

Resolving Trustee Disputes Foundation Split-Ups and Other Approaches

Megan C. Sanders
Michael V. Bourland

Bourland, Wall & Wenzel,
A Professional Corporation
Attorneys and Counselors
301 Commerce Street, Suite 1500
Fort Worth, Texas 76102
(817) 877-1088
(817) 877-1636 (facsimile)

Email: mbourland@bwwlaw.com

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INTRODUCTION

Like any organization, a family foundation must deal with internal conflict issues, whether between the board and the executive director, the board and the staff, or among board members themselves. In fact, the potential for conflict may be particularly high in a family foundation, where conflict easily brews among family members who have varying ideas regarding the legacy of the organization. How a conflict is addressed and resolved could have significant effects on the organization, even to the point of the termination of the entity. The key in resolving these disputes and avoiding a split-up comes in how the organization is prepared to handle these issues, both in its policies and its daily practices. In the event the internal conflicts are unresolvable to the point of irreparable division within the foundation, it should be dissolved in the most administratively and tax efficient way.

This article addresses common situations that may brew conflict in the foundation atmosphere, and ways in which a foundation board can be proactive in limiting the occurrence of serious disputes within the organization. It goes on to detail methods in which a foundation may properly deal with conflict once it has arisen, exploring responses to various types of foundation conflicts and how—if a conflict cannot be resolved—ways in which a foundation may be terminated or split into another form (or forms) of a more productive nonprofit organization, and finally, the federal tax implications of such results.¹

¹ The author gratefully acknowledges the guidance of Darren B. Moore in the preparation of this article.

Case Example Currently in the News

Trustee disputes are by no means simply a theoretical issue. Consider, for example, a case currently making headlines:

Upon his death in 2011, Mr. Cy Twombly left his vast collection of art pieces to be used for public purposes. Rather than serving the charitable purposes of its founder, however, the Cy Twombly Foundation is currently enveloped in a lawsuit among its directors. The dispute began when one of the four board members, Mr. Saliba, mentioned during a board meeting that the foundation had been paying investment fees to his investment company.² This arrangement created two problems: (1) the foundation had never approved such fees, and as such, the rest of the board was unaware of this insider benefit; and (2) the investment company was not registered as required by state and federal law, meaning the payment of the fees was illegal, even if the fees had been approved by the board. In February 2013, another board member, Mr. Lerner, filed suit in Delaware state court, asking a judge to intervene in the internal board dispute that soon followed.³ This lawsuit asked the judge to appoint Cy Twombly's son, Alessandro, to the board, in order to break the deadlock among the four board members.⁴

In March 2013, the foundation's president and vice president filed a lawsuit in which they alleged that with Mr. Lerner's assistance, Mr. Saliba (who was not only a foundation director but also but also a well-known art-world lawyer) stole hundreds of

² Randy Kennedy and Carol Vogel, "Turmoil at Cy Twombly Foundation," *The New York Times*, March 13, 2013, available at <http://www.nytimes.com/2013/03/14/arts/design/cy-twombly-foundation-embroiled-in-lawsuits.html?pagewanted=all&r=0>.

³ *Id.*

⁴ *Id.*

thousands of dollars in unauthorized fees for investment services. The suit states that Mr. Lerner and Mr. Saliba grossly overstated the value of the artwork left to the foundation.⁵ Allegedly, the appraiser hired by Mr. Lerner and Mr. Saliba to value the artwork never physically inspected any of the pieces. Instead, the appraisal was based on a written inventory prepared by an archivist hired by Mr. Lerner and Mr. Saliba.

The facts alleged in the Cy Twombly Foundation litigation raise serious issues regarding self-dealing, conflicts of interest, lack of disclosure, and potentially fraudulent behavior. The situation likely is not what Mr. Twombly envisioned when he created his legacy.

While the litigation is far from over, the certainty in this situation is the foundation's reputation will never be the same, and its ability to achieve its original purposes likely will forever be affected. What began as an internal dispute has now caused significant public relations issues, which might have been avoided had proper practices and policies been put in place.

I. COMMON ISSUES LEADING TO DISPUTES

The Cy Twombly Foundation is just one example of the drastic effects that unchecked and unresolved foundation disputes and the failure to follow good governance practices can have on a foundation's legacy. This section highlights some common problem areas.

A. Non-Functional Boards. Some of the most common issues that allow conflicts to brew among board members include disputes over strategy, conflicts of interest, power struggles, personality conflicts and

misunderstanding the management of the organization.⁶ Foundation boards can become infected with poor communication, passivity and inadequate information leading to poor decision-making, and a lack of intellectual diversity.⁷

Misunderstood Roles and Responsibilities. Issues also tend to arise when a board lacks a clear structure and individual board members do not understand their duties or roles.⁸ Shared leadership can easily generate conflict, especially when the board is made up of people with varied and diverse backgrounds.⁹ Further, board members who spend the majority of their time in other fields may have different goals or methods of handling business that do not coincide with the mission of the foundation or its ethical obligations.¹⁰

Unless they have been through some kind of training and development program, it is likely the board members are unaware of their duties, roles and responsibilities as fiduciaries.¹¹ Unclear and undefined lines of accountability and board leadership may lead to internal struggles and unrealistic

⁶ Richard C. Reuben, "Corporate Governance: A Practical Guide for Dispute Resolution Professionals," American Bar Association Section of Dispute Resolution, 2005, available at <http://www.ifc.org/wps/wcm/connect/b3e3358048a7e46e9d47df6060ad5911/Corporate%2BGovernance%2B-%2BREuben.pdf?MOD=AJPERES&CACHEID=b3e3358048a7e46e9d47df6060ad5911>.

⁷ *Id.*

⁸ Kathryn W. Miree, "Managing the Board: Governance, Administration, and Marketing," Planned Giving Design Center Network, available at <http://www.pgdc.com/pgdc/managing-board-governance-administration-and-marketing>.

⁹ Marion Peters Angelica, "Resolving Board Conflicts," available at <http://www.tgci.com/magazine/ResolvingBoardConflicts.pdf>.

¹⁰ *Id.*

¹¹ Miree, *supra* note 8.

⁵ *Id.*

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