

BUY AND SELL AGREEMENTS AND THE WIDOW'S RIGHTS

In a closely held corporation the everyday affairs of the business are usually carried on by its owners without aid from non-shareholder managers. The shareholders are in close contact with each other in the same way as partners are in a partnership. It is therefore not surprising that shareholders desire the right to choose future associates and thus prevent outsiders from entering the business. Frequently, restrictions are placed on the transferability of shares so that control can be maintained.¹

One commonly used type of restriction, known as the "buy and sell agreement,"² permits the surviving shareholders to purchase the shares of a deceased shareholder for a specified price.³ Some buy and sell agreements obligate the survivors to purchase the deceased's shares; others merely give them an option to do so.⁴ Although first option agreements were originally held invalid as arbitrary and unreasonable restraints on alienation,⁵ their legality is now established⁶ in most jurisdictions.⁷

¹ Cataldo, *Stock Transfer Restrictions and the Closed Corporation*, 37 VA. L. REV. 229, 229-30 (1951). For a detailed discussion of stock transfer restrictions, see 2 O'NEAL, CLOSE CORPORATIONS § 7 (1958).

While absolute restrictions which prohibit transferability of shares have been said to be void as against the public policy of allowing and promoting the free transfer of property, *Baumohl v. Goldstein*, 95 N.J. Eq. 597, 599, 124 Atl. 118, 119 (1924) (dictum); *Allen v. Biltmore Tissue Corp.*, 2 N.Y.2d 534, 540, 141 N.E.2d 812, 814-15, 161 N.Y.S.2d 418, 421-22 (1957) (dictum); *Bloomington v. Bloomington*, 107 Misc. 646, 656, 177 N.Y. Supp. 873, 878 (Sup. Ct. 1919) (dictum); *Rychwalski v. Baranowski*, 205 Wis. 193, 196, 236 N.W. 131, 132 (1931) (dictum); see cases cited Annot., 61 A.L.R.2d 1318, 1322 (1958); courts have sustained restrictions which were reasonable in light of the circumstances surrounding the case. See, e.g., *Lawson v. Household Fin. Corp.*, 17 Del. Ch. 343, 152 Atl. 723 (1930) (nature of the business—lending money—required honest, competent management); *Allen v. Biltmore Tissue Corp.*, *supra* (complied with New York Corporation Law which allowed restrictions); *Rychwalski v. Baranowski*, *supra* (contract between shareholders giving remaining holders an option for thirty days to buy the seller's shares). However, restrictions will not be allowed when they serve no valid corporate purpose, see 2 O'NEAL, *op. cit. supra* at 10 n.25, or where there is inadequate consideration, see *Palmer v. Chamberlain*, 191 F.2d 532 (5th Cir. 1951).

Although large publicly held corporations are not precluded from placing similar restrictions on their shareholders, these companies usually do not restrict free transferability, in order to encourage rather than discourage extensive exchange of their shares.

² O'NEAL, *op. cit. supra* note 1, at 15.

³ If no price is specified there is a risk that the agreement will be unenforceable because of vagueness. See *Baumohl v. Goldstein*, 95 N.J. Eq. 597, 124 Atl. 118 (1924).

⁴ 2 O'NEAL, *op. cit. supra* note 1, at 35.

⁵ *Victor G. Bloede Co. v. Bloede*, 84 Md. 129, 34 Atl. 1127 (1896); *Brinckerhoff-Farris Trust and Sav. Co. v. Home Lumber Co.*, 118 Mo. 447, 24 S.W. 129 (1893); *Ireland v. Globe Milling Co.*, 21 R.I. 9, 41 Atl. 258 (1898).

⁶ See, e.g., *Lawson v. Household Fin. Corp.*, 17 Del. Ch. 343, 152 Atl. 723 (1930); *Baumohl v. Goldstein*, 95 N.J. Eq. 597, 124 Atl. 118 (1924); cases cited Note, 44 CORNELL L.Q. 133, 135 n.15 (1958).

⁷ 2 O'NEAL, *op. cit. supra* note 1, at 13-14. In upholding such agreements courts have required the existence of a valid business purpose for the restriction. Such valid purposes include: keeping outsiders out, *Talbott v. Nibert*, 167 Kan. 138, 148-49, 206 P.2d 131, 139 (1949); concentrating control in the hands of those who are congenial, *Coleman v. Kettering*, 289 S.W.2d 953, 957 (Tex. Civ. App. 1956); preventing competitors from using a minority interest as a means of ferreting out secret informa-

While the courts generally support the policies underlying buy and sell agreements, conflicting policies occasionally limit the operation of these arrangements. One such instance was presented by the recent case of *Burk Estate*.⁸ In *Burk*, the decedent owned four shares of stock in a close corporation, and his son by a previous marriage owned the remaining two shares. In 1948, they executed a buy and sell agreement whereby the survivor was given the option to purchase the deceased's shares at one hundred dollars each.⁹ The book value of the stock at the time of the agreement was 2,000 dollars per share, and at the decedent's death fifteen years later it was 12,000 dollars per share. The decedent's will directed that the agreement be carried out and that his estate be left according to the intestate laws. His surviving spouse elected to take against the will,¹⁰ objecting that the valuation of the decedent's shares of stock at 400 dollars substantially prejudiced her marital rights. The orphans' court held that the widow was entitled to a fractional interest in the stock itself rather than merely in its value.¹¹ The court concluded that the widow, in taking the stock itself, was not bound by the buy and sell agreement, her rights not being subject to the contractual obligation in favor of the son.

It seems clear, in the light of *Mather Estate*,¹² a case decided two years earlier by the Pennsylvania Supreme Court, that the crucial factor in *Burk* was the presence of the widow's rights.¹³ In *Mather*, a similar agreement had been executed, stating an option price of one dollar per share at a time when the fair market value of the stock was fifty dollars. At the decedent's death the value of the stock had increased to 1,060 dollars per share, and the executor refused to sell it to the surviving stockholder for the option price. The court decided that the disparity between the option price

tion, *Rychwalski v. Baranowski*, 205 Wis. 193, 196, 236 N.W. 131, 132 (1931); and allowing incorporators to maintain control of a corporation to which they have contributed their energies and fortunes, *Baumohl v. Goldstein*, 95 N.J. Eq. 597, 602, 124 Atl. 118, 121 (1924).

⁸ 15 Fiduciary Rep. 449 (Montgomery County, Pa. Orphans' Ct. 1965).

⁹ He was also given a right of first refusal on any inter vivos transfers of the stock.

¹⁰ The widow's election was made pursuant to PA. STAT. ANN. tit. 20, § 180.8 (Supp. 1965) and PA. STAT. ANN. tit. 20, § 301.11 (Supp. 1965).

¹¹ 15 Fiduciary Rep. at 454. The court in *Burk* relied on *Runyan Estate*, 21 Pa. D. & C.2d 180 (Fulton County, Pa. Orphans' Ct. 1960), which held that where the testator devised real estate to his wife for life, then to his daughter for her life, remainder to daughter's issue, and where the widow took against the will, she was entitled to one-half of the real estate, not merely one-half of the value of the land. The *Burk* court, therefore, extended a holding involving real estate to a personal property case. In view of *Gallagher's Estate*, 76 Pa. 296 (1874) (*Sharswood, J.*), which held that where personal property was involved the widow was entitled to a fractional interest in the value of the property rather than in the property itself, this extension may have been improper.

Furthermore, the court in *Runyan* also made what may have been an improper extension. It relied on *Wagner v. Custer*, 52 York L.R. 61 (C.P. York County, Pa. 1938), which held that the widow and the remainderman under the will together could convey a merchantable title and therefore could maintain an action for specific performance. The determination whether the widow's interest was in the land itself or merely in the proceeds of the sale was unnecessary.

¹² 410 Pa. 361, 189 A.2d 586 (1963).

¹³ A comment on the *Mather* decision suggested that the court might not have upheld the agreement if the rights of a surviving spouse had been involved. Note, 59 Nw. U.L. REV. 91, 97-98 (1964).

and the fair market value of the stock was not sufficient to invalidate the agreement or to defeat specific performance.¹⁴ Thus, in *Mather*, where the rights of a widow were not involved, the state supreme court upheld the buy and sell agreement, though the option price was a small fraction of the market value of the stock, while in *Burk*, the orphans' court held that a similar agreement was not binding on the widow.¹⁵

The law has gone to great lengths to protect the widow from being disinherited by her husband. At common law, the widow was entitled to a life interest in one-third of all lands of which her husband was solely and beneficially seised during coverture—her dower interest.¹⁶ At present, however, since decedents generally leave estates which are composed mostly of personal property, most jurisdictions provide the widow with a statutory share of the husband's real and personal estate.¹⁷ Reasons such as fairness¹⁸ and giving the widow her share of family property¹⁹ have been advanced for allowing the surviving spouse to take this share. Whatever the specific reason, there is, as the court in *Burk* noted, a long established policy in Pennsylvania to protect the rights of widows in the estates of their husbands.²⁰

The *Burk* court apparently determined that upholding the buy and sell agreement would prevent the widow from enjoying the financial interests accorded her under the statutory share provisions and would therefore prejudice her marital rights. Thus it ruled that the widow was not bound by the agreement. In so holding the court was unclear whether the agreement was governed solely by the election provision of section 8 of the Pennsylvania Wills Act,²¹ or was inter vivos but within section 11 of the Pennsylvania Estates Act.²² The court quoted section 11 of the Estates Act²³ and emphasized the decedent's right to consume the principal value of

¹⁴ A large portion of the shares owned by the decedent at his death had been purchased from his brother many years earlier pursuant to the agreement in question. The court pointed out the incongruity of the executor's questioning the validity of the agreement where his decedent had already benefited from its provisions. However, since the court did not base its decision on this point, this feature does not distinguish *Mather* from *Burk*.

¹⁵ It is not clear whether the court held that the agreement was not binding on the widow alone or that the agreement was wholly invalid.

¹⁶ For the origin and development of common law dower, see Haskins, *The Development of Common Law Dower*, 62 HARV. L. REV. 42 (1948).

¹⁷ MACDONALD, *FRAUD ON THE WIDOW'S SHARE* 3 (1960). For an index of the various state statutes see Phipps, *Marital Property Interests*, 27 ROCKY MT. L. REV. 180 (1955).

¹⁸ Because people normally devise most of their estates to those who are related by blood or marriage, it would seem unfair to do otherwise. Since a fair minded husband would devise a substantial part of his estate to his widow, if he fails to do so the law will do it for him. Simes, *Protecting the Surviving Spouse by Restraints on the Dead Hand*, 26 U. CINC. L. REV. 1, 5-6 (1957).

¹⁹ Because the family unit prospers through the joint efforts of husband and wife, the law has taken steps to provide the wife with her share of the property to be used for the support of her and the children should the husband, intentionally or otherwise, fail to do so. *Beirne v. Continental-Equitable Title & Trust Co.*, 307 Pa. 570, 579-80, 161 Atl. 721, 724 (1932) (dissenting opinion).

²⁰ 15 Fiduciary Rep. at 454.

²¹ PA. STAT. ANN. tit. 20, § 180.8 (Supp. 1965).

²² PA. STAT. ANN. tit. 20, § 301.11 (Supp. 1965).

²³ 15 Fiduciary Rep. at 453.

his holdings²⁴—a section 11 concept, yet it treated the stock as an asset of his probate estate²⁵—a section 8 concept.

Under section 11 a conveyance of assets with the retention of a power of appointment, revocation or consumption may be treated as a testamentary disposition by the surviving spouse.²⁶ Although the policy behind this section—preventing the deceased from defeating his spouse's marital rights through an inter vivos transfer of property over which he has retained practical control—indicates that certain contracts should be considered conveyances within the section, its wording seems to limit its applicability to certain types of trusts. "Power of appointment," "power of revocation," "power of consumption," "principal" and "income beneficiary" are all terms which are commonly used in the field of trust administration; and although a devise of stock can be called an "appointment by will" and the wasting of corporate assets can be called "consumption of principal," these terms are not ordinarily used in that manner. The Pennsylvania Supreme Court has therefore limited the applicability of section 11 to certain types of trusts.²⁷ It is thus quite difficult to fit an agreement such as that in *Burk* within the operation of section 11; the widow must rely solely on section 8.

Section 8 allows the surviving spouse to elect against the will and take "one-third of the real and personal estate of the testator" ²⁸ The

²⁴ *Id.* at 455.

²⁵ *Id.* at 453.

²⁶ Section 11 provides:

A conveyance of assets by a person who retains a power of appointment by will, or a power of revocation or consumption over the principal thereof, shall at the election of his surviving spouse, be treated as a testamentary disposition so far as the surviving spouse is concerned to the extent to which the power has been reserved, but the right of the surviving spouse shall be subject to the rights of any income beneficiary whose interest in income becomes vested in enjoyment prior to the death of the conveyor.

PA. STAT. ANN. tit. 20, § 301.11 (Supp. 1965).

Because the statutory share is generally aimed at keeping a portion of the family property within the family unit for its maintenance and support after the husband's death, it operates only on the property included in the husband's estate. It is therefore possible for a husband to defeat his widow by giving away his property while still alive. Most husbands, however, are reluctant to give away property while they are alive solely to defeat their wives, for to do so would mean that they, too, would lose its benefits. One way of circumventing this difficulty is ostensibly to make an inter vivos transfer while in reality retaining complete control through the use of the trust mechanism. Courts, however, have determined that these transfers should not defeat the widow's statutory share if they are "illusory." *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937), "sham," *In re Halpern's Estate*, 303 N.Y. 33, 100 N.E.2d 120 (1951), or motivated by a fraudulent intent. *In re Sides' Estate*, 119 Neb. 314, 228 N.W. 619 (1930). When the widow successfully attacks such a transfer, the entire trust falls into the estate.

Under § 11, the widow may attack certain types of inter vivos trusts without a determination that the trust is "testamentary," and the trust will be invalidated only insofar as the widow's rights are affected. If other beneficiaries under the will wish to attack the trust, they must prevail under the traditional standards.

²⁷ *In re Behan's Estate*, 399 Pa. 314, 321, 160 A.2d 209, 214 (1960).

²⁸ Section 8 provides:

(a) Right of Election. When a married person dies testate as to any part of his estate the surviving spouse while living shall have a right of election under the limitations and conditions hereinafter stated: Provided, that the spouse so electing must also elect to take against all conveyances within the scope of subsection (a) of section 11 of the Estates Act of 1947, as amended, of which he is a beneficiary.

statute does not specify whether the widow, by her election, is entitled to the stock itself or merely the proceeds of the sale to the surviving shareholder. Although it is not apparent that the widow is entitled to the stock itself, as the court in *Burk* concluded,²⁹ it may be persuasively argued that this is the correct interpretation,³⁰ for to hold otherwise would enable testators to avoid the effect of a section 8 election by contracting to "sell" their property for a nominal amount instead of simply devising it to the intended beneficiaries.³¹ This interpretation was followed in *Rumyan Estate*³² and adopted by the the *Burk* court.³³ If the widow, by her election, is entitled to the stock, the question then arises whether she receives the stock subject to the contractual obligation in favor of the surviving shareholder.

Generally, if a contractual obligation does not require personal services of the decedent, his death will not discharge it,³⁴ and the estate therefore will be bound to carry it out. The stock involved in buy and sell agreements operative upon death passes to the estate subject to the equitable right of the surviving shareholder to compel specific performance of the contract.³⁵ Under Pennsylvania law, if a person dies before the consummation of a binding agreement to sell real or personal property,³⁶ "his personal representative shall have power to consummate it, but if he does not do so, the court . . . may order specific performance of the agreement . . ." ³⁷ Because specific performance is an equitable action, the court will also look to the equities favoring those seeking to prevent it. In a *Burk* situation the court should weigh the equities of upholding the buy and sell agreement

(b) Share of Estate. The surviving spouse, upon an election to take against the will, shall be entitled to one-third of the real and personal estate of the testator, if the testator is survived by more than one child, or by one or more children and the issue of a deceased child or children, or by the issue of more than one deceased child, and in all other circumstances the surviving spouse shall be entitled to one-half of the real and personal estate of the testator.

PA. STAT. ANN. tit. 20, § 180.8 (Supp. 1965).

²⁹ 15 *Fiduciary Rep.* at 453-54.

³⁰ *But see* BREGY, *INTESTATE, WILLS & ESTATES ACTS OF 1947 2609* (1949).

³¹ If the widow were entitled to a fractional share in the proceeds, her interest would be limited to a share of the consideration which would, in most cases, be nominal. Therefore, unless she were cut out of the will entirely, she would be better off taking under the will than making a § 8 election.

³² 21 Pa. D. & C.2d 180 (Fulton County, Pa. Orphans' Ct. 1960).

³³ See note 11 *supra*.

³⁴ 6 WILLISTON, *CONTRACTS* § 1945 (rev. ed. 1938). See, e.g., *Young v. Gongaware*, 275 Pa. 285, 119 Atl. 271 (1922).

³⁵ See *Mather Estate*, 410 Pa. 361, 189 A.2d 586 (1963).

³⁶ In a buy and sell agreement operative upon death, obviously one party must die before the consummation of the sale.

³⁷ PA. STAT. ANN. tit. 20, § 320.620(a) (1950). According to the Joint State Government Commission's comments following this section, subsection (a) now includes personal as well as real estate. The comments further point out that this may prevent irreparable harm "where the decedent agreed to purchase or sell the controlling shares in a close corporation."

against the widow's equities—the public policy of protecting the widow as expressed by section 8 of the Wills Act.

Utilization of this balancing process does not necessarily create a conflict, at least on the policy level. The policy behind allowing reasonable restrictions on stock transfers is one of control—allowing the shareholders to choose their future associates and to maintain control of the enterprise.³⁸ On the other hand, the policy behind allowing the widow to take a statutory share by election is financial—providing her with a share of family property for maintenance and support.³⁹ These policies are not in conflict, for it is possible to accomplish both goals by a decree that the surviving shareholders are entitled to receive the stock in accordance with the wishes of the decedent by payment to the widow of the fair market value of the stock to which she is entitled by her election.⁴⁰ The stock owned by the decedent which is not included in the widow's election would be transferred to the surviving shareholders for the price specified in the agreement, for there are no overriding policy considerations operative on this portion of the agreement. In effect, with regard to the heirs generally, the result in *Mather* is followed, whereas with regard to the widow the fair market value must be paid for the stock. Under this result the shareholder would be able to retain control of the corporation⁴¹ and would still get the benefit of the favorable price as to the stock not covered by the widow's election. The

³⁸ See note 7 *supra*.

³⁹ See notes 18-19 *supra*. Although claims of decedent's creditors were not at issue in *Burk*, in those cases where such claims do exist the creditors may have equitable standing similar to that of the widow and may thereby be able to set aside the buy and sell agreement insofar as it prejudices their rights to estate assets.

⁴⁰ Administratively, the situation would be handled as follows: the widow would make her election and obtain the right to a fractional share in the stock subject to the surviving shareholder's right to purchase it for fair market value; upon payment to her of this amount, she would release her rights to the stock in favor of the shareholder.

In Pennsylvania the surviving spouse has up to one year from the date of probate to elect against the will (in some cases, she may be granted an extension). See PA. STAT. ANN. tit. 20, § 180.11 (Supp. 1965). It would therefore be advisable for the personal representative either to wait until the expiration of this period or to obtain the approval of the widow before carrying out the terms of the buy and sell agreement. If the widow were to make her election after the completion of the agreement, the personal representative might be surcharged for the difference between the contract price and the fair market value to which the widow is entitled. Cf. Blish Trust, 350 Pa. 311, 38 A.2d 9 (1944); Newcomer Estate, 9 Pa. D. & C.2d 99 (York County, Pa. Orphans' Ct. 1956).

⁴¹ While in *Burk*, a single stockholder would be given complete ownership, in most cases a group of stockholders would receive the decedent's shares. In a case where the widow elects against the will, there is probably some degree of discord in the family; this lack of congeniality is one of the major reasons for keeping control in the hands of the existing shareholders. See note 7 *supra*.

In the *Burk* situation, where the surviving shareholder has an option to purchase the shares, he need not perform the agreement if he believes that the fair market value is too great a price to pay for the privilege of keeping out outsiders. Where the surviving shareholder has an obligation to purchase instead of an option, a new problem arises—is he obligated to pay the fair market value regardless of the price specified in the agreement, or is his obligation limited to the price in the agreement? If the latter, does he get all the shares specified or only that number which can be purchased at fair market value for the total price which the agreement obligates him to pay? A suggested solution is to obligate him to purchase whatever shares can be bought for the total price specified in the agreement and to give him the option of buying the additional number of shares specified at their fair market value.

widow would receive the fair market value of the stock⁴² and would avoid being placed in the disadvantageous position of being a minority shareholder in a close corporation.⁴³ The only parties who would not benefit by this compromise would be the other legatees of the estate who would still be bound by the option price of the agreement.⁴⁴ However, they would not be in a worse position than under the *Mather* result.

The approach taken to reach this compromise—that of a court modifying a contract—is not novel. By allowing the equity of redemption, chancery courts in England modified the terms of mortgage contracts to prevent the unconscionable result of a mortgagor losing all rights to property because he was late in paying the mortgagee.⁴⁵ Although an orphans' court is not strictly a chancery court, in Pennsylvania it is given exclusive jurisdiction of specific performance of contracts made by a decedent⁴⁶ and with respect to such contracts it has all the powers of a chancery court.⁴⁷ This compromise is also consistent with section 8 of the Wills Act. If the surviving shareholder exercises his option, the widow receives the fair market value of the shares; if he does not, she gets the shares outright. In either case, she has received her fractional share of the estate.

Under this result one important problem remains—how to determine the fair market value of the shares. The problem of valuation of close corporation stock is a source of much litigation and confusion.⁴⁸ While it is generally recognized that there is no one formula for determining the value of these shares,⁴⁹ several factors such as book value, earnings, sales

⁴² It is unclear whether the *Burk* result is limited to those cases where the difference between the fair market value of the stock and the contract price is unreasonably large or applies to all cases in which there is any disparity. If it applies only to the former, then courts must determine at what point the difference becomes unreasonably large. Under the suggested compromise the courts need not make this determination for the widow should be allowed to challenge the agreement price whenever she believes that it does not reflect market value.

⁴³ Because stockholders are active in most close corporations, they receive salaries for their services. It is therefore rarely necessary to pay them dividends on their investment. In addition, the double tax on corporate dividends makes it very unfavorable to distribute profits in the form of dividends. Of course, any salary in excess of a reasonable amount will be considered a dividend for tax purposes. Treas. Reg. § 1.162-3 (1958). When an active shareholder dies, his family is left with stock on which little or no dividends accrue. If less than a majority of stock is owned, the family is usually "locked in" because there is little market for minority interests in close corporations. This puts them in the position of having stock which cannot be transferred and which provides little or no income. In *Burk*, the widow wanted to be placed in this position, but only when the alternative was accepting \$100 per share for her interests.

⁴⁴ The widow's attack might also have adverse federal estate tax consequences. See note 50 *infra*.

⁴⁵ See, e.g., *Emanuel College v. Evans*, 1 Car. 1, 21 Eng. Rep. 494 (Ch. 1625).

⁴⁶ PA. STAT. ANN. tit. 20, § 2080.301(9) (1964).

⁴⁷ See *In re Starz' Estate*, 353 Pa. 612, 46 A.2d 486 (1946); *In re Slagle's Estate*, 335 Pa. 552, 7 A.2d 353 (1939); *In re Gibson's Estate*, 153 Pa. Super. 413, 34 A.2d 159 (1943); *Shultz' Estate*, 55 Schuylkill L.R. 181 (Schuylkill County, Pa. Orphans' Ct. 1959).

⁴⁸ Page, *Setting the Price in a Close Corporation Buy-Sell Agreement*, 57 MICH. L. REV. 656 (1959).

⁴⁹ See, e.g., Kascle, *Valuation of Closely Held Corporations*, 43 TAXES 454 (1965); Schwingle, *Fiduciaries Need Dependable Valuation of Closely Held Stocks*, 100 TRUSTS & ESTATES 555 (1961); Note, 11 N.Y.L.F. 315 (1965).

and management are important considerations.⁵⁰ In *Burk*, where the option price is not related to the market value and where no provision is made for periodic revaluation, various methods for determining market value are available to the court: the court may simply adopt the value placed on the shares for estate tax purposes, as approved by the Commissioner of Internal Revenue; it may let the litigants determine the fair market value through arbitration; or the court itself may determine fair market value by appointing a master to make the valuation.

The result in *Burk* has created serious problems for estate planners and for owners of closely held corporations who have relied on the validity of buy and sell agreements to further both business and personal interests. The compromise suggested will have the effect of enabling the businessman to further these interests while at the same time protecting the widow's statutory share.⁵¹ The surviving shareholders will retain the right to choose future associates and control the corporation, but will have to pay the fair market value of the stock to keep that right. Only in this way can *both* the shareholders' rights and the widow's rights receive maximum protection.

⁵⁰ Rev. Rul. 59-60, 59-1 CUM. BULL. 237, contains a detailed list of factors. For a discussion of advantages of using various factors, see 2 O'NEAL, CLOSE CORPORATIONS §7.24 (1958).

A buy and sell agreement itself may set a price for estate tax purposes, but in order to do so the agreement must be an arm's length transaction, which the one in *Burk* obviously was not. Use of these agreements in setting estate tax valuation is treated in Butala, *Restrictive Agreements: Their Effect Upon the Tax Valuation of Corporate Stock*, 105 TRUSTS & ESTATES 15 (1966).

In cases where the option price approximates the fair market value of the stock and where the parties have made provision for periodic revaluation of the option price, the Commissioner of Internal Revenue may adopt the option price for the estate tax valuation. If, however, the widow were to question the fairness of the option price by her section 8 election, the Commissioner might also question the accuracy of this price for the estate tax valuation. The widow's election, therefore, may have the effect of increasing the valuation of the estate and hence the estate tax, though the Commissioner would otherwise have accepted the agreement price. While an increase in estate taxes would not affect the widow so long as the stock she receives qualifies for the marital deduction, it would harm the other legatees of the estate who would have the tax apportioned to their shares. See P.A. STAT. ANN. tit. 20, § 884 (Supp. 1965).

⁵¹ In cases where the agreement specifies a price equal to the fair market value there will be no change in its operation. Only in those agreements which specify a price less than the fair market value will there be some change, but only so far as the widow's fractional share is concerned, since only this part of the agreement violates the policy of protecting the widow's rights expressed by section 8 of the Wills Act. If the price specified is more than fair market value, there will be no reason for the widow to make an election; she will merely take her share of the proceeds under the will. However, under these circumstances the holder of the option may not exercise it, thereby leaving the widow as a minority stockholder.