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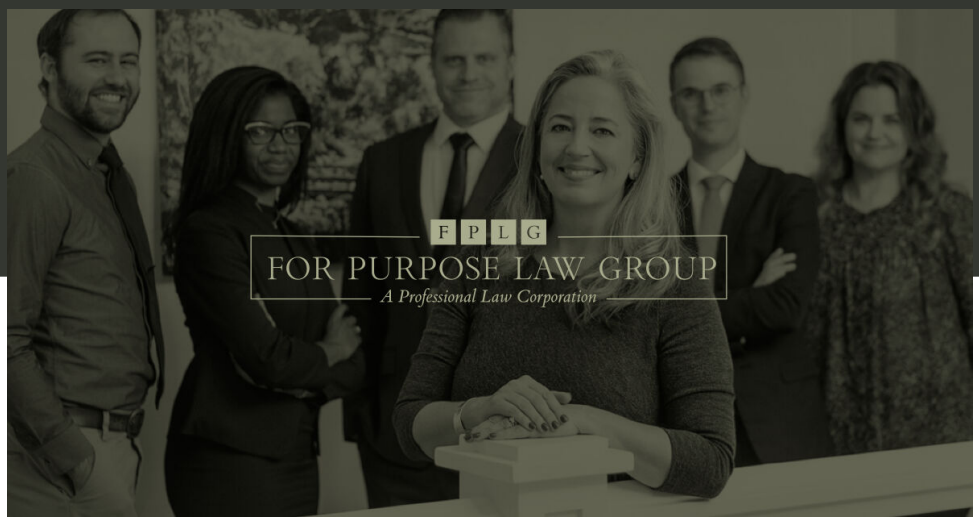
A Deadlock on a Charity Board: What Then?

04.27.16 | Linda J. Rosenthal, JD



The dilemma has been splashed across the headlines for many weeks now: What happens if the current 8-member United States Supreme Court is evenly split on a particular case? There's a good reason that the Court at full capacity comprises 9 justices – an odd number.
Similarly, it's a good idea to build into any and all deliberative bodies an odd number of members in order to avoid any vote ties.

Optimal Board Size
For charity boards, there is no one-size-fit-all, magic, number. The "ideal size of a board depends on many factors, such as the age of the organization, the nature and geographic scope of its mission and activities, and its funding needs." Other considerations are –

> *the size of the organization, its tax-exempt classification (e.g., public charity, private foundation), its life cycle stage, its culture, its staffing, its ability to recruit directors who are willing and prepared to meet their fiduciary responsibilities, the board's expected duties and functions, the importance of diversity (in identity, values, and perspectives), and the desired committee structures and activities.*

Many experts recommend a minimum of 3 or 5 directors; the maximum could be 7 or 9, maybe 15 or more for a larger organization. It all depends.

But, clearly, it's best to avoid an even number – as much as possible. A vacancy can occur, of course, by a death, but there are more benign or temporary circumstances that can also result in a temporary tie vote: an unavoidable absence from a meeting, or a conflict of interest that may require a director to sit out a particular vote.

What Happens With a Tie Vote?

There are some quick fixes for certain temporary tie votes. Reschedule the matter for the next meeting when absent directors can attend. Have procedures in the bylaws to quickly fill vacancies. A conflict of interest situation is trickier because the conflict will continue indefinitely.

Consider scrapping the proposal that has resulted in a tie vote and work out a compromise that avoids the split decision.

If all else fails, there may be a statutory solution.

In California, this is Section 5225 of the California Corporations Code, the Nonprofit Public Benefit Law (for corporations without voting members). But it's extreme, burdensome, and costly:

> *(a) If a corporation has an even number of directors who are equally divided and cannot agree as to the management of its affairs,*
> *so that its activities can no longer be conducted to advantage or so*
> *that there is danger that its property, activities, or business will be impaired or lost, the superior court of the proper county may,*
> *notwithstanding any provisions of the articles or bylaws and whether*
> *or not an action is pending for an involuntary winding up or dissolution of the corporation, appoint a provisional director pursuant to this section.*

"Any director" can go to court seeking this remedy. Anyone taking this matter to litigation "shall give notice to the Attorney General, who may intervene." But the Attorney General may also take the initiative to start such a proceeding, if a serious situation comes to light.

Who is eligible to be appointed a provisional director? Such an appointee –

> *... shall be an impartial person, who is neither a member nor a creditor of the corporation, nor related by consanguinity or affinity within the third degree according to the common law to any of the other directors of the corporation or to any judge of the court by which such provisional director is appointed. (Sec. 5225(e))*

This appointed, provisional, director "shall have all the rights and powers of a director until the deadlock in the board or among members is broken or until such provisional director is removed by order of the court or by approval of a majority of all members (Section 5033)."
The provisional director is entitled to compensation "as shall be fixed by the court unless otherwise agreed with the corporation."

Conclusion

Clearly, this statutory remedy is drastic, time-consuming, and costly. It would be a last resort only – reserved for cases of serious, intractable, disagreement on a fundamental matter before a charitable organization.