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A part of the Business Law Section and the Tax Section, the Tax-Exempt Organizations Committee provides a forum for practitioners interested in the law of nonprofit organizations. In addition to featured education topics, the monthly lunch meetings present an opportunity for an exchange of information and ideas about current practice issues and developments. The Committee also presents continuing legal education seminars and, as appropriate, initiates or participates in legislative and regulatory advocacy efforts of interest to Exempt Organization practitioners.

# **The Voluntary Dissolution of a Massachusetts Public Charity**

**By Regina S. Rockefeller and Tamara L. Sturges**

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## **I. Introduction**

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With the U.S. economy still far from full recovery, endowment values holding at historically low levels and many major charitably inclined donors hard hit by shady con artists and by anemic stock market valuations and lowered real estate appraisals, many charitable organizations are finding that their previously generous donors are no longer able to support the organization's mission. For some organizations, this confluence of adverse factors has led boards of trustees/directors reluctantly to consider their organization's dissolution or, if possible, merger with another charity. In Massachusetts, at present, a public charity can voluntarily dissolve only with the close involvement of the Massachusetts Attorney General's office and the approval of the Massachusetts Supreme Judicial Court.

This article discusses the basic process and practical legal issues for the voluntary dissolution of public charitable corporations in Massachusetts. This outline presents: (1) when a charity should consider corporate dissolution; (2) a step-by-step guide to the voluntary dissolution process and (3) some practical legal issues that are likely to arise during the dissolution of a large public charity.

### **A. Voluntary versus involuntary dissolution**

In Massachusetts, a public charitable corporation can be dissolved voluntarily or involuntarily. M.G.L. c. 180 §§ 11A (voluntary), 11B (involuntary).

#### **1. Voluntary dissolution**

A charitable corporation may seek voluntary dissolution after an affirmative vote by a majority of the board of directors. The charity can then file a petition for dissolution with the Supreme Judicial Court making the Attorney General a party to the petition. This is the sole method by which a charity may voluntarily dissolve in Massachusetts. M.G.L. c. 180, § 11A.

#### **2. Involuntary dissolution**

Involuntary dissolutions are rare. To involuntarily dissolve a public charity, the attorney general must petition the Supreme Judicial Court under M.G.L. c. 180, § 11B for the dissolution of such charitable corporation based on one of the following permissible causes: failure to submit required annual filings for two consecutive years or inactivity of the charity and its dissolution would be in the public interest.

### **B. Application of *cy pres* doctrine**

The application of the equitable doctrine of *cy pres* allows for the allocation of funds that have been designated for a specific use or are otherwise limited by their nature as a charitable contribution. M.G.L. c. 12, § 8K. *Cy pres* allows for the distribu-

tion of assets from one charity to another so as to best fulfill the donor's intended purpose of the charitable contributions. When a charity is dissolved, any remaining funds must be redistributed to other charities with "similar public charitable purposes." M.G.L. c. 180 §§ 11A, 11B.

The doctrine of *cy pres* is an equitable remedy that allows for restricted charitable funds to be applied to similar charitable purposes when the original purpose has become impossible or impracticable to fulfill. The doctrine of *cy pres* is codified in M.G.L. c. 214, § 10B. See also *New England Hospital v. Attorney General*, 362 Mass. 401, 404 (1972), quoting *American Academy of Arts & Sciences v. Harvard College*, 12 Gray 582, 596 (Mass. 1832) ("It is now a settled rule in equity that a liberal construction is to be given to charitable donations, with a view to promote and accomplish the general charitable intent of the donor, and that such intent ought to be observed, and when this cannot be strictly and literally done . . .").

Applying *cy pres* is an integral part of the dissolution of a charitable corporation. When a charity dissolves, any remaining funds must be re-appropriated to similar charitable purposes. This process is done through a complaint for dissolution filed with the Supreme Judicial Court. The complaint will set forth the grounds for dissolution and a request for authorization to transfer funds to other charitable organizations, which have similar charitable purposes. The selection of these recipient charities is an important decision to be initially made by the trustees or directors of the dissolving charity. Some boards will invite other organizations to make presentations about what those potential recipients would do with the dissolving charity's remaining unrestricted assets and, for restricted assets, how the potential recipient organizations would carry out the original donor's intent for his or her donation.

The Attorney General must be made party to the complaint for dissolution. M.G.L. c. 12, §§ 8, 8G. All recipient organizations nominated to receive funds from the dissolving charities will also be made parties to the complaint for dissolution. Assuming that the Attorney General assents to the complaint and there are no other objections, the Court will enter judgment allowing dissolution of the charity and the transfer of the remaining charitable funds to the identified recipients.

## **II. When A Charity Should Consider Voluntary Dissolution**

Voluntary dissolution is usually a sad and irrevocable decision for a board of trustees/directors and often represents the death of a hope. The board of trustees/directors of a Massachusetts public charity should appropriately consider voluntary dissolution and its alternatives when facing:

1. A lack of interest/support from volunteers and donors;
2. Inadequate financial resources to fund properly the organization's mission; and
3. An inability to accomplish the organization's mission in a cost-effective manner in the future.

Alternatives to dissolution to be considered include:

1. A merger or consolidation with a like-minded charity to achieve economies of scale and attract new clients, volunteers and donors.
2. Sale of assets in accordance with M.G.L. c. 180, § 8A to a more financially capable charitable organization having a similar mission and the seller's contributing the sale proceeds to that organization or to a local foundation to fund the mission previously accomplished by the dissolving corporation. In these circumstances, dissolution by the Supreme Judicial Court would ultimately occur.
3. Voluntary reorganization.

## **III. Possible Cast of Characters in a Voluntary Dissolution of a Large Public Charitable Corporation, M.G.L. c. 180 8A(d)**

The Massachusetts Attorney General's office in a typical year assents to the dissolution of approximately 100 charitable organizations. The dissolution of larger charities with remaining assets can involve a large cast of characters including (a) the Board of Trustees/Directors of the charity, (b) the management of the charity, (c) the communities served by the charity,

(d) the Medical Staff if the charity is a hospital, (e) the faculty and alumni if the charity is a school, college or university, (f) the Massachusetts Attorney General, (g) the Massachusetts Supreme Judicial Court, (h) the Internal Revenue Service, (i) the Massachusetts Department of Revenue, (j) the Massachusetts Secretary of State, (k) any state licensing authority, e.g. the Department of Public Health for hospitals or clinics, (l) donors of charitable funds and their lawful issue, (m) other 501(c)(3) organizations who may potentially receive the remaining funds of the dissolving charity, (n) competitors of the dissolving corporation who may carry on a portion of the dissolving charity's former mission, (o) employees of the dissolving charity, (p) accountants, lawyers and business consultants of the charity, (q) purchasers and donees, both domestic and international, of useful assets from the dissolving charity, (r) creditors of the dissolving charity, (s) local law enforcement officials if the charity is involved in public safety activities, (t) organizations holding real estate leases from the charity, (u) organizations that have been allowed to use the charity's space for little or no charge for the benefit of the public, such as Alcoholics Anonymous, Meals on Wheels, Girl Scouts, Boy Scouts, and still others.

#### **IV. Process Of Voluntary Corporate Dissolution Where The Corporation Has Assets**

- **Step 1:** Make sure all required financial report filings are current. M.G.L. c. 12, § 8F. File the last Form PC. If any annual reports are missing, file them with the Attorney General's Office: Division of Non-profit Organizations/Public Charities.
  - If the charity is exempt from filing under M.G.L. c. 12, 8F as a religious organization, file a financial affidavit summarizing financial activities for the past four years.
- **Step 2:** Prepare initial pleadings for submission to the Massachusetts Supreme Judicial Court:
  - Complaint for Dissolution must contain:
    - The authorization for dissolution by a majority vote of the board of directors/trustees.
    - The grounds for dissolution.
    - The most recent Form PC.
    - If there are funds remaining after payment of the charity's debts and expenses, a request for authorization to transfer funds to one or more other organizations for similar charitable purposes is made.
      - The complaint should include the charitable purposes of the dissolving charity and how the charitable purposes of the recipient organizations are similar.
  - Motion for Entry of Interlocutory Order
  - Interlocutory Order
    - The Supreme Judicial Court orders the dissolving charity to transfer funds to the recipient charities.
- **Step 3:** Forward pleading to the Attorney General's Office: Division of Public Charities for review and assent:
  - Enclose originals and one copy. If everything is in order, the Attorney General's office will assent and return the originals to you.
- **Step 4:** File pleadings with the Supreme Judicial Court:
  - Submit the filing fee made payable to the Commonwealth of Massachusetts or seek a waiver of the filing fee from the Supreme Judicial Court.
  - The assented documents (the Complaint for Dissolution, Motion of Entry of Interlocutory Order, and Interlocutory Order) should be filed with the Supreme Judicial Court. The Supreme Judicial Court will review the pleadings and, if those pleadings are acceptable, issue the Interlocutory Order.

- **Step 5:** After the payment of all legitimate debts and expenses of the dissolving charity, transfer the funds to recipient charities pursuant to the Interlocutory Order of the Court and prepare the following affidavits:
  - Affidavits of Receipt, signed by the recipient organizations, indicating that the funds have been received.
  - An Affidavit of Compliance, signed by an officer of the dissolving organization, indicating compliance with the Court's Interlocutory Order.
- **Step 6:** Prepare final documents:
  - Motion for Entry of Judgment
  - Judgment naming a recipient organization as the successor to any funds, property, assets or interest of the dissolved charity.
- **Step 7:** Forward documents to the Attorney General's Office: Division of Non-Profit Organizations/ Public Charities:
  - Enclose originals and one copy of each affidavit, Motion for Entry of Judgment, and the Judgment. If everything is in order, the Attorney General's office will assent and return the originals.
- **Step 8:** File the documents with the Supreme Judicial Court and, as needed with the Secretary of State's Office.
- **Step 9:** Notify the Internal Revenue Service of the dissolution by sending a letter to: Internal Revenue Service, Exempt Organizations Determinations, P.O. Box 2508, Cincinnati, OH 45201. with the following information:
  - One of the following:
    - Articles of Dissolution filed with state officials.
    - Minutes of the meeting where the vote was taken to dissolve (signed and dated by an officer of the charity).
  - For section 501(c)(3) organizations: a statement signed by an officer giving details on final distribution of assets.

## V. Practical Legal Issues

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- Preparing for the Costs of Business Wind Down/Dissolution for Larger Charities such as Hospitals, Colleges, Schools:
  - Substantial costs are often incurred in dissolving a major charity. In deciding whether or not and when to dissolve, the officers and Trustees/Directors of the charity must consider how much money will be needed to dissolve the corporation in an orderly manner. An organization facing dissolution should reserve sufficient (and often substantial) funds for that purpose and not spend its last few dollars operating prior to dissolution. For Trustees/Directors who are passionately committed to the organization's mission, making this judgment can be extremely difficult. Unjustified optimism that some miraculous intervention will come if the charity just keeps functioning day-to-day can cloud more realistic decision making.
  - Once the decision to dissolve is made, the charity or its qualified agents and consultants should:
    - Perform an audit to determine which funds are restricted and what those restrictions are. This process will allow the charity to determine what funds are available for paying the costs of dissolution and what remaining funds will be available to be distributed with court approval through the *cy pres* process to charities with similar charitable purposes. This audit can often be most efficiently performed by an independent auditing firm.

- Permanently Restricted Funds:
    - Contributions and other inflows with donor stipulations that do not expire and cannot be fulfilled by the dissolving charity.
  - Temporarily Restricted Funds:
    - Contributions and other inflows with donor stipulations that will expire or can be fulfilled by the dissolving corporation.
    - Examples may include assets received in a charity drive to fund a specific purpose.
  - Unrestricted Funds:
    - Neither permanently nor temporarily restricted by donor.
    - Assets with self-imposed limits, including voluntary restrictions on funds for specific purposes.
    - Board-designated funds: self-imposed limitations on otherwise unrestricted funds by trustees are a revocable internal designation that does not give rise to restricted assets.
  - M.G.L. c.180A § 2: Appropriations for expenditures from endowment funds authorized; presumption of imprudence.
    - Rebuttable presumption that using over 7% of specific purpose and endowment funds is imprudent.
  - Pay all legitimate debts:
    - Terminate contracts and leases of the organization including contracts for equipment rentals.
    - Negotiate accounts payable: The charity should negotiate with vendors to reach a compromise for the payment of legitimate debts.
  - Severance: Offer severance to employees to keep employees from leaving their employment prior to the closure of operations. Without an adequate workforce, the charity may have to cease operations earlier than planned for safety reasons.
  - Provide for employment benefits for terminated employees. M.G.L. c. 151A, § 14A.
  - Provide for worker's compensation for injured or disabled employees whose entitlement may continue beyond the dissolution.
  - Address pension and other retirement issues, including records retention.
  - Purchase tail coverage if professional liability insurance has been maintained on a claims-made basis.
  - Arrange for continued protection under various liability insurance policies including any existing Directors and Officers Liability insurance.
- Required Notices for Closure of a Charitable Hospital
    - Corporate Notices:

- By laws: Determine the procedure for voting to dissolve. A majority vote of the board of directors/trustees can authorize a petition for dissolution to be filed with the Supreme Judicial Court. M.G.L. c. 180, § 11A.
- 90 day notice to the Massachusetts Department of Public Health of intent to discontinue services. 105 CMR 130.122 (C); M.G.L. c. 111, § 51G(4).
  - Notice to discontinue services must contain:
    - Current utilization rates for services being discontinued.
    - Anticipated impact of discontinuance on individuals in the hospital's service area.
    - The date set for discontinuation.
    - Names and addresses of any organized health care coalitions and community groups that are known to the hospital when the notice is issued to the Department.
- 90 day notice to Attorney General's Office and the Commissioner of Public Health prior to a disposition of substantial amount of property of an acute-care hospital to an entity other than a public charity. M.G.L. c. 180, § 8A (d)(1).
- 30 day notice to Attorney General's Office prior to a disposition of all or a substantial portion of a public charity's assets. M.G.L. c. 180, § 8A (c).
- Public hearings regarding disposition of property. M.G.L. c. 180A, § 8A(d)(3); 105 CMR 130.122(C).
  - The attorney general will hold one or more public hearings regarding the disposition of a substantial amount of property of the charity.
  - 21 days prior to the public hearing, the charity must publish notice of the hearing in a local newspaper of general circulation.
- Federal Worker Adjustment and Retraining Notification (WARN) Act.
  - Circumstances that trigger WARN:
    - A number of circumstances trigger the WARN Act. Generally, if an employer is laying off a significant number of its work force, it is vital to determine whether the employer and the types of layoffs fall under WARN (Please find further information on WARN at <http://www.doleta.gov/layoff/warn.cfm>).
  - The WARN Act requires 60 day notice to workers in order to mitigate long periods of unemployment. How will the charity's workforce react to this notice? Will they immediately leave their current employment?
  - Employers in Massachusetts must provide 60 days written notice where there are:
    - 100 or more full-time employees and employers are laying off at least (i) 50 employees at a single site of employment, or (ii) 100 or more employees who work at least a combined 4,000 hours per week.

- The employer is a private for-profit, private non-profit organization, or a quasi-public entity separately organized from regular government.
- The notice must be in writing, in clear and specific language.
- The notice must contain the following information:
  - A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect.
  - The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated.
  - An indication as to whether or not bumping rights exist.
  - The name and telephone number of a company official to contact for further information.
- The issuance of a WARN notice triggers the State Rapid Response Dislocated Worker Unit, which will work with an employer to provide on-site job fairs.
- 48 hour notice to the Division of Unemployment Assistance (617-727-8221) of mass separation of employees (10 or more) prior to lay off.
- Additional Practical Issues (This list is not exhaustive):
  - Retention of accounting firm to pay payables and to collect receivables during the dissolution process after all the charity's employees have left for other jobs.
  - Retention of law firm to handle corporate dissolution and all legal needs of the organization during the dissolution process.
  - Requests received by the charity after closure of its operations but prior to corporate dissolution by the Supreme Judicial Court must be considered.
  - Requests that come to fruition after dissolution of the charity will need to be addressed.
  - Final tax filings such as Forms 990 must be submitted.
  - Pending tax refund claims should be pursued. Which charity will receive tax refunds if the refund is paid after the charity's corporate dissolution? Who will pursue the refund after the dissolution of the charity that is entitled to the refund?
  - Collection of abandoned property (e.g. checks received but not cashed by the organization) owed to the dissolving corporation.
  - Job Fairs for employees or referring employees to regional job fairs will be needed. Some major employers invite their competitors to conduct job fairs on site so that employees of the dissolving corporation can conveniently attend. The dissolving charity's interest is best served by affording its own workforce a smooth transition to their next position at another company.
  - Disposition and storage of medical records for 30 years, in the case of hospitals, and storage of administrative files of the dissolving charity. Will former competitors and other record storage facilities help for a one-time lump sum fee?



- Disposition (sale or donation) of equipment, personal property, drugs, and radioactive materials.
- Return of leased equipment and personal property to lessors and negotiation of accelerated lease terminations.
- Selection by the Trustees/Directors of similar charitable institutions for *cy pres* funds. Do the Trustees want to attach new restrictions on future use of transferred assets, e.g. so that those funds are used only within the local community previously served by the dissolving corporation?
- Internal and external communication plan regarding the closure of operations and the corporate dissolution. When will ambulances stop coming? When will patients stop coming? What signage needs to be removed and when?
- Provision for defense/pursuit/resolution of ongoing litigation, e.g. pending MCAD actions, pending medical malpractice actions, and any other pending litigation.

## **VI. Conclusion**

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The decision of dedicated Trustees or Directors of a public charity voluntarily to dissolve the charity as a corporation is often an anguishing one. Each major charity has a wide network of constituents, including the communities served by the charity, faithful donors, hard-working employees, dedicated volunteers, and neighboring businesses who may have been dependent on the nearby major public charity for their daily livelihood. In the cases of colleges, independent schools and hospitals, these charities are often the single largest employer in their locale. Cities and towns can be justly apprehensive about the closure of a major charity within its borders and the future of the charity's campus after closure.

Legislation has been filed to amend M.G.L. c. 180, Section 11A to simplify the voluntary dissolution process for those corporations without remaining assets and those with assets below a yet-to-be set dollar threshold. Massachusetts Senate Bill 2117 of the 2009-2010 Session, sponsored primarily by Senator Michael W. Morrissey, would permit a charitable corporation having no remaining assets to submit a petition for dissolution to the Division of Public Charities of the office of the attorney general. If the Division is satisfied that the corporation has or will become inactive and that its dissolution would be in the public interest, then the Division may approve the dissolution without need for the involvement of the Supreme Judicial Court.

Senate Bill 2117 would afford the Supreme Judicial Court the option to remain involved in the dissolution of a corporation with remaining assets. In that case, the petition for dissolution would still be filed in the Supreme Judicial Court. The Court would, as it does now, authorize the administration of the dissolving charity's funds for such similar charitable purposes as the Court may determine. However, this bill permits the Court by rule or order to provide that such petition and court authorization would not be required for dissolutions approved by the Division of Public Charities if the corporation has net assets not greater than whatever amount the Court may so provide. Since the close scrutiny of voluntary dissolutions is even today accomplished at the Division of Public Charities, the Court would do well to choose a high dollar threshold. Even if this legislative simplification becomes law, the closure of a major public charity will still take time, substantial funds and detailed legal attention.