

1. The most basic thing that Elvis must establish is that he has an express pursuant to the company bylaws or operating agreement that he has such a right. Under Texas law, since September 1, 2003, there is no assumed or default right to purchase shares as part of a preemptive, absent some agreement otherwise (until that date, preemptive rights were assumed). As such, Elvis will have to prove that express right exists in one of the company agreements, bylaws or his original purchase agreement.

Additionally it is important to note that if preemptive rights do exist, that apply only to unissued stock which is now being issued for case. (to be discussed further in #2) He would also have to show written request or demand to exercise his preemptive rights.

2. Elvis would have the right to purchase 300 shares if he establishes he posses a preemptive right under Texas law preemptive rights will only apply to unissued stock which is presently being issued for case. This means that preemptive rights would therefore not apply to the issuance of stock as compensation in exchange for property or some other non-cash exchange.

As applied to the current facts we see that Widget intends to issue an additional 5,000 shares. However, as discussed above, to determine Elvis' right to purchase one must view the manner in which that stock is being issued. 1000 shares are being issued as compensation, and therefore is not a cash transaction and Elvis' preemptive rights would not apply. An additional 1,000 shares are being issued in exchange for equipment. Again this is not a cash transaction so Elvis would not have preemptive rights as to his portion. The remaining 3,000 shares are being sold to the general public. To this portion of the shares, Elvis would have preemptive rights. Preemptive rights essentially entitle a shareholder to purchase that proportion of shares being offered that he currently owns. As such, Elvis currently holds 500 shares of 5000 total issued shares or 10% Elvis would therefore be entitled to purchase 10% of the 3000 shares now being offered for purchase. Elvis is entitled to purchase 300 shares.

3. Yes, Elvis can require Widget to pay him for his shares. Under Texas law, when a closely held corporation makes a fundamental change, such as a being sold or merged with another company, a shareholder is entitled to express his dissention with that decision, and ultimately may be entitled to have his shares bought out or repurchased by the company. Texas law requires several specific, statutorily defined steps for this action to be taken. First the shareholder must receive timely notice of a meeting to vote on such a decision, which has already occurred here. Next, the dissenting shareholder (Elvis) must send written notice to the corporation (typically the secretary or president) expressing his disagreement with the decision and his anticipated actions of voting against it and then requesting a buy out. Elvis must next then actually vote against the decision to merge at the shareholder meeting. And finally, after the vote has occurred and passed, Elvis must provide written notice within the statutory prescribed time (30 days) of his desire to have his shares repurchased by the corporation.

END OF EXAM

1. In order to establish that he has preemptive right, Elvis must show that the certificate of formation or corporation bylaws give him this right. In Texas, a preemptive right must be expressly stated in the corporation's certificate of formation or bylaws if the corporation was incorporated on or after September 1, 2003. For corporation incorporated before September 1, 2003, a preemptive right is always available. Here, the corporation was incorporated in 2006 so there is no automatic preemptive right. Therefore, Elvis must show that the certificate of formation or bylaws authorizes such a right. Elvis would also need to show the corporation did not detrimentally rely on his waiver over the phone and already sell the shares.

2. If Elvis establishes a preemptive right, he would have the right to purchase 300 shares. A preemptive right in Texas allows a shareholder to purchase shares that are issued for money in the same proportion to his current ownership of the outstanding shares. Outstanding share are issued stock that the corporation has not reacquired. Here, Elvis owns 500 shares of a total of 5,000 outstanding shares (his 500 plus 4,500 owned by others). Therefore, he owns 10% (500/5000). He is only entitled to enforce a preemptive right (if he has one) on stock issued for money. Therefore, he has no preemptive right for the 1,000 shares given to Veronicas as compensation or for the 1,000 shares given to supplier in exchange for equipment. He would, however, have a preemptive right for the 3,000 shares up for sale. Since he owns 10% of the outstanding stock, he is entitled to 10% of the newly issued stock for money (10% of 3000 = 300). Of course, this does not mean he is required to purchase 300 shares but if he has a preemptive right, he is able to do so if he chooses.

3. Yes; Elvis can require Widget to pay for his shares so long as the corporation is a close corporation. In Texas, a close corporation must give its shareholders a right of appraisal whenever they merge. This applies if there are less than 2,000 shareholders and the stock is not publicly traded. The facts here do not state how many shareholders there are and imply that the shares are not publicly traded. Assuming both these conditions are met, the corporation qualifies as a close corporation with a right of appraisal for its shareholders. In Texas, shareholders with a right of appraisal can exercise this right when there is a fundamental corporate change. Here, there is a merger (which is a fundamental corporate change) so there is a right of appraisal. In order to perfect the right of appraisal, a shareholder must submit his dissent and intention to assert his right of appraisal to the shareholder before their meeting to vote on the proposed merger. Next, the shareholder must abstain from voting for the merger or he must vote against the merger. Then, within 20 days after the merger is approved by the shareholders (2/3 of those entitled to vote), he must send a written request to be bought out. He must receive a reply from the corporation within 20 days of his request stating their offer to buy him out. If he likes their offer, he can accept. If he does not like their offer he can bring a suit in court and the justice system will decide the price the corporation must pay to buy him out.

END OF EXAM

1. Elvis must show that the certificate of formation provides for preemptive rights. In Texas, corporations formed on, or after, September 1, 2003, must indicate in the certificate of formation or by-laws whether a shareholder has preemptive rights. Prior to the adoption of the TBOC, preemptive rights were automatic for corporations formed prior to September 1, 2003. Here, Widget Co. was formed in 2006 under the TBOC. Unless Widget expressly allows for preemptive rights, Elvis will not be able to exercise his option to maintain a proportionate share of ownership via preemptive rights.

2. Elvis will be allowed to purchase 300 shares if he establishes a preemptive right. In Texas, preemptive rights are available only when shares are issued for money. Preemptive rights do not arise when shares are issued for compensation, property, or other goods. Here, Widget's exchange of 1,000 shares to Veronica as compensation will not be subject to preemptive rights. Similarly, the 1,000 shares for equipment will not trigger preemptive rights. However, the 3,000 shares for sale to the public will allow for preemptive rights as this will be an issuance for money. Elvis will have the option to buy 300 shares of the issuance as he already owns 10% of the outstanding stock. This amount will maintain a proportionate ownership interest. Elvis will be allowed to purchase these share although he orally revoked his preemptive right. Revocation orally is ineffective, and the intent to invoke preemptive rights must be communicated in writing. Elvis effectively communicated his intent with the letter to the treasurer.

3. Yes, Elvis may require Widget to pay him for his shares through his right of appraisal. In Texas, a shareholder of a closely held, private corporation has the right of appraisal if he disapproves of a fundamental corporate change. To invoke this right, the shareholder must vote against the fundamental corporate change, give notice of intent to invoke the appraisal right, and provide an expected valuation of the shares for which he wants the corporation to pay. The corporation may accept the shareholder's appraisal proposal or deny it based upon a valuation difference. If the parties can't agree on a valuation, a court will appoint a third party to determine a fair value. Here, it is likely a presume that Widget is a closely held, private company, although the facts do not specify. Accordingly, Elvis should have the right of appraisal and must follow the steps above to relinquish his shares and be compensated.

END OF EXAM