties in the management of the corporation as may be provided in the by-laws . . . .} \textit{Model Act} § 50.} section 54, which permits the articles to include "any desired
provision for the regulation of the internal affairs of the corporation,” and the key features of section 34, authorizing stockholders agreements and ensuring their enforceability, create a favorable statutory environment for the close corporation. However, one can argue that even this liberalization of the law is not as productive as the total break from existing corporate norms made by the states that have enacted separate statutes. For example, it is significant that the Model Act, in order to make itself acceptable to a great many jurisdictions, has left its enabling language vague, thus necessitating reliance on case law to add limits and definition to its provisions. This is inherent to a degree in all legislation, but statutes should strive to eliminate as much uncertainty as possible. Thus, the Maryland example, charting a totally new course for the close corporation and removing all doubt as to the validity of certain key issues, seems a preferable course of action.

Virginia’s adaptation does not provide the same degree of flexibility to close corporation planners as the original Model Act. A significant omission is found in Virginia’s Code section 13.1-35. This section was originally designed to make “agreements among shareholders regarding the voting of their shares . . . valid and enforceable in accordance with their terms without limitation in time.” By failing to distinguish a voting trust from a stockholders agreement, and by omitting the language authorizing enforcement by the courts, the statute has failed to accomplish the purpose of the Model Act provision. This omission should be corrected, not only for the reason stated, but to acknowledge existing case authority in Virginia.

2. Management by the Stockholders

Virginia’s most glaring failure with respect to the close corporation is its continued insistence on management by a board of directors. Section 35 of the Model Act directs that “the business and affairs of a corporation should be managed by a board of directors except as may be otherwise

64 Model Act § 54(h).
65 “Agreements among shareholders regarding the voting of their shares shall be valid and enforceable in accordance with their terms. Such agreements shall not be subject to the provisions of this section regarding voting trusts.” Model Act § 34.
67 Id. at 756-57.
68 Sternheimer v. Sternheimer, 208 Va. 89, 155 S.E.2d 41 (1967). Here the stockholders of a family corporation entered into an agreement covering the distribution of the stock, the officers of the corporation, their duties, and compensation. The court, in modifying and affirming the lower court decree, held that the contract was binding on the parties and, without hesitation, enforced its provisions.
According to the Committee on Corporate Laws of the ABA, the purpose of the 1969 amendment adding the italicized language was to:

permit close corporations to do under the law what they have been commonly doing in practice. The generality of the provision permits almost complete flexibility in patterns of management that can be tailored to specific needs . . . . This amendment will permit useful flexibility not only for family owned corporations but also for corporate joint ventures.\textsuperscript{71}

Virginia's adaptation of section 35 does not permit the sought after flexibility. Section 13.1-35 grants the stockholders veto power,\textsuperscript{72} if reserved in the articles of incorporation, but continues to tie the corporation to formalities, even though liberalized,\textsuperscript{73} designed essentially for the public issue corporation. This omission casts doubt not only on the effectiveness of section 13.1-3(1), 13.1-24, 13.1-45, and 13.1-49(g)\textsuperscript{74} in close corporation planning, but also on the validity of stockholder agreements to emasculate the board and assume a partnership form. This continued insistence on an outmoded form is even more surprising in light of case authority giving effect to stockholder agreements which extensively control corporate activity.\textsuperscript{75}

3. Provisions for Conflict and Dissolution

Both the Model Act and its Virginia adaptation contain liberal provisions for the dissolution of a corporation.\textsuperscript{76} Because the provisions are designed for both the public issue and the close corporation, they more closely reflect the needs of the former than the latter, such that stockholders can plan for dissolution on the happening of a specified event solely through the questionable procedure of drawing in advance a section 13.1-80 voluntary dissolution agreement.\textsuperscript{77} In addition, an equity court might be hard pressed

\textsuperscript{70} Model Act § 35 (emphasis added).
\textsuperscript{72} "The business and affairs of a corporation shall be managed by a board of directors subject to any requirement of stockholder action made by this Act or the articles of incorporation." VA. CODE ANN. § 13.1-35 (1973).
\textsuperscript{73} See, e.g., VA. CODE ANN. § 13.1-36 (1973) (authorizing a single director for certain corporations), and VA. CODE ANN. § 13.1-41.1 (1973) (authorizing director action without a meeting).
\textsuperscript{74} For the corresponding Model Act provisions, see notes 63-66 supra.
\textsuperscript{75} See note 70 supra.
\textsuperscript{77} "A corporation may be voluntarily dissolved by the written consent of all of its stockholders." VA. CODE ANN. § 13.1-80 (1973). The agreement must be drawn in advance because it might be impossible to achieve consent among the stockholders once dissension exists.
to grant dissolution to a stockholder seeking dissolution based on the violation of the original agreement because the court's discretion is limited by a standard designed for public issue corporations.\textsuperscript{78}

Short of dissolution, Virginia section 13.1-94 grants an equity court the authority to appoint a custodian based on the Delaware model.\textsuperscript{79} However, continuation of the business under a custodian might only postpone the inevitable if a strong difference of opinion develops among the stockholders. Here again, it appears that the needs of the “partners” in a close corporation do not quite fit under the provisions of a statute designed for a public issue corporation.

**Conclusion**

From this brief survey, it is evident that there is much room for improvement in the statutory treatment of the close corporation in Virginia. It seems equally clear that the most preferable alternative is to recognize the two separate corporate systems in separate legislation. It is a basic fact that in most modern public issue corporations, ownership and control are separated. It is equally true that in most close corporations, ownership and control are exercised by the same people or according to their contractual wishes. The ramifications, remedies, public policy arguments and needs that are generated by the separation of ownership from control are completely different from those that flow from the integration of these two functions. These elementary facts are the core of the argument for separate legislative treatment.

If this alternative is chosen, Virginia and other states can learn much from the Maryland example. Maryland’s consistent requirement for stockholder unanimity on issues that affect the basic nature of the corporation, its broad grant of authority to the stockholders to construct an individualized management form, and its procedures for internal dissension provide a viable model for future close corporation legislation.

*F. W. P., III*

\textsuperscript{78}VA. CODE ANN. § 13.1-94 (1973) authorizes an equity court to order dissolution if it finds, in the case of petition by a stockholder, that the directors are deadlocked and the stockholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered; or that the acts of the directors are illegal, oppressive or fraudulent; or that if the stockholders are deadlocked, irreparable harm is thereby threatened; or that the corporate assets are being misapplied or wasted. In addition to these standards, the 1968 amendment to the section may have further limited the court’s discretion by the added language that “where the court also finds that it would be in the best interests of both the creditors and the stockholders of the corporation, . . .” Such provisions are designed to make it difficult for a public issue corporation to be dissolved for a frivolous reason but give little relief to a close corporation stockholder seeking dissolution for violation of a stockholder agreement.

\textsuperscript{79}See note 50 with accompanying text, *supra*. 