

Incorporation of Churches in Virginia: A New Day and Law

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Prior to the decision in *Falwell v. Lynchburg and the Commonwealth of Virginia* (W.D. Va. 2002), Virginia churches were not permitted to incorporate, under Virginia Constitution Article IV, § 14(20), which states, “The General Assembly shall not grant a charter of incorporation to any church or religious denomination.” This Virginia Constitutional provision was in part based on Thomas Jefferson’s Virginia Declaration of Rights that was adopted in the summer of 1776, which provided strong religious liberties for all people and all sects by stating, “The General Assembly shall not prescribe any religious test whatsoever or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society to levy on themselves or others any tax... in support of any church or ministry, but it shall be left free to every person to select his religious instructor...” *Virginia Constitution AM.ART I § 16*.

I. History of the Ban on Incorporation of Churches in Virginia

A brief historical background may explain some of the original reasons for the ban on incorporation of churches. In 1777, the Assembly suspended taxation for the support of Anglican ministries that continued until 1779 when they finally repealed all statutes provided tax support for the Episcopal Church. Nonetheless, the General Assembly retained control of church governance, doctrines and the glebes (church lands). To address the serious matters, including a loss of members to the other sects and a loss of tax money to the Church (which caused serious financial and church decline), the Episcopal Church in 1784 requested, and the Virginia General Assembly passed an Incorporation Act, which permitted the Episcopal clergy to incorporate themselves separate from the laity, and hold the Church lands. After strong opposition from the Presbyterians and Baptists about Episcopal Church incorporation, the Virginia legislature in 1787 repealed the Act incorporating the Episcopal Church, but allowed the Church to retain its property.

In 1798 however, the legislature repealed all acts that reserved glebe lands to the Episcopal Church, and in 1802, authorized the seizure of the church lands. The Episcopal Church challenged the seizures of lands, but the Virginia Supreme Court in *Turpin v. Lockett* 10 Va. 113, 6 Coll. 113 (1804), held that the seizures were valid under the Constitution, since the glebes were public property purchased by taxpayers of all denominations and thus, the legislature never had the power to grant them to the Episcopal Church. In a later case, the U.S. Supreme Court held such acts un-Constitutional, since the Incorporation Act of 1784 indefeasibly and irrevocably vested title to the glebes in the Church, and the legislature was without authority to reverse it. *Tarent v. Taylor*, 13 US 43 (1815).

Over the next century, Virginia continued with the sale of glebe lands and the Virginia Supreme Court again considered the issues in *Selden v. Overseers of the Poor of London*, 28 Va. 127 (1940). Ignoring the U.S. Supreme Court, the Virginia Supreme Court again upheld the seizure and sale of the glebes, but opined that “incorporations of religious sects, providing for church government of the members and election or appointment and institution of ministers are outside the scope of legislative power and incompatible with the principles of [the Act establishing religious freedom] now incorporated in the Constitution.” The Virginia Constitutional Convention of 1940, following the dicta in *Selden*, added to Article IV § 14 of the Constitution the provision precluding churches or religious denominations from incorporating and therefore from holding title in the church’s own name.

2. Falwell v. Commonwealth of Virginia

In the fall of 2001, Jerry Falwell and the Trustees of Thomas Road Baptist Church challenged the Constitutionality of the Virginia Constitution based on the United States Constitution in the Federal Court for the Western District of Virginia. The *Falwell* case challenged the Constitutionality of several provisions in the Virginia Constitution and Code of Virginia that impose unique limitations on churches. Specifically, Article IV § 14(20) banned churches from incorporating, and in addition, § 57-12 of the Code of Virginia limits the amount of real property a church may own to fifty (50) acres within a city or town and two hundred fifty (250) acres in any one county. This section also limits the value of personal property assets held by a church to ten million dollars (\$10,000,000.00) and requires the appointment of church trustees to hold land in the trustees’ names. Finally, § 57-15 of the Code of Virginia requires court approval of any transactions involving the church’s real property.

On April 15, 2002, the United States District Court for the Western District of Virginia held that the portion of § 14(20) of Article IV of the Constitution of Virginia which read “the General Assembly shall not grant a charter of incorporation to any church or religious denomination” violates the First Amendment rights of free exercise of religion, made applicable to the states by the Fourteenth Amendment of the United States Constitution, and granted Falwell and Thomas Road Baptist Church’s Motion for Summary Judgment as to that part.³ While the court noted that such provision preventing incorporation of churches violated the U.S. Constitution and lacked facial neutrality, it did note that the likely explanation for the existence of § 14(20) is that its drafters believed that state incorporation of individual churches was inconsistent with the principles of Mr. Jefferson’s Statutes of Virginia for Religious Freedom, in that any infringement

¹ The Court had already dismissed the challenges to the Virginia Code §§ 57-12 and –15 for mootness and lack of standing. While technically the Court’s ruling on incorporation only applied to churches in the Western District of Va., it appears that the Va. Attorney General has essentially applied the ruling throughout the Commonwealth of VA. See letter from Kenneth Schrad, Director, Va. State Corp. Comm., dated 7/15/03, stating that “SCC has applied the federal court ruling to all churches in VA and now incorporates any church that wishes to do so.” (Refer to www.state.va.us/scc/division/clk.fee.domcorp.htm for form SCC8191 with instructions). Recently, on Nov 7 Va. ballot, the church incorporation amendment overwhelmingly adopted!! The BALLOT QUESTION NUMBER 2 read “Shall Section 14 of Article IV of the Constitution of Virginia be amended by deleting the provision that prohibits the incorporation of churches, a provision that was ruled to be unconstitutional and therefore now is obsolete?” Confusingly written but fortunately understood by the voters and now answers any confusion about whether all churches in Virginia can legally incorporate with a resounding yes!

of religious freedom constituted “an infringement of a natural right of mankind.” The Attorney General for Virginia decided not to appeal the Summary Judgment ruling, and thus, by order of the Federal Court, this Virginia Constitutional provision was invalidated, allowing churches and religious denominations to now incorporate in the state of Virginia.

3. Senate Bill 1267 and 2005-2006 Changes to Virginia Church Corporation Law

In 2002, as explained above, the Federal District Court for the Western District of Virginia ruled the Constitutional provision disallowing the incorporation of churches violates the U.S. Constitution. Since the right to incorporate came through judicial ruling and not Constitutional or statutory revisions, all of the prior laws applicable to churches, both incorporated and unincorporated, have remained unchanged until the fairly recent passage of Senate Bill 1267 which became effective as of July 1, 2005. Following are the changes made to Title 57 of the Virginia Code, specifically those changes regarding church incorporation.

3.1 § 57-8: Trustees are no longer needed for church corporations and court appointment of such trustees is not required to hold, manage, buy, sell, transfer or encumber real property. SB 1267 specified that the court may appoint a trustee or trustees of “an *unincorporated* church or religious body”; however, this provision no longer applies to churches in general, only unincorporated churches.

3.2 § 57-10: Real property and personal property for church corporations no longer needs to be held by trustees but can be held in the name of the church corporation pursuant to § 57-16.1. SB 1267 added the following language to § 57-10 “if the church has created a corporation pursuant to § 57-16.1, [personal property may] be held by it as its land is held, and for the same purpose.”

3.3 § 57-15(B): Upon or after incorporating, church trustees may now transfer real or personal property to the incorporated church *without need of court approval*. If no petition seeking to set aside such transfer is filed within one year of recordation of the trustees’ deed transferring title to real estate or the date of transfer of any personal property, it shall be conclusively presumed that the transfer was made in accordance with the church’s polity insofar as a good faith purchaser or lender is concerned. (Emphasis added).

3.4 § 57-15(C): Each transfer will not accelerate any indebtedness and all transfers of real property shall be entitled to the exemptions set forth in § 58.1-811.

3.5 § 57-15(D): All insurance policies connected to property transferred shall be contemporaneously assigned to the incorporated church at the time of transfer.

3.6 § 57-15.1: The treasurer or other fiscal officer may sign a note, deed of trust, or mortgage on behalf of a church without incurring any personal liability. While this provision applies to both incorporated and unincorporated churches, clearly incorporation adds an additional layer especially when he/she signs in their officer capacity with their title clearly noted.

3.7 § 57-16.1: Property of an unincorporated or incorporated church may be held by another related corporation.

As a result of Senate Bill 1267 and the 2006 Constitutional Amendment, churches that incorporate will have much greater maneuverability with regard to property rights in comparison to unincorporated associations. The major benefit to church corporations is that they will now have the ability to hold property in the name of the church corporation, thus setting aside the need of statutory trustees to hold the church's land. Also, contrary to the fears that church incorporation will result in more government entanglement with religion, the changes made to Title 57 actually result in the courts having less authority over incorporated churches than unincorporated ones with regard to property rights.

4. The Benefits of Church Incorporation

Prior to the *Falwell* case, Virginia and West Virginia were the last two states in the United States where churches and religious denominations could not incorporate. Thus, Virginia churches were unincorporated associations, which status subjected their members² and particularly their leaders, such as the pastors and boards, to all forms of liability and precluded a church's ability to hold title to its property. There are many forms of liability where either an insurance policy does not cover the acts upon which a lawsuit against a church is based, or its coverage is limited. A Board of Directors (elders, deacons or pastors) could be personally liable for the liabilities which were essentially against the unincorporated church. There have been cases where a pastor, deacon or elder has suffered greatly due to this unincorporated association status and the imposed personal liability for the negligent or reckless acts of the church or its officers, directors or agents.

In July 2005, after numerous attempts, the Va. General Assembly amended Virginia church law provisions to bring it into conformity with other nonprofit corporation benefits as outlined above and removed the obstacles that some churches felt made church incorporation still uncertain. Now, the benefits for Church Incorporation include:

- 1) Incorporation will **substantially limit personal liability** of the Pastor(s), Board and members, providing a sure liability shield, provided the church board is not "grossly negligent."
- 2) Under the new law of §57-8, trustees are no longer needed for church corporations and thus court appointment of such trustees is not required to hold, manage, buy, sell, transfer or encumber real property of the church corporation. Of course, church corporations may still authorize trustees to have that legal authority with the church members' approval, or it can delegate it to one or more of its officers or directors. Unincorporated churches, however, must comply with all the old law provisions

² Under VA Code §8.01-220.13 members of any church, synagogue or religious body shall not be liable in tort or contract for actions of any officer, director, employee or other member of such church solely because of membership. VA Code § 8-220.1.1 provides some limited immunity for volunteer officers, trustees and directors of 501(c)(3) tax exempt organization and limits liability in some cases for paid Directors & Officers to 1 year salary and benefits.

requiring court approval for appointment of trustees and court approval for all buying, selling, encumbering or transferring land to another entity (other than the new successor church corporation).

- 3) Under § 57-10, real or personal property for church corporations no longer needs to be held by trustees but can be held in the name of the church corporation or a separate property holding nonprofit corporation under the new § 57-16.1. If no petition is filed within one year of recordation of the trustee's deed transferring property, it shall be conclusively presumed that the transfer was valid.
- 4) Incorporation often makes it easier for a church to buy, sell, and encumber real estate, operate bank accounts and engage in other business transactions.
- 5) Incorporation protects the corporate name in Virginia and eases trade name registration and trademarking the name where appropriate.
- 6) Incorporation also lends to stability of an organization more so than an unincorporated association, since the members, directors, trustees, and officers of a church may change over the years.
- 7) Churches must be incorporated in order to receive grants through government faith-based social service provider programs or private foundations.
- 8) Incorporation and tax exemption can often permit special nonprofit mailing rates and procure discounts from vendors.
- 9) Finally, most banks and lending institutions prefer to deal with an incorporated entity to assure its governance, purpose and legal status and have started encouraging incorporation before finalizing any loans to the church.

Even after the *Falwell* case, churches in Virginia need not be incorporated to be exempt from federal income tax. However, at least one court has observed that, “while not a pre-requisite for exemption, a showing that an organization seeking a property tax exemption is incorporated as a church or religious association will lend credence to that organization’s claim that it is a *bona fide* church or religious organization.”

5. Concerns about Church Incorporation in Virginia.

Other than ill-placed theological concerns about separation of church and state³, the primary roadblocks the author has observed to incorporation are the upfront legal and filing costs and requirement that an informational report and nominal fee must be paid annually to the State Corporation Commission or suffer the loss of its non-profit corporate status. Some other

³ Another concern may be the time involved in changing all legal documents (deeds, titles, bank accounts, loans, etc.) to reflect the new incorporation states. However, the word ‘incorporated’ or ‘Inc.’ does not need to appear as part of the Church’s name, on its stationery, checks, church signs, etc. and at this point a name change to “_____ Church Inc.” will suffice for other legal documents. Some church leaders also believe incorporation makes a church more liable to government regulation. Church law expert Richard Hammar disagrees: “That argument fails to distinguish between the church as a corporate entity and the church as the Body of Christ. Any church that incorporates is not subservient to the state but provides advantages to its members and leaders.” With all the government privileges, protections and rights already accepted long accepted by churches and other religious organizations, such as tax deductibility of donations, no corporate tax, sales and use tax exemptions, property tax exemptions, housing allowances for ministers etc. the argument was ended or severely diluted over 100 years ago to no longer have much, if any, validity!

commentators have alleged the following as disadvantages of incorporation, to which this author has provided his response to those claimed disadvantages:

- It requires the re-writing of a congregation's Constitution and Bylaws to conform to the requirements of the IRS and the State Corporation Commission which could cause dissention since some provisions may be matters of disagreement within a church; *in our experience, most church Constitution and Bylaws are already out of date and desperately need updating for 21st century legal compliance and risk management purposes, as well as for resolving ambiguities, conflicting statements, and streamlining.*
- There is a cost to setting up and maintaining the church corporation; *currently, the State Corporation Commission ("SCC") charges \$75 for filing the Articles of Incorporation. An Annual Report must be filed each year with the SCC which reflects an updated list of officers and directors (currently, the annual renewal fee paid to the SCC is \$25) to maintain your church corporation. Additional attorney fees from a knowledgeable attorney skilled in church laws and tax exempt entities and knowledgeable about your church government will also be needed to draft the Articles of Incorporation and to tailor your church corporation's Constitution and Bylaws to assure that both are compliant with the applicable Virginia law and IRS regulations for a §501c3 tax-exempt church corporation. However, this is a one-time initial cost, which is significantly less compared to the potential liability of the church and its leadership as an unincorporated association or, worse, incorporated incorrectly.*
- A registered agent must be designated to receive service on behalf of the corporation instead of trustees (he or she must be either a member of the State Bar or a director of the corporation); *however, a good attorney who serves as a registered agent will have a system for recording all incoming and outgoing mail/faxes, as required by Virginia law, and will better be able than lay Trustees to handle legal documents with deadlines and correctly answer complex legal issues.*
- Names on bank accounts need to be changed to the corporate name and all property should be transferred to the church corporation; *generally, unless the church changes its name completely, little change is necessary with the church's bank account. As discussed above, the transfer of the property to the church corporation can be done easily by a knowledgeable attorney and will result in much greater protection for the church.*
- The Church must follow the Virginia statutes in regard to its organization; *statutory rules apply unless the Bylaws or Constitution provide differently, which good Bylaws will, including: annual meeting, quorum requirements, notice provisions; use of proxies, terms for directors and officers, removal of an officer by the board of directors, judicial dissolution of the corporation and court ordered meetings of the corporation. (Va.Code §§13.1-801-13.1-945)*
- Inspection of records by members would appear to be governed by the Non-Stock Corporation Act (*Code of Virginia §13.1-933(D)*) and under §13, it is debatable whether it can be changed by the Constitution or Bylaws of the church; *however, while it can be limited or restricted by Bylaws especially as church corporation under Sections 57-58, most churches make records to members available (except salary*

- information) since they desire to be transparent to its donors and fellow Christian brothers and sisters.*
- A church corporation director is liable for failure to exercise “good faith *business* judgment of the best interest of the corporation.” (*Va. Code §13.1-870(A)*); *this is correct, however a leader in an unincorporated association is completely liable for acts of the association.*
 - Church property is held in the name of the church corporation and not by trustees; *once transferred to the church corporation, the property may be bought, sold or mortgaged without court approval, providing for easier property transactions without state involvement and court oversight. Good Bylaws drafted by a knowledgeable attorney will establish proper guidelines for these types of transactions and reduce the possibility of abuse by church leaders.*

Over the years, Virginia has passed several statutory provisions that have tried to protect members and officers/directors of churches from being liable for the negligence of others in a church setting. Ostensibly, these laws were enacted prior to the *Falwell* decision in order to give churches some of the same protections that churches in other states receive by incorporating. Here are some examples: 1) No **member** of a church is liable in tort or contract for the actions of any other member of the church or the actions of the church itself. (*Va. Code §8.01-220.1:3*); 2) **Unpaid officers, trustees and directors** of certain tax-exempt organizations may have immunity from liability. (*Va. Code §8.01-220.1:1*); and 3) The fiscal officer of the church who signs a deed or mortgage **on behalf of the church** is generally not personally liable on the debt. (*Va. Code §57-15.1*).

Unfortunately, even these provisions are like Swiss cheese when it comes to limiting personal liability of church leaders. Thus, church incorporation appears to be a better alternative and perhaps a “belt and suspenders approach” by incorporating and utilizing these provisions.

6. Process of Incorporation

While the process of incorporation of churches and religious denominations remains somewhat unclear since the *Falwell* decision and the church incorporation process is still relatively new, the statutory changes, which became effective July 1, 2005, have cleared up much of the uncertainty in church incorporation law. While it would be understandable that the Virginia Non-Stock Corporation Act (*Code of Virginia §13.1-803 et. seq.* 2002 Supp.) may be applicable,⁴ since at present there is no special incorporation for religious corporations, one must remember that there is church law sprinkled throughout the Virginia code and in case law history interpreting such church law provisions. Thus, such non-stock non-profit law will probably only be utilized if the Bylaws, church law provisions and case law do not cover the issue at hand. Thus, a church’s incorporation should be handled as a church corporation, not a non-profit or non-stock corporation under Title 13 non-stock statutes, in order to achieve all the church law benefits and

4. Some comfort should come from the fact that it appears that the Virginia Non-Stock Corporation Act is modeled after the Revised Model Non-Profit Incorporation Act that has been adopted by many states across the country so there is history and interpretation to these laws that add greater understanding when it comes to church disputes and problems under tax exempt corporations that are churches or related entities.

protections. Moreover, since the right to incorporate came through judicial ruling and now Constitutional and statutory revisions, all of the prior laws that applies to churches will also still apply, until the Va. Legislature rewrites the entire law as to churches and religious institutions as has been done in other states⁵.

The general procedure for filing the Articles of Incorporation consists of the following steps: (1) preparation of duplicate Articles of Incorporation setting forth the Corporation's name, period of duration, registered agent and address within the state, registered office address, purposes and names and addresses of the Board of Directors, how they will be appointed/elected and set forth the incorporator(s); (2) signatures of the incorporator(s); 3) inclusion of all IRS required tax exempt language and (4) submission of the Articles of Inc., together with the prescribed filing fee of \$75.00 to the Va. State Corporation Commission.

After approval by the Va. SCC, it issues a Certificate of Incorporation. The church's corporate existence begins at the moment the Certificate of Incorporation is issued. However, after such a Certificate of Incorporation is issued, the Virginia and common law specify that an organizational meeting of the Board or congregation (depending on church government) shall be held at the call of the incorporator(s) for the purpose of adopting the initial Bylaws and Constitution of the Corporation, accepting members from the unincorporated entity to new church incorporation, confirming new Directors and Officers, authorizing new bank accounts; giving the corporation all authority and power to act and changes to legal documents to reflect corporate status (*See my article entitled 'Power in the Bylaws, Constitution and Policies for Incorporated Churches.'*), and such other purposes as may come before the meeting.

After reviewing hundreds of church Constitutions and Bylaws documents over the past several years, we have concluded it is imperative that a church's Constitution and Bylaws be reviewed and amended by competent legal counsel knowledgeable in church and tax exempt law for legal compliance, governance changes, updating to conform to current church practice and best practices of risk management. There are too many nuances in church and tax exempt law and too many idiosyncrasies with churches and denominations to believe that a lawyer can just "dabble" in this area of law any longer.

Some of the typical provisions in the Articles of Incorporation will be whether the church corporation is to have members or not, the right of the members to vote, statement of the manner in which directors shall be elected, appointed or designated, amendment provisions, statement of the tax-exempt purposes and limitations, and the powers of the non-profit tax-exempt corporation, as well as a statement of what happens upon dissolution. While some of these provisions are mandatory and others are permissive, it is essential that a number of the provisions, **including the tax-exempt provisions**, be strictly adhered to, in order to both protect and promote the corporate and tax exempt status and its powers.

7. Frequently Asked Questions

⁵ VA HB 1466 and SB 1267, which have been passed and effective July 1, 2005, provide that an incorporated church may hold legal title to real or personal property and permits a church to act without court appointed trustees including the buying, selling and encumbering of real property. The bill also addresses potential transfer of real property from the unincorporated church to the incorporated church.

Q. Who should serve as the Church's Registered Agent?

A. Ideally, the Incorporator and Registered Agent should generally be a member of the Virginia Bar since Virginia Law provides for that qualification and most, if not all, of the documents which will be delivered to the registered agent will be legal in nature. Some documents, such as lawsuits and annual reports, will contain important deadlines that could incur significant liability on the part of the church if not met. To minimize the chances of important legal papers being lost, the registered address of the church should be a law office or other location with a system in place for recording all incoming mail and facsimiles. Churches may designate their own Registered Agent or Simms Showers, LLP can provide this service for an annual fee. If the registered agent is not a Virginia licensed attorney, he or she must be a director of the corporation and the registered address must be the same as the individual's Virginia business address.

Q. What is an organizational meeting?

A. After incorporation, every new corporation is required by law to hold an organizational meeting at which members join the new church corporation, the Bylaws are formally adopted, officers are elected/appointed, and other powers and policies are authorized for the new corporation and/or officers to conduct the business of ministry. Depending on the form of church governance, upon request, the author will either schedule a phone conference with the client's directors of the church corporation after the Certificate of Incorporation is received but before the Bylaws and Constitution are redrafted to determine the governance etc. of the church and send a *sample agenda and minutes* for a congregational meeting to be conducted. Upon request and additional fee, the author's firm representative may conduct either or both the question and answer meeting with the members and Board and the Organizational Meeting, but that service is generally not needed since this article and sample organizational meeting agenda and minutes are self-explanatory.

Q. Who should serve as the Directors of the Corporation?

A. Typically, it is wisest to simply designate the Church's current governing Board (Trustees, Church Council, Elders or Deacons) as the Directors of the new church corporation and make the transition in the Bylaws and over years. This avoids extra meetings, confusion and political strife, since it allows most of the duties and responsibilities of the governing individuals to remain the same.

Q. Is it necessary to revise the Church's Constitution and Bylaws after incorporation?

A. *Absolutely yes.* In incorporating many Virginia churches over the last several years, the author has found that all churches' Constitution and/or Bylaws are either outdated, legally inadequate or inconsistent with the new Articles of Incorporation. In order to

ensure legal compliance, good risk management and clear, best practices for operating the church, Simms Showers strongly advises that a church revise its Constitution and/or Bylaws at the time of incorporation. Moreover, some revisions of such Constitution and Bylaws can be contentious but incorporation provides an excellent reason to finally solve these problems. The organizational meeting provides a good easy opportunity to adopt these new governing documents.

Q. Does the Commonwealth of Virginia require an Annual Report after a church is incorporated?

A. Yes. Every year the State Corporation Commission will mail to your Registered Agent an Annual Report form containing the name and address of the corporation, registered agent's name and address, and the names and addresses of the directors. Updates to the information on record of the Church can be made at that time.

Q. Is there an annual fee to keep the Corporation's status active?

A. Yes. Currently, the annual fee to remain active with the State Corporation Commission is \$25.00. This fee is submitted along with the Annual Report form by the Registered Agent.

Q. What is the best way to introduce the new members' covenant/statement for members of the old unincorporated church?

A. While church covenants or applications which each member signs are optional to legally enforce risk management provisions, such as Biblical conciliation and church discipline, it is best to get all to sign the document of how we will live together as a body of believers. It is best to treat the Organizational Meeting as a Charter Celebration and have the members sign the members' covenant as Charter Members. The more positive the process and celebration, the easier it will be received. Also, explain that the 21st Century brings new challenges and risks, and the new Bylaws and Member Covenants will best meet the increasing 21st century risks of the church. We have developed a sample letter for our clients to accompany new Constitution and Bylaws that can be tailored for pastor or church leader to sign and made available to church members to explain why the church is incorporating, changing its Constitution and Bylaws, having a Members Covenant and other legal requirements.

Q. Do we have to change the legal documents (deed, mortgages, bank accounts, etc.) after we incorporate our church?

A. Yes. However, with the passage of SB 1267, which became effective July 1, 2005, implementing amendments to Virginia General Statutes Sections 57-8 and 57-10, Trustees are no longer required for church corporations to hold, manage buy, sell, encumber or transfer real property and court appointment of such trustees are obviously no longer required. Thus, upon incorporation being finalized (Bylaws and Constitution revised and Organizational meeting held), court appointed Trustees may now transfer real and personal property to the new incorporated church without the need for court approval

by simply sending a gift deed for recordation or letter to transfer property to the clerk of the county court where the property is located with instructions to transfer to the new church corporation. See new Section 57-16 for further instructions or contact a knowledgeable church law attorney to help in this process. Beware, however, that the signing trustees are properly appointed by the church and approved by the court and empowered by the unincorporated association thought minutes to transfer the property to the new church corporation to be accepted by the President or Secretary of the new church corporation. Of course, if there is refinancing or other property issues involved you may want to use the court to approve the transfer etc.

Q. What are the significant law changes that became effective July 1, 2005 and later in 2006 with the passage of the Constitutional amendment as to church corporations?

First, the Constitutional amendment made incorporation applicable to all churches in Virginia not just to those in the western district dependent on the Falwell federal court decision. Second, in general, trustees are no longer needed for church corporations and court appointment of such trustees is not required to hold, manage, buy, sell, transfer or encumber real property of the church corporation. Of course, church corporations may still authorize trustees to have that legal authority with the church members' approval or it can delegate it to one of its officers or directors. Unincorporated churches, however, must comply with all the old law provisions requiring court approvals for appointment of Trustees and buying, selling, encumbering or transferring land to another entity (other than the new church corporation).

Moreover, court approvals are no longer needed for church corporations to buy, sell or encumber real property and an authorize officer or agent of the church corporation will have the power under and consistent with the Bylaws to bind the church in any sale, purchase or mortgage of church property. Real or personal property for church corporations no longer need to be held by trustees but can be held in the name of the church corporation or a separate property holding nonprofit corporation under the new section 57-16.1. If no petition is filed within one year of recordation of the trustee's deed transferring property, it shall be conclusively presumed that the transfer is valid. Finally, the Constitutional amendment cleared up all legal questions about the ability of churches throughout the Commonwealth to incorporate. (See above detailed explanation for all changes)

Q. Is there a detailed process concerning transferring property from the unincorporated association to the new church corporation and is it necessary?

A. The basic reason is to more fully protect the property and church with the corporate shield. Of course, for more protection many larger churches with net assets worth more than \$1 million are creating Property holding corporations/companies with the church being the sole member to separate its major liabilities from its major assets. (See *Church and Nonprofit Affiliates and Subsidiaries legal memo for further information*). Here is the basic church gift deed process:

- 1) If the trustees have been court approved (signed court order proving appointment) and willing and able to sign the gift deed then the members resolution authorizing these trustees to transfer to the new church corporation is all that is needed for the gift deed authorization; however, if trustees not approved or are no longer living or in the area able and willing to sign the gift deed, then new ones have to be appointed by the church (consistent with the number under the association Bylaws) and then a petition and order filed with the court authorizing their appointment and approval to transfer property;

- 2) Once that is accomplished one has to research the deeds and land descriptions with the tax id numbers to begin to draft the gift deed(s) (the church needs to make a decision on whether to notify the bank of the transfer although it is not needed under the law);
- 3) After the gift deed(s) IS DRAFTED then the trustees have to sign and get notarized and have the church chairman or president accept the gift; and
- 4) Then the signed and notarized gift deed gets recorded at the county courthouse either by the church or our firm and returned for the church and us to keep a filed recorded copy of the Gift Deed.

Obviously, the cost depends on how much has already been done and how many parcels the church has along with how much title research has to be done by us. However, a simple gift deed process for one parcel with the resolution and church recording the gift deed generally runs around \$500 on an hourly basis but if one has to do the entire process including the petition and order drafting and filing and/or multiple gift deeds it could run considerably more

Q. Will church incorporation require the church to file for 501(c)(3) tax exempt status?

A. **Absolutely not.** Churches that meet the requirements of IRC section 501(c)(3) are **automatically considered tax exempt** and are not required to apply for and obtain recognition of tax-exempt status from the IRS. See **IRS Publication - Churches and Religious Organizations Benefits and Responsibilities under Federal Law** at www.irs.gov/exempt. Although there is no requirement to do so, some churches seek recognition of tax-exempt status from the IRS because such recognition assures church leaders, members, and contributors that the church is recognized as exempt and qualifies for related tax benefits. For example, major contributors to a church that has been recognized as tax exempt would know that their contributions generally are tax-deductible but vendors and government grant officials may want to see an IRS “tax exempt determination letter”.

Q. How does a church get started with church incorporation, how long does it take and cost?

A. First, we have a new church or nonprofit entity client fill out the ***Church Incorporation Questionnaire and Retainer*** and submit it, along with the requested documents, both in hard and electronic copy, to Simms Showers, LLP. Presently, churches and denominations/associations who are existing clients receive a reduced fixed fee, while other churches will pay slightly more, plus a filing fee and optional costs for the entire package. The entire process normally takes 2-4 months but it can be expedited in emergency situations or can take longer if the church needs more time to work the acceptance process for the new Constitution and Bylaws, etc.

Q. Should we separately incorporate more risky ministries, such as childcare operations, schools, motorcycle clubs, social or community service or camps associated with the church and/or separate our valuable property assets from our operations liabilities?

A. While this is beyond the scope of this article and the author has written extensive articles on this complex question and subjects, suffice it to say that it is generally prudent in the 21st century to separate your major assets from your major liabilities. However, you also have to decide if you will file it as a separate tax exempt entity with its own 501c3 status or will it come under the church's automatic tax exempt status through a sole member nonprofit LLC or integrated auxiliary of the church. Moreover, you have to also think of the practical aspects of running multiple organizations with different boards, financials and corporate/tax exempt status.

8. Conclusion

Incorporation provides a great opportunity for churches to revise, update and make its Constitution and Bylaws legally compliant, more workable from a governance point of view and better manage 21st Century risks. The entire process involves gathering documents and information to draft and file Articles of Incorporation, obtaining the Certificate of Incorporation, serving as Registered Agent, revising the Constitution and Bylaws and working to tailor such documents to church needs, drafting the Member's Covenant, helping church leaders with the approval process up to and including the Organizational Meeting, providing a sample Agenda and Minutes for that important meeting.

We are prepared to help with any other needs that the church or its related entities may have to help it best serve God's kingdom and His work. We are glad to draft the gift deed for transferring property from the unincorporated association to the new church corporation under the new law and with building, land and construction issues with which most attorneys are unfamiliar. We regularly assist in child abuse and sexual offense issues, employment matters, and pre-litigation and litigation/arbitration cases. We have a list of policies and other services that we provide to churches and nonprofits upon request. If the church wishes to retain the author and his law firm to do such work or any other church or tax-exempt law-related work, it may contact him at the email address or phone number below::

H. Robert Showers

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We would consider it a privilege and a pleasure to incorporate any church, bring its Constitution/Bylaws up to date, into legal compliance and using best risk management practices and to help your church or religious ministry in any other way that you need. We have devised an easy-to-use Church Incorporation Questionnaire so that a church representative can complete it and return it to us with the requested documents, fees and expenses to facilitate this process. Please also feel free to get a free version or a paid subscription to a bi-monthly nonprofit and church legal, tax and risk management national newsletter at www.nonprofitchurchlaw.com.

Legal Disclaimer: *This Article and related material have been prepared specifically for churches seeking to incorporate in the Commonwealth of Virginia. It is not meant to provide legal advice or substitute for competent legal counsel that can address specifics of each church. Any reader is encouraged to seek appropriately trained and experienced professional legal counsel who specializes in tax exempt and church law prior to taking the step of incorporating and redrafting governing documents and policies for legal compliance and risk management.*