

## Background

In 1992, Phillip R. Shawe and Elizabeth Elting, business school classmates, founded the corporation that is now Transperfect Global, Inc., a worldwide language translation, website localization and litigation support services business (together with its subsidiaries, the “Company”). Shawe (49 shares) and Elting (50 shares), Co-CEOs, have successfully managed the Company’s businesses to profitable growth every year for over two decades. Shawe, Elting and Shawe’s mother, Shirley Shawe (1 share), are the Company’s only stockholders. In 2014, the Company’s revenue exceeded a record \$470 million, and its net income was \$49.8 million.

In 2012, the Shawe-Elting relationship deteriorated quickly, and then devolved into what was described as “mutual hostaging,” as a management model. It is alleged that Elting would obstruct Shawe’s business initiatives until he approved her business initiatives, which he was said to be likewise obstructing.

Although the Company continued to grow revenues and profits, the CEOs’ discord precluded the election of a third director and inevitably led to the parties seeking a [judicial remedy](#). Elting brought the case to the [New York State Supreme Court](#), where it was dismissed.

Relevant here is Elting’s successful petition to the Court of Chancery of the State of Delaware for an order under [Section 226 of the Delaware General Corporation Law](#) (DGCL) appointing a custodian to become involved in managerial decision-making and to conduct an auction to sell the Company.

The Court of Chancery found that the requirements of both subsections of Section 226(a) with respect to the appointment of a custodian to sell the Company were satisfied, even though the Company maintained a high level of growth in revenues and profitability. It based this finding on its perception of a severe division between Shawe and Elting with respect to the management of the Company, which division required votes for action by the board of directors that could not be obtained. The court also found that the stockholders could not terminate the deadlock and that the Company’s business was suffering and threatened with irreparable harm.

The court further found that, although the Company was wildly profitable, its governance structure was irretrievably dysfunctional and negatively impacting the operation of its business in areas such as corporate morale, relationships with clients and acquisitions.

During this period of litigation, in 2015 revenues rose to \$500 million, and in 2016 company-wide sales totaled \$546 million. It is worth noting that 2016 was TransPerfect's 24th consecutive year of growth, with annual revenue increasing every year since the company's founding in 1992.

The court declined the less intrusive option to appoint a custodian to serve as a third director, or some other form of tie-breaking mechanism in the governance of the Company, on the basis it would enmesh an outsider and, by extension, the court, into matters of internal corporate governance for an extended period of time.

Shawe appealed the decision to the Supreme Court of the State of Delaware, maintaining that the Court of Chancery exceeded its statutory authority when it ordered the custodian to sell a solvent, and still very successful, corporation without stockholder consent, and that less draconian remedies were available to address the deadlock. Shirley Shawe also maintained, for the first time on this appeal, that the custodian's sale of the Company might result in an unconstitutional taking of her Company stock.

The Supreme Court of the State of Delaware, with one Justice dissenting, affirmed the Court of Chancery's opinion.

The Supreme Court found that Phillip Shawe failed to properly raise his statutory argument pertaining to Section 226 in the Court of Chancery and that he could not raise it for the first time on appeal. Further, it found that the Court of Chancery only ordered the custodian to sell the Company after attempting less intrusive measures and concluding that they would not be successful.

What the Delaware Supreme Court avoided mentioning was the fact that Shawe had made numerous offers to purchase Elting's shares, and that his offers were at times ignored or rebuffed, but never countered or deliberated.

The Supreme Court found that Shirley Shawe's argument that she might have to sell her share of the Company's stock in violation of the Takings Clause of the

United States Constitution was not presented to the Court of Chancery during the various hearing phases.

[The dissenting Justice began](#) by finding that Phillip Shawe had amply raised the statutory argument pertaining to Section 226 in the Court of Chancery and that a holistic reading of the Delaware General Corporation Law supports the view that divestiture of a stockholder's stock may occur over a stockholder's objection, but only when the relevant statute expressly contemplates such a divestiture and provides fair notice that it may occur. Further, the dissent found that Section 226 contains no such express provision or notice that a forced divestiture may occur. The dissent held that its construction of Section 226 takes account of property rights and due process protections, because these concepts are embedded in the statutory framework of the DGCL.

The dissent observed the majority opinion now puts shareholders on notice, at least prospectively, that in a deadlock situation involving the appointment of a custodian pursuant to Section 226, a sale to a third party over stockholder objections is a permissible outcome, even for a thriving business. The dissent added that this judicially-created notice leaves the Shawes stuck with the unanticipated outcome of such a sale under Section 226, even though this section lacked the express notice stated in other provisions of the DGCL and other provisions of Delaware statutory law where defeasance of property rights is possible.

### Legal Writing Problem – What Entrants Must Do

Contestants should assume the Shawes promptly petitioned the United States Supreme Court for a writ of certiorari, which was granted. The contest's question does not address issues considered by the Supreme Court in connection with granting the writ.

The United States Supreme Court will consider only the following question raised by the Shawes:

Whether the issuance of an order by the Court of Chancery of the State of Delaware, which order provides for the appointment of a custodian under Section 226 of the Delaware General Corporation Law to sell a profitable company over the objections of shareholders, constitutes (1) a violation of the shareholders' due process rights under the Fifth Amendment to the United States Constitution, and (2) an unconstitutional "taking" of the shareholders' personal property in violation of the Fifth Amendment to the United States Constitution.

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Contestants will write briefs on the U.S. constitutional implications (Due Process and Takings Clauses) of the Delaware courts' powers to adopt a forced sale remedy when shareholders of a highly profitable privately-held corporation are deadlocked.

Law students are going to help make the case to overturn the decision of the Delaware Court of Chancery, based on the question above. Relevant materials are provided.

Read the various news stories on the case and watch and listen to the arguments made [during the appeal](#).

Read the various filings and transcripts and be as creative, but legally appropriate, as you wish.

The contest entries will be initially reviewed by attorneys selected by [Lateral Link Group, Inc.](#) and the finalists' entries will be reviewed by the following esteemed panel of judges, who will both, review the written material and hear the students' oral arguments:

- **Justice Melvin Schweitzer**, (Ret) New York State Supreme Court, Commercial Division
- **Professor Alan Dershowitz** (also legal counsel to Shirley Shawe)
- **Judge Carmen Beauchamp Ciparick**, (Ret) Senior Associate Judge of the New York State Court of Appeals, and
- **Joseph D. Hansen**, former Director of Interns for Justice Schweitzer, New York State Supreme Court, Commercial Division

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Appeal documentation

<b>Parties/Caption</b>	<b>Date</b>	<b>File Number</b>	<b>Court</b>	<b>Type</b>	<b>Judicial Officer</b>	<b>Description</b>
<a href="#">Shawe v. Elting</a>	02/13/2017	<a href="#">423, 2016</a>	Supreme Court (Court of Chancery)	Civil	Seitz J.	Opinion
<a href="#">Shawe v. Elting</a>	02/13/2017	<a href="#">487, 2016</a>	Supreme Court (Court of Chancery)			

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