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2020 Virtual Summer Meeting

Webinar 3:

Wednesday, June 24

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The Law of Endowments
(The Uniform Prudent Management of Institutional Funds Act)

Erik Dryburgh

I. WHAT IS AN ENDOWMENT?

A. To a donor, an endowment is a sum of money given to a charity for charitable purposes, with only the "income" being spent and "principal" being preserved.

B. To an accountant, it is a fund which is "permanently restricted."

C. To a lawyer, it is an institutional fund not wholly expendable on a current basis under the terms of the gift instrument.

D. Thus, a "true" endowment is one established or created by the donor. A board-restricted endowment (or "quasi-endowment") is created when the Board takes unrestricted funds and imposes a spending restriction.

II. WHAT WAS UMIFA AND WHY WAS IT ADOPTED?

The Uniform Management of Institutional Funds Act (UMIFA) was a uniform law which provided rules regarding how much of an endowment a charity could spend, for what purpose, and how the charity should invest the endowment funds. UMIFA was the governing law in California through December 31, 2008. It was adopted because charities and their lawyers were unsure how to define "income" in the context of an endowment. Many looked to trust law, which generally defines "income" as including interest, dividends and the like, but defines gains as "principal." Thus, charities invested endowments in bonds and high-dividend stocks, but passed by investments with favorable growth prospects if they had a low current yield. Consequently, long-term yield suffered. The drafters of UMIFA thought charities should be able to spend a prudent portion of the gains earned by an endowment.

III. SO WHAT IS UPMIFA?

A. UMIFA was thought to be out of date, particularly as to management, investment, and spending issues. In particular, the post-dot.com "down" market resulted in many "underwater" endowments, exposing the flaws in the UMIFA spending rules.

B. UPMIFA ("Uniform Prudent Management of Institutional Funds Act") was approved by the National Conference of Commissioners on Uniform State Laws in July 2006, and has been adopted in virtually every state.

C. California adopted UPMIFA effective January 1, 2009. It applies to funds created after that date, and to decisions made after that date for existing endowments (i.e., it will be "retroactive").

IV. HOW DOES AN ENDOWMENT GET CREATED?

A. An endowment fund is a fund not wholly expendable by the institution on a current basis under the terms of the applicable gift instrument. UPMIFA makes it clear that the term "endowment fund" does not include funds that the charity designates as endowment (these are "quasi-endowment" funds).

B. UPMIFA defines a gift instrument as being a "record" – information inscribed on a tangible medium or stored electronically – including an institutional solicitation, under which property is given. UPMIFA thus makes it clear that a gift instrument must be in writing, but expands the definition to include email. Governance documents, such as Bylaws, may be part of the gift instrument. A record is part of the gift instrument, however, only if the donor and the charity were, or should have been, aware of its terms.

V. HOW SHOULD A CHARITY INVEST ITS ENDOWMENT?

A. Investment is a matter of state law. In California, the Board is subject to the rules on prudent investments as set forth in both the Corporations Code and UPMIFA.

B. The Corporations Code provides that in making investments, a Board must "avoid speculation, looking instead to the permanent disposition of the funds, considering the probable income, as well as the probable safety of funds." This is an "old fashioned" and fairly conservative statement of the prudent investor rule. Fortunately, effective January 1, 2016, compliance with UPMIFA is deemed to be compliance with the Corporations Code standard.

C. UPMIFA articulates a standard of care for both managing and investing an endowment. It requires the charity to consider the charitable purposes of the charity, and the purposes of the endowment fund. It requires the Board (and others responsible for managing and investing) to act in good faith and with the care of an ordinary prudent person, and notes that the charity may incur only appropriate and reasonable costs.

The charity must consider:

1. General economic conditions,
2. Effects of inflation and deflation,
3. Tax consequences,
4. The role of each investment in the overall portfolio,
5. Expected total return from income and appreciation,
6. The charity's other resources, and
7. The needs of the charity and the fund to make distributions and preserve capital.

D. UPMIFA provides that an individual investment must be analyzed in the context of the total portfolio and the overall risk-reward objectives, and that a charity can invest in any kind of property that is not inconsistent with the standard of care.

E. UPMIFA imposes a duty to diversify.

VI. HOW MUCH OF AN ENDOWMENT CAN A CHARITY SPEND?

A. UMIFA provided that "The governing board may appropriate for expenditure for the uses and purposes for which an endowment fund is established so much of the net appreciation, both realized and unrealized, in the fair value of the assets of an endowment fund over the historic dollar value of the fund as is prudent ...."

Net appreciation includes realized gains and unrealized gains.

Historic dollar value is "the aggregate fair value in dollars of (1) an endowment fund at the time it became an endowment fund, (2) each subsequent donation to the endowment fund at the time it is made, and (3) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the endowment fund."

Although UMIFA did not explicitly so state, most attorneys concluded that "income" (e.g., interest and dividends) could be spent as well (even with an "underwater" endowment).

B. UPMIFA makes a radical change and does away with the concept of "historic dollar value." UPMIFA allows a charity to appropriate for expenditure, or accumulate, so much of an endowment fund as the charity determines is prudent for the purposes for which the fund was established.

The charity must consider:

1. The duration and preservation of the endowment fund,
2. The purposes of the charity and the fund,
3. General economic conditions,
4. Effects of inflation and deflation,
5. Expected total return from income and appreciation,
6. The charity's other resources, and
7. The charity's investment policy.

C. California's UPMIFA includes the optional provision stating that an appropriation of greater than 7% of the average FMV of an endowment (averaged over the last three years) is presumptively imprudent.

VII. WHAT ABOUT DELEGATION?

UPMIFA allows a charity to delegate management and/or investment decisions to agents. The charity must act prudently in selecting the agent, establishing the scope of the delegation, and reviewing the agent's actions. A charity that does so is not liable for the actions of the agent. However, the agent is held to a "reasonable care" standard and is expressly made subject to appropriate court jurisdiction.

VIII. WHAT ABOUT CHANGING A RESTRICTION?

A. UPMIFA allows a charity to release or modify a restriction regarding management, investment, or purpose of a fund if the donor consents in writing.

B. If a purpose or use restriction becomes unlawful, impracticable, impossible to achieve, or wasteful, the court may modify the restriction in a manner consistent with the donor's intent. The Attorney General must be notified.

C. The court can modify a management or investment restriction if it has become impracticable or wasteful, impairs the management or investment of the fund, or (if due to unforeseen circumstances) the release would further the purposes of the fund. The Attorney General must be notified.

D. If a fund is less than $100,000 in value and over 20 years old, and the charity determines that a restriction on the management, investment, or use of the fund is unlawful, impracticable, impossible to achieve, or wasteful, the charity can (after notice to the Attorney General) release or modify the restriction. It must thereafter use the funds in a manner consistent with the donor's charitable purposes.

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Attorney General Guidance on Endowments for Charities Facing Financial Challenges Due to COVID-19
April 28, 2020

The Commonwealth of Massachusetts, along with the rest of the nation, is facing a multi-faceted adversary in COVID-19. While we are confident that our researchers, scientists, first responders, and health care workers will help us to overcome this challenge, this crisis has affected the very institutions that educate, train, employ, and deploy our frontline workers, as well as other important public charities such as museums and community organizations. Massachusetts public charities are facing revenue shortfalls, unexpected debt and repayment obligations, and other unanticipated circumstances resulting from this crisis. In these circumstances, charities may find themselves considering extraordinary measures to ensure survival and continued fidelity to their charitable missions.

Donor-restricted endowment funds are an important, perpetual source of support for charities and their missions; they are not available for unlimited discretionary spending. The Massachusetts Attorney General's Office ("AGO"), through its Non-Profit Organizations/Public Charities Division (the "Division"), offers these guidelines to public charities examining their endowments as a potential source of funding to address current challenges.

The Division provides this guidance for informational purposes only and not as a substitute for legal advice. The Division encourages institutions and the leaders that govern them to seek legal counsel when considering the issues discussed herein.

Overview

This Guidance covers the following:

I. Background on Endowment Funds and Governing Law

Many charities hold endowment funds, which broadly speaking are donor-restricted funds that are intended to be invested and used to perpetually sustain charities and their missions. The AGO oversees the administration of endowment funds and other assets that charitable nonprofits and charitable trusts hold throughout the Commonwealth. This authority arises under common law and the AGO's statutory mandate to "enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof." M.G.L. c. 12, § 8. In particular, the AGO is a necessary party to a charity's request for judicial relief to modify charitable restrictions – including endowment restrictions subject to the Uniform Prudent Management of Institutional Funds Act, M.G.L. c. 180A, §§ 1-9 (UPMIFA).

Most Massachusetts public charities (referred to by UPMIFA and herein as an "institution") holding donor-restricted endowment funds are subject to UPMIFA. M.G.L. c. 180A, § 1. Pursuant to UPMIFA, endowment funds have three necessary characteristics. First, endowment funds are held exclusively for charitable purposes. These purposes may be for the institution's general charitable purposes or for more specific purposes that fall within the overall charitable purposes of the institution. Second, endowment funds cannot be spent by the institution all at once. Only a portion of an endowment fund may be spent throughout the year (most often some or all of the income earned) in accordance with UPMIFA's rules on prudent expenditures and the institution's internal spending policies.[1] Finally, generally speaking, the spending restrictions on endowment funds are donor imposed—expressly through a gift instrument or impliedly in response to fundraising solicitations, in contrast to restrictions the institution itself imposed through action of its board.[2] A fund with these three characteristics is subject to UPMIFA except to the extent that a donor has clearly provided otherwise. M.G.L. c. 180A, § 3(b).

The distinction between donor-restricted endowment funds and board-restricted institutional funds is important: an institution may modify the terms of board-restricted institutional funds without court approval, but only the donor or a court has the power to modify donor-imposed restrictions on endowment funds. This proscription on extrajudicial modifications of donor-restricted endowment funds protects the perpetual duration of endowment funds and the charitable purposes for which they were established. Accordingly, institutions that are looking to their endowment funds for financial relief during this crisis should

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[1] The average effective spending rate from endowments in fiscal year 2019 was 4.5%. Press Release, 2019 NACUBO-TIAA Study of Endowments, National Association of College and University Business Officers & TIAA, *available at* https://www.nacubo.org/Press-Releases/2020/US-Educational-Endowments-Report-5-3-Percent-Average-Return-in-FY19. As a practical matter, the institution's governing board decides what percentage of the endowment fund to spend on the fund's charitable purposes in any given year. Note, in addition to expenditure restrictions, endowment funds may also be subject to specific use or purpose restrictions.

[2] Although by definition endowment funds are necessarily also institutional funds, this guidance is limited to endowment funds because institutional funds (as defined by UPMIFA) are a broader category of funds that are not subject to the same spending restrictions as endowment funds (institutional funds may or may not be subject to donor restrictions).

consider the potential alternatives to, as well as the myriad implications of, this extraordinary measure.

II. Exploring Other Sources of Funding Before Seeking Court Approval to Modify Donor-Imposed Restrictions on Endowment Funds

As a practical matter, institutions facing acute financial needs should explore other funding sources before considering expanded use of their endowment funds. The Division expects that, prior to submitting to the AGO (and the court) a request to modify donor-imposed restrictions on endowment funds, institutions will have explored the following questions:

- Can the institution raise new, unrestricted donations?
- Is there funding available through federal or state sources, such as the Coronavirus Aid, Relief and Economic Security Act (CARES Act), Small Business Recovery Loan Fund, or Economic Injury Disaster Loan Program?
- Is there grant funding available through COVID-19 relief funds or private foundations?
- Are there other financing or refinancing options, including through commercial banks?

Institutions should consult with legal counsel to assess the above questions. These other funding mechanisms may be effective ways to address financial gaps the COVID-19 emergency has created, without seeking to modify restricted endowment funds.

III. Accessing Donor-Restricted Endowment Funds Without Court Approval

If alternative funding sources are unavailable or insufficient, institutions may be looking to their endowment funds to address unanticipated costs and monetary shortfalls related to COVID-19. Before asking the court to modify endowment fund restrictions, institutions should first assess whether the following nonjudicial remedies are viable options.

Ask donors to release spending restrictions

Institutions and counsel should consider whether it is feasible to contact donors to obtain their consent to lift or modify the spending restrictions on donor-restricted endowment funds.[3] UPMIFA expressly provides that institutions may release or modify restrictions imposed on endowments funds with donor consent. M.G.L. c. 180A, § 5(a). The particular modification will depend on any agreement reached between the institution and the donor. But, with donor consent, the institution may access the modified fund (or relevant portion thereof) to further the fund's charitable purpose, subject to applicable fiduciary duties of care and loyalty.

Consider endowment spending adjustments

Institutions anticipating revenue shortfalls or extraordinary costs due to COVID-19 may be able to increase endowment fund spending in a given year, with the potential for downward

[3] Institutions may consider similar measures in assessing other donor-restricted funds that are not subject to spending restrictions.

adjustments in later years.[4] Although UPMIFA provides authority for an institution to increase or decrease the "take" from an endowment fund,[5] the foundational principles of endowments remain: they must retain their purchasing power (i.e., the fund must grow to keep pace with inflation); they may not be expended all at once; and donor intent must be respected. Institutions should discuss carefully with legal counsel the options that UPMIFA's expenditure provisions afford them.

Pursue administrative modification of small and old funds

In limited circumstances, court approval may not be required for modifications of endowment funds with less than $75,000 and that have been in existence for 20 years or longer. Institutions may apply to the AGO for administrative modification of such funds, which in some cases may free up resources to address COVID-related shortfalls. The Division's guidance on these administrative modifications may be found here: https://www.mass.gov/service-details/donor-restricted-gifts.

IV. Seeking Court Approval to Access Donor-Restricted Endowment Funds

For institutions that have exhausted alternative funding options or otherwise have determined that accessing endowment funds is necessary in light of COVID-19, modification proceedings before the court may be available. UPMIFA addresses such requests and describes the circumstances and standards that may be applicable. Institutions should consult with counsel for appropriate legal advice. What follows is a general overview of the potential legal remedies.

Massachusetts courts may modify certain endowment fund restrictions pursuant to two equitable doctrines, codified in UPMIFA. M.G.L. c. 180A, § 5. These two doctrines recognize that with the passage of time and changed circumstances, a donor's original charitable intent—and the mechanisms for advancing that intent—may someday become obsolete. The *cy pres* doctrine permits a court to modify an endowment fund's charitable purpose or use restriction if the purpose or restriction has become "unlawful, impracticable, impossible to achieve or wasteful"; *cy pres* modifications must be consistent with the charitable purposes reflected in the original gift instrument.[6] *Id.* at § 5(c). The doctrine of equitable deviation permits a court to modify a management, investment, or durational restriction on an endowment fund if the restriction has become "impracticable or wasteful, if it impairs the management or investment of the fund or if, because of circumstances not anticipated by the donor, a modification of a

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[4] Model Uniform Prudent Management of Institutional Funds Act § 4 comment subsection (d) (2006).

[5] Importantly, the institution's board is subject to the fiduciary duty of care, and spending decisions must be based on the board's consideration of several different statutory factors. These factors include: the duration and preservation of the endowment fund; the purposes of the institution and the endowment fund; general economic conditions; the possible effect of inflation or deflation; the expected total return from income and the appreciation of investments; other resources of the institution; and the investment policy of the institution. M.G.L. c. 180A, § 3(a).

[6] Institutions that seek to modify a donor-imposed purpose or use restrictions (i.e., specific charitable purposes or uses within the overall charitable mission of the institution) must pursue *cy pres* relief.

restriction will further the purposes of the fund"; deviation modifications should be consistent with the donor's probable intent.[7] *Id.* at § 5(b).

A threshold determination of whether to seek judicial relief under these equitable doctrines depends on the facts and circumstances of each case, the specific relief sought, and whether the institution meets the requisite evidentiary standards. When it is not clear which doctrine applies, it may be appropriate to plead in the alternative.[8] Importantly, if an institution pursues judicial relief pursuant to either or both of these doctrines, the AGO is a necessary party to any such action.

The Division understands that some charitable institutions may consider borrowing from an endowment fund or making an outright distribution from the fund that exceeds the amount that the institution could spend from the fund using the standard UPMIFA rule described above. The Division's position is that either remedy requires court approval.[9] An important factor that the Division will consider is whether such borrowing or invasion of the endowment fund will materially increase the likelihood of the institution's continued operations in furtherance of its mission. It is the Division's position that if borrowing or invasion will merely delay impending closure, cessation of operations, or discontinuance of charitable activities, modification of an endowment fund's spending restrictions may not be appropriate. Although legal counsel will advise on the best course of action, we note that courts are guided by the principle that the less extreme modification or deviation (in this case, borrowing) is the preferred outcome.[10]

V. Submitting Requests to Modify Endowment Funds to the AGO for Review

If, after exploring the above, the institution decides that it will request deviation or *cy pres* relief, it should contact the AGO to discuss the proposed petition, judicial relief, and any related considerations. As the AGO is a necessary party to any such action, the appropriate court will want to know whether the AGO assents to the relief requested. Accordingly, the institution should be prepared to provide the AGO, and include or attach to the petition as appropriate, the following:

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[7] Since general purpose endowment funds implicitly manifest, at a minimum, a donor's intent to both further the institution's charitable purposes and create a fund of perpetual duration, proposed deviations to facilitate access to endowment funds should be carefully drawn to hew closely to that intent.

[8] *See, e.g.*, Ann Hetherwick Cahill & Lisa M. Cukier, Cy Pres and Deviation, in FIDUCIARY LITIGATION IN THE PROBATE COURT, MASSACHUSETTS CONTINUING LEGAL EDUCATION, INC. (2019) ("[I]t is sometimes difficult to determine which principle applies, particularly when the requested relief does not involve a traditional change of purpose under the *cy pres* doctrine, but also is not easily characterized as an administrative change.").

[9] We recognize that during the COVID-19 crisis, an institution may have an immediate need for funds. It is the Division's position that emergency access to endowment funds does not abrogate the requirement that such action be sanctioned by the appropriate court. We encourage institutions and their counsel to carefully consider their fiduciary obligations under governing statutory and common law standards, including those articulated in the Restatement of the Law of Charitable Nonprofit Organizations. *See* Restatement of the Law of Charitable Nonprofit Org. § 3.03 comment c TD No 1 (2016).

[10] *See* Restatement of the Law of Charitable Nonprofit Org. § 3.03 comment b(3) TD No 1 (2016).

- A description of the circumstances that led to the current financial situation and steps taken to ameliorate the financial crisis, including reference to any alternatives explored;

- If the institution seeks to take the extraordinary measure of borrowing from an endowment fund (which requires court approval), assurances that outline a business plan for repayment and viability post-COVID-19 crisis;

- A clear articulation of how the facts and circumstances necessitating relief meet either or both of the equitable deviation and *cy pres* standards, as articulated in UPMIFA;

- A description as to how such extraordinary measures will further the purposes of the endowment fund and donor's probable intent (deviation) or are as near as possible to the charitable purposes expressed in the gift instrument (*cy pres*); and

- An agreement to make periodic reports to the AGO regarding repayment and financial health, as appropriate.

VI. How the Division Can Help

The Division stands ready to assist public charities from our virtual office. Our legal team is available by phone and email to discuss these issues and answer your questions. For proposed judicial proceedings, we will review draft petitions and provide feedback. We will also provide sample documents if requested to assist institutions with their pleadings. And, we will cooperate as appropriate to help schedule emergency court hearings if needed.

Please note that we request that all drafts, correspondence, and other notices be submitted electronically, to the extent permitted by applicable court rules. Please contact the Division at charities@mass.gov or at 617-727-2200 ex. 2101.

Charities In Crisis

ACTEC 2020 Summer Meeting

Selected Issues

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Borrowing From the Endowment, or Pledging Endowment Assets

Borrowing from an endowment would appear to be problematic. A loan is a contract, and there must be at least two parties to have a valid contract, a promisor and a promisee (you can make a promise to yourself, but what is the remedy for a breach?). When borrowing from the endowment, there are not two parties - only one (the board). Even if there is an endowment committee on one 'side' of the borrowing, and an executive committee on the other 'side' - that doesn't constitute two legal parties. Practically, who would sign as borrower? As lender? If the charity defaulted, who would sue whom?

Both the Massachusetts and California Attorney General's office have recently come out with guidance instructing charities not to invade their endowments to address shortfalls in light of COVID, without first trying to obtain PPP Loans and other sources, and then only after going to court. See for example, Massachusetts' "Attorney General Guidance on Endowments for Charities Facing Financial Challenges Due to COVID-19, April 28, 2020." This guidance states in part: "The Division understands that some charitable institutions may consider borrowing from an endowment fund or making an outright distribution from the fund that exceeds the amount that the institution could spend from the fund using the standard UPMIFA rule described above. The Division's position is that either remedy requires court approval. We recognize that during the COVID-19 crisis, an institution may have an immediate need for funds. It is the Division's position that emergency access to endowment funds does not abrogate the requirement that such action be sanctioned by the appropriate court. We encourage institutions and their counsel to carefully consider their fiduciary obligations under governing statutory and common law standards, including those articulated in the law of Charitable Nonprofit Organizations. *See* Restatement of the Law of Charitable Nonprofit Org. § 3.03 comment c TD No 1 (2016)."

The California Attorney General similarly has recently issued guidance on this subject. In its online publication "Charity Governance During COVID-19 Pandemic", it covers a variety of topics. Its publication states:

"Many nonprofit organizations have endowment funds, which are donor-restricted funds that are intended to be invested and used in perpetuity to support the nonprofit's charitable programs. Endowments are subject to the requirements of the Uniform Prudent Management of Institutional Funds Act (UPMIFA) (Probate Code § 18502, et seq.) Nonprofits need to be cautious on how much they spend from their endowment funds. Spending more than 7 percent of the fair market value of an endowment fund may create a presumption of imprudence. (Prob. Code, § 18504,

subd (d).) While your organization may be tempted to look to endowments as a means of addressing unanticipated costs and budget shortfalls, before your organization decides to invade principal or borrow against the principal, which is not permitted, the board should contact the donors to inquire whether they are willing to release or modify restrictions to allow for more spending authority. (Prob. Code, § 18506, subd. (a).)"

As to pledging endowment assets as collateral for a third-party loan, the UPMIFA Commentary states (citing Marion Fremont-Smith) that this happens, and that "Subsection (e)(3) permits this sort of debt financing, subject to the guidelines of (e)(1)." This author is not so sure, however. While it may look like an investment (and even if so, query whether it really is a prudent investment), it also has the potential to look like an expenditure. If the charity defaults and the bank takes the endowment assets, it would certainly appear that the charity spent those assets on whatever the charity used the loan proceeds for, which is unlikely to satisfy the UPMIFA spending limits and perhaps donor-imposed use restrictions. Further, some banks will not accept "permanently restricted assets" as collateral. Others have said they will, but want a legal opinion that the assets are valid as collateral.

Overriding the UPMIFA Spending Rules*

UPMIFA sets forth a rule of construction, providing that an institution can spend from its endowment the amount the institution determines to be "prudent for the uses, benefits, purposes, and duration for which the endowment fund is established." UPMIFA sets forth a number of factors to be considered in making this decision.

UPMIFA's rule of construction provides that terms like "endowment" and "use only the income" mean that the donor intended to create an endowment fund of permanent duration and not to limit otherwise the authority to spend from the fund. The general focus is that a donor is unlikely to be concerned (or aware of) the designation of particular returns as "income" or "principal" under accounting principles.

A donor and donee can agree to modify this rule—UPMIFA is default law—but questions about what language is specific enough to override UPMIFA arise. A gift agreement could provide an alternative rule by explaining with specificity how distributions will be made. For example, the agreement could provide that the endowment will spend four percent of the value of the endowment fund every year for the purposes of the charity. The Commentary to UPMIFA states that an instruction to "pay only interest and dividend income earned by the fund and not to make other distributions of the kind authorized by Section 4 of UPMIFA should be sufficient." Questions arise when language falls in between the general and specific directions.

Overcoming the UPMIFA Rebuttable Presumption of Imprudence on Spending*

UPMIFA § 4(d) provides: "The appropriation for expenditure in any year of an amount greater than seven percent of the fair market value of an endowment fund, calculated on the basis of market values determined at least quarterly and averaged over a period of not less than three years immediately preceding the year in which the appropriation for expenditure is made, creates a rebuttable presumption of imprudence." UPMIFA § 4(d)(2) notes that distributions of seven

percent or less are not presumptively prudent. UPMIFA § 4(d)(1) provides that distributions permitted under other laws or the gift instrument are not subject to the presumption.

What circumstances might overcome the presumption of imprudence? The easy case is when the expenditure is authorized by the gift instrument or some other law. Also, when a charity has distributions below seven percent for a few years, and then exceeds seven percent, but does not bring the average over seven percent for the four-year period, the presumption does not apply.

The Comments to UPMIFA describe the pros and cons of adopting the presumption as part of the law and note the difficulties of setting the spending level at which the presumption applies in light of possible changing investment environments. Fewer than half the adopting jurisdictions included the presumption in their version of UPMIFA. The presumption, the Comments note, is a burden of going forward, not a burden of persuasion.

The situations that the Comments describe as likely overcoming the presumption are institutions that are reducing distributions for periods longer than the statutory averaging period and then taking a distribution that exceeds the seven percent for the four year look back, but not for the period the charity was reducing distributions. The examples assume the timing relates to capital projects. The charity must document the intent at the outset of the relevant period. The Comments suggest that the big distribution can come at the beginning or the end of the period that the charity otherwise reduces its distributions. While the Comments give examples based on the capital projects, it is likely that other activities that require a large distribution in one year, preceded or followed by several years of minimal distributions, would overcome the presumption.

Beyond situations where the seven percent will be met over a longer time frame than four years, it is less clear how else the presumption is overcome. The purpose of UPMIFA is to protect the permanence of the fund. Proof of consistent higher returns might support distributions in excess of seven percent. Perhaps one-time exigent circumstances, where the institution can show that the permanence of the fund will not be jeopardized even if the distribution results in a spending rate over seven percent for many years, will overcome the presumption.

Releasing or Modifying Purpose or Spending Restrictions*

UPMIFA provides rules on the release and modification of restrictions. UPMIFA continues the rule from UMIFA that a charity can release a restriction if the donor consents. In addition, UPMIFA incorporates the rules of deviation and cy pres from the Uniform Trust Code. While these doctrines probably applied to charities before the enactment of UPMIFA, their inclusion in the Act makes clear that they do apply. UPMIFA added a new provision, permitting a charity to release or modify a restriction on a small and old fund, after notice to the Attorney General. UPMIFA defines small as under $100,000 (in California) and old as more than 20 years.

Donor Consent to Release or Modification of Restrictions*

UPMIFA § 6(a) provides: "If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or

purpose of an institutional fund. A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution."

If a husband and wife make a gift, can the survivor of them consent to the release of a restriction on the gift? UPMIFA does not give spouses the power to speak for each other. A surviving spouse may be able to release a restriction as to half of the assets donated to the institution, assuming each spouse gave half of the gift. Perhaps state property rights that give each spouse management authority to act individually as to marital or community property might be a basis for a surviving spouse to have the power to modify a restriction.

If many donors contribute to a fund, who can release a restriction on the gift? Each donor could only release the restriction as to that donor's gift—assuming it could be identified.

UPMIFA's provisions for modifying the purpose of a fund are limited and often may require court approval. To allow funds to be modified without court intervention, a clause such as the following should be included in gift agreements:

In the event the above purpose of the fund is frustrated, becomes unreasonably burdensome, becomes inconsistent with the charitable objectives of Charity or cannot otherwise be accomplished, the Fund shall be made available as specified by Charity for uses most consistent with the above purpose, and the source of alternative use shall clearly be identified as the "_____ Fund".

Release of Restrictions Imposed by Private Foundation Grantors

Many of the largest private foundation grantors (including Ford Foundation and McArthur Foundation) have pledged to promote "trust-based philanthropy". This involves loosening or eliminating restrictions on new and outstanding grants to charities, so they may be used for general support.

Donor-Advised Funds and Supporting Organizations

Although legally a DAF Sponsor could appropriate all of the funds out of its donor-advised funds and spend them for any charitable purposes (see Styles vs. Friends of Fiji, Nev. S. Ct., No. 51642 (Feb. 8, 2011) for a particular egregious example), doing so would violate the custom and practice of how donor-advised funds operate and would, in effect, "be detrimental to the business" of the DAF Sponsor. Donors would be far less likely to create a new donor-advised funds or add funds to an existing fund if he or she knew that the DAF Sponsor was willing to use those funds for payroll or its own administrative needs, even if hard times. Further, it is typical for a DAF agreement or policy to specify a very small percentage of the fund balance that may be used for administrative purposes, and unilaterally distributing a larger percentage could be seen as violating the terms of the agreement.

Similar concerns exist regarding tapping into supporting organizations - even though the supported organization of a Type 1 supporting organization can exert control and force grants, doing so would

violate the custom and practice of how supporting organizations operate and would create long-term donor relations issues.

Board Governance Issues

See California Department of Justice, Charitable Trusts Section May 2020 publication on Charity Governance during the COVIS-19 Pandemic.

* These sections are based on material prepared by Susan Gary for the ACTEC March 2020 presentation "UPMIFA Conundrums".