

**Distressed Nonprofits  
Part 2  
Wind-Up or Bankruptcy?**

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November 10, 2010**

## **Mission of Pro Bono Partnership of Atlanta:**

To provide free legal assistance to community-based nonprofits that serve low-income or disadvantaged individuals. We match eligible organizations with volunteer lawyers from the leading corporations and law firms in Atlanta who can assist nonprofits with their business law matters.

## Pro Bono Partnership of Atlanta Eligibility & Other Information

- In order to be a client of Pro Bono Partnership of Atlanta, an organization must:
  - ✓ Be a 501(c)(3) nonprofit organization.
  - ✓ Be located in or serve the greater Atlanta area.
  - ✓ Serve low-income or disadvantaged individuals.
  - ✓ Be unable to afford legal services.
- *Visit us on the web at [www.pbpatl.org](http://www.pbpatl.org)*
- Host free monthly webinars on legal topics for nonprofits
  - ✓ To view upcoming webinars or workshops, visit the [Workshops Page](#) on our website

# Wind-Up or Bankruptcy?

## Understand the Options

- Wind-Up Under State Law
- Assignment for the Benefit of Creditors
- Chapter 7 Bankruptcy Case
- Chapter 11 Bankruptcy Case

# What Funds Can Be Used For A Wind-Up Or Bankruptcy?

## Fund Categories

- General Unrestricted
- Quasi-Endowment
- Endowment

## What Funds Can Be Used For A Wind-Up Or Bankruptcy?

### General Funds

General Funds – Comprised of properties that are unrestricted and can be used for any purpose

- Personal Property (e.g., monies, vehicles, equipment, securities, notes receivable, etc.)
- Real Property

# What Funds Can Be Used For A Wind-Up Or Bankruptcy?

## Quasi-Endowment Funds

- Look to the Uniform Prudent Management of Institutional Funds Act (the “Act” - O.C.G.A. § § 44-15-1 *et seq.*)
- “Quasi-Endowment Fund” is defined in comments to former O.C.G.A. § 44-15-3: “A restriction on use that makes a fund an endowment fund arises *only from the applicable gift instrument*. If a governing board has the power to spend all of a fund but, *in its discretion*, decides to invest the fund and spend only the yield or appreciation therefrom, the fund does not become an endowment fund under this definition, but it may be described as a “*quasi-endowment fund*” or a “*fund functioning as endowment*.”

## What Funds Can Be Used For A Wind-Up Or Bankruptcy?

### Endowment Funds

- Defined by the Act (O.C.G.A. § 44-15-2)
- Endowment Fund: “[A]n institutional fund, or any part thereof, that *under the terms of a gift instrument*, is not wholly expendable by the institution on a current basis.

# What Funds Can Be Used For A Wind-Up Or Bankruptcy?

## Endowment Funds

- An institution may not spend *endowment* money in *amounts* or for *purposes* that are inconsistent with donor restrictions.
- The concept of limiting the expenditure of an endowment is spelled out in O.C.G.A. § 44-15-4: “[A]n institution may appropriate for expenditure or accumulate assets of an endowment fund as the institution determines shall be prudent *for the uses, benefits, purposes and duration* for which the endowment fund is established.”

## What Funds Can Be Used For A Wind-Up Or Bankruptcy?

### Endowment Funds

- What is a “gift instrument”?
- Defined in O.C.G.A. § 44-15-2 as: “[A] record or records, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution as an institutional fund.”

# What Funds Can Be Used For A Wind-Up Or Bankruptcy?

## Endowment Funds

- Can restrictions be removed?
- Yes - O.C.G.A. § 44-15-6:
  - Donor waives restriction in writing.
  - Superior Court, upon application, determines that the restriction has become impracticable or wasteful and modification of the restriction will further the purposes of the fund (Note – the Attorney General must be notified and provided the opportunity to be heard).
  - If a particular charitable purpose or a restriction becomes unlawful, impracticable, impossible to achieve, or wasteful, the Superior Court, upon application, may modify the purpose of the fund or the restriction in a manner consistent with the charitable purposes expressed in the gift instrument (Note – the Attorney General must be notified and provided the opportunity to be heard).

## Beginning The Process Of Wind-Up Or Bankruptcy

### Board Action

Board must vote on action to be taken and select a responsible officer to oversee and assist whatever process is chosen.

# Wind-Up

## Wind-Up for Georgia Non-Profits

- Make a plan for payment of all debts.
- Plan must be provided to the Attorney General for approval. If approved, or if there is no response by the Attorney General within 30 days, then implement plan.
- Any property left over after payment of all debts must be transferred to other non-profits or to the Attorney General for distribution to other non-profits.

# Assignment For The Benefit Of Creditors

## Out of Court Liquidation

- Assign all assets to a liquidating fiduciary.
- All non-endowment assets will be liquidated and proceeds distributed to creditors.
- Any excess funds, if any, will be transferred to the Attorney General for distribution to other non-profits.
- Endowment assets, or property of negligible value, will be abandoned to the “debtor” for transfer to other non-profits or to the Attorney General for transfer to other non-profits.

# Chapter 7 Bankruptcy Case

## Straight Liquidation

- All legal and equitable interests of the debtor in property become “property of the estate.”
- A trustee is appointed to take control of and liquidate all assets and distribute the proceeds to creditors.
- Liquidation will be a “fire sale.”
- Excess funds, if any, or property of negligible value, will be abandoned to the debtor for transfer to other non-profits or to the Attorney General for transfer to other non-profits.
- Trustee will investigate transactions with “insiders” and “affiliates.”

# Chapter 11 Bankruptcy

## Orderly Liquidation

- All legal and equitable interests of the debtor in property become “property of the estate.”
- No trustee is appointed. A trustee is only appointed where there are bad acts or gross mismanagement.
- The “debtor in possession” controls the liquidation, *i.e.*, no “fire sale.”
- High administrative and legal costs.

# Chapter 11 Bankruptcy

## Reorganization

- All legal and equitable interests of the debtor in property become “property of the estate.”
- No trustee is appointed. A trustee is only appointed where there are bad acts or gross mismanagement.
- The “debtor in possession” controls the reorganization.
- **VERY EXPENSIVE** and time consuming. A plan must be proposed and approved by creditors.

## Director And Officer Liability

### No Discharge of D&O Liability

- Personal liability for officers and directors for payroll, sales and unrelated business income taxes is unaffected by a bankruptcy filing.
- Other personal liability of officers and directors is unaffected by a bankruptcy filing.

## **For More Information:**

If you would like more information about the services of Pro Bono Partnership of Atlanta, contact us at:

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