[Land & Water Law Review](https://scholarship.law.uwyo.edu/land_water)

Volume 16 | Issue 1 Article 8

1981

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Recommended Citation

Gelb, Harvey (1981) "Close Corporation Control and the Voting Agreement," *Land & Water Law Review*: Vol. 16 : Iss. 1 , pp. 225 - 242.

Available at: https://scholarship.law.uwyo.edu/land_water/vol16/iss1/8

University of Wyoming

College of Law

LAND AND WATER

LAW REVIEW

VOLUME XVI | 1981 | NUMBER 1

The organization of a close corporation involves detailed planning on the part of an attorney. This article emphasizes the importance of considering a control allocation plan when a corporation is being formed. The author discusses the possibility of using a voting agreement as a part of such a control allocation plan. Particular attention is given to the problems and perils of using a voting agreement.

CLOSE CORPORATION CONTROL AND THE VOTING AGREEMENT

*Harvey Gelb**

CLOSE CORPORATION CONTROL AND THE VOTING AGREEMENT

The organization of a close corporation[1] is frequently no simple undertaking to be accomplished by squeezing an hour or two of work into a lawyer's busy day. Both tax and nontax factors may require the use of substantial legal expertise and time at the inception of the incorporation process. In selecting the corporation as the form in which to operate their business, clients typically are motivated by tax or limited liability advantages, and not by a desire to embrace the traditional corporate governmental structure,[2]

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1. There is no single definition of the term close corporation. As used herein, the term refers to a corporate entity with relatively few shareholders whose shares are generally not traded on the securities markets. Often, too, the shareholders have significant involvement in the management of a close corporation. For further discussion *see* O'NEAL, 1 CLOSE CORPORATIONS Ch. 1 (2d ed. 1971). [Hereinafter cited as O'NEAL].
2. In the traditional corporate governmental structure embodied in statutes, shareholders elect directors, directors are responsible for management and elect officers, and officers execute corporate policy. Shareholders do retain control over certain fundamental corporate matters such as charter amendments and dissolution.

of which they are often largely ignorant and toward which, if they were knowing, they would likely be hostile. The attorney's job of explaining to clients the operation of the corporate structure and the matters to be considered before deciding to incorporate may be formidable but may not be ignored. This article does not cover all of the issues which may arise in organizing a close corporation, but rather has the following more limited purposes: (a) to emphasize the importance of considering a control allocation plan when the corporation is being formed, and (b) to discuss the possibility of using a voting agreement as a device in such a plan, with particular attention to the problems and perils of such use even in a jurisdiction with a statute expressly sanctioning voting agreements.

THE NEED FOR A CONTROL PLAN— A HYPOTHETICAL CASE

Consideration of a rather simple hypothetical case demonstrates the need for careful planning regarding the allocation of control in the prospective close corporation.

A and *B* have been the only partners in the *X* partnership which has been in business for the past several years. *A* has contributed twenty-five percent of the capital and *B* seventy-five percent, and by agreement the profits and losses of the business have been shared by the partners in percentages reflecting their capital contributions. Both partners worked the same number of hours but neither received a salary. The profits of the past year in the amount of $120,000 were divided so that *A* received $30,000 and *B* received $90,000. Their accountant recommended that the business be incorporated for tax reasons. *A* and *B* who are largely without knowledge concerning the traditional corporate governmental structure advised their attorney that they wished to incorporate and that their only motive was tax saving.[3] Their attorney, without discussing with them differences in the control structures of partnerships and corporations, promptly filed articles of incorporation of *X* Inc.,

3. Tax considerations, though very important to the corporate planner, are beyond the scope of this article.

obtained a corporate kit containing the usual by laws, minutes and stock certificates, filled in the blanks, had twenty-five percent of the shares of common voting stock (the only class of stock authorized by the articles of incorporation) issued to *A* and seventy-five percent issued to *B* so as to reflect their capital contributions to the new corporation, and took no action whatsoever to alter what would be the traditional corporate governmental structure for *X* Inc.

Although it may have seemed to the parties that they received excellent and speedy service down the road to incorporation, the former partners with the aid of their legal counsel have stumbled into a new relationship foreign to their expectations. This new relationship may be illustrated by looking at three important ways in which *A's* rights have deteriorated.

Management: Subject to any agreement between them, "all partners have equal rights in the management and conduct of the partnership business,"[4] and "any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners."[5] In the hypothetical case, no special agreement is posited regarding the management of the *X* partnership; therefore *A* could block management action which *B* desires to take. In the traditional corporate governmental structure, however, the Board of Directors is responsible for management of the business, and *B's* seventy-five percent ownership of stock enables him to control the Board. Much to *A's* surprise, and perhaps even to *B's* surprise, *A's* legal position vis-a-vis *B* has deteriorated enormously.

Distribution of funds: As indicated above in the *X* partnership, the partners received no salaries[6] but by agreement *A* received twenty-five percent of the profits and *B*, seventy-five percent.

4. UNIFORM PARTNERSHIP ACT § 18(e). This Act has been adopted widely in the United States.
5. *Id.* at § 18(h).
6. Absent agreement, under the UNIFORM PARTNERSHIP ACT § 18(f), "no partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs."

Corporate funds may be disbursed to the shareholders in a variety of ways; *e.g.* salaries and fringe benefits to shareholder employees, interest to shareholder lenders, rent to shareholder lessors, and dividends (based on share ownership). If *X* Inc. is operated like many small corporations, dividends (which are not deductible for tax purposes) may be minimal or nonexistent and disbursements are likely to consist of deductible items so that maximum tax advantages are achieved. In such a situation, *A's* twenty-five percent ownership interest would be unrelated to the sums he is to receive from the corporation except in those rare instances where dividends are paid. In any event, the power of *B* as the controlling shareholder operating through the traditional corporate framework will largely determine what A gets, if anything, whether by way of salaries, dividends or otherwise.

Dissolution: While *A* as a partner has the important right to compel dissolution of the partnership,[7] *A's* right as a dissatisfied minority stockholder to compel the dissolution of *X* Inc. may be subject to significant statutory and judicial limitations.[8]

It is obvious that by exchanging a twenty-five percent partnership interest for a twenty-five percent shareholder's interest, *A*, without being cognizant of differences between the corporate and partnership entities, has exchanged his position of strength for one of weakness without ever having had a fair chance to bargain to preserve his status. Indeed in the hypothetical case under consideration, it is doubtful that *A* would have been compelled to bargain at all. If the issues of control were raised, *A* should have found no resistance on *B's* part to an allocation plan which would have maintained *A's* rights satisfactorily since the purpose of this incorporation was to save taxes, not to alter *A's* position relative to B.

7. UNIFORM PARTNERSHIP ACT § 31(1)(b) and (2).
8. Statutory limitations are evident from a cursory review of 2 MODEL BUS. CORP. ACT ANN. § 97 (2d ed. 1971). Judicial reluctance regarding dissolution is evident in In re Radom and Neidorff, Inc., 307 N.Y. 1, 119 N.E.2d 563 (1954).

It should be evident too that with a loss in power, *A* will find a loss in value respecting his ownership interest. *B*, who would be the most likely buyer should *A* decide to sell,[9] would find it much more valuable to buy out a partner who could compel dissolution of a successful business or who has substantial rights respecting profits and management than to buy out a mere minority shareholder.[10]

THE VOTING AGREEMENT AND THE CONTROL PLAN

Now let it be assumed that prospective incorporators and their legal counsel are aware of the ways in which the traditional corporate governmental structure differs from that of the partnership and that they become engaged, therefore, prior to incorporation, in serious discussions concerning a corporate control allocation plan. Their discussion may embrace a variety of matters such as management roles, compensation, and other corporate policy decisions, and stock ownership restrictions. After consultation with their counsel they may wish to deal with the issues that concern them in a variety of ways. For example they may want to provide that certain issues should be decided in advance, that there should be a veto power possessed by each with regard to certain other matters, and that other questions should be left to the normal processes of traditional corporate government. It would then become the job of legal counsel, after reviewing the range of available mechanisms, to devise a suitable plan. Some of the tools which may be considered for use in such a plan are voting agreements, cumulative voting, classification of shares, higher than majority quorum and voting requirements for shareholders and directors, employment agreements, buy-sell agreements (with stock transfer restrictions) and preemptive rights. Consideration may also be given *inter alia* to devices for breaking deadlocks, resolving disputes, and even easing the path to corporate dissolution

9. It likely will be difficult to find any other buyer anxious to succeed to A's minority position.
10. It should be noted that the controlling shareholder does not have absolute power to abuse the corporation or the minority shareholder. It is beyond the scope of this article to consider potential claims available to a disgruntled minority shareholder. Hopefully, good advance corporate planning will eliminate any need for litigation and promote an amicable environment in which corporate affairs may be conducted properly.

under certain circumstances. The mechanisms to be used may call for the skillful drafting of a variety of documents such as contracts, articles of incorporation and by-laws.

As previously indicated, this article focuses primarily on one of the devices which counsel may consider using in the control allocation plan—the voting agreement. From a purely mechanical point of view, the voting agreement may be used in the control allocation plan in a limited way, or to deal with a whole range of problems or merely to reinforce other arrangements. For example, a voting agreement may merely secure for A representation on the board of directors which together with other devices, such as charter provisions requiring unanimity for certain directors' actions, in effect would give A veto power with respect to such actions.

It should be noted that the shareholder voting agreement, as the term is used herein in a strict technical sense, should relate only to matters falling within the ambit of shareholder action (such as the election of directors). However, since counsel may wish to consider broadening the agreement in an effort to cover other matters such as, the election of officers, employment arrangements, and dividends, the discussion herein also will touch upon some of the issues raised by a voting agreement which has been so broadened.

While well aware of the need for a control allocation plan, the lawyer involved in the organization of the close corporation may perceive of the voting agreement, perhaps with undue optimism, as an ideal form in which to embody, in whole or in part, a plan which exchanges the traditional corporate governmental structure for one which more satisfactorily meets the needs and expectations of the parties. Since difficult questions may arise concerning the validity and enforceability of voting agreements, over-reliance on voting agreements may prove unwise, particularly in certain jurisdictions. Therefore, the lawyer contemplating their use must study carefully pertinent statutes and cases. Before considering statutees dealing expressly with voting agreements, counsel should review the various principles elaborated in cases involving such agreements. As will be seen, knowledge of such principles will prove useful in interpreting and determining the efficacy of such statutory provisions and in assessing the legal situation in jurisdictions where no statute expressly covers voting agreements. In order to demonstrate the kind of analysis in which counsel should engage and the kinds of problems which are likely to be encountered, some case law principles are discussed hereafter and certain statutory provisions expressly pertaining to voting agreements are then analyzed in light of such principles. For convenience, the principles to be considered are discussed under the following headings: (1) *per se* invalidity (2) purpose or effect (3) consideration (4) statutory norms (5) enforcement.

Per Se Invalidity: While the weight of authority supports the proposition that under the general common law rule a voting agreement is not, *per se*, invalid,[11] principles may emerge from case law in certain jurisdictions which would result in the *per se* invalidation of a voting agreement. For example, the principle that shareholders must be free at all times to vote for what they deem the best interests of the corporation[12] would invalidate an agreement precluding such voting freedom. Obviously, the lawyer considering the use of a voting agreement must assess whether any principle mandating the invalidation of such an agreement has vitality in the prospective corporate jurisdiction.

Purpose or Effect: Even in jurisdictions in which voting agreements are not invalid *per se* the question of their validity in light of their purpose or effect may arise. In one case,[13] corporate indebtedness was cancelled and cash advanced to a corporation, in exchange for forty percent of the corporation's shares and equal representation on the Board of Directors. A shareholders agreement entered into by the owners of most of the stock of the corporation required that a four member Board of Directors be maintained, and that each of two shareholders should have the right to

11. Weil v. Beresth, 154 Conn. 12, 220 A.2d 456 (1966).
12. Roberts v. Whitson, 188 S.W. 2d 875, 878 (Tex. Civ. App. 1945).
13. E. K. Buck Retail Stores v. Harkert, 157 Neb. 867, 62 N.W.2d 288 (1954).

designate two Board members. In the face of a contention that public policy forbids the enforcement of a contract by which a shareholder undertakes to bargain away his right to vote for directors according to his best judgment, and in the interest of the corporation, the court ruled that shareholders control agreements are not invalid *per se* but emphasized the importance of the purpose and effects of the agreement:

> But we think the correct rule is that stockholders control agreements are valid where it is for the benefit of the corporation, where it works no fraud upon creditors or other stockholders, and where it violates no statute or recognized public policy. "The propriety of the object validates the means, and must affirmatively appear."[14]

In another case, the court referred to the importance of damage suffered or threatened in determining the validity of the agreement:

> It would admittedly facilitate judicial supervision of corporate behavior if a strict adherence to the provisions of the Business Corporation Act were required in all cases without regard to the practical exigencies peculiar to the close corporation. . . . However, courts have long ago quite realistically, we feel, relaxed their attitudes concerning statutory compliance when dealing with close corporate behavior, permitting "slight deviations" from corporate "norms" in order to give legal efficacy to common business practice. . . . This attitude is illustrated by the following language in *Clark v. Dodge*: "Public policy, the intention of the Legislature, detriment to the corporation, are phrases which in this connection [the court was discussing a shareholder-director agreement whereby the directors pledged themselves to vote for certain people as officers of the corporation] mean little. Possible harm to bona fide purchasers of stock or to creditors or to stockholding minorities have more substance; but such harms are absent in many instances. If the enforcement of a particular con-

14. *Id.* at 299.

> tract damages nobody—not even, in any perceptible degree, the public—one sees no reason for holding it illegal, even though it impinges slightly upon the broad provisions of [the relevant statute providing that the business of a corporation shall be managed by its board of directors]. Damage suffered or threatened is a logical and practical test, and has come to be the one generally adopted by the courts."[15]

In *Grogan v. Grogan*[16] which involved voting trust agreements, the Texas Court of Civil Appeals focused on the importance of discovering the purpose of the agreements in determining their validity:

> Since the agreements themselves did not indicate the purpose for which they were executed, it was proper for the trial court to hear evidence to show the real purpose for the execution of such agreements.[17]

The Court concluded that the evidence was satisfactory to show that the purpose of the agreements was to continue a person in a lucrative corporate position, that such person was not only a party to the agreements, but also had them drawn, and secured the signatures of most of the remaining shareholders who signed them, and that because of such facts, the agreements were void. The Texas Supreme Court, while finding fault with the way in which the lower court stated the law, found that reversal was not required.[18] While the meaning of the holding in *Grogan* may not be clear, if *Grogan* suggests that the securing of a lucrative position by a party to a voting agreement is a prohibited objective rendering such agreement invalid in a given jurisdiction, then the utility of such agreements in such a jurisdiction would be impaired seriously. However, since the placement of a capable and conscientious person in a lucrative position may be of great benefit to the corporation and other interested parties, and since interests requiring protection can be safeguarded by an appropriate inquiry regarding

15. Galler v. Galler, 32 Ill.2d 16, 203 N.E.2d 577, 584-585 (1964).
16. Grogan v. Grogan, 315 S.W.2d 34 (Tex. Civ. App. 1958), *writ of error denied* 159 Tex. 392, 322 S.W.2d 514 (1959).
17. *Id.* 315 S.W.2d, at 39.
18. Grogan v. Grogan, 159 Tex. 392, 322 S.W. 2d 514 (1959).

the agreement, a rule invalidating the agreement, merely because it has as an objective the securing of a lucrative benefit for a party, is unnecessary and unwise.

In any event, the lawyer contemplating the use of a voting agreement must consider the "purpose or effects" issue, and in drafting an agreement, should give thought to the feasibility of inserting a clause indicating its purpose.[19]

Consideration: The question of consideration for a voting agreement may present difficulties which a lawyer would not normally anticipate. In contrast with the normal contract rule, it has been held that mutual promises are insufficient consideration for voting agreements.[20] It may be that because voting agreements in the eyes of some judges may resemble proxies to the extent that they confer authority to vote shares, courts have applied proxy revocability concepts from agency law to them. However, the contrary conclusion that mutual promises are sufficient consideration for such agreements has also been reached.[21] Although the use of agency concepts to determine the validity or binding nature of voting agreements designed to deal with control allocation problems seems artificial and inappropriate, counsel must be concerned about the pitfalls of the consideration issue in using a voting agreement in a particular jurisdiction and should consider, when possible, supporting the agreement by consideration other than the parties' mutual promises to vote their shares.[22]

A further complication in connection with voting agreements arises from the kind of benefit received by a shareholder in exchange for his vote. In one case, the court, citing the principle that "any agreement by a shareholder to sell his vote or to vote in a certain way, for a consideration personal to himself is contrary to public policy and void,"[23] invalidated consents of shareholders to vote their shares in

19. Various drafting suggestions including this one are set forth in O'NEAL, *supra* note 1, § 5.27.
20. Roberts v. Whitson, *supra* note 12.
21. Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling, 29 Del. Ch. 610, 53 A.2d 441 (1947).
22. O'NEAL, *supra* note 1, § 5.27.
23. Chew v. Inverness Management Corp., 352 A.2d 426 (Del. Ch. 1976).

the election of directors procured through payment to them of ten cents per share for options to buy the shares at prices in excess of their rather dubious value. Although, the foregoing principle is not so widely applied as to invalidate all voting agreements which result in gain or advantage to parties,[24] counsel must be concerned with the kind of benefit being conferred on the shareholder as a result of a voting agreement, and as to whether it falls within the prohibited zone of personal benefit in the applicable jurisdiction.

Statutory Norms: Challenges to the validity of voting agreements are sometimes based upon alleged conflicts with statutory provisions.[25] In a broad sense any voting agreement not expressly sanctioned by statute, which seemingly undermines the traditional statutory corporate governmental structure, is arguably subject to attack on that basis. The proposition that the law evidences a policy that individuals cannot be partners *inter sese* and a corporation as to the rest of the world has been accepted[26] and rejected[27] by courts as has the notion that statutory provisions for actions by majority vote preclude establishment of unanimous voting requirements.[28] Where agreements purporting to cover matters outside the ambit of shareholders action—such as matters placed by statute within the discretion of the Board of Directors—have been attacked, the results of the cases have been mixed. In one case,[29] an agreement executed by all shareholders providing for one of them to select a manager with authority to supervise and direct operations and management without approval of the Board of Directors was held invalid as in violation of a statutory provision that the business of a corporation shall be managed by its board of directors; while in another case,[30] an agreement providing for declaration of dividends, and continuation of a deceased

24. O'NEAL, *supra* note 1, § 5.15.
25. Alleged conflicts with statutory provisions expressly sanctioning voting agreements are discussed later.
26. Jackson v. Hooper, 76 N.J.Eq. 592, 75 A. 568 (Ct. Err. & App. 1910).
27. Arditi v. Dubitzky, 354 F.2d 483 (2d Cir. 1965).
28. *Compare* Benintendi v. Kenton Hotel, Inc., 294 N.Y. 112, 60 N.E.2d 829 (1945), *with* Katcher v. Ohsman, 26 N.J. Super. 28, 97 A.2d 180 (1953).
29. Long Park Inc. v. Trenton-New Brunswick Theatres Co., 297 N.Y. 174, 77 N.E.2d 633 (1948).
30. Galler v. Galler, *supra* note 15.

executive's salary to his widow was sustained. In still another case[31] involving an agreement, which the court held could reasonably be found by a jury to protect three contracting brothers who were major or sole stockholders of corporations incorporated in several states from removal from office, the potential for mixed results was illustrated vividly by a court holding that the agreement was valid except as applied to a West Virginia corporation, but leaving open the door for validating evidence on remand.

While a variety of arguments, such as those referred to above, may be used to contest the validity of voting agreements on the basis of alleged conflicts with statutory provisions, strong arguments may be advanced in favor of allowing close corporation shareholders flexibility in making arrangements to fit their needs and expectations. Some arguments of the latter type have been set forth succinctly as follows:

> While the shareholder of a public-issue corporation may readily sell his shares on the open market should management fail to use, in his opinion, sound business judgment, his counterpart of the close corporation often has a large total of his entire capital invested in the business and has no ready market for his shares should he desire to sell. He feels, understandably, that he is more than a mere investor and that his voice should be heard concerning all corporate activity. Without a shareholder agreement, specifically enforceable by the courts, insuring him a modicum of control, a large minority shareholder might find himself at the mercy of an oppressive or unknowledgeable majority. Moreover, as in the case at bar, the shareholders of a close corporation are often also the directors and officers thereof. With substantial shareholding interests abiding in each member of the board of directors, it is often quite impossible to secure, as in the large public-issue corporation, independent board judgment free from personal motivations concerning corporate policy.[32]

31. Glazer v. Glazer, 374 F.2d 390 (5th Cir. 1967), *cert. denied,* 389 U.S. 831 (1967).
32. Galler v. Galler, *supra* note 15, at 583-584.

> There is no reason why mature men should not be able to adapt the statutory form to the structure they want, so long as they do not endanger other stockholders, creditors, or the public, or violate a clearly mandatory provision of the corporation laws. In a typical close corporation the stockholders' agreement is usually the result of careful deliberation among all initial investors. In the large public-issue corporation, on the other hand, the "agreement" represented by the corporate charter is not consciously agreed to by the investors; they have no voice in its formulation, and very few ever read the certificate of incorporation. Preservation of the corporate norms may there be necessary for the protection of the public investors.[33]

In some cases where voting agreements have been attacked as in conflict with statutory provisions courts have concluded that there really was no conflict,[34] that the statutory provisions involved were directory,[35] that the deviation from the statutory provisions was slight,[36] or that the agreement was a valid waiver by the parties of the statutory provisions.[37]

In any event, counsel in considering the utility of a voting agreement in a particular jurisdiction must assess the force of potential attacks on its validity based upon alleged conflict with statutory provisions.

Enforcement: In drafting a voting agreement counsel must be aware of the various factors involved in devising a procedure to assure the effective enforcement of the agreement such as the following: (1) There is some conflict in authorities as to whether specific enforcement of such an

33. *Id.* at 585.
34. *Id.* In Galler, the court concluded that a statutory ten-year limit on voting trusts was not applicable to the control agreement involved in the case which was not a voting trust.
35. Clark v. Foster, 98 Wash. 241, 167 P. 908 (1917).
36. In Clark v. Dodge, 269 N.Y. 410, 199 N.E. 641, 642 (1936) a voting agreement was upheld with the court saying "If the enforcement of a particular contract damages nobody—not even, in any perceptible degree, the public—one sees no reason for holding it illegal, even though it impinges slightly upon the broad provision of section 27," (§ 27 was a statutory provision that "the business of a corporation shall be managed by its board of directors").
37. Peck v. Horst, 175 Kan. 479, 264 P.2d 888 (1953), decision adhered to on rehearing, 176 Kan. 581, 272 P.2d 1061 (1954).

agreement will be granted,[38] (2) Some courts may imply the existence of a proxy to vote shares in the absence of an express proxy provision but others may not,[39] (3) Where feasible an enforcement device which functions without court intervention with its delays and other disadvantages should be used,[40] (4) In considering the use of a proxy as a device for casting votes serious risks must be examined: (a) an ordinary proxy whereby *A* gives *B* the authority to vote *A's* shares is characterized as a terminable agency relationship; (b) while proxies coupled with an interest may be irrevocable, the cases are not clear as to what constitutes the requisite interest.[41] Thus counsel may find that in certain jurisdictions the proxy is an unreliable mechanism for the enforcement of a voting agreement. (5) A dilemma may exist in some jurisdictions by virtue of providing for certain effective enforcement mechanisms in a voting agreement: if such mechanisms make the arrangement similar to a voting trust, there is a risk that a court will hold the arrangement illegal if it does not conform to statutory requirements pertaining to voting trusts.[42]

STATUTES EXPRESSLY DEALING WITH VOTING AGREEMENTS

Analysis of statutory provisions expressly dealing with voting agreements in the prospective corporate jurisdiction is essential in determining the utility of such agreements in control allocation plans. Consider, for example, Section 34 of the Model Business Corporation Act[43] which has been enacted in a number of jurisdictions in identical or similar form[44] which provides:

38. *Compare* Haldeman v. Haldeman, 176 Ky. 635, 197 S.W. 376 (1917) *with* Weil v. Beresth, *supra* note 11.
39. In Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling, *supra* note 21, the court refused to imply the existence of the proxy, although the court below in that case had done so.
40. Such a device should be self-executing like a voting trust or proxy or other mechanism providing for expeditious enforcement without litigation.
41. CARY AND EISENBERG, CASES AND MATERIALS ON CORPORATIONS 393-394 (5th Ed. Unabr. 1980).
42. See Abercrombie v. Davies, 36 Del. Ch. 371, 130 A.2d 338 (1957).
43. 1 MODEL BUS. CORP. ACT ANN. § 34 (2d ed. 1971). While this section has been selected for analysis here, it should be noted that pertinent statutes may vary considerably from the Model Act in the prospective corporate jurisdiction.
44. *See* OR. REV. STAT. § 57.175 (1979), KY. REV. STAT. § 271 A. 170 (1971), NEB. REV. STAT. § 21-2034 (1943).

> Any number of shareholders of a corporation may create a voting trust for the purpose of conferring upon a trustee or trustees the right to vote or otherwise represent their shares, for a period of not to exceed ten years, by entering into a written voting trust agreement specifying the terms and conditions of the voting trust, by depositing a counterpart of the agreement with the corporation at its registered office, and by transferring their shares to such trustee or trustees for the purposes of the agreement. Such trustee or trustees shall keep a record of the holders of voting trust certificates evidencing a beneficial interest in the voting trust, giving the names and addresses of all such holders and the number and class of the shares in respect of which the voting trust certificates held by each are issued, and shall deposit a copy of such record with the corporation at its registered office. The counterpart of the voting trust agreement and the copy of such record so deposited with the corporation shall be subject to the same right of examination by a shareholder of the corporation, in person or by agent or attorney, as are the books and records of the corporation, and such counterpart and such copy of such record shall be subject to examination by any holder of record of voting trust certificates, either in person or by agent or attorney, at any reasonable time for any proper purpose.
>
> 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.

Does such broad statutory authority for voting agreements eliminate the problems and perils involved in using such agreements?

First, the mere existence of Section 34 should overcome any effort to declare a voting agreement invalid *per se.*

Second, both paragraphs of Section 34 relate to a trust or agreement regarding the voting of shares, and do not deal expressly with the question of whether a voting agreement may control nonshareholder matters such as actions within the discretion of directors. Since Section 34 evidences a legislative purpose to create a favorable climate for voting agreements, it may be argued that an intent should be implied to bring within its protective scope provisions of voting agreements which cover nonshareholder matters.[45] However, it may be contended, perhaps with more force, that the plain language of the statute with its obvious omission of any attempt to cover nonshareholder matters cannot support any construction of Section 34 which would validate agreements concerning such matters. Indeed, arguably Section 34 may have a preemptive effect in that it may be construed to preclude agreements other than those specifically authorized by its language.[46]

Third, notwithstanding the broad language of the statute sanctioning voting agreements, inquiry by the court as to the purpose or effect of the agreement should not be foreclosed.[47] For example, inquiry as to whether an agreement works a fraud on someone should not be precluded.

Fourth, it is difficult to see how the language of Section 34 resolves the twin issues regarding consideration discussed above. It would seem that a court would be concerned about the private benefit issue to the same extent with or without Section 34. Arguably the statutory provision may reinforce the position that no special consideration is needed for voting agreements and that mutual promises, therefore, are sufficient consideration for such agreements, but the provision is not explicit on this point.

45. This argument is reinforced by Special Comment—Close Corporations, 1 MODEL BUS. CORP. ACT ANN. § 35 ¶ 2, 756 at 757, 758 (2d ed. 1971) which indicates that shareholder's agreements could relate to the election of officers and other nonshareholder matters.
46. The preemption argument may threaten the validity of any voting agreement which does not comply strictly with statutes expressly authorizing such agreements. In Wyoming, where a paragraph similar to (but containing interesting variations from) the second paragraph of Section 34, *supra* note 43, was repealed in 1979, the validity and enforceability of voting agreements other than voting trusts which comply with WYO. STAT. § 17-1-131(a) (1977) are open to question. *Quaere* whether a Wyoming court would hold that the aforementioned repeal precludes such voting agreements or returns the whole matter of the validity and enforceability of such agreements to the realm of judicial law.
47. Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964); Grogan v. Grogan, *supra* note 16.

Fifth, while Section 34 limits the duration of a voting trust to 10 years, an agreement covered by the second paragraph of the Section is affected by no comparable limitation, and the second sentence of that paragraph should preclude any implication of a 10-year limit with respect to agreements other than voting trusts. However, it is unlikely that the aforementioned second sentence would foreclose an inquiry into whether a document which is not labelled a voting trust is in reality such a trust because that would exalt form over substance beyond reasonable bounds.

Sixth, Section 34 does not indicate that voting agreements must be entered into by all of the shareholders. Indeed voting trusts created by "any number of shareholders of a corporation" are expressly sanctioned. While the second paragraph is not so clearly worded in that it sanctions "agreements among shareholders regarding the voting of their shares," judicial implication of the word "all" preceding the word "shareholders" would seem unwarranted.[48]

Seventh, insofar as voting agreements other than voting trusts are concerned, enforcement problems remain serious under Section 34. Since that Section indicates that such agreements should be enforceable in accordance with their terms, a controversy may develop over the kind of remedy to be granted if the agreement does not contain terms relating to enforcement. For example, while it may be contended that the statutory language evidences an intent that the terms of an agreement should be enforced specifically even though the agreement does not call expressly for such enforcement, it also may be argued, that the statute is neutral or even negative on the question of such enforcement if the agreement does not provide expressly for it. It would be wise, therefore, for the draftsman to deal expressly in the agreement with the problem of enforcement. Moreover, express provision for an enforcement mechanism will be essential if a goal of enforcement without judicial intervention is to be attained.

48. Even though unanimity of shareholders as parties may not be a statutory requirements for the validation of a voting agreement such unanimity should enhance prospects for judicial acceptance of an agreement particularly because of its impact on an argument based on prejudice to a shareholder.

Eighth, since the proxy form may be used as an enforcement device in a voting agreement, statutory provisions concerning proxies must be examined by the draftsman. Paragraph three of Section 33 of the Model Business Corporation Act sheds little light on the value of the proxy as a planning tool since it merely states that "a shareholder may vote either in person or by proxy executed in writing by the shareholder or by his duly authorized attorney-in-fact" and that "no proxy shall be valid after eleven months from the date of its execution, unless otherwise provided in the proxy."[49] This section does not really address itself to the pitfalls in using proxies in voting agreements referred to above. However, it may necessitate an express reference to the duration of any proxy intended to survive after 11 months.[50]

CONCLUSION

It is apparent that an attorney who is working on a corporate control allocation plan should study carefully issues involving validity and enforceability before utilizing a voting agreement, and should acquire a comprehensive understanding of other devices which may be used in conjunction with, or in lieu of, a voting agreement.

It would be well, too, for interested members of the bar to ease their own tasks of providing for stable relationships in the close corporation setting by recommending legislation, where needed, which would inject more certainty into the process of developing appropriate voting agreements. This does not mean that all documents labelled voting agreements should be legitimized without regard to any other factors. But there is a need for the law to resolve with as much clarity as possible issues of validity, and to provide for reasonable and reliable enforcement methods.

49. 1 MODEL BUS. CORP. ACT ANN. § 33, Par. 3 (2d ed. 1971).
50. Stein v. Capital Outdoor Advertising, Inc., 273 N.C. 77, 159 S.E.2d 351 (1968).