

CASE NO. S-04-1291

**IN THE SUPREME COURT
STATE OF GEORGIA**

**SHORTER COLLEGE AND
SHORTER COLLEGE FOUNDATION, INC.,**

Appellants,

v.

BAPTIST CONVENTION OF THE STATE OF GEORGIA, et. al.

Appellees.

APPELLANTS' MOTION FOR RECONSIDERATION

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Inc.**

Pursuant to Rule 27, Appellants Shorter College and Shorter College Foundation, Inc. respectfully move this Court to reconsider its May 23, 2005 decision which affirmed, by a vote of four justices to three, the judgment of the Court of Appeals setting aside the dissolution of Shorter College.¹

This has not been an easy case, but the issues now are focused clearly by the Majority and Dissenting Opinions, and the decisions by the courts below. All judges and justices reviewing this case have agreed that the GBC did not have the right, in any capacity, to vote on, veto, or approve the dissolution of Shorter College. All judges and justices reviewing this case have further agreed that Shorter complied with the substantive and procedural requirements for a voluntary dissolution under the Nonprofit Code, including adopting and following a plan of dissolution, giving appropriate public notice of the dissolution, notifying the appropriate authorities (including the Attorney General and the Secretary of State), discharging its liabilities, and transferring its assets. There also is uniform agreement that Shorter College, the entity, did in fact dissolve: the Secretary of State issued a Certificate of Dissolution on April 24, 2003. Most important, the Majority and Dissenting Opinions concur that in voting to dissolve, the Board of Shorter College acted in conformity with their fiduciary duties.

¹ A copy of the decision is attached hereto as Exhibit A. Attached as Exhibit B is a copy of the Court's order granting Shorter an extension until June 7, 2005 to file this motion.

The sole issue separating the Majority Opinion and the Dissenting Opinion is this: to the Majority, Shorter, upon dissolving, had to terminate the operations of the college -- to shut its doors, send the students home, and fire the faculty. A dissolution, to the Majority, involves the extinguishment not only of the corporate entity, but also the annihilation of any remaining assets of the nonprofit corporation. As the Dissenting Opinion carefully explains, there is no requirement in the Nonprofit Code that the dissolving nonprofit, in addition to terminating its existence as a corporate entity, also annihilate its underlying assets. To the contrary, the Nonprofit Code explicitly requires a nonprofit to transfer any remaining charitable assets to an organization engaged in substantially similar activities. O.C.G.A. § 14-3-1403(b)(3). That express requirement, which follows centuries of common law, would make no sense if the dissolving nonprofit were required to render any such charitable assets useless.

As will be explained below, the source of the Majority's mistaken conclusion is a misreading of the definition of "dissolution" found in the AmJur treatise. The concept of "dissolution" does not encompass the extinguishment of the underlying operation of the corporation, but instead refers to the extinction of the corporate entity. Clearly, a corporation cannot dissolve unless it has wound down its affairs by alienating itself from all of its assets and liabilities -- just as the Nonprofit Code requires and just as Old Shorter did in this case. But it does not

follow, and the law does not hold, that the assets that are alienated by transfer or sale must be rendered useless for the dissolution to be effective.

Animating the Majority Opinion appears to be the notion that Shorter, by dissolving the entity but seeing to it that the college remained operating independent of the GBC, has evaded if not the letter at least the spirit of the law. To this notion Shorter would respond as follows. First, all agree that the GBC had no right to be included in the decision to dissolve. GBC could have protected itself by insisting upon the right to vote on matters such as these, but never did so. Second, prior to voting to dissolve, Shorter gave the GBC every last opportunity to agree on a compromise concerning the nomination of trustees that would have satisfied the accrediting authorities *and* preserved GBC's role in the institution. The GBC refused, defiantly rejecting all sixteen potential trustees nominated by Shorter College. The GBC's own stubborn and spiteful actions precipitated this crisis and left the GBC vulnerable to appropriate corporate action by the Shorter Board.

Third, and most important, by extinguishing the entity but keeping the charitable assets intact, Shorter College was not taking advantage of some new loophole in the Nonprofit Code, but instead was acting in conformity with *centuries* of common law on the subject. *E.g., Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890) (holding that, unlike the dissolution of a "business corporation," it is appropriate in the

dissolution of a charitable corporation to distribute the charitable assets “so as to fulfill in substance, if not in manner and form, the purpose of its consecration”).

The choice for the Court is clear and compelling. If this Court denies this motion, the Majority Opinion will cause great confusion in the application of for-profit and nonprofit corporate law in the State and will throw Shorter College back into more conflict with the GBC and the accrediting agency. If this Court, after taking a second look at the case, grants this motion and reverses, it will be upholding the dissolution because Shorter complied with the letter and spirit of the law, and did so while complying to the full extent with its fiduciary duties. Such a result will also allow Shorter the clean break that it needs to fulfill the mission of the college to provide the best possible college education in a consciously Christian setting.

In Part A, Shorter will outline the major flaws in the Majority’s analysis, including the incorrect definition of “dissolution,” the failure to distinguish between for-profit and nonprofit dissolutions, and the failure to distinguish between the corporate entity and the assets owned by the corporation. In Part B, Shorter will show that, once these issues are clarified and corrected, the analysis of Shorter’s dissolution is simple and straightforward.

A. Fatal Flaws in the Majority’s Analysis

1. Misreading of AmJur: the incorrect definition of “dissolution”

The Majority opens its analysis with a glaring misreading of the definition of “dissolution” found in the American Jurisprudence treatise on the subject. Quoting AmJur, the Majority offers a definition of “dissolution” that becomes the basis for its opinion. The Majority states that a “dissolution” is the “liquidation of all business affairs.” Yet this is *not* the definition of “dissolution” found in AmJur. In the section quoted by the Majority, AmJur gives two definitions, one for “dissolution” and another for “liquidation.” AmJur states that “dissolution” “implies the termination of its existence and the utter extinction and obligation *as an entity*” (emphasis added), a definition that is squarely in line with Shorter’s arguments on appeal. The treatise goes on to define “liquidation” as “the winding up of affairs of the corporation.” The Majority, however, mixes these two definitions together, confusing the definition of liquidation with the definition of dissolution. Worse, the next sentence in the AmJur treatise, which the Majority does not quote, states: “However, the term ‘liquidation’ is not always synonymous with ‘dissolution,’ since even though the shareholders have resolved to liquidate a corporation, a dissolution may not be effected until the corporation has complied with the formal requirements prescribed by the applicable corporation law.”

The treatise goes on to make an another notable statement, also not quoted by the Majority:

Caution: When evaluating corporate administrative dissolution statutes that vary widely from state to state, it cannot safely be assumed that the term "dissolution" has any strict meaning

independent of the jurisdiction and precise context in which that term is applied.

The significance of the mistake made here by the Majority with respect to the definition of dissolution cannot be underestimated. The fatal flaw in Shorter's dissolution, according to the Majority, was Shorter's failure to "dissolve," which the Majority incorrectly defined as winding down the *operation of the college*. Had the Majority used the correct definition of "dissolution," it would have concluded that Shorter had indeed dissolved because the process resulted in the "utter extinction" of Shorter "as an entity." The Majority's misreading of AmJur reflects its failure to distinguish between the corporate entity and the assets or businesses owned by the corporation, a failure that is repeated throughout the opinion. The motion for reconsideration must be granted so that these incorrect definitions of basic corporate terms do not become Georgia law.

Moreover, as the "Caution" paragraph quoted above from AmJur notes, the term "dissolution" may not have any meaning independent of the particular corporate statute involved. In other words, the best definition of "dissolution" may be this: dissolution is what happens when a corporation follows, to the letter, the dissolution statute in the for-profit or nonprofit code. It is not unusual for a process to have no independent definition apart from the compliance with the specified procedure. For example, Rule 56 of the Civil Practice Act does not define summary judgment in any way other than to set forth the requirements for

obtaining such relief. To determine whether the moving party is entitled to summary judgment, a court would not look outside the Civil Practice Act for a definition of “summary judgment” to determine whether such relief was appropriate; if the moving party meets the standards set forth in Rule 56, it is entitled to the relief specified therein. A court decision introducing a new, external definition of “summary judgment” that altered the process or standards of Rule 56 would be contrary to law and would generate substantial uncertainty and litigation.

The same is true here. The Majority Opinion superimposes a faulty external definition of dissolution upon the detailed statutory scheme. As the Dissent cogently explains, however, Shorter did dissolve, and dissolved properly, by following the step-by-step voluntary dissolution procedure set forth in the Nonprofit Code. By importing definitions from outside the Nonprofit Code, particularly incorrect definitions, the Majority Opinion not only reaches the wrong conclusion in this case but also injects unnecessary uncertainty in the application of corporate law.

2. *Failure to distinguish between the entity and its underlying assets*

Building on its misreading of AmJur, the Majority then states that “this definition of ‘dissolution’ as the winding up and liquidation of all business affairs applies equally to both for-profit and nonprofit corporations in Georgia,” and that the dissolution of a nonprofit must necessarily include “terminating the existence”

of the nonprofit's collection of underlying assets -- in Shorter's case, its school. (Maj. Op. at 4). The Majority's reasoning here simply cannot be reconciled with its own discussion later in the opinion. For example, on page 10, the Majority states that "the trustees had every right to vote to dissolve the College and to transfer its assets intact or piecemeal to other separate and independent educational institutions." (Maj. Op. at 10). According to the Majority, then, the transfer of the school to another institution would have been permissible (Maj. Op. at 10) if such a transfer had been for the "purpose of terminating the existence of the school and winding up its affairs." (Maj. Op. at 4).

There is no law, not a single provision of the for-profit or Nonprofit Code, that supports this holding. Of course the dissolving entity must wind up its affairs, as Old Shorter did in the case, by discharging its debts and transferring its assets. But there is no requirement that the dissolving nonprofit go further and destroy the underlying assets prior to their transfer to a similar organization. Indeed, the very notion that a dissolving corporation must – or even may – waste charitable assets is contrary to common sense, the Nonprofit Code and centuries of common law.

This analysis, premised upon a misreading of the AmJur definition of "dissolution," cannot be allowed to become the law of Georgia. "Dissolution" means the winding up of the *corporation itself – the corporate entity*, not the extinction of the underlying business or the ruination of the assets. Because the

Majority does not distinguish between the corporate entity and the underlying assets of the corporation, the Majority is simply unable to reconcile (A) its belief that upon dissolution the continued operation of the business of the dissolving corporation must be terminated with (B) the Nonprofit Code's clear command that upon dissolution the nonprofit is supposed to transfer its assets to a similar institution for the purpose of carrying on the mission of the nonprofit. O.C.G.A. § 14-3-1403(b)(3).

This internal conflict is most apparent on page 11, where the Majority attempts to explain away the unique distribution process required in nonprofit voluntary dissolutions. The Majority states: "Whether the distribution of a corporation's assets constitutes a valid dissolution is *not* determined by *how* and *to whom* the assets were conveyed." (Maj. Op. at 11) (emphasis added). But the Majority holds that Shorter's dissolution is invalid on precisely those grounds -- because of how Shorter conveyed its assets (intact, as an operating school) and to whom the assets were conveyed (to the Foundation, instead of Mercer).

The Majority's difficulties are a direct result of its failure to distinguish between the corporate entity and its underlying business. Particularly with a relatively small corporation like Shorter College, it is sometimes not easy to distinguish between the corporation itself and the "business" operated by the corporation. Indeed, in ordinary conversation when one refers to "Shorter College," the reference could be to the corporate entity (now known as Shorter

College, Inc.), or to *the school*, that collection of assets owned by Shorter College, Inc. and operated by it as an educational institution. With a multinational conglomerate like General Electric, with separate subsidiaries and divisions, the distinction is more readily apparent. But even so, Shorter College, Inc. has a corporate existence separate and apart from the business or the collection of assets that it owns. Obviously the corporate entity would remain in existence if its assets were transferred somewhere else; conversely, the assets may “survive” after being transferred to another organization even if the company thereafter dissolved.

Under the Nonprofit Code, it is very clear that it is the corporate entity, not the assets or the “business” of the corporation, that is to be “terminated” upon dissolution. The Nonprofit Code treats the entity and its assets on two different tracts. In the dissolution process, the dissolving corporation must submit a plan of dissolution to the Attorney General and the Secretary of State that explains, among other things, exactly what the dissolving nonprofit is going to do with its charitable assets. O.C.G.A. § 14-3-1403. To wind down its affairs the dissolving corporation must also report back to the Attorney General and explain that the assets of the nonprofit have in fact been distributed in the manner outlined in the proposed plan of dissolution. O.C.G.A. § 14-3-1404. After giving the appropriate notices and complying with the many other procedural requirements of the Nonprofit Code that are not at issue in this case, the dissolving nonprofit is then issued a “Certificate of Dissolution” from the Secretary of State, which represents

the official termination of the existence of the nonprofit corporate entity. O.C.G.A. § 14-3-1409. The now-dissolved nonprofit remains “alive” only for the purpose of further winding down its affairs. Thus, the structure and process of a nonprofit dissolution confirms that the entity dies but its assets may be preserved intact.

3. *Waste Required by Majority Opinion Contrary to Centuries of Common Law of Charitable Assets*

The Majority Opinion is not only internally inconsistent and contrary to the Nonprofit Code, it is at odds with centuries of common law. As the Dissenting Opinion explains, by transferring its assets to the Foundation, Shorter complied with its fiduciary obligation to ensure that the value of its assets – collectively, the school – were preserved even after the death of the corporation. To the Majority, the preservation of the value of the charitable assets of the dissolving corporation by keeping the school operating was the single flaw in the manner in which Shorter dissolved. (Maj. Op. at 4). Moreover, the tone of the Majority Opinion suggests the underlying sentiment that Shorter may have complied with the letter of the law but, by preserving the school intact, took advantage of an unfortunate loophole in the current codification of the Nonprofit Code. To the contrary: the notion that the value of charitable assets must be preserved irrespective of the dissolution of the corporate entity is deeply ingrained in centuries of common law.

A seminal case in the law of dissolution of charitable corporations is *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890). In *Latter-Day Saints*, Congress had legislatively dissolved the nonprofit corporation owning the vast assets of the Mormon Church in the Territory of Utah because of the church's then support of the practice of bigamy. One of the issues before the Court was the disposition of the charitable assets of the dissolved nonprofit. In a long and erudite opinion for the Court by Justice Bradley, the Supreme Court held that it was appropriate for Congress to take the assets of the dissolved corporation and dedicate them for public use consistent with the charitable purposes for which they "were consecrated." What is remarkable about the *Latter-Day Saints* case is that it addresses both issues that arise in this motion for reconsideration – the distinction between the charitable corporate entity and its underlying assets and the necessity for the underlying assets, after the extinction of the charitable corporation, to continue to be used to advance their charitable purpose.

In *Latter-Day Saints*, the Court began its analysis by noting the distinction between the dissolution of a business corporation and the dissolution of a charitable corporation:

When a business corporation, instituted for the purposes of gain or private interest, is dissolved, the modern doctrine is that its property, after payment of its debts, equitably belongs to its stockholders. But this doctrine has never been extended to public or charitable corporations. As to these, the ancient and established rule prevails,

