

12)

(1) (a) Anne and Dan, as organizers, must have properly signed and delivered a Certificate of Formation.

(b) Anne and Dan were required to file the Certificate of Formation with the Secretary of State. The Secretary of State would subsequently file the Certificate of Formation and send an acknowledgment establishing that Anne's and Dan's certificate had been filed.

(c) The Certificate of Formation should contain the following: the name of the corporation, "Modern Restorations" (the name must not be misleading and must include the word "Company," "Corporation," or "Incorporated" or an abbreviation of any of the three; the names and addresses of the organizers; the number of initial directors; the names and addresses of the directors; the name and address of the corporate registered agent and their post office address; the statement of purpose (modern trend for general statement of purpose); the capital structure (authorized stock, issued stock, outstanding stock, etc.); and the duration of the corporation.

(d) The legal effect of filing a Certificate of Formation would be that a de jure corporation would be formed (a legal corporation). Now the corporation will be able to have an organizational meeting, where it can elect its board of directors, adopt bylaws and handle other corporate transactions.

(2) (a) Anne did not provide proper notice of the meeting. Under the Texas Business Organizations Code, a notice of a meeting of the board of directors must be in writing and provide information concerning the time, and place, but does not have to state the purpose of the meeting. An email notice is generally okay, if the respective directors consent to receiving notification in that manner. Here, Anne was not required to state the purpose of the meeting in her email. However, she was required to get the consent of the other 6 board members before providing them with email notification of a director meeting. There, there are no facts that indicate that any of the directors gave consent to receiving notice via email. In fact, one of the directors (Stan) specifically complained informing Anne "that the meeting was 'illegal' because he had not consented to be notified by e-mail. . . ." Thus, Anne did not provide proper notice of the meeting.

(b) Yes, the vote to purchase the building was effective as an act of the corporation. Under the Texas Business Organizations Code, a corporation acts either expressly by passing a resolution at a

meeting or impliedly by accepting a benefit. If notice of the meeting is not properly provided, then any acts taken at the meeting are void. Here, although notice was not properly given. The defect in notice was cured by Stan attending the meeting. When the meeting started there were four out of seven directors present, which was enough to have quorum at the meeting. Quorum is required before the board can make a vote. After quorum was acquired, Stan subsequently left causing the number of directors to reduce from four to three which is under quorum. However, case law has not established whether or not quorum can be lost once it is obtained. Thus, since there is no clear case law on the issue, we will assume that quorum still existed for a vote to be taken. The vote was unanimous (a favorable vote only requires a vote of majority of the directors present). Thus, the vote to purchase the building was effective as an act of the corporation.

(c) If Stan wants his dissent to be recorded in the minutes of the meeting, Stan must send a letter via registered or certified mail, return receipt requested to the corporate secretary. Had Stan remained at the meeting he could have written a note to the secretary during the meeting to ensure that his dissent was properly recorded.

END OF EXAM

12)

(1a) Anne and Dan must prepare and file a Certificate of Formation, formerly called the Articles of Incorporation.

(1b) The Certificate of Formation must be filed with the Texas Secretary of State.

(1c) The Certificate of Formation must include: (1) the name of the Corporation, which must include Corporation, Corp., or some variation of corporation in the name to give notice to anyone dealing with the corporation that it is a corporation; (2) the names and address of the initial incorporators (Anne and Dan) who formed the corporation and filed the Articles of Incorporation; (3) the number of initial directors and their names and address; (4) the name of the person to be designated as the corporation's registered agent and the address of the registered agent's office; (5) a statement of duration, which is how long the corporation is to be in existence for (if none stated, the duration of the corporation will be perpetual); (6) a statement of the purpose of the corporation; and (7) information regarding the shares of the corporation, such as the number of authorized shares the corporation will issue, the number and class of shares, and whether there will be a par value on the shares.

(1d) The corporation becomes a de jure corporation, or a legal corporation once the Certificate of Formation is filed. The corporation then becomes its own legal entity. It can sue and be sued, enter into contracts, and even be a partner of a partnership.

(2a) Anne did not provide proper notice of the special meeting.

For a Board of Director's annual meeting, no notice is required. For a special meeting, however, notice must be provided. Notice is acceptable by mail. Notice by e-mail is acceptable if this form of notice is in the bylaws as an acceptable form of notice or if the director's consent to this type of notice. The notice for a board of director's special meeting requires only the date, time, and place of the meeting. There is no requirement that the purpose be stated in the notice. The purpose is only required in a notice for a shareholder's meeting. The notice requirement is waived, however, if a partner shows up at the meeting in spite of the defective notice. A partner may also waive a defective notice by filing a written waiver of notice with the secretary of the corporation prior to the date of the meeting.

Here, there is no indication that the bylaws provided that notice could be given by e-mail. Also, it seems the directors did not consent to being notified through e-mail because Stan was claiming the meeting was illegal because he was notified by e-mail. However, because Stan was present at the

meeting, he waived the defective notice requirement. However, because three of the other directors were not available, unless they waived the notification requirement in writing to the secretary, any action taken at the meeting will not be valid.

(2b) The vote to purchase the building was not effective as an act of the corporation because notification was improper.

If all directors were properly notified, however, the act would be effective. To take any action at a meeting, a quorum must be established. A quorum is when a majority of the directors are present at the meeting. Once the quorum is established, then a majority of the directors present at the meeting must vote for the act in order for the corporation to be able to do that act on behalf of the corporation. Here, if there was proper notification, a quorum would have been established because four out of the seven directors were present. Even though Stan left, that does not matter. Once a quorum is established, it is not lost if anyone leaves. Because three out of the four directors voted in favor of the purchase, the purchase would have been effective as an act of the corporation.

(2c) To record his dissent in the minutes, Stan must make a writing of his dissent and give it to the secretary of the corporation. He must do this within a reasonable time after the meeting was held. The effect of his dissent will be that he will not be held to have been apart of any act that was taken in the meeting. Therefore, if the directors decided to take an act that made the directors liable, Stan will not also be held liable because he dissented in the minutes.

END OF EXAM

12)

1. In order to form the Texas corporation, Anne and Dan would need to file a certificate of formation with the Texas Secretary of State containing the required statutory information, the acceptance of which would be conclusive evidence of the corporation's existence under Texas law.

a. The certificate of formation (COF) must be filed.

In order to properly form a corporation under Texas law, a certificate of formation must be filed.

b. The COF must be filed with the Texas Secretary of State.

The certificate of formation is to be filed with the Texas Secretary of State.

c. The COF must contain the required statutory information.

The certificate of formation must contain the following required statutory information: (1) the name of the corporation (Modern Restorations, Inc.), (2) the duration of the corporation (until 12/31/15, otherwise it would have been perpetual), (3) the purpose of the corporation (to purchase, remodel, and re-sell commercial buildings), (4) the name and address of the corporation's registered agent, (5) the relevant stock information, (6) the names and addresses of the organizers (Anne and Dan), and (7) the names and addresses of the initial board of directors.

d. The acceptance of the COF is conclusive evidence of the corporation's existence.

When the Texas Secretary of State accepts the certificate of formation after its filing, it is conclusive evidence that the corporation is in existence.

2. Anne did not give proper notice of the meeting, but the vote was effective, and Stan must now file his dissent with the secretary of the corporation at its principal office.

a. Anne did not give proper notice.

The issue is whether notice by e-mail of a special meeting of the Board of Directors (BOD) is sufficient.

The chairman of the BOD may call a special meeting of the BOD at any location. Typically, acceptable locations are found in the bylaws. The notice needs to be reasonable, but there is no required, set amount of days as there are with shareholders' meetings. Also unlike shareholders' meetings, the person calling the special meeting of the BOD does not need to indicate the subject matter of the meeting. A person calling a special meeting of the BOD may send notice by e-mail, but only with the consent of the members of the BOD.

In this case, Anne's notice was deficient because she did not get permission from all the BOD to send the notice by e-mail.

b. The vote on the purchase of the building was effective.

The issue is whether there was an appropriate quorum at the meeting and whether the vote was effective with only Anne, Dan, and Fran voting. An appropriate quorum for a meeting of the BOD is a majority of the BOD that is more than one-third of the total. A BOD member who arrives at a meeting solely to contest its validity is not counted in the quorum. If a member of the BOD participates in the meeting, he is deemed to have waived his right to contest the holding of the meeting and is counted for purposes of a quorum. Once a quorum is established, the BOD may carry out effective board action even if a member dissents and walks out on the meeting. A vote of the majority of the BOD that made up the quorum (those that showed up for the vote) will effectuate a valid act of the corporation.

In this case, 4 of the 7 members of the BOD showed up to vote on the issue. This is a majority, so it constitutes a quorum. If Stan had showed up only to contest the "illegality" of the meeting, he would not have been counted in the quorum and the meeting would have been invalidated because 3 of the 7 members would not have constituted a majority. However, because Stan stayed in the meeting and participated as several items of business were being conducted, he waived his right to prevent the quorum. His choice to storm out of the meeting had no effect on quorum or on the vote. As such, the three votes of Anne, Dan, and Fran constitute a majority of the votes of the members present at the BOD meeting (3 of 4).

Thus, the vote on the purchase of the building was effective as an act of the corporation.

c. Stan must put his dissent in writing and file it with the corporation secretary.

The issue is how a member of the BOD files a dissent to board action. A member may do so by voting no to the action, getting this in the minutes of the board, and filing with the secretary of the corporation at the corporation's principal office. In order to have his dissent duly noted, Stan should have stayed in the meeting and voted no. He can cure this misstep by putting his dissent in writing and filing it with the secretary of the corporation.

END OF EXAM