

**Patterson Belknap Webb & Tyler** LLP

# Why Do Charities Terminate? A Soundtrack for Dissolution

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# The Beginning of the End: How did we get here?

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- Financial trouble
  - Insolvent or approaching insolvency
  - Donor pools have dried up
- Mission trouble
  - Purpose no longer relevant
  - Crowded mission space
- Lack of “joie”
- Pre-determined sunset

*“You may ask yourself, how did I get here”*

## The Decision to Terminate: Is the Board on board?

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- When to involve the Board
  - Due diligence
  - Analysis
- Is there a strong consensus among Board members that terminating is the best course of action?
  - Other options
  - Dissent

*“How little we know, how much we discover”*

# The Decision to Terminate: The Team

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- Who should be involved?
  - Who will lead the dissolution process?
    - 1) Formal committee or specified individuals
  - Internal division of labor (Board & staff)
    - 1) Legal
    - 2) Financial
    - 3) Program
    - 4) HR
    - 5) Communications
  - Outside advisors
    - 1) Legal Counsel
    - 2) Accountants
    - 3) Consultants

*“My baby needs a shepherd, she’s lost out on the hill”*

# Moving Forward: How Do You Get There From Here?

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- Legal considerations
  - Formal/process
  - Operational
- When to involve outside advisors
  - What to say
  - What they hear

*“Call me, call me any, anytime”*

## Moving Forward: Setting the GPS

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- Develop dissolution “roadmap”
  - A guide for directors and staff involved in dissolution
  - Lay out planned steps in chronological order
  - Allocate responsibility for tasks and deliverables to specific directors and employees
  - Prepare a “closing” checklist for the organization (by task, date, responsible party) to include
    - » Legal requirements
    - » Notifications
    - » Filings
    - » Deadlines
    - » Inventory of assets
    - » Key milestones
    - » Communications
    - » Expenses

*“If there's a place you got to get, I can get you there I bet, I'm the Map”*

# Implement the Plan: Communication

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- Develop communications guidelines
  - What is the message
  - Who is authorized to talk
  - Stay on message
- Communicate internally with staff & volunteers
- Communicate externally with stakeholders
  - Supporters, donors, grantees, grantors, governmental agencies, other partners, the general public, etc.

*“Let’s give ‘em somethin’ to talk about”*

## Implement the Plan: Organizational Leadership

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- Officers & Directors
  - Determine which officers and directors will have a role in the dissolution process
  - Communicate with those officers and directors with no role re: submitting resignations to facilitate simpler wind-up process

*“You gotta let me know, should I stay or should I go”*

## Implement the Plan: Staff

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- Employees
  - Determine which employees should/need be involved in dissolution
  - Determine timetable and plan for departure of remaining employees
  - Severance/retention program
    - » Reasonable compensation
  - Tax withholding during the wind-up process
  - Review terms of benefit plans and work with providers to ensure fulfillment of all requirement

*“Sing a little bit of these working man blues”*

## Implement the Plan: External Communications

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- Donors/Grantors
  - review terms of existing grant agreements to ensure compliance throughout dissolution process
  - obtain any necessary approvals
  - notify donors and grantors, as appropriate
- Grantees
  - if organization makes grants, communicate with grantees, particularly long-time recipients
- Partners
  - Plan for transitioning project responsibilities
- General public
  - develop strategy for notifying public at large

*“It's the same story the crow told me. It's the only one he know”*

## Implement the Plan: Disposition of Assets

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- Dispose of assets
  - Consult governing documents, grant agreements, other relevant documents re: restrictions on asset disposition
  - Contact recipients of assets to ensure that they are equipped to handle receipt of assets
  - Most states will require organization to have written plan for asset disposition

*“If you want more happy than your heart will hold...Take whatever you have, and give it away“*

## Implement the Plan: Liabilities & Expenses

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- Satisfy liabilities and ensure payment of final expenses
  - Notify creditors of impending dissolution
  - Ensure available funds for payment of creditors
  - Negotiate to settle any contested liabilities
  - Arrange for payment of final expenses and set up accounts to accomplish payment

*“If I had a million dollars, I’d buy you some art (a picasso or a garfunkle)”*

## Implement the Plan: Merger or Asset Transfer

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- Merger or asset transfer
  - If the dissolution is occurring in the form of a merger or asset transfer pay attention to corporate formalities inherent in those legal structures

*“If I should call you up, invest a dime. And you say you belong to me and ease my mind.  
Imagine how the world could be, so very fine.”*

# Implement the Plan: Is that all there is?

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- Insurance
  - review existing policies
  - consider purchasing “tail” to ensure future coverage post-dissolution
- Final audit and notifications
  - perform final audits and gather any required financial reports (required by some states)
  - file required notifications of dissolution in applicable jurisdictions
- Document management
  - approve a plan for record-keeping and storage after date of dissolution

*“If that's all there is my friends, then let's keep dancing”*

## Legal Requirements for Dissolution: State Law

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- Most states require the same basic two-step process for approving dissolution:
  - Board adopts resolution to dissolve
  - Membership approves resolution
- Some states (e.g., New York) require additional approvals from state entities (Attorney General, state court)
- Judicial dissolution also allowed in some states:
  - court may take steps to dissolve organization in the event of insolvency, illegal behavior, or on request of a certain percentage of the members

*“Lord knows I paid some dues getting through”*

# Legal Requirements for Dissolution: Federal Law

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- Tax Forms
  - File complete and final Form 990, 990-EZ or 990-PF (to satisfy IRS requirement of notification of dissolution)
  - Prepare and file final W-2/W-3 forms for employees and ensure that year-end payroll forms are distributed to employees
  - File final tax forms relating to employee pension plans

*“So long, farewell, auf Wiedersehen, adieu. Adieu, adieu, to yieu and yieu and yieu”*

# Legal Requirements for Dissolution: Private Foundations

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- Private Foundation Issues
  - Private foundations remain classified as such for tax purposes unless they take affirmative steps to terminate that status, regardless of whether corporate existence continues
  - To terminate status, foundation can do one of three things, two of which involve termination tax under Section 507:
    - » Voluntarily terminate by providing notice to IRS and pay termination tax at time of notification
    - » Forcibly terminate due to willful repeated violations or willful flagrant violation of foundation excise tax rules, and pay termination tax at time of termination
    - » Terminate after distributing assets to public charity (no termination tax assessed because post-distribution, foundation's assets should equal zero)

*“Should 5% appear too small, be thankful I don’t take it all”*

## Restricted Asset Considerations

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- Restricted or endowed funds generally continue to be restricted post-dissolution
- Uniform Prudent Management of Institutional Funds Act (UPMIFA):
  - Model state law designed to regulate investment decisions and endowment expenditures for certain charitable organizations
  - Adopted in over 40 states and D.C., and permits release or modification of restrictions in certain cases:
    - » Donor may consent to release or modify restrictions
    - » Court may approve release or modification, if donor is unavailable

*“I’m not one to get too sentimental, like those other sticky valentines”*

## Restricted Asset Considerations (cont'd)

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- New York version of UPMIFA (NYPMIFA) is illustrative of model rules:
  - Donee corporation may obtain donor consent to release or modify restrictions after dissolution
  - If donor grants permission, corporation may choose Section 501(c)(3) organization to receive transferred funds, as long as recipient organization promises to use the funds in a manner that honors original endowment
- Corporation preparing for dissolution should contact donors of restricted funds to determine their wishes as to treatment of such funds upon dissolution
  - Distinguish from funds of the organization raised from the general public

*“Forever is the love that can stand the test of time  
Forever I am yours, say forever you’ll be mine”*

## Playlist (Side A)

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- Slide 2 Talking Heads, *Once in a Lifetime*
- Slide 3 Frank Sinatra (Johnny Mercer/Hoagy Carmichael), *How Little We Know*
- Slide 4 Emmylou Harris, *My Baby Needs a Shepherd*
- Slide 5 Blondie, *Call Me*
- Slide 6 Dora the Explorer, *I'm the Map*
- Slide 7 Bonnie Raitt, *Something to Talk About*
- Slide 8 The Clash, *Should I Stay or Should I Go*
- Slide 9 Merle Haggard, *Working Man Blues*
- Slide 10 Grateful Dead, *Uncle John's Band*
- Slide 11 Gaither Vocal Band, *Give It Away*

## Playlist (Side B)

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- Slide 12 Barenaked Ladies, *If I Had \$1,000,000*
- Slide 13 The Turtles, *So Happy Together*
- Slide 14 Peggy Lee (Stoller & Leiber), *Is That All There Is*
- Slide 15 Bob Dylan, *Tangled Up In Blue*
- Slide 16 The Von Trapp Children (Rodgers & Hammerstein), *So Long, Farewell*
- Slide 17 The Beatles, *Tax Man*
- Slide 18 Elvis Costello, *Alison*
- Slide 19 Porter Wagoner & Dolly Parton, *Say Forever You'll Be Mine*

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