

THE INCORPORATION OF TENNESSEE BAPTIST CHURCHES

A church considering incorporation is very strongly encouraged to utilize the advice and assistance of an attorney experienced in Tennessee nonprofit corporation law and knowledgeable of Baptist polity. The information contained in this material is not intended to substitute for the legal advice the church should seek. This information was provided to Tennessee Baptist Mission Board by James P. Guenther, an attorney with the Nashville firm of Guenther, Jordan and Price. Mr. Guenther's firm is general counsel for the Convention. He may be contacted at 615-646-2638, or by email at jpguenther@gjplaw.com.

Baptists understand the church to be an autonomous local congregation of baptized believers, associated by covenant in the faith and fellowship of the Gospel, each congregation operating under the Lordship of Christ through democratic processes. The church is not of this world, but it is operated in this world. The regulation of our society is accomplished through civil law. Therefore each Baptist church must choose a civil identity and create a legal framework which will facilitate its ministries. Each church must determine how it can best transliterate its spiritual nature into an existence which the law will recognize.

Tennessee law offers a Baptist church a choice essentially between being an unincorporated association or a nonprofit corporation. If a congregation has not become a corporation by adopting articles of incorporation (a charter), and by filing that document with the Secretary of State, and then by adopting bylaws and electing officers and trustees, the church is an unincorporated association.

While no statistics are available, most Tennessee Baptist churches are probably unincorporated associations. This probably does not reflect the intentional choice of congregations between the two legal forms; it more likely reflects the fact that many churches have simply not “bothered” to incorporate. Increasingly, however, new Baptist churches are choosing to start out as nonprofit corporations, and established churches are choosing to “convert” from being an unincorporated association to being a corporation.

There are advantages to operating a church as a nonprofit corporation. One is that it eliminates the risk that the members of the church may become liable for the debts and obligations owed or the wrongs committed by the church. Another is that nonprofit corporation law is clearer than the law regulating unincorporated associations. Incorporation offers the church's membership, officers, and trustees greater clarity when it comes to management of the church's business. An incorporated church presents to the world a more precise legal identity, one that is better understood in commerce. Finally, Tennessee corporation law nicely accommodates Baptist polity.

As a corollary, the corporate structure requires that the congregation and its leadership take more care to comply with the more extensive requirements of the law.

As of January 1, 2015, Tennessee law has established a precise path by which an unincorporated church may come to be a nonprofit corporation. The path is found in the Tennessee Nonprofit Corporation Act. The process is called “entity conversion.” It is contained in the Tennessee Code at Chapter 61 of Title 48. A church which is presently an unincorporated association may be spurred by this development to consider becoming incorporated.

A church which wants to consider conversion to a nonprofit corporation status should secure the assistance of an attorney experienced in Tennessee nonprofit corporation law. That assistance is critical not only in guiding the church through the process, but in assisting the church in drafting the required documents and making the necessary filings.

The entity conversion process requires the church to first determine that the name it wishes to use is not the name of an existing Tennessee nonprofit corporation. That search may be done at <http://sos.tn.gov/products/business-services/search-business-name-availability> . “Incorporated” or “Inc.” is not required to be in a church’s name.

The church would then draft and adopt a Plan of Entity Conversion, notify the Attorney General of Tennessee, and then execute Articles of Entity Conversion which are filed with the Secretary of State. Articles of Entity Conversion may be found at <http://www.tn.gov/sos/forms/9406.pdf>. The filing fee for the Secretary of State is \$200.00.

The Plan of Entity Conversion must include, among other things, the full text of the charter of the corporation. The following is a charter which a brand new church may wish to consider. The Secretary of State offers a charter form and instructions for creating a new nonprofit corporation at <http://share.tn.gov/sos/forms/ss-4418.pdf>. The use of that charter form is not mandatory. The following charter may be used instead of the Secretary of State’s form.

The charter which an existing unincorporated church might use to include in its Plan of Entity Conversion could be the same as the following charter, except that the names and addresses of the incorporators and their signatures would not be included.

These are some explanatory notes to the charter:

1. This charter is pretty much a “bare-bones” charter. A church may choose to add additional provisions to its charter. In making these choices, the church should recognize that, unlike an amendment to the church’s bylaws, an amendment of the charter must be filed with the Secretary of State. That may argue for putting desired and necessary governance provisions in the bylaws if they are not required by the law to be in the charter.
2. The language in sections 1-9 is required. The “registered agent” named in section 8 of the charter is the person to whom service of process, notice of suit against the church, is delivered. For example, the pastor could be named as agent.

3. A church is a 501(c)(3) entity, entitled to the exemptions of the Internal Revenue Code, if its governing documents and its operations meet the Code's requirements. Each church cooperating with the Tennessee Baptist Convention is also included in a group exemption maintained by the Convention and evidenced by an exemption letter from the Internal Revenue Service. Section 10 of the charter is the language which IRS expects to see in the charter of a 501(c)(3) entity.
4. A nonprofit corporation must have a board of directors. (T.C.A. §48-58-101) It may hurt Baptist ears to hear of a church's having a board of directors since Baptist churches are controlled by the members. However, the church's charter may declare that the duties normally performed by a board will be performed by the members of the church. (T.C.A. § 48-58-101(d)) If the church wishes to preserve congregational control, it must make this declaration in its charter. And, to allow the document to sound a little less secular, the Act allows the charter and bylaws to call the board of directors by another name, for example, "board of trustees." The attached charter begins to accomplish all this in sections 11 and 12.
5. Section 13, limiting the liability of a trustee to the corporation or its members is permitted, but not required, to be in the charter. (T.C.A. §48-52-102)(b)(3))
6. The charter or the bylaws may permit or make obligatory indemnification of a trustee for liability to persons under certain circumstances. (T.C.A. §48-52-102(b)(5)) "Indemnification" is a promise made by the church that it will compensate its trustees for any harm they may suffer by properly carrying out their trustee responsibilities. Section 14 is a provision which makes indemnification obligatory to the extent allowed by the Act.
7. A nonprofit corporation must have bylaws in addition to its charter. The charter is the most fundamental governing document and the bylaws are the next most fundamental governing document. The bylaws may not be inconsistent with the charter. The charter is filed with the Secretary of State and with the County Register. Bylaws are not filed with government. Amendment of either the charter or the bylaws must be accomplished in a manner allowed by the Act. A church may not "suspend" its bylaws or charter.

Some incorporated Baptist churches have a document called a "constitution," and a document called "bylaws." The law does not contemplate a corporate document called a "constitution," and if an incorporated church has such a document it will likely be seen in the law as the bylaws, or part of the bylaws. It is probably a better practice for an incorporated church to avoid the use of a "constitution," and be governed by documents whose titles fit the vocabulary of the law, those documents being the "charter" and the "bylaws."

The bylaws will be something of a "rule book" by which the church will conduct its business. The bylaws are the agreement between and among the members on how the church will function.

This rule book is in part taken from rules which the Act imposes on all nonprofit corporations, or on at least on public benefit religious nonprofit corporations, the class of nonprofit corporations in which churches fall. It in part contains rules made up by the church to avoid the application of a statutory rule which will apply to the church absent the church's rule to the contrary. Some statutory rules may be avoided by this technique. And it is in part made up of rules the church has made up and which are simply not inconsistent with the Act or the charter.

So, the bylaws may not be inconsistent with the rules established by the Tennessee Nonprofit Corporation Act. And, while the Act dictates many of the rules contained in the bylaws, the Act also allows the church to establish some rules which will avoid the application of what one might call “default” rules, or rules which the Act makes applicable to a church unless the church has provided otherwise in its governing documents. Understanding this will help a church understand why it needs the assistance of an attorney in drafting those bylaws. Drafting bylaws for Baptist churches is seldom a matter of one-size-fits-all. Copying some other church’s bylaws or some “model” bylaws found on the internet is not likely to give a church a good result.

Among other things, the bylaws will:

Declare the church’s mission and perhaps its religious tenets;

Establish rules regarding membership, and the voting of members. Should all members be entitled to vote or, for example, only “resident members” who are at least more than a certain age? Unless the charter or bylaws prohibit proxy voting, a member may vote in person or by proxy. Should the church allow for proxy voting, perhaps for its shut-in members? Or should a voting member be required to be in the meeting so that, before the member votes, the member has the benefit of the information and the reasoning of other members which will come out during the debate which will occur in the meeting? (T.C.A. § 48-57-205);

Establish rules regarding member meetings and the fair notice of those meetings which the members must receive, the required quorum, and the affirmative vote required for actions. Unless the charter or bylaws provide for a higher or lower quorum, ten percent of the votes entitled to be cast must be represented in a meeting of members to constitute a quorum. (T.C.A. § 48-57-203);

Give guidance for the trustees and the corporation’s officers, and declare who will fill the required offices of president and secretary, which officer will have the power and duty to authenticate the records of the church, how the trustees and officers are elected, and what are their duties;

Speak to standing and *ad hoc* committees of the church and the role of deacons;

Specify rules regarding the execution of contracts, borrowing money, buying, selling and mortgaging property, and the maintenance of banking accounts and deposit;

Declare the method by which the charter and bylaws may be amended.

The bylaws are the guide book for the members, officers, trustees, committee members, and deacons to the end that the church will act decently and in order.

CHARTER OF FIRST BAPTIST CHURCH OF SOMEPLACE, TENNESSEE

The undersigned, acting as incorporators of a nonprofit corporation under the Tennessee Nonprofit Corporation Act, adopt the following Articles of Incorporation:

1. The name of the corporation is **First Baptist Church of Someplace, Tennessee.**
2. The corporation is not for profit.
3. The corporation is a public benefit corporation.
4. The corporation is a religious corporation.
5. The duration of the corporation is perpetual.
6. The corporation will have Members.
7. The name and address of each incorporator is: Paul Lastname, 10 Rome Road, Someplace, Tennessee, 37000, and Silas Lastname, 10 Philippi Drive, Someplace, Tennessee, 37000.
8. The name and complete address of the corporation's initial registered agent and office in Tennessee is: John Baptist, 100 Church Street, Someplace, Tennessee, 37000. This office is located in Backwoods County.
9. The month and day the corporation's fiscal year shall conclude is _____.
10. The corporation is organized exclusively for charitable, religious, and educational purposes, including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code. No part of the net earnings of the corporation shall inure to the benefit of, or be distributable to its Members, trustees, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth herein. No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of or in opposition to any candidate for

public office. Notwithstanding any other provision of this charter, the corporation shall not carry on any other activities not permitted to be carried on (a) by a corporation exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code, or (b) by a corporation, contributions to which are deductible under section 170(c)(2) of the Internal Revenue Code, or the corresponding section of any future federal tax code. Upon the dissolution of the corporation, assets shall be distributed for one or more exempt purposes within the meaning of section 501(c)(3) of the internal Revenue Code, or the corresponding section of any future federal tax code. Any such asset not so disposed of shall be disposed of by a court of competent jurisdiction of the county in which the principal office of the corporation is then located, exclusively for such purposes or to such organization or organizations, as said court shall determine, which are organized and operated exclusively for such purposes.

11. Pursuant to T.C.A. §48-58-101(d) and in order to maintain the congregational polity of Baptists, all corporate powers, including but not limited to the powers which would otherwise be exercised by a board of directors, shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, its Members.
12. The corporation's board of directors shall be known as its board of trustees. Those persons constituting the board of trustees shall be not fewer than three, and shall be elected by the Members. The trustees shall act only upon and according to the explicit instructions of the Members.
13. No person who is or was a trustee of the corporation, nor such person's heirs, executors or administrators, shall be personally liable to the corporation or its members for monetary damages for breach of fiduciary duty as a trustee; provided, however, that this provision shall not eliminate or limit the liability of any such person: (a) for any breach of a trustee's duty of loyalty to the corporation or its members; (b) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; or (c) under T.C.A. §48-58-302, as amended from time to time.
14. With respect to claims or liabilities arising out of service as a trustee of the corporation, the corporation shall indemnify and advance expenses to each present and future trustee (and his or her estate, heirs, and personal representatives) to the fullest extent allowed by the laws of the State of Tennessee, both as now in effect and as hereafter adopted or amended.

Dated this _____ day of _____, 20__.

By: _____

Paul Lastname

Silas Lastname