

STARTING AN ARTS CHARITY IN FLORIDA: A CASE HISTORY

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Introduction

Starting and indeed running a charity in Florida's near tropical climate is an exhilarating experience. Charitable work is very much part of life for some of the more fortunate of Florida's permanent residents. But it is also hard work. The glamour of charity fund-raising functions is counterbalanced by pedestrian effort and by the vital need to attend to detail, particularly legal detail.

This article is an attempt to catalogue the case history of the setting up and running of a charitable musical foundation in South Florida. It recounts essentially three aspects of the case history. First, there is the foundation itself and the documentation necessary for constituting the charity. In the second place, there are the various procedural steps necessary for securing tax exemption from the Internal Revenue Service.² Thirdly, I have added some thoughts on some of the practical problems of running the foundation. These home-spun musings and a first person singular anecdote will, I hope, contrast pleasantly with the drier material contained in the article about legal requirements and initial procedures.

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Rationale of Charitable Status

Charities to support the arts are of course common-place throughout the United States. They are, as in England,³ charitable as advancing education.⁴

Origin

Most charities are conceived by enthusiasm out of need. The Symphony Guild of South Florida was no exception. The need became apparent when a symphony orchestra in Florida in which I took an interest was looking urgently for funds to meet essential expenses. It emerged that there was no obviously and immediately available charitable source. This planted the idea in my head that there was a need for such a body. Having had a lifelong love of music, I therefore set about constituting a suitable body of fellow enthusiasts to help raise money to fulfil that need and we also decided to support the advancement of music in other beneficial ways.

Choice of Vehicle

Early on it became clear that the best and most appropriate vehicle for carrying out what was proposed was an incorporated body. By having a corporation there is an identifiable legal person. A corporation does not die or retire and if granted tax exempt status acquires by virtue of such status enhanced respectability. Other apparent advantages were limited liability and well-recognised precedents which could be adapted to fit the initial conception. The first step was obviously to have a suitable constitution drafted and for that purpose Articles of Incorporation and By-Laws were prepared.

³ I am grateful to Hubert Picarda QC for drawing my attention to parallels in English law.

⁴ 15 American Jurisprudence 2d para 52. For the position in England and Scotland, see *Re Henry Wood National Memorial Trust* [1966] 2 WLR 1601; *Royal Choral Society v IRC* [1942] 2 AER 101; *IRC v Glasgow Musical Festival Association* [1926] SC 920.

Articles of Incorporation

Preliminary

Articles of Incorporation for the Symphony Guild of South Florida were filed at the Department of State of the State of Florida on 30th March 1989. They correspond in many respects, I am told, to what in England constitutes a Memorandum of Association. For comparative purposes it is therefore perhaps of some value to summarise their contents.

Name, Nature and Term of the Corporation

The corporate name was designated as Symphony Guild of South Florida Inc: Article I. Article II, headed Corporate Nature, states:

"This is a non-profit corporation organised solely for general educational and charitable purposes pursuant to the Florida Corporation Not For Profit law set forth in Section 617 of the Florida Statutes."

Article III provides that the term of existence of the corporation is perpetual.

Objects

Article IV, because it defines the purpose, is, of course, of particular importance. It is headed "General and Special Purpose" and reads as follows:

"The general nature and the object of this corporation is to promote in the South Florida area symphony related activities, promotion and support of various symphony groups individuals and activities in the community which might or could improve and enhance the symphonic art and development and improvement of all established facilities, develop programs and groups that tend to promote symphony related activities and to improve and assist in the improvement of existing groups and the creation of additional groups that serve the community, to engage in a general program of education on various phases of symphony related activities, to assist in the creation of facilities for the practice and presentation of symphony related activities; to cooperate with and assist any local institutions; to assist in establishing symphony clinics in South Florida; to promote the study of symphonic music within the local public school systems, and to present and assist in presenting educational programs on the symphony among the instructors of the public schools and among the public in general; to offer general information and educational services through the distribution and sale of literature and otherwise to various civic, fraternal, club, business, professional and labour organisations, and among schools and churches on symphony related activities, and in every way to influence public opinion towards the study and enjoyment of symphonic related programs; and to assist in

securing proper legislation to support symphony related programs."

Then it continues with a second (unnumbered) purpose which is:

"To operate exclusively in any other manner for such charitable and educational purposes as will qualify it as an exempt organisation under the Internal Revenue Code of 1954, as amended, or under any provisions of any subsequent federal tax laws, covering the distributions to organisations qualified as tax exempt organisations under the Internal Revenue Code, including private foundations and private operating foundations."

Management of Corporate Affairs

The composition of the Board of Directors and some of the provisions governing the regulation of its officers reflect the role given to the President by the constitution of the charity. Article V is concerned with Management of Corporate Affairs and is divided into two parts. The first deals with the Board of Directors, and the second with Corporate Officers. These are the subject of Articles V(a) and (b) respectively.

Board of Directors

According to the Articles of Incorporation the power of the corporation must be exercised, its properties controlled, and its affairs conducted by a Board of Directors. The number of Directors of the Corporation was directed to be no greater than 31, and never less than one provided, however, that such number may be changed by a By-Law Amendment adopted by the members and that such Board always has an odd number of Directors to avoid a tie. In fact there are at present 10 Directors. The Association may, as provided by the By-Laws, have a non-voting Board such as (but not limited to) Advisory Boards, Honorary Boards, etc.

The Directors named in the Articles as the first Board of Directors were expressed to hold office until the first meeting of members, at which time an election of Directors was to be held.

Directors elected at the first annual meeting, and at all times thereafter, are required to serve for a term of up to three years until the annual meeting of members following the election of Directors and until the qualification of the successors in office. Annual meetings have to be held in the Southeastern Florida area in May of each year at 7.30 p.m., or at such other place or places and at such time as the Board of Directors may designate from time to time by resolution: Article V(a). A useful provision included in Article V enables decisions to be taken by written consent, thus obviating the need for a meeting. This may be either individual or collective and once filed with the minutes of the proceedings of the Board has the same force and effect as if taken by unanimous vote.

Corporate Officers

The Board of Directors is duty bound to elect the following officers: President, Vice-President, Secretary and Treasurer and such other officers as the By-Laws of the corporation may authorise the Directors to elect from time to time.

Again, a tidying-over provision specified that until an election at the first annual meeting of the Board of Directors certain specified persons should hold certain specified offices including, in addition to the offices mentioned above, a Vice President for Public Relations and a Correspondence Secretary: Article V(b).

Earnings and Activities of Corporation

Exclusion of Private Benefit

Article VI which deals with earnings and activities of the corporation is also not without interest. It provides, in the first place, in Article VI(a) that no part of the net earnings of the corporation shall enure to the benefit of, or be distributable to its members, Directors, officers or other private persons, except that the corporation shall be authorised and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set out in Article IV, in other words the objects clause.

Political Activity

Next comes a provision about permissible political activities. Article VI(b) provides as follows:

"(b) A substantial part of the activities of the corporation shall be attempting to influence legislation for the benefit of the symphony; however the corporation shall not participate in or intervene in any political campaign on behalf of any candidate for public office."

No Threats to Tax Exemption

Then follows a provision designed to prevent any activities that could affect exemption from Federal income tax under section 501(c)(3) of the Internal Revenue Code of 1954 or the deductibility of contributions under section 170(c)(2) of the Internal Revenue Code of 1954 or any corresponding provisions of any future United States Judicial Revenue Law in relation to either of those matters.

Finally, it is provided that notwithstanding any other provision in the Articles of Incorporation the corporation is not, except to an insubstantial degree, to engage in any activities or exercise any powers that are not in furtherance of the purpose of the corporation. A word or two on the relevant fiscal matters is needed for readers in the United Kingdom.

Relevant Fiscal Matters

Currently Section 501(c), which lists exempt organisations for the purpose of exemption from tax, lists under section 501(c)(3) the following:

"(3) Corporations, and any community chest, fund, or foundation, organised and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of the activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, otherwise attempting, to influence legislation, (except as otherwise provided in subsection (h)), and which does not participate, or intervene in (including the publishing or distributing of statements any political campaign on behalf of (or in opposition to) any candidate for public office."

Section 170(a) provides that there shall be allowed as a deduction any charitable contribution (as defined in subsection (2)) payment of which is made within the taxable year. A charitable contribution can only be allowable as a deduction if verified under regulations prescribed by the Secretary.

For present purposes it is only section 170(c) which is in point. Section 170(c) defines what is meant by charitable contribution as including, inter alia:

"(c)...a contribution or gift made to or for the use of..

(2) A corporation trust or community chest, fund or foundation -

(A) Created or organised in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

(B) Organised and operated exclusively for religious, charitable, scientific, literary or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment) or for the prevention of cruelty to children or animals;

(C) No part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) Which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

A contribution or gift by a corporation to a trust, chest, fund or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B). Rules similar to the rules of section 501(j) shall apply for purposes of this paragraph."

Distribution of Assets on Dissolution

Upon dissolution of the corporation, the Board of Directors must, after paying or making provision for the payment of all of the liabilities of the corporation, dispose of all of the assets of the corporation exclusively for the purposes of the corporation in such manner, or to such organisation or organisations organised and operated exclusively for charitable, or educational purposes as shall at the time qualify as an exempt organisation or organisations under Section 501(C)(3) of the Internal Revenue Code of 1954 (or the corresponding provisions of any future United States Internal Revenue Law), as the Board of Directors shall determine. Any such assets not so disposed of shall be disposed of by a Court of competent jurisdiction in the county in which the principal office of the corporation is located, exclusively for such purposes or to such organisation or organisations as such Court shall determine, which are organised and operated exclusively for such purposes: Article 7.

Membership

Membership in the corporation is expressed to be open to any persons living in South Florida or elsewhere who are interested in accomplishing the objects of the corporation as set forth in Article IV and who pay such dues as set forth in the By-Laws of the corporation.

Any member of the corporation may voluntarily resign or may be dropped from membership in the corporation by a majority vote of the Board of Directors at any regular or special meeting thereof.

Amendment of By-Laws

Subject to the limitations contained in the By-Laws, and any limitations set forth in the Corporations Not For Profit law of the State of Florida, concerning corporate action that must be authorised or approved by the members of the corporation, By-Laws of the corporation may be made, altered, rescinded, added to, or new By-Laws may be adopted, either by a resolution of the Board of Directors, or by following the procedure set forth therefor in the By-Laws: Article X.

Dedication of Assets

The property of the corporation is irrevocably dedicated to educational and charitable purposes, and no part of its net income or assets should ever enure to the benefit of any director, officer or member thereof, or to the benefit of any private individual: Article XI.

By-Laws

The initial By-Laws of the corporation are, as I understand the position, equivalent to Articles of Association for an English company. Those of the Symphony Guild were, in accordance with chapter 617 of the Florida Statutes (which deals with corporations not for profit), adopted by its Board of Directors: section 617.0206.

Name, Purpose and Fiscal Year

Article I deals with the name of the corporation and its principal office, its purpose and its fiscal year. The purpose set out in section 2 of Article I of the By-Laws was expressed to be "to engage in such religious, scientific, educational and charitable programs, within the meaning of section 501(C)(e)(g) of the Internal Revenue Code of 1986 (as amended)" as the Board of Directors should determine and as should be consistent with the Articles of Incorporation. The Board of Directors was charged with the duty of determining "the amount of funds and/or property to be allocated to each such program and all conditions to be attached to each said declaration, if any."

Members and the Board of Directors

Membership of the corporation and the relationship of Members to the Board of Directors are covered by Article II of the By-Laws.

Members have to be individuals or entities who or which subscribe to the corporation's purposes and satisfy all other requirements of membership as determined by the Board of Directors. They fill in prescribed application forms and pay annual dues. They are entitled to all rights and privileges determined by the Board of Directors and have no voting rights as long as there is at least one surviving Director. If there are at any time no surviving Directors, the Members are entitled to elect at their next meeting one additional Director. Directors have to be members at the time they become Directors and are entitled to one vote each. The Directors may (but are not required to) elect additional Directors who have to be individuals.

Meetings

The provisions as to meetings supplement the provisions made in the Articles of Incorporation. They cover (1) the Annual Meeting of the Board of Directors (2) Additional Meetings of Members or Directors each year and (3) Quorums.

The Directors Annual Meeting is held on 10 days' notice by mail or telephone at a time and place fixed by the Board for April in each year.

General or special meetings of Members or Directors can be called by the President at any time or on petition in writing of any three directors in good standing. There have to be at least three meetings of the Directors and of Members in each year. Notice of special meetings of the Board has to be given by mail or telephone to each Director at least three days prior to such meetings. Meetings of a committee of the Board can be called at any time by the President or by the committee chairman.

At any duly called general meeting, Board of Directors meeting or committee meeting the lesser of five or of a majority of those entitled to vote constitutes a quorum.

Securing Tax Exemption

Initial submission of the application for tax exemption resulted in a request by the relevant District Director for further information concerning a number of matters. Since what had been submitted was an amended version of the Articles of Incorporation, the original form of Articles was requested.

Essentially, what the Internal Revenue Service wished to have was a more detailed account of the actual activities of the Symphony Guild including, in particular, an account of how fund-raising activities were organised and the manner in which the proceeds were applied. There were also important queries about (1) licenses, grants, contracts or other agreements to which the corporation was a party, (2) present or proposed salaried employees and (3) what special privileges, services or goods provided to members resulted from the dues paid. At the date of the request all three queries got the negative response: "there are none".

The account which follows summarising the fund-raising and other activities and the application of the proceeds of fund-raising is essentially that which was given to the Internal Revenue Service in response to their queries, with some updating information added to reflect what has actually happened since exemption was granted.

Questions Raised by Internal Revenue Service

Activities

The Symphony Guild engages in three types of activities: (1) monthly meetings of the Directors, (2) fund-raising activities, approximately six to eight times a year, and (3) encouragement of talented young musicians through scholarships and grants for music study and music programs.

Periodic Meetings

Periodic meetings of the Board of Directors and of paid-up members are held monthly with a view to informing all participants of activities of local symphonies, to planning fund-raising activities to benefit local symphonies and youth musical programs, and to discussing ways to improve the community's appreciation of music. They are conducted by the President or Vice-President.

The time and funds devoted to monthly meetings by the members are negligible. Fund-raising activities encompass the following:

- (A) Musical performances provided by local musicians and food donated by members or purchased from local food services. Invitations are sent to all members for all fund-raising activities.
- (B) Major fund-raising dinners.
- (C) The Board of Directors, President, and Vice President of Ways and Means appoint a committee chairman who selects a committee to plan and conduct the fund-raising activity.
- (D) All persons and organisations are invited to participate in all fund-raising activities upon payment of the necessary fees for admission.
- (E) Admission fees for fund-raising activities are computed to provide an excess of receipts over the costs of the program. Fees for the different activities vary from approximately \$25.00 to \$200.00.

Fund-raising activities of the kind outlined have provided funds to be applied as described below. On a rough and ready estimate, the planning and conducting of the fund-raising activities requires approximately 50% of the time made available by members of the Board of Directors.

Application of Proceeds of Fund-raising

From its very inception, proceeds raised from fund-raising activities have been applied by the Symphony Guild to benefit local symphonies and provide scholarships as follows:

- (1) The officers and directors of the Symphony Guild review requests for funds by local symphonies and aspiring musicians who intend to pursue musical careers.
- (2) The Board of Directors selects recipients of scholarships and grants based upon need and musical potential.
- (3) Talented young musicians who wish to pursue musical careers are eligible for scholarships.
- (4) Youth symphonies are eligible for grants to purchase instruments and to obtain musical training.

- (5) Fund-raising activity has to date enabled several hundred young musicians to pursue further musical training. It also has provided funds for local symphonies to maintain the highest quality possible for their programs.

In consequence of these grants and scholarships the community's appreciation of music has inevitably been improved.

Administration of Scholarships and Grants

One pertinent request made by the Inland Revenue Service was for information about the way scholarships and grants were awarded and the extent to which the Symphony Guild was directly involved. In fact, the Symphony Guild directly administers the scholarships. In addition to scholarships, the Symphony Guild has donated lump sums to certain youth programs, to enable those programs to purchase musical instruments, to finance special programs and musical competitions, and to provide musical training.

Principals of local schools administering youth musical programs and the conductors of youth symphonies nominate potential recipients of scholarships. Those nominated perform for the applicable committee or the Board of Directors and the Board of Directors decides if the student has sufficient musical talent and a sufficient desire to pursue those musical talents. The most promising musicians are offered scholarships in amounts of \$500.00 to \$5,000.00. Managers of local orchestras may apply for grants which may be approved by the Board of Directors by majority vote.

Availability of grants and scholarships is advertised by verbal notification to local conductors, symphony managers, principals of high schools, and professional musicians.

The Inland Revenue Service was concerned to know whether Symphony Guild members and their families were eligible for scholarships or grants. The answer was a firm "No". The Symphony Guild is not in the business of providing kick backs to members.

Granting of Exemption

In the first instance, the Internal Revenue Service on the information supplied, and assuming the Guild's operations would be as stated in their application for recognition of exemptions, considered that the Guild was exempt from Federal income tax under section 501(a) of the Internal Revenue Code as an organisation described in section 501(c)(3).

However, because the Guild was a newly created organisation, the IRS did not make a final determination of the foundation status under section 509(a) of the code but determined that the Guild could reasonably be expected to be a publicly supported organisation described in section 509(a)(2).

Accordingly, it was to be treated as a publicly supported organisation, and not as a private foundation, during an advance ruling period of six months.

Within 20 days after the end of the advance ruling period, the Guild had to submit to the IRS information needed to determine whether it had met the requirements of the applicable support test during the advance ruling period. On establishing that it had been a publicly supported organisation, the Guild was promised classification as a section 509(a)(1) or 509(a)(2) organisation as long as it continued to meet the requirements of the applicable support test.

Practical Side of Things

Choice of Board Members

The choice of Board members is, in my experience, of crucial importance. In constituting such a board my own preference is to have colleagues who are used to working together and feel "comfortable" with each other. For my own part I also have a preference for women Board members. There are two reasons for this. First, women tend to spend less time in debate and are more anxious to get on with whichever job is in hand. Secondly, it is my experience in Florida that many men volunteers tend to press too hard and too much for publicity for their own businesses. Some of the liberties taken in this regard are, to put it mildly, surprising. Incidents of Board Members touting for business among ordinary members have been not uncommon, and other improper uses of membership lists for trade purposes have caused great offence for some members. The fact that Board Members are not remunerated puts off many men, even though they may claim expenses. In this respect women tend not to push very hard even for expenses.

Raising Funds

The first element in the Symphony Guild's fund-raising is the money generated by membership dues. To this must be added donations sought from corporations, banks and private individuals. The third important element consists of the money raised at all sorts of fund-raising events, balls, dinners, cocktail parties, luncheons (usually with some kind of "draw" like a celebrity). Concerts in themselves are never very profitable.

Sponsorship

Most organisers and those in the front line of fund-raising also lay considerable store on getting sponsorship. Lining up suitable sponsors is best done, where possible, by social connections. The approaches can be direct by mail or by cold calling with (where necessary) the mention of a name always to be followed by a letter. The virtue of the initial telephone approach is, of course, that it gets a quick response and the caller is at the usual psychological advantage of being the initiator.

Cutting Costs

As I suspect is the case with most charities everywhere, we try wherever possible to cut costs to the minimum and to get as much free input as we can. Thus the biggest printing firm in Miami has committed itself to do all our print work for free throughout the year. And a computer specialist does all our computer work for nothing. Where appropriate I give free tickets or invite the "providers" to private parties in return. The Symphony Guild is also fortunate to have the services of an attorney acting without remuneration.

The telephone listed in the local directory is covered by answering machine or by volunteers for as long as necessary. Very few local charities (it should be added) have their own offices and telephone. Ticket selling and weekly mail out are also handled by volunteers who hand address or stamp the mail themselves.

At functions we aim to underwrite all costs with donations of goods, money or services. Most volunteers are paying guests, paying for their own tickets. But, of course, we have paid professionals to cover things which are not donated.

Identifying Young Musicians for Awards

Earlier on in this article there is an account of the procedure usually followed to identify young musicians for awards. It should be added that in addition to requests and recommendations by their teachers and conductors, the student in question is asked to write a letter stating why he or she wants the scholarship award. Once final approval is given on the recommendation of the committee, contact is usually made with the teacher, who in turn advises the parents. The award is given at a special awards banquet and is, if the secret is kept (and it usually is), a surprise to the student recipient. This element of happy surprise is very popular. Needless to say, we have more requests than awards.

Pitfalls

The two main pitfalls are procrastination and what I call "failing to deliver".

Procrastination

Each charity event needs to be driven by a certain momentum. A well coordinated plan can collapse in ruins if individual participants, with particular assumed responsibilities, delay doing (or fail to do) what they have undertaken to do. For that reason, each charity needs its gadfly to sting, or at any rate gently prod into action, those who have agreed to help, where things are not moving properly.

Failing to Deliver

Every charity needs volunteers: it is more or less impossible to work without them. In the case of the Symphony Guild the office itself is manned by volunteers. The whole point about volunteers is that they are not paid, so they do not always care if they do things right or do them at all. For this reason I personally check

that everything that was supposed to be done has been done (and often it has not). And I keep tabs on attendances. If a better offer comes up, some volunteers will go elsewhere and one is left with one less volunteer that day and maybe the next (some days, all volunteers have better offers). All the same one has to tread warily: one cannot deal with volunteers as with qualified professionals. If you are not political (or tactful) and "nice" with them, they will go elsewhere.

Volunteers as Pitfalls: A Cautionary Tale

Some volunteers can be major pitfalls. Like the little blue-eyed blonde who suddenly appeared on the South Floridian social scene and who provides a convenient cautionary tale with which to end. She was seen at all the leading social events in the area. She begged herself into being a chairman for our annual Christmas Ball. I was delighted with the offer.

As time went by she told me stories how her committee had sold over 400 tickets to the ball even before the mailing out of any invitations. She added that just about all expenses were underwritten and she gave names and sums. All of this was further detailed to the Board of Directors by way of progress report. She further let it be known that she had also acquired a 2 week free cruise for two through the Caribbean and the Panama canal to be used as a raffle prize. Putting it shortly, less than one week before the big event, to which I had already committed myself to more than \$25,000 in expenses, I realised there were no 400 reservations coming in. I also understood that the so-called chairman did not have - and never had - a committee, that there was no underwriting and, indeed, that only a fraction of the membership had received invitations. To avoid a social scandal and financial disaster, for the next few days with no time for even getting dressed, I sat by the telephone and called everyone I knew. I made deals and talked up a storm. We ended up having a ball in every sense. In fact, it turned out to be the party of the year. The Ballroom was filled to capacity, there was exciting entertainment throughout the evening, we had the best big band orchestra in the area, superb decorations, and the most eclectic group of fun people from Miami to Palm Beach that the city had ever seen. But the story is not over. Our lady the Chairman, who had made sure that there was a reserved table for her and her family at the ball, was waving around a gift certificate with the precious 2 week cruise for two. Our volunteers sold raffle tickets for nearly \$3,000 because of the appealing first prize - the cruise. And with a fanfare, the cruise prize was drawn. And I won it! At first I was going to give it away, but luckily I did not do so. I opened up the envelope with the promised free tickets to the cruise...and there it was, shining right into my face:

If you buy a cabin for two for a two week cruise, we will give you \$100 off!!

And what happened to the blonde "chairman-lady"? Well, her cheque for dining and wining at the ball bounced. Then she left town, leaving a string of similar incidents and debts behind.