



The Sale of Nonprofit Nursing Homes Pursuant to the Not-for-Profit Corporation Law

**Charities Bureau
www.charitiesnys.com**

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Two of the most significant measures of human civilization are the effort and resources devoted to the care of older citizens with serious medical issues that limit their ability to live independently. For a significant number of elders, a nursing facility may well be their last home and its residents and staff their final community. At the same time, running a nursing home is a challenging business. Residents may suffer from a variety of challenging physical, mental, and emotional conditions. Employees and managers must cover three shifts per day, seven days every week, through storms, power blackouts, and holidays. Revenue depends on a strange and changing mix of private pay, private insurance, Medicare, Medicaid, and donations. Physical facility requirements and patient mix have changed substantially over the past 20 years, requiring significant capital investment. Then there are regular state inspections and audits, and private lawsuits.

Background: Trend Towards For-Profit Nursing Homes

Many nursing homes, particularly in the Northeast and Upper Midwest, have traditionally been established and operated as non-profit charities. In 2009, 26.4% of nursing homes nationally were nonprofit.¹ In New York, 40.5% (257) were nonprofits in 2010; by 2014, 239

¹ CENTERS FOR MEDICARE AND MEDICAID SERV., DEP'T OF HEALTH & HUM. SERV., *Nursing Home Data Compendium 27* (2013), available at https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/downloads/nursinghomedatacompendium_508.pdf.

were nonprofits.² Research suggests that, on average, nonprofit nursing homes provide better care and achieve greater patient satisfaction than for-profit facilities.³

In New York, we have seen a significant increase in efforts to sell nonprofit nursing homes to for-profit entities since 2014. Within the past few years, about 5% of New York’s nonprofit nursing homes were sold to for-profits annually. Sections 510, 511, and 511-a of New York’s Not-For-Profit Corporation Law (“N-PCL”) direct the New York Attorney General and/or the New York Supreme Court to review the sale of substantially all the assets of nonprofits, including nursing homes. That review requires consideration and determination that the nonprofit nursing home has satisfied two factors. First, are the “consideration and terms of the sale fair and reasonable” to the (seller) corporation? This standard assures that the selling organization will receive optimal consideration for its property and that the terms of the sale do not involve excessive risks to the selling organization. The second standard is that the sale or transfer of the assets, and the terms under which the assets are sold, will promote the mission and purposes of the charity. This can be a more difficult determination. As a leading treatise states, “Usually, in order for an organization’s mission to be promoted, the services it provides must be continued. In simple transactions, frequently involving the sale of property that is the organization’s main asset, the court is unlikely to approve the sale if the activities or services for which the organization was formed are interrupted or foreclosed by the sale.”⁴

² CENTERS FOR MEDICARE AND MEDICAID SERV., DEP’T OF HEALTH & HUM. SERV., *Nursing Home Data Compendium 18-22* (2015), available at https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/Downloads/nursinghomedatacompendium_508-2015.pdf.

³ Several reviews have concluded that for-profit nursing homes had poorer care quality and poorer patient and family experiences than nonprofit-owned homes U.S. Government Accountability Office. *See e.g.* Kai You et al., *Do nursing home chain size and proprietary status affect experiences with care?*, 54 MED. CARE 229 (2016), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4752885/>; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-689, *CMS’S SPECIFIC FOCUS FACILITY METHODOLOGY SHOULD BETTER TARGET THE MOST POORLY PERFORMING FACILITIES, WHICH TENDED TO BE CHAIN AFFILIATED AND FOR-PROFIT* (2009); Charlene Harrington et al., *Does Investor Ownership of Nursing Homes Compromise the Quality of Care?*, 91 AM. J. PUB. HEALTH 1452 (2001); Vikram R. Comondore et al., *Quality of care in for-profit and not-for-profit nursing homes: systematic review and meta-analysis*, 339 BMJ 2732 (2009); Aline Bos et al., *Financial performance, employee well-being, and client well-being in for-profit and not-for-profit nursing homes: A systematic review*, 42 HEALTH CARE MGMT. REV. 352 (2017), available at https://www.researchgate.net/profile/Margo_Trappenburg/publication/305382614_Financial_performance_employee_well-being_and_client_well-being_in_for-profit_and_not-for-profit_nursing_homes_A_systematic_review/links/5b51de3aa6fdcc8dae30a01b/Financial-performance-employee-well-being-and-client-well-being-in-for-profit-and-not-for-profit-nursing-homes-A-systematic-review.pdf; Lisa A. Ronald et al., *Observational Evidence of For-Profit Delivery and Inferior Nursing Home Care: When Is There Enough Evidence for Policy Change?*, 13 PLOS MED. e1001995 (2016), available at <https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1001995>; *Non-Profit Nursing Homes: Is there a Difference in Care?*, CENTER FOR MEDICARE ADVOCACY, <http://www.medicareadvocacy.org/non-profit-vs-for-profit-nursing-homes-is-there-a-difference-in-care/> (last visited Oct. 30, 2018).

⁴ Victoria B. Bjorklund, James. J. Fishman and Daniel L. Kurtz, *New York Nonprofit Law and Practice with Tax Analysis* § 9.02(2)(c) (Matthew Bender, 3d Ed.).

Impact on Charitable Mission

However, the charitable programs of many nonprofit nursing homes do not continue after their sale. Most nonprofit nursing home corporations are single purpose entities whose mission, as defined in their charter and demonstrated by their history, is to provide nursing home care. Ensuring that the proceeds of the sale are used to further the mission of the sold nursing home is challenging. In its review of sale petitions, the Charities Bureau has found that many nonprofit nursing homes have not fully considered their responsibility to assure that their use of the proceeds will promote the mission of the charity. Some nonprofit nursing homes are sole member corporations, effectively controlled by a related health care or fraternal organization that may have its own plans for the proceeds of the sale that are only marginally related to the mission of the selling entity. In other cases, as a nursing home administrator approaches retirement, the directors may decide to use proceeds of the sale to fund a grant making foundation and provide the administrator with a lucrative position overseeing a new grant making foundation.

The board operating the nonprofit home being sold should identify the level of care and services that the purchaser is likely to provide to the nursing home's residents. If they fail to do so, there is a significant chance that they will miss an opportunity to ensure that current and future nursing home residents will receive at least the same level of care and services that the nonprofit home provided. Similarly, because delivery of high levels of care and services require adequate supervision and staffing, individuals operating the nonprofit home can ensure quality care and services by seeking commitments from the purchaser to maintain the same staffing and supervision levels as the seller.

Many nonprofit nursing homes interested in selling have been able to prepare an economic case, claiming that continued operation of an existing single facility nonprofit nursing home will not be viable in the long run, and that a sale or transfer is appropriate. In addition, well-advised boards have been able to demonstrate that the sale price terms are "fair and reasonable" to the seller.

A significant concern has arisen in our reviews concerning the effort and success by boards of nonprofit nursing homes and their advisors in evaluating whether the terms of the sale or transfer and intended use of the proceeds will promote the mission and purposes of the charity. We have had the benefit of careful and thorough work by a number of conscientious boards and their advisors to address this issue, in well-articulated sale petitions. We have also had the unfortunate experience of approving petitions for sales of nursing homes that are shortly thereafter closed by the purchasers, and sold or converted by the purchasers to condominiums or commercial developments. In other cases, the proposed purchaser has been placed in control of the facility pending the sale, with no accountability for income or expenses during the period following the execution of the agreement of sale but prior to obtaining required regulatory approvals.

Best Practices

This guidance articulates recommended best practices for a board, its management, and its advisors in considering the sale of a nonprofit nursing home including:

- factors to be evaluated in considering a sale,
- the business process for exploring requests for proposals and evaluating bidders,
- protections to be provided for the class of charitable beneficiaries (that is, current and future residents) during and after the sale, and
- use of proceeds of the sale consistent with the nursing home's charitable mission.

The best practices for considering and entering into an agreement for sale by a nonprofit nursing home should include planning for and development and submission of specific factual representations in a statement to the Charities Bureau by the selling charity. The planning should include developing a process for use by the board, management, and their professional advisors, including recognizing the importance of independent legal advice, to determine that the proposed sale is in the best interests of the charitable corporation and its beneficiaries. Where the board is considering a sale to a for-profit entity, such a statement should include:

Planning

- A five-year projection of revenues and expenditures for the nursing home under current ownership.
- Whether and how the board explored alternative or additional sources of funding to continue operations as a nonprofit nursing home.
- Whether and how the board has evaluated merger or affiliation with another nonprofit health care facility, and the results of that evaluation.
- Whether and how the board advised current residents and their family members or guardians that sale of the nursing home to a for-profit purchaser is contemplated, and what comments or responses have been received to the advice.
- Whether and how the board solicited inquiries, bids, or requests for proposals from potential purchasers, and what inquiries, bids, or requests for proposals it received and considered.
- Whether and how the board conducted its own examination of the character, competence, integrity, and ability to pay of potential purchasers, their owners, officers, and directors
- Whether and how the board determined that the transaction was done at arm's length and no person would reap any personal benefit from the transaction.
- Whether and how the board determined that compliance with all provisions of N-PCL 715 applicable to related party transactions have been met.

Continuation of Care

- Whether and how the board evaluated the ability and willingness of potential purchasers to provide quality services as required by 10 CRR-NY 415.12, and protection from abuse or neglect to current and contemplated nursing home residents, including consideration of the effect that any planned changes in staffing and/or supervision are likely to have on

patient care, and what representations to protect the residents are required to be memorialized in writing.

- Whether and how the board evaluated the ability and willingness of potential purchasers to assure continued operation of the nursing home for current residents and the specific population served by the nursing home for a period of at least five years after the sale.
- Whether and in what form the purchaser made a commitment to continue operating the nursing home for five years.
- Whether and how the board considered the need for continuity in the staff providing care for residents after the sale and the levels of staffing and supervision.
- Whether the board considered the CMS ratings of other nursing homes operated by the prospective purchasers of the home, as an indicator of the likely level of care and services residents would receive after a sale to that purchaser, and whether that would be a desirable outcome.
- Whether and how the board considered contracts with staff of the nursing home and if those considerations included negotiations with union leadership if staff are unionized.
- How the board will obtain and enforce commitments from the purchaser for conduct after the sale.

Other Provisions for the Petition

- The specifics of any items, which might disclose confidential business information, should be appropriately marked and contained in a separate document for filing with the Charities Bureau, and need not be included in the publicly available petition.
- A statement of the fair value of the assets. N-PCL § 511(a)(4). For most charities owning nursing homes, the “assets” include real estate, personal property, and the value of the ongoing business. The Charities Bureau expects that the statement of the “fair value of the assets” will reflect information and evaluation from an independent professional advisor with expertise in such evaluations.
- A statement of the amount of the corporation's debts and liabilities and how they are secured as of the date of the agreement of sale. N-PCL § 511(a)(4). The statement should be current, include the name of each payee, any security and, if past due. In addition, a copy of the corporation's most recent annual financial report (i.e., IRS Form 990 or 90-PF) or audited or unaudited financial statements should be attached as an exhibit. The Charities Bureau expects that the Board and management have and have reviewed accurate financial records of outstanding liabilities and contingencies prior to entry into an agreement of sale, and that the agreement of sale will reflect how post agreement expenditures, obligations, revenues, and claims will be allocated at closing.
- The consideration to be received by the corporation, including the timing of the planned receipt of consideration, the debts or obligations or contingent obligations to be assumed by the purchaser, and the debts or obligations or continued obligations to be retained by the seller. N-PCL § 511(a)(5). If any consideration is to be delivered other than in cash at closing, there should be evidence in the appraisal or other independent support as to the fair value of that consideration. If the consideration is less than the appraised value of the

assets, a documented explanation of why the consideration is fair and reasonable should be provided.

- The petition should include as attachments any filings concerning the facility made by the buyer with any healthcare regulatory agency and any other government agencies relevant to the transaction, and any related agency orders or communications, and all such filings by the seller concerning any proposed sale or transfer of the facility.
- A copy of the contract, including a clause that the agreement is contingent upon approval by the Supreme Court or the Attorney General to afford both seller and purchaser protections if the transaction cannot meet the “fair and reasonable” or “best interest” standards.

Use of Proceeds

- A description of the proposed use of the proceeds of the sale to honor pre-existing obligations and costs connected to the sale. N-PCL § 511(a)(5). The description should include disclosure of all existing obligations for use of the consideration, and contingent obligations. Support for all commitments for use of proceeds should be attached to the petition as exhibits (evidence of debt, invoices, and a draft closing statement).
- A description and explanation of the proposed use of the proceeds for charitable purposes. N-PCL 511(a)(5). These uses could, depending on the charitable organization’s charter, by-laws, and mission statements in the IRS 990 or elsewhere, include payments to assure continued provision of services by third parties for existing charitable beneficiaries; transfer of any proceeds received from the sale to another charitable entity; use of the proceeds for a new facility or to fund a new service; use of the proceeds for a grant making entity for grants related to its mission; creation of an endowment of restricted funds for the organization’s charitable purposes; or dissolution and distribution pursuant to Article 10 of the N-PCL. In determining distribution of proceeds for charitable purposes, the board and management should be aware that sole members of charitable corporations are not entitled to appropriate charitable proceeds from the corporation of which they are sole member unless the directors of the entity make an independent determination that such distribution and its terms are consistent with the mission and charter of the selling charitable corporation.
- A statement as to whether dissolution of the corporation is contemplated. N-PCL § 511(a)(5). In certain circumstances, the Attorney General will require that the proceeds be placed in escrow if the corporation plans to dissolve. In addition, if the corporation plans to dissolve after the sale, the legal doctrine of *quasi cy pres* requires that the net proceeds be distributed under a Plan of Dissolution and Distribution of Assets to organizations engaged in substantially similar activities.⁵

⁵ Not-for-profit corporations contemplating dissolution should consult the Attorney General's guidance on dissolution posted at <http://www.charitiesnys.com/home.jsp>. Religious Corporations should consult Religious Corporations Law § 18.

- A statement that the transaction was recommended or authorized by a vote of the directors in accordance with law, at a meeting duly called and held. N-PCL § 511(a)(7). Include the total number of directors, how the meeting was noticed (a copy of the notice is helpful), the number of the directors present at the meeting, the vote pro and con, and what constitutes a quorum. A copy of the board resolution, certified by the secretary, should be attached as an exhibit.
- If consent of members of the selling corporation is required by law, a statement that such consent was given in accordance with law, at a meeting of the members duly called and held. N-PCL § 511(a)(8). Include the total number of members, the number of members present at the meeting, the vote pro and con, and what constitutes a quorum. A copy of the membership resolution, certified by the secretary, should be attached as an exhibit.

The Charities Bureau recognizes that the decision by a board and management to sell a nonprofit nursing home to a for-profit entity is not taken lightly. This guidance is provided to assist both board and management in the exercise of their fiduciary responsibilities to charitable beneficiaries, and to allow well-considered actions to proceed through the approval process. It should not be viewed as a substitute for advice from a corporation's attorney.

There will be circumstances where the financial situation of the charitable entity, or the ability of the nursing home to provide services to existing residents, or the licensing or regulatory status of the nursing home are in substantial jeopardy such that the process described in this guidance is not practicable or not in the best interest of charitable beneficiaries.

Other guidance for not-for-profit corporations is posted at www.charitiesnys.com. Please address questions concerning property transactions to charities.transactions@ag.ny.gov.