

TAX-FAX Up-Dates Church Financial Services

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CHURCH INCORPORATION

Should my church incorporate? This is a question that many are asking themselves. The answer for each individual church cannot be given in a short paper of this nature, but there are many good reasons any church should consider incorporating and very few, if any good reasons why they should not incorporate.

The first and foremost reason a church should consider incorporating is the protection the corporate structure provides its members and officers from personal liability for the financial obligations of the church.

The common law rule is that unincorporated organizations and associations¹ can neither sue nor be sued in their own name. The members make up the organization or association and therefore each member must appear in their own names as parties, plaintiffs or defendants. As a result all the members of a church might be held liable if sued and served individually.

Although this common law rule has been changed or modified in many states, Georgia being among them, there are still real and potential liability issues that members face by being a part of an unincorporated organization or association organization. Georgia has provided, by statute, that "actions may be maintained against and in the name of any unincorporated organization or association..."² This does not, however, provide the unincorporated organization or association with the same protection as a corporation when it comes to liability. The statute itself makes it clear that any member can still be held personally liable and have a judgment enforced against them if "the member has personally participated in the transaction for which the action was instituted..."³

In *Osborne v. Dickey*, 9 Ga. App. 469, 71 S.E. 763, the court said the "members of a committee who undertake to act in behalf of an unincorporated association in contracting for a banquet are individually liable upon the contract".⁴ Therefore any member involved in a transaction, whether they are the one who actually signs the contract, or on a committee that negotiates the contract, or even only constructively assents to or ratifies the contract may be held liable on that contract.

Contrast this to a corporation where the officers and members are not personally liable (except in rare circumstances) for contracts made in the name of the corporation, only the corporation is held liable. The members and officers of an unincorporated church are far more exposed to financial liability than are the members and officers of an incorporated church.

A second reason a church should consider incorporation is the exposure of its members to tort liability. As a general rule in tort actions against an unincorporated organization or association any member may be held liable for the actions of others acting on behalf of the organization or association. In Georgia there is limited charitable immunity. Limited because there are certain exceptions to the general rule of charitable immunity. The first exception is that any charitable organization can be held liable to the extent of its income derived from noncharitable sources.⁵ Also charitable immunity does not extend to corporate or original negligence of the charitable entity in its employment or retention of incompetent employees.⁶ There is also an exception to the general rule for torts against one who is not a beneficiary of the charity.

Even with the above exceptions an incorporated church is still exposed to a great deal of liability but this liability would only be to the extent of the churches noncharitable assets such as insurance policies. However, because of the vulnerability of an unincorporated organization or association it is possible that the assets of one or all of the members could be at stake in a successful tort action against the organization or association because there is no corporate structure to protect them.

A third and final reason a church should consider incorporating is because of the changing legal and moral climate of our society. In the past the church and other charitable organizations have been relatively free from the onslaught of our litigious society. However, the respect the church once enjoyed has diminished in recent years and people are more likely to sue a church than in years past and the courts are more willing to allow the action to go forward than in the past. As one court put it "...the immunity rule was introduced by the courts without the legislative sanction, and that it is therefore, for the courts to undo what they have themselves brought about." "...liability is the rule. Immunity is the exception to the rule, created by the courts which have applied it. The law's emphasis is ordinarily on liability, not immunity for wrongdoing." "...we are of the opinion that if public policy ever required that charitable institutions should be immune from liability for torts ... that policy no longer exist."⁷ It is only a matter of time, if that time is not already here, before churches and charitable organizations will have to endure the same vexatious litigation that others have been subject to for years. Without the protection of the corporate shield many church members could find themselves personally liable for the churches contract and tort liability.

¹ "Association is a word of vague meaning that indicated a group of persons who have joined together for a certain object or purpose." H. Oleck, *NONPROFIT CORPORATIONS, ORGANIZATIONS, AND ASSOCIATIONS* 96 (4th ed. 1980).

² O.C.G.A. § 9-2-25(a).

³ O.C.G.A. § 9-2-25(d).

⁴ See also *Wilkins v. Wardens of St. Mark's Protestant Episcopal Church*, 52 Ga. 351 (1874); *Wynn v. Richard Allen Ledge*, 11 Ga. 796, 42 S.E. 29 (1902); *Walker v. Ful-Kalb, Inc.*, 181 Ga. 563, 183 S.E. 776 (1935). Cf. *Executive committee of the Baptist Convention v. Ferguson*, 95 Ga. App. 393, 98 S.E. 2d 50 (1957) and *Camp v. Emory University*, 95 Ga. App. 442, 98 S.E. 2d 66 (1957).

⁵ *Harrell v. Louis Smith Memorial Hosp.*, 397 S.E. 2d, 197 Ga. App. 189.

⁶ *Young Men's Christian Ass'n of Metropolitan Atlanta v. Bailey*, 146 S.E. 2d 324.

⁷ *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P. 2d 934 (1954).

If you would like additional information, please contact Jimmy Terrell or Keith Hamilton at the Georgia Baptist Convention. (770) 936-5295. If you would like this guide e-mailed, please send a notice to khamilton@gabaptist.org. This document is intended to provide churches, pastors, and staff with current and accurate information about the subjects covered. However, such information is not intended to be sufficient for dealing with a particular legal problem, and the authors and distributors do not warrant or represent its suitability for such purpose. The reader should not rely upon this document as a substitute for independent legal consultation or IRS instructions.