

Nonprofit Dissolutions and Mergers

PLI: Advising Nonprofit Organizations 2022

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Intro and background

- Life cycle of a public charity includes how it ends
- End of (corporate) life planning is a useful exercise
- Winding down responsibly and gracefully (and without further liability)
- Nonprofit sector hygiene and efficiency
 - Defunct, voided, revoked, or non-operational corporations create sector clutter
 - Nonprofits that are no longer effective or functional should be able to close without unreasonable burden

Roadmap for this session

- Common fact patterns that lead to dissolution or merger as “exit strategies”
- Existential questions
- Getting your affairs in order
- Dissolution
- Merger

Polling question #1

Have you represented a nonprofit organization that has dissolved or merged, or have you worked with or for a nonprofit organization that dissolved or merged?

- A. Yes, I have
- B. No, I have not

Common fact patterns

- Elderly leadership/Board members
- Founders' fatigue
- Relevancy
- Funding
- Competition
- Fights

Polling question #2

For those of you who answered yes to the last question, which one of the following reasons best describes the circumstances that led to the dissolution or merger?

- A. Elderly leadership/Board members
- B. Founders' fatigue
- C. Relevancy issues
- D. Funding issues
- E. Competition
- F. Fights
- G. Other reasons

Framework for determining whether to continue

- Mission. Why was org formed? How has mission evolved? Does mission still make sense?
- Vision. Able to offer something no one else is able to offer? Clear definition of impact that org would have going forward and a compelling need to further it?
- Charitable class. Who does org serve? Is there still a need?
- Methods. How does org accomplish its mission? Are those methods still the most effective? Are other orgs serving same mission more effectively?
- People. Who founded org? Who will run it?
- Funding. How has org been funded? How will it sustain itself?

Dissolution: at a glance

- What is it: termination of an organization's corporate existence
- Trigger: filing of Certificate of Dissolution
- Legal effect: entity no longer exists. Other than winding up, can't conduct new business, incur legal obligations, sign contracts, or do anything else
 - *"After dissolution, a corporation shall not commence any new activities. A dissolved corporation, its directors, officers and members may continue to function for the purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not taken place...."* NY N-PCL 1006(a)
 - *"The dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or members, for any right or claim existing or any liability incurred before such dissolution...."* NY N-PCL 1006(b)
- Interested parties: board/management; members; donors; state AG; IRS

Dissolution: getting your affairs in order

- Locate organizational documents (certificate and bylaws), as amended to date
 - Charitable purpose
 - Dissolution clause
 - Any special requirements for approval of dissolution
- Ensure statutory minimum number of directors
- Determine whether organization has members
- Ensure annual state and federal filings are up to date
- Take inventory of assets (incl. financial, real and intangible) and liabilities (incl. outstanding contracts)
 - Donor restricted-purpose funds?
- Take stock of other corporate records

Dissolution: roadmap

- Develop Plan of Dissolution
- Internal corporate approvals
- Routine state filings
- State AG approvals or other consents (i.e., external approvals)
- Distribution of assets
- State tax clearance
- Certificate of Dissolution
- Final federal tax return (990)

Dissolution: potential challenges

CPR → RIP

- Key organizational documents
 - Locating them
 - Purpose clause
- Governing body
 - Board members? Statutory minimum? Officers?
 - Members?
- Good standing

Dissolution: more potential challenges

- Restricted funds
- Setting aside funds to cover dissolution costs; potential post-dissolution liabilities
- Document retention and destruction
- IP
- Donor acknowledgment letters
- Unclaimed funds
- Employment issues
- Closing bank accounts, social media accounts, etc.
- (Every organization is unique)

Merger

- What is it: merging of one entity (the “Merging Organization” or “MO”) with and into a second entity (the “Surviving Organization” or “SO”), with only SO surviving.
- Trigger: filing of Certificate/Articles of Merger in state(s) of incorporation
- Legal effect: MO has no continuing independent existence – it becomes the SO.
 - (1) SO succeeds to and possesses all rights, privileges, powers, and purposes of each CC; (2) All property including causes of action vest in SO, and any disposition by will taking effect post-merger to either CC inure to SO; (3) SO assumes all liabilities, obligations, and penalties of each of the CCs. No liability or obligation due, claim or demand for any cause existing against any CC, or any member, officer or director thereof, shall be released or impaired by such merger. N-PCL 905(b)
 - No action or proceeding then pending by or against any such CC, or any member, officer or director thereof, shall abate or be discontinued by such merger, but may be enforced, prosecuted, settled or comprised as if such merger had not occurred, or SO may be substituted in such action or special proceeding in place of any CC. N-PCL 905(b)
- Interested parties: For both MO and SO, Board/management/staff, donors; State AG, IRS

Merger: roadmap

- Getting affairs in order (see earlier slide)
- Develop Agreement and Plan of Merger
- Internal corporate approvals
- Routine state filings
- State AG approvals or other consents (i.e., external approvals)
- Certificate/Articles of Merger
- Transfer of assets
- Final federal tax return (990) for merging organization

Merger: potential challenges

CPR → RIP (x2)

- Key organizational documents
 - Locating them
 - Purpose clause
- Governing body
 - Board members? Statutory minimum? Officers?
 - Members?
- Good standing

Merger: more potential challenges

- Leadership/governance of surviving organization
- Restricted funds
- IP
- Branding and communications
- Donor acknowledgment letters
- Document retention and records
- Contracts, claims, diligence
- Passwords, accounts
- Employment issues
- (Every organization is unique)

Questions?

Thank you.

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