

## Help On Church Incorporation

### **Each church chooses its legal identity and structure.**

Baptists understand the church to be an autonomous local congregation of baptized believers, associated by covenant in the faith and fellowship of the gospel, each congregation operating under the Lordship of Christ through democratic process. This religious body is not *of* this world but it operates *in* this world. The regulation of our society is accomplished through civil law. Therefore each Baptist church must choose a civil identity and create a legal framework. Each church must determine how it can best transliterate its spiritual nature into an existence which the law will recognize.

Texas law offers a Baptist church a choice between being an unincorporated nonprofit association or a nonprofit corporation. If a congregation has not become a corporation by adopting a certificate of formation, also called articles of incorporation, and by filing that document with the Secretary of State, the church is an unincorporated association.

Whether an unincorporated association or a corporation, the church is a legal entity, separate from its membership, with legal rights and duties. It may, in its own name, buy, sell, and own property, borrow money, and contract. Its debts are the debts of the church, not of the individual members; if the law imposes a judgment on the church, it is not a judgment on the individual members.

Either as a nonprofit unincorporated association or a nonprofit corporation, if it is structured and if it acts appropriately, a church is recognized as a charitable nonprofit entity which is exempt from federal income tax and as an entity to whom gifts may be made and those gifts deducted as charitable contributions on the donor's income tax. Upon written request a church which is affiliated with the Southern Baptists of Texas Convention is covered under a group exemption granted by the Internal Revenue Service to the Convention.

An unincorporated nonprofit association is an "organization consisting of three or more members joined by mutual consent for a common, nonprofit purpose." The creation of the association is accomplished without the involvement of the state. To be an association it must act like an association and the members must share a common purpose. Unincorporated associations normally have a constitution or bylaws which evidence the consent and purpose and which prescribe the rights and duties of the members and of the association. These documents are contracts between and among the members.

A corporation is a more sophisticated legal entity. Its existence is explicitly recognized by the state. It functions pursuant to a state-granted charter. It is required to have articles of incorporation (called in the Code, "certificate of formation"), and bylaws. A more elaborate set of statutory rules govern its management. As a result, a corporation offers its membership greater clarity when it comes to management of the church's business. And, a corporation presents to the world a more precise legal identity, one that is better understood in commerce. As a corollary, the corporate structure requires that the congregation take more care to comply with the more extensive requirements of the law.

While there are no statistics, undoubtedly more Baptist churches in Texas are unincorporated associations than corporations. That probably does not reflect the intentional choice of congregations between the two legal forms; it more likely reflects the fact that most churches have simply not "bothered" to incorporate.

Whether a church is an unincorporated association or a corporation, it will be regulated by the Texas

Business Organizations Code on January 1, 2010. The Code does not change the law for unincorporated associations. However, unincorporated associations should make certain that their bylaws or practices do not run counter to the existing law. The Code does make some changes for incorporated churches.

The adoption of this new Code affords churches an opportunity to consider if they wish to be an unincorporated association or a corporation. And it is an occasion requiring incorporated churches to test their governing documents against the new Code.

### **How does a church become a corporation?**

**The membership meets and adopts a certificate of formation, formerly known as articles of incorporation.** The Secretary of State provides a form (Form 202) and instructions at [http://www.sos.state.tx.us/corp/forms\\_boc.shtml](http://www.sos.state.tx.us/corp/forms_boc.shtml). The church is not required to file its certificate of formation on this form, but the contents of the form should be followed as the church drafts its certificate of formation for filing.

The following is offered as a model certificate of formation for a Baptist church, but the church should employ a lawyer to assist the congregation in drafting and filing the certificate of formation. (Unless otherwise noted, references to sections, as in "§22.531," are references to sections of the Texas Business Organizations Code. This Code is available on the Secretary of State's web site, but a church is strongly discouraged from undertaking an analysis of the Code without the assistance of an attorney.)

Certificate of Formation  
First Baptist Church of Someplace, Texas  
A Texas Nonprofit Corporation

Article 1. Entity Name and Type. The name of the entity is First Baptist Church of Someplace, Texas. It is hereinafter sometimes referred to as "the Church." The entity being formed is a nonprofit corporation.<sup>1</sup>

Article 2. Organizer. The name and address of the Organizer is Paul Baptist, 100 Residence Road, Someplace, Texas \_\_\_\_\_.<sup>2</sup>

Article 3. Registered Agent and Registered Office. The initial registered agent is an individual resident of the state whose name is John Baptist. The business address of the registered agent and the registered office address is: 100 Church Street, Someplace, Texas \_\_\_\_\_.<sup>3</sup>

Article 4. Members. The Church shall be a nonprofit corporation which has members.<sup>4</sup>

Article 5. Governance. The Church is organized and is operated under a congregational system, and the management of the affairs of the corporation is to be vested in the Church's members.<sup>5</sup>

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<sup>1</sup> The name must not be the name of an entity which is already a Texas corporation. See the Secretary of State's web site for information on how to ask if the church's preferred name is available.

<sup>2</sup> The congregation, when it acts to adopt the certificate of formation, should designate the pastor or a church member to sign as the "organizer."

<sup>3</sup> The congregation may choose anyone to act as registered agent. A registered agent is one upon whom service is had when the church is sued. The registered office address is the street address where the registered agent is likely to be found. If the registered agent is a member of the church staff the registered office would be the church's street address.

<sup>4</sup> A nonprofit corporation may or may not have members. A Baptist church is a nonprofit corporation which has members.

<sup>5</sup> This provision is critical. Absent this provision the law will presume that the church is managed by a board of directors. §22.202.

Article 6. Purpose. The Church is organized for religious purposes. No part of the net earnings of the corporation shall inure to the benefit of or be distributable to its members, trustees, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for service rendered and to make payments and distributions in furtherance of its purpose. No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of or in opposition to any candidate for public office. Notwithstanding any other provision of this Certificate, the corporation shall not carry on any other activities not permitted to be carried on (a) by a corporation exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code, or (b) by a corporation, contributions to which are deductible under section 170(c)(2) of the Internal Revenue Code, or the corresponding section of any future federal tax code.<sup>6</sup>

Article 7. Winding Up. Upon the winding up of the corporation, after all liabilities and obligations are paid, satisfied, and discharged, the property of the corporation shall be applied and distributed as follows: (1) property held by the corporation on a condition requiring return, transfer, or conveyance because of the winding up or termination shall be returned, transferred, or conveyed in accordance with that requirement; and (2) the remaining property shall be distributed for one or more exempt purpose within the meaning of section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code.<sup>7</sup>

Article 8. Amendment. An amendment to this Certificate of Formation must be submitted to a vote of the members in a regular or special meeting. Notice containing the proposed amendment or a summary of the changes to be effected by the amendment shall be given to the members within the time and in the manner provided by the Bylaws for giving notice of a meeting.<sup>8</sup> The vote required for adoption of an amendment shall be at least two-thirds of the votes of members present at the meeting at which the action is submitted for a vote.<sup>9</sup>

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<sup>6</sup> This language is recommended by the Internal Revenue Service for any entity which desires to be tax exempt and an entity whose donors may deduct their gifts on their income tax returns. Compliance with these statements is required for the church to be exempt.

<sup>7</sup> The Texas Business Organizations Code and the Internal Revenue Code require this provision. If the church wishes, it may add: "If at the time of winding up, Southern Baptists of Texas Convention is exempt under Section 501(c)(3), then the property shall be distributed to that Convention." Or, if the church wishes, it may substitute the name of its association in place of the Convention's name.

<sup>8</sup> §22.106 and §22.156.

<sup>9</sup> §22.164(b)(2). The Code requires a two-thirds affirmative vote of those in attendance who have a right to vote. This Certificate and the following Bylaws are worded on the assumption that all members have the right to vote. See footnotes 14 and 19.

Article 9. This document becomes effective when the document is filed by the Secretary of State.<sup>10</sup>

The undersigned signs this document subject to the penalties imposed by law for the submission of a materially false or fraudulent instrument.<sup>11</sup>

Date: \_\_\_\_\_

\_\_\_\_\_  
Signature of Organizer

The church's attorney will file the certificate with the Secretary of State. The filing must be accompanied by the payment of a \$25 fee to the Secretary of State.

**After filing the Certificate of Formation the membership of the church adopts bylaws.**

Bylaws are the "rules adopted to regulate or manage the corporation, regardless of the name used to designate the rules."<sup>12</sup> Some churches have both a "constitution" and "bylaws." The law calls both those documents "bylaws." A provision in the certificate of formation that is inconsistent with a bylaw controls over the bylaw.<sup>13</sup>

The following is something of an outline with comments for bylaws for a Texas Baptist church. Some of the bylaw provisions are required by the Texas Business Organizations Code; others are optional. Some are more important legally than others. Again, the church will need an attorney's assistance in drafting bylaws. Bylaws are not filed with the Secretary of State or elsewhere.

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<sup>10</sup> If the Church wishes it may alter this sentence to provide: "This document becomes effective at a later date, which is not more than 90 days from the date of signing. The delayed effective date is: \_\_\_\_\_." The Church might wish to use that language, for example, if it wants to have the document become effective at the beginning of a new fiscal year. A third option is also described in Form 202.

<sup>11</sup> This statement is required by the Texas Business Organizations Code.

<sup>12</sup> §22.001(2).

<sup>13</sup> §22.103.

## Bylaws for First Baptist Church of Someplace, Texas

These Bylaws constitute the rules adopted by First Baptist Church of Someplace, Texas, (hereinafter sometimes referred to as, "the Church") for the regulation and management of its affairs.

### Article 1. Purpose of the Church.

(Optional. Elaborate, if desired, on the religious purpose statement in the certificate of formation, but do not contradict, or provide for anything inconsistent with, the certificate of formation.) Example:

1.1. The Church exists to worship God, to proclaim the Word of God, and to be in service to God.

### Article 2. Doctrine of the Church.

(Optional. A doctrinal statement may be included in the bylaws at the option of the church.)

### Article 3. Polity of the Church.

(Optional but legally desirable.) Example:

3.1. The Church is an autonomous body, governed by its congregation, subject solely to the Lordship of Jesus Christ.

### Article 4. Cooperation.

(Optional but legally desirable.) Example:

4.1. The Church seeks to identify associations and conventions with which the Church may cooperate for the great objects of the Kingdom of God. In every instance, cooperation shall be voluntary on the part of the Church and no association or convention or any other body or person shall have any authority over the Church.

### Article 5. Ordinances.

(Optional)

5.1. Baptism.

5.2. The Lord's Supper.

### Article 6. Membership.

(This area is legally important.) Example:

6.1. The membership shall be composed of Baptized believers who have been accepted for membership by profession of faith in Jesus Christ as his or her Savior and Lord and as a candidate for baptism by immersion, or by promise of a letter from another Baptist church of like faith and order, or by statement that he or she is or was a member of a Baptist church of like faith and order and his or her records, for any reasonable cause, are no longer available.

6.2. Candidacy. . . .

6.3. Acceptance by the Church. . . .

6.4. Privileges of Membership. Each member shall be entitled to one vote on each matter submitted to a vote at a regular or special meeting of Church members.<sup>14</sup>

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<sup>14</sup> Clarifying a member's right to vote is essential. Under the Code, the Church may have more than one class of membership, if it wishes. For example, it may have one class for adult members and another class for children who are members, with only the adult class having the right to vote. Or the Church may have one class of active members, with those members having a right to vote, and another class of inactive members, with those members not having a right to vote. These Bylaws and the Certificate of Formation assume the Church has only one class of members, and each member has a right to vote.

6.5. Member's Right to Inspect Books and Records. A member, on written demand stating the purpose of the demand, is entitled to examine and copy at the member's expense, in person or by agent, accountant, or attorney, at any reasonable time and for a proper purpose, the books and records of the corporation relevant to that purpose.<sup>15</sup>

6.6 Discipline. . . .

6.7. Termination of Membership. . . .

Article 7. Watchcare.

(Optional. May be helpful to differentiate from membership.)

Article 8. Meetings.

(This area is legally important.)

8.1. Act of the Membership. The membership may act only at a properly called meeting of the membership where a quorum is present.<sup>16</sup>

8.2. Quorum. Members present at a meeting for which notice has been given shall constitute a quorum.<sup>17</sup>

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<sup>15</sup> Required by §22.351.

<sup>16</sup> §22.159(b).

<sup>17</sup> A greater quorum may be established. §22.159.

8.3. Voting. At such a meeting, a member may only vote in person.<sup>18</sup> A vote of a majority of the members in attendance shall be an act of the membership,<sup>19</sup> except that a two-thirds majority of the members in attendance shall be required for the Church to take the following actions: dissolution of the corporation, merger or consolidation with another corporation, sale of substantially all of the corporation's assets, amendment to the corporation's Certificate of Formation or of its Bylaws.<sup>20</sup>

8.4. Regular Meetings. A regular meeting of members shall be held \_\_\_\_\_.<sup>21</sup>

8.5. Special Meetings. A special meeting of the members may be called by \_\_\_\_\_, or by members having not less than one-tenth of the votes entitled to be cast at the meeting.<sup>22</sup>

8.6. Notice. Notice of regular and special business meetings shall be given by oral announcement at a regularly scheduled worship service before the meeting, or by \_\_\_\_\_.<sup>23</sup>

8.7. Location. All meetings shall be held at \_\_\_\_\_ (for example, "the church.").

Article 9. Parliamentary Authority.  
(Optional but desirable.)

Example:

9.1 The rules contained in the then current edition of *Robert's Rules of Order*, not inconsistent with the Certificate of Formation or the Bylaws, are adopted by the Church.

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<sup>18</sup> Absent this provision, a member is by law permitted to vote by proxy. §22.160(b).

<sup>19</sup> §22.159. If the congregation wishes to require a two-thirds vote for any other action, it should recite that action here. Note that the Code requires that every action of the church must be taken with at least the approval of a majority of the members present, not merely a majority of the members present and voting. §22.159(b). This means that members who are present but do not vote are included in the vote calculation as if they had voted "no." If a church has more than one class of members, and the members of a class do not have the right to vote, understand that the Code requires at least the approval of a majority of those members present who have a right to vote. And, where these Bylaws require a two-thirds vote, that means the affirmative vote of two-thirds of the members present who have a right to vote.

<sup>20</sup> The law requires this two-thirds vote of the members present for each of these fundamental actions, except amendment of the bylaws. §22.164.

<sup>21</sup> The Code requires at least an annual meeting at a time and place stated in or determined in accordance with the bylaws. If the bylaws provide for more than one regular meeting, an annual meeting is not required. §22.153.

<sup>22</sup> §22.155.

<sup>23</sup> The Code deems this notice to be sufficient for a church, but allows other, more elaborate, means of notice to be recited in the bylaws. Notice should be "fair." §22.156.

Article 10. Officers.

(A church may have any officers it chooses.<sup>24</sup> The bylaws should identify the officers and their functions, provide for the manner of election of officers, and specify the term of office, not to exceed three years.<sup>25</sup> Typical officers include Pastor, Moderator, Clerk and Assistant Clerk, and Treasurer.)

Article 11. Committees.

(Optional but desirable.)

11.1. Standing Committees.

11.2. Special Committees.

11.3. Task Forces and Ministry Teams.

Article 12. Deacons.

(Optional but desirable.)

12.1. Purpose and Function.

12.2. Qualifications.

12.3. Election.

12.4. Deacon Officers.

Article 13. Amendment.

(Some rule should be declared. The Code allows total flexibility. Normally some "supermajority" is required to amend the bylaws.)

Example: 13.1 These Bylaws may be amended at any regular meeting or at any special meeting, if the notice of the meeting contained notice of the proposed amendment, upon the adoption of the amendment by the vote of two-thirds of the members present.

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<sup>24</sup> §22.233.

<sup>25</sup> §22.232(a).

**How does a church which is already incorporated test its documents against the new Code and amend those documents if it needs or desires to do so?**

An attorney whose practice of law includes work in the area of nonprofit corporations should be consulted. The Church may, in preparation for that work, undertake to identify language in its Articles of Incorporation or Bylaws which do not match up with the language in these model documents. (The new Code calls what was formally called "Articles of Incorporation," "Certificate of Formation.") The attorney can help the church know if those are areas which need to be amended.

If a church wishes to amend its Articles of Incorporation it may consider Form 424 and its instructions provided by the Secretary of State's web site. Or, if a church wishes, it may amend and, at the same time, restate its Articles of Incorporation. To accomplish this, the church may consider Form 414, "Restated Certificate of Formation with New Amendments."

If a church merely needs to change its registered agent and/or its registered office, it may do so by filing online, utilizing the Secretary of State's Form 401.

In all these areas, the attorney can help the Church make good decisions and not err.

*A church which has its governing documents in good form has taken a giant step to "Let all things be done decently and in order."*