



Pacific Law Journal Review of Selected Nevada Legislative

Volume 1989 | Issue 1

Article 7

1-1-1989

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Recommended Citation

The University of the Pacific, McGeorge School of Law, *Business Associations and Professions; close corporations*, 1989 U. PAC. L. REV. (2019).

Available at: <https://scholarlycommons.pacific.edu/nlr/vol1989/iss1/7>

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Business Associations and Professions

Business Associations and Professions; close corporations

NEV. REV. STAT. § ____ (new); §§ 14.020, 78.019, 78.030, 78.050, 78.090, 78.097, 78.110, 78.160, 80.010, 80.070, 80.130, 273.010, 273.030 (amended).

SB 389 (Committee on Judiciary); 1989 STAT. Ch. 440

CREATION OF A CLOSE CORPORATION

Chapter 440 authorizes the creation of statutory close corporations.¹ The party organizing the close corporation must comply with the requirements of existing law for the creation of private corporations;² in addition, all stock issued by the close corporation must be represented by stock certificates, and no more than thirty persons may be record holders of the shares.³

The transfer of stock in a close corporation must be limited by restrictions contained in the articles of incorporation, the corporate bylaws, a stockholder's agreement, or a voting trust agreement.⁴ Chapter 440 prohibits a close corporation from making a public offering of its stock.⁵

1. 1989 Nev. Stat. ch. 440, secs. 1-34, at 940-53 (amending NEV. REV. STAT. §§ 14.020, 78.019, 78.030, 78.050, 78.090, 78.097, 78.110, 78.160, 80.010, 80.070, 80.130, 273.010, 273.030) (providing for the creation and administration of close corporations).

2. *Id.* sec. 3, at 941 (incorporating NEV. REV. STAT. §§ 78.030-.055) (requiring filing, and specifying the contents of articles of incorporation, and prohibiting the use of certain corporate names).

3. *Id.* Treasury shares need not be represented by stock certificates. *Id.* See NEV. REV. STAT. §§ 78.283 (1987) (definition of treasury shares); 78.235 (1987) (defining purpose and contents of stock certificates). Stock held as community property, in joint tenancy, or as tenants in common is treated as being held by one stockholder for establishing the number of holders of record. 1989 Nev. Stat. ch. 440, sec. 3, at 941 (enacting NEV. REV. STAT. § ____).

4. 1989 Nev. Stat. ch. 440, sec. 3, at 941 (enacting NEV. REV. STAT. § ____). See also *id.* sec. 7, at 942 (enacting NEV. REV. STAT. ____.) (restrictions on transfer of stock).

5. *Id.* sec. 3, at 941 (enacting NEV. REV. STAT. § ____). See also 15 U.S.C.A. § 77 (West Supp. 1989) (definition of public stock offering).

The articles of incorporation of a close corporation must carry a heading stating the corporate name and indicating the corporation's status as a close corporation.⁶ An existing corporation⁷ may become a close corporation by amending its articles of incorporation to include a statement that the corporation elects to become a close corporation.⁸ The amendment must be approved by the holders of at least two-thirds of each voting class of stock.⁹

CLOSE CORPORATION SHARES

Chapter 440 requires all stock certificates of a close corporation to include a specified notice concerning the rights of stockholders.¹⁰

If a close corporation has included the notice regarding shareholders' rights on its stock certificates, any person with an interest in the shares of the corporation is bound by all the documents mentioned in that notice.¹¹

Transfer restrictions¹² on shares in a close corporation are valid if they are contained in the articles or certificate of incorporation, the bylaws, or in a shareholders' or voting trust agreement.¹³ If a

6. 1989 Nev. Stat. ch. 440, sec. 3, at 941 (enacting NEV. REV. STAT. § ____). Chapter 440 also requires the articles of incorporation to specify the qualifications of stockholders and the classes entitled to be holders of record. *Id.*

7. See NEV. REV. STAT. §§ 78.030-.055 (1987) (formation of a private corporation).

8. 1989 Nev. Stat. ch. 440, sec. 4, at 941 (enacting NEV. REV. STAT. § ____). In order to become a close corporation, the corporation must also meet other requirements imposed by Chapter 440. *Id.* See *id.* secs. 2-3, at 940-41 (enacting NEV. REV. STAT. § ____). (requirements for formation of a close corporation). See also *supra* notes 1-7 and accompanying text (formation of a close corporation).

9. *Id.* sec. 4, at 941 (enacting NEV. REV. STAT. § ____). The articles of incorporation or bylaws may require a higher proportion of voter approval. *Id.*

10. *Id.* sec. 6, at 941-42 (enacting NEV. REV. STAT. § ____). This notice is identical to that required by the RMBCA. Compare *id.* with REV. MODEL BUSINESS CORP. ACT, STATUTORY CLOSE CORP. SUPP. § 10(a) (1984).

11. 1989 Nev. Stat. ch. 440, sec. 6, at 941-42 (enacting NEV. REV. STAT. § ____). If the corporation has not complied with the notice requirement, persons claiming an interest in the shares are bound only by those documents of which they, or the person through whom they are claiming an interest, have actual knowledge. *Id.* This provision is identical to that of the RMBCA. Compare *id.* with REV. MODEL BUSINESS CORP. ACT, STATUTORY CLOSE CORP. SUPP. § 10(d) (1984). Upon written request, a close corporation must provide any shareholder with free copies of any documents containing provisions restricting the transfer of shares or voting rights to shareholders. 1989 Nev. Stat. ch. 440, sec. 6, at 941-42 (enacting NEV. REV. STAT. § ____).

12. See generally NEV. REV. STAT. § 78.242 1-5 (1987) (restrictions on transfer of corporate securities).

13. Any attempt to transfer close corporation stock in violation of a transfer restriction is ineffective, unless either the corporation did not provide the required notice of shareholders' rights, or the restriction is found unenforceable by the court. 1989 Nev. Stat. ch. 440, sec. 8, at 943 (enacting NEV. REV. STAT. § ____). If the transfer is not held ineffective, the corporation has the option to repurchase the shares from the transferee at the same price and

transferee of stock in a close corporation has knowledge that the transfer violates a transfer restriction, the corporation may deny the transfer; however, if all the stockholders consent to the transfer, it is effective in spite of any restrictions.¹⁴ A court may enjoin any transfer of stock that is contrary to a lawful restriction on transfer, and may enjoin any public offering of stock of the close corporation.¹⁵

TERMINATION OF CLOSE CORPORATION STATUS

Corporations may end their close corporation status by amending their articles or certificate of incorporation to remove the close corporation designation.¹⁶ A close corporation which violates or fails to maintain compliance with any of the provisions of Chapter 440 will lose its status, unless the corporation files a certificate with the Secretary of State¹⁷ indicating the requirement is presently inapplicable.¹⁸ The corporation must also act to remedy the situation that threatens its close corporation status.¹⁹ If a suit is brought against a close corporation, the court may issue orders designed to prevent the loss of status, or may enjoin any act by the corporation or by a stockholder that would terminate the close corporation status.²⁰

terms that the transferee purchased the shares. *Id.* This language is similar to the provisions of the RMBCA. *Compare id. with* REV. MODEL BUSINESS CORP. ACT, STATUTORY CLOSE CORP. SUPP. § 13(a)-(b) (1984).

14. 1989 Nev. Stat. ch. 440, sec. 6, at 941-42 (enacting NEV. REV. STAT. § ____). The corporation must notify the transferee, and give reasons for its refusal to register the transfer. *Id.* Restrictions on stock transfers contained in the articles or certificate of incorporation, bylaws, shareholders' agreements, or voting trust agreements do not apply to transfers to the corporation or other shareholders of the same class of shares. *Id.* sec. 7, at 942 (enacting NEV. REV. STAT. § ____). Transfer restrictions do not apply to transfers incident to death, transfers to bankruptcy trustees, transfers by merger or exchange, or to transfers by a pledge serving as collateral for a loan when voting rights are not included in the transfer. *Id.*

15. *Id.* sec. 10, at 943-44 (enacting NEV. REV. STAT. § ____).

16. *Id.* sec. 9, at 943 (enacting NEV. REV. STAT. § ____). The close corporation status may also be terminated by removing the transfer restrictions from the shares and the restrictions on record ownership contained in the articles or certificate of incorporation. *Id.* Any amendment of the certificate or articles of incorporation must be by at least two-thirds of the voting shares of each class of stock. *Id.* If the certificate or articles require more than two-thirds of the votes to discontinue the status, that provision must be met. *Id.* A corporation that terminates its status as a close corporation is subject to the provisions governing private corporations. *Id.* sec. 17, at 946 (enacting NEV. REV. STAT. § ____).

17. A copy of the certificate must also be provided to each shareholder. *Id.* sec. 10, at 943-944 (enacting NEV. REV. STAT. § ____).

18. *Id.* The certificate must be filed within 30 days after the provision is violated or ceases to be in effect, or within 30 days after the discovery of the violation by the corporation, whichever is later. *Id.*

19. *Id.*

20. *Id.*

GOVERNANCE OF CLOSE CORPORATIONS

Chapter 440 allows all the voting shareholders, upon their unanimous written agreement, to realign the powers of the corporation and directly manage its business affairs.²¹ Shareholders may agree to eliminate the board of directors.²² When operating without a board of directors, the shareholders assume, and may delegate, all corporate powers.²³ The shareholders may vote to reconvene a board of directors, but only by a two-thirds vote of each class of shares.²⁴

The shareholders of a close corporation may agree to restrict the power of the board of directors, or agree to terms that create a quasi-partnership relationship among themselves.²⁵ An agreement restricting the powers of the board of directors will exempt the directors from liability, and shift the liability to those who have assumed the board's responsibilities.²⁶ The failure of a close corporation to follow normal corporate formalities is not a ground for piercing the corporate veil.²⁷

The articles of incorporation of a close corporation may grant individual shareholders the right to dissolve the corporation.²⁸ If a

21. *Id.* sec. 11, at 944 (enacting NEV. REV. STAT. § ____). See *Zion v. Kurtz*, 50 N.Y.2d 92, 405 N.E.2d 681, 428 N.Y.S.2d 199 (1980) (upholding a shareholder agreement limiting the directors' powers even though the agreement was not mentioned in the articles of incorporation). A close corporation is required to hold an annual meeting only if a shareholder requests the meeting in writing. *Id.* sec. 13, at 945 (enacting NEV. REV. STAT. § ____). The meeting must be held within 30 days. *Id.*

22. 1989 Nev. Stat. ch. 440, sec. 11, at 944 (enacting NEV. REV. STAT. § ____). Agreements eliminating the board of directors are not valid unless the articles of incorporation reflect the agreement. *Id.* In order for the corporation to act without a board of directors, the certificate of incorporation must be amended by a unanimous vote of all shareholders (including those not entitled to vote) or by all subscribers if no shares have been issued. *Id.* sec. 12, at 944-45 (enacting NEV. REV. STAT. § ____).

23. *Id.* The shareholders have the power to approve actions which formerly required the approval of the directors, but any actions which formerly required a particular majority vote of the directors may only be approved by the same vote of the shareholders. *Id.* The shareholders may also appoint one or more shareholders as designated directors to sign documents. *Id.* See *infra* note 25-26 and accompanying text (discussing corporate liability).

24. *Id.* Shareholders may vote to reconvene the Board of Directors, whether or not the shareholders have voting rights. *Id.*

25. *Id.* sec. 11, at 944 (enacting NEV. REV. STAT. § ____). Directors' votes may also be subject to proxies or weighted voting rights. *Id.* See generally NEV. REV. STAT. §§ 87.060-.430 (1987) (describing nature of partnership and relation of partners to one another).

26. 1989 Nev. Stat. ch. 440, sec. 11, at 944 (enacting NEV. REV. STAT. § ____). See NEV. REV. STAT. § 78.145 1-3 (1987) (defining directors' liability for false or fraudulent statements). See also *Yochum v. Davis*, 98 Nev. 484, 653 P.2d 1215 (1982) (statute of limitations similar to that provided by Nevada Revised Statutes section 78.145, considered a valid defense).

27. 1989 Nev. Stat. ch. 440, sec. 15, at 945 (enacting NEV. REV. STAT. § ____). This language is similar to the provisions of the RMBCA. Compare *id.* with REV. MODEL BUSINESS CORP. ACT, STATUTORY CLOSE CORP. SUPP. § 25 (1984).

28. 1989 Nev. Stat. ch. 440, sec. 11, at 944 (enacting NEV. REV. STAT. § ____). The dissolution may be at will or may be triggered by certain events, depending upon the provisions

close corporation grants the right to dissolution, then all stock certificates must clearly state that the holder may exercise an option to dissolve the corporation, or the provision is without effect.²⁹

JUDICIAL SUPERVISION

If the shareholders of a close corporation operating without a board of directors are caught in a deadlock that threatens irreparable harm to the corporation, a stockholder may apply to a court for the appointment of a custodian or receiver.³⁰ A custodian may also be appointed by the court if the petitioning stockholder has the right to order the dissolution of the corporation.³¹ The court may appoint a provisional corporate director,³² instead of a custodian, if doing so is in the best interests of the corporation.³³ The court may also appoint a provisional director if the directors or those in control of the close corporation are so deadlocked in the management of the corporation's affairs that it is impossible to obtain the votes necessary to decide an issue, and the interests of the shareholders are being compromised by the deadlock.³⁴

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regarding dissolution contained in the articles of incorporation. *Id.* sec. 21, at 947-48 (enacting NEV. REV. STAT. § ____). Stockholders exercising the right of dissolution must give written notice to all other stockholders. *Id.* The dissolution must proceed 30 days after the notice is sent. *Id.* The articles of incorporation may be amended by a unanimous vote of all stockholders (including holders without voting rights) to allow a stockholder to dissolve the corporation at will or upon the occurrence of a certain event. *Id.* These provisions are similar to those of the RMBCA. Compare *id.* with Rev. Model Business Corp. Act, Statutory Close Corp. Supp. § 20(e) (1984).

29. 1989 Nev. Stat. ch. 440, sec. 21, at 947-48 (enacting NEV. REV. STAT. § ____).

30. *Id.* sec. 18, at 946 (enacting NEV. REV. STAT. § ____). All remedies provided for in the certificate of incorporation, bylaws, or other agreements must have failed before a custodian may be appointed. *Id.*

31. *Id.* The stockholder's right to dissolve the corporation must be provided for in the certificate or articles of incorporation. *Id.* Compare *id.* (allowing the court to appoint a custodian when the petitioning stockholder has the right to dissolve the corporation) with REV. MODEL BUSINESS CORP. ACT, STATUTORY CLOSE CORP. SUPP. § 43(a)-(b) (1984) (allowing the court itself to dissolve the corporation if it finds there are appropriate grounds for judicial dissolution, or all other relief ordered by the court has failed to resolve the dispute).

32. See 1989 Nev. Stat. ch. 440, sec. 19, at 946-47 (enacting NEV. REV. STAT. § ____.) (defining qualifications and providing for the compensation of a provisional director). The provisional director has the power of an elected director. *Id.*

33. *Id.* sec. 18, at 946 (enacting NEV. REV. STAT. § ____). The appointment of a provisional director does not preclude the court's appointment of a custodian or receiver. *Id.*

34. The court may make the appointment upon petition by a majority of the directors, or by more than one-third of the stockholders entitled to elect directors, or by the holders of two-thirds of the stock of each class if there is more than one class of stockholder permitted to elect a director. *Id.* sec. 19, at 946-47 (enacting NEV. REV. STAT. § ____).