

## IN THE SUPREME COURT OF MISSISSIPPI

No. 2016-CA-00288

**THE MATTER OF THE ESTATE OF  
FRANKIE DON WARE, DECEASED:  
CAROLYN WARE, EXECUTRIX**

*Appellant**v.***RICHARD WARE***Appellee*

**Consolidated with:  
No. 2016-CA-01589**

**CAROLYN WARE, EXECUTRIX OF  
THE ESTATE OF FRANKE DON WARE**

*Appellant**v.***RICHARD WARE***Appellee*

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**ON APPEAL FROM  
THE CHANCERY COURT OF CHICKASAW COUNTY, MISSISSIPPI  
FIRST JUDICIAL DISTRICT  
CASE NO.: 2011-1212-KMB**

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**APPELLANT'S BRIEF****ORAL ARGUMENT IS NOT REQUESTED****Counsel for Appellant**

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*Appellant*

*v.*

**RICHARD WARE**

*Appellee*

**CERTIFICATE OF INTERESTED PARTIES**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Edith Carolyn Ware, Appellant;
2. Dana Carol Ware, daughter of Decedent;
3. Angela Dawn Mohr, daughter of Decedent;
4. Richard Don Ware, Appellee;
5. Ware Milling, Inc., Corporation subject to Chancery Court's order;
6. Chickasaw Farm Services, Inc., Corporation subject to Chancery Court's order;
7. Chickasaw Grain Transportation, Inc., Corporation subject to Chancery Court's order;
8. Rex F. Sanderson, Esq., attorney for Appellant;
9. Rhett R. Russell, attorney for Appellant;
10. Thomas A. Wicker, attorney for Appellant;
11. Steven M. Brom, attorney for Appellant;
12. Casey L. Lott, Esq., attorney for Appellee, and
13. Dustin C. Childers, Esq., attorney for Appellee

*/s/ Rhett R. Russell*  
MSB5743  
Attorney for Appellant

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## **STATEMENT OF THE ISSUES**

1. Whether the Chancery Court erred by holding that Richard Ware is a proper party to file an objection to the closing of the estate
2. Whether the Chancery Court erred by holding that Richard Ware's objection was not untimely
3. Whether the stock transfer restriction applies to Frankie Ware's testamentary disposition
4. Whether the Chancery Court erred by setting the stocks' values
5. Whether the Chancery Court erred by applying a discount for lack of control and marketability
6. Whether the Chancery Court erred by holding that the Board of Directors shall vote to accept or reject the stock purchase offer instead of the shareholders

## **STATEMENT OF THE CASE**

### **A. Nature of the Case**

On April 8, 2011, Frankie Don Ware passed away. [RE 6]. Frankie Ware is survived by his wife, Edith Carolyn Ware, and their children, Richard Don Ware, Angela Dawn Mohr, and Dana Carol Ware. *Id.* Frankie Ware's will was admitted to probate on August 23, 2011. *Id.*

Frankie Ware's will left most of his property to several testamentary trusts. *Id.* The trusts provided that Carolyn Ware would receive the benefits of the trusts' income and corpus until her death and then the trust assets would go to the children. *Id.* At the time of his death, Frankie Ware owned a 25% interest in Ware Milling, Inc. ("Ware Milling"), Chickasaw Farm Services, Inc. ("Chickasaw Farm"), and Chickasaw Grain Transportation, Inc. ("Chickasaw Grain"). [RE 7]. Carolyn Ware owns a 25% interest, and Richard Ware owns the remaining 50% interest in these corporations. *Id.*

On June 6, 2014, Carolyn Ware filed a petition to close the estate. *Id.* On July 31, 2014, Richard Ware filed an objection to the closing of the estate and cited a section from the corporate bylaws, which he contends require that Frankie Ware's shares of each corporation must first be offered for sale to that corporation before the shares can be transferred to the testamentary trusts. *Id.* The corporate bylaws of each corporation contain the following provision:

## **2. TRANSFERS OF SHARES.**

(a) No shareholder shall have the right to sell, assign, pledge, encumber, transfer, or otherwise dispose of any of any (sic) of the shares of the corporation without first offering the shares for sale to the corporation at the annually established net asset value of such shares.

*Id.*

Richard Ware asserts that Carolyn Ware, as executor of Frankie Ware's estate, must first offer the shares for sale to the corporations, and the corporations must decline the option to purchase the shares, before the shares can be transferred to Frankie Ware's testamentary trusts. [RE 9-10]. Carolyn Ware asserts that the share transfer restriction is inapplicable to the administration of Frankie Ware's estate because the share transfer restriction does not apply to testamentary dispositions. [RE 8-9].

The Chancery Court held that the share transfer restriction applied to Frankie Ware's testamentary disposition. [RE 6-13]. In addition, the Chancery Court determined a value for the shares of the corporation. *Id.* Carolyn Ware filed this appeal asserting that the Chancery Court erred by holding that the share transfer restriction applies to Frankie Ware's testamentary disposition, the determination of a value at which the shares must be offered for sale to the corporation, and that the corporations' Board of Directors decide whether to purchase the shares and not the shareholders. [RE 18].

## **B. Course of Proceedings and Disposition Below**

On June 6, 2014, Carolyn Ware filed a petition to close the estate of Frankie Ware. [RE 7]. On July 31, 2014, Richard Ware filed an objection to the closing of the estate asserting the share transfer restriction contained in the corporate bylaws. *Id.* Following a hearing, the Chancery Court entered an order on January 4, 2016. [RE 6-13].

In its order, the Chancery Court held that the share transfer restrictions contained in the corporate bylaws applied to Frankie Ware's testamentary dispositions. *Id.* The Chancery Court further held that Carolyn Ware, as executor of the estate of Frankie Ware, must first offer the shares for sale to the corporations and the corporations must decline to purchase the shares before the shares could be transferred to Frankie Ware's testamentary trusts. *Id.*

In addition, the Chancery Court determined the price at which the shares must be offered for sale over Carolyn Ware's objections. Finally, the Chancery Court determined the date for the valuation of stocks to be August 23, 2011, the date of the opening of the estate, with 3% interest from that date until the purchase by the corporations. *Id.*

On January 8, 2016, Carolyn Ware filed a Motion to Alter or Amend Judgment. [RE 14-16]. In her motion, Carolyn Ware asserted that the Chancery Court erred by setting a value for the shares at issue. *Id.* Specifically, Carolyn Ware argued that the shareholders never determined a share value as required by the corporate bylaws, that the value was to be determined by the shareholders and not the court, and, in the event the shareholders could not agree, a shareholder could move to dissolve the corporation. *Id.* On January 20, 2016, the Chancery Court entered an order denying Carolyn Ware's Motion to Alter or Amend Judgment. [RE 17]. On February 28, 2016, Carolyn Ware filed a notice of appeal from the Opinion and Judgment entered by the Chancery Court, and the denial of the Motion to Alter or Amend Judgment by Order entered January 20, 2016. [RE 18].

The Chancery Court entered a subsequent order on October 14, 2016 on Richard Ware's Motion for Declaratory Judgment and Motion to Compel Specific Acts of Disobedient Party or, Alternatively, for a Bond. [RE 20-23]. In its order of October 14, 2016, the Chancery Court held that the decision regarding whether to repurchase Frankie Ware's shares lies with the Board of Directors of said corporations and not the shareholders. [RE 22]. On November 3, 2016, Carolyn Ware filed a Notice of Appeal challenging the Chancery Court's determination that the Board of Directors shall decide whether to repurchase Frankie Ware's shares instead of the shareholders. [RE 24].

### **C. Statement of Facts**

Frankie Don Ware died on April 8, 2011. [RE 6]. Frankie Ware left behind his widow, Carolyn Ware, and their children, Richard Don Ware, Angela Dawn Mohr, and Dana Carol Ware. *Id.* On August 23, 2011, Carolyn Ware filed a Petition to Admit Will to Probate in the Chancery Court of the First Judicial District of Chickasaw County, Mississippi, Case No. 2011-1212-KMB. *Id.* On the same day, the Chancery Court entered an order granting Letters Testamentary admitting the Last Will and Testament of Frankie Don Ware dated February 14, 2003 to probate and appointing Carolyn Ware as Executor of the estate. *Id.*

Frankie left most of his property to several testamentary trusts. *Id.* In essence, the trusts provided that Carolyn Ware would enjoy the benefits of the trusts' income and corpus until her death and then the trust assets would go to the children. *Id.* At the time of his death, Frankie Ware owed a 25% interest in Ware Milling, Chickasaw Farm, and Chickasaw Grain. [RE 7]. Carolyn Ware owns a 25% interest and Richard Ware owns the remaining 50% interest in these corporations. *Id.*

On June 6, 2014, Carolyn Ware filed a Petition to Close Estate. *Id.* On July 31, 2014, Richard Ware filed an Objection to Closing the Estate of Frankie Don Ware. *Id.* Richard Ware's

Objection cited a section from the corporate bylaws, which he contends require that Frankie Ware's shares of each corporation must first be offered for sale to that corporation. *Id.* The corporate bylaws of each corporation contain the following provision:

## **2. TRANSFERS OF SHARES.**

(a) No shareholder shall have the right to sell, assign, pledge, encumber, transfer, or otherwise dispose of any of any (sic) of the shares of the corporation without first offering the shares for sale to the corporation at the annually established net asset value of such shares.

*Id.*

On March 3, 2015, the Chancery Court appointed The Koerber Company to conduct a limited audit for evidence of fraud and to provide a valuation for the corporations as of April 8, 2011, the date of Frankie Ware's death. [RE 8]. The Koerber Company provided an opinion that the "net asset" values of a 25% equity interest on April 8, 2011 are:

Ware Milling, Inc.	\$1,880,000.00
Chickasaw Farm Services, Inc.	\$161,000.00
Chickasaw Grain Transportation, Inc.	\$68,000.00
	<b>\$2,109,000.00</b>

During the hearing on the Motion to Close the Estate by Carolyn Ware and the Objection filed by Richard Ware, Carolyn Ware asserted that the disputed shares should go to the testamentary trusts established by Frankie Ware in his Last Will and Testament in accordance with his intentions. *Id.* Carolyn Ware asserts that the shares transfer restriction at issue does not apply in this situation as it does not apply to testamentary transfers. *Id.*

In addition, Carolyn Ware, while not conceding that the shares must be offered to the corporations asserts, in the alternative, if the Court requires an offering, that the Court should value the corporations at more than \$15,000,000. [RE 11]. The Chancery Court

disagreed and determined the corporations' values as established by The Koerber Corporation which applied a 20% discount for lack of control and marketability. *Id.* In addition, the Chancery Court awarded 3% interest from August 23, 2011, the date the estate was admitted to probate. [RE 12].

### **SUMMARY OF THE ARGUMENT**

Richard Ware is not a proper party to object to the closing of the estate of Frankie Don Ware. Richard Ware filed the objection in his individual capacity asserting a claim on behalf of the corporations. As such, Richard Ware lacks standing to assert a claim against the estate on behalf of the corporations. The corporations are indispensable parties and are the only proper parties.

The objection to the closing of the estate is due to be dismissed as untimely. The estate was admitted to probate on August 23, 2011. The claim on behalf of the corporations was not presented until July 31, 2014. This is well after the period for the presentation of claims. The claims presented by Richard Ware on behalf of the corporations are untimely.

The Chancery Court erred by holding that the share transfer restriction clause applies to Frankie Ware's estate. The clause is inapplicable in this case as the clause does not specifically address testamentary dispositions. The clause constitutes a restraint on the alienation of property. Such clauses are to be strictly construed. Here, the clause does not indicate any intent to restrict a testamentary disposition and should not apply to Frankie Ware's estate.

The Court further erred in setting a value for the shares at issue. The share transfer restriction clause states that the shareholders were to annually set a price for valuing the shares. This did not occur. As a result, the Court substituted its judgment for the judgment of the shareholders. The value of the shares is to be determined by the shareholders and not the court. In the event the shareholders do not agree, the shareholders may move for a dissolution.

In addition, the Court erred by improperly valuing the stocks. Carolyn Ware testified that the shares were worth more than \$15,000,000. Richard Ware testified that Ware Milling has at least \$6,000,000 on hand. Also, Ware Millings' revenue has increased dramatically over the past number of years. These factors were not considered by the Court making the valuation erroneous.

The Court further erred in its valuation of the shares by applying a 20% discount for lack of control and marketability. Discounts for lack of control and marketability are not appropriate under the facts of this case and applicable Mississippi law.

Finally, the Court erred by concluding that the Board of Directors shall vote on whether or not to reacquire Frankie Ware's shares instead of the shareholders. The vote is proper before the shareholders and not the directors as the vote would materially affect shareholders rights and establish Richard Ware as the majority shareholder. The directors' authority is limited to the business and affairs of the corporations and does not extend to votes that materially affect the relationship amongst shareholders in a close corporation. The vote should be submitted to the shareholders.

#### **STANDARD OF REVIEW**

“This Court applies a limited standard of review on appeals from chancery court.” *Isom v. Jernigan*, 840 So. 2d 104, 106 (Miss. 2003) (citing *Reddell v. Reddell*, 696 So.2d 287, 288 (Miss.1997)). “The chancellor's findings of fact should not be interfered with unless they were ‘manifestly wrong, clearly erroneous or an erroneous legal standard was applied.’” *Id.* (citing *Bell v. Parker*, 563 So.2d 594, 596-97 (Miss.1990)). “However, the chancery court's interpretation and application of the law is reviewed under a de novo standard.” *Id.* (citing *In re Carney*, 758 So.2d 1017, 1019 (Miss.2000)).

## **ARGUMENT**

### **1. Whether the Chancery Court erred by holding that Richard Ware is a proper party to file an objection to the closing of the estate**

Richard Ware lacks standing to object to the closing of the estate. Frankie Ware's estate was admitted to probate on August 23, 2011. [RE 6]. On June 6, 2014, Carolyn Ware filed a petition to close the estate. [RE 7]. On July 31, 2014, Richard Ware filed an objection in his individual capacity asserting the disputed share transfer restriction. *Id.* The objection to the closing of the estate was not filed by the corporations. "In general, 'an action to redress injuries to a corporation ... cannot be maintained by a stockholder in his own name, but must be brought by the corporation because the action belongs to the corporation and not the individual stockholders whose rights are merely derivative.'" *Scafidi v. Hille*, 180 So. 3d 634, 646 (Miss. 2015) (quoting *Longanecker v. Diamondhead Country Club*, 760 So.2d 764, 768 (Miss.2000)). Richard Ware's alleges an injury to the corporations. Specifically, he alleges that the corporations have a first right of refusal to purchase Frankie Ware's shares in the corporations. This is an alleged injury to the corporations and not Richard Ware personally. As such, Richard Ware lacks standing. The corporations are not parties to the objection filed by Richard. The Chancery Court erred by failing to hold that Richard Ware's objection to the closing of the estate was due to be dismissed for lack of standing.

Under Mississippi Law, a corporation is an entity separate and distinct from its stockholders. *Illinois Central RR. Co. v. Cottonseed Co.*, 166 Miss. 579, 148 So. 371 (1942). See *United States v. State Tax Commission of the State of Mississippi*, 505 F.2d 633 (5th Cir. 1974), and *Childers v. Beaver Dam Plantation, Inc.*, 360 F.Supp. 331 (N.D.Miss.1973), (Applying Mississippi Law).

Our research reveals no Mississippi cases dealing with the right of a stockholder to bring suit in an individual capacity to redress a wrong done to a corporation. In other jurisdictions the rule is well established that a stockholder of a corporation has no personal or individual right of action against third persons for a wrongful injury to a corporation although the injury may result in the destruction or

depreciation of the value of corporate stock. 36 A.L.R.2d 1351; 167 A.L.R. 280; 18 C.J.S. Corporations s 559; 19 Am.Jur.2d, Corporations s 525 (1939).

In *Schaffer v. Universal Rundle Corp.*, 397 F.2d 893 (5th Cir. 1968), (applying Texas law), the Court stated:

The general rule is, of course, well established that an action to redress injuries to a corporation, whether arising out of contract or tort, cannot be maintained by a stockholder in his own name but must be brought in the name of the corporation, since the cause of action being in the corporation, the stockholder's rights are merely derivative and can be asserted only through the corporation. The general rule is applicable in cases where the individual is the sole stockholder. The rule does not apply in a case where the stockholder shows a violation of duty owed directly to him. That exception to the general rule does not arise, however, merely because the acts complained of resulted in damage both to the corporation and to the stockholder, but is confined to cases where the wrong itself amounts to a breach of duty owed to the stockholder personally. (397 F.2d at 896).

The reasons supporting the rule are succinctly stated in 6 Cavitch, Business Organizations section 199.03(1) (Rev.Ed.1979), as follows:

- (1) The corporation is a separate entity and the shareholder does not have a legal interest in its property.
- (2) Multiplicity of suits by individual shareholders will be avoided.
- (3) Impairment to creditors' rights will be avoided since the recovery will belong to the corporation.
- (4) Corporate recovery benefits all shareholders equally.

*Bruno v. Se. Servs., Inc.*, 385 So. 2d 620, 621–22 (Miss. 1980). “We adopt the rule in Mississippi that an action to redress injuries to a corporation, whether arising in contract or in tort cannot be maintained by a stockholder in his own name, but must be brought by the corporation because the action belongs to the corporation and not the individual stockholders whose rights are merely derivative.” *Id.* at 622. “The rule applies even though the complaining stockholder owns all or substantially all of the stock of the corporation.” *Id.* “We hold that the basis of the suit in this case is a wrong to the corporation and plaintiff may not bring suit in his individual capacity to redress a wrong to the corporation.” *Id.*

“The cause of action belongs solely to the corporate entity... ... and may be asserted only by the corporation itself or by plaintiff in a representative capacity in the form of a shareholder derivative suit.” *Id.* “The corporation is an indispensable party to such an action.” *Id.*

In 13 Fletcher, *Cyclopedia Corporations*, Section 5908, pages 279, 280, the author states:

Where the basis of the suit is a wrong to the corporation, redress must be sought in a ‘derivative’ suit. The stockholders’ derivative suit, like the pure ‘class’ suit, was an invention of equity as a form of ‘representative’ suit. But the incidents and characteristics of derivative and class suits are quite different. In the stockholders’ derivative suit the right of the plaintiff to maintain the suit is derivative or secondary. The corporation is not a mere formal, but is an indispensable party to the action.

*Id.* As Richard Ware filed his objection solely in his personal capacity and not in the name of the corporations, he lacks standing to proceed. As such, the Chancery Court erred by failing to dismiss his objection for lack of standing.

2. Whether the Chancery Court erred by holding that Richard Ware’s objection was not untimely

The estate of Frankie Ware was admitted to probate on August 23, 2011. [RE 6]. Richard Ware did not file his objection to the administration of the estate until July 31, 2014. [RE 7]. In his objection, Richard Ware asserted a claim against the estate in his individual capacity on behalf of the corporations for Frankie Ware’s shares. Richard Ware’s claim against the estate is untimely as it was not presented until nearly three years after the estate was opened.

All claims against the estate of deceased persons, whether due or not, shall be registered, probated and allowed in the court in which the letters testamentary or of administration were granted within ninety (90) days after the first publication of notice to creditors to present their claim. Otherwise, the same shall be barred and a suit shall not be maintained thereon in any court, even though the existence of the claim may have been known to the executor or administrator. Where the affidavit is made in good faith and the claim is registered, probated and allowed by the clerk but the affidavit is defective or insufficient, the court may allow the affidavit to be amended so as to conform to the requirements of the statute, at any time before the

estate is finally settled; whereupon the probate shall be as effective and the claim as valid against the estate as if the affidavit had been correct and sufficient in the first instance.

Miss. Code. Ann. § 91-7-151. Proof of Publication of the Notice to Creditors was filed with the Chancery Court on September 19, 2011. [RE 1]. Richard Ware's claim against the estate was not filed until nearly three years later. [RE 7]. As such, his claim is untimely and barred.

3. Whether the stock transfer restriction applies to Frankie Ware's testamentary disposition

The corporate bylaws do not specifically restrict *bequests* of stock, nor transfers to entities such as a testamentary trust which are essentially an extension of the shareholder's life. As such, this Court should strictly construe the language of the bylaws and limit their application to transfers outside the immediate family of the testator/shareholder.

*Fayard v. Fayard*, 293 So.2d 421 (Miss 1974) involved a dispute concerning a charter restriction prohibiting the transfer of stock without consent of the shareholders. *Id.* at 423. “Corporate shares of stock are universally considered personal property and in the absence of valid restrictions the owner has an inherent right incident to ownership to sell and transfer at his will.” *Id.* “Restrictions upon the right to transfer were once regarded with disfavor by the courts upon the theory that they impinged upon the right to alienate personal property.” *Id.* “As a general proposition today a majority of the courts will sustain the restrictions in close corporations which are determined to be reasonable in the light of the relevant circumstances.” *Id.* “The underlying test for determining reasonableness is whether the restraint is sufficiently needed by the particular enterprise to justify overriding the general policy against restraints on alienation.” *Id.*

Against this background several types of restraints on stock transfers have emerged as reasonable under circumstances persuasive of validity. Among these are (1) consent restraint, i.e., restrictions requiring the consent of the directors or of other shareholders or a designated percentage of one of these groups for transfer, (2) provisions limiting transfers to a specified class of persons, (3) first option provisions or (4) options empowering a corporation, its officers, directors or other

shareholders to purchase the shares of a holder on the happening of a specified event.

*Id.* at 423-24.

Some of the factors considered by other courts in applying the reasonableness test include the following: (1) The size of the corporation, (2) the degree of restraint on the power to alienate, (3) the time the restriction is to remain in effect, (4) the method used in determining the transfer price of shares, (5) the likelihood of the restrictions contributing to the attainment of corporate objectives, (6) the possibility that a hostile shareholder would injure the corporation and (7) the likelihood of the restriction promoting the best interest of the enterprise as a whole.

*Id.* Applying these principles, the Supreme Court concluded “...that the prohibition against transfers within the family without the permission of each shareholder is unduly restrictive in that it serves no reasonable purpose and is permissive to one dissenting shareholder thwarting the corporate business to the frustration of other shareholders by arbitrarily withholding consent, there being no charter or other provision for relief from such situation.” *Id.* at 424. As in *Fayard*, the restriction at issue in this case is invalid as to Frankie Ware’s desire to leave his shares in trust for the benefit of his spouse and children as there is no clear intent for the clause to apply to a testamentary disposition.

The Chancery Court erred by applying the share transfer restriction to Frankie Ware’s estate as the clause does not specifically address bequests or testamentary dispositions. “Restrictions on the alienation or transfer of corporate stock are not looked upon with favor; they are sustained as valid provided they are authorized and reasonable.” *In re Martin’s Estate*, 490 P.2d 14, 15 (Ariz. Ct. App. 1971). “However, such restrictive provisions are strictly construed.” *Id.* (citing *Casteel v. Gunning*, 402 S.W.2d 529 (Tex.Civ.App.1966)). “The pivotal question is whether the by-law restriction on alienability applies to a testamentary disposition.” *Id.* “The majority of courts which have considered this question have answered it in the negative.” *Id.* at 15-16. *See Storer v.*

*Ripley*, 178 N.Y.S.2d 7 (N. Y. 1958) (holding that restrictive agreements on the alienability of property after death must be clearly expressed); *Elson v. Security State Bank of Allerton*, 67 N.W.2d 525 (Iowa 1955) (holding that such provisions are a restraint on free transfer and must be strictly construed); *Vogel v. Melish*, 203 N.E.2d 411 (Ill. 1965) (holding that a stock holder restriction did not apply to a testamentary disposition absent express provision); *Taylor's Adm'r. v. Taylor*, 301 S.W.2d 579 (Ky. 1957) (holding that provisions which require a stockholder intending to offer his stock for sale shall first offer such stock to the corporation or to other stockholders in the corporation are construed applicable only to voluntary sales contemplated by the stockholder); *Stern v. Stern*, 146 F.2d 870 (D. C. Cir. 1945) (holding ); *Globe Slicing Machine Co. v. Hasner*, 333 F.2d 413 (2nd Cir. 1964) cert. den. 379 U.S. 969 (1965) (holding requirement that stock shall first be offered to corporation and then to stockholders, before it is transferred, meant that stockholder must make the offer before he voluntarily transferred his stock and did not prevent stockholder from disposing of his stock by will.). “We hold that since there is no express restriction on testamentary disposition in the present case the rule of strict construction inhibits such restriction by implication.” *In re Martin's Estate*, 490 P.2d at 16.

In this case, the restriction on transfer of shares read as follows:

## **2. TRANSFERS OF SHARES.**

- (a) No shareholder shall have the right to sell, assign, pledge, encumber, transfer, or otherwise dispose of any of any (sic) of the shares of the corporation without first offering the shares for sale to the corporation at the annually established net asset value of such shares.

The restriction is silent with regard to “bequeathing” the shares and nothing indicates an intent by the parties to prevent a shareholder from being able to dispose of his shares by

his will. Because of the disfavor in which such restrictions are held, the failure to include testamentary bequests means that the restriction should not apply to the testamentary trust.

Upon the authority of several cases cited, it is said in Note 2 A.L.R.2d 754: Provisions which require that a stockholder intending to offer his stock for sale shall first offer such stock to the corporation or to other stockholders in the corporation are construed applicable only to voluntary sales contemplated by the stockholder. Also: They do not apply to transfers by operation of law in the absence of a specific provision making it so applicable.

*Taylor's Adm'r v. Taylor*, 301 S.W.2d 579, 583 (Ky. 1957).

The stock transfer restriction is a restriction on the alienation of property after death. As such it is to be strictly construed. Nothing in the stock transfer restriction clause expressly states that it shall apply to bequests or testamentary dispositions. Rather, application of the stock transfer clause to Frankie Ware's estate shall operate to thwart his intent to transfer his interest in the companies he spent his life building to his testamentary trusts for the benefit of his wife and children.

#### 4. Whether the Chancery Court erred by setting the stocks' values

Carolyn Ware, who is familiar with the value of the corporations based on more than forty years' experience in the business, including having sold similar corporate interests in the past, submitted her opinion that the value of Ware Milling was in excess of \$15,000,000. [RE 11]. Her opinion is buttressed by the fact that Ware Milling has \$6 million cash on hand. [T 30]. Yet, the Court erroneously calculated the value of Frankie Ware's shares at only \$1,880,000. [RE8 ].

Christy Bazemore is a certified public accountant that testified at the trial of this matter. [T 59]. In offering her opinion, Bazemore reviewed tax returns prepared by the corporations' accountant for a span of ten years, the financial statements, and the valuations prepared by Bristow and Koerber in this case. *Id.* Based upon the information received, Bazemore prepared a spreadsheet concerning the profitability of Ware Milling. [T 62]. Bazemore calculated that Ware

Milling showed a dramatic increase in profitability from 2007 to 2015, the years she was able to review. [T 65].

Well, the profitability increased dramatically from 2007. It [increased] quite a bit every year since. So, ultimately, in 2015, I believe the number is roughly 3.4 million dollars. So within those eight years, we went from \$187,000 in income to 3.4 million. And it was a dramatic increase every year.

[T 65]. The Court's opinion was clearly erroneous as it failed to account for Ware Milling's remarkable growth, incredible amount of cash on hand and improperly applied a discount for lack of control and marketability.

*Hernando Bank v. Huff*, 796 F.2d 803 (5th Cir. 1986) involved a case in which shareholders appealed the District Court's finding that the "fair value" of their shares was \$100 per share. The District Court computed fair value by making reference to the Bank's market and investment values. *Id.* at 805. The shareholders argued that the Court resorted to the wrong methodology when it computed the shares' values. *Id.* On appeal, the Circuit Court discussed methodologies for calculating the shares' values. *Id.*

"[The investment value] formulation places value on a firm's capacity to generate increasingly higher earnings and its prospects of doing so." *Id.* "The preferred method of courts and commentators alike is to use historical earnings and factor any discernible trend into the selection of the multiplier." *Id.* "In this case, the trial court chose a very generous multiplier, ranking Bank with several highly profitable institutions of comparable size located in similarly fast-growing areas." *Id.* In the case at bar, the Court failed to account for Ware Milling's substantial annual growth and extraordinary amounts of cash on hand. Failure to account for these factors resulted in a grossly undervaluing of Frankie Ware's shares.

The Chancery Court further erred by awarding only 3% interest on the value of the shares. “‘Interest’ means interest from the effective date of the corporate action until the date of payment, at the rate of interest on judgments in this state on the effective date of the corporate action.” Miss. Code. Ann. § 79-4-13.01. “All judgments or decrees founded on any sale or contract shall bear interest at the same rate as the contract evidencing the debt on which the judgment or decree was rendered. All other judgments or decrees shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint.” Miss. Code. Ann. § 75-17-7.

In *Hernando Bank*, the District Court calculated the applicable interest rate at 10.5% based upon yields of certain investments-U.S. Treasury securities and bank certificates of deposit – to approximate the rate chosen by the Court. *Id.* at 806. Based on these findings, the appellate court concluded that the trial court’s findings were “fair and equitable.” *Id.* “As to interest, the statute requires the rate to be ‘fair and equitable in all the circumstances.’” *Id.* “Moreover, the rate is determined with a view towards compensating the dissenting stockholders for their inability to use the money owed them for their shares during the time fair value is calculated.” Here, the Chancery Court did not make any such finding but rather arbitrarily set a rate of 3%.

5. Whether the Chancery Court erred by applying a discount for lack of control and marketability

The Chancery Court erred by applying a discount to the corporations’ shares’ values. In *Richton Bank & Trust Company v. Bowen*, 798 So.2d 1268 (Miss. 2001), the Supreme Court of Mississippi noted the current trend in the laws of other states for the disallowance of minority and marketability discounts.

Since no other Mississippi cases have spoken on the issue, the Bowens gladly point to the current trend in the laws of other states for the disallowance of minority and marketability discounts. *See Pueblo Bancorporation v. Lindoe, Inc.*, 37 P.3d 492, 2001 WL 921190 (Colo.App.2001); *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137 (Del.1989); *Arnaud v. Stockgrowers State Bank*, 268 Kan. 163, 992 P.2d 216 (1999); *Hansen v. 75 Ranch Co.*, 288 Mont. 310, 957 P.2d 32 (1998); *HMO-W Inc. v. SSM Health Care Sys.*, 234 Wis.2d 707, 611 N.W.2d 250 (2000). This trend has culminated in the year 2000 amendment to Miss. Code Ann. § 79-4-13.01 in which the Legislature clarified the definition of ‘fair value’ in dissenter’s rights cases by eliminating discounts for lack of marketability and minority status.

*Id.* at 1273.

Under Miss. Code. Ann. § 79-4-13.01 “‘Fair value’ means the value of the corporation’s shares determined: (i) Immediately before the effectuation of the corporate action to which the shareholder objects; (ii) Using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal; and (iii) Without discounting for lack of marketability or minority status except, if appropriate, for amendments to the articles pursuant to Section 79-4-13.02(a)(5).” “The application of a minority discount (1) deprives minority shareholders of their proportionate interest in a going concern; (2) values minority shares below majority shares, resulting in unequal treatment of the same class of shares; (3) undermines the primary goal of the dissenters’ rights statute, i.e., preventing minority shareholders from being forced to sell at unfairly low values while allowing the majority to proceed as it desires; and (4) encourages oppressive conduct by the majority.

*Bowen* 798 So.2d at 1274.

Many jurisdictions have taken a blanket approach in refusing to allow the application of minority or marketability discounts. The leading case out of Delaware states, “to fail to accord to a minority shareholder the full proportionate value of his shares imposes a penalty for lack of control, and unfairly enriches the majority shareholders who may reap a windfall from the appraisal process by cashing out a dissenting shareholder, a clearly undesirable result.

*Id.* The Court concluded that the Chancery Court did not err by basing “...his valuation on the stock as a ‘whole entity, a going concern’ without applying discounts for minority status or lack of marketability.” *Id.* at 1273-74. Here, the Chancery Court erred by applying a 20% discount for lack of control and marketability. [RE 11].

6. Whether the Chancery Court erred by holding that the Board of Directors shall vote to accept or reject the stock purchase offer instead of the shareholders

Whether the corporations should reacquire Frankie Ware's shares and at what price is a vote for the shareholders and not the Board of Directors. "All corporate powers shall be exercised by or under the authority of the board of directors of the corporation, and the business and affairs of the corporation shall be managed by or under the direction, and subject to the oversight, of its board of directors, subject to any limitation set forth in the articles of incorporation or in an agreement authorized under Section 79-4-7.32." Miss. Code. Ann. § 79-4-8.01. The Board of Directors merely conduct the business and affairs of the corporation. The decision to reacquire Frankie Ware's shares is not merely "the business and affairs of the corporation." Rather, it is a vote that affects the shareholders' percentage of ownership and ultimate control of the corporations. The Board of Directors cannot undertake action that affects a shareholders rights and shares without a vote of the shareholders.

The vote of the shareholders is particularly important in this case as a reacquisition of Frankie Ware's shares in the corporations would make Richard Ware the majority shareholder of shares in the corporation. Presently, Richard Ware only has 50% of the shares, Carolyn Ware has 25% of the shares and Frankie Ware's estate has 25% of the shares. [RE 7]. Carolyn Ware can vote her 25% of the shares as well as the 25% of Frankie Ware's shares presently in his estate, and his testamentary trust upon transfer, against Richard Ware's 50% shares. *Id.*

The Board of Directors consist of Richard Ware, Richard Ware's wife Melissa Ware, and Carolyn Ware. [T 17-18]. A vote of the Board of Directors would result in Richard Ware becoming the majority shareholder. As such a vote of the shareholders is necessary and is not properly a vote of the Board of Directors as "the business and affairs of the corporation."

A close corporation is a business entity with few shareholders, the shares of which are not publicly traded. The Model Statutory Close Corporation Supplement, sub-

chapter a, section 3(b), defines it as a corporation having 50 or fewer shareholders. Management typically operates in an informal manner, more akin to a partnership than a corporation. The traditional view that shareholders have no fiduciary duty to each other, and transactions constituting ‘freeze outs’ or ‘squeeze outs’ generally cannot be attacked as a breach of duty of loyalty or good faith to each other, is outmoded. *See, O’Neal, Close Corporations, § 8.08 (1987).*

In *Ross v. Biggs*, 206 Miss. 542, 40 So.2d 293 (1949), this Court held that stockholders in a family corporation do not bear toward each other the same relationship of trust and confidence which prevails in partnerships. The Court stated: ‘A partnership is based almost wholly on the trust and confidence reposed by each partner in the other and the fact of existence of a partnership is one of the evidences of a confidential relationship between the partners.’ *Id.* 40 So.2d at 296. While this statement is generally true, it ignores the practical realities of the organization and function of a close corporation which operates as a small business enterprise where the shareholders, directors, and managers often are the same persons.

While this Court has not spoken on this matter since Ross, other jurisdictions have done so. The Supreme Judicial Court of Massachusetts in *Donahue v. Rodd Electrotype*, 367 Mass. 578, 328 N.E.2d 505 (1975), imposed a ‘strict good faith standard’ upon shareholders in a close corporation because of its resemblance to a partnership. The court stated that standards for the discharge of management and responsibilities of shareholders are substantially the same as standards applicable to partners, and are stricter than standards imposed on shareholders and directors of publicly held corporations. *Id.* 328 N.E.2d at 515.

In *Donahue*, *supra*, the corporation purchased the shares held by the father of the Rodd family which controlled it, without affording Donahue, the major non-family minority shareholder, an opportunity to sell at the same price. This purchase, in effect, merely redistributed the Rodd family interest among its members and Donahue refused to ratify the transaction. The Massachusetts Court considered several aspects of the close corporation, such as: (1) the existence of only a small number of shareholders, (2) the lack of an available ready market for the corporate stock, and (3) the substantial majority stockholder participation in the management, direction and operation of the corporation. *Id.* 511. The Court then stated, ‘[s]tockholders in close corporations must discharge their management and stockholder responsibility in conformity with this strict good-faith standard. They may not act out of avarice, expediency, or self-interest in derogation of their duty of loyalty to other stockholders and to the corporation.’ *Id.* at 515. *See also, Galler v. Galler*, 32 Ill.2d 16, 203 N.E.2d 577 (1964).

The Massachusetts courts continued to apply this good faith standard, as in *Hallahan v. Haltom Corporation*, 7 Mass.App. 68, 385 N.E.2d 1033 (1979), where shares were secretly acquired by an equal owner in an effort to change the balance of power within the corporation. The Court there ordered that the shares be returned to the seller at cost.

The case of *Orchard v. Covelli*, 590 F.Supp. 1548 (W.D.Penn.1984), aff'd 802 F.2d 448 (3rd Cir.1986), dealt with a close corporation where the majority shareholders acted unfairly toward the minority in regard to dissolution. Recognizing that the controlling interest owes a duty of loyalty and fairness to minority shareholders, the court stated that where a majority shareholder stands to benefit as a controlling stockholder, the law requires that the majority's action be "intrinsically fair" to the minority interest. *Id.* at 1556. The Court further stated that the use of the corporate process in the context of mergers designed to discount or remove the participation of the minority interest amounts to self-dealing in that the minority shareholder is denied the right to participate in the benefits of the corporation. Such action is an abuse of the corporate process. (Citations Omitted).

The *Orchard* court also stated that adherence by the majority interest to its fiduciary duty is particularly critical in the context of the closely-held corporation, and recognized the acute vulnerability of minority shareholders in such a corporation. This vulnerability stems from several factors. The majority is able to dictate the manner in which the corporation is run. Shares are not publicly traded so that a fair market for them is seldom available. Dissention makes the minority interest unattractive to a prospective purchaser. Consequently, the minority shareholder can neither profitably leave, nor safely stay with, the corporation. Thus, the only prospective buyer is usually a majority shareholder. Finally, close corporations frequently originate in the context of relationships personal in nature, often undertaken by family members or friends. Thus, the *Orchard* court went on to hold that

any attempt to squeeze out a minority shareholder must be viewed as a breach of his fiduciary duty ... such conduct is injurious when the result is the exclusion of the minority shareholders without adequate recompense and it is particularly harmful when carried out with malevolence or indifference.... The law recognizes a right to recovery under such circumstances

*Id.* at 1557.

These decisions evince the evolving awareness by courts of the distinctive characteristics and needs of close corporations. We recognize that often close corporations consist of friends or family members where the directors, officers and shareholders are synonymous. Each contributes his or her capital, skill, experience, and labor to the company. Management and ownership are substantially identical. Each shareholder has an inside view of the company's operations and maintains an element of trust and confidence in each other which is commonly lacking in a large or publicly-held corporation. Persons involved in a close corporation should act, therefore, at all times in good faith toward each other and to the corporation in order to maintain this confidence.

We find the *Orchard* court rationale and standard more appropriate and therefore, hold that in a close corporation where a majority stockholder stands to benefit as a controlling stockholder, the majority's action must be 'intrinsically fair' to the minority interest. Thus, stockholders in close corporations must bear toward each other the same relationship of trust and confidence which prevails in partnerships, rather than resort to statutory defenses. This holding does not mean that directors, executive officers and stockholders are not required to adhere to the corporate statutes; rather, we mean that blind adherence to corporate statutes may not be used to circumvent the corporation's by-laws, charter or various agreements, such as a stock redemption agreement, because of the 'intrinsically fair' standard we here adopt today. To the extent that Ross, *supra*, differs from our holding today, it is overruled.

*Fought v. Morris*, 543 So. 2d 167, 169-71 (Miss. 1989). *Fought* makes it clear that the parties must act "intrinsically fair" to each other when matters affect their rights as shareholders.

In this case, allowing the Board of Directors to vote on whether or not to reacquire Frankie Ware's shares would violate this duty. Richard Ware would be voting along with his wife, Melissa Ware who is a Director but not a shareholder, on a vote that would materially affect Carolyn Ware's rights as a shareholder. It can be reasonably anticipated that Melissa Ware would vote in favor of her husband becoming the majority shareholder in what has historically been a family owned business to Carolyn Ware's detriment. Melissa Ware as a Director should not be participating in a vote that would materially affect Carolyn Ware's rights as a shareholder. As such, the vote on whether or not to reacquire Frankie Ware's shares should be by the shareholders and not the Board of Directors. "[D]irectors and officers of a corporation stand in a fiduciary relationship to the corporation and its stockholders." *Id.* at 171. "These duties include exercising the utmost good faith and loyalty in discharge of the corporate office." Allowing a vote by the Board of Directors would be a violation of this duty as it would favor Richard Ware by making him the majority shareholder to Carolyn Ware's detriment.

## **CONCLUSION**

Richard Ware is not a proper party to assert a claim against Frankie Ware's estate on behalf of the corporations as he lacks the necessary standing. The claims are only properly presented by the corporations. In addition, the claims are untimely as they were not filed against the estate until almost three years later. The Chancery Court erred in its calculation of the value of the shares at issue, the application of a discount to the shares for lack of control and marketability and by holding that the Board of Directors shall vote on the reacquisition of the shares instead of the shareholders.

Respectfully submitted this the 12<sup>th</sup> day of July, 2017.

**CAROLYN WARE, EXECUTRIX OF  
THE ESTATE OF FRANKE DON WARE,  
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## **CERTIFICATE OF SERVICE**

I hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the appellate e-filing system, which sent notification of such filing to the following:

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Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-registered participants:

This the 12<sup>th</sup> day of July, 2017.

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