



10-1-2018

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### Recommended Citation

Lauren G. DeBona, *If You Climb Into Bed With Your Business Partner, the Court Might Climb in, Too: The Delaware Supreme Court's Cautionary Tale of Acrimonious Engagement and Corporate Deadlock in Shawe v. Elting*, 63 Vill. L. Rev. 501 (2018).

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2018]

IF YOU CLIMB INTO BED WITH YOUR BUSINESS PARTNER,  
THE COURT MIGHT CLIMB IN, TOO:  
THE DELAWARE SUPREME COURT'S CAUTIONARY TALE OF  
ACRIMONIOUS ENGAGEMENT AND CORPORATE  
DEADLOCK IN *SHAWE* v. *ELTING*

LAUREN G. DEBONA\*

“Naturally, business and pleasure can be readily combined, but a certain balance should exist, and the latter should not predominate over the former.”<sup>1</sup>

I. BREAKING UP, NOT MAKING UP: AN INTRODUCTION TO PROBLEMS  
ASSOCIATED WITH INTIMATE RELATIONSHIPS  
BETWEEN BUSINESS PARTNERS

It is often said that it is a mistake to mix business and pleasure.<sup>2</sup> Yet, this advice is not always taken.<sup>3</sup> Close relationships between professional partners—whether familial, friendly, or romantic—can blur the line be-

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\* J.D. Candidate, 2019, Villanova University Charles Widger School of Law; B.A. 2016, Washington & Jefferson College. This article is dedicated to my parents, Grace and Vince DeBona, grandparents, Helen and Armando Ombres, brother, Matthew DeBona, cousin, Jared DeBona, and boyfriend, Scott Zlotnick. My success in life and throughout my law school career would not have been possible without their unconditional love, guidance, and support. I also extend my gratitude to my Philadelphia family, namely Kayla Cronin, Charlotte Merritt, and the Zlotnicks, for their endless love and encouragement. Finally, I would like to thank my *Villanova Law Review* peers for their hard work and dedication throughout the publication of this article.

1. Fredrik Bajer, Nobel Laureate, Nobel Lecture at the Norwegian Nobel Institute: The Organization of the Peace Movement (May 18, 1909) (transcript available at [https://www.nobelprize.org/nobel\\_prizes/peace/laureates/1908/bajer-lecture.html](https://www.nobelprize.org/nobel_prizes/peace/laureates/1908/bajer-lecture.html) [<https://perma.cc/HM4J-7Y3X>]) (“Naturally, business and pleasure can be readily combined, but a certain balance should exist, and the latter should not predominate over the former.”).

2. See Chitra Reddy, *11 Reasons Why You Shouldn't Mix Business with Pleasure*, WISESTEP.COM, <https://content.wisestep.com/shouldnt-mix-business-pleasure/> [<https://perma.cc/VZY8-QF4M>] (last visited June 12, 2018) (highlighting eleven negative side effects of allowing personal life to interfere with work life); C. Yoder, *Mixing Marriage and Business: The McCourt Divorce*, LEGALZOOM.COM (May 2010), <https://www.legalzoom.com/articles/mixing-marriage-business-the-mccourt-divorce> [<https://perma.cc/NJ6V-MMYN>] (providing overview of issues associated with broken marriages and business).

3. See Reddy, *supra* note 2 (“According to a recent study conducted by the University of Illinois, it is found that 60% [sic] people around the globe heavily mix their office life or business with pleasure through heavy socialization and various other means.”); Yoder, *supra* note 2 (demonstrating what happens when business and pleasure mix resulting in damage to business).

tween the business and pleasure.<sup>4</sup> Although intimate relationships between business partners have proven successful in a number of enterprises, such relationships have resulted in business disasters for many.<sup>5</sup> Thus, owners of businesses, both small and large, must be aware of the volatility of these relationships.<sup>6</sup>

As circumstances change, affection between intimate business partners can quickly morph into vengefulness and acrimony.<sup>7</sup> In the corporate world, personal strife between directors, executives, or stockholders can have a devastating impact on the business.<sup>8</sup> Most commonly, corporate dissension and deadlock paralyze efficient management and decision-making and threaten the business of the corporation with irreparable injury.<sup>9</sup>

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4. See Jodi Glickman, *Stop Mixing Business with Pleasure*, HARVARD BUSINESS REVIEW (Mar. 22, 2011), <https://hbr.org/2011/03/stop-mixing-business-with-pleasure.html> [<https://perma.cc/55H7-2Y7R>] (cautioning young business employees about dangers of mixing work and personal life and stating that business and pleasure are not synonymous because lines between them easily blur).

5. See Yoder, *supra* note 2 (“Mixing marriage and business has proven to be a formula for success for many Americans—and a recipe for disaster for others.”). See generally *Shawe v. Elting*, 157 A.3d 152, 155 (Del. 2017) (demonstrating risks associated with allowing romantic discord to interfere with business efficiency); *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 235, 240 (Del. 1982) (demonstrating risks associated with deteriorating relationships between co-founders and equal fifty percent stockholders); *In re Shawe & Elting LLC*, C.A. No. 9661-CB, 2015 WL 4874733, at \*2–3 (Del. Ch. Aug. 13, 2015) (demonstrating risks associated with allowing romantic discord to interfere with business efficiency); *In re Supreme Oil Co., Inc.*, No. 10618-VCL, 2015 WL 2455952, at \*1 (Del. Ch. May 22, 2015) (demonstrating risks associated with allowing familial discord to interfere with business efficiency); *Bentas v. Haseotes*, No. Civ. A. 1723-NC, 2003 WL 1711856, at \*1–2 (Del. Ch. Mar. 31, 2003) (emphasizing the consequences of allowing familial discord to interfere with business operations); *Fulk v. Wash. Serv. Assocs., Inc.*, No. Civ. A. 17747-NC, 2002 WL 1402273, at \*1–2 (Del. Ch. June 21, 2002) (demonstrating risks associated with allowing personal discord between co-owners and former friends to interfere with business efficiency); *Bentas v. Haseotes*, 769 A.2d 70, 72–73 (Del. Ch. 2000) (demonstrating risks associated with allowing familial discord to interfere with business efficiency in closely-held family corporations); *Brown v. Rosenberg*, No. 833, 1981 WL 7638, at \*5 (Del. Ch. Dec. 17, 1981) (Recognizing “that it is more likely than unlikely that a Court will end up appointing a receiver to liquidate a corporation where there are but two stockholders, both of whom own 50% of the corporation’s shares, when they are unable to agree on anything.”).

6. See Yoder, *supra* note 2 (“Whether the business is small or large, like a professional sports franchise, owners should be aware of the potential pitfalls.”).

7. See *id.* (explaining that changing circumstances in personal relationships may lead to harmful relations between business partners, especially in family businesses).

8. See, e.g., *Shawe*, 157 A.3d at 155 (finding that personal discontent between co-owners and co-directors created corporate deadlock that was so severe as to warrant appointment of custodian to sell solvent corporation); see also Yoder, *supra* note 2 (stating that deteriorating relationships may have devastating impact on business).

9. See DEL. CODE ANN. tit. 8, § 226 (West 2010) (acknowledging that court intervention may be necessary when deadlock threatens “irreparable injury”); see

When corporate deadlock strikes, however, many states provide statutory remedies.<sup>10</sup> Specifically, section 226 of the Delaware General Corporation Law (DGCL) allows the Court of Chancery to appoint a custodian for a corporation upon deadlock or for other cause.<sup>11</sup> Although the statutory language is relatively clear, the scope of both the court's and the custodian's powers under section 226 have become topics of contention.<sup>12</sup>

The Delaware Supreme Court expounded upon this issue in *Shawe v. Elting*.<sup>13</sup> In *Shawe*, the co-owners and board members of a Delaware corporation developed an increasingly acrimonious and turbulent rapport after the ruin of their romantic relationship in 1997.<sup>14</sup> Since the relationship ended, they managed to grow the profitable corporation.<sup>15</sup> However, unsatisfied with their financial success, they allowed their "simmering personal discontent" to infect the corporation's business affairs, resulting in paralyzing corporate deadlock.<sup>16</sup>

Upon petition, the Court of Chancery appointed a custodian under section 226 and subsequently ordered the custodian to sell the solvent corporation amid the deadlock over the objection of its fifty percent stockholders.<sup>17</sup> On appeal, the Delaware Supreme Court considered whether

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*also* GARY LOCKWOOD, LAW OF CORPORATE OFFICERS AND DIRECTORS: INDEMNIFICATION AND INSURANCE § 1:22 (2d ed. 2017) (stating that deadlock can paralyze normal, established operations of corporations).

10. *See* RICHARD C. TINNEY, 6 AM. JUR. PROOF OF FACTS 2D 387, §§ 13–24 (1975) (providing overview of various statutory remedies for deadlock, including involuntary dissolution, appointment of provisional director, and appointment of custodian or receiver).

11. *See* § 226 (providing statutory remedy for corporations facing deadlock and granting Court of Chancery authority to appoint receiver or custodian for deadlocked corporation).

12. *See, e.g., Shawe*, 157 A.3d at 152 (considering scope of Court of Chancery's authority to appoint custodian and order custodian to sell solvent corporation under section 226); *In re Supreme Oil Co., Inc.*, No. 10618-VCL, 2015 WL 2455952, at \*4 (Del. Ch. May 22, 2015) (ordering custodian to exercise full extent of powers under section 226 and to conduct sale for corporation); *Fulk v. Wash. Serv. Assocs., Inc.*, No. Civ. A. 17747-NC, 2002 WL 1402273 (Del. Ch. June 21, 2002) (considering whether to approve plan for sale of corporation under section 226); *Bentas v. Haseotes*, 769 A.2d 70 (Del. Ch. 2000) (considering when Court of Chancery may appoint custodian under section 226 and what powers that custodian exercise).

13. *See Shawe*, 157 A.3d at 155 (holding that Court of Chancery did not exceed statutory authority under section 226 by appointing custodian and ordering sale of solvent corporation after less severe means were tried but failed).

14. *See id.* at 156 (stating *Shawe* and *Elting* co-founded corporation, became engaged in 1996, broke off their engagement in 1997, and that their relationship became exceedingly tenuous since).

15. *See id.* (stating that *Shawe* and *Elting* grew TransPerfect Global, Inc. together); *id.* at 159 (acknowledging that TransPerfect Global "has been a profitable enterprise").

16. *See id.* at 156 ("As the Company grew, the founders were not satisfied with their financial success, and brought their simmering personal discontent into the Company's business affairs.").

17. *See id.* at 154 (reiterating holding issued by Court of Chancery).

the Court of Chancery erred and exceeded its statutory authority under section 226.<sup>18</sup> In a four-to-one decision, the court affirmed the Court of Chancery's order to sell the corporation; the court concluded that in circumstances such as this, when intermediate measures were attempted but failed, the Court of Chancery properly exercised its discretion to order the custodian to sell the company and distribute the proceeds to stockholders of the deadlocked corporation.<sup>19</sup>

This Casebrief argues that the Delaware Supreme Court's holding in *Shawe* was properly decided and consistent with foundational principles of Delaware corporate law and section 226 jurisprudence—the *Shawe* decision serves as an important cautionary tale for Delaware corporations facing deadlock.<sup>20</sup> Ultimately, *Shawe* signals to Delaware corporations that the Court of Chancery's statutory authority to appoint a custodian in the face of deadlock under section 226, while not unfettered, is rather broad.<sup>21</sup> Part II provides an overview of the relevant background principles of Delaware corporate law, corporate deadlock, the statutory remedy provided by section 226, and the cases interpreting its provisions.<sup>22</sup> Part III provides the facts and procedure of *Shawe*, demonstrating that the case presents facts and issues similar to those in most corporate deadlock cases, but also presents more unique, extreme facts that warranted the judicially ordered sale of the corporation over less drastic means.<sup>23</sup> Part III also outlines the holding and reasoning of the *Shawe* court.<sup>24</sup> Part IV contends that *Shawe* was properly decided and discusses its implications for corporations and their counsel when handling dissension and deadlock.<sup>25</sup> Finally, Part V concludes by emphasizing the importance of *Shawe* as a cautionary tale for Delaware corporations and as a reaffirmation of the broad, equitable powers of the Court of Chancery.<sup>26</sup>

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18. *See id.* at 155 (describing issues presented to court on appeal).

19. *See id.* (agreeing with Court of Chancery's conclusion to sell company and distribute proceeds to deadlocked stockholders).

20. For a discussion of why *Shawe* was properly decided and why the decision serves as a cautionary tale for Delaware corporations and their counsel, see *infra* notes 154–84 and accompanying text.

21. For a discussion of why *Shawe* affirms the broad scope of the court's equitable powers, see *infra* notes 154–84 and accompanying text.

22. For a discussion of background principles of corporate law, corporate deadlock, and statutory deadlock remedies including section 226, see *infra* notes 27–85 and accompanying text.

23. For a discussion of the facts and procedure of *Shawe* that demonstrate why it is both a typical and extreme corporate deadlock case, see *infra* notes 89–114 and accompanying text.

24. For a discussion of the *Shawe* court's reasoning, see *infra* notes 115–53 and accompanying text.

25. For a critical analysis of *Shawe* and for a discussion of the decision's substantive implications for corporations and corporate counsel, see *infra* notes 154–204 and accompanying text.

26. For a conclusion regarding *Shawe*'s importance for Delaware corporations and for Delaware courts, see *infra* notes 205–10 and accompanying text.

II. 'TIL DEADLOCK DO US PART: AN OVERVIEW OF CORPORATE DEADLOCK  
AND THE STATUTORY REMEDY PROVIDED BY  
SECTION 226 OF THE DGCL

Deadlock exists when factions of the corporation with significant decision-making power—stockholders or directors—have irreconcilable differences that hamper corporate operations.<sup>27</sup> Deadlock poses many issues for a corporation and its constituencies, but there are available remedies.<sup>28</sup> The equitable powers of the Court of Chancery and basic principles of Delaware corporate law are important to understanding these remedies.<sup>29</sup> This Casebrief highlights the statutory remedy provided by section 226 of the DGCL, providing the Court of Chancery with the power to appoint a custodian for deadlocked corporations.<sup>30</sup> The courts that have interpreted section 226 have affirmed the Court of Chancery's wide discretion to determine the most appropriate remedy when deadlock has escalated to extremes.<sup>31</sup>

A. *Corporate Cupid: The Court of Chancery and Delaware Corporate Law*

It is widely recognized that the Court of Chancery has broad, inherent equitable powers.<sup>32</sup> Traditionally, the court has discretion to decide issues

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27. See TINNEY, *supra* note 10, § 3 (noting that corporate deadlock depends on decision-making powers of disagreeing factions). Corporate deadlock can only truly occur when the disagreeing parties have power that can influence corporate affairs. *See id.* This power is usually held by stockholders, directors, or officers that exercise control either through voting power or through powers derived from the articles of incorporation or bylaws. *See id.* For a discussion of corporate deadlock, see *infra* notes 50–55 and accompanying text.

28. For a discussion of remedies for corporate deadlock, see *infra* notes 56–68 and accompanying text.

29. For a discussion of foundational principles of Delaware corporate law and the equitable powers of the Court of Chancery, see *infra* notes 32–49 and accompanying text.

30. For a discussion of section 226, see *infra* notes 60–68 and accompanying text.

31. For a discussion of relevant cases interpreting section 226, see *infra* notes 69–85 and accompanying text.

32. See Lyman Johnson, *Delaware's Non-Waivable Duties*, 91 B.U. L. REV. 701, 709, 711 (2011) (stating equity is well-established in Delaware corporate law and that equity's "supervening role" has been recognized in Delaware lawmaking); William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery – 1792–1992*, 18 DEL. J. CORP. L. 819, 849 (1993) (noting Court of Chancery's power cannot be diminished unless legislation which places the jurisdiction exclusively in another court).

The Delaware Supreme Court has recognized the broad equitable powers of the Court of Chancery. *See* *Shawe v. Elting*, 157 A.3d 152, 165, 169 (Del. 2017) (recognizing that Court of Chancery has broad discretion in fashioning equitable remedies). For instance, the Delaware Supreme Court has stated, "The Court of Chancery's powers are complete to fashion any form of equitable and monetary relief as may be appropriate." *See* Kurt M. Heyman & Christal Lint, *Recent Developments in Corporate Law: Recent Supreme Court Reversals and the Role of Equity in Corporate Jurisprudence*, 6 DEL. L. REV. 451, 462 (2003) (quoting *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 176 (Del. 2002)).

on a situational, case-by-case basis.<sup>33</sup> This wide discretion allows the court to fashion the best remedy for the parties before it, especially when no adequate remedy is available at law.<sup>34</sup> Discretion has proven essential in the context of corporate law because the court must be able to respond to the flexible design of the DGCL.<sup>35</sup>

The Court of Chancery is the primary forum for deciding cases arising under the DGCL.<sup>36</sup> The DGCL is often characterized as a series of enabling statutes, allowing for “private ordering” by permitting corporations to waive default benefits of the corporate form when desirable and to opt in to statutory forms when appropriate.<sup>37</sup> The Court of Chancery’s

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33. See Quillen & Hanrahan, *supra* note 32, at 821–22 (recognizing courts of equity must be able to respond to specific situations, rather than relying on universal rules, and noting that emphasis is on individual cases and that particular facts control).

34. See Johnson, *supra* note 32, at 713 (recognizing that courts of equity must be employed when “doing so is necessary for the greater attainment of justice”); Quillen & Hanrahan, *supra* note 32, at 820 (recognizing that Court of Chancery is not overly bound by restrictive legal doctrines and that it can adapt to different factual situations to find relief under the circumstances when no adequate remedy is available at law). Commentators note that, when the Court of Chancery was established under the Delaware state constitution, it was a “guarantee to the people of the State that equitable remedies will at all times be available for their protection.” See *id.* at 849. Its equitable powers were not limited by any legislative provision, but only by the commonly understood principle that “equity does not act where there is an adequate remedy at law.” See *id.* at 850.

35. See Quillen & Hanrahan, *supra* note 32, at 855 (explaining that equity mandates jurisprudence be flexible to respond to and expand with social needs). In order to fashion the best possible remedy, the courts look for guidance to remedies fashioned under other statutes of the DGCL. See, e.g., *Shawe*, 157 A.3d at 165 (noting Chancellor properly looked for guidance under section 273 to fashion remedy under section 226).

36. See Stephen J. Massey, *Chancellor Allen’s Jurisprudence and the Theory of Corporate Law*, 17 DEL. J. CORP. L. 683, 699, 704 (1992) (referring to Court of Chancery as “the nation’s principal corporate law forum” because it “can respond quickly and effectively to changing business needs”).

37. See Johnson, *supra* note 32, at 721, 724 (recognizing that “the legislatively-enacted corporate statute is ‘permissive, enabling, and expansive in its thrust’ and that “enabling statutes are necessary to permit waivers in those instances where they are desirable and knowingly availed of”). Delaware’s enabling statutes maximize managerial flexibility. See Robert A. Ragazzo, *Toward a Delaware Common Law of Closely Held Corporations*, 77 WASH. U. L.Q. 1099, 1099 (1999) (noting that Delaware “maximize[s] managerial flexibility”). Therefore, it is no surprise that Delaware is the premier domicile for companies that seek to incorporate. See *id.* Delaware’s enabling statutes allow for “private ordering.” See *id.* at n.1 (citing Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80, 123 n.192 (1991) (“Delaware has fashioned what is predominantly an enabling statute that accommodates rather than restricts private ordering”). The flexibility of the DGCL permits deviation from traditional features of the corporate form, such as deviating from board management through provisions in a company’s articles of incorporation. See Dennis S. Karjala, *An Analysis of Close Corporation Legislation in the United States*, 21 ARIZ. ST. L.J. 663, 691 (1989) (detailing flexible features of DGCL’s enabling statutes). The corporation can include nontraditional features, such as supermajority voting, deadlock-breaking devices, and share transfer

equitable powers allow it to respond to private ordering.<sup>38</sup> One commentator suggests that judicial intervention is necessary when private ordering fails.<sup>39</sup> Therefore, the DGCL explicitly provides the Court of Chancery with jurisdiction over matters arising under many of its provisions.<sup>40</sup> Even with statutory jurisdiction, however, the Court of Chancery retains its equitable powers.<sup>41</sup>

The Court of Chancery's broad equitable powers are balanced by its hesitation to interfere with corporate governance.<sup>42</sup> Nevertheless, the

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restrictions. *See id.* Enabling statutes, such as those included in the DGCL, allow incorporators to meet the foreseeable needs and desires of involved parties. *See id.*

38. *See* Johnson, *supra* note 32, at 724 (recognizing that legislatively-enacted corporate statutes are countered by judicially-imposed duties that constrain managerial misbehavior that goes too far).

39. *See* Robert B. Thompson, *Corporate Dissolution and Share-Holders' Reasonable Expectations*, 66 WASH. U. L.Q. 193, 237–38 (1988) (suggesting that judicial intervention is useful when private ordering proves inadequate). Thompson suggests that the role of the judiciary supplements private ordering. *See id.* at 237. For instance, the court's intervention may be necessary to limit the permanence of corporate decisions when controlling parties have exercised their discretion in a way that is contrary to the reasonable expectations of other corporate parties. *See id.*

40. *See* Heyman & Lint, *supra* note 32, at 479–80 (“The Court of Chancery’s jurisdiction over most corporate disputes stems from both sources: fiduciary duties of corporate directors are equitable in nature . . . and many sections of the DGCL expressly provide for jurisdiction in that court.”); *see also* Peter B. Ladig & Kyle Evans Gay, *Judicial Dissolution: Are the Courts of the State That Brought You in the Only Courts That Can Take You Out?*, 70 BUS. LAW. 1059, 1076 (2015) (recognizing statutes that “empower” Court of Chancery).

41. *See* Johnson, *supra* note 32, at 718–19 (“The judges on the Chancery Court simply cannot, by blithely referring to such an agreement or the underlying enabling statute, avoid their own continuing responsibility to ask—in every case—whether, in equity, they should or should not enforce the contractual waiver.”).

Under section 394 of the DGCL, “[t]his chapter and all amendments thereof shall be a part of the charter or certificate of incorporation of every corporation except so far as the same are inapplicable and inappropriate to the objects of the corporation.” DEL. CODE ANN. tit. 8, § 394 (West 2013). Thus, Delaware corporations and their stockholders submit to the statutory equitable authority granted to the Court of Chancery. *See* *Shawe v. Elting*, 157 A.3d 152, 163 (Del. 2017) (citing § 394 and recognizing that “all corporations agree to make all provisions of the DGCL part of their charters”). Stockholders of Delaware corporations are only entitled to the rights that come with their stock, and those rights, as evidenced by the incorporation of the DGCL into the company’s articles of incorporation, are subject to the Court of Chancery’s statutory powers. *See id.* at 165. In some instances, statutes, such as those dealing with certain mergers, may require that the stockholders give up their stock over their objections; thus, when the Court of Chancery exercises its statutory authority, stockholders may be required to do the same. *See id.*

42. *See* Henry Ridgely Horsey, *The Duty of Care Component of the Delaware Business Judgment Rule*, 19 DEL. J. CORP. L. 971, 984–85 (1994) (citing *Cole v. Nat’l Cash Credit Ass’n*, 156 A. 183, 188 (Del. Ch. 1931)) (discussing Delaware’s reliance on business judgment rule, through which courts defer to decisions of management, executives, and directors). Courts of equity should not be called upon to control the discretion of the managing bodies of corporations. *See id.* Likewise, the Court of Chancery has expressed its hesitation to “enmesh an outsider and, by extension,



Court of Chancery is inclined to intervene, when it must, to ensure “equity will not suffer a wrong without a remedy.”<sup>43</sup> The court acts when doing so is necessary to protect the interests of the corporation’s various constituencies—most importantly, its stockholders.<sup>44</sup> The interests of the corporation’s stockholders and employees are particularly important when the corporation is deadlocked, and the court will favor remedies that further the interests of these constituents.<sup>45</sup>

When the Court of Chancery fashions a remedy, its decision is often given great deference.<sup>46</sup> The Delaware Supreme Court has recognized

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the Court into matters of internal corporate governance for an extensive period of time.” *See Shawe*, 157 A.3d at 160.

A commentator also notes that the Delaware courts should be hesitant to use equitable principles to override established principles of corporate law, such as the business judgement rule. *See Heyman & Lint, supra* note 32, at 484 (quoting *Alabama By-Prod. Corp. v. Neal*, 588 A.2d 255, 258 n.1 (Del. 1991)) (“The invocation of equitable principles to override established precepts of Delaware corporate law must be exercised with caution and restraint. Otherwise, the stability of corporate law is imperiled.”) (emphasis omitted). Other commentators recognize Delaware’s “desire to let business decisions be made by the directors and stockholders of Delaware corporations rather than by the Court.” *See Quillen & Hanrahan, supra* note 32, at 864.

43. *See Weinberger v. UOP, Inc.*, No. 5642, 1985 WL 11546, at \*9 (Del. Ch. Jan. 30, 1985), *aff’d sub nom. Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1985) (“Quite simply, equity will not suffer a wrong without a remedy.”); *Shawe*, 157 A.3d at 159 (quoting *Weinberger*, 1985 WL 11546, at \*9). In *Weinberger*, the court liberalized appraisal valuation procedures for corporate stockholders. *See Ragazzo, supra* note 37, at 1149 (citing *Weinberger*, 457 A.2d at 714). A commentator suggests that the decision in *Weinberger* was pivotal for Delaware courts, indicating that liberal, equitable remedies are available to protect stockholders in Delaware. *See id.*

44. *See Henry Hansmann & Reinier Kraakman, The End of History for Corporate Law*, 89 GEO. L.J. 439, 440–41 (2001) (arguing that shareholder primacy is paramount and that managers of corporations are obliged to manage the company in shareholders’ interests, but also recognizing arguments favoring the interests of other corporate constituencies, namely employees); Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 170 (2008) (recognizing that courts allow corporate directors to make decisions that harm shareholders for benefit of other corporate constituencies).

45. *See Shawe*, 157 A.3d at 160, 166 (ordering custodian to sell corporation as remedy for deadlock because doing so was best means to safeguard the company and recognizing that selling corporation as a going concern was best method of protecting employees and maximizing value for stockholders); *Bentas v. Haseotes*, 769 A.2d 70, 79 (Del. Ch. 2000) (stating custodian should use best judgement in deciding what is best for corporation and its stockholders collectively).

46. *See Shawe*, 157 A.3d at 155, 160, 166 (refusing to disturb findings of Court of Chancery on appeal and deferring to Chancellor’s judgment); *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 175 (Del. 2002) (recognizing that Court of Chancery has wide discretion to fashion remedies and implying that its discretion deserves great deference); *Weinberger*, 457 A.2d at 715 (noting “the broad discretion of the Chancellor to fashion such relief as the facts of a given case may dictate”); *Int’l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 439 (Del. 2000) (noting that the Delaware Supreme Court “defer[s] substantially to the discretion of the trial court in determining the proper remedy”); *see also Massey, supra* note 36, at 690 (“[E]ven when unappealed, [Delaware Court of Chancery opinions on corporate law] carry great weight and authority. This is

that the Chancellor's "powers are complete to fashion any form of equitable and monetary relief as may be appropriate."<sup>47</sup> Illustrative of this deference, the Delaware Supreme Court reviews on appeal only questions raised before the Court of Chancery and will review the Chancellor's choice of remedy for abuse of discretion.<sup>48</sup> Two commentators even suggest that the Supreme Court is willing to exercise the Court of Chancery's equitable discretion itself when it believes the Chancellor erred below.<sup>49</sup>

### B. *Mending the Broken Heart: Deadlock and Section 226*

Deadlock occurs when "dissension" among directors or stockholders progresses to a degree that the corporation cannot perform business operations.<sup>50</sup> When one party acts to resolve the problem, that may provoke counteraction by the other party, and this often results in increased dissen-

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due, in no small measure, to their high quality and to the unusually able succession of chancellors, especially in this century."

47. See Heyman & Lint, *supra* note 32, at 462–63 (quoting *Gotham Partners*, 817 A.2d at 176) (recognizing Delaware Supreme Court acknowledges broad equitable powers of Court of Chancery).

48. See *Gotham Partners*, 817 A.2d at 175 ("This Court reviews the Court of Chancery's fashioning of remedies for abuse of discretion."); DEL. SUP. CT. R. 8 ("Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented."). The Delaware Supreme Court considers all arguments that were not raised before the Court of Chancery to be waived. See *Shawe*, 157 A.3d at 162 (relying on Rule 8 to determine party had waived his primary argument on appeal). The court relied the following language: It is axiomatic that an appellate court will generally not review any issue not raised in the court below. This rule is based on the principle that it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. Furthermore, it is unfair to allow a party to choose to remain silent in the trial court in the face of error, taking a chance on a favorable outcome, and subsequently assert error on appeal if the outcome in the trial court is unfavorable.

*Id.* (quoting 5 AM. JUR. 2D *Appellate Review* § 618 (2018)).

49. See Heyman & Lint, *supra* note 32, at 482 ("[I]n holding that Court of Chancery had abused its discretion in fashioning the remedy it did, not only did the Supreme Court not reinforce the role of equitable principles, but it arguably demonstrated that it will exercise the Court of Chancery's equitable discretion itself where it disagrees with the results reached by the Court of Chancery.").

50. See TINNEY, *supra* note 10, §§ 2–4 (defining "deadlock," noting that it hampers carrying on of corporate affairs and distinguishing between director and stockholder deadlock); see also 19 AM. JUR. 2D *Corporations* § 2371 (2018) (stating that "deadlocked" within the meaning of statutes refers to corporation that cannot perform its corporate powers because of stockholders' indecision); *Deadlock in a Close Corporation: A Suggestion for Protecting a Dissident, Co-Equal Shareholder*, 1972 DUKE L.J. 653, 654 (1972) [hereinafter *Deadlock in a Close Corporation*] (defining deadlock as "an impasse in corporate decisional processes."). Corporate dissension must be distinguished from deadlock. See TINNEY, *supra* note 10, §§ 2–3 (defining both "dissension" and "deadlock" and distinguishing between the two). Dissension is commonly regarded as "disagreement in opinion especially partisan and contentious." Dissension exists whenever there is any degree of difference of opinion among any of the corporation's officers, directors, or shareholders. See *id.* Dissension can exist without deadlock; it is expected that these factions will disa-

sion as other stockholders, directors, and officers take sides.<sup>51</sup> Deadlock has significant negative impacts, including obstruction of routine business, detriment to corporate borrowing, and often times, costly litigation.<sup>52</sup>

While deadlock may affect any corporation, the likelihood of deadlock is significantly increased in closely-held corporations, which have only a few stockholders and are distinguishable from those that are widely held.<sup>53</sup> With fewer stockholders, the likelihood that dissension will escalate into deadlock is significantly increased.<sup>54</sup> This has been attributed to the degree of trust, respect, and cooperation required among stockhold-

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gree. *See id.* § 3. Deadlock, however, is the product of dissension that cannot be resolved through interaction and compromise. *See id.*

51. *See* TINNEY, *supra* note 10, § 5 (“Any action by one faction to resolve the problem is likely to provoke counteraction by an opposing faction, with various shareholders, directors, and officers taking sides, merely adding to the dissension.”).

52. *See* TINNEY, *supra* note 10, § 1 (noting that deadlock has “crippling effect” on corporations); *id.* § 5 (including obstruction of routine business matters, adverse effects on corporate credit, and continuous actual or threatened litigation as crippling); *Deadlock in A Close Corporation*, *supra* note 50, at 655 (listing “obstruction of even routine business matters, deleterious effects on corporate borrowing, and incessant litigation” as adverse effects of deadlock on the corporation); *see also* 3 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 14:11 (3d 2017) (recognizing “heavy impact” on corporation in context of close corporations).

Deadlock struggles often lead to litigation between opposing factions. *See* LOCKWOOD, *supra* note 9, § 1:22. Any opposing faction may be justified in either bringing or defending an action regarding the deadlock in order to protect the interest of the corporation. *See id.* Because deadlock can paralyze corporate operations, courts may order remedies as extreme as dissolution of the corporation. *See id.* Additionally, litigation in the course of resolving deadlock can be very costly. *See* *Shawe v. Elting*, 157 A.3d 142, 152 (Del. 2017), *cert. denied*, 138 S. Ct. 93 (2017) (awarding large amount of costs and fees to applicant under section 226).

53. *See* GREGORY C. SMITH, START-UP & EMERGING COMPANIES: PLANNING, FINANCING & OPERATING THE SUCCESSFUL BUSINESS § 1.08[12] at 64 (Release 12 2003) (stating that “closely held corporations” are those with few shareholders, as distinguished from corporations which are widely or publicly held); TINNEY, *supra* note 10, § 1 (stating dissension and deadlock is one peculiar to close corporations and has particularly crippling effect on those organizations).

Courts and commentators have noted deadlock usually occurs in the closely-held “family” corporation in which each of the two groups vying for control of the corporation has 50% of the outstanding stock. *See* LOCKWOOD, *supra* note 9, § 1:22 (citing *Bentas v. Haseotes*, 769 A.2d 70 (Del. Ch. 2000)); 16A FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 8066.10 (2017) [hereinafter 16A FLETCHER CYCLOPEDIA] (citing *Shawe v. Elting*, 157 A.3d 152 (Del. 2017)).

The term “closely-held” corporation is an informal term that is used interchangeably with the term “close corporation.” *See* SMITH, *supra*. However, “close corporation” has developed a particular meaning. *See id.* A number of states, including Delaware, have created a statutory entity called a “close corporation.” *See id.* (citing DEL. CODE ANN. tit. 8, § 342 (West 1983)).

54. *See* TINNEY, *supra* note 10, § 5 (stating dissension in close corporations is likely to continue and to become more disruptive).

ers and to the additional bonds, such as personal relationships, that may connect stockholders.<sup>55</sup>

Corporations fail to adequately prepare for deadlock.<sup>56</sup> Nevertheless, there are a number of remedies available, including contractual and non-statutory equitable remedies.<sup>57</sup> While courts have traditionally addressed the paralyzing effects of deadlock, state legislatures have addressed it as well by providing statutory remedies.<sup>58</sup> Specifically, section 226 of the DGCL grants the Court of Chancery authority to appoint either a custodian or receiver to resolve deadlock.<sup>59</sup>

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55. *See id.* (stating that nature of closely held corporations requires high degree of trust, respect, and cooperation among those in control). Closely held corporations require more intimate relationships among fewer corporate participants. *See* Thompson, *supra* note 39, at 196. The closely-held corporation often permits participants to invest both their money and their efforts through employment. *See id.* Stockholders in closely-held corporations expect both employment and a role in the management of the company. *See id.* Importantly, the stockholders in a close corporation often are bonded through other personal relationships that combine with their business relationships and influence the corporation. *See id.*

56. *See* SMITH, *supra* note 53, at 14 (recognizing that few businesses engage in advance planning to resolve or decrease likelihood of deadlock and noting that optimism at start of business usually obscures belief that deadlock may occur); Thompson, *supra* note 39, at 199 (noting that close corporations often fail to adequately plan for deadlock).

57. *See* TINNEY, *supra* note 10, § 6 (stating that remedies for dissension and deadlock fall into three general categories, including contractual remedies, equitable remedies other than those provided by statute, and statutory remedies). Contractual remedies are those that parties agree to through the corporation's bylaws, articles of incorporation, or shareholder agreements. *See id.* § 7. They include buyout arrangements, voluntary dissolution, and arbitration agreements. *See id.* §§ 8–11. Statutory remedies may include involuntary dissolution; appointment of a custodian, receiver, or provisional director; or purchase of plaintiff's shares. *See id.* §§ 13–22.

58. *See* 16A FLETCHER CYCLOPEDIA, *supra* note 53 (acknowledging that courts traditionally have provided relief from deadlock and that state legislature now provide statutory relief as well); TINNEY, *supra* note 10, §§ 6, 13–15, 18–24 (cataloging statutory remedies available to cure deadlock); *see, e.g.*, DEL. CODE ANN. tit. 8, § 226 (West 2010) (providing for appointment of receiver or custodian as deadlock remedy); § 352 (providing for appointment of custodian for statutory close corporation); *cf.* § 273 (providing for dissolution of joint venture corporation having two 50% stockholders when “such stockholders shall be unable to agree upon the desirability of discontinuing such joint venture and disposing of the assets used in such venture”); § 275 (providing for dissolution generally “if it should be deemed advisable”).

59. *See* § 226 (allowing appointment of custodian or receiver of corporation on deadlock or for other cause). Under the statute,

(a) The Court of Chancery, upon application of any stockholder, may appoint 1 or more persons to be custodians, and, if the corporation is insolvent, to be receivers, of and for any corporation when:

(1) At any meeting held for the election of directors the stockholders are so divided that they have failed to elect successors to directors whose terms have expired or would have expired upon qualification of their successors; or

(2) The business of the corporation is suffering or is threatened with irreparable injury because the directors are so divided respecting the management of the af-

The Court of Chancery has discretion to appoint one or more persons to be custodians upon application of any stockholder for stockholder deadlock or director deadlock of the corporation.<sup>60</sup> Under section 226(a)(1), the court may appoint a custodian for stockholder deadlock when the stockholders are so divided that they fail to elect successor directors.<sup>61</sup> Under 226(a)(2), the court may appoint a custodian for director deadlock when the corporation's business is suffering or threatened with

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fairs of the corporation that the required vote for action by the board of directors cannot be obtained and the stockholders are unable to terminate this division; or (3) The corporation has abandoned its business and has failed within a reasonable time to take steps to dissolve, liquidate or distribute its assets.

(b) A custodian appointed under this section shall have all the powers and title of a receiver appointed under § 291 of this title, but the authority of the custodian is to continue the business of the corporation and not to liquidate its affairs and distribute its assets, except when the Court shall otherwise order and except in cases arising under paragraph (a)(3) of this section or § 352(a)(2) of this title.

*Id.* The distinction between receivers and custodians is critical. *See* R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, *DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS* § 7.56 (2018). Custodians are appointed for solvent corporations, but receivers are appointed for insolvent corporations. *See id.* (citing § 226(a)). However, the relation between the two is significant because the scope of the custodian's powers is defined in light of the receiver's powers. *See* § 226(b) (stating custodian has all powers of receiver).

Section 226 has not been amended since 1967. *See* COX & HAZEN, *supra* note 52, § 14:15 n.2. Before it was amended in 1967, it was very difficult to address deadlocks. *See id.* The statute was liberalized in 1967 to overcome this problem. *See id.* Prior to 1967, section 226 did not provide for the appointment of a custodian. *See* *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 236–37 (Del. 1982). The “custodian” language was added to enhance the power of the court to remedy deadlock, but was accompanied by a limitation on the custodian's powers. *See id.* at 237, 237 n.10.

60. *See* § 226(a)(1)–(3) (identifying three conditions that may be met for court to exercise discretion to appoint receiver, including stockholder deadlock, director deadlock, and abandonment of corporation). Appointment of a custodian or receiver under section 226 is not mandatory; it is discretionary. *See* BALOTTI & FINKELSTEIN, *supra* note 59, § 7.56. Although the decision to appoint a custodian is within the court's discretion, its decision may be overturned if the court abused its discretion by applying an improper standard. *See* *Giuricich*, 449 A.2d at 239–40 (applying abuse of discretion standard and finding Court of Chancery abused its discretion by denying petition for appointment of custodian under section 226).

Particularly important are the provisions regarding stockholder and director deadlocks. *See generally* § 226(a)(1)–(2) (providing condition for stockholder deadlock under section 226(a)(1) and providing condition for director deadlock under section 226(a)(2)). Although the statute provides a third condition for abandonment of the corporation's business, discussion of that provision is unnecessary to this Casebrief's discussion of *Shawe*. *See generally* *Shawe v. Elting*, 157 A.3d 152, 160–61 (dealing explicitly with stockholder deadlock and director deadlock provisions of section 226).

61. *See* § 226(a)(1) (providing that Court of Chancery may appoint custodian when there is stockholder deadlock).

irreparable injury because its directors are so divided that the board cannot obtain the votes necessary for action.<sup>62</sup>

The powers of a custodian are defined in section 226(b).<sup>63</sup> The custodian has all powers of a receiver under section 291 of the DGCL.<sup>64</sup> But, unless the court orders otherwise or unless another exception is met, the custodian's duty is to continue the business of the corporation without liquidating or distributing its assets.<sup>65</sup> Courts have found section 226 clear and unambiguous, but the custodian's powers under this provision have been debated.<sup>66</sup> Nevertheless, courts agree that the custodian's involvement in the corporation's business should be minimized.<sup>67</sup> Courts also

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62. *See id.* § 226(a)(2) (providing that Court of Chancery may appoint a custodian when there is a director deadlock).

63. *See id.* § 226(b) (defining powers of custodian appointed under section 226).

64. *See id.* (stating custodian has all powers of receiver under section 291). Under section 291, a receiver may "take charge of its assets, estate, effects, business and affairs" and "[may] do all other acts which might be done by the corporation and which may be necessary or proper." *See id.* § 291. Courts have interpreted section 291 to permit dissolution of the corporation. *See Ladig & Gay, supra* note 40, at 1076 n.119. Because a custodian has all of the powers of a receiver under section 291, the custodian likely has the power to dissolve a corporation under section 226. *See id.* at 1076 n.122.

65. *See* § 226(b) (stating that custodian should continue business of corporation, except when court otherwise orders or except in cases under section 226(a)(3) or section 352(a)(2)). The custodian has the "standby" powers of a receiver under 291; its default duty is to continue the business of the corporation. *See Giuricich v. Emtrol Corp.*, 449 A.2d 232, 237 (Del. 1982). The custodian has the authority to liquidate the corporation's affairs or distribute its assets only if the court so orders. *See Bentas v. Haseotoes*, No. Civ. A. 17223-NC, 2003 WL 1711856, at \*4 n.13 (Del. Ch. Mar. 31, 2003). The courts have found "liquidation" to include, "(1) the sale of assets (or subsidiaries); (2) paying off of creditors; (3) otherwise winding up business affairs, (4) distribution of remaining proceeds to shareholders; and (5) abandonment of corporate form." *Id.* Nothing in section 226 limits the court to a single structure for choosing to discontinue a venture; the court could order sale of the company at auction as a going concern or an asset division. *See id.* (citing *Fulk v. Wash. Serv. Assocs.*, No. Civ. A. 17747-NC, 2002 WL 1402273, at \*10 (Del. Ch. June 21, 2002)).

There are three distinct exceptions for when the custodian may deviate from its duty to continue the business rather than liquidating its affairs or distributing its assets. *See* § 226(b). First, the court may order otherwise. *See id.* Second, the custodian may also deviate from its express duty to continue the business of the corporation in situations arising under section 226(a)(3). *See id.* §§ 226(b), 226(a)(3). Finally, the custodian may also deviate from its express duty to continue the business of the corporation in situations arising under section 352(a)(2), which provides for appointment of a custodian for a statutory close corporation. *See id.* § 226(b); *see also* § 352.

66. *See Shawe v. Elting*, 157 A.3d 152, 164 (Del. 2017) (disputing scope of section 226(b) but finding that language of section 226(b) is clear and unambiguous); *Giuricich*, 449 A.2d at 238 (finding that language of section 226(a)(1) is clear and unambiguous).

67. *See Shawe*, 157 A.3d at 160, 164 (demonstrating reluctance to insert court into affairs of corporation); *Giuricich*, 449 A.2d at 240 (recognizing that custodian's involvement in corporate affairs should be minimized).

agree that although the Chancellor may determine the duration and specific powers of the custodian under sections 226 and 291, those powers should be limited and exercised only insofar as fairness and justice require.<sup>68</sup>

C. *Love Lessons: Cases Interpreting Section 226*

Cases interpreting section 226 illustrate that the Court of Chancery has broad discretion to appoint custodians and to determine the duties custodians must carry out under the statute.<sup>69</sup> In *Brown v. Rosenberg*,<sup>70</sup> the Court of Chancery noted it could order liquidation of the corporation when two fifty percent stockholders are unable to agree on significant business issues.<sup>71</sup> One year later, the Delaware Supreme Court issued the premier decision interpreting section 226, *Giuricich v. Entrol Corporation*.<sup>72</sup>

In *Giuricich*, the court stated that a custodian's powers should be limited.<sup>73</sup> It recognized that section 226(b), in conjunction with section 291, sets forth the maximum statutory limits of the custodian's powers.<sup>74</sup> While

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68. See *Shawe*, 157 A.3d at 160, 164 (fearing custodian's over-involvement in corporation's affairs and recognizing that custodian's powers should be limitedly exercised as justice requires); *Giuricich*, 449 A.2d at 240 (stating that court may determine duration of appointment and specific powers of custodian and that court's and custodian's involvement in corporation's business and affairs should be minimized).

69. See *Shawe*, 157 A.3d at 163, 163 n.36 (collecting cases and stating that Court of Chancery has previously authorized custodian to sell company faced with stockholder deadlock, which helps confirm Court of Chancery's broad authority under section 226).

70. No. 833, 1981 WL 7638, at \*5 (Del. Ch. Dec. 17, 1981) (stating that appointment of custodian or receiver under section 226 is within court's discretion).

71. See *id.* ("[I]t is more likely than unlikely that a Court will end up appointing a receiver to liquidate a corporation where there are but two stockholders, both of whom own 50% of the corporation's shares, when they are unable to agree on anything.").

72. 449 A.2d at 240 (considering whether Court of Chancery abused its discretion by denying petition for appointment of custodian under section 226). Plaintiffs owned 50% of the corporation's stock, while the remaining 50% of the stock was controlled the corporate defendant. See *id.* at 235. Plaintiffs sought restructuring of the board of directors to reflect their proportional interest, but the defendant corporation denied this request. See *id.* Plaintiffs filed petition under section 226. See *id.* The Delaware Supreme Court considered whether the Court of Chancery abused its discretion by denying a petition for the appointment of a custodian under section 226. See *id.* at 239-40. Although appointment is discretionary under section 226, the court abused its discretion in this case because it denied the petition although the applicant clearly demonstrated that the stockholder deadlock satisfied section 226(a)(1). See *id.* at 240. Denying the petition would leave the corporation in perpetual control of the current directors because of the deadlock, relegating fifty percent owners to minority status without recourse. See *id.*

73. See *id.* (stating powers of custodian should be "sharply limited").

74. See *id.* at 240 (finding that section 226(b) sets maximum limits of custodian's powers, noting that section 291 permits court to determine powers and duration of receiver).

the Court of Chancery may determine the specific powers of the custodian, the involvement of the court and its custodian in the corporation's affairs and business must be kept to a minimum.<sup>75</sup> Its powers should be exercised only insofar as fairness and justice require.<sup>76</sup>

Since *Giuricich*, the Court of Chancery has issued multiple decisions directing custodians appointed under section 226 to sell corporations when doing so is in the best interest of the corporation and its constituencies.<sup>77</sup> For example, the court appointed a custodian for a profitable corporation in *Bentas v. Haseotes*.<sup>78</sup> The court stated that the custodian should exercise good faith and informed judgment in deciding what is best for the corporation and its stockholders collectively.<sup>79</sup> Consistent with its equitable powers and broad discretion to craft remedies, the court approved the custodian's sale of the corporation.<sup>80</sup>

The Court of Chancery adopted a similar approach in *Fulk v. Washington Service Associates, Inc.*,<sup>81</sup> approving a custodian's plan to sell a corpora-

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75. *See id.* (explaining that under sections 226 and 291, the court may determine duration of custodian's appointment and specific powers of custodian and stating court's and custodian's involvement in corporation's business and affairs must be kept to minimum).

76. *See id.* (providing that court's and custodian's powers and involvement should only be exercised to extent that fairness and justice require).

77. *See* *Shawe v. Elting*, 157 A.3d 152, 160 (Del. 2017) (“[T]he Court of Chancery ‘has appointed custodians to resolve deadlocks involving profitable corporations and authorized them to conduct a sale of the corporation.’”).

78. 769 A.2d 70, 80 (Del. Ch. 2000) (appointing custodian to resolve deadlock involving profitable corporations). Two of four directors brought action against holdover directors for appointment of custodian to resolve deadlock of a profitable corporation. *See id.* at 73. The corporation's board was historically controlled by its four “family directors.” *See id.* The stockholders were unable to elect new directors, and applicants sought appointment of a custodian under section 226(a)(1). *See id.* at 74. The defendants argued that the custodian remedy was “intrusive” and therefore should not be granted for an economically successful corporation. *See id.* at 77. The court rejected this argument. *See id.* at 78.

79. *See id.* at 78–79 (interpreting role of custodian). The court concluded the custodian shall be totally independent of either deadlocked faction and of the company. *See id.* The role shall be consistent with and limited to the purpose of assuring the board functions properly. *See id.* In order to exercise good faith and informed judgment, the custodian must be empowered to explore any and all alternatives that might result in a mutually agreed to resolution for the deadlock, including asset sales and stock sales as a going concern. *See id.* at 79–80.

80. *See* *Bentas v. Haseotes*, No. Civ. A. 17223 NC, 2003 WL 1711856, at \*4 (Del. Ch. Mar. 31, 2003) (granting custodian's motion to order auction and sell corporation and its stock as going concern rather than conducting asset sale). After its previous decision, the court decided whether to grant the custodian's motion to conduct an auction for the sale of the corporation or to order an asset sale as suggested by defendants. *See id.* at \*2, \*4. The court determined that it had the discretion to order the auction of the company or an asset sale because it has “broad discretion to craft remedies as justice and equity require.” *See id.* at \*4 n.13. Concluding it would maximize value for the stockholders, the court ordered the custodian to conduct an auction. *See id.* at \*4.

81. *See* *Fulk v. Wash. Serv. Assocs., Inc.*, No. Civ. A. 17747-NC, 2002 WL 1402273, at \*1 (Del. Ch. June 21, 2002) (considering whether to approve custo-



tion as a going concern and with its business intact.<sup>82</sup> Most recently, the Court of Chancery issued order in *In re Supreme Oil Company, Incorporated*.<sup>83</sup> After the parties could not agree to work together toward a consensual sale of the corporation's stock, the court ordered the custodian to sell the company as a going concern, soliciting bids to maximize the amount payable to stockholders.<sup>84</sup> The scope of the custodian's powers was reexamined by the Delaware Supreme Court in *Shawe v. Elting*.<sup>85</sup>

### III. WHEN DEADLOCK MAKES THE BED, THE DELAWARE SUPREME COURT ALLOWS A CUSTODIAN TO CLEAN (OR SELL) THE SHEETS

In *Shawe*, the Delaware Supreme Court considered whether the Court of Chancery erred by ordering a custodian, appointed under section 226, to sell a solvent corporation, TransPerfect Global, Inc.<sup>86</sup> The court af-

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dian's comprehensive plan of sale that would maximize value for corporation's stockholders). The two fifty percent stockholders of a very profitable corporation, plaintiff and defendant, became deadlocked. *See id.* at \*1–2. Defendant wanted to discontinue business with plaintiff or decrease plaintiff's salary. *See id.* at \*2. Defendant objected to and obstructed every effort and proposal plaintiff made to ensure the company would be sold at fair market price. *See id.*

82. *See id.* at \*13–14 (approving custodian's proposed plan to sell corporation as going concern with its primary business intact). The court appointed a custodian, who determined that Defendant's efforts to frustrate sale of the company at fair market price, including threats of competition and removal of key employees, threatened the value of the company. *See id.* at \*4. The custodian concluded sale to either of the two stockholders, rather than to a third party, would maximize value. *See id.* at \*5. The court concluded it was not limited to one way of discontinuing the joint venture, but that it had the flexibility to consider its options. *See id.* at \*10.

83. No. 10618-VCL, 2015 WL 2455952, at \*3 (Del. Ch. May 22, 2015) (ordering custodian to sell profitable company). The corporation had two controlling stockholders, each of which was able to elect half of the board of directors. *See id.* at \*1. The directors of each respective stockholder had different views regarding the management of the company, resulting in director deadlock under section 226(a)(2). *See id.* Neither the company's bylaws or charter provided a means of dealing with the deadlock. *See id.*

84. *See id.* at \*1–3 (describing court's order). The court initially appointed a custodian to serve as a tie-breaking director. *See id.* at \*2. Subsequently, the parties agreed to either a sale of 100% of the stock of the corporation or a buyout by one stockholder of the other, whichever was the best means of maximizing value for the stockholders. *See id.* at \*3. The parties could not agree on working together toward a consensual sale. *See id.* at \*2. Therefore, the court ordered the custodian to act as an auctioneer and collect bids for the sale of the corporation as a going concern, seeking to maximize shareholder value. *See id.* at \*3.

85. 157 A.3d 152, 162 (Del. 2017) (recognizing appellant's argument that section 226 does not authorize custodian to sell solvent corporation over objection of stockholders).

86. *See id.* at 155 (identifying issues before court on appeal). On appeal, Shawe raised statutory arguments. *See id.* (stating that Shawe argued for first time on appeal that Court of Chancery exceeded statutory authority under section 226 by ordering custodian to sell solvent company and that Shirley Shawe argued for first time on appeal that custodian's sale of company might result in unconstitutional taking of her one share of TPG stock). The majority concluded the Shawes'

firmed the Chancellor's decision.<sup>87</sup> In light of the facts and because intermediate measures were attempted but failed, the Court of Chancery properly exercised its discretion under section 226 to order the custodian to sell the company and distribute proceeds to deadlocked stockholders.<sup>88</sup>

A. *You Can't Hide This Mess Under the Bed: The Facts and Procedure in Shawe v. Elting*

TransPerfect Global, Inc. (TPG) is a Delaware corporation that provides services worldwide.<sup>89</sup> In 1992, TPG was co-founded by Elizabeth Elting (Elting) and Philip Shawe (Shawe).<sup>90</sup> TPG is a closely-held corporation that has one hundred shares of common stock issued and outstanding.<sup>91</sup> Shawe and Elting have behaved functionally as equal, non-controlling, fifty percent co-owners of TPG, despite one share of TPG being owned by Shawe's mother, Shirley Shawe.<sup>92</sup> Shawe and Elting serve as

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arguments were not properly before the court because they were raised for the first time on appeal. *See id.*

87. *See id.* (affirming Court of Chancery's decision and agreeing with Court of Chancery's conclusion that custodian should sell TPG).

88. *See id.* (finding lower court did not abuse discretion by ordering custodian to sell corporation). Conversely, the dissent argued that the Court of Chancery did exceed its authority under section 226. *See id.* at 172 (Valihura, J., dissenting) (concluding the Court of Chancery did not have power to order custodian to force sale of stockholders' shares under section 226). The dissent felt that the statutory argument should be heard although it was not raised below. *See id.* In response, the majority felt compelled to explain its interpretation of the custodian statute, despite its conclusion that the Appellants could not raise the issue for the first time on appeal. *See id.* at 155.

89. *See id.* (describing TPG as a Delaware corporation and identifying services corporation provides to clients, including translation, website localization, and litigation support services).

90. *See id.* at 155–56 (stating that Shawe and Elting co-founded TPG in 1992). TPG acts as a holding company for its main operating company, TransPerfect International, Inc. *See id.* Together, the entities provide services from ninety-two offices in eighty-six worldwide cities. *See id.* at 155. The company has over 3,500 full-time employees and a network of over 10,000 translators, editors, and proofreaders in 170 languages. *See id.*

91. *See id.* at 155–56 (describing equity structure of corporation and stating how many shares corporation has issued and outstanding); *see also* *In re Shawe & Elting LLC*, C.A. No. 9661-CB, C.A. No. 9686-CB, C.A. No. 9700-CB, C.A. No. 10449-CB, 2015 WL 4874733, at \*18 (Del. Ch. Aug. 13, 2015) (describing TPG as closely held private corporation).

92. *See Shawe*, 157 A.3d at 155 (describing Elizabeth Elting's and Philip Shawe's ownership of issued and outstanding shares of TPG stock). Elting owns fifty shares, and Shawe owns forty-nine shares. *See id.* Shirley Shawe, the mother of Shawe, owns one share. *See id.* However, Shawe has treated his mother's share as his own property and himself as a fifty-percent co-owner of TPG. *See id.* The Delaware Supreme Court credited the Court of Chancery's finding that Shawe has treated his mother's shares as his own and has treated himself as fifty-percent owner of company. *See id.* Shawe held a general proxy for his mother's one share of TPG in 2014, "giving him the 'full and complete power to exercise at any time . . . any and all rights to and/or arising from or connected with'" his mother's share. *See In re Shawe & Elting*, 2015 WL 4874733, at \*2. Elting also demonstrated

co-chief executive officers and have been the only directors of TPG since 2007.<sup>93</sup>

Since Shawe and Elting founded TPG, their relationship deteriorated due to their troubled romance.<sup>94</sup> In 1996, the co-founders engaged to be married, but Elting called off the marriage in 1997.<sup>95</sup> When Elting ended the engagement, Shawe responded by crawling under Elting's bed and refusing to leave.<sup>96</sup> After the relationship ended, Shawe exhibited this same behavior on another occasion.<sup>97</sup>

Over time, the personal issues between Shawe and Elting began to affect TPG's business affairs.<sup>98</sup> For example, Shawe spied on Elting by intercepting her mail, monitoring her phone calls, accessing her email, and breaking into her locked office on various occasions.<sup>99</sup> He recruited TPG advisors to advance his agenda against Elting, fabricated documents, and unilaterally hired employees to work in Elting's divisions without her

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that Shawe represented himself to third parties as "the 50% owner and Co-CEO of the Company." *See id.* In addition, Shawe instructed the company's accountants to start efforts to get his mother's one share back into his name. *See id.* The Court of Chancery thus found that Shawe and Elting behaved functionally as if they were equal fifty-fifty owners of the corporation with equal, non-controlling ownership interests. *See id.*

93. *See Shawe*, 157 A.3d at 155–56 (stating that Shawe and Elting serve as co-CEOs and board members of TPG and noting that Shawe and Elting have been only directors of TPG since 2007). In 2007, TPG underwent corporate reorganization. *See id.* at 156. At that time, TPG's bylaws were amended to provide for a three-member board of directors, or a different number fixed by the corporation's stockholders. *See id.* However, Shawe and Elting have been the only two directors of TPG since the 2007 reorganization. *See id.*

94. *See id.* (stating that Court of Chancery's decision was based upon founders' troubled romantic relationship that began while they were attending business school).

95. *See id.* (noting that Shawe and Elting were engaged from 1996 to 1997).

96. *See id.* at 156 n.3 (identifying one of two occasions when Shawe crawled under Elting's bed and refused to leave after she ended their engagement). When Elting married in 1999, Shawe did not take kindly to the news and would "terrorize" Elting and say "horrendous things" about Elting's husband. *See id.* at 156.

97. *See id.* (identifying another occasion when Shawe crawled under Elting's bed and refused to leave). Elting was traveling alone to Buenos Aires to find a new office space. *See id.* When she arrived at her hotel room, Shawe showed up unannounced and proceeded to hide under her bed for about thirty minutes. *See id.*

98. *See id.* (stating founders allowed personal issues to influence company's business affairs). The parties experienced "serious clashes" both before and during the litigation. *See id.* at 156, 157 n.4.

99. *See id.* at 156 (identifying Shawe's invasions of Elting's privacy as causing serious clashes between Shawe and Elting). The emails that Shawe accessed included thousands of privileged communications with her counsel. *See id.* In addition to entering Elting's locked office on his own, Shawe also sent his "paralegal" there in the early hours of the morning on another occasion. *See id.* (the court seemed skeptical of the characterization of Shawe's colleague as a "paralegal")

consent.<sup>100</sup> Finally, Shawe disparaged and marginalized Elting through TPG memoranda and press releases.<sup>101</sup>

Their disputes directly involved and impacted the business of TPG.<sup>102</sup> The parties frequently had “temper tantrums” over expenses.<sup>103</sup> They made efforts to hinder each other’s activities and decisions regarding proposed acquisitions, stockholder distributions, hiring and pay, and office locations.<sup>104</sup> It was common for senior officers to be drawn into the co-founders’ disputes and be subsequently abused for their involvement.<sup>105</sup> Shawe bullied Elting and her supporters and created a hostile environment, attempting to pressure Elting to agree to his plans.<sup>106</sup>

The harassment, demoralization of TPG employees, and interference with TPG’s business precipitated Elting’s petition under section 226 to de-

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100. *See id.* (identifying Shawe’s misuse of TPG advisors and underhanded hiring as causing serious clashes between TPG’s co-founders).

101. *See id.* at 156–57 (noting instances when Shawe disparaged and attempted to marginalize Elting). On one occasion, Shawe disseminated a memorandum on another TPG employee’s letterhead to employees in Elting’s division, accusing Elting of collusion and financial improprieties. *See id.* at 156. On another occasion, Shawe publicly disparaged Elting by unilaterally issuing a press release in TPG’s name that contained false and misleading statements. *See id.* at 156–57.

102. *See id.* at 157 (enumerating ways in which Shawe and Elting’s disputes interfered with TPG business).

103. *See id.* (stating that Shawe and Elting had “continuous acrimonious disputes over personal and business expenses” and “weekly if not daily temper tantrums”).

104. *See id.* (identifying “mutual hostaging” over various TPG business decisions as result of dispute between Shawe and Elting). Shawe fired outside real estate and public relations professionals, refused to execute leases, and interfered with TPG’s payroll process. *See id.* He refused to engage in the annual expense true up, interfered with the annual review of TPG’s finances, and interfered with the audit process. *See id.* To avoid review by Elting, Shawe falsified corporate records. *See id.* Finally, Elting refused to pay counsel to defend patent ongoing litigation for TPG. *See id.*

105. *See id.* (noting that TPG’s senior officers were drawn into Shawe and Elting’s disputes). Because of their involvement, these officers were threatened with firing, fines, withholding of compensation and promotions, and inappropriate emails. *See id.*

106. *See id.* (expressing that Shawe created hostile environment for Elting and those aligned with her). Additionally, Shawe expressed a desire to “create constant pain” for Elting until she conceded to his plans. *See id.* Shawe went to great lengths to harass Elting. *See id.* For example, Elting once boarded a flight to Paris to find Shawe seated across from her. *See id.* It was later determined that Shawe made the arrangements to be seated next to her without her knowledge after learning of Elting’s flight plans. *See id.* After Elting changed seats, Shawe sent a message to two allies that read: “Was next to Liz on the plane to Paris and she switched seats;).[sic]” *See id.* Shawe claimed he had “no idea” Elting would be on the flight, which was later found to be untrue. *See id.* Due to Shawe’s message, the court was not persuaded by Shawe’s characterization of the event as an attempt to make peace with Elting. *See id.* Instead, the court concluded it was another seized opportunity for Shawe to harass Elting. *See id.*

clare deadlock and appoint a custodian to sell TPG.<sup>107</sup> After a lengthy trial, the Chancellor appointed a custodian to assist the co-founders in settling their disputes and gave the parties additional time to resolve their differences, but these settlement attempts failed.<sup>108</sup> In a subsequent opinion, the Chancellor found both stockholder deadlock under section 226(a)(1) and director deadlock under section 226(a)(2).<sup>109</sup>

The Court of Chancery concluded that the distrust between the co-founders “strikes at the heart of the palpable dysfunction that exists in the governance of the Company” and that the deadlock caused actual and threatened irreparable injury to TPG.<sup>110</sup> The deadlock threatened TPG’s morale, reputation, employee relations, client relations, and revenue-generating acquisitions.<sup>111</sup> The Chancellor considered alternative remedies,

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107. *See id.* at 157–58 (stating that harassment, employee demoralization, and interference with business resulted in litigation and ultimately to Court of Chancery’s appointment of custodian to sell corporation). Initially, four lawsuits were filed as a result of the incidents. *See id.* at 157. On May 8, 2014, Elting filed a motion to remove Shawe as a director of TransPerfect International, Inc. *See id.* at 157 n.7. On May 15, 2014, Elting filed a verified petition for the dissolution of Shawe and Elting LLC, the co-founder’s joint owned asset protection and distribution vehicle. *See id.* On May 22, 2014 Shawe filed a verified complaint in the Court of Chancery, both individually and derivatively on behalf of TPG, asserting various claims against Elting, including waste, breach of fiduciary duty, unjust enrichment, breach of contract, and indemnification. *See id.* Finally, on May 23, 2014, Elting filed her petition in the Court of Chancery, seeking the appointment of a custodian to sell TPG and dissolution of TPG under the court’s equitable powers. *See id.*

108. *See id.* at 158 (noting Court of Chancery’s initial “measured step” to appoint custodian to mediate and attempt to remedy dispute between Shawe and Elting after lengthy litigation). Before taking any action, the Court of Chancery held twelve hearings, decided sixteen motions, and conducted a six-day trial regarding the petition under section 226. *See id.* The court delayed its post-trial decision to appoint a custodian for the sale of TPG for two months in hopes the parties could resolve the controversy. *See id.* Only after that time did the Court of Chancery issue its final, 104-page decision. *See id.*

109. *See id.* (finding that parties’ stipulation that they were divided as stockholders and unable to elect successor directors satisfied section 226(a)(1) and finding that Elting’s petition satisfied all three requirements to demonstrate director deadlock under section 226(a)(2)).

110. *See id.* (describing Court of Chancery’s findings in its lengthy 104-page decision). As to the existence of deadlock, the court found this element was satisfied by the many facts uncovered throughout the litigation regarding Shawe and Elting’s distrust for one another. *See id.* Regarding the inability to break director deadlock, the court found this element was satisfied by the parties’ stipulation to deadlock. *See id.* After considering the profitability of TPG and noting that section 226 contemplates the appointment of a custodian for solvent corporations that can suffer irreparable injury, the Court of Chancery found that the final requirement—harm to the business—was satisfied. *See id.*

111. *See id.* at 158–59 (cataloging many facts that demonstrated TPG was suffering actual or threatened irreparable injury). In particular, TPG’s Senior Vice President of Sales called the feud between Shawe and Elting the “biggest business issue” faced by TPG and was “the number 1 reason people leave to go to work at competitors.” *See id.* at 158. TPG’s Vice President of Corporate Development also stated the feud was “so obviously the biggest problem the company faces.” *See id.* TPG’s Chief Information Officer identified the need to find a way for Shawe and

such as appointing a custodian to serve as a third director of TPG, but determined these alternatives were insufficient.<sup>112</sup> The Chancellor decided the evidence warranted appointment of a custodian to sell the company and resolve the deadlocks.<sup>113</sup> Shawe and his mother, Shirley Shawe, appealed.<sup>114</sup>

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Elting to work together “without negatively impacting everyone else” as a Company goal. *See id.* TPG’s Chief Technology Officer testified that the conflict “hurts company morale” and “is detrimental to the company.” *See id.* TPG’s former Vice-President of Human Resources stated the feud results in “pervasive and continuous hostile environment where inappropriate behavior impacts the morale, health and well-being of myself and the staff.” *See id.* at 159.

TPG’s Chief Operating Officer, referred to “mass exodus” of TPG workers, attributable to “the ongoing disputes and stressful environment.” *See id.* He further stated that “[e]mployees are resigning and leaving these departments at unprecedented rates,” that “[t]he morale and retention issue will likely spread,” and that “[t]he company’s reputation is taking a beating, internally and externally.” *See id.* Finally, one TPG employee noted that the feud has “affected employee morale,” that workers feel “caught in the middle,” and that TPG therefore has an “unhealthy work environment.” *See id.*

Even though Shawe acknowledged the “potential for grievously harming” TPG, he continued his feud with Elting. *See id.* Major TPG clients who were free to use competitive servicers expressed concern with the dispute. *See id.* The founders were unable to agree on major acquisitions, which generally accounted for about sixteen to twenty percent of TPG’s annual revenue and between eight and fourteen percent of its net profit. *See id.* Despite TPG’s profitability, its governance was inevitably dysfunctional. *See id.*

112. *See id.* at 159–60 (identifying Court of Chancery’s alternatives to ordering custodian to sell TPG). The Chancellor considered two alternatives to ordering the custodian to sell the corporation under section 226. *See id.* at 159. First, the court considered it could “leave the parties to their own devices,” but quickly rejected this approach because the management of TPG was so dysfunctional that it threatened irreparable harm to TPG. *See id.* (quoting *In re Shawe & Elting LLC*, C.A. No. 9661-CB, C.A. No. 9686-CB, C.A. No. 9700-CB, C.A. No. 10449-CB, 2015 WL 4874733, at \*31 (Del. Ch. Aug. 13, 2015)). Notably, the court stated, “equity will not suffer a wrong without a remedy.” *See id.* (quoting *Weinberger v. UOP, Inc.*, No. 5642, 1985 WL 11546, at \*9 (Del. Ch. Jan. 30, 1985), *aff’d*, 497 A.2d 792 (Del. 1985)).

Second, the court considered appointing the custodian to serve as a third director or act in a capacity to break ties between the warring factions. *See id.* The court rejected this argument, stating “it would enmesh an outsider and, by extension, the Court into matters of internal corporate governance for an extensive period of time . . . It is not sensible for the Court to exercise essentially perpetual oversight over the internal affairs of the Company.” *See id.* at 160 (quoting *In re Shawe & Elting*, 2015 WL 4874733, at \*31).

113. *See Shawe*, 157 A.3d at 159–60 (outlining Court of Chancery’s reasoning in ordering custodian to sell TPG). The final option was appointing the custodian to sell the company in order to separate Shawe and Elting in order to protect TPG from the pair’s dysfunctional relationship. *See id.* at 160. The Chancellor recognized that this was an unusual remedy to be implemented with extreme caution, but found that case law interpreting section 226 and the facts of the case permitted the action. *See id.*

114. *See id.* at 154 (“Philip Shawe and his mother, Shirley Shawe, have filed an interlocutory appeal from the Court of Chancery’s August 13, 2015 opinion and July 18, 2016 order, and related orders, appointing a custodian under 8 Del. C. § 226 to sell TransPerfect Global, Inc., a Delaware corporation.”).

B. *The Court Finds That the Corporate Bed Is Big Enough for Three – Shawe, Elting, and the Custodian*

On appeal, the court concluded that there was indisputable director and stockholder deadlock under both section 226(a)(1) and section 226(a)(2) and refused to disturb the Chancellor's detailed factual findings of threatened and irreparable harm to the company on appeal.<sup>115</sup> Arguing that judicial intervention should be limited to extreme circumstances, Shawe contented that the Chancellor erred and should have applied a more rigorous "imminent corporate paralysis" standard to find deadlock under section 226(a)(2).<sup>116</sup> Nevertheless, the court concluded that the Chancellor did not misapply the threatened or actual irreparable injury requirement.<sup>117</sup>

The court found that the Chancellor properly applied the statute and principles of irreparable injury to evaluate the likelihood of threatened or irreparable injury to TPG.<sup>118</sup> It emphasized that "irreparable injury" is an equitable principle that takes into account multiple factors, such as "harm to a corporation's reputation, goodwill, customer relationships, and em-

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115. *See id.* at 161–62 (identifying and analyzing Shawe's statutory argument regarding application of facts to provision of section 226; finding that deadlock was undisputable under two provisions of section 226; and finding that trial record amply supported Court of Chancery's finding that deadlock between TPG's founders caused threatened and actual irreparable injury to the company). First, Shawe challenged the Chancery's appointment of a custodian under section 226(a)(2), claiming that the Chancellor misapplied the requirement of finding irreparable injury to the business of the corporation due to director deadlock under section 226(a)(2). *See id.* at 161. Shawe claimed that the Chancery improperly relied on case law that defined "irreparable injury" in the temporary injunction context. *See id.* Shawe did not challenge the Court of Chancery's appointment of a custodian under section 226(a)(1) due to stockholder deadlock on appeal. *See id.* Shawe stipulated to the stockholder deadlock required by that provision of the statute. *See id.* In fact, the majority recognized that Shawe's irreparable injury argument under section 226(a)(1) was "academic" because Shawe agreed that the Chancery was authorized to appoint a custodian under section 226(a)(1), which requires no showing of irreparable injury. *See id.*

116. *See id.* at 161 (stating Shawe believed Court of Chancery should have applied more stringent standard for finding irreparable injury under section 226).

117. *See id.* (finding that Chancellor did not apply irreparable injury requirement under section 226(a)(2)).

118. *See id.* at 161–62 ("The Court of Chancery properly applied the words of the statute and settled principles of irreparable injury to evaluate the likelihood of threatened or actual irreparable injury to the Company's business."). To describe the standard as the Court of Chancery did or to define it as "imminent corporate paralysis" would be "distinction without difference" because the court in *Giuricich* used the terms interchangeably. *See id.* (citing *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982)) (noting Shawe's "imminent corporate paralysis" standard and Court of Chancery's standard applied below are, for all intents and purposes, identical under section 226(a)(2)). In *Giuricich*, the court described "imminent corporate paralysis" as equivalent to "irreparable harm" when considering whether irreparable harm is required before appointment of custodian under § 226(a)(1). *See id.* at 161, 161 n.29 (citing *Giuricich*, 449 A.2d at 238).

ployee morale.”<sup>119</sup> Further, the record supported the Chancellor’s finding of actual and threatened irreparable injury.<sup>120</sup> While TPG was profitable, the acrimonious relationship between its founders had a chilling effect on all of the company’s operations, and if this were to persist, TPG would continue on a path toward employee discontent and business ruin.<sup>121</sup>

Next, Shawe argued that the Court of Chancery exceeded its statutory authority by ordering the custodian to sell a solvent company over the objection of stockholders and that, even if the statutory authority existed, the Chancellor should have tried other measures to address the deadlock before resorting to a sale of the Company.<sup>122</sup> In response, the court deter-

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119. *See id.* at 162–62 (quoting *In re Shawe & Elting LLC*, C.A. No. 9661-CB, C.A. No. 9686-CB, C.A. No. 9700-CB, C.A. No. 10449-CB, 2015 WL 4874733, at \*28 (Del. Ch. Aug. 13, 2015)) (emphasizing that “irreparable injury” is equitable principle that considers multiple factors).

120. *See id.* at 162 (finding that trial record amply supported Court of Chancery’s finding that deadlock between TPG’s founders caused threatened and actual irreparable injury to the company).

121. *See id.* (“If allowed to persist, the Company was likely to continue on the path of plummeting employee morale, key employee departures, customer uncertainty, damage to the Company’s public reputation and goodwill, and a fundamental inability to grow the Company through acquisitions.”).

122. *See id.* at 160 (identifying Shawe’s primary arguments raised on appeal). Bound by Delaware Supreme Court Rules, the majority found Shawe could not raise these statutory interpretation arguments for the first time on appeal because he failed to raise them before the Court of Chancery. *See id.* Per Supreme Court Rule 8, the Delaware Supreme Court requires that arguments be considered for the first time by the trial court before they may be heard on appeal. *See id.* at 162, 168; *see also* DEL. SUP. CT. R. 8. Shawe contended that he raised the statutory issues below, but the court concluded that Shawe’s citations to the record in support of this contention actually supported the opposite conclusion. *See Shawe*, 157 A.3d at 162 n.32. For example, Shawe made statements that the statute “discourages dissolution,” that Elting did not meet “the very high standard for appointment of a custodian to dissolve and sell” TPG, and that “dissolution is a last, not first resort.” *See id.* (quoting trial court record). Therefore, the argument was waived. *See id.* at 163. Nevertheless, in response to the dissent’s lengthy analysis of Shawe’s arguments and of section 226, the majority considered the merits of Shawe’s arguments. *See id.* at 163 n.33. The dissent, however, criticized the majority for responding to the waived statutory interpretation arguments. *See id.* at 163 n.33. Yet, the majority felt “obliged” to respond to the dissent’s “exhaustive analysis” of section 226 that it believed was “mistaken.” *See id.* In addition, Shirley Shawe argued for the first time that the ordering the custodian to sell TPG would violate her rights under both the state and federal constitutions. *See id.* at 168–69. The court, however, quickly dismissed Shirley Shawe’s argument. *See id.* In contrast to her son’s arguments, the majority did not feel obliged to address the merits of Shirley Shawe’s constitutional argument although it was also raised for the first time, and thus waived, on appeal. *See id.* at 168. Unlike her son, Shirley Shawe did not posit that she raised the issue below and, instead, admitted that she did not properly present the constitutional issue to the Court of Chancery. *See id.* Shirley Shawe argued that the Supreme Court should hear her constitutional issue under the “interests of justice exception” to Delaware Supreme Court Rule 8. *See id.* at 169. This exception applies only if the Supreme Court “finds that the trial court committed plain error requiring review in the interests of justice.” *See id.* at 168. The court found that Shirley Shawe failed to meet this standard. *See id.* at 169.



mined that the Chancellor ordered the custodian to sell the company only after less intrusive measures were attempted and proven ineffective.<sup>123</sup> The court also concluded that the decision to appoint a custodian to sell TPG was supported by the facts, was permitted by the statute, and therefore was not an abuse of discretion.<sup>124</sup>

Examining the express language of section 226(b), the court concluded that the Court of Chancery did not exceed its statutory authority by ordering the custodian to sell TPG.<sup>125</sup> As the court stated, “Under a plain reading of section 226(b), the custodian has the powers of a receiver under [section] 291, and his duties are to continue the business unless the [c]ourt otherwise orders, and except under the special circumstances of abandoned businesses and close corporations.”<sup>126</sup> Thus, the *default* duty of the custodian is to “continue the business of the corporation.”<sup>127</sup> However, the provision expressly grants the Court of Chancery authority to displace this default duty and “otherwise order” the custodian to “liquidate the [corporation’s] affairs and distribute its assets” rather than “continue the business of the corporation.”<sup>128</sup>

The court emphasized its prior recognition of the Court of Chancery’s broad authority under the statute, specifically with regard to the incorporation of a receiver’s powers under section 291.<sup>129</sup> Under section 291, the receiver shall have the powers that “the Court shall deem necessary.”<sup>130</sup> Following *Giuricich*, the court determined the Court of Chancery has the same broad discretion to determine the specific powers of the custodian under Section 226 as it does under Section 291.<sup>131</sup> Therefore, the

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123. *See id.* at 160 (finding that Court of Chancery took “measured approach” by ordering custodian to sell TPG only after attempting less intrusive measures).

124. *See id.* (concluding that court’s decision to appoint custodian to sell TPG was supported by facts found after trial, was permitted by statute, and was not an abuse of discretion).

125. *See id.* at 163–65 (examining plain language of section 226 and concluding Court of Chancery has broad authority to order custodian to sell corporation under statute).

126. *See id.* at 164 (parsing through express language of section 226 to determine custodian’s duties and court’s ability to determine those duties).

127. *See id.* at 163 (quoting § 226 and acknowledging that section 226 mandates that custodian’s default duty is to continue business of corporation).

128. *See id.* (quoting § 226 and expressly granting Court of Chancery authority to “otherwise order” and displace custodian’s default duty under section 226).

129. *See id.* at 163–64 (“This Court has also recognized the broad authority granted the Court of Chancery under the statute.”).

130. *See id.* at 164 (quoting DEL. CODE ANN. tit. 8, § 291 (West 2018)) (stating court has discretion to determine powers of receiver under section 291).

131. *See id.* (stating Court of Chancery’s broad authority to set receiver’s powers under section 291 leads to same conclusion for custodian’s authority under section 226). Although the court previously held that the authority of a custodian should be exercised only to the extent that fairness and justice require, it also recognized that section 226(b) sets the maximum statutory limits of the power of the custodian. *See id.* These powers may include the power of a receiver to under section 291. *See id.*

Court of Chancery's broad equitable power under the statute includes the authority to order the custodian's sale of a corporation.<sup>132</sup> The court's conclusion was supported by the Court of Chancery's decisions in *Bentas*, *Fulk*, *In re Supreme Oil Company*, and *Brown*.<sup>133</sup>

Additionally, the court addressed the dissent's discontent with the recognition that the case "was within a whisker" of cases under section 273 of the DGCL, which permits dissolution of joint venture corporations when equal fifty percent owner-stockholders are deadlocked.<sup>134</sup> The court, however, found that it was not error on the part of the Chancellor to look to cases decided under section 273 for guidance.<sup>135</sup> The only

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The dissent did not disagree that the statute expressly grants a custodian under section 226 all of the powers of a receiver under section 291. *See id.* However, the dissent appeared to argue that the custodian cannot exercise the powers of a receiver when the court "otherwise orders" that the deadlocked corporation be sold. *See id.* at 162, 164, 172–73 n.12, 181 n.63. The majority framed the dissent's argument as follows:

According to the dissent, even though the language "except as the Court shall otherwise order" directly modifies the phrase coming before it—"not to liquidate its affairs and distribute its assets"—and is followed by the words "and except"—the dissent argues that interpretive principles should be applied to require that the exception language be read to permit liquidation only in circumstances similar to § 226(a)(3) (corporations that have abandoned their business) and § 352(a)(3) (custodians for close corporations).

*Id.* at 164. The majority felt that the dissent's reliance on principles of statutory interpretation was misguided. *See id.* Where a statute is clear and unambiguous, the plain meaning controls. *See id.* (citing *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932–33 (Del. 2007)). In addition, the majority argued that the dissent's interpretation of section 226 ignored the conjunctive words "and" and "except" used in the statute. *See id.* The inclusion of these words indicates that the statute lists three distinct exceptions to the custodian's default duty: "'except when the court shall otherwise order,' and 'except in cases arising under paragraph (a)(3) of [section 226] or [section] 352(a)(2) of [the DGCL].'" *See id.* (quoting § 226).

132. *See id.* at 163 (stating Court of Chancery has broad authority under section 226 and that authority includes ordering sale).

133. *See id.* (citing *In re Supreme Oil Co., Inc.*, No. 10618-VCL, 2015 WL 2455952, at \*2 (Del. Ch. May 22, 2015); *Bentas v. Haseotes*, No. Civ. A. 17223-NC, 2003 WL 1711856, at \*1 (Del. Ch. Mar. 31, 2003); *Fulk v. Wash. Serv. Assocs., Inc.*, No. Civ. A. 17747-NC, 2002 WL 1402273, at \*2 (Del. Ch. June 21, 2002); *Bentas v. Haseotes*, 769 A.2d 70, 73 n.3 (Del. Ch. 2000); *Brown v. Rosenberg*, No. 833, 1981 WL 7638, at \*5 (Del. Ch. Dec. 17, 1981)). The court noted that the cited cases involved actions in which the parties eventually agreed that the business should be sold. *See id.* at 163 n.36. However, the court emphasized that the cases demonstrate the Court of Chancery's exercise of its broad discretion to determine the best remedy to resolve corporate deadlock. *See id.*

134. *See id.* at 165 (citation omitted) (discussing dissent's discontent with Court of Chancery's reliance on section 273 and on remedies for deadlock arising under section 273). The majority recognized that section 273 has frequently been used to end corporate deadlock through the sale of corporations ordered by the Court of Chancery. *See id.* Thus, the dissent was misguided to contend that the Court of Chancery's order to sell a solvent Delaware corporation as a going concern in the best interest of its constituencies was unprecedented. *See id.*

135. *See id.* ("That the Chancellor looked for guidance to the remedies entered in cases under § 273 was not error on his part.").

“novelty” was that *Shawe* arose under section 226 because it did not fit precisely within the fifty-fifty ambit of section 273.<sup>136</sup> Using section 273 for guidance demonstrated the Chancellor’s understanding that TPG’s economic reality is essentially identical to a fifty-fifty deadlock and that the tools provided by the DGCL to address that deadlock would inform his discretion under section 226.<sup>137</sup>

Likewise, the court concluded Shawe’s argument—that the Chancellor could not order the sale of the solvent corporation over stockholders’ objection—was null, especially considering that sale of TPG as a going concern would best benefit its employees and stockholders.<sup>138</sup> Stockholders of Delaware corporations are aware that their rights to their shares are subject to the Court of Chancery’s power under statutes like section 226.<sup>139</sup> The court emphasized that sales of corporate assets or of the entire corporation are not unusual when the corporation is profitable.<sup>140</sup> The court was unconvinced by any attempt to distinguish between the sale of the corporation as a going concern rather than as mere liquidation of

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136. *See id.* (stating only “novelty” to distinguish present case from cases under section 273 was that present case arose under section 226). The only fact barring the present case from consideration under section 273 was that Shawe and Elting were not fifty-fifty shareholders in fact. *See id.* at 155, 165. Even though Shawe and Elting behaved as equal owners, Shirley Shawe’s ownership of one share of TPG precluded use of section 273. *See id.*

137. *See id.* at 165 (acknowledging Court of Chancery’s thorough understanding of case and efficient use of DGCL for guidance). The majority emphasized that the flexible and efficient design of the DGCL allows the Court of Chancery to analyze cases on a situational basis and use its discretion to “deal sensibly with corporations,” even if that includes looking for guidance in other sections of the DGCL. *See id.*

138. *See id.* at 166 n.46 (indicating that absence of cases where stockholders object to sale of corporation is not surprising and therefore is not dispositive); *id.* at 166 (“Selling TPG as a going concern will protect TPG’s employees from the ruinous consequences of an asset sale and provide the maximum return to the stockholders.”).

139. *See id.* (citing DEL. CODE ANN. tit. 8, § 394 (West 2018)) (reasoning that stockholders of Delaware corporations are on notice of Court of Chancery’s broad authority that may affect fundamental ownership interests). Stockholders of Delaware corporations are only entitled to the rights that are inherent with their stock. *See id.* Those rights are subject to the Court of Chancery’s power under provisions of the DGCL. *See id.* Stockholders are made aware of this because the provisions of the DGCL are adopted into any Delaware corporation’s corporate charter by way of section 394. *See id.* at 163, 165. It would be inconsistent with the practical design of the DGCL to allow stockholders to cling to their shares only to receive a final, lower, liquidating dividend. *See id.* at 166.

140. *See id.* (explaining that most cases in which court has ordered sale dealt with profitable corporations). The court further reasoned that this was unsurprising. *See id.* Especially in the Court of Chancery, parties are more inclined to fight over solvent corporations because insolvent corporations’ cases are dealt with by the federal bankruptcy courts. *See id.* Parties that are severely deadlocked often rarely want asset sales or dissolution, which the dissent characterized as lesser remedies. *See id.*

its assets.<sup>141</sup> Importantly, the court recognized that liquidation of TPG's assets or sale of TPG as a going concern would achieve the same ultimate end in this case.<sup>142</sup> To distinguish between the two would elevate form over substance.<sup>143</sup>

Finally, the court addressed Shawe's contention that the Chancellor should have experimented with less intrusive measures before ordering the sale of TPG.<sup>144</sup> The court agreed with Shawe that sale is a remedy to be used "cautiously" and "reluctantly."<sup>145</sup> The Court of Chancery should always consider less drastic means before ordering the custodian to sell a solvent corporation.<sup>146</sup> However, the court emphasized that the best remedy to address deadlock is within the Chancellor's discretion, and the Court of Chancery did not abuse its discretion in this case.<sup>147</sup>

Ultimately, the court determined that the Court of Chancery is in the best position to assess the viability of remedies when a corporation faces deadlock.<sup>148</sup> First, the Chancellor attempted a less intrusive measure by appointing a custodian at the end of trial to serve as a mediator to resolve the disputes and by giving the parties at least four months to reach a reso-

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141. *See id.* at 165 (declaring that there is no merit in characterizing method chosen by Chancellor as different from section 273 for purposes of section 226 because it involved sale of corporation's stock rather than its underlying assets).

142. *See id.* (stating that making distinction between liquidation and sale has no practical effect in present case). TPG acts as a holding company for TPI, the main, wholly-owned operating company. *See id.* If the court were to order an asset sale on remand, the Court of Chancery could sell TPG's assets, including TPI and its other subsidiaries, and then distribute the proceeds to TPG and its stockholders. *See id.* Shawe conceded that this was the case. *See id.* Neither Shawe nor Elting wanted an asset sale. *See id.* The court expressed that "[s]uch meaningless corporate shuffling illustrates why" selling TPG instead of its parts is within the custodian's powers under section 226. *See id.* In addition, the majority asserted that the dissent made no substantive response to this "reality." *See id.* at 166 n.48. The dissent merely claimed that the point was not conceded by the Shawes and that during the appeal no party suggested liquidation or asset sale as options. *See id.* at 166 n.48, 172-73 n.12.

143. *See id.* at 166 (explaining that directing Court of Chancery to order asset sale "could exalt form over substance" by allowing sale of TPG's wholly owned operating company TPI).

144. *See id.* at 166-67 (detailing ways in which Court of Chancery attempted less intrusive remedies before ordering custodian to sell TPG).

145. *See id.* at 166 (advocating for Shawe's position that sale of corporation is a remedy to be used reluctantly and only after consideration of other remedies).

146. *See id.* ("The Court of Chancery should always consider less drastic alternatives before authorizing the custodian to sell a solvent company.").

147. *See id.* (stating that choice of remedy to address corporation's deadlock is ultimately within Court of Chancery's discretion and that court of Chancery did not abuse its discretion in this case). The court reviewed the Chancellor's choice to order the custodian to sell TPG under the abuse of discretion standard. *See id.* at 166 n.49.

148. *See id.* at 167 (recognizing Chancellor was in best position to assess remedies to cure deadlock, including those less extreme than sale).

lution before ordering the custodian's sale of TPG.<sup>149</sup> In addition, the Chancellor considered whether to appoint a custodian to serve as a third director or some form of tie-breaking figure, but exercised its judgement to conclude doing so would be ineffective.<sup>150</sup>

The court refused to “second-guess” on appeal the Chancellor’s determination that the dysfunction between Shawe and Elting “must be excised to safeguard the [c]ompany.”<sup>151</sup> Thus, the court affirmed the Court of Chancery’s order for the custodian appointed under section 226 to sell TPG.<sup>152</sup> In a separate decision, the court awarded \$7,103,755 to Elting, which included the fees she incurred litigating the merits of the case.<sup>153</sup>

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149. *See id.* (explaining that Chancellor immediately appointed custodian to serve as mediator to assist in resolving issues and explaining that mediation attempts failed and Chancellor provided parties with another month to settle disputes before issuing post-trial opinion to order sale of TPG). Therefore, the court declared that “[t]he Court of Chancery gave the parties every opportunity to resolve their acrimonious dispute outside the courthouse.” *Id.*

150. *See id.* (discussing Chancellor’s consideration of appointing custodian to serve as third director or in some tie-breaking capacity and Chancellor’s determination that such remedy would be ineffective). The court quoted—for the second time in the opinion—the Chancellor’s language rejecting this option:

[I]t would enmesh an outsider, and, by extension, the Court into matters of internal corporate governance for an extensive period of time. Shawe and Elting are both relatively young. Absent a separation their tenure as directors and co-CEOs of the Company could continue for decades. It is not sensible for the Court to exercise essentially perpetual oversight over the internal affairs of the Company. *Id.* at 160 (quoting *In re Shawe & Elting LLC*, C.A. No. 9661-CB, C.A. No. 9686-CB, C.A. No. 9700-CB, C.A. No. 10449-CB, 2015 WL 4874733, at \*31 (Del. Ch. Aug. 13, 2015)). Shawe characterized the Chancellor’s remedy as extremely intrusive. *See id.* at 167. However, the court concluded that, in light of “the abundant record that Shawe and Elting cannot work together constructively [.]” the custodian appointed to serve as a tie-breaker would need to be a “constant monitor.” *See id.* This approach would be “expensive, cumbersome, and very intrusive.” *See id.* Most importantly, however, the court declared that the Chancellor properly rejected this remedy because it would not allow TPG to “capitalize on its business model.” *See id.* In contrast, the Chancellor’s order to sell TPG preserved the company as a whole and therefore allowed it be owned and managed in accord with the demands of commerce. *See id.* Additionally, the order to sell TPG as a going concern protected TPG’s constituencies. *See id.*

151. *See id.* (quoting *In re Shawe & Elting LLC*, 2015 WL 4874733, at \*31) (acknowledging that Chancellor exercised “extreme caution” that must be used before ordering sale and that Chancellor determined it was “painfully obvious” that Shawe and Elting needed to be separated in management of TPG).

152. *See id.* at 169 (“The Court of Chancery’s August 13, 2015 opinion and July 18, 2016 order, and the related orders, are affirmed.”).

153. *See Shawe v. Elting*, 157 A.3d 142, 152 (Del. 2017) (affirming award to Elting for costs and fees), *cert. denied*, 138 S. Ct. 93 (2017). The court affirmed Elting’s award of \$7,103,755 in fees and expenses. *See id.* This included 33% of the fees she incurred litigating the merits of the case, as well as the fees and expenses incurred in her bringing a motion for sanctions against Shawe for his behavior throughout the litigation. *See id.* at 144.

IV. SLEEPING WITH THE RIGHT IDEAS: AN ANALYSIS OF *SHAWE* AND ITS WARNINGS FOR CORPORATIONS AND COUNSEL

In light of cases interpreting section 226, the structure of and principles underlying the DGCL, and the equitable powers of the Court of Chancery, *Shawe* was properly decided.<sup>154</sup> The decision reaffirms the broad scope of the Court of Chancery's equitable powers and ultimately serves as a warning sign to Delaware corporations facing deadlock.<sup>155</sup> After *Shawe*, Delaware corporations and their counsel should implement policies to prevent deadlock from occurring, plan to resolve deadlock privately, and evaluate the risks of statutory remedies.<sup>156</sup>

A. *Critical Analysis: The Corporate Relationship Might Not Be Consistent, but the Shawe Decision Is*

*Shawe* is consistent with the cases interpreting section 226.<sup>157</sup> As indicated by the court, it is not unprecedented for the Court of Chancery to determine that a solvent corporation must be sold as a going concern when doing so is in the best interest of its constituencies.<sup>158</sup> The court issued similar orders in *Bentas*, *Fulk*, and *In re Supreme Oil*.<sup>159</sup> This is allow-

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154. For a discussion of why *Shawe* was properly decided, see *infra* notes 156–80 and accompanying text.

155. For a discussion of why *Shawe* reaffirms the Court of Chancery's powers and why *Shawe* is a warning for Delaware corporations, see *infra* notes 181–86 and accompanying text.

156. For a discussion of how Delaware corporations and counsel should handle deadlock after *Shawe*, see *infra* notes 187–206 and accompanying text.

157. See *Shawe*, 157 A.3d at 163 n.36 (citing *In re Supreme Oil Co., Inc.*, No. 10618-VCL, 2015 WL 2455952, at \*2 (Del. Ch. May 22, 2015); *Bentas v. Haseotes*, No. Civ. A. 17223 NC, 2003 WL 1711856, at \*1 (Del. Ch. Mar. 31, 2003); *Fulk v. Wash. Serv. Assocs., Inc.*, No. Civ. A. 17747-NC, 2002 WL 1402273, at \*2 (Del. Ch. June 21, 2002); *Bentas v. Haseotes*, 769 A.2d 70, 73 n.3 (Del. Ch. 2000); *Brown v. Rosenberg*, No. 833, 1981 WL 7638, at \*5 (Del. Ch. Dec. 17, 1981) (recognizing that court's decision is consistent with Court of Chancery's previous authorizations for custodian to sell deadlocked corporations in these cases)); see also *Bentas*, 2003 WL 1711856, at \*4 (granting custodian's motion to order auction and sell corporation and its stock as going concern, rather than conducting asset sale); *Fulk*, 2002 WL 1402273, at \*13–14 (approving custodian's proposed plan to sell corporation as going concern with its primary business intact); *In re Supreme Oil, Inc.*, 2015 WL 2455952, at \*1, \*6 (ordering custodian to sell profitable company).

158. See *Shawe*, 157 A.3d. at 165 (“[I]t is by no means unprecedented for the Court of Chancery to have to address the fate of a solvent Delaware corporation by setting up a fair process to have it sold as a going concern, when that outcome is necessary to best protect its constituencies.”); see also DEL. CODE ANN. tit. 8, § 273 (West 2018) (permitting dissolution of corporations).

159. See *Bentas*, 2003 WL 1711856, at \*4 (granting custodian's motion to order auction and sell corporation and its stock as going concern rather than conducting asset sale); *Fulk*, 2002 WL 1402273, at \*13–14 (approving custodian's proposed plan to sell corporation as going concern with its primary business intact); *In re Supreme Oil, Inc.*, 2015 WL 2455952, at \*1, \*6 (ordering custodian to sell profitable company).

able because the DGCL explicitly subjects Delaware stockholders to the equitable powers of the Court of Chancery.<sup>160</sup>

As section 394 of the DGCL expresses, all Delaware corporations agree to incorporate the provisions of the DGCL into their charters.<sup>161</sup> It is therefore reasonable to conclude that Delaware stockholders' shares are subject to the enabling statutes in the DGCL.<sup>162</sup> As *Shawe* noted, there are many Delaware statutes that affect stockholders' rights, some of which even require stockholders to give up shares.<sup>163</sup> The practical effect and design of the DGCL demand that Delaware corporations and their stockholders succumb to the equitable remedies fashioned by the Court of Chancery when justice requires.<sup>164</sup>

Like all provisions of the DGCL, Section 226 permits the Court of Chancery to deal with cases on a situational basis in order to fashion the best remedy.<sup>165</sup> Therefore, the court properly focused on the language "except as when the Court shall otherwise order" in section 226.<sup>166</sup> This

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160. See *Shawe*, 157 A.3d at 165 (citing § 394) ("Stockholders of Delaware corporations are only entitled to the rights that come with their stock, and those rights are subject to the Court of Chancery's power under statutes like [section] 226.") (citation omitted); see also Heyman & Lint, *supra* note 32, at 479–80 (recognizing that DGCL statutes explicitly grant Court of Chancery jurisdiction over matters arising thereunder); Ladig & Gay, *supra* note 40, at 1076 (recognizing statutes that "empower" Court of Chancery).

161. See § 394 ("This chapter and all amendments thereof shall be a part of the charter or certificate of incorporation of every corporation except so far as the same are inapplicable and inappropriate to the objects of the corporation.").

162. See *Shawe*, 157 A.3d at 163 (citing § 394) (recognizing that all corporations agree to incorporate provisions of DGCL into their charters). When stockholder's purchase stock in Delaware corporations, they know that the DGCL provides the Court of Chancery with broad authority to address corporate issues and that authority may affect their ownership interests. See *id.* at 165.

163. See *id.* (stating that many Delaware statutes subject stockholders to sale of their shares, even over stockholders' objections); *Fulk*, 2002 WL 1402273, at \*8 (acknowledging shareholder's objection to custodian's plan for sale but approving custodian's plan over objections).

164. See Quillen & Hanrahan, *supra* note 32, at 855 (recognizing that law must be flexible in order for equity to meet society's needs and that Court of Chancery is not bound by restrictive legal doctrines and can adapt to factual situations when no adequate remedy is available at law); Johnson, *supra* note 32, at 724 (recognizing that legislatively-enacted corporate statutes are countered by judicially-imposed duties that constrain managerial misbehavior that goes too far).

165. See *Shawe*, 157 A.3d at 165 ("But, consistent with the flexible and efficient design of the DGCL, § 226 allows the Court of Chancery to address this situation by using its power to deal with cases on a situational basis."); see also Quillen & Hanrahan, *supra* note 32, at 821–22 (observing equity requires courts to respond to specific situations, rather than relying on universal rules, noting that particular facts control, and stating that Delaware adheres to these maxims); Johnson, *supra* note 32, at 713 (noting courts of equity must act when "doing so is necessary for the greater attainment of justice").

166. See *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932–33 (Del. 2007) (mandating that when statutory language is clear and unambiguous, plain meaning controls and precludes need for judicial interpretation); *Shawe*, 157 A.3d at 164–65 (adopting and applying "plain meaning" analysis and stating this is "key

language clearly intends to give the court “the discretion to deal sensibly with corporations that are unable to move forward.”<sup>167</sup> Consistent with the comprehensive and flexible design of the DGCL, the court had the discretion to look to other provisions of the DGCL, such as section 273, to ensure that TPG’s stockholders and employees would “not suffer a wrong without a remedy.”<sup>168</sup>

However, the *Shawe* court appropriately recognized the risks of judicial interference in corporate governance, and emphasized that it should be reluctant to intervene in corporate affairs unless justice demands action.<sup>169</sup> This aligns with the attitude Delaware courts generally have toward such action.<sup>170</sup> *Shawe* presented a set of unique circumstances that required the court to act.<sup>171</sup> Although extreme, the benefits of the game-ending decision to sell the corporation outweighed the benefits of interfering with the board of directors for an uncertain period of time.<sup>172</sup> The

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language” under section 226 and that it is significant and to be read in accord with overall design of the statute).

167. See *Shawe*, 157 A.3d at 165 (“[W]e read it consistently with the overall design of the statute, and its intention to allow our Court of Chancery the discretion to deal sensibly with corporations that are unable to move forward with governance[.]”). When section 226 was amended in 1967, the “custodian” language was added to enhance the power of the court to remedy deadlock. See *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 237 n.10 (Del. 1982); see also *COX & HAZEN*, *supra* note 52, § 14:15 (recognizing that section 226 was liberalized by amendment). Therefore, it is reasonable to suggest the Court of Chancery has flexibility to fashion remedies under section 226. See *Shawe*, 157 A.3d at 165.

168. See *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1985) (“Quite simply, equity will not suffer a wrong without a remedy.”); see also *Shawe*, 157 A.3d at 165 (noting Chancellor properly looked for guidance under section 273 to fashion remedy under section 226); *Fulk*, 2002 WL 1402273, at \*10-11 (interpreting sections 226 and 273 together); *Quillen & Hanrahan*, *supra* note 32, at 855 (implying that Court of Chancery must be able to respond to cases using flexibility of DGCL).

169. See *Shawe*, 157 A.3d at 166 (noting intrusive and extreme remedies should be employed “reluctantly” and only after consideration of less drastic remedies). The Court of Chancery expressed its hesitation to “enmesh an outsider and, by extension, the Court into matters of internal corporate governance for an extensive period of time.” See *id.* at 160 (quoting *In re Shawe & Elting LLC*, C.A. No. 96661-CB, 2015 WL 4874733, at \*31 (Del. Ch. Aug. 13, 2015)).

170. See *Horsey*, *supra* note 42, at 984–85 (providing that courts of equity cannot control managing bodies unless necessary to do so); *Heyman & Lint*, *supra* note 32, at 484 (commenting that Delaware courts should be hesitant to use equitable principles to override established principles of corporate law, such as business judgement rule); *Quillen & Hanrahan*, *supra* note 32, at 864 (recognizing Delaware’s “desire to let business decisions be made by the directors and stockholders of Delaware corporations rather than by the Court”).

171. See *Shawe*, 157 A.3d at 155–57, 167 (cataloging extreme facts of TPG’s deadlock, acknowledging that facts in *Shawe* caused irreparable injury to TPG, and refusing to disturb factual findings on appeal).

172. See *id.* at 167 (finding that sale of TPG was preferable over other remedies). Although *Shawe* felt that the sale was extremely intrusive, appointing a custodian to constantly monitor the parties would be required according to the record indicating *Shawe* and *Elting* had no chance of working together constructively. See *id.* This would be “expensive, cumbersome, and very intrusive.” See *id.*



remedy was appropriate because it provided the greatest benefits to TPG's stockholders and employees; this was consistent with Delaware's initiative to protect the corporation's constituencies.<sup>173</sup> Likewise, allowing the sale of TPG as a going concern enabled the custodian to keep TPG's business intact, consistent with the duty to "continue the business of the corporation" under section 226.<sup>174</sup>

Additionally, *Shawe* is unsurprising because of its unique facts that made the deadlock so extreme.<sup>175</sup> These were the circumstances in which an extreme remedy should be implemented—it was the "last resort" necessary to protect the interests of TPG and its constituencies.<sup>176</sup> Importantly, *Shawe* makes it clear that the court should "reluctantly and cautiously" order sale, which is an "unusual" remedy; less extreme and intrusive options must be considered.<sup>177</sup> After *Shawe*, it is likely that less extreme remedies will be employed in most cases arising under section 226.<sup>178</sup>

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Most importantly, it would not allow the company to capitalize on its business model. *See id.*

173. *See id.* (asserting that sale of TPG was most beneficial for company's constituencies). Preserving the company as a whole protected TPG's business and employees. *See id.* Doing so would allow the company to be owned and managed in a way that would allow it to function effectively. *See id.* Positioning the company to succeed would help it to become profitable and secure jobs for employees. *See id.* Likewise, sale would provide maximum return to TPG's stockholders. *See id.* at 166. These concerns are consistent with Delaware's concern for corporate constituencies. *See* Hansmann & Kraakman, *supra* note 44, at 440-41 (recognizing that Delaware courts seek to protect corporate constituencies, most importantly stockholders); Stout, *supra* note 44, at 170 (recognizing that courts protect corporate constituencies, such as stockholders and employees).

174. *See* DEL. CODE ANN. tit. 8, § 226 (West 2018) (stating custodian must "continue the business of the corporation"); *Shawe*, 157 A.3d at 167 (explaining how sale of TPG allows its business to continue by preserving company as whole).

175. *See Shawe*, 157 A.3d at 155-57, 167 (cataloging extreme facts of TPG's deadlock, acknowledging that facts in *Shawe* caused irreparable injury to TPG, and refusing to disturb factual findings on appeal). In *Shawe*, the dissension between Shawe and Elting was very well-documented. *See id.* at 155-57. The "personal nature of the long-running discord" caused irreparable injury to TPG. *See id.* at 156, 162.

176. *See id.* at 162 (explaining that extremely dysfunctional relationship between Shawe and Elting affected all of TPG's operations). The dysfunction and dissension between Shawe and Elting was so extreme that it absolutely needed to be eradicated in order to protect TPG. *See id.* at 167. They needed to be separated from the management, and sale was the best way of doing so. *See id.* The Court of Chancery was in the best position to make this determination. *See id.*

177. *See id.* at 160, 166-67 (recognizing that sale is an "unusual" and "extreme" remedy that "should be implemented only as a last resort and with extreme caution" and only after consideration of other remedies and discussing less intrusive remedies considered by Court of Chancery); *see also* *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 240 (Del. 1982) (mandating that involvement of the court and its custodian in corporation's affairs and business must be kept to minimum and exercised only so far as justice requires).

178. *See id.* at 166 ("The Court of Chancery should always consider less drastic alternatives before authorizing the custodian to sell a solvent company.").

*Shawe* ultimately signals to deadlocked Delaware corporations that the Court of Chancery's statutory authority to appoint a custodian and order a remedy under section 226, while not unfettered, is rather broad.<sup>179</sup> This is consistent with the vast scope of the Court of Chancery's equitable powers and the deference it has traditionally been afforded on appeal.<sup>180</sup> Nevertheless, the decision warns Delaware corporations of the potential extremes the court may reach to cure deadlock if the deadlocked factions fail to privately resolve their issues.<sup>181</sup>

Depending on the severity of the deadlock, the court may order the sale of even the most profitable corporation over the objection of its stockholders.<sup>182</sup> This is foreseeable considering that deadlock provides a unique framework for the court to intervene.<sup>183</sup> Although Delaware corporations enjoy the court's reluctance to interfere with corporate governance and decision-making, deadlock may necessitate reliance on the court's equitable powers because it is a high sign that the corporation's business, stockholders, and employees are at risk.<sup>184</sup>

B. *A Corporate Guide to Divorce: Advice for Corporations and Their Counsel When Facing Deadlock*

After *Shawe*, corporations and their counsel must seriously consider the possibility of corporate deadlock and plan accordingly.<sup>185</sup> It is wise for

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179. See *id.* at 163–64, 165–67 (“Several sources confirm the Court of Chancery’s broad authority under the statute, which includes ordering a sale.”); *id.* at 165 (“[O]ur statute provides the Court of Chancery broad authority to address corporate deadlocks of various kinds, authority that may well affect fundamental ownership interests”); *id.* at 163–64 (“This Court has also recognized the broad authority granted the Court of Chancery under the statute.”); *id.* at 166 (“[T]he remedy to address the deadlock is ultimately within the Court of Chancery’s discretion.”); *id.* at 167 (“The Chancellor was in the best position to assess the viability of options short of sale.”).

180. See *id.* at 166 (applying abuse of discretion standard); *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 175 (Del. 2002) (recognizing that Court of Chancery has wide discretion to fashion remedies and implying that its discretion deserves great deference); see also *Heyman & Lint*, *supra* note 32, at 462–63 (recognizing Court of Chancery’s powers are complete to determine remedies); *Massey*, *supra* note 36, at 690 (explaining that Court of Chancery opinions on corporate law carry great weight and authority).

181. See *Shawe*, 157 A.3d at 167 (noting parties failed to successfully reach resolution before ordering custodian to sell TPG).

182. See *id.* (affirming Court of Chancery’s authority to order sale of profitable corporation over objection of stockholder).

183. See *LOCKWOOD*, *supra* note 9, § 1:22 (determining that courts may order remedies as extreme as dissolution of corporation because deadlock can paralyze corporate operations).

184. See *TINNEY*, *supra* note 10, § 1 (emphasizing deadlock’s “crippling effect” on corporations); *Deadlock in A Close Corporation*, *supra* note 50, at 655 (listing negative effects of deadlock on corporation); *LOCKWOOD*, *supra* note 9, § 1:22 (stating deadlock leads to litigation).

185. See *SMITH*, *supra* note 53, at 14 (recognizing that few businesses engage in advance planning to resolve or decrease likelihood of deadlock and noting that

corporations and counsel to implement preventative measures to avoid deadlock from occurring.<sup>186</sup> Because lawyers play an active role in planning and structuring the enterprise, counsel should advise clients to establish defined methods of settling disputes and of evaluating the rights of involved parties.<sup>187</sup> In addition, counsel should advise corporations to avoid giving parties equal control and voting rights or, in the alternative, establish a tie-breaking mechanism.<sup>188</sup>

If these efforts fail, corporations should proactively design a course of action in the event deadlock does occur.<sup>189</sup> Counsel may advise the corporation to rely on contractual remedies provided by the parties in advance through the articles of incorporation, bylaws, or stockholders' agreements.<sup>190</sup> The parties may agree in advance that, if deadlock occurs, there will be a buy-out arrangement, voluntary dissolution, or arbitration.<sup>191</sup> Likewise, courts have recognized corporations' failures to establish an "exit strategy" in the event deadlock occurs and the corporation must be sold.<sup>192</sup> Therefore, counsel should advise clients to establish a method of valuation and sale to ensure that involved parties control the method of sale to guarantee stockholders recover the value of their investment.<sup>193</sup>

Nonetheless, counsel should advise their clients of the benefits and risks associated with the statutory remedy under section 226.<sup>194</sup> In the wake of *Shawe*, corporations and counsel must prudently consider the potential financial detriment brought about by corporate deadlock.<sup>195</sup> Liti-

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optimism at start of business usually obscures belief that deadlock may occur); Thompson, *supra* note 39, at 199 (noting that close corporations often fail to adequately plan for deadlock).

186. See SMITH, *supra* note 53, at 14 (stating corporations should engage in advance planning).

187. See *id.* at 14–16 (stating corporations should predetermine methods for settling disputes and noting important role of counsel).

188. See *id.* at 14–15 (advocating for avoidance of creating enterprises that give equal control to their parties).

189. See *id.* at 14 (stating lawyers should consider techniques for dealing with deadlock).

190. See TINNEY, *supra* note 10, § 7 (describing contractual deadlock remedies integrated into corporate documents or private agreements).

191. See *id.* §§ 8–10 (discussing buy-out arrangements, voluntary dissolution, and arbitration).

192. See *Shawe v. Elting*, 157 A.3d 152, 184 n.83 (Valihura, J., dissenting) (stating parties failed to negotiate exit strategy); *Fulk v. Wash. Serv. Assocs., Inc.*, No. Civ. A. 17747-NC, 2002 WL 1402273, at \*6 (Del. Ch. June 21, 2002) (stating parties never agreed on exit strategy to recover value of investment).

193. See *Fulk*, 2002 WL 1402273, at \*6 (stating parties never agreed on exit strategy to recover value of investment and implying that they would have determined fate of corporation's sale if they had); SMITH, *supra* note 53, at 15 (necessitating mechanism for evaluation of rights).

194. See SMITH, *supra* note 53, at 16 (noting lawyers must actively assist and counsel client in planning corporate enterprise).

195. See LOCKWOOD, *supra* note 9, § 1:22 (recognizing deadlock leads to costly litigation).

gating deadlock issues is far from inexpensive, and misbehavior in the course of litigation between the deadlocked parties may even result in sanctions and payment of fees.<sup>196</sup>

If the corporation does decide to proceed under section 226, counsel should identify potential risks.<sup>197</sup> For example, *Shawe* warns closely-held corporations of the ramifications of invoking section 226.<sup>198</sup> Close corporations are put in a bind under the statute because the structure of the company—which often obliterates the line between stockholders and management—leaves it vulnerable to courts finding deadlock under both section 226(a)(1) and section 226(a)(2).<sup>199</sup> Therefore, counsel must inform clients in this situation that they are greatly exposed to the equitable powers of the court.<sup>200</sup>

In addition, counsel should determine whether the deadlock at issue is as extreme as in *Shawe* and, therefore, whether the facts will warrant an extreme remedy.<sup>201</sup> If so, counsel must make the corporation aware that the business may be sold as a going concern or have its assets liquidated and distributed.<sup>202</sup> Ultimately, counsel should make it clear that the court has broad discretion to choose a remedy, even over objections from stockholders or directors.<sup>203</sup> Therefore, counsel should encourage clients to settle the dispute through negotiation and mediation in order to avoid any unexpected or unwanted outcomes.<sup>204</sup>

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196. See generally *Shawe v. Elting*, 157 A.3d 142 (Del. 2017) (awarding large amount of costs and fees to applicant under section 226), *cert. denied*, 138 S. Ct. 93 (2017).

197. See SMITH, *supra* note 53, at 14–15 (noting lawyers must anticipate litigation issues associated with deadlock).

198. See *Shawe*, 157 A.3d at 155, 161, 167 (describing TPG's ownership and control between two stockholders and directors, determining that they were deadlocked in both capacities, and ordering sale of TPG).

199. See *Shawe*, 157 A.3d at 160–61 (finding deadlock under both section 226(a)(1) and section 226(a)(2)); SMITH, *supra* note 53, at 64 (stating “closely held corporations” have few shareholders); TINNEY, *supra* note 10, § 1 (claiming dissension and deadlock are peculiar to close corporations).

200. See *Shawe*, 157 A.3d at 160–61 (implying that Court of Chancery's ability to fashion remedy under either provision of section 226 exposed parties to broader exercise of equitable powers).

201. *Cf. id.* at 155–59 (cataloging facts and issues that made deadlock in *Shawe* so extreme that it warranted sale of TPG).

202. See *id.* at 166 (noting court had discretion to choose between selling TPG as going concern or conducting asset sale of its parts).

203. See *id.* at 165 (proclaiming that Delaware stockholders are subject to Chancellor's equitable powers, which include ability to sell corporation over their objection).

204. *Cf. id.* at 167 (implying that Court of Chancery would not have ordered sale of TPG if they had resolved their disputes through negotiation).

V. FROM BUSINESS PARTNERS TO BROKEN UP: UNDER SECTION 226 THE COURT HAS THE POWER TO END IT FOR GOOD

*Shawe* determined that the Court of Chancery has broad authority under section 226 of the DGCL to resolve deadlock by appointing a custodian and ordering the sale of a solvent corporation.<sup>205</sup> The decision reaffirmed the Court of Chancery's broad equitable powers and authority to fashion remedies on a case-by-case basis.<sup>206</sup> Although *Shawe* was properly decided, the decision has significant implications for Delaware corporations facing deadlock.<sup>207</sup> Corporations and their counsel must be aware of the prevalence of deadlock and the risks of invoking section 226.<sup>208</sup> Ultimately, *Shawe* illustrates the dangers of mixing business and pleasure, demonstrating that the intimate bonds between stockholders and directors can quickly deteriorate and result in corporate deadlock.<sup>209</sup> Therefore, Delaware corporations' stockholders and directors must heed *Shawe's* warning: when corporate relationships break up, the Court of Chancery has the power to end it for good.<sup>210</sup>

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205. *See id.* at 166 (finding Court of Chancery has broad discretion to choose deadlock remedy, including ordering sale of solvent corporation).

206. For a discussion of how *Shawe* affirmed the broad powers of the Court of Chancery, see *supra* notes 179–84 and accompanying text.

207. For a discussion of why *Shawe* was properly decided and its implications for Delaware corporations, see *supra* notes 157–84 and accompanying text.

208. For a discussion of how Delaware corporations and counsel should approach deadlock after *Shawe*, see *supra* notes 185–204 and accompanying text.

209. For a discussion of how intimate relationships may negatively impact business, see *supra* notes 2–12 and accompanying text. For a discussion of the deteriorated romance that resulted in the *Shawe* deadlock, see *supra* notes 89–114 and accompanying text.

210. For a discussion of why *Shawe* is a warning for Delaware corporations, see *supra* notes 179–84 and accompanying text.