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The Decision to Incorporate

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By Thomas L. Hazen*

The Decision to Incorporate†

I. INTRODUCTION

It may appear somewhat anomalous to begin a symposium on corporation law with the suggestion that the corporate form is overused. However, as will be developed herein, several of the so-called advantages of incorporation may prove to be illusory in any given situation.

Recent figures indicate that the number of new corporations is on the rise, with more than eleven new Nebraska corporations and more than sixty-eight new Delaware corporations being formed each business day. In fact, in Delaware the number of new corporations has increased by more than fifty percent in the four-year period.

Table I

<table>
<thead>
<tr>
<th>Year</th>
<th>New incorporations per year</th>
<th>Increase over prior years</th>
<th>Increase over 1975</th>
<th>New incorporations per business day</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percent</td>
<td>Number</td>
<td>Percent</td>
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<tr>
<td>Nebraska</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>1975</td>
<td>2,555</td>
<td></td>
<td>23</td>
<td>0.9</td>
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<tr>
<td>1976</td>
<td>2,578</td>
<td>23</td>
<td>0.9</td>
<td>10.2</td>
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<td>1977</td>
<td>2,753</td>
<td>175</td>
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<td>11.0</td>
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<td>1978</td>
<td>2,851</td>
<td>98</td>
<td>4.0</td>
<td>11.4</td>
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<td>Delaware</td>
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<tr>
<td>1975</td>
<td>11,328</td>
<td></td>
<td>1,621</td>
<td>14.3</td>
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<tr>
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<td>1978</td>
<td>17,129</td>
<td>2,291</td>
<td>15.4</td>
<td>68.5</td>
</tr>
</tbody>
</table>

Letter from Marie C. Schulte, Delaware Department of State, Division of Corporations, to Thomas L. Hazen (January 23, 1979); Letters from Kathy Meyer.
Although incorporation of an enterprise can provide great benefits from both a structural and tax perspective, planners should not be too quick to opt for the corporate form.

II. ADVANTAGES AND DISADVANTAGES OF THE CORPORATE FORM

Especially when confronted with a smaller business concern—defined in terms of both the number of owners and size of the enterprise—the planner may adopt incorporation without giving sufficient thought to other business forms because one or more of the corporate advantages seems attractive. However, there are two factors which must not be forgotten: (1) that along with the advantages there may be countervailing drawbacks, and (2) that many of the advantages may be available in the partnership form as well. It follows that one must carefully examine and balance the advantages and drawbacks as well as the availability of alternative structures before adopting the corporation as a modus operandi.

Limited liability of the owners usually heads the list of benefits flowing from use of the corporate form. This is followed by free transferability of ownership interests and perpetual existence, which guarantees continuity of life of the enterprise. Of particular importance are flexibility in management structuring and, in particular, centralization of management. Another advantage is flexibility of capital structure. These advantages of corporate form are oft-quoted and have become legion. Still further advantages can

2. See Table I, supra note 1.
3. The scope of this introductory piece is limited to the smaller enterprise. As the number of owners grows, the corporate form becomes more inevitable with the slight exception of the few larger enterprises that may be carried on as limited partnerships, unincorporated associations, or as business trusts.
4. For example, in his treatise on corporations Professor Ballantine listed six corporate advantages:

(1) The capacity to act as a legal unit, to hold property, to contract, to sue and be sued as a distinct entity; (2) limitation of or exemption from individual liability of shareholders; (3) continuity of existence; (4) transferability of shares; (5) centralized management by the board of directors; (6) standardized methods of organization, management and finance prescribed by corporation acts for the protection of shareholders and creditors, including a more or less standardized system of shareholders' relations, rights, and remedies.


Professor Ballantine then pointed to the correlative disadvantages of the partnership form which must be compared with the corporate advantages:

(1) lack of recognition of the concern as a separate legal person; (2) danger of abuse of wide authority of co-partner; (3) risks of unlimited
be found in terms of collateral benefits such as an exemption from the usury laws and the availability of social security benefits to persons who would otherwise be self-employed and thus ineligible.\footnote{6}

Balanced against these there are various disadvantages. There are usually no filings required for a partnership or sole proprietorship in contrast to the universal corporate requirement that the articles of incorporation be on file with the state.\footnote{7} The corporate filings may also be accompanied by fees\footnote{8} and organizational taxes\footnote{9} far in excess of those accompanying other business forms. In addition to the filings there are other formalities such as the requirements of annual shareholder and formal director meetings,\footnote{10} and the necessity of written notice and minutes of shareholder and director meetings.\footnote{11} The corporate form also requires the adoption of a system of legal accounting that bears no resemblance to accepted accounting principles.\footnote{12} In terms of raising additional capital, corporate limited liability may be nothing more than a fiction. Absent individual guarantees the extent of credit is limited to the corporate assets and except in the most prosperous, low risk con-

\footnote{5. E.g., Neb. Rev. Stat. § 45-101 to -102 (Reissue 1974).}

\footnote{6. See Stark v. Flemming, 283 F.2d 410 (9th Cir. 1960) (where this was the sole reason for incorporating). \textit{But cf.} Roccograndi v. Unemployment Compensation Ed. of, 197 Pa. Super. 372, 178 A.2d 786 (1962) (denying unemployment benefits since incorporation was a sham directed solely at procuring such benefits).}


cerns, creditors will not generally advance funds without such guarantees.

In addition to the above-mentioned issues the planner must be aware of taxation factors. A corporation is a taxable entity apart from its owners, unlike the partnership or sole proprietorship, in which all income, including gains and losses, is passed through to the individual taxpayers. To the extent that the entity pays out profits in the form of dividends taxable to the shareholders, the corporate profits are subject to double taxation. An alternative to distributing corporate profits is to reinvest them for expansion or improvement of the business. This method of operation allows the ownership shares to appreciate in value and results in capital gain treatment upon sale of the interest. Although the capital gains tax on the appreciated value of the stock is still a form of double taxation, it is less vigorous than the taxation of compensation or dividends as ordinary income.

A subchapter S election enables a corporation to enjoy quasi-partnership tax treatment and thereby avoid being a separate taxable entity with respect to corporate income. However, the tax code places additional restrictions on the subchapter S corporation which often make the election impractical or unattractive.


14. IRC. § 6012(a) (2).

15. IRC. § 701.

16. If cash or unrelated investments "are permitted to accumulate beyond the reasonable needs of the business" in order to avoid taxation on dividend distributions, the corporation will be subject to the accumulated earnings tax in addition to other corporate taxes. IRC. §§ 531-537.

17. IRC. § 1372. The subchapter S election does not, of course, result in partnership tax treatment for all purposes as the corporation is still subject to many of the provisions of subchapter C. For example, corporate treatment applies to liquidations and reorganizations. IRC. §§ 331-368. In addition, subchapter S taxation differs from partnership taxation in treatment of cash distributions (compare IRC. § 1373 and Treas. Reg. § 1.1373-1(d) (1959), amended, T.D. 6960 (1968) with IRC. § 731(a)); net operating loss carryovers (compare IRC. § 1374 with IRC. §§ 702, 172); and capital gains (compare IRC. § 702(a) (2) with IRC. § 1378). See generally I. Grant, Subchapter S Taxation (1974).

18. A subchapter S corporation is limited to 15 shareholders all of whom must be individuals, except for estates and certain trusts, IRC. § 1371(a) (2); moreover, a shareholder may not be a nonresident alien, IRC. § 1371(a) (3). The corporation can have only one class of stock, IRC. § 1371(a) (4), and a certain percentage of the business must consist of active rather than passive investments, IRC. § 1372(e) (5). Additionally, subchapter S status may be adopted only by unanimous shareholder consent, IRC. § 1372(a), and may be termi-
At the other end of the spectrum is the fact that as a partnership takes on more of the characteristics normally associated with the corporate form, it runs the risk of being subject to subchapter C's provisions for the taxation of corporations. These are but a few of the tax considerations involved in selecting the appropriate form of business. Although they may be the paramount consideration in many situations, the remainder of this article will be limited to nontax issues.

The nontax disadvantages to incorporation such as the increased formality and expenses of operation speak for themselves. It is easy to see how they must fit into the calculus of the incorporation decision. Not as clear, however, is the extent to which the advantages of incorporation may be illusory. The discussion that follows is directed towards pointing out some of the pitfalls in relying too heavily upon the supposed advantages. It will become clear that although the corporate form is preferable in a large number of situations, it should not be routinely and mechanically adopted.

A. Limited Liability

Common and preferred shares in corporations are nonassessable and accordingly—the shareholders’ exposure to liability is generally considered to be limited to their initial investment. It follows that any business planner is well versed in the general black-letter-law proposition that shareholders of a corporation enjoy limited liability. However, such generalities are overbroad and may wane when applied to specific situations; this is especially true in the context of the closely-held concern.

To begin with, as a practical matter a shareholder’s potential liability will go further. When a small incorporated concern designated by unanimous agreement, I.R.C. § 1372(e)(2). If the election is terminated, the corporation is ineligible to reelect subchapter S status for five years. I.R.C. § 1372(f). See generally Z. CAVITCH, supra note 13, at § 3.01.

The Internal Revenue Service has identified six attributes of corporateness which may result in a partnership being taxed as an “association,” or corporation:

(1) Associates,
(2) An objective to carry on business and divide the gains therefrom,
(3) Continuity of life,
(4) Centralization of management,
(5) Liability for corporate debts limited to corporate property, and
(6) Free transferability of interests.


19. See generally W. MCKEE, W. NELSON & R. WHITMIRE, supra note 13, at ¶ 3.06. For comprehensive treatment of the tax issue, see authorities cited in note 13 supra.
cides to raise funds by borrowing, prudent creditors will require
the major shareholders to personally guarantee corporate obligations. Similarly, third parties contracting with the corporation will
often require performance bonds or individual guarantees by the
shareholders. Accordingly, at least until the enterprise becomes
well established and sufficiently stable in the eyes of outsiders,
limited liability will be limited in application to insulating the
shareholders against tort judgments.

In addition to the demands of the marketplace, there are vari-
ous judicially created doctrines that may be applied to extinguish
the shareholders' limited liability. Application of these doctrines
can work extreme harshness since the lack of predictability of re-
result makes this an extremely difficult risk to anticipate and guard
against.

Although the courts have exhibited great reluctance to apply
the doctrine, thin capitalization may be the basis for piercing the
veil of limited liability. For example, in *Minton v. Cavaney,* Justice Traynor, speaking for the California Supreme Court, held
that shareholders of a corporation operating a swimming pool
could be held personally liable for a tort judgment against the cor-
poration due to their failure to adequately capitalize the business
and thereby provide a cushion to absorb the foreseeable risks of
the enterprise.

Another basis for piercing through the corporation to the share-
holders' personal assets is a finding by the court that the share-
holders disregarded the corporate entity by operating the
connection as their "alter ego." In applying the alter ego analy-

21. E.g., Walkovszky v. Carlton, 23 N.Y.2d 714, 244 N.E.2d 55, 246 N.Y.S.2d 362
(1968). *But see,* e.g., Minton v. Cavaney, 56 Cal. 2d 576, 364 P.2d 473, 15 Cal.
Rptr. 641 (1961).

22. *See generally* C. CARY, CASES AND MATERIALS ON CORPORATIONS 109-49 (4th
unabr. ed. 1969); FLETCHER, supra note 4, § 44.1; R. HAMILTON, CASES AND
MATERIALS ON CORPORATIONS 194-220 (1976); H. HENN, LAW OF CORPORATIONS


24. The tort victim had drowned due to negligence in the operation of the pool.
The court held that the operation of a pool creates certain foreseeable risks
which must be taken into account in capitalizing the corporation. *But cf.* Wall-
kovszky v. Carlton, 18 N.Y.2d 414, 223 N.E.2d 6, 276 N.Y.S.2d 585 (1966) (refus-
ing, over a vigorous dissent, to pierce the veil of thinly capitalized taxi
company, relying on the corporation's compliance with New York's minimum
automobile liability insurance policy).

25. *See, e.g.,* Walkovszky v. Carlton, 23 N.Y.2d 714, 244 N.E.2d 55, 246 N.Y.S.2d 362,
244 N.Y. 84, 155 N.E. 58 (1926) (court refused to pierce veil although some of
formalities of separate corporate forms disregarded by parent and subsidiar-
ies).
the failure to keep separate books, and the absence of arm's-length dealings between the principal shareholders and the corporation. Other activities that fall into this category include the failure to follow corporate formalities such as keeping minutes of the required shareholder and director meetings. To the extent that such a failure exists, as is the case with defective incorporation ab initio, there is the risk that the shareholders will be held personally liable for the obligations of the corporation. It follows that the diligence required to maintain the de jure corporate existence is a significant burden of corporate form.

The cases indicating that the veil may be pierced for noncompliance with corporate formalities present an interesting quandry. On the one hand, in line with the growing trend of cases recognizing the special needs of the closely-held concern—or "incorporated partnership"—courts have been willing to forgive such noncompliance. In such decisions it is reasoned that insofar as the parties in selecting the corporate form wanted to retain flexibility in defining the parties' relative rights, the courts should recognize this fact in upholding the form selected. Accordingly, special agreements and other devices which might otherwise run afoul of corporate norms and formalities are not only tolerated but are encouraged in the close corporation context. However, if shareholders rely on the leniency of this line of cases, they run the risk that their informality will lead to the piercing of the corporate veil and the concomitant elimination of limited liability.

The foregoing discussion should not be taken to indicate that limited liability is too easily lost. This is not the case, as the corporate veil is a benchmark of corporate life. On the other hand, piercing the veil is a risk which should not be minimized. When this risk is coupled with the likelihood that creditors and other third parties will often require personal guarantees before dealing with the corporation, it would be a mistake to give limited liability too much weight in deciding whether or not to incorporate.

30. See generally A. FREY, J. CHOPER, N. LEECH & C. MORRIS, CASES AND MATERIALS ON CORPORATIONS 540-616 (2d ed. 1977); 1 F. O'NEAL, supra note 4.
A final point to be kept in mind in deciding whether to incorporate is the alternative availability of the limited partnership form of operation. Although the limited partnership is frequently thought of as a vehicle for establishing tax sheltered investments, it is also a viable alternative to the corporate form for small businesses. The primary drawbacks of this form are (1) the limited partners' inability to actively participate in management and (2) the general partner's unlimited personal exposure to liability. Accordingly, the limited partnership interest represents a passive investment which may not meet the participants' objectives if they desire some control over their investment. The unlimited liability of the general managing partner may be minimized by incorporation of the general partner. However, the passivity of the limited partners' investment is not as readily avoidable since


34. The general partner has the same exposure to liability as in a general partnership. Even incorporation of the general partner will not always assure limited liability. See 7 TEX. TECH. L. REV. 745 (1976). But see Recent Developments, Limited Partnership—Limited Control Through a Corporate General Partner, 53 WASH. L. REV. 775 (1978).

35. For a recent case refusing to pierce the corporate veil of the general partner, see Frigidaire Sales Corp. v. Union Properties, Inc., 88 Wash. 2d 400, 562 P.2d 244 (1977). Contra, Delaney v. Fidelity Lease Ltd., 526 S.W.2d 543 (Tex. 1975). See note 34 supra.
their limited liability is quite fragile and thus very easily set aside for taking an active role in management. While it follows that the limited partnership may not be a viable alternative in many situations, its utility under appropriate circumstances should not be underestimated. This form of operation is one way to assure limited liability while at the same time preserving the flexibility and lack of formality of the partnership form.

Another factor in evaluating the importance of limited liability is the availability and cost of insurance to cover the risks of the enterprise. While it is impossible to insure against a general business failure, many of the risks are insurable. For example, any business involving the use of motor vehicles will want adequate liability insurance as would any business owning real property. The nature of the business and the potential exposure of the owners to liability will necessarily be factors, but in many instances insurance may make even the general partnership a viable business form despite its lack of limited liability protection.

B. Continuity of Existence

Under many of the current corporate chartering statutes, a provision in the articles of incorporation may provide for perpetual existence. A slight variation that appears in some of the other acts is that corporate duration is perpetual unless a shorter period is provided for in the articles. This possibility of immortality contrasts to the black letter common law rule that a partnership dissolves whenever a general partner ceases to hold that position whether it be by virtue of death, withdrawal, or transfer of the partnership interest.

While under the Uniform Partnership Act a conveyance of a partner's interest does not of itself dissolve a general partnership, all of the remaining members may decide to dissolve the

36. See Coleman & Weatherbie, supra note 31, at 897-906; Crane, Are Limited Partnerships Necessary?, 17 MINN. L. REV. 351, 353-55 (1933); Lewis, supra note 31, at 719-20; Comment, supra note 31, at 895-99; Recent Developments, supra note 34, at 765 n.39.

37. Cf. Walkovszky v. Carlton, 23 N.Y.2d 714, 244 N.E.2d 55, 246 N.Y.S.2d 362 (1968) (refusing to pierce the corporate veil in an automobile injury where the corporation had complied with the state's minimum liability insurance requirements).


39. E.g., MODEL ACT § 45(b); NEB. REV. STAT. § 21-2052(b) (Reissue 1977).

40. E.g., DEL. CODE tit. 8, § 102(b)(5) (1974).


42. UNIFORM PARTNERSHIP ACT § 27(1) [hereinafter cited as UPA]; NEB. REV. STAT. § 67-327(1) (Reissue 1976).
entity without breaching the partnership agreement.\textsuperscript{43} Nevertheless, under the Act either the death or bankruptcy of any partner still operates as an automatic dissolution.\textsuperscript{44} In addition, a person may not become a member of the partnership without the unanimous consent of the existing partners.\textsuperscript{45} In the case of a limited partnership, the limited partnership interests are assignable if so provided in the partnership certificate.\textsuperscript{46} The withdrawal, death or insanity of a general partner dissolves the partnership \textit{pro tanto} unless the business is carried on by the remaining general partners either with the consent of all members or pursuant to a preexisting provision in the partnership agreement.\textsuperscript{47}

A reading of the current statutory provisions governing partnerships makes it clear that a corporation's perpetual existence is not unique. Except in the case of a limited partnership with a sole general individual partner, the partners may in essence provide for perpetual existence.\textsuperscript{48} However, since this is one of the key characteristics of corporateness, under the tax laws, perpetual existence may cause the partnership to be taxed as a corporation.\textsuperscript{49} With a general partnership, a contractual arrangement extrinsic to the partnership agreement between and among all of the general partners to reform the partnership after death will probably not suffice to ensure continuity through specific performance, but will at least give a remedy in damages for breach of contract.\textsuperscript{50} The damage remedy does not go far in guaranteeing continuity, especially since in many cases breach and payment of damages may be economically advantageous to the dissident partner. As noted above, in the case of a limited partnership with a single general partner, incorporation of the general partner assures continuity of existence.

An additional factor in evaluating the importance of perpetual

\textsuperscript{43} UPA § 31(1)(c); Neb. Rev. Stat. § 67-331(1)(c) (Reissue 1976).
\textsuperscript{44} UPA § 31(4)-(5); Neb. Rev. Stat. § 67-331(4)-(5) (Reissue 1976).
\textsuperscript{45} UPA § 18(g); Neb. Rev. Stat. § 67-318(g) (Reissue 1976).
\textsuperscript{46} ULP\textsuperscript{\textcopyright} 88 21(a) X & 19; Rev. ULP\textsuperscript{\textcopyright} 88 201(a)(7), 702, 704; Neb. Rev. Stat. §§ 67-202(a) X & -219 (Reissue 1976).
\textsuperscript{47} ULP\textsuperscript{\textcopyright} 88 20; Neb. Rev. Stat. § 67-220 (Reissue 1976). It follows that the death, retirement or insanity of the sole general partner will necessarily dissolve the partnership. \textit{But see} Rev. ULP\textsuperscript{\textcopyright} 88 402, 602.
\textsuperscript{48} See note 47 supra.
\textsuperscript{49} See W. McKee, W. Nelson & R. Whitmire, supra note 13, ¶ 3.06[4][a]; note 19 supra.
\textsuperscript{50} When incorporating the family farm or other business, the owners can provide for perpetual existence. For example, by deeding the land or other property to the corporation and by adding a limited purpose clause, a dissident shareholder may be prevented from dissolving the family corporation. However, with a general partnership the dissident could breach the contract and compel dissolution under the statute.
existence in selecting the corporate form is the fact that a corporation may be subject to involuntary dissolution. Failure to comply with the required corporate formalities, including the payment of franchise taxes, may result in an action by the attorney general to dissolve the corporation.\textsuperscript{51} This raises problems of predictability similar to those that exist with the risk of losing limited shareholder liability.\textsuperscript{52} A second type of involuntary dissolution may be obtained at the behest of a disgruntled shareholder.\textsuperscript{53} This may be even more of a factor in the future to the extent that courts become more willing to decree involuntary dissolution upon a shareholder petition in order to accommodate the flexibility and needs of the incorporated partnership.\textsuperscript{54} As a result of this unpredictability, the planned duration of the enterprise may not always be a significant factor in deciding whether to adopt the corporate rather than partnership form.

C. Free Transferability

As is the case with continuity of existence,\textsuperscript{55} in most situations the partnership form's limitations on the free transferability of ownership interests need no longer be a significant factor in the planner's decision to opt for the corporate form. The partnership is not as restrictive as it once was. For example, as noted above, an interest in a general partnership is freely assignable subject to the unanimous veto of the remaining members.\textsuperscript{56} In a limited partnership the limited partners may freely transfer their interests if the partnership certificate so provides,\textsuperscript{57} while an appropriate provision in the partnership certificate may provide for the transferability of a general partner's shares.\textsuperscript{58} Once again, however, the

\textsuperscript{51} MODEL ACT § 95. \textit{Cf.} Neb. Rev. Stat. § 21-2094 (Reissue 1977) (upon receipt of certification from the Secretary of State, the Attorney General is entitled to file an action against a corporation for its dissolution). In Nebraska a corporation is automatically dissolved for failure to pay corporate occupation taxes. \textit{Id.} § 21-313.

\textsuperscript{52} \textit{See} note 27 & accompanying text \textit{supra}.


\textsuperscript{54} Comment, \textit{supra} note 53, at 814-24.

\textsuperscript{55} \textit{See} text accompanying notes 41-45 \textit{supra}.

\textsuperscript{56} UPA §§ 27(a), 31(1)(c); Neb. Rev. Stat. §§ 67-327(1), -331(1)(c) (Reissue 1976).

\textsuperscript{57} ULPA §§ 2(1)(a) X & 19; Revised ULPA §§ 201(a) (7), 702, 704; Neb. Rev. Stat. §§ 67-202(a) X & -219 (Reissue 1976).

\textsuperscript{58} ULPA § 20; Neb. Rev. Stat. §§ 67-220 (Reissue 1976). \textit{Compare} Revised ULPA §§ 402, 602. Placed in its proper perspective, the transfer of a general partner's interest in a limited partnership is in reality a change in management rather than a change in ownership. Sale of such an interest by the general partner can create sale of control problems. \textit{See} Hazen, \textit{Transfers of
presence of free transferability may cause the partnership to be
taxed as a corporation.\textsuperscript{59}

Conversely, the increasing recognition of special treatment for
closely held corporations has led the courts to be extremely toler-
ant of share transfer restrictions.\textsuperscript{60} The types of transfer restric-
tions on corporate shares are many and can be readily adopted to
meet the needs of a particular situation.\textsuperscript{61} Also as the use of these
devices has increased, they have become far more sophisticated
and are most valuable not only as a means of maintaining limita-
tions of ownership but also as a device for resolving corporate

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\textbf{Corporate Control and Duties of Controlling Shareholders—Common Law,}
\textbf{Tender Offers, Investment Companies—And a Proposal For Reform, 125 U.}
\textbf{Pa. L. Rev. 1023 (1977); Note, Opportunity Lost: More of the Same in Sale of}
\textbf{Corporate Control Cases, 58 Neb. L. Rev. 891 (1979).}

\textsuperscript{59} See W. McKee, W. Nelson & R. Whitmire, \textit{supra} note 13, \S 3.06[4][d]; note 19
\textit{supra}.

\textsuperscript{60} E.g., \textit{In re Mather's Estate}, 410 Pa. 361, 189 A.2d 586 (1963) (great difference in
sale price and fair market value is not sufficient standing alone to strike down

\textsuperscript{61} Professor O'Neal divides transfer restrictions into nine major categories:

Various types of restrictions on the alienability of shares have
been resorted to from time to time in attempts to confine share own-
erness to persons approved by the original shareholders. The re-
straints may be classified as follows: (1) absolute prohibitions
against the transfer of shares; (2) “consent restraints,” requiring ap-
proval of transfers by the shareholders, the directors or a stipulated
percentage of one of these groups; (3) provisions limiting transfers to
specified classes of persons (e.g., families of existing shareholders or
the corporation's customers or employers) or prohibitions against
transfers to other classes of persons (e.g., competitors of the busi-
ness); (4) “first option” provisions granting the corporation, its
officers or directors, or other shareholders a preemptive right
(sometimes referred to as a right of “first refusal”) to shares which a
holder decides to sell; (5) options empowering the corporation, its
officers or directors, or the other shareholders to purchase some or
all of the shares of a holder on the happening of specified events
(e.g., his death, his becoming disabled, his becoming bankrupt or in-
solvent, his moving from the city where the corporation's principal
place of business is located, his acquiring an interest in a competing
concern or a severance of his employment with the corporation); (6)
buy-out arrangements for the transfer of a deceased holder’s shares
(and probably those of a holder who becomes disabled) to the corpo-
ration or to the other shareholders at a stipulated price or at a valua-
tion determined by formula; (7) options empowering legal
representatives of a deceased shareholder to purchase the shares of
surviving holders; (8) provisions for the corporation's repurchase or
redemption of the shares of a holder who ceases to be an employee of
the corporation or provisions for the other shareholders to purchase
his shares; and (9) provisions for the redemption (“call”) of common
stock at the option of the corporation or its board of directors.

These categories are set up only for convenience of discussion.
Actually the restraints are subject to almost infinite variation and
combination.

\textsuperscript{2} F. O'Neal, \textit{supra} note 4, \S 7.05.
An additional factor to keep in mind is the existence of judicially created limitations on the transferability of corporate ownership interests, at least where control of the enterprise is involved. For example, a controlling shareholder has been held accountable for the subsequent looting of the corporation by the control purchaser. Controlling shareholders who receive a premium too much in excess of the per share value of their holdings may be held accountable to the remaining shareholders. These limitations on the sale of corporate control are based on various theories of the fiduciary obligation flowing from the majority shareholders to the minority. Along these lines, most significant to the question of which form to select is the Massachusetts Supreme Court's holding in Donahue v. Rodd Electrotype Co. and its progeny that within the context of the closely held corporation the shareholders owe one another the same high duty of fairness as do members of a partnership. In addition to providing another example of recognizing the incorporated partnership, the rationale employed in this line of cases minimizes the distinction between these two forms of enterprise.

Although the mechanics may differ, in substance the variations on transferability of ownership between the partnership and corporate form are relatively slight. In both forms of operation the interests can be freely transferable. Alternatively, as is frequently the case, the parties may want to protect both themselves and the business with the use of the types of transfer restrictions discussed above. Although in certain situations the designs of the parties in fashioning transfer limitations may be better adapted to the corporate form, in a vast number of situations this will not be so. Accordingly, as is the case with the other corporate advantages

63. See generally Hazen, supra note 58; Note, supra note 58.
68. See text accompanying note 69 infra.
that are discussed above, the significance of this factor in selecting
the form of enterprise should not be overestimated.

D. Flexibility in Structuring Management

In 1928 Benjamin Cardozo explained the extraordinarily high
standards of dealing that govern the partnership relation: "Joint
adventurers, like copartners, owe to one another . . . the duty of
the finest loyalty. . . . [They are] held to something stricter than
the morals of the market place. Not honesty alone, but the punc-
tilio of an honor the most sensitive, is then the standard of behav-
ior." This is in sharp contrast to the negligence or even lower
standard of care generally applied to corporate management70 to-
gether with the presumption that it acts within the broad range of
valid business judgment.71 In terms of general standards there is
clearly at least a divergence of emphasis in describing the nature
of the fiduciary relationship in these two forms of enterprise. The
apparent increased deference to the managers that exists with the
corporate form can be a distinct advantage over the partnership
arrangement. However, this is true only with the caveat that there
is a growing line of cases that apply the partnership standard to
the directors of closely held corporations.72 Of course, in many sit-
suations the owners of the enterprise may want to protect them-
selves against a runaway management. In these instances the
higher fiduciary standard is an advantage.

Another divergence between the corporate and general part-
nership form is the centralization of management. The directors
manage the affairs of the corporation73 and these directors, who
are elected by the shareholders,74 in turn appoint the corporate of-

70. "[D]irectors are liable for negligence in the performance of their duties. Not
being insurers, directors are not liable for errors of judgment . . . ." Litwin
(Rosemarin) v. Allen, 25 N.Y.S.2d 667, 678 (Sup. Ct. 1940). See generally H.
BALLANTINE, supra note 4, at 157-62; 1 FLETCHER, supra note 4, §§ 5-7, 10-14; H.
HENN, supra note 22, at 453-59; Shaneyfelt, The Personal Liability Maze of
71. See generally H. BALLANTINE, supra note 70, at 160-62; 1 FLETCHER, supra note
4, at §§ 5-7, 10-14; H. HENN, supra note 22, at 482-83; Note, Section 21-2040.01:
Interested Director Transactions and Considerations of Fairness, 58 Neb. L.
72. See notes 66-67 supra.
§ 21-2035 (Reissue 1977).
DECISION TO INCORPORATE

76. While the shareholders may remove directors, only the directors can remove officers. E.g., Model Act § 51; Neb. Rev. Stat. § 21-2049 (Reissue 1977).
77. UPA § 18(e); Neb. Rev. Stat. § 67-318(e) (Reissue 1976).
79. In addition to the stratification of corporate management as a result of the presence of both officers and directors, another example of this flexibility in structuring is the use of the committee system. Model Act § 42; Del. Code tit. 8, § 141(c) (1974); Neb. Rev. Stat. § 21-2041 (Reissue 1977).
80. See W. McKee, W. Nelson, & R. Whitmire, supra note 13, ¶ 3.06[4][b]; note 19 supra.
81. See note 85 infra.
82. See generally 1 Fletcher, supra note 4, §§ 5-7, 10-14.

ficers75 over whom the shareholders have no direct control.76 In contrast, the members of a general partnership are all co-managers.77 For example, any partner has both the apparent and implied authority to bind the partnership in dealings with third parties.78 Of course, utilization of the limited partnership form provides for the same type of management centralization that exists with the corporation. However, this is true only to a limited degree insofar as in the limited partnership the management is not highly stratified as readily as it may be in the corporation,79 and too much centralization may result in the loss of partnership tax advantages.80

Certainly, to the extent that the enterprise in question requires a sophisticated, stratified management structure, the corporate form is preferable. However, the need for a sophisticated structure is not typical, especially for the small business, but rather is a situation that may occur in a relative handful of situations.

E. Flexibility in Capitalization

The final corporate advantage to be discussed is, standing alone, probably the most utilitarian and hence the most significant in selecting the form of operation. The partnership basically provides for one type of equity or ownership interest with the one variation presented by the limited partnership form. Intrapartnership agreements can, of course, define relative priorities in profit sharing with even more flexibility than is available with the corporate form. However, planners may be reluctant to rely on such contractual definitions because of unfamiliarity. The various types of share classification and senior securities that are available in the corporate form are expressly sanctioned by the corporate statutes81 and have been subject to much judicial scrutiny,82 thus providing guidelines. The absence of statutes and case law in the partnership setting gives more flexibility but provides a lesser degree of certainty. This certainty in the partnership context can only be provided by the far-thinking planner who is able to anticipate and then draft provisions to cover all contingencies with respect to the desired preferences.
With respect to debt financing, the chief difference between the partnership (or sole proprietorship) and the corporation is limited liability. However, this need not be a significant factor. As noted earlier it is not uncommon for a creditor of a closely held corporation to require the personal guarantees of the principal shareholders. Conversely, with a profitable partnership, a third party may well extend credit with recourse limited to the partnership assets. It follows that the significant difference in financing exists, if at all, in terms of equity interests.

As has been already pointed out, the prime advantage to the corporate form may be nothing more than the ease of adaptability. The ability to issue voting and nonvoting equity interests is readily provided by the statutory schemes. Additionally, corporate statutes uniformly provide for preferred stock permitting dividend and liquidation preferences. And the ability to create hybrid securities having attributes of both equity and debt interests is available with the corporate structure. Such devices include the right to cumulative preferred dividends (debt), participating preferred interests (equity), the corporate right of redemption (debt), and the ability to have both debt instruments and preferred stock convertible into common stock at the security holder's option.

To the extent that an enterprise seeks to take advantage of these alternatives, the corporate form is a significant advantage. However, for those who prefer partnership single taxation, subchapter S status is limited in availability to corporations with one class of stock. Thus, the true “incorporated partnership” is not in

83. See text accompanying note 30 supra.
84. In some states the use of non-voting common stock is permissible. E.g., DEL. CODE tit. 8, § 151(a) (1974); NEB. REV. STAT. § 21-2014 (Reissue 1977). In a few jurisdictions there are statutory prohibitions against non-voting stock. See C. CARY, supra note 22, at 255, 411. However, even non-voting stock is allowed to vote for or against organic changes that would affect its relative rights. E.g., MODEL ACT §§ 59(c), 60; DEL. CODE tit. 8, § 242(c)(2) (Supp. 1978); NEB. REV. STAT. §§ 21-2057(3), 2058 (Reissue 1977).
86. A right to cumulative dividends means that the stated annual amount accrues from year to year even when no dividends are paid in a given year, thus entitling holders of the preferred shares to payment of accrued dividends before any dividend on the common stock can be paid. Without such a right the preference exists only on a one year basis.
87. Participation can exist with either dividends or liquidation rights and provides that in addition to a preference, i.e., standing in line before the common shareholders up to a stated amount, there is a right to participate equally in the remainder after the preference is satisfied.
a position to take advantage of corporate flexibility in capital structuring.

III. CONCLUSION

It has been admonished: "When in doubt, don't incorporate." This advice is well taken. Indiscriminate use of the corporate form will frequently result in a counter-productive situation in which the expense, time and formality will far outweigh any benefit to the enterprise. In deciding which form to adopt the planner should take cognizance of the oft-times illusory nature of the advantages discussed above. When viewed in the appropriate perspective and when properly balanced against the known disadvantages, the optimal form of enterprise will be chosen through an informed rather than a mechanical selection process.


When in doubt, don't incorporate. Many small corporations are formed inadvisedly. The corporate form of doing business is probably disadvantageous for a small new venture. The cost of the privilege of limited liability will probably be too high. Not only is there expense involved in forming and maintaining a corporation which a sole proprietor would not have to pay, but there may be serious tax disadvantages. The double tax on corporate income distributed as dividends makes the corporate form of doing business basically unattractive. Only by taking advantage of the exceptions and the unusual provisions in the law is the corporate form made attractive for the typical small venture. Hence a basic rule: don't incorporate unless the advantages are worth the cost. Time devoted at the outset to determining whether incorporation is advisable, will be well spent.