

Memorandum 76-20

Subject: Study 77.70 - Nonprofit Corporations (Voting of Memberships)

Attached to this memorandum is the staff draft of the chapter of the General Nonprofit Corporation Law that relates to voting of memberships. This chapter generally parallels the comparable provisions (Chapter 7 (commencing with Section 700)) of the General Corporation Law. This memorandum discusses selected aspects of the staff draft.

§ 5263. Bylaws relating to voting rights

When the Commission first considered nonprofit corporations about two years ago, it made the determination that a bylaw affecting the voting rights of members could not be adopted, amended, or repealed by the board of directors but only by the members themselves. This represents a departure from existing law, for Section 9400 permits the directors (subject to the power of members to change or repeal the bylaws) to adopt, amend, or repeal bylaws.

Mr. Robert Sullivan has written to the Commission (see Second Supplement to Memorandum 76-7) that he believes strongly that the ability of directors to adopt bylaws affecting members' voting rights should not be restricted. He cites the example of a nonprofit corporation which was unable to verify who its members were and, hence, found it necessary to amend its bylaws to alter the quorum provisions and to restate the membership composition. "If the Commission's suggestion is adopted, there may be frequent situations where nonprofit corporations are paralyzed by their inability to ascertain or locate their members

and also be unable to similarly modify voting requirements." He concludes that, "Building in restrictions of the type suggested, although having an aura of fairness, will more frequently result in such non-profit corporations finding themselves in a legal 'box,' from which there is no escape."

§ 5700. Manner of voting

Subdivision (b) of Section 5700, which permits voting by ballot, mail, or any other reasonable means provided in the articles or bylaws, is unique to nonprofit corporations. Cf. Powers v. Marine Engineers' Beneficial Ass'n No. 35, 52 Cal. App. 551, 199 P.353 (1921). It enables greater flexibility in the manner of voting which is not limited to a meeting of members.

§ 5705. Proxies

At common law, proxy voting by members of nonprofit corporations was not permitted. As a practical matter, proxy voting is a necessity in the modern corporation of any size, even though it may be the chief device for self-perpetuation of management. For a listing of the proxy statutes of other jurisdictions, see Exhibit I (pink). In California, proxy voting by shareholders of a business corporation is a matter of right; proxy voting by members of a nonprofit corporation is authorized by statute unless the articles or bylaws expressly provide otherwise.

The new General Corporation Law makes several changes in the rules governing proxies: (1) the seven year maximum time limit on the validity of a proxy is not continued; (2) a new provision is added relating to proxies by pledgees or other security holders or persons other than the owner of stock; (3) the provisions relating to irrevocable proxies

coupled with an interest are elaborated; (4) the provision relating to proxies that designate more than one representative is deleted. The staff draft incorporates these changes, except for the provisions relating to proxies for shares held as security or by persons other than the owner, and the provisions relating to irrevocable proxies. These may be found in subdivisions (d)-(f) of Section 705. The staff has omitted these provisions because they have limited applicability to nonprofit corporations. Memberships are not normally pledged or otherwise given as security, and the like. One result of the omission of these provisions is that a member's proxy is not "irrevocable," even though "coupled with an interest."

Proxy solicitation is not governed by statute. There has been recent litigation over the proxy solicitation practices of at least one large nonprofit corporation. See Braude v. Havenner, 38 Cal. App.3d 526, 113 Cal. Rptr. 386 (1974) (electoral procedures for selection of directors unfair and unlawful; trial court must require nonprofit corporation to put into effect such new electoral process as the court considers just and proper), a copy of which is attached as Exhibit II (yellow). This case states the proposition that, while a nonprofit corporation may regulate its proxy practices by bylaws (Section 9402(d)), it has "no power to create bylaws that are unreasonable in their practical application." 38 Cal. App.3d at 533.

In light of the equitable jurisdiction of the court to review the bylaws and proxy practices, and in view of the futility of attempting to legislate against specific practices, the staff has proposed no provisions to deal with issues such as those raised in Braude v. Havenner. Nor has the staff discovered either existing or proposed statutes that purport to deal with these problems. Specific issues will have to be challenged and reviewed by the court on a case-by-case basis, using general standards of equity.

As a matter of interest, Exhibit III (green) is a copy of recent proxy information distributed by the California State Automobile Association to its members.

§ 5706. Voting agreements

Voting agreements between two or more members or shareholders have given rise to substantial litigation. Existing California law provides an effective technique for making a voting agreement self-executing--the voting trust. In addition, the new General Corporation Law (Section 706(a)) expressly validates other voting agreements among members of close corporations.

The voting trust generally has little use in the nonprofit corporation situation. It is a device to concentrate shareholder control in one or a few persons who, primarily through the election of directors, can control corporate affairs. Numerically, corporate reorganization is the most important occasion for the use of a voting trust, where it may be used to give control to creditors. It might also be used by incorporators to retain control, or in the close corporation, to distribute voting power disproportionately to share ownership.

Neither the ALI-ABA Model Nonprofit Corporation Act nor the Pennsylvania Corporation Not-for-profit Code provides expressly for either voting agreements generally or voting trusts specifically. The New York Not-for-Profit Corporation Law Provides:

619. An agreement between two or more members, if in writing and signed by the parties thereto, may provide that in exercising their voting rights as members they shall vote as therein provided, or as they may agree, or as determined in accordance with a procedure agreed upon by them.

The Comment to this section notes that the section "authorizes a very liberal vote-pooling arrangement among members which, when coupled with the irrevocable proxy device, effectively eliminates the need for the

voting trust in not-for-profit corporations." A Canadian report states, "Although pooling or unanimity agreements would be rarely sought among the members of a not-for-profit corporation, the flexibility to enter such agreements should be provided, to be used if desired. For example, the members of a family controlled foundation might want a unanimity agreement."

Professor Oleck in his nonprofit corporations treatise (§ 61, "Control Agreements" Among Promoters), on the other hand, notes that:

In a nonprofit corporation, such an agreement is rather futile, as well as incompatible with the democratic basis of a "membership corporation." Since each member ordinarily has only one vote, an agreement of this kind would have no real effectiveness unless it included a majority of the members. If the promoters made such an agreement to vote together, they would be outweighed by the majority as soon as a number of new members joined the organization.

In any event, even in a business corporation, and far more positively in a nonprofit corporation, unfair treatment of the minority members is not legally tolerated. More important the members may not, by private agreement, take control out of the hands of the board of directors or trustees. Nor may they prevent at least annual general elections, in which they each will have only one vote. An attempt to do any of these things is simply illegal.

Section 5706 (staff draft) is modeled on the voting agreement provisions of Section 706(a) of the new General Corporation Law. The staff notes several points about this section: (1) it places no limit on the duration of the agreement (note the 21-year and 10-year limits on voting trusts under the old and new general corporation statutes); (2) it does not require the agreement to be filed with the corporation (a voting trust agreement must be so filed); (3) it does not provide that a voting agreement may be revoked at any time (contrast the proxy provisions and the voting trust provision under the old general corporation statute); and (4) it applies to all nonprofit corporations (the voting agreement provisions of the new general corporation law apply only to close corporations).

§ 5708. Cumulative voting

One key difference between business corporations and nonprofit corporations is that cumulative voting for directors is mandatory in business corporations, whereas it is prohibited in nonprofit corporations unless the articles or bylaws expressly permit it. While cumulative voting is an important protection for minority shareholders of business corporations, the California philosophy (and that of most other jurisdictions) has been to permit greater control by management of nonprofit corporations. The staff draft makes no change in this regard.

Voting By Members Under Legal Disabilities

Existing law prescribes the manner of voting where shares stand in the name of a pledgee, trustee, or other fiduciary, where they stand in the name of a person adjudged incompetent or who is deceased, or where they stand in the name of a minor. Sections 2218-2221. These provisions apply to memberships in nonprofit corporations by virtue of Section 9002.

Section 702 of the new General Corporation Law continues these provisions, specifying when an administrator, guardian, conservator, custodian, trustee, or pledgee may vote, and adding a provision relating to shares in the name of a receiver. The staff draft omits comparable provisions for memberships in nonprofit corporations. The rationale for this omission is that such provisions have only minimal relevance to nonprofit corporations. The number of cases where a membership is placed in trust or is pledged, or is held by a receiver must surely be minute, if they exist at all. As to deceased members, the membership terminates on death unless the articles or bylaws provide otherwise; the

staff feels that, if the nonprofit corporation has provided otherwise, it can also provide for voting and other incidents of membership in the hands of an administrator or executor. If a nonprofit corporation admits minors to membership, the staff believes that the minors should have the same voting rights as any other member, regardless of the appointment of a guardian of the minor's property. Likewise, where a person has been adjudged incompetent and a conservator or guardian of the property has been appointed, the staff does not believe that a membership in a nonprofit corporation should be treated as "property" so as to enable the appointee to exercise the member's voting rights.

The staff has not discovered any other jurisdiction whose nonprofit corporation statute purports to deal with the problem of voting by members who are under legal disabilities.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

[H. Oleck Non-Profit Corporations, Organizations, and Associations Proxies § 177.]

436

Proxies

§ 177. Statutory Proxy Rules

Today statutes, charters, or bylaws generally provide for proxy voting in business corporations.¹¹

The best way to ascertain the state of the law as to proxy voting in non-profit organizations is to examine the provisions of the several states. References are to voting by members, except as otherwise noted. [These are from an article in 14 Clev.-Mar. L. Rev. 273 (1965).]:^{11a}

- Alabama: Proxy voting allowed unless articles or bylaws provide otherwise (three months maximum duration unless otherwise provided in the proxy).¹²
- Alaska: Corporation may "prescribe their respective voting rights" for members.¹³
- Arizona: Bylaws must be adopted and may provide for proxy voting by members.¹⁴
- Arkansas: One vote per member in elections of directors; in other voting of members, as the articles or bylaws may provide; and directors may vote by proxy.¹⁵
- California: Bylaws may provide manner of voting by members and whether proxy voting shall be allowed.¹⁶
- Colorado: No general provision; proxy voting prohibited in agricultural cooperatives, credit unions, and livestock coops., restricted in mutual benefit associations, and permitted in other non-profit coops.¹⁷
- Connecticut: Proxy voting allowed unless articles or bylaws provide otherwise (11 months maximum duration unless limited to a particular future meeting).¹⁸
- Delaware: Proxy voting allowed unless articles provide otherwise (three years maximum duration unless proxy provides a longer period).¹⁹ Members, officers, representatives, or delegates of

¹¹See lists of case citations by states in 5 Fletcher, *Cyclopedia of the Law of Private Corporations* 207 (1952 with 1972 cum. supp.).

^{11a}Note that most of these citations of statutes below are from Oleck, *Proxies in Non-Profit Orgns.*, 14 Clev.-Mar. L. Rev. 273 (1965).

¹²Code of Ala., tit. 10, Sec. 217.

¹³Alaska St. Sec. 10.20.080.

¹⁴Ariz. Rev. St. Anno. Sec. 10-706A3.

¹⁵Ark. St. Anno. Secs. 64-1911, 64-406.

¹⁶Anno. Cal. Code, Corporations, Sec. 9402(d).

¹⁷Colo. Rev. St. Secs. 31-24-5, 38-1-7, 31-24-5, 72-10-21, 31-25-6.

¹⁸Conn. Gen. St. Anno. Sec. 33-471.

¹⁹Del. Code Anno. tit. 8, Sec. 215.

- fraternal benefit society may not vote by proxy,²⁰ except Masons, Odd Fellows, and certain named other societies.²¹
- District of Columbia: Members or delegates may vote by proxy if bylaws so provide.²² No proxy voting by members in cooperative associations.²³
- Florida: No provision as to proxies in general non-profit corporations statute. Bylaws may provide for proxy voting in agricultural coop. marketing associations²⁴ and other cooperative associations,²⁵ but not in credit unions.²⁶
- Georgia: Proxies may be used by members of business corporations,²⁷ and non-profit corporations have generally similar powers.²⁸
- Hawaii: Members may vote by proxy; bylaws may provide the mode of voting of trustees, directors, or managers.²⁹
- Idaho: Members may vote by proxy,³⁰ with limitations for water users' associations,³¹ and bylaws may provide for proxy voting in cooperative marketing associations.³²
- Illinois: Members may vote by proxy unless articles or bylaws provide otherwise (11 months maximum duration unless otherwise provided in the proxy).³³
- Indiana: Voting in person or by proxy, as the bylaws shall provide (11 months maximum duration unless the proxy provides a longer time).³⁴
- Iowa: No provision in non-profit statute;³⁵ no proxy vote in cooperatives.³⁶

²⁰ *Ibid.* tit. 18, Sec. 1901(c).

²¹ *Ibid.* Sec. 1903.

²² D.C. Code Sec. 29-603.

²³ *Ibid.* Sec. 29-814.

²⁴ Fla. St. Anno. Sec. 618.09(3).

²⁵ *Ibid.* Sec. 619.06(6).

²⁶ *Ibid.* Sec. 657.07.

²⁷ Ga. Code Anno. Sec. 22-1863.

²⁸ *Ibid.* Sec. 22-1881.

²⁹ Rev. L. Hawaii Sec. 172-90.

³⁰ Idaho Code Secs. 30-134, 30-161.

³¹ *Ibid.* Sec. 30-140.

³² *Ibid.* Sec. 22-2610(c).

³³ Ill. Anno. St., ch. 32, Sec. 163a14. The right of members of non-profit corporation to vote is not protected by the constitution. *Westlake Hospital Assn. v. Blix*, 13 Ill. 2d 183, 148 N.E. 2d 471, app. dismd. 79 S. Ct. 44, 358 U.S. 43, 3 L. Ed. 2d 43 (1958).

³⁴ Ind. St. Anno. Sec. 25-515(c).

³⁵ Iowa Code Anno., ch. 504. Business corporation articles may deny right to vote by proxy. *Ibid.* Sec. 496 A. 32.

³⁶ *Ibid.* Sec. 498.18.

- Kansas: Members may vote by proxy (three years maximum duration unless proxy states a longer period).³⁷
- Kentucky: Directors must adopt bylaws, which may provide for proxy voting by members.³⁸
- Louisiana: Members may vote by proxy unless articles or bylaws prohibit it, and directors may vote by proxy if so provided (11 months maximum duration unless the proxy provides a longer period).³⁹ No proxy voting in credit unions.⁴⁰
- Maine: Proxy voting forbidden in fraternal associations⁴¹ and consumers' cooperatives.⁴² Otherwise they seem to be permitted (with maximum duration of one year),⁴³ or bylaws may provide for them.⁴⁴
- Maryland: Proxy voting by members may be provided for by articles or bylaws (use of proxies seems to be assumed).⁴⁵
- Massachusetts: Bylaws must provide rules for elections and the carrying out of purposes.⁴⁶ No specific provision.
- Michigan: No provision as to proxies in the general statute.⁴⁷ Proxies prohibited in fraternal benefit societies.⁴⁸ Forbidden in non-profit corporations,⁴⁹ except seemingly in elections of directors in some types of corporations.⁵⁰
- Minnesota: Proxy voting is permitted at all meetings unless prohibited by the articles or bylaws (11 months maximum duration), but directors may not vote by proxy.⁵¹
- Mississippi: Apparently voting by proxy is authorized generally,⁵² and specifically may be provided in bylaws of coop. associations,⁵³ but is forbidden to credit unions.⁵⁴

³⁷ Gen. St. Kans. Sec. 17-3304.

³⁸ Ky. Rev. St. Anno. Sec. 272.420 (3).

³⁹ La. St. Anno. Secs. 12:131; 12:35 (F).

⁴⁰ *Ibid.* Art. 6, Sec. 647.

⁴¹ Rev. St. Me., c. 60, Sec. 170.

⁴² *Ibid.* c. 56, Sec. 8.

⁴³ *Ibid.* c. 53, Sec. 28.

⁴⁴ *Ibid.* Sec. 23.

⁴⁵ Anno. Code Md. Art. 23, Sec. 135.

⁴⁶ Anno. L. Mass. c. 180, Secs. 7, 17.

⁴⁷ Comp. L. Mich. Sec. 450.122.

⁴⁸ *Ibid.* Sec. 524.3.

⁴⁹ *Ibid.* Sec. 450.32.

⁵⁰ *Ibid.* Sec. 450.651.

⁵¹ Minn. St. Anno. Secs. 317.22 (subd. 6), 317.20 (subd. 13).

⁵² Miss. Code Anno. Sec. 5326.

⁵³ *Ibid.* Sec. 4502; and electric power assns. Sec. 5471.

⁵⁴ *Ibid.* Sec. 5402.

- Missouri: Apparently voting by proxy may be provided for in the bylaws,⁵⁵ and is specifically provided for in elections of directors of cooperatives.⁵⁶
- Montana: Bylaws may provide rules for voting.⁵⁷ No specific provisions.
- Nebraska: Proxy voting is permitted unless articles or bylaws provide otherwise (11 months maximum duration unless the proxy provides otherwise).⁵⁸
- Nevada: No specific provisions; vague bylaw powers.⁵⁹
- New Hampshire: No specific provisions; vague bylaw powers.⁶⁰
- New Jersey: No specific provision,⁶¹ in absence of statutory authority plus bylaw provisions, no proxy voting.⁶²
- New Mexico: Bylaws may make voting rules.⁶³ No specific provision.
- New York: Proxy voting permitted, unless articles or bylaws provide otherwise.⁶⁴ Lack of a bylaw does not abridge the right.⁶⁵ Directors may not vote by proxy.⁶⁶ Proxy as security device is provided for.^{66a}
- North Carolina: Proxy voting allowed unless articles or bylaws provide otherwise (11 months maximum duration unless the proxy provides otherwise).⁶⁷
- North Dakota: Proxy voting allowed unless articles or bylaws provide otherwise (11 months maximum duration unless the proxy provides otherwise).⁶⁸ No proxy voting in credit unions and fraternal benefit societies.⁶⁹
- Ohio: No proxy voting by members (except organizations which are members) unless the articles or bylaws so provide.⁷⁰

⁵⁵ Anno. Mo. St. Sec. 352.110.

⁵⁶ *Ibid.* Secs. 357.090, 357.110.

⁵⁷ Rev. Codes Mont. Sec. 15-1404.

⁵⁸ Rev. St. Nebr. Secs. 21-1914, 21-1915.

⁵⁹ Nev. Rev. St., c. 81.

⁶⁰ N.H. Rev. St. Anno. Sec. 295:5.

⁶¹ N.J. St. Anno. Sec. 15:1-9.

⁶² *Lo Curto v. River Edge Girl Scouts Assn.*, 59 N.J. Super. 408, 157 A. 2d 862 (1960).

⁶³ New Mex. St. Sec. 51-14-29.

⁶⁴ N.Y. Not-For-Profit Corp. L. §609; and voting agreements, *id.* §619.

⁶⁵ *Flynn v. Kendall*, 195 Misc. 221, 88 N.Y.S. 2d 299 (1949).

⁶⁶ *Craig Medicine Co. v. Merchants' Bank*, 59 Hun 561, 14 N.Y.S. 2d 16 (1891).

^{66a} N.Y. Not-For-Profit Corp. L. §609.

⁶⁷ Gen. St. No. Car. Sec. 55-A-32(b).

⁶⁸ No. Dak. Cent. Code Anno. Sec. 10-24-15.

⁶⁹ *Ibid.* Secs. 6-06-10, 26-12-03.

⁷⁰ Ohio Rev. Code Sec. 1702.20.

- Oklahoma: Proxy voting allowed (seven years maximum duration, but 11 months maximum unless otherwise provided in the proxy).⁷¹
- Pennsylvania: Proxy voting allowed if bylaws so provide (11 months maximum duration, unless a longer period, up to three years, is provided therein).⁷²
- Rhode Island: Proxy voting may be provided for by articles or bylaws.⁷³
- South Carolina: Vague bylaw powers,⁷⁴ but proxy voting may be provided for by bylaws of cooperative marketing associations⁷⁵ and rural electric coops.⁷⁶
- South Dakota: Proxy voting allowed, in vague provision;⁷⁷ must be in bylaws for existing communals;⁷⁸ various special provisions for specific types of organizations.
- Tennessee: Proxy voting allowed in elections.⁷⁹
- Texas: Proxy voting by members permitted unless articles or bylaws provide otherwise (11 months maximum duration unless otherwise provided in the proxy).⁸⁰
- Utah: Members may vote by proxy unless articles or bylaws provide otherwise.⁸¹
- Virginia: Members may vote by proxy unless articles or bylaws provide otherwise (11 months maximum duration unless otherwise provided in the proxy).⁸²
- Virgin Islands: Vague bylaw powers; apparently may provide for proxy voting.⁸³
- Washington: Vague bylaw powers; apparently may provide for proxy voting.⁸⁴ Credit unions may not use proxy voting.⁸⁵
- West Virginia: Vague provision, apparently permitting use of proxy voting.⁸⁶

⁷¹Okla. St. Anno., tit. 18, Secs. 160, 1.3.

⁷²Pa. St. Anno., tit. 15, Sec. 2851-606.

⁷³Gen. L.R.I. Sec. 7-6-12.

⁷⁴Code L. So. Car. Sec. 12-758.

⁷⁵Ibid. Sec. 12-951 (3).

⁷⁶Ibid. Sec. 12-1034.

⁷⁷So. Dak. Code Sec. 11.0711.

⁷⁸Ibid. Sec. 11.1205, now replaced by new c. 11.12.

⁷⁹Tenn. Code Anno. Sec. 48-1114.

⁸⁰Tex. Civ. St. Art. 1396-2.13.

⁸¹Utah Code Anno. Sec. 16-6-30.

⁸²Code Va. Sec. 13.1-217.

⁸³Virgin Islands Code, tit. 13, Sec. 495.

⁸⁴Rev. Code Wash. Secs. 24.04.060, 24.04.020.

⁸⁵Ibid. Sec. 31.12.160.

⁸⁶W. Va. Code Sec. 3016 (1) (1, 6).

Proxies

441

Wisconsin: Members may vote by proxy unless articles or bylaws provide otherwise (11 months maximum duration unless otherwise provided in the proxy).⁸⁷ No proxy voting in credit unions⁸⁸ nor mutual benefit societies.⁸⁹

Wyoming: Voting by proxy allowed.⁹⁰

The foregoing summaries of state statutes and rules should suffice to convey a fair idea of the present status of the law on voting by proxy. Many state statutes contain special additional rules applicable to certain specific types of organizations. The summaries here provided contain the major provisions on the subject.

Memorandum 76-20

526

EXHIBIT II

BRAUDE v. HAVENNER
38 C.A.3d 526; 113 Cal.Rptr 386

[Civ. No. 33512. First Dist., Div. Four. Apr. 10, 1974.]

MARVIN BRAUDE et al., Plaintiffs and Appellants, v.
JOSEPH E. HAVENNER et al., Defendants and Respondents.

SUMMARY

In an action contesting an election of directors by the Automobile Club of Southern California, the trial court gave judgment voiding proxies obtained from persons who applied for membership by mail, but upholding the validity of other proxies and the results of the election. Plaintiffs made a broad attack on the fairness of the club's election practices, and the court determined, in its findings of fact, that the effect of the club's solicitation of proxies, failure to give any more than minimal legal notice of the annual meeting, failure to disclose nominees to be voted on at the meeting, and the impracticality of any third person's being able to communicate effectively with the members of the club, all had the necessary result of perpetuating the directors in office without affording to the members a fair opportunity to express their vote for other candidates. The judgment, however, failed to grant relief from such effective exclusion of real exercise of the franchise by club members. (Superior Court of Los Angeles County, No. 996 002, John L. Cole, Judge.)

The Court of Appeal reversed with directions to the trial court to enter a new judgment determining that the electoral procedures which led to the selection of defendant directors were unfair and unlawful. Though the contested terms of office had expired, the court concluded that the appeal should not be dismissed as moot, since it involved the general public interest and the future rights of the parties, and there was a reasonable probability that the same questions would again be litigated and appealed. The court approved the trial court's voiding of the proxies of mail-order applicants, and its finding of validity of proxies obtained from persons who applied for membership in person. The procedures employed for obtaining proxies from continuing members were not considered since the request form had been superseded by a new form not in issue. Though it noted circumstances supporting the trial court's

[Apr. 1974]

determination that it would be inequitable and unfair to the club and the majority of its members to set aside the election, the court concluded that the judgment was inconsistent with the total effect of the findings in that it failed to grant relief from the effective exclusion of real exercise of the franchise by club members which was found to have occurred. (Opinion by Christian, J., with Caldecott, P. J., and Rattigan, J., concurring.)

HEADNOTES

Classified to McKinney's Digest

- (1) **Appeal § 912(7)—Grounds for Refusing Dismissal.—**Dismissal of an appeal from a judgment upholding a directors' election held by the Automobile Club of Southern California, a nonprofit corporation, was not appropriate, even though the contested terms of office had expired during pendency of the appeal, where the matter involved the general public interest and the future rights of the parties, and there was reasonable probability that the same questions would again be litigated and appealed.
- (2) **Corporations § 379—Stockholders' Elections—Attack on Validity.—**In determining a challenge to a corporate election, the court should consider all factors bearing on the validity of the questioned election and give effective direction to the relief required. Thus, the scope of inquiry is not limited to technical and procedural questions involved in the election.
- (3) **Corporations § 902.1—Nonprofit Corporations—Proxies.—**In an action challenging a directors' election held by the Automobile Club of Southern California, a nonprofit corporation, the trial court correctly determined that a prospective member of the club is not prevented, under Corp. Code, § 2225, referring to execution of a proxy by a "person entitled to vote," from executing a proxy when he applies for membership. To execute a proxy is to appoint an agent for a special purpose, and an agent may be appointed before the happening of an event which may call for him to exercise his powers as an agent.

[Apr. 1974]

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- (4) **Corporations § 902.1—Nonprofit Corporations—Proxies.**—In an action challenging a directors' election held by the Automobile Club of Southern California, a nonprofit corporation, the trial court correctly concluded that "over-the-counter" proxies obtained from applicants for membership were not invalid, where, though such applicants were requested to sign the proxy form, it unambiguously stated that it created a voting agency, and there was evidence that the club's field representatives, in answer to questions, disclosed that it was not necessary to execute a proxy in order to apply for membership.
- (5) **Corporations § 117 — Validity of Bylaws.** — Corporations have no power to create bylaws that are unreasonable in their practical application, and bylaws seemingly in compliance with statutory provision are invalid if they are unreasonable.
- (6) **Corporations § 902.1—Nonprofit Corporations—Election Practices.**—In an action challenging a directors' election held by the Automobile Club of Southern California, a nonprofit corporation, the trial court's judgment was deficient in failing to grant relief from the effective exclusion of real exercise of the franchise by club members, where the court had determined, in its findings of fact, that the effect of the club's solicitation of proxies, failure to give any more than minimal legal notice of the annual meeting, failure to disclose nominees to be voted on at meeting, and the impracticality of any third person's being able to communicate effectively with the members of the club, all had the necessary result of perpetuating directors in office without affording to the members a fair opportunity to express their vote for other candidates.

[See Cal.Jur.3d, Associations and Clubs, § 49 et seq.; Am.Jur.2d, Corporations, § 1082.]

COUNSEL

Alvin S. Kaufer, Robert T. Belber, James A. Hamilton, Carlyle W. Hall, Jr., Mary D. Nichols, John R. Phillips, Brent N. Rushforth and Fredric P. Sutherland for Plaintiffs and Appellants.

Adams, Duque & Hazeltine, James S. Cline and Bruce A. Beckman for Defendants and Respondents.

OPINION

CHRISTIAN, J.—Appellants Marvin Braude and James Ruddick brought this action under Corporations Code section 2236 et seq., to set aside an election in which respondents Toll, King, and Milligan were selected as members of the Board of Directors of the Automobile Club of Southern California. Appellants attacked the validity of proxies executed by members of the club and sought a declaration of rights and equitable relief. A stipulation of facts, entered into by the parties, was supplemented by testimony taken in a nonjury trial. The court gave judgment voiding some proxies but upholding the results of the election; the present appeal followed.

The Automobile Club of Southern California is a nonprofit corporation with more than one million members. The club extends to its members services related to motoring, such as travel information and emergency road service. It also participates in public activity concerning legislation that may affect motoring. Through its board of directors the club controls the Interinsurance Exchange of the Automobile Club of Southern California, an entity which provides insurance to some members of the club. The insurance exchange has assets of over \$200 million. The club is governed by its 11-member board of directors; the board elects officers who manage the club business, appoint committees, adopt rules and regulations to control the transaction of business, and amend the club's bylaws.

The Automobile Club of Southern California worked against a proposition on the November 1970 general election ballot which would have permitted the application of gasoline tax revenue to mass transit purposes. This prompted Braude to seek election to the board. Braude was nominated at the annual members' meeting of the club held on February 22, 1971. Present at the meeting were 107 active members; in addition, 732,757 members were represented by proxy. Respondents Havenner,

[Apr. 1974]

Lowe, and Farrand held 721,143 of the proxies, obtained as follows: 382,045 were obtained "over-the-counter" from new members; 83,863 were obtained by mail from new members; and 262,235 were obtained from continuing members. Braude was defeated in the election; respondents King, Toll, and Milligan were elected directors. The trial court held invalid the 83,863 proxies obtained by mail from new members of the club, but it upheld the validity of the other proxies and of the election.

(1) The contested terms of office have expired during the pendency of this appeal. We have concluded, however, that the appeal should not be dismissed as moot; it involves "the general public interest and the future rights of the parties, and there is reasonable probability that the same questions will again be litigated and appealed, . . ." (*People v. West Coast Shows, Inc.* (1970) 10 Cal.App.3d 462, 468 [89 Cal.Rptr. 290]; see also 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, pp. 4426-4428.)

As a nonprofit corporation, the Automobile Club of Southern California is regulated by the General Nonprofit Corporation Law.¹ The General Corporation Law (§§ 100-6804) applies to nonprofit corporations except regarding matters governed by the General Nonprofit Corporation Law (§ 9002).

Because nonprofit corporations generally do not issue stock, the ultimate governing interest rests with members rather than with shareholders. (See 2 Ballantine & Sterling, Cal. Corporation Laws (4th ed. 1973) p. 759.) An equitable remedy has been provided for a member who wishes to challenge a corporate election. (See, e.g., *Columbia Engineering Co. v. Joiner* (1965) 231 Cal.App.2d 837, 842-849 [42 Cal.Rptr. 241].) The code provides very broadly that "[t]he court may determine the person entitled to the office of director or may order a new election to be held or appointment to be made, and direct such other relief as may be just and proper." (§ 2238.) (2) In determining a challenge to a corporate election the court should consider all factors bearing on the validity of the questioned election and give effective direction to the relief required. (*Lawrence v. I. N. Parlier Estate Co.* (1940) 15 Cal.2d 220, 227 [100 P.2d 765].) Thus, the scope of inquiry is not limited to technical and procedural questions involved in the corporate election. (*Columbia Engineering Co. v. Joiner, supra*, 231 Cal.App.2d at p. 844; see 2 Ballantine & Sterling, Cal. Corporation Laws, *supra*, § 196, p. 386.)

(3) Appellants contend that proxies obtained from applicants for mem-

¹Corporations Code sections 9000-9802. All code citations hereafter are to the Corporations Code unless specified otherwise.

bership in the club are void as having been taken prematurely. Under the bylaws applications for membership are "subject to approval and acceptance by the Board of Directors or any person or persons designated by them." Section 2225 states that a person entitled to vote may do so by an agent authorized by a written proxy.² Therefore (the argument runs) applicants who signed proxies before they were accepted as members were not then "entitled to vote" and not therefore authorized to give a proxy. Appellants' interpretation of section 2225 is strained. There is no requirement that only those already entitled to vote may execute proxies. To execute a proxy is to appoint an agent for a special purpose. (2 Ballantine & Sterling, Cal. Corporation Laws, *supra*, § 192 at p. 371.) An agent may be appointed before the happening of an event which may call for him to exercise his powers as agent. The trial court acted correctly in determining that there was no reason to prevent a prospective member of the club from executing a proxy when he applies for membership.

Persons who applied by mail for membership received an application form accompanied by an attachment which requested the applicant to "sign both sides." One side of the application was an application form; the other was a proxy. The trial court concluded that the proxies obtained in this manner were invalid because the attachment suggested that the applicant was required to execute both the application and the proxy if he wanted to join the club. That determination was sound; it is not contested by respondents.

(4) Proxies were obtained over-the-counter from applicants as follows: When a person inquired about membership at a field office of the club he was given a brochure, and the services outlined in the brochure were explained. If a membership was desired, the applicant was given the same form used in postal transactions, but the attachment requesting the applicant to sign both sides was not used. Applicants were asked to sign the proxy, and were not told about the effect of the proxy unless they specifically inquired. The club's field representatives were instructed to advise any applicant who questioned the proxy "that the proxy is a device used by many organizations which conduct their business through an elected Board of Directors to facilitate the conducting of the business of the organization when members can't or don't wish to attend meetings," and that the signing of a proxy is not required. The trial court concluded that proxies obtained over-the-counter were not invalid. Substantial evi-

²Corporations Code section 2225: "Every person entitled to vote or execute contracts may do so either in person or by one or more agents authorized by a written proxy executed by the person or his duly authorized agent and filed with the secretary of the corporation."

dence supports that conclusion. The proxy form unambiguously states that it creates a voting agency, and there was evidence that the club's field representatives, in answer to questions, disclosed that it was not necessary to execute a proxy in order to apply for membership. (Cf. *Wyatt v. Armstrong* (1945) 186 Misc. 216 [59 N.Y.S.2d 502, 505].)

The procedure for obtaining proxies from continuing members is also attacked by appellants. Each year a proxy solicitation is sent to each member whose proxy has expired or is about to expire. The trial court held that the procedure was not objectionable. We do not examine the fairness of the proxy request which is under attack; it has been superseded by a new form which is not in issue in this appeal.

Appellants have launched a broad attack on the fairness of the club's election practices. First, it is contended that it was improper for the club to pay the management's expenses in soliciting proxies for the board of directors. In general, corporate funds and proxy machinery may be used for management's solicitation of proxies if the proxies are needed to conduct ordinary corporate business, such as obtaining a quorum and voting on normal, uncontested business matters. (*Rosenfeld v. Fairchild Engine & Airplane Corp.* (1955) 309 N.Y. 168, 172-173 [128 N.E.2d 291, 292-293, 51 A.L.R.2d 860]; see Eisenberg, *Access to the Corporate Proxy Machinery* (1970) 83 Harv.L.Rev. 1489, 1495-1496.) In the case of contested elections, it is said that corporate funds may be used if a policy issue is at stake as opposed to a strictly personal power contest. (*Rosenfeld v. Fairchild Engine & Airplane Corp.*, *supra*, 309 N.Y. at p. 173 [128 N.E.2d at p. 293].) The rule is uncertain in application because every contest involves or can be made to involve issues of policy. (Eisenberg, *Access to the Corporate Proxy Machinery*, *supra*, 83 Harv.L.Rev. at pp. 1497-1498.)

In any event, management's solicitation is not without limit. Incumbent directors may not use the corporate proxy machinery solely to perpetuate themselves in office. (Eisenberg, *Access to the Corporate Proxy Machinery*, *supra*, 83 Harv.L.Rev. at p. 1495; see, e.g., *Hall v. Trans-Lux Daylight Picture Screen Corp.* (1934) 20 Del.Ch. 78 [171 A. 226, 228-229]; cf. *Burnett v. Banks* (1955) 130 Cal.App.2d 631, 634 [279 P.2d 579] [no director may perpetuate himself in office by refusing to call an election].) Other limits on the board's use of the corporate proxy machinery are inherent in each director's fiduciary obligations to the members or shareholders. (*Rosenfeld v. Fairchild Engine & Airplane Corp.*, *supra*, 309 N.Y. at p. 173 [128 N.E.2d at p. 293].)

Other aspects of the process employed in the election of directors are attacked. The club's bylaws provide that a nominating committee appointed by the club's president is to prepare a list of nominees for director which contains as many names as there are vacancies on the board. The list is not required by the bylaws to be disclosed other than by publication once in a newspaper of general circulation prior to the annual meeting. Active members may nominate other candidates at the annual meeting. Appellants contend that the election was unfair because the club's bylaws permit members to nominate candidates for director only at the annual meeting, while the bylaws permit notice of the annual meeting to be given in an ineffective manner. Although the nominating committee is required to act at least 15 days prior to the annual meeting, candidates nominated by club members may not be put forward until the annual meeting has been convened. (5) Corporations have no power to create bylaws that are unreasonable in their practical application (*People's Bank v. Superior Court* (1894) 104 Cal. 649, 652 [38 P. 452]); bylaws seemingly in compliance with statutory provision are invalid if they are unreasonable. (*Id.*; *Haynes v. Annandale Golf Club* (1935) 4 Cal.2d 28, 30 [47 P.2d 470, 99 A.L.R. 1439].) By permitting nominations by members only at the annual meeting, the club's bylaws restrict the members' right to nominate, and hence elect, the directors. (See *Com. ex rel. Gallagher v. Knorr*, 21 Pa. Dist. R. 784 [held similar bylaw unreasonable], discussed in *Matter of Farrell* (1923) 205 App. Div. 443 [200 N.Y.S. 95, 97], *affd.* 236 N.Y. 603 [142 N.E. 301].)

(6) In its findings of fact the trial court determined that "considering all of the circumstances, the effect of defendant club's solicitation of proxies, failure to give any more than minimal legal notice of the meeting, failure to disclose nominees to be voted upon at the meeting, and the impracticality of any third person[s] being able to communicate effectively with the members of the club, all have the necessary result of perpetuating directors in office without affording to the members a fair opportunity to express their vote for other candidates if that is what a given member desires to do." That view of the situation was directly responsive to the issues posed by appellants' broad-scale attack on the club's electoral procedures. It was consistent with, indeed virtually compelled by, uncontradicted evidence.

The findings also set out several circumstances which, as the court reasonably determined, indicated that it would be "inequitable and unfair to the club, to the best interests of the club, and to the majority of the members of the club to set aside the election . . ." which had been the primary target of attack in this action. It cannot be said that it would have been an abuse of discretion to abstain from annulling the past election

while making provision to prevent the continued employment of electoral procedures which resulted in "perpetuating directors in office without affording to the members a fair opportunity to express their vote for other candidates." The judgment, however, is inconsistent with the total effect of the findings in that it failed to grant relief from the effective exclusion of real exercise of the franchise by club members which was found to have occurred. (See Corp. Code, § 2238.)

Respondents have represented to this court, by material not part of the record on appeal, that some deficiencies in the electoral procedures discussed above have been corrected. We make no determination concerning the merits of those changes; the trial court can more appropriately consider those matters.

The judgment is reversed with directions to enter a new judgment determining that the electoral procedures which led to the selection of respondent directors were unfair and unlawful. The trial court will retain jurisdiction as a court of equity to compel respondents to put into effect such new electoral process as the court may consider just and proper. The trial court may take further evidence before determining whether to approve or order any specific electoral plan.

Caldecott, P.J., and Rattigan, J., concurred.

A petition for a rehearing was denied May 10, 1974, and the judgment was modified to read as printed above.



Important Message for Members

Will you and each Associate Member in your household please take a moment to read this important proxy information?

IT IS IMPORTANT that you be represented at the membership meetings of the California State Automobile Association, even though you may be unable to attend in person.

IF A PROXY FORM BEARING YOUR NAME IS NOT ENCLOSED

- This means that CSAA records show that you have a proxy on file which is not due to expire within the next twelve months. You should know that you may revoke your proxy at any time.

IF A PROXY FORM BEARING YOUR NAME IS ENCLOSED

- This means that CSAA records show
 - you have no proxy on file, or
 - your prior proxy has expired, or
 - your current proxy will expire within the next twelve months

The enclosed proxy forms give you the choice of appointing as your proxy any individual(s) you wish. The names preprinted on the proxy form are CSAA Officers and Directors, CSAA Management invites you to express your confidence in them by appointing the named Directors and Officers as your proxies. This will help to insure that the affairs of CSAA and the services it renders to you will continue to be directed in the same manner which has made CSAA the organization it is today. Your proxy will be exercised in the election of Directors as well as in voting on any other matter which may come before the regular or any special Membership Meeting which you do not attend.

You are invited to sign and return THE PROXY FORM BEARING YOUR NAME in accordance with the instructions below.

PLEASE NOTE

- 1) You do NOT have to sign a proxy in order to renew your membership.
- 2) You may attend and exercise your own vote at any Membership Meeting, whether you have signed a proxy or not. (Date and location of Membership Meetings are published in Motorland.) You may substitute a proxy of more recent date designating a different proxy holder if you wish. A PROXY OF MORE RECENT DATE SUPERSEDES A PRIOR PROXY.
- 3) You have the right to appoint any individual(s) other than the named Officers and Directors, by printing in your proxy(ies) name(s) in the space provided on the proxy form.
- 4) Your proxy will remain in effect for five years, unless revoked or you check the box on the proxy form to indicate that you wish it to remain in force for only one year.
- 5) You may revoke your proxy at any time.

I hope you will protect your voting franchise by appointing a proxy of your choice in the event you are unable to attend Membership Meetings. I particularly hope you will see fit to appoint as your proxy the Directors and Officers named on the enclosed proxy form. Your support is appreciated.

Sincerely,

Neal Garrison
Secretary

INSTRUCTIONS:

1. Use the proxy form which bears YOUR name and membership number.
2. Sign your name on the line provided exactly as it appears on the proxy.
3. Date the proxy in the space provided. If undated, your signature will be authority for CSAA to enter the date of receipt.
4. To designate someone other than the named Directors and Officers as your proxy(ies), please PRINT your proxy(ies) name(s) and address(es) (if known) on the line provided near the top of the proxy. The address is to assist CSAA in identifying your proxyholder.
5. If you wish your proxy to remain in force for only one year, please check the box just above your signature.
6. IMPORTANT: Please return the completed proxies in the enclosed envelope.

OUTLINE

- § 5124. Business corporation
- § 5129. Proxy
- § 5130. Vote
- § 5263. Bylaws relating to voting rights

CHAPTER 7. VOTING OF MEMBERSHIPS

- § 5700. Voting rights and manner of voting
- § 5701. Record date for determining members
- § 5702. Voting of membership held by partnership, association, family, or other group
- § 5703. Voting of membership held by corporation
- § 5704. Voting of membership held by two or more persons
- § 5705. Proxies
- § 5706. Voting agreements
- § 5707. Inspectors of election
- § 5708. Cumulative voting
- § 5709. Contested elections or appointments

APPENDIX (pink pages)

- Corporations Code § 9402 (repealed)
- Corporations Code § 9601 (repealed)

§ 5124. Business corporation

5124. "Business corporation" means a corporation organized under Division 1 (commencing with Section 100) of Title 1 or a business corporation organized under any predecessor general corporation law or by any act of the Legislature creating a private corporation prior to the enactment of a general incorporation statute.

Comment. Section 5124 is new; it adopts the definition of "corporation" found in Section 162 (General Corporation Law).

§ 5129. Proxy

5129. "Proxy" means a written authorization signed by a member or the member's attorney in fact giving another person or persons power to vote with respect to the membership of the member. "Signed" for the purpose of this section means the placing of the member's name on the proxy (whether by manual signature, typewriting, telegraphic transmission, or otherwise) by the member or the member's attorney in fact.

Comment. Section 5129 is new. For a comparable provision, see Section 179 (General Corporation Law).

§ 5130. Vote

5130. "Vote" includes authorization by written consent.

Comment. Section 5130 is new. For a comparable provision, see Section 194 (General Corporation Law).

Note. Section 194 is subject to Sections 307(f) and 603(d); the staff has not yet examined these provisions.

§ 5263. Bylaws relating to voting rights

5263. (a) The bylaws may provide for the manner of voting by members and whether cumulative voting and proxy voting shall be allowed.

(b) A bylaw affecting the voting rights of members shall not be adopted, amended, or repealed by the board.

Comment. Subdivision (a) of Section 5263 continues former Section 9402(d). For provisions relating to cumulative voting, see Section 5708; for provisions relating to proxy voting, see Section 5705.

Subdivision (b) is new. It is an exception to the rule of Section [9400] (manner of adoption, amendment, and repeal of bylaws).

Note. The staff has not yet drafted general provisions relating to adoption, amendment, and repeal of bylaws.

CHAPTER 7. VOTING OF MEMBERSHIPS

§ 5700. Voting rights and manner of voting

5700. (a) Unless the articles or bylaws provide otherwise, every member of a nonprofit corporation is entitled to one vote.

(b) The manner of voting may be by ballot, mail, or any reasonable means provided in the articles or bylaws.

Comment. Subdivision (a) of Section 5700 continues a portion of the first sentence of former Section 9601. For a comparable provision, see Section 700(a)(General Corporation Law). Although the established norm for nonprofit corporations is one vote per member (see Green Gables Home Owner's Ass'n v. Sunlite Homes, 202 P.2d 143 (1949)), the articles or bylaws may provide different classes of membership with differing voting rights (see Section 5261; see also Erickson v. Gospel Foundation, 43 Cal.2d 581, 275 P.2d 474 (1954)). Absent a specification of the rules fixing the respective voting rights of each member or class of members, the voting rights of members are equal. Section 5401.

Subdivision (b) continues the second sentence of former Section 9601.

§ 5701. Record date for determining members

5701. (a) In order that the nonprofit corporation may determine the members entitled to notice of any meeting or to vote or entitled to receive any allotment of any rights or entitled to exercise any rights in respect of any other lawful action, the board may fix, in advance, a record date which shall not be more than 60 nor less than 10 days prior to the date of such meeting nor more than 60 days prior to any other action.

(b) If no record date is fixed:

(1) The record date for determining members entitled to notice of or to vote at a meeting of members shall be at the close of business on the business day next preceding the day on which notice is given or, if notice is waived, at the close of business on the business day next preceding the day on which the meeting is held.

(2) The record date for determining members entitled to give consent to corporate action in writing without a meeting, when no prior action by the board is necessary, shall be the day on which the first written consent is given.

(3) The record date for determining members for any other purpose shall be at the close of business on the day on which the board adopts the resolution relating thereto or the 60th day prior to the date of such other action, whichever is later.

(c) A determination of members of record entitled to notice of or to vote at a meeting of members shall apply to any adjournment of the meeting unless the board fixes a new record date for the adjourned meeting, but the board shall fix a new record date if the meeting is adjourned for more than 45 days.

(d) Members on the record date are entitled to notice and to vote or to receive the allotment of rights or to exercise the rights, as the case may be, notwithstanding any transfer of any memberships on the books of the nonprofit corporation after the record date except as otherwise provided in the articles or bylaws.

Comment. Section 5701 supersedes provisions applicable to nonprofit corporations by former Sections 2214 and 2215 through former Section 9002. Section 5701 extends the permissible record date from 50 to 60 days prior to the event to which it relates, adds a 10-day cutoff prior to meetings of members, and provides rules governing the record date absent a date fixed by the board. For a comparable provision, see Section 701 (General Corporation Law).

Note. The staff has yet to draft provisions relating to meetings of members. The 10-day cutoff, designed for stock corporations, may prove to be inappropriate for nonprofit corporations.

§ 5702. Voting of membership held by partnership, association, family, or other group

5702. (a) Unless the articles or bylaws otherwise provide, a membership standing in the name of a partnership, association, family, or other group shall be voted by a person designated by the partnership, association, family, or other group to act as its representative. The name of the representative shall be delivered in writing to the non-profit corporation prior to the record date of the vote at which the representative is to act. Unless the articles or bylaws preclude voting by proxy, a representative so designated may vote by proxy.

(b) A new representative may be designated and the name of the new representative given in writing to the nonprofit corporation prior to the record date of the vote at which the new representative is to act. The designation of a new representative revokes any prior designation.

Comment. Section 5702 is new. It should be noted that only natural persons may be members of a nonprofit corporation unless the articles or bylaws provide otherwise. Section 5400. Moreover, where a nonprofit corporation allows partnership, association, family, and other group memberships, Section 5702 permits the articles or bylaws to provide differing voting requirements, such as majority or fractional voting by members of the partnership, association, family, or other group.

§ 5703. Voting of membership held by corporation

5703. (a) Unless the articles or bylaws otherwise provide, a membership standing in the name of another business corporation or nonprofit corporation, domestic or foreign, may be voted by such officer, agent, or proxyholder as the bylaws of the other corporation may prescribe or, in the absence of such provision, as the board of the other corporation may determine or, in the absence of such determination, by the chairman of the board, president, or any vice president of the other corporation, or by any other person authorized to do so by the chairman of the board, president, or any vice president of the other corporation.

(b) Memberships which are purported to be voted or any proxy purported to be executed in the name of a business corporation or nonprofit corporation, domestic or foreign (whether or not any title of the person signing is indicated) shall be presumed to be voted or the proxy executed in accordance with the provisions of this section unless the contrary is shown.

Comment. Section 5703 is comparable to Section 703(a) (General Corporation Law). It should be noted that only natural persons may be members of a nonprofit corporation unless the articles or bylaws provide otherwise. Section 5400. Moreover, where a nonprofit corporation allows corporate members, Section 5703 permits the articles or bylaws to provide differing voting requirements, such as designation of a voting representative. See Section 5702.

Subdivision (a) continues provisions applicable to nonprofit corporations by former Section 2222 through former Section 9002.

Subdivision (b) is new.

§ 5704. Voting of membership held by two or more persons

5704. (a) This section applies where a membership stands of record in the names of two or more persons, whether fiduciaries, members of a partnership, joint tenants, tenants in common, husband and wife as community property, tenants by the entirety, or where two or more persons (including proxyholders) have the same fiduciary relationship respecting the same membership, unless the secretary of the nonprofit corporation is given written notice to the contrary and is furnished with a copy of the instrument or order appointing them or creating the relationship wherein it is so provided.

(b) Unless the articles or bylaws otherwise provide, the acts with respect to voting of the persons in whose names the membership stands shall have the following effect:

(1) If only one person votes, such act binds all.

(2) If more than one person votes, the act of the majority so voting binds all; but, where the vote is evenly split on any particular matter, each faction may vote the membership in question proportionately. If the instrument so filed or the registration of the membership shows that the membership is held in unequal interests, a majority or even split for the purposes of this paragraph shall be a majority or even split in interest.

Comment. Section 5704 continues provisions applicable to nonprofit corporations by former Section 2223 through former Section 9002. For a comparable provision, see Section 704 (General Corporation Law). It should be noted, however, that no member may hold a fractional membership or a joint interest in a membership unless the articles or bylaws so provide. Section 5400. Moreover, where a nonprofit corporation allows memberships in the names of two or more persons, Section 5704 permits the articles or bylaws to provide differing voting requirements, such as designation of a single voting representative or fractional voting.

§ 5705. Proxies

5705. (a) Unless the articles or bylaws provide otherwise, every member of a nonprofit corporation entitled to vote may vote or act by proxy. Any proxy purporting to be executed in accordance with the provisions of this division shall be presumptively valid.

(b) No proxy shall be valid after the expiration of 11 months from the date thereof unless otherwise provided in the proxy. Every proxy continues in full force and effect until revoked by the person executing it prior to the vote pursuant thereto except as otherwise provided in this section. Such revocation may be effected by a writing delivered to the nonprofit corporation stating that the proxy is revoked or by a subsequent proxy executed by, or by attendance at the meeting and voting in person by, the person executing the proxy. The dates contained on the forms of proxy presumptively determine the order of execution, regardless of the postmark dates on the envelopes in which they are mailed.

(c) A proxy is not revoked by the death or incapacity of the maker unless, before the vote is counted, written notice of such death or incapacity is received by the nonprofit corporation.

Comment. Section 5705 states the basic rules governing proxies. The term "proxy" is defined in Section 5129, which also provides the manner of execution of proxies.

The first sentence of subdivision (a) continues a portion of former Section 9601; the second sentence is new. For a comparable provision, see Section 705(a)(General Corporation Law). Unlike the General Corporation Law, the General Nonprofit Corporation Law permits nonprofit corporations to preclude proxy voting. See also Section 5263 (bylaws relating to voting rights).

Subdivision (b) supersedes provisions applicable to nonprofit corporations by former Sections 2226 and 2228 through former Section 9002. Cf. Braude v. Havenner, 38 Cal. App.3d 526, 113 Cal. Rptr. 386 (1974). Unlike the former provisions, subdivision (b) imposes no seven-year maximum duration for a proxy and makes no provision for irrevocable proxies. The last sentence of subdivision (b) is new. For a comparable provision, see Section 705(b)(General Corporation Law).

Subdivision (c) continues provisions applicable to nonprofit corporations by former Section 2227 through former Section 9002. Cf. Braude v. Havenner, 38 Cal. App.3d 526, 113 Cal. Rptr. 386 (1974). For a comparable provision, see Section 705(c)(General Corporation Law).

§ 5706. Voting agreements

5706. (a) An agreement between two or more members of a nonprofit corporation, if in writing and signed by the parties thereto, may provide that, in exercising any voting rights, the memberships held by them shall be voted as provided by the agreement or as the parties may agree or as determined in accordance with a procedure agreed upon by them.

(b) If the articles or bylaws permit transfer of memberships, the parties may transfer the memberships covered by an agreement under this section to a third party or parties with authority to vote them in accordance with the terms of the agreement.

(c) An agreement under this section shall not be denied specific performance by a court on the ground that the remedy at law is adequate or on other grounds relating to the jurisdiction of a court of equity.

Comment. Section 5706 supersedes the voting trust provisions applicable to nonprofit corporations by former Sections 2230 and 2231 through former Section 9002. Unlike the former provisions, Section 5706 imposes no limitations on the duration of voting agreements nor does it make such agreements revocable at will of the parties. For a comparable provision applicable to close corporations, see Section 706(a) (General Corporation Law).

§ 5707. Inspectors of election

5707. (a) In advance of any meeting of members, the board may appoint inspectors of election to act at the meeting and any adjournment thereof. If inspectors of election are not so appointed, or if any persons so appointed fail to appear or refuse to act, the chairman of any meeting of members may, and on the request of any member or a member's proxy shall, appoint inspectors of election (or persons to replace those who so fail or refuse) at the meeting. The number of inspectors shall be either one or three. If appointed at a meeting on the request of one or more members or proxies, the majority of memberships represented in person or by proxy shall determine whether one or three inspectors are to be appointed.

(b) The inspectors of election shall determine the number of memberships outstanding and the voting power of each, the memberships represented at the meeting, the existence of a quorum and the authenticity, validity and effect of proxies, receive votes, ballots or consents, hear and determine all challenges and questions in any way arising in connection with the right to vote, count, and tabulate all votes or consents, determine when the polls shall close, determine the result, and do such acts as may be proper to conduct the election or vote with fairness to all members.

(c) The inspectors of election shall perform their duties impartially, in good faith, to the best of their ability, and as expeditiously as is practical. If there are three inspectors of election, the decision, act, or certificate of a majority is effective in all respects as the decision, act, or certificate of all. Any report or certificate made by the inspectors of election is prima facie evidence of the facts stated therein.

Comment. Section 5707 continues provisions applicable to nonprofit corporations by former Sections 2232 and 2233 through former Section 9002. For a comparable provision, see Section 707 (General Corporation Law).

§ 5708. Cumulative voting

5708. No member may cumulate votes for directors unless the articles or bylaws so provide.

Comment. Section 5708 continues the last sentence of former Section 2235 and the last sentence of former Section 9601. Nonprofit corporations, unlike business corporations, need not permit cumulative voting by members. Contrast Section 708 (General Corporation Law). See also Section 5263 (bylaws relating to voting rights). It should be noted, however, that cumulative voting in certain types of nonprofit corporations is prohibited. See Sections 5211 and 5212 (medical and legal services corporations).

§ 5709. Contested elections or appointments

5709. (a) Upon the filing of an action therefor by any member or by any person who claims to have been denied the right to vote, the superior court of the proper county shall try and determine the validity of any election or appointment of any director of any domestic nonprofit corporation, or of any foreign nonprofit corporation if the election was held or the appointment was made in this state. In the case of a foreign nonprofit corporation, the action may be brought at the option of the plaintiff in the county in which the foreign nonprofit corporation has its principal office in this state or in the county in which the election was held or the appointment was made.

(b) Upon the filing of the complaint, and before any further proceedings are had, the court shall enter an order fixing a date for the hearing, which shall be within five days unless for good cause shown a later date is fixed, and requiring notice of the date for the hearing and a copy of the complaint to be served upon the nonprofit corporation and upon the person whose purported election or appointment is questioned and upon any person (other than the plaintiff) whom the plaintiff alleges to have been elected or appointed, in the manner in which a summons is required to be served, or, if the court so directs, by registered mail; and the court may make such further requirements as to notice as appear to be proper under the circumstances.

(c) The court may determine the person entitled to the office of director or may order a new election to be held or appointment to be made, may determine the validity, effectiveness and construction of voting agreements, the validity of the issuance of memberships and the right of persons to vote, and may direct such other relief as may be just and proper.

Comment. Section 5709 continues provisions applicable to nonprofit corporations by former Sections 2236-2238 through former Section 9002. See Braude v. Havenner, 38 Cal. App.3d 526, 113 Cal. Rptr. 386 (1974). This section provides an equitable remedy in which the scope of inquiry is not limited to technical and procedural questions. 38 Cal. App.3d at 530.

Note. The staff has not yet researched foreign nonprofit corporations.

APPENDIX

Corporations Code § 9402 (repealed)

9402. The by-laws of a nonprofit corporation may make provisions for:

(a) The admission, election, appointment, withdrawal, suspension, and expulsion of members.

(b) The qualifications of members and different classes of memberships, and the property, voting, and other rights, interests, or privileges, or any of them, of members or classes of members.

(c) The transfer, forfeiture, and termination of membership, and whether the property interest of members shall cease at their death or the termination of membership, and the mode of ascertaining the property interest, if any, at death or the termination of membership.

(d) The manner of voting by members and whether cumulative voting and proxy voting shall be allowed.

(e) The making of annual reports and financial statements to the members.

Comment. Subdivision (a) of former Section 9402 is continued in Section 5262(a). Subdivision (b) is superseded by Section 5261. Subdivision (c) is continued in Section 5262(b). Subdivision (d) is continued in Section 5263(a).

Note. The staff has not yet disposed of subdivision (e).

Corporations Code § 9601 (repealed)

9601. Unless the articles or by-laws provide otherwise, every member of a nonprofit corporation is entitled to one vote and may vote or act by proxy. The manner of voting may be by ballot, mail, or any reasonable means provided in the articles or by-laws. No member may cumulate his votes unless the articles or by-laws so provide.

Comment. The portion of the first sentence of former Section 9601 providing one vote per member is continued in Section 5700(a); the portion authorizing proxy voting is continued in Section 5705. The second sentence is continued in Section 5700(b). The last sentence is continued in Section 5708.