

## Memorandum 88-65

Subject: Study L-3012 - Uniform Management of Institutional Funds Act

At the January meeting, the Commission decided to consider whether the scope of the California version of the Uniform Management of Institutional Funds Act should be expanded. (Valerie J. Merritt's letter requesting this study is attached as Exhibit 1.)

The Uniform Management of Institutional Funds Act of 1972 (UMIFA) permits eleemosynary organizations to take advantage of the appreciation of their endowments, to delegate day-to-day investment management, and to be released from outmoded, wasteful, or unworkable restrictions on gifts by petition to court. (The prefatory note and official text of UMIFA is attached as Exhibit 2.)

As enacted in 1973, the California version of UMIFA applies only to certain higher educational institutions, specifically "a private incorporated or unincorporated organization organized and operated exclusively for educational purposes and accredited by the Association of Western Colleges and Universities to the extent that it holds funds exclusively for any such purposes." Educ. Code § 94000(a). As promulgated, however, UMIFA applies to "an incorporated or unincorporated organization organized and operated exclusively for educational, religious, charitable, or other eleemosynary purposes, or a governmental organization to the extent that it hold funds exclusively for any of these purposes." UMIFA § 1(1).

Expansion of Scope of UMIFA

Our research has not turned up any reason to continue the restricted scope of UMIFA. None of the other 28 jurisdictions that have enacted UMIFA adopted such a drastic restriction. Uniform Laws Annotated indicates that only two states have limited the type of institutions to which the act applies. North Carolina and Oregon do not apply UMIFA to funds held by governmental organizations.

The California statute was originally enacted as a pilot study subject to a five-year sunset provision. Ms. Merritt suggests that the failure to expand the coverage of the statute beyond certain colleges and universities when the sunset provision was repealed was an oversight. However, it may also be assumed that the impetus for repealing the sunset provision came from the private colleges and universities who had been using the statute and they had no particular interest in expanding its scope.

#### Relation of UMIFA to Nonprofit Public Benefit Corporations Law

The Nonprofit Public Benefit Corporations Law (Corp. Code § 5110 et seq.) contains detailed provisions relating to the duties and liability of directors. We assume that these provisions should prevail over conflicting provisions in UMIFA. In addition, Corporations Code Section 5240(e) provides that the investment rules of that section do not preclude the application of UMIFA if it would otherwise be applicable. These questions are discussed in the note following draft Section 18506 in the attached draft tentative recommendation.

#### Location of Expanded UMIFA

Because of its restricted application, UMIFA was moved from the Civil Code to the Education Code when the trust provisions in the Civil Code were generally repealed in connection with the enactment of the Commission's Trust Law. See 1986 Cal. Stat. ch. 820, § 24 (operative July 1, 1987). Obviously, it is not appropriate to keep UMIFA in the Education Code if it applies to charitable trusts in general. The staff suggests consideration of two locations: the Probate Code or the Government Code.

Locating UMIFA in the Probate Code as a part of the Trust Law makes sense. Probate Code Section 15004 provides that the Trust Law applies to charitable trusts subject to the jurisdiction of the Attorney General unless otherwise provided by statute or unless there is a conflict with the Uniform Supervision of Trustees for Charitable Purposes Act. The Trust Law also contains some provisions concerning the duties of trustees of private foundations, charitable trusts, and split-interest trusts. See Prob. Code §§ 16100-16105. See also Prob.

Code § 17210 (enforcement of beneficiary's rights under charitable trust by Attorney General). The draft statute attached to this memorandum tentatively locates UMIFA in the Probate Code.

There is also some logic in locating UMIFA in the Government Code with the Uniform Supervision of Trustees for Charitable Purposes Act (Gov't Code §§ 12580-12597). However, the best option might be to move the Uniform Supervision Act to the Probate Code and put it with the UMIFA in a new Part 7 of Division 9 (commencing with Section 18500).

Comments of Interested Persons

At this point, the draft recommendation does not reflect much input from interested persons. The staff is in the process of locating representatives of institutions that would be affected by this proposal so that we can have the benefit of their views. The Nonprofit Corporations and Unincorporated Associations Committee of the Business Law Section has also indicated a willingness to consider this material. We also expect to hear the views of the charitable trust attorneys in the Attorney General's office. Any comments we receive before the October meeting will be considered in later supplements.

Respectfully submitted,

Stan G. Ulrich  
Staff Counsel

## LAW OFFICES

## KINDEL &amp; ANDERSON

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

TWENTY-SIXTH FLOOR

555 SOUTH FLOWER STREET

LOS ANGELES, CALIFORNIA 90071-2498

(213) 880-2222

TELEX: 67-7497 KINDEL AND LSA

TELECOPIER/FACSIMILE:

LOS ANGELES (213) 888-7584

NEWPORT BEACH (714) 833-0192

WOODLAND HILLS (818) 348-8502

CABLE ADDRESS: KAYANDA

REFER TO FILE NO.

November 18, 1987

FEDERAL EXPRESS

Mr. John DeMouilly  
California Law Revision Commission  
4000 Middlefield Road, No. D-2  
Palo Alto, California 94303-4739

Re: Uniform Management of Institutional Funds Act,  
California Education Code Section 94600, et seq.

Dear John:

I am not writing this letter as the representative of any Bar Association, but as an individual.

In the course of doing the comprehensive revision of California trust law, the Uniform Management of Institutional Funds Act (hereafter "Uniform Act") was moved from the Civil Code to the Education Code. So far as I can tell from the material I have, there was no attempt at the time to study the current version of the Uniform Act and to consider suggestions for its revision. I would like to suggest that further changes be made to this Act, and that its location in the California Education Code be reconsidered.

In general, public policy favors the uniform and universal adoption of uniform acts. On the other hand, California has a history of adopting uniform acts with revisions made to improve them. While I support improvements, I believe it is important to examine deviations between California law and the uniform acts to make sure each such deviation is an improvement.

I enclose a copy of the entire section on the Uniform Management of Institutional Funds Act, annotated to show the adoption of various portions of it by various states and to show the comments of the Commission on Uniform State Laws. If you compare Section 1 of the Uniform Act to California Education Code Section 94600, it is immediately evident that the scope of application of California Education Code 94600 is much more limited. I would like to suggest that this section be modified so that it contains the same breadth of application as the Uniform Act. I see no reason why the Uniform Act should be

KINDEL & ANDERSON

Mr. John DeMouilly  
November 18, 1987  
Page 2

restricted only to private educational organizations. I believe it should be expanded to non-profit organizations generally, including public institutions. A broad definition of "institution" will mean that a broader group of organizations will be able to avail themselves of the greater flexibility that the Uniform Act provides for investment management. In addition, because the California version of the Uniform Act provides that any institution availing itself of the powers granted under the Uniform Act shall file with the Registrar of Charitable Trusts such reports as may be required by the Attorney General, it may also increase the scope of supervision of the Attorney General over charitable institutions. All in all, I perceive only salutary effects of expanding the definition of "institution" and no detrimental effects.

I also enclose with this letter a copy of the historical note which is an annotation to former Civil Code Section 2290.1 found in West Annotated California Codes. Section 4 of Statutes 1973, Chapter 950, page 1789, provided in part: "The Legislature declares, therefore, that it is in the public interest to authorize a pilot study for a limited period of time of these expanded investment and expenditure policies by a limited class of reputable, substantially endowed educational institutions faced with these problems." Apparently, in 1978, the Legislature was sufficiently pleased with the success of the "pilot study" that the sunset provision contained in the 1973 law was repealed. However, there was no expansion of the limited class of eligible institutions at the same time. I believe that this failure to enlarge the class of eligible institutions was inadvertent. Given the success under the Uniform Act for those institutions covered by it, I believe it would be appropriate to enlarge the class of institutions which may avail themselves of this act.

Obviously, if the definition of "institution" is broadened so that it includes institutions other than educational institutions, you should consider whether the Uniform Act should be relocated. If it is not limited solely to educational institutions, it should be removed from the Education Code and placed elsewhere. I suggest placing it with the provisions governing charitable trusts in the Probate Code.


I recognize that the Commission has a great deal on its agenda with regards to trying to complete the Probate Code revision process as soon as possible. However, I believe that this is a matter of some importance. I would submit that it is at least equal in importance to the revision of the Uniform Dormant Mineral Interests Act which is on the November agenda. I request that this matter be brought to the attention of the Commission at the November meeting and that you seek to prepare a

KINDEL & ANDERSON

Mr. John DeMouilly  
November 18, 1987  
Page 3

brief staff report on this issue and set it for the December meeting. Alternatively, this issue could be incorporated in the "clean-up" legislation to be considered in the next session.

Sincerely,

  
Valerie J. Merritt, Esq.

VJM:brm  
Enclosure

## UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

### 1972 Act

*Table of Jurisdictions Wherein Act Has Been Adopted*

Jurisdiction	Laws	Effective Date	Statutory Citation
California .....	1973, c. 950	9-30-1973	West's Ann. Cal. Civ. Code, §§ 2290.1 to 2290.12.
Colorado .....	1973, c. 126		C.R.S. 15-1-1101 to 15-1-1109.
Connecticut .....	1973, P.A. 73-548	7-1-1973 6-11-1973*	C.G.S.A. §§ 45-100h to 45-100p.
Delaware .....	1974, c. 572	7-29-1974	12 Del.C. §§ 4701 to 4708.
Dist. of Columbia	D.C. Laws No. 1-103	4-6-1977	D.C. Code 1981, §§ 32-401 to 32-409.
Georgia .....	1984, p. 831	3-28-1984	O.C.G.A. §§ 44-15-1 to 44-15-8.
Illinois .....	1973, P.A. 78-866	10-1-1973	S.H.A. ch. 32, §§ 11101 to 11110.
Kansas .....	1973, c. 226	7-1-1973	K.S.A. 58-3601 to 58-3610.
Kentucky .....	1976, c. 115	6-19-1976	KRS 273.510 to 273.590.
Louisiana .....	1976, No. 410	7-31-1976*	LSA-R.S. 9:2337.1 to 9:2337.8.
Maryland .....	1973, c. 838	7-1-1973	Code, Estates and Trusts, §§ 15-401 to 15-409.
Massachusetts .....	1975, c. 886	1-17-1976*	M.G.L.A. c. 180A, §§ 1 to 11.
Michigan .....	1976, P.A. 157	6-17-1976	M.C.L.A. §§ 451.1201 to 451.1210.
Minnesota .....	1973, c. 313	8-1-1973*	M.S.A. §§ 309.62 to 309.71.
Montana .....	1973, c. 389	3-20-1973*	MCA 72-30-101 to 72-30-207.
New Hampshire .....	1973, c. 547:1	9-1-1973	RSA 292-B:1 to 292-B:9.
New Jersey .....	1975, c. 26	3-5-1975	N.J.S.A. 15:18-15 to 15:18-24.
New York .....	1978, c. 690	7-25-1978	McKinney's N-PCL, §§ 102, 512, 514, 522.
North Dakota .....	1975, c. 182	7-1-1975	NDCC 15-67-01 to 15-67-09.
Ohio .....	1975, p. 303	11-26-1975	R.C. §§ 1715.51 to 1715.59.
Oregon .....	1975, c. 707	9-13-1975	ORS 128.310 to 128.355.
Rhode Island .....	1972, c. 260	5-4-1972	Gen. Laws 1956, §§ 18-12-1 to 18-12-9.
Tennessee .....	1973, c. 177	5-7-1973	T.C.A. §§ 35-10-101 to 35-10-109.
Vermont .....	1973, No. 59	7-1-1973	14 V.S.A. §§ 3401 to 3407.
Virginia .....	1973, c. 167	3-10-1973*	Code 1950, §§ 55-268.1 to 55-268.10.
Washington .....	1973, c. 17	6-7-1973*	West's RCWA 24.44.010 to 24.44.900.
West Virginia .....	1979, c. 60	6-8-1979	Code, 44-6A-1 to 44-6A-8.
Wisconsin .....	1975, c. 247	5-15-1976	W.S.A. 112.10.

\* Date of approval.

#### Historical Note

The Uniform Management of Institutional Funds Act was approved by the National Conference of Commissioners on Uniform State Laws in 1972.

### Use of Appreciation

The argument for allowing prudent use of appreciation of endowment funds has been stated in Cary and Bright, *The Law and The Loss of Endowment Funds* 5-6 (1969):

[T]oo often the desperate need of some institutions for funds to meet current operating expenses has led their managers, contrary to their best long-term judgment, to forego investments with favorable growth prospects if they have a low current yield.

[I]t would be far wiser to take capital gains as well as dividends and interest into account in investing for the highest overall return consistent with the safety and preservation of the funds invested. If the current return is insufficient for the institution's needs, the difference between that return and what it would have been under a more restrictive policy can be made up by the use of a prudent portion of capital gains.

The Uniform Act authorizes expenditure of appreciation subject to a standard of business care and prudence. It seems unwise to fix more exact standards in a statute. To impose a greater construction would hamper adaptation by different institutions to their particular needs.

The standard of care is that of a reasonable and prudent director of a nonprofit corporation—similar to that of a director of a business corporation—which seems more appropriate than the traditional Prudent Man Rule applicable to private trustees. The approach has been used elsewhere. A New York statute allows inclusion in income of "so much of the realized appreciation as the board may deem prudent." New York [McKinney's] Not-for-Profit Corporation Law § 513(d) (1970). Recent enactments in New Jersey, California, and Rhode Island follow the same pattern. N.J.S.A. § 15:18-8; West's Anno. Corp.Code § 10251(c) (Calif.); Gen.Laws of R.I. § 18-2-2.

The Act authorizes the appropriation of net appreciation. "Realization" of gains and losses is an artificial, meaningless concept in the context of a nontaxable eleemosynary institution. If gains and losses had to be realized before being taken into account, a major objective of the Act, to avoid distortion of sound investment policies, would be frustrated. If only realized capital gains could be taken into account, trustees or managers might be forced to sell their best assets, appreciated property, in order to produce spendable gains and conceivably might spend realized gains even when, because of unrealized losses, the fund has no net appreciation.

The Act excludes interests held for private beneficiaries, even though a charity is the ultimate beneficiary, e.g., an individual life interest followed by a charitable remainder. Also excluded is any trust managed by a professional trustee even though a charitable organization is the sole beneficiary.

The Uniform Act has been drafted to meet the objection that there will be a decline in gifts to charity because donors cannot rely on their wishes being enforced if appreciation can be expended. The drafters were convinced that donors seldom give any indication of how they want the growth in their gifts to be treated. If, however, a donor does



indicate that he wishes to limit expenditures to ordinary yield, under the Act his wishes will be respected.

A statute such as this can be constitutionally applied to gifts received prior to its enactment. There is no substantial authority to be found in law or reason for denying retroactive application.

When the Uniform Principal and Income Act was adopted it changed the apportionment of some items of revenue between principal and income. It was argued that the retroactive application of the statute to existing trusts would deprive either the income beneficiaries or the remaindermen of their property without due process of law. Professor Scott spoke for the overwhelming majority of commentators when he said:

[T]here should be no constitutional objection to making the Act retroactive. The rules as to allocation should not be treated as absolute rules of property law, but rather as rules as to the administration of the trust. The purpose is to make allocations which are fair and impartial as between the successive beneficiaries. Scott, *Principal or Income?*, 100 *Trusts & Est.* 180, 251 (1961).

Professor Bogert reached the same conclusion. Bogert, *The Law of Trusts and Trustees* § 847, pp. 505-6 (2d ed. 1962). The courts which considered the matter reached the same conclusion.

There is even less reason to deny retroactive application to an apportionment statute which deals only with the endowment funds of eleemosynary institutions, because the statute does not deprive any beneficiary of vested property rights. In a broad sense, the public is the real beneficiary of an endowment fund. The only argument which can be made against retroactivity is that it might violate the intent of the donor. Such an argument was also made in respect of the Uniform Principal and Income Act, but it was uniformly rejected by the courts. The language of a Minnesota case is typical:

[I]t is doubtful whether testatrix had any clear intention in mind at the time the will was executed. It is equally plausible that if she had thought about it at all she would have desired to have the dividends to go where the law required them to go at the time they were received by the trustee. ... *In re Gardner's Trust*, 266 Minn. 127, 132, 123 N.W.2d 69, 73 (1963).

In any event, the Act does not raise a problem of retroactive application because the rule of construction of Section 3 is declaratory of existing law in that it interprets the presumed intent of the donor in the absence of a clear statement of the donor's intention.

Other similar acts follow the same pattern. The New York [McKinney's] Not-for-Profit Corporation Law Section 513(e) (1970) authorizing the expenditure of appreciation applies to assets "held at the time when this chapter takes effect" as well as to "assets hereafter received." Similar language appears in the New Jersey, California, and Rhode Island acts authorizing expenditure of appreciation by eleemosynary institutions.

#### Specific Investment Authority

It seems reasonably clear that investment managers of endowment funds are not limited to investments authorized to trustees. The broad

grant of investment authority contained in Section 4 of the Act expressly so provides.

#### Authority to Delegate

In the absence of clear law relating to the powers of governing boards of eleemosynary institutions, some boards have been advised that they are subject to the nondelegation strictures of professional private trustees. The board of an eleemosynary institution should be able to delegate day-to-day investment management to committees or employees and to purchase investment advisory or management services. The Act so provides.

#### Standard of Care

Fear of liability of a private trustee may have a debilitating effect upon members of a governing board, who are often uncompensated public-spirited citizens. They are managers of nonprofit corporations, guiding a unique and perhaps very large institution. The proper standard of responsibility is more analogous to that of a director of a business corporation than that of a professional private trustee. The Act establishes a standard of business care and prudence in the context of the operation of a nonprofit institution.

#### Release of Restrictions

It is established law that the donor may place restrictions on his largesse which the donee institution must honor. Too often, the restrictions on use or investment become outmoded or wasteful or unworkable. There is a need for review of obsolete restrictions and a way of modifying or adjusting them. The Act authorizes the governing board to obtain the acquiescence of the donor to a release of restrictions and, in the absence of the donor, to petition the appropriate court for relief in appropriate cases.

#### Conclusion

Over a decade ago, Professor Kenneth Karst in an article in the Harvard Law Review stated the need for the Uniform Act:

[T]he managers of corporate charity are still, at this late date, without adequate guides for conduct. The development of these standards is of some urgency. *The Efficiency of the Charitable Dollar: An Unfilled State Responsibility*, 73 Harv.L.Rev. 433, 435 (1960).

to the assets of the institution covered by this chapter and the results of the use of the powers granted by this chapter with respect to such assets. Any institution electing not to avail itself of the powers conferred by this chapter shall file a written statement to such effect with the registrar.

"This section shall remain in effect until January 1, 1983, and as of that date is repealed."

**"§ 2290.11 Status of governing boards**

"Nothing in this chapter shall be deemed to alter the status of governing boards under other chapters of this title, or other laws of the state."

**Massachusetts.** Adds sections as follows:

**"§ 4. Accumulation of annual net income; reserve**

"The governing board may accumulate so much of the annual net income of the institutional fund as is prudent under the standard established by section eight, and may hold any or all of such accumulated income in an income reserve for subsequent expenditure for the uses and purposes for which such institutional fund is established or may add any or all of such accumulated income to the principal of such institutional fund, as is prudent under said standard. This section does not limit the authority of the governing board to accumulate income or to add the same to principal of an institutional fund as permitted under other law, the terms of the applicable gift instrument, or the charter of the institution."

**"§ 5. Restrictions in gift instruments against accumulation of income or addition to principal**

"Section four does not apply if and to the extent that the applicable gift instrument indicates the donor's intention that income of an institutional fund shall not be accumulated or shall not be added to the principal of the fund. A restriction against accumulation or addition to principal may not be implied from a designation of a gift as an endowment fund, or from a direction or authorization in the applicable gift instrument to apply to the uses and purposes of the fund the 'income', 'interest', 'dividends', 'currently expendable income', or 'rent, issues or profits', or a direction which contains other words of similar import. This rule of construction applies to gift instru-

ments executed or in effect before or after the effective date of this section."

**Michigan.** Adds a section as follows:

**§ 451.1210 Construction of act not to prohibit investments or guaranteeing of obligations regardless of financial return or capital gain or loss**

"This act shall not be construed to prevent an institution otherwise authorized by the terms of the applicable gift instrument establishing an endowment fund, or not prohibited by the terms of the applicable gift instrument establishing an institutional fund which is not an endowment fund, from making an investment or guaranteeing the obligations of others to further the educational, religious, charitable, or other eleemosynary purpose of the institution, regardless of whether any financial return is anticipated or any capital gain or loss is actually incurred."

**New Hampshire.** Adds sections as follows:

**"292-B:1 Declaration of Purpose.** It is hereby declared to be in the public interest and to be the policy of the state to promote, by all reasonable means, the maintenance and growth of eleemosynary institutions by encouraging them to establish and continue investment policies, without artificial constraints, which will provide them with the means to meet the present and future needs of such eleemosynary institutions pursuant to the provisions of this act. To this end it is hereby declared to be in the public interest and to be the policy of the state to encourage such institutions to adopt investment policies whose objective is to obtain the highest possible total rate of return consistent with the standard of prudence."

**"292-B:3-a Accumulation of Annual Net Income; Reserve.** The governing board may accumulate so much of the annual net income of an institutional fund as is prudent under the standard established by RSA 292-B:6, and may hold any or all of such accumulated income in an income reserve for subsequent expenditure for the uses and purposes for which such institutional fund is established or may add any or all of such accumulated income to the principal of such institutional fund, as is prudent under said standard. This section does not limit the authority of the governing board to accumulate income or to add the

## INSTITUTIONAL FUNDS

same to principal of an institutional fund as permitted under other law, the terms of the applicable gift instrument, or the charter of the institution."

**"292-B:3-b Restrictions in Gift Instruments.** The provisions of RSA 292-B:3-a do not apply if and to the extent that the applicable gift instrument indicates the donor's intention that income of an institutional fund shall not be accumulated or shall not be added to the principal of the fund. A restriction against accumulation or addition to principal may not be implied from a designation of a gift as an endowment fund, or from a direction or authorization in the applicable gift instrument to apply to the uses and purposes of the fund the 'income', 'interest', 'dividends', 'currently expendable income', or 'rent, issues or profits', or a di-

rection which contains other words of similar import. This rule of construction applies to gift instruments executed or in effect before or after the effective date of this section."

**New York.** The New York act is a substantial adoption of the major provisions of the Uniform Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

**Rhode Island.** The Rhode Island Act is a substantial adoption of the major provisions of the Uniform Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

## UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

AN ACT to establish guidelines for the management and use of investments held by eleemosynary institutions and funds.

### Section

1. Definitions.
2. Appropriation of Appreciation.
3. Rule of Construction.
4. Investment Authority.
5. Delegation of Investment Management.
6. Standard of Conduct.
7. Release of Restrictions on Use or Investment.
8. Severability.
9. Uniformity of Application and Construction.
10. Short Title.
11. Repeal.

*Be it enacted* .....

### § 1. [Definitions]

In this Act:

(1) "institution" means an incorporated or unincorporated organization organized and operated exclusively for educational, religious, charitable, or other eleemosynary purposes, or a governmental organization to the extent that it holds funds exclusively for any of these purposes;

(2) "institutional fund" means a fund held by an institution for its exclusive use, benefit, or purposes, but does not include (i) a fund held for an institution by a trustee that is not an institution or (ii) a fund in which a beneficiary that is not an institution has an interest, other than possible rights that could arise upon violation or failure of the purposes of the fund;

(3) "endowment fund" means an institutional fund, or any part thereof, not wholly expendable by the institution on a current basis under the terms of the applicable gift instrument;

(4) "governing board" means the body responsible for the management of an institution or of an institutional fund;

(5) "historic dollar value" means the aggregate fair value in dollars of (i) an endowment fund at the time it became an endowment fund, (ii) each subsequent donation to the fund at the time it is made, and (iii) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund. The determina-

tion of historic dollar value made in good faith by the institution is conclusive.

(6) "gift instrument" means a will, deed, grant, conveyance, agreement, memorandum, writing, or other governing document (including the terms of any institutional solicitations from which an institutional fund resulted) under which property is transferred to or held by an institution as an institutional fund.

#### COMMENT

The Uniform Act applies generally to colleges, universities, hospitals, religious organizations and other institutions of an eleemosynary nature. It applies to a governmental organization to the extent that the organization holds funds for the listed purposes, e.g., a public school which has an endowment fund.

[Subsec. (1)] A non-governmental institution which is not "charitable" in the classic sense is not within the Act, even though it may hold funds for such purpose. If the fund is separate and distinct from the noncharitable organization, the fund itself may be an institution, to which the Act applies.

[Subsec. (2)] An institutional fund is any fund held by an institution which it may invest for a long or short term. Excluded from the Act is any fund held by a trustee which is not an institution as defined in this Act, e.g., a bank or trust company, for the benefit of an institution even though the institution is the sole beneficiary.

A fund held by an institution for the benefit of any noninstitutional beneficiary is also excluded. The exclusion would apply to any fund with an individual beneficiary such as an annuity trust or a unitrust. When the interest of a noninstitutional beneficiary is terminated, the fund may then become an institutional fund.

The "use, benefit, or purposes" of an institution broadly encompasses all of the activities permitted by its charter or other source of authority. A fund to provide scholarships for students or medical care for indigent patients is held by the school or hospital for the

institution's purposes. Such a fund is not deemed to be held for the benefit of a particular student or patient as distinct from the use, benefit, or purposes of the institution, nor does the student or patient have an interest in the fund as a "beneficiary which is not an institution."

The particular recipient of the aid of a charitable organization is not a "beneficiary" in the sense of a beneficiary of a private trust; only the Attorney General or similar public authority may enforce a charitable trust. 4 Scott, *Law of Trusts* § 348 pp. 2768-9 (3d ed. 1967); Bogert, *The Law of Trusts and Trustees* §§ 411-15 pp. 317-348 (2d ed. 1962).

[Subsec. (3)] An endowment fund is an institutional fund, or any part thereof, which is held in perpetuity or for a term and which is not wholly expendable by the institution. Implicit in the definition is the continued maintenance of all or a specified portion of the original gift. "Endowment fund" is specially defined because it is subject to the appropriation rules of Section 2.

A restriction on use that makes a fund an endowment fund arises only from the applicable gift instrument. If a governing board has the power to spend all of a fund but, in its discretion, decides to invest the fund and spend only the yield or appreciation therefrom, the fund does not become an endowment fund under this definition, but it may be described as a "quasi-endowment fund" or a "fund functioning as endowment."

A fund which is not an institutional fund originally and therefore not an endowment fund may become an endowment fund at a later time. For example, a fund given to an institution to pay the grantor's widow a life income, with the remainder to the institution, would become an institutional fund on the widow's death, and, if the fund were not then wholly expendable, it would become an endowment fund at that time.

If a gift instrument provided that the institution could use the income from the fund for ten years and thereafter spend the entire principal, the fund would be an endowment fund for the ten-year period and would cease to be an endowment fund at the time it became wholly expendable.

[Subsec. (4)] The definition is meant to designate the policy making or management group which has the responsibility for the affairs of the institution or the fund.

[Subsec. (5)] "Historic dollar value" is simply the value of the fund expressed in dollars at the time of the original contribution to the fund plus the dollar value of any subsequent gifts to the fund. Accounting entries recording realization of gains or losses

to the fund have no effect upon historic dollar value. No increase or decrease in historic dollar value of the fund results from the sale of an asset held by the fund and the reinvestment of the proceeds in another asset.

If the gift instrument directs accumulation, the historic dollar value will increase with each accumulation. For example, if a donor gives an institution \$300,000 and directs that the fund is to be accumulated until its value reaches \$500,000, the historic dollar value will be the aggregate value of \$500,000 at the time the fund becomes available for use by the institution.

If under the terms of the gift instrument a portion of an endowment fund, after passage of time or upon the happening of some event, becomes currently wholly expendable, such portion should be treated as a separate fund and the historic dollar value of the remaining endowment fund should be reduced proportionately.

[Subsec. (6)] A gift instrument establishes the terms of the gift. It may be a writing of any form, or it may result from the institution's solicitation activities, or the by-laws, or other rules of an existing fund.

#### Action in Adopting Jurisdictions

##### Variations from Official Text:

**California.** In subsec. (1), defines "Institution" as "a private incorporated or unincorporated organization organized and operated exclusively for educational purposes and accredited by the Association of Western Colleges and Universities to the extent that it holds funds exclusively for any of such purposes".

Subsec. (5) reads: "'Historic dollar value' means the aggregate fair value in dollars of (i) an endowment fund at the time it became an endowment fund, (ii) each subsequent donation to the fund at the time it is made, and (iii) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund."

**Colorado.** In subsec. (4), omits "of an institution or".

In subsec. (6), omits "writing".

**Connecticut.** In subsec. (1), includes a charitable community trust as described in section 45-81 within the definition of institution.

In subsec. (2), inserts "other than a fund which is held for a charitable community trust" following "not an institution" in clause (i).

Subsec. (5) reads:

"'Historic dollar value' means the aggregate fair value in dollars of

"(A) an endowment fund at the time it became an endowment fund,

"(B) each subsequent donation to the fund at the time it is made, and

"(C) each accumulation made pursuant to a direction in the applicable gift instrument

at the time the accumulation is added to the fund.

"The determination of historic dollar value made in good faith by the institution is conclusive."

**Georgia.** Omits subsec. (5).

**Kansas.** Subsec. (5) reads: "(5) 'historic dollar value' means the fair value in dollars of an endowment fund at the time it first became an endowment fund, plus the fair value in dollars of each subsequent donation to the fund at the time it is made, plus the fair value in dollars of each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund. The determination of historic dollar value made in good faith by the institution is conclusive;"

**Louisiana.** In subsec. (6), inserts "donation," following "grant,".

**Minnesota.** Omits subsec. (4).

Subsec. (5) reads: "'Historic dollar value' means the aggregate fair value in dollars of (a) an endowment fund at the time it became an endowment fund, (b) each subsequent donation to the fund at the time it is made, and (c) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund. The determination of historic dollar value made in good faith by the institution is conclusive."

**Montana.** Subsec. (5) reads:

"'Historic dollar value' means the aggregate fair value in dollars of

"(a) an endowment fund at the time it became an endowment fund,

"(b) each subsequent donation to the fund at the time it is made, and

"(c) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund.

"The determination of historic dollar value made in good faith by the institution is conclusive."

**New Jersey.** In subsec. (1), inserts "hospital" following "charitable,".

**North Dakota.** In subsec. (2), includes a perpetual trust fund established by section 153 of the Constitution of the state of North Dakota within the definition of "institutional fund".

**Ohio.** In subsec. (1), substitutes "or religious" for "religious, charitable, or other eleemosynary" and "either" for "any", and adds sentence as follows: "Such definitions do not apply to Section 109.23 of the Revised Code."

In subsec. (2), clause (ii), omits "other than possible rights that could arise upon violation or failure of the purposes of the fund".

**Oregon.** In subsec. (1), defines "institution" as "an incorporated or unincorporated nonpublic organization organized and operated exclusively for educational, religious, charitable, or other eleemosynary purposes."

**Tennessee.** Introductory text reads: "As used in this chapter, unless the context otherwise requires:".

**Vermont.** In subsec. (5), makes some minor language changes without affecting substance.

#### Law Review Commentaries

Liability of directors and officers of not-for-profit corporations. Bennet B. Harvey, Jr. 17 John Marshall L.Rev. 665 (1984).

#### Library References

Charities  $\Leftarrow$ 48(1).  
Colleges and Universities  $\Leftarrow$ 6(5).<sup>4</sup>

C.J.S. Charities § 47.  
C.J.S. Colleges and Universities § 14.



## Notes of Decisions

Jurisdiction 1  
Venue 2

county or state. *Williams College v. Attorney General*, 1978, 375 N.E.2d 1225, 375 Mass. 220.

## 1. Jurisdiction

The probate court is a "court of competent jurisdiction" to resolve questions of the management of a trust or charitable fund arising under the Uniform Management of Institutional Funds Law. *Williams College v. Attorney General*, 1978, 375 N.E.2d 1225, 375 Mass. 220.

## 2. Venue

Probate court in county in which college has its usual place of business is an appropriate forum for granting college equitable relief under the Uniform Management of Institutional Funds Law, even though fund derives from instrument made in another

The Berkshire County Probate Court was a proper forum for action to resolve questions of the management of charitable funds arising under the Uniform Management of Institutional Funds Law, although the trusts, and donors were strangers to the Probate Court in the sense that the trust institution, in its formation and operation, and the gifts to it, were all without the judicial aegis of the Berkshire County Probate Court, where the college to which funds were donated was located within Berkshire County, no other court had assumed jurisdiction as to inter vivos gifts, and probate in another county of estates of testamentary donors had terminated. *Id.*

## § 2. [Appropriation of Appreciation]

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, 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 under the standard established by Section 6. This Section does not limit the authority of the governing board to expend funds as permitted under other law, the terms of the applicable gift instrument, or the charter of the institution.

## COMMENT

This section authorizes a governing board to expend for the purposes of the fund the increase in value of an endowment fund over the fund's historic dollar value, within the limitations of Section 6 which establishes a standard of business care and prudence.

The section does not apply to funds which are wholly expendable by the

institution such as so-called "quasi-endowment funds" or "funds functioning as endowment," nor does the section limit or reduce any spending power granted by a gift instrument or otherwise held by the institution.

Unrealized gains and losses must be combined with realized gains and losses to insure that the historic dollar value is not impaired.

## 4 Action in Adopting Jurisdictions

## Variations from Official Text:

**California.** Omits "and unrealized", and adds sentence which reads: "Appropriations shall be based upon an average fair value covering a period of up to the five

preceding fiscal years of the institution and shall be set at any reasonable date prior to each fiscal year."

**Delaware.** Make some language changes without affecting substance.

Staff Draft

## TENTATIVE RECOMMENDATION

*relating to*

## REVISION OF THE UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

California enacted the Uniform Management of Institutional Funds Act in 1973 as a pilot study, subject to a five-year sunset clause and restricted to certain accredited private colleges and universities.<sup>1</sup> The official text of the Uniform Management of Institutional Funds Act has a much broader scope, applying to private educational, religious, charitable, and eleemosynary institutions and to governmental organizations holding funds for such purposes.<sup>2</sup> Apparently, the pilot study was successful, since the sunset provision was repealed in 1978.<sup>3</sup> However, the restricted scope of the act remained unchanged.

The Commission recommends that the California version of the Uniform Management of Institutional Funds Act be applied to the same organizations covered by the original uniform act. No persuasive reasons have been given for continuing the restrictions that applied under the original pilot study. None of the other 28 jurisdictions that have enacted the uniform act have so drastically restricted its scope.<sup>4</sup> The problems faced by charitable organizations that are treated by the uniform act are not unique to private colleges and

---

1. See 1973 Cal. Stat. ch. 950, § 1 (enacting Civil Code §§ 2290.1-2290.12). The sunset clause was enacted by 1973 Cal. Stat. ch. 950, § 3. The act was moved to Education Code Sections 94600-94610 when the Civil Code trust provisions were generally repealed in connection with enactment of the new Trust Law. See 1986 Cal. Stat. ch. 820, §§ 7, 24.

2. See Unif. Management Inst. Funds Act § 1(1) (1972).

3. 1973 Cal. Stat. ch. 806, § 1.

4. See annotations at 7A U.L.A. 714-27 (1985) & Supp. at 143-44 (1988).

universities.<sup>5</sup> The effect of this recommendation would be to extend the benefits of the uniform act to all educational, religious, charitable, or eleemosynary institutions. Specifically, these institutions would be able (1) to use appreciation of endowment funds subject to a fiduciary standard, (2) to delegate day-to-day investment management to committees and employees and hire investment advisory or management services, and (3) to release obsolete or impracticable restrictions on use of endowment funds with the donor's consent or on petition to court and notice to the Attorney General.<sup>6</sup> Extending the act's application would also provide guidance as to the board's power to invest and manage property and the standard of care governing the exercise of the board's powers.<sup>7</sup>

---

5. In addition, the Commission recommends that the act be moved to the Probate Code. The Education Code is not an ideal location if the act's coverage is expanded beyond private colleges and universities. It is appropriate to place the expanded act with the Trust Law, since the Trust Law also applies to charitable trusts. See Prob. Code § 15004.

6. For the existing provisions that would apply under a broadened statute, see Educ. Code §§ 94602 (use of appreciation), 94605 (delegation of authority), 94607 (release of restrictions). See generally Prefatory Note, Unif. Management Inst. Funds Act (1972), 7A U.L.A. 706-09 (1985).

7. For the existing provisions that would apply under a broadened statute, see Educ. Code §§ 94604 (investment authority), 94606 (standard of care).

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 5240 of the Corporations Code, to add Part 7 (commencing with Section 18500) to Division 9 of the Probate Code, and to repeal Chapter 6 (commencing with Section 94600) of Part 59 of Division 10 of Title 3 of the Education Code, relating to the Uniform Management of Institutional Funds Act.

*The people of the State of California do enact as follows:*

**Corporations Code § 5240 (amended). Investments under Nonprofit Public Benefit Corporations Law**

SECTION 1. Section 5240 of the Corporations Code is amended to read:

5240. (a) This section applies to all assets held by the corporation for investment. Assets which are directly related to the corporation's public or charitable programs are not subject to this section.

(b) Except as provided in subdivision (c), in investing, reinvesting, purchasing, acquiring, exchanging, selling and managing the corporation's investment, the board shall do the following:

(1) Avoid speculation, looking instead to the permanent disposition of the funds, considering the probable income, as well as the probable safety of the corporation's capital.

(2) Comply with additional standards, if any, imposed by the articles, bylaws or express terms of an instrument or agreement pursuant to which the assets were contributed to the corporation.

(c) No investment violates this section where it conforms to provisions authorizing such investment contained in an instrument or agreement pursuant to which the assets were contributed to the corporation. No investment violates this section or Section 5231 where it conforms to provisions requiring such investment contained in an instrument or agreement pursuant to which the assets were contributed to the corporation.

(d) In carrying out duties under this section, each director shall

act as required by subdivision (a) of Section 5231, may rely upon others as permitted by subdivision (b) of Section 5231, and shall have the benefit of subdivision (c) of Section 5231, and the board may delegate its investment powers as permitted by Section 5210.

(e) Nothing in this section shall be construed to preclude the application of the Uniform Management of Institutional Funds Act, ~~Chapter 3 Part 7~~ (commencing with Section 2290, ~~1~~ 18500) of ~~Title 8 of Part 4 of~~ Division 3 9 of the Civil Probate Code, if that act would otherwise be applicable.

Comment. Subdivision (e) of Section 5240 is revised to correct a cross-reference.

Note. The staff is not completely clear on why subdivision (e) is in this section since subdivision (a) provides that it does not apply to assets directly related to the corporations charitable programs. Thus, this section and UMIFA would appear to be mutually exclusive, and subdivision (e) would never come into play.

Education Code §§ 18500-18508 (repealed). Uniform Management of Institutional Funds Act

SEC 2. Chapter 6 (commencing with Section 94600) of Part 59 of Division 10 of Title 3 of the Education Code is repealed.

Probate Code §§ 18500-18508 (added). Uniform Management of Institutional Funds Act

SEC. 3. Part 7 (commencing with Section 18500) is added to Division 9 of the Probate Code, to read:

**PART 7. UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT**

**§ 18500. Short title**

18500. This part may be cited as the Uniform Management of Institutional Funds Act.

Comment. Section 18500 continues Education Code Section 94600 without change. The Uniform Management of Institutional Funds Act has been relocated from the Education Code, where it applied only to certain private institutions of higher education. See Section 18501(e) and the Comment thereto. See also Sections 2(b) (interpretation of uniform acts), 11 (severability).

**§ 18501. Definitions**

18501. As used in this part:

(a) "Endowment fund" means an institutional fund, or any part thereof, not wholly expendable by the institution on a current basis under the terms of the applicable gift instrument.

(b) "Gift instrument" means a will, deed, grant, conveyance, agreement, memorandum, writing, or other governing document (including the terms of any institutional solicitations from which an institutional fund resulted) under which property is transferred to or held by an institution as an institutional fund.

(c) "Governing board" means the body responsible for the management of an institution or of an institutional fund.

(d) "Historic dollar value" means 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.

(e) "Institution" means an incorporated or unincorporated organization organized and operated exclusively for educational, religious, charitable, or other eleemosynary purposes, or a governmental organization to the extent that it holds funds exclusively for any of these purposes.

(f) "Institutional fund" means a fund held by an institution for its exclusive use, benefit, or purposes, but does not include (1) a fund held for an institution by a trustee that is not an institution or (2) a fund in which a beneficiary that is not an institution has an interest, other than possible rights that could arise upon violation or failure of the purposes of the fund.

**Comment.** Section 18501 restates former Education Code Section 94601 without substantive change, except that the definition of "institution" has been substantially expanded. As revised, the definition of "institution" is the same as that provided in Section 1(1) of the Uniform Management of Institutional Funds Act (1972). Former Education Code Section 94601(a) defined "institution" as a "private incorporated or unincorporated organization organized and operated exclusively for educational purposes and accredited by the Association of Western Colleges and Universities to the extent that it holds funds exclusively for any of such purposes."

Section 18501 lists the definitions in alphabetical order, unlike former Education Code Section 94601. The definition of "historic

dollar value" in subdivision (d) has been revised by adding "endowment" preceding "fund" in the second and third clauses.

Note. The definition of "historic dollar value" omits the following sentence from UMIFA: "The determination of historic dollar value made in good faith by the institution is conclusive." This language was deleted by a 1974 amendment. It appears that, of the 29 jurisdictions that have enacted UMIFA, only California and Georgia omit this language; Georgia omitted the entire definition. The staff does not know why the provision was omitted.

§ 18502. Expenditure of asset net appreciation for current use

18502. 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, realized in the fair value of the assets of an endowment fund over the historic dollar value of the fund as is prudent under the standard established by Section 18506. Appropriations shall be based upon an average fair value covering a period of up to the five preceding fiscal years of the institution and shall be set at any reasonable date prior to each fiscal year. This section does not limit the authority of the governing board to expend funds as permitted under other law, the terms of the applicable gift instrument, or the charter of the institution.

Comment. Section 18502 continues former Education Code Section 94602 without change. See the Comment to Section 18500.

Note. The first two sentences of this section differ from the uniform language. The corresponding provision in Section 2 of UMIFA reads as follows:

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, 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 under the standard established by Section 6.

The staff does not know why this language was changed when California adopted its limited version of UMIFA in 1973. It appears that the language was revised to clarify the meaning of "unrealized" appreciation as it appears in UMIFA. However, this also has the effect of changing the meaning of "realized" as it is explained in the official Prefatory Note, which uses "realized" to mean appreciation that is truly realized by sale of the appreciated asset. (See the Prefatory Note at 707-08 -- copy included in Exhibit 2, attached to the memorandum.) The California version seems to confuse "realization" with "appreciation," although it may work well enough in practice. The

staff is not aware of any problems arising from this variation since we have not found any cases or articles dealing with the issue. But we still don't know why "unrealized" was omitted. The staff recommends either that "unrealized" be restored to this provision or that "realized" and the preceding comma be omitted.

The purpose of the second sentence of the California language is not clear. Perhaps it is simply an attempt to clarify the meaning of "fair value" in the first sentence. Use of a five-year averaging rule would smooth out the effects of fluctuating values. The mandatory language indicates that it is intended to work in a mechanical fashion. The suspicion arises that this language is part of the attempt to limit the discretion of the governing board, apparent in the California approach.

#### § 18503. Construction of gift instrument

18503. (a) Section 18502 does not apply if the applicable gift instrument indicates the donor's intention that net appreciation shall not be expended.

(b) If the gift instrument includes a designation of the gift as an endowment or a direction or authorization to use only "income," "interest," "dividends," or "rents, issues, or profits," or "to preserve the principal intact," or a direction or authorization that contains other words of similar meaning:

(1) A restriction on the expenditure of net appreciation need not be implied solely from the designation, direction, or authorization, if the gift instrument became effective before the Uniform Management of Institutional Funds Act became applicable to the institution.

(2) A restriction on the expenditure of net appreciation may not be implied solely from the designation, direction, or authorization, if the gift instrument becomes effective after the Uniform Management of Institutional Funds Act became applicable to the institution.

(c) The effective dates of the Uniform Management of Institutional Funds Act are the following:

(1) January 1, 1974, with respect to a private incorporated or unincorporated organization organized and operated exclusively for educational purposes and accredited by the Association of Western Colleges and Universities.

(2) January 1, 1990, with respect to an institution not described in paragraph (1).

Comment. Subdivisions (a) of Section 18503 continues former Education Code Section 94603(a) without change. Subdivisions (b) and



(c)(1) restate former Education Code Section 94603(a) without substantive change. Subdivision (c)(2) applies a consistent rule of construction to institutions (as defined in Section 18501(e)) that were not covered by the former law. See the Comment to Section 18501.

*Note.* The California version differs from the uniform language, but the California version makes needed distinctions based on the effective date of the gift instrument.

**§ 18504. Investment authority**

18504. In addition to an investment otherwise authorized by law or by the applicable gift instrument, the governing board, subject to any specific limitations set forth in the applicable gift instrument, may do any or all of the following:

(a) Invest and reinvest an institutional fund in any real or personal property deemed advisable by the governing board, whether or not it produces a current return, including mortgages, stocks, bonds, debentures, and other securities of profit or nonprofit corporations, shares in or obligations of associations, or partnerships, and obligations of any government or subdivision or instrumentality thereof.

(b) Retain property contributed by a donor to an institutional fund for as long as the governing board deems advisable.

(c) Include all or any part of an institutional fund in any pooled or common fund maintained by the institution.

(d) Invest all or any part of an institutional fund in any other pooled or common fund available for investment, including shares or interests in regulated investment companies, mutual funds, common trust funds, investment partnerships, real estate investment trusts, or similar organizations in which funds are commingled and investment determinations are made by persons other than the governing board.

**Comment.** Section 18504 continues former Education Code Section 94604 without change. See the Comment to Section 18500.

**Note.** Section 4 of UMIFA is as follows (with language omitted in California underscored):

*In addition to an investment otherwise authorized by law or by the applicable gift instrument, and without restriction to investments a fiduciary may make, the governing board, subject to any specific limitations set forth in the applicable gift instrument or in the applicable law other than law relating to investments by a fiduciary, . . .*

The staff assumes that these phrases were omitted as unnecessary, or perhaps because they caused confusion. Presumably the governing board may exercise the same powers over these funds as it may exercise generally, and subject to any applicable restrictions.

Another California variation occurs in subdivision (a) where the phrase "shares in or obligations of associations, partnerships, or individuals" in Section 4(1) of UMIFA was revised to read "shares in or obligations of associations, or partnerships." The comma following "associations" should be deleted. On the other hand, the Commission may want to restore the uniform language.

#### § 18505. Delegation of authority

18505. Except as otherwise provided by the applicable gift instrument or by applicable law relating to governmental institutions or funds, the governing board may do the following:

(a) Delegate to its committees, officers, or employees of the institution or the fund, or agents, including investment counsel, the authority to act in place of the board in investment and reinvestment of institutional funds.

(b) Contract with independent investment advisers, investment counsel or managers, banks, or trust companies, so to act.

(c) Authorize the payment of compensation for investment advisory or management services.

Comment. Section 18505 continues former Education Code Section 94605 without change.

#### § 18506. Standard of care

18506. (a) When investing, reinvesting, purchasing, acquiring, exchanging, selling, and managing property, appropriating appreciation, and delegating investment management for the benefit of an institution, the members of the governing board shall act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the institution. In the course of administering the fund pursuant to this standard, individual investments shall be considered as part of an overall investment strategy.

(b) In exercising judgment under this section, the members of the governing board shall consider the long and short term needs of the

institution in carrying out its educational, religious, charitable or other eleemosynary purposes, its present and anticipated financial requirements, expected total return on its investments, general economic conditions, the appropriateness of a reasonable proportion of higher risk investment with respect to institutional funds as a whole, income, growth, and long-term net appreciation, as well as the probable safety of funds.

Comment. Section 18506 continues former Education Code Section 94606 without change. See the Comment to Section 18500. The standard of care in subdivision (a) is consistent with the general standard of care provided by Section 16040.

Note. This section differs significantly from Section 6 of UMIFA. As noted in the Comment, subdivision (a) supplants the UMIFA standard of care.

Subdivision (b) also differs significantly from the second sentence of Section 6 of UMIFA. The California language starting with "appropriateness" does not appear in the uniform act. California omits the reference to "price level trends" that appears in the uniform act. There seems to be an "and" missing at the end of the series of factors. The final clause introduced by "as well as" seems to come from Civil Code Section 2261, as it was phrased when UMIFA was enacted in California.

We have added the description of purposes that was omitted from the California version as a necessary result of the limited scope of the pilot study act. But see Educ. Code § 94607(c) [draft Section 18507(c)] containing the same list of purposes, which was not omitted in the original California version.

The Nonprofit Public Benefit Corporations Law provides different rules governing the standard of care and liability of directors. Corporations Code Section 5231 provides, in part:

(a) A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

[Good faith reliance on advice and information from officers, employees, counsel, accountants, committees, etc.]

(c) Except as provided in Section 5233, a person who performs the duties of a director in accordance with subdivision (a) and (b) shall have no liability based upon any alleged failure to discharge the person's obligations as a director, including, without limiting the generality of the foregoing, any actions or omissions which exceed or defeat a public or charitable purpose to which a corporation, or assets held by it, are dedicated.

*The standard applicable to unpaid directors is provided by Corporations Code Section 5231.5:*

*Except as provided in Section 5233 [self-dealing] or 5237 [distributions and loans], there is no monetary liability on the part of, and no cause of action for damages shall arise against, any nonpaid director, including any nonpaid director who is also a nonpaid officer, of a nonprofit public benefit corporation based upon any alleged failure to discharge the person's duties as director or officer if the duties are performed in a manner than meets all of the following criteria:*

- (a) The duties are performed in good faith.*
- (b) The duties are performed in a manner such director believes to be in the best interests of the corporation.*
- (c) The duties are performed with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.*

*It is probably best to leave these rules untouched. Perhaps draft Section 18506 should be revised to make it subject to other statutory rules. It is conceivable that this is the general purpose of draft Section 18508 which continues a former provision.*

**§ 18507. Release of restriction in gift instruments**

18507. (a) With the written consent of the donor, the governing board may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.

(b) If written consent of the donor cannot be obtained by reason of the donor's death, disability, unavailability, or impossibility of identification, the governing board may apply in the name of the institution to the superior court of the county in which the principal activities of the institution are conducted, or other court of competent jurisdiction, for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. No court has jurisdiction to release a restriction on an institutional fund under this part unless the Attorney General is a party to the proceedings. If the court finds that the restriction is obsolete or impracticable, it may by order release the restriction in whole or in part. A release under this subdivision may not change an endowment fund to a fund that is not an endowment fund.

(c) A release under this section may not allow a fund to be used

for purposes other than the educational, religious, charitable, or other eleemosynary purposes of the institution affected.

(d) This section does not limit the application of the doctrine of cy pres.

Comment. Section 18507 restates former Education Code Section 94607 without substantive change. In the second sentence of subdivision (b), the phrase "release a restriction on" has been substituted for the phrase "modify any use of" in former Education Code Section 94607(b).

Note. By an amendment in 1974, the uniform provision requiring notice to and an opportunity to be heard by the Attorney General was changed to the jurisdictional provision in subdivision (b). The California version of the act also omits inappropriateness as a ground for releasing a restriction.

This section uses the term "donor" as does the uniform act. AB 2841 defines "transferor" to mean, in effect, a person who makes a donative transfer. We could substitute "transferor" for "donor" in this section for consistency with other Probate Code provisions, but it not really necessary and would be another variation from UMIFA.

#### § 18508. Status of governing boards

18508. Nothing in this part alters the status of governing boards under other laws of this state.

Comment. Section 18508 continues former Education Code Section 94610 without change.

COMMENTS TO REPEALED SECTIONS

Education Code § 94600 (repealed). Short title

Comment. Former Section 94600 is continued Section 18500 without change. The Uniform Management of Funds Act has been relocated to the Probate Code expanded to apply to religious, charitable, and institutions.

25 copies  
only  
Green

Education Code § 94601 (repealed). Definitions

Comment. Former Section 94601 is restated in Probate Code Section 18501 without substantive change, except that the definition of "institution" in subdivision (a) has been substantially expanded in the new provision. See Prob. Code § 18501 and the Comment thereto.

Education Code § 94602 (repealed). Expenditure of asset net appreciation for current use

Comment. Former Section 94602 is continued in Probate Code Section 18502 without change.

Education Code § 94603 (repealed). Construction of gift instrument

Comment. Former Section 94603 is continued in Probate Code Section 18503(a)-(b) without change.

Education Code § 94604 (repealed). Authority of board to invest and reinvest

Comment. Former Section 94604 is continued in Probate Code Section 18504 without change.

Education Code § 94605 (repealed). Delegation of authority

Comment. Former Section 94605 is continued in Probate Code Section 18505 without change.

Education Code § 94606 (repealed). Standard of care

Comment. Former Section 94606 is continued in Probate Code Section 18506 without change.

Education Code § 94607 (repealed). Release of restriction in gift instruments

Comment. Former Section 94607 is restated in Probate Code Section 18507 without substantive change. See the Comment to Prob. Code § 18507.

Education Code § 94608 (repealed). Severability

Comment. Former Section 94608 is omitted because it is unnecessary. See Prob. Code § 11 (severability).

Education Code § 94609 (repealed). Application and construction

Comment. Former Section 94609 is omitted because it is unnecessary. See Prob. Code § 2(b) (interpretation of uniform acts).

Education Code § 94610 (repealed). Status of governing boards

Comment. Former Section 94610 is continued in Probate Code Section 18508 without change.

**Georgia.** Section reads: "The governing board may accumulate so much of the annual net income of an institutional fund as is prudent under the standard established by Code Section 44-15-7 [section 6 of the Uniform Act] and may hold any or all of such accumulated income in an income reserve for subsequent expenditure for the uses and purposes for which such institutional fund is established or may add any or all of such accumulated income to the principal of such institutional fund, as is prudent under said standard. This Code section does not limit the authority of the governing board to accumulate income or to add the same to principal of an institutional fund as permitted under other law, the terms of the applicable gift instrument, or the charter of the institution."

**Kansas.** Omits "and unrealized".

**Massachusetts.** Adds the following at the end of the first sentence: "provided, however, the appropriation of net appreciation for expenditure in any year in an

amount greater than seven per cent of the fair market value of the institution's endowment funds, calculated on the basis of market values determined at least quarterly and averaged over a period of three or more years, shall create a rebuttable presumption of imprudence on the part of the governing board."

**Ohio.** Section reads: "The governing board of an institution may appropriate for expenditure for the uses and purposes for which an endowment fund is established up to fifty per cent of the net appreciation, realized and unrealized, in the fair value of the assets of an endowment fund over the historic dollar value of the fund, but only so much of such fifty per cent of the net appreciation as is prudent under the standard established by section 1715.56 of the Revised Code. This section does not limit the authority of the governing board to expend funds as permitted under other law, the terms of the applicable gift instrument, or the charter of the institution."

#### Library References

Charities ¶48(1).

Colleges and Universities ¶6(5).

C.J.S. Charities § 47.

C.J.S. Colleges and Universities § 14.

### § 3. [Rule of Construction]

Section 2 does not apply if the applicable gift instrument indicates the donor's intention that net appreciation shall not be expended. A restriction upon the expenditure of net appreciation may not be implied from a designation of a gift as an endowment, or from a direction or authorization in the applicable gift instrument to use only "income," "interest," "dividends," or "rents, issues or profits," or "to preserve the principal intact," or a direction which contains other words of similar import. This rule of construction applies to gift instruments executed or in effect before or after the effective date of this Act.

#### COMMENT

If a gift instrument expresses or otherwise indicates the donor's intention that the governing board may not appropriate the appreciation in the value of the fund, his wishes will govern.

The rule of construction of this section is based upon the assumption that a grantor who makes an outright gift to an educational, religious, charitable

or other eleemosynary institution seldom makes a full statement of his intentions and that his unstated intention is usually quite different from the intention of a grantor who makes a gift to a trust for private beneficiaries. The assumption is that the grantor of a gift to an institution: (1) means to devote to the institution any return or

benefit that the institution can obtain from the gift, (2) acknowledges the responsibility of the institutional management to determine the prudent use of the return or benefit over time and (3) usually regards the "amount" of the gift as the dollars given or the dollar value of the property transferred to the institution at the time of the gift. Thus, in the case of a gift instrument which states no clear intention or merely echoes the rubrics of a private trust, the statutory rule of interpretation should apply.

Some advisers to institutions, aware of the body of private trust law, have interpreted references to "income" or "principal" in a gift instrument to evi-

dence a grantor's intent that the private trust rules developed to insure equity between an income beneficiary and a remainderman should be applied to an outright gift to an institutional donee. Neither the facts of donor's intentions nor the law of trusts support such an interpretation of the meaning of gift instruments where an institution is the sole beneficiary.

This section does not purport to change existing law or rights; it simply codifies a rule of construction or interpretation or administration by articulating the presumed intent of a donor in the absence of a statement of the donor's actual intent.

#### Action in Adopting Jurisdictions

##### Variations from Official Text:

###### California. Section reads:

"(a) Section 2290.2 does not apply if the applicable gift instrument indicates the donor's intention that net appreciation shall not be expended.

"(b) With respect to gift instruments in effect prior to the effective date of this section, a restriction upon the expenditure of net appreciation need not be implied solely from a designation of a gift as an endowment, or from a direction or authorization in the applicable gift instrument to use only 'income,' 'dividends,' or 'rents, issues or profits,' or 'to preserve the principal intact,' or a direction which contains other words of similar import.

"(c) With respect to gift instruments executed or becoming effective after the effective date of this section, a restriction upon the expenditure of net appreciation may not be implied from a designation of a gift as an endowment or from a direction or authorization in the applicable gift instrument to use only 'income,' 'interest,' 'dividends,' or 'rents, issues or profits,' or 'to preserve the principal intact,' or a direction which contains other words of similar import."

Colorado. Substitutes "all gift instruments whenever executed" for "gift instru-

ments executed or in effect before or after the effective date of this act".

Georgia. Section reads: "Code Section 44-15-3 [section 2 of the Uniform Act] does not apply if and to the extent that the applicable gift instrument indicates the donor's intention that income of an institutional fund shall not be accumulated or shall not be added to the principal of the fund. A restriction against accumulation or addition to principal may not be implied from a designation of a gift as an endowment fund or from a direction or authorization in the applicable gift instrument to apply to the uses and purposes of the fund the 'income,' 'interest,' 'dividends,' 'currently expendable income,' or 'rent, issues, or profits' or a direction which contains other words of similar import. This rule of construction applies to gift instruments executed or in effect before or after the effective date of this chapter."

Louisiana. Inserts "'usufruct,'" following "'dividends,'" and "or 'to preserve the naked ownership intact,'" following "'to preserve the principle intact,'".

Ohio. Section reads: "Section 1715.52 of the Revised Code does not apply if the applicable gift instrument indicates the donor's intention that net appreciation shall not be expended."

Washington. Omits this section.

#### Library References

Charities ⇐48(1).

Colleges and Universities ⇐6(5).

C.J.S. Charities § 47.

C.J.S. Colleges and Universities § 14.



**§ 4. [Investment Authority]**

In addition to an investment otherwise authorized by law or by the applicable gift instrument, and without restriction to investments a fiduciary may make, the governing board, subject to any specific limitations set forth in the applicable gift instrument or in the applicable law other than law relating to investments by a fiduciary, may:

(1) invest and reinvest an institutional fund in any real or personal property deemed advisable by the governing board, whether or not it produces a current return, including mortgages, stocks, bonds, debentures, and other securities of profit or nonprofit corporations, shares in or obligations of associations, partnerships, or individuals, and obligations of any government or subdivision or instrumentality thereof;

(2) retain property contributed by a donor to an institutional fund for as long as the governing board deems advisable;

(3) include all or any part of an institutional fund in any pooled or common fund maintained by the institution; and

(4) invest all or any part of an institutional fund in any other pooled or common fund available for investment, including shares or interests in regulated investment companies, mutual funds, common trust funds, investment partnerships, real estate investment trusts, or similar organizations in which funds are commingled and investment determinations are made by persons other than the governing board.

**COMMENT**

Institutional investment managers suggest that a general grant of investment powers will clarify the authority of a governing board to select investments. Subsection (1) provides broad powers of investment and states that a governing board is not restricted to investments authorized to trustees.

Two other matters of investment policy have been troublesome to boards because of the absence of specific authority. Subsections (2) and (3) provide authority to hold property given by a donor even though it may not be the best investment (ordinarily in the hope of obtaining additional contri-

butions) and to invest in common or pooled investment funds such as the Common Fund for Non-Profit Organizations. See 4 Scott, *Law of Trusts*, § 389 pp. 2997-3000 (3d ed. 1967).

The absence of specific reference to investment for return by an institution in its own facilities does not limit the power of a governing board to make such investments under the general clause of Section 4(1), or other law or the gift instrument.

Section 6 establishes the standard of care and prudence under which the investment authority is exercised.

## Action in Adopting Jurisdictions

## Variations from Official Text:

**California.** Introductory clause reads: "In addition to an investment otherwise authorized by law or by the applicable gift instrument, the governing board, subject to any specific limitations set forth in the applicable gift instrument, may do any or all of the following:"

In subsec. (1), inserts "or individuals", following "partnerships."

**Colorado.** In introductory clause, substitutes "is authorized to make" for "may make" and "a fiduciary is authorized to make" for "by a fiduciary".

In subsec. (1), omits "debentures".

**Georgia.** In introductory clause, substitutes "any" for "an".

**Kansas.** In introductory clause, substitutes "is authorized to make" for "may make" and "a fiduciary is authorized to make" for "by a fiduciary".

**Louisiana.** In subsec. (1), substitutes "corporeal or incorporeal immovable or movable" for "real or personal".

**New Hampshire.** Subsec. (3) reads: "Include all or any part of an institutional fund or all or any part of a pooled income fund (as defined in Section 642(c)(5) of the Internal Revenue Code of 1954 as amended ('the Code')), as charitable remainder annuity trust (as defined in Section 664(d)(1) of the Code), or a charitable remainder unitrust (as defined in Section 664(d)(2) of the Code) in one or more pooled or common funds maintained by the institution; and"

In subsec. (4), inserts "pooled income fund, charitable remainder annuity trust or charitable remainder unitrust" following "part of an institutional fund".

**Ohio.** In introductory clause, inserts "of an institution" following "governing board".

In subsec. (4), adds sentence as follows: "All institutional funds held by a governmental organization shall be audited by the auditor of state."

## Library References

Charities  $\Leftarrow$  48(1).

Colleges and Universities  $\Leftarrow$  6(5).

C.J.S. Charities § 47.

C.J.S. Colleges and Universities § 14.

## § 5. [Delegation of Investment Management]

Except as otherwise provided by the applicable gift instrument or by applicable law relating to governmental institutions or funds, the governing board may (1) delegate to its committees, officers or employees of the institution or the fund, or agents, including investment counsel, the authority to act in place of the board in investment and reinvestment of institutional funds, (2) contract with independent investment advisors, investment counsel or managers, banks, or trust companies, so to act, and (3) authorize the payment of compensation for investment advisory or management services.

## COMMENT

Questions have arisen about the power of a governing board to delegate investment decisions. In the absence of authority, some boards have tried to follow the nondelegation principles applicable to trustees. Governing boards do, in fact, delegate invest-

ment authority, sometimes with rather cumbersome procedures to produce a record of apparent decisions by the boards.

This section clarifies the authority to delegate investment management and to purchase investment advisory and

management services. Responsibility for investment policy and selection of competent agents remains with the

board under the Section 6 standard of business care and prudence.

**Action in Adopting Jurisdictions**

**Variations from Official Text:**

**Michigan.** In clause (2), substitutes "to act in place of the board in investment and reinvestment of institutional funds" for "so to act."

**Ohio.** Inserts "of an institution" following "governing board".

**Oregon.** Omits exception clause.

**Law Review Commentaries**

**Liability of directors and officers of not-for-profit corporations.** Bennet B. Harvey, Jr. 17 John Marshall L.Rev. 665 (1984).

**Library References**

Charities ¶48(1).

Colleges and Universities ¶6(5).

C.J.S. Charities § 47.

C.J.S. Colleges and Universities § 14.

**§ 6. [Standard of Conduct]**

In the administration of the powers to appropriate appreciation, to make and retain investments, and to delegate investment management of institutional funds, members of a governing board shall exercise ordinary business care and prudence under the facts and circumstances prevailing at the time of the action or decision. In so doing they shall consider long and short term needs of the institution in carrying out its educational, religious, charitable, or other eleemosynary purposes, its present and anticipated financial requirements, expected total return on its investments, price level trends, and general economic conditions.

**COMMENT**

The section establishes a standard of care and prudence for a member of a governing board. The standard is generally comparable to that of a director of a business corporation rather than that of a private trustee, but it is cast in terms of the duties and responsibilities of a manager of a nonprofit institution.

Officers of a corporation owe a duty of care and loyalty to the corporation, and the more intimate the knowledge of the affairs of the corporation the higher the standard of care. Directors are obligated to act in the utmost good

faith and to exercise ordinary business care and prudence in all matters affecting the management of the corporation. This is a proper standard for the managers of a nonprofit institution, whether or not it is incorporated.

The standard of Section 6 was derived in part from Proposed Treasury Regulations § 53.4944-1(a)(2) dealing with the investment responsibility of managers of private foundations.

The standard requires a member of a governing board to weigh the needs of today against those of the future.

## Action in Adopting Jurisdictions

## Variations from Official Text:

**California.** Section reads: "In investing, reinvesting, purchasing, acquiring, exchanging, selling and managing property, appropriating appreciation and delegating investment management for the benefit of an institution, the members of the governing board shall exercise the judgment, care and prudence, under the circumstances then prevailing, which men of discretion and intelligence exercise in the management of their affairs. In exercising judgment under this section, the members of the governing board shall consider the long and short term needs of the institution in carrying out its purposes, its present and anticipated financial requirements, expected total return on its investments, general economic conditions, the appropriateness of a reasonable proportion of higher risk investment with respect to institutional funds as a whole, income, growth, and long term net appreciation, as well as the probable safety of funds."

**Colorado.** Omits "business" preceding "care and prudence".

**Georgia.** Substitutes "accumulate income" for "appropriate appreciation".

**Massachusetts.** Section reads:

"In the administration of the powers to appropriate appreciation, to accumulate income, to make and retain investments, and to delegate investment management of institutional funds, members of a governing board shall consider long and short term needs of the institution in carrying out its educational, religious, charitable or other eleemosynary purposes, the problems peculiar to the institution, its present and anticipated financial requirements, expected total return on its investments, price level trends, and general economic conditions.

"No member of the governing board shall be liable for any action taken or omitted with respect to such appropriation or accumulation or with respect to the investment of institutional funds, including endowment funds, under the authority granted in this chapter, if such member shall have discharged the duties of his position in good faith and with that degree of diligence, care

and skill which prudent men would ordinarily exercise under similar circumstances in a like position."

**Michigan.** Section reads:

"(1) In the administration of the powers to appropriate appreciation, to make and retain investments, and to delegate investment management of institutional funds, members of a governing board shall exercise ordinary business care and prudence under the facts and circumstances prevailing at the time of the action or decision. Persons to whom the governing board has delegated authority, or with whom the governing board has contracted, to act in its place in investment and reinvestment of institutional funds shall exercise ordinary business care and prudence under the facts and circumstances prevailing at the time of the action or decision.

"(2) In exercising ordinary business care and prudence pursuant to subsection (1), the governing board or person to whom investment or reinvestment authority is delegated or with whom such authority is contracted shall consider the long- and short-term needs of the institution in carrying out its educational, religious, charitable, or other eleemosynary purposes, its present and anticipated financial requirements, expected total return on its investments, price level trends, and general economic conditions."

**New Hampshire.** Inserts "to accumulate income or add income to principal," following "appropriate appreciation" in first sentence, and adds the following at end of section: "Provided, however, the appropriation of appreciation in any years in an amount greater than seven percent of the fair market value of the assets of the institution's endowment funds (calculated on the basis of market values determined at least quarterly and averaged over a period of three or more years) shall create a rebuttable presumption of imprudence on the part of the governing board."

**Ohio.** Inserts "of an institution" following "governing board" and substitutes "or religious" for "religious, charitable, or other eleemosynary".

## Law Review Commentaries

Liability of directors and officers of not-for-profit corporations. Bennet B. Harvey, Jr. 17 John Marshall L.Rev. 665 (1984).

## Library References

Charities ¶48(1).

Colleges and Universities ¶6(5).

C.J.S. Charities § 47.

C.J.S. Colleges and Universities § 14.

## Notes of Decisions

## 1. Diversification of investments

Trustee is under a duty to beneficiary to distribute risk of loss by reasonable diversification of investments unless under circum-

stances it is prudent not to do so. Matter of Estate of Collins, 1977 139 Cal.Rptr. 644, 72 C.A.3d 663.

## § 7. [Release of Restrictions on Use or Investment]

(a) With the written consent of the donor, the governing board may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.

(b) If written consent of the donor cannot be obtained by reason of his death, disability, unavailability, or impossibility of identification, the governing board may apply in the name of the institution to the [appropriate] court for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. The [Attorney General] shall be notified of the application and shall be given an opportunity to be heard. If the court finds that the restriction is obsolete, inappropriate, or impracticable, it may by order release the restriction in whole or in part. A release under this subsection may not change an endowment fund to a fund that is not an endowment fund.

(c) A release under this section may not allow a fund to be used for purposes other than the educational, religious, charitable, or other eleemosynary purposes of the institution affected.

(d) This section does not limit the application of the doctrine of *cy pres*.

## COMMENT

One of the difficult problems of fund management involves gifts restricted to uses which cannot be feasibly administered or to investments which are no longer available or productive. There should be an expeditious way to make necessary adjustments when the restrictions no longer serve the original purpose. *Cy pres* has not been a satisfactory answer and is reluctantly applied in some states. See *Restatement of Trusts* (2d), §§ 381, 399; 4

Scott, *Law of Trusts* § 399, p. 3084, § 399.4 pp. 3119 et seq. (3d ed. 1967).

This section permits a release of limitations that imperil efficient administration of a fund or prevent sound investment management if the governing board can secure the approval of the donor or the appropriate court.

Although the donor has no property interest in a fund after the gift, nonetheless if it is the donor's limitation

that controls the governing board and he or she agrees that the restriction need not apply, the board should be free of the burden. See *Restatement of Trusts* (2d) § 367. Scott suggests that in minor matters, the consent of the settlor may be effective to remove restrictions upon the trustees in the administration of a charitable trust. 4 Scott, § 367.3 p. 2846 (3d ed. 1967).

If the donor is unable to consent or cannot be identified, the appropriate court may upon application of a governing board release a limitation which is shown to be obsolete, inappropriate or impracticable.

This section authorizes only a release of a limitation. Thus, if a fund were established to provide scholarships for students named Brown from Brown County, Iowa, a donor might acquiesce in a reduction of the limitation to enable the institution to offer scholarships to students from Brown County who are not named Brown, or to students from other counties in Iowa or to students from other states, or he could acquiesce in the release of the restriction to scholarships so that the fund could be used for the general educational purposes of the school.

Subsection (d) makes it clear that the Act does not purport to limit the established doctrine of *cy pres*. A liberalization of addition to, or substitute for *cy pres* is not without respectable support. Professor Kenneth Karst in "The Efficiency of the Charitable Dol-

lar: An Unfilled State Responsibility," 73 *Hart.L.Rev.* 433 (1960) suggested that the doctrine of *cy pres* be expanded to permit the courts to redirect charitable grants if the purpose had become "obsolete, or useless, or prejudicial to the public welfare, or are insignificant in comparison with the magnitude of the endowment . . ." quoting from the Nathan Report (of the British Committee on the Law and Practice Relating to Charitable Trusts, Cmd. 8710, 1952) quoting the Scotland Education Act 1946, 9-10 Geo. 6, ch. 72 § 119(b). The Uniform Act provision is far less broad; it applies only to the release of restrictions on the gift under limited circumstances.

New England courts apply a rather strict doctrine of separation of powers to deny legislative encroachment on judicial *cy pres*. The Act is compatible with the New England cases because the final decision is in the courts. See *City of Hartford v. Larrabee Fund Association*, 161 Conn. 312, 288 A.2d 71 (1971); Opinion of Justices, 101 N.H. 531, 133 A.2d 792 (1957).

No federal tax problems for the donor are anticipated by permitting release of a restriction. The donor has no right to enforce the restriction, no interest in the fund and no power to change the eleemosynary beneficiary of the fund. He may only acquiesce in a lessening of a restriction already in effect.

#### Action in Adopting Jurisdictions

##### Variations from Official Text:

##### California. Section reads:

"(a) With the written consent of the donor, the governing board may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.

"(b) If written consent of the donor cannot be obtained by reason of his death, disability, unavailability, or impossibility of identification, the governing board may apply in the name of the institution to the superior court of the county in which the

principal activities of the institution are conducted, or other court of competent jurisdiction for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. No court shall have jurisdiction to modify any use of an institutional fund under this chapter unless the Attorney General is a party to the proceedings. If the court finds that the restriction is obsolete, or impracticable, it may by order release the restriction in whole or in part. A release under this subdivision may not change an endowment fund to a fund that is not an endowment fund.

"(c) A release under this section may not allow a fund to be used for purposes other than the educational, religious, charitable, or other eleemosynary purposes of the institution affected.

"(d) This section does not limit the application of the doctrine of cy pres."

Colorado. Section reads:

"(1) A restriction on the use of an institutional fund imposed by the applicable gift instrument may be released, entirely or in part, by the governing board with the written consent of the donor.

"(2) If consent of the donor cannot be obtained by reason of death, disability, unavailability, or impossibility of identification of the donor, upon application of the governing board, a restriction on the use or investment of an institutional fund imposed by the applicable gift instrument may be released, entirely or in part, by order of the district court after reasonable notice to the attorney general and an opportunity for him to be heard, and upon a finding that the restriction on the use or investment of the fund is obsolete, inappropriate, or impracticable. A release under this subsection (2) may not change an endowment fund to a fund which is not an endowment fund.

"(3) A release under this section may not allow a fund to be used for purposes other than educational, religious, or other eleemosynary purposes of the institution affected.

"(4) The provisions of this section do not limit the application of the doctrine of cy pres."

Connecticut. Subsec. (b) reads: "If written consent of the donor cannot be obtained by reason of his death, disability, unavailability or impossibility of identification, the governing board may apply, in the name of the institution, to the superior court for a county or judicial district in which the institution conducts its affairs for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. The attorney general shall be notified of the application and shall be given an opportunity to be heard. If the court finds that the restriction is obsolete, inappropriate or impracticable, it may by order release the restriction in whole or in part. A release under this subsection may not change an endowment fund to a fund that is not an endowment fund."

7A U.L.A.—24

In subsec. (d), adds "or approximation" following "cy pres."

District of Columbia. In subsec. (b), provides that the Corporation Counsel of the District of Columbia shall be notified of the application and shall be given an opportunity to be heard and further that the Attorney General of the United States shall be notified of the application and shall be given an opportunity to be heard when a Federal interest in the application or the institution is asserted.

Georgia. Omits this section.

Illinois. Omits subsec. (b).

Kansas. Subsec. (a) reads: "(a) A restriction on the use or investment of an institutional fund imposed by the applicable gift instrument may be released, entirely or in part, by the governing board with the written consent of the donor."

Subsec. (b) reads: "(b) If consent of the donor cannot be obtained by reason of the death, disability or unavailability, or impossibility of identification of the donor, upon application of the governing board, a restriction on the use or investment of an institutional fund imposed by the applicable gift instrument may be released, entirely or in part, by order of the district court after reasonable notice to the attorney general and an opportunity for him to be heard, and upon a finding that the restriction on the use or investment of the fund is obsolete, inappropriate or impracticable. A release under this subsection may not change an endowment fund to a fund which is not an endowment fund."

Louisiana. In subsec. (b), inserts "by petition" following "may apply" and substitutes the following for the second sentence: "The [Attorney General], the following: "Notification of interested parties shall be made in accordance with R.S. 9:2332."

Michigan. In subsec. (b), inserts "or legal incapacity" following "disability".

In subsec. (c), substitutes "shall" for "may".

Minnesota. Subsec. (b) reads: "If written consent of the donor cannot be obtained by reason of his death, disability, unavailability, or impossibility of identification, the governing board may apply in the name of the institution to the district court for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. The attorney

general shall be notified of the application and shall be given an opportunity to be heard. If the court finds that the restriction is obsolete, inappropriate, or impracticable, it may by order release the restriction in whole or in part. A release under this subsection may not change an endowment fund to a fund that is not an endowment fund."

**Montana.** Section reads:

"(1) With the written consent of the donor, the governing board may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.

"(2) If written consent of the donor cannot be obtained by reason of his death, disability, unavailability or impossibility of identification, the governing board may apply in the name of the institution to the appropriate court for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. The attorney general shall be notified of the application and shall be given an opportunity to be heard. If the court finds that the restriction is obsolete, inappropriate or impracticable, it may by order release the restriction in whole or in part. A release under this subsection may not change an endowment fund to a fund that is not an endowment fund.

"(3) A release under this section may not allow a fund to be used for purposes other than the educational, religious, charitable or other eleemosynary purposes of the institution affected.

"(4) This section does not limit the application of the doctrine of cy pres."

**New Hampshire.** In subsec. (d), adds "or deviation of trust" at the end thereof.

**Ohio.** In subsec. (a), inserts "of an institution" following "governing board".

Subsec. (b) reads: "If written consent of the donor cannot be obtained by reason of his death, disability, unavailability, or impossibility of identification, the governing board may apply in the name of the institution to the appropriate court for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund, the attorney general is a necessary party to and shall be served with process in all such proceedings. A judgment rendered in such proceedings without service of process upon the attorney general is void. If the court finds that the restriction is obsolete or impossible, it may by order release the restriction in whole or in part. A release under this division may not change an endowment fund to a fund that is not an endowment fund."

In subsec. (c), substitutes "or religious" for "religious, charitable, or other eleemosynary".

**Vermont.** Subsec. (a) reads: "With the written consent of the donor, the governing board may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund."

Subsec. (b) reads: "If written consent of the donor cannot be obtained by reason of his death, disability, unavailability, or impossibility of identification, the governing board may apply in the name of the institution to the county court for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. The attorney general shall be notified of the application and shall be given an opportunity to be heard. If the court finds that the restriction is obsolete, inappropriate or impracticable, it may by order release the restriction in whole or in part. A release under this subsection may not change an endowment fund to a fund that is not an endowment fund."

#### Library References

Charities ¶37(1), 48(1).

Colleges and Universities ¶6(5).

C.J.S. Charities §§ 47, 50 et seq.

C.J.S. Colleges and Universities § 14.

#### Notes of Decisions

##### 1. Generally

The Berkshire County Probate Court was a proper forum to resolve the issues presented in proceeding seeking release of restrictions on investment of testamentary

gifts to college located in Berkshire County, where the estates were probated within Massachusetts but outside Berkshire County. *Williams College v. Attorney General*, 1978, 375 N.E.2d 1225, 375 Mass. 220.



## INSTITUTIONAL FUNDS

## § 11

Although the legislature may put certain conditions on money that it appropriates for the Michigan State University, and such conditions are binding if the trustees accept the money, the conditions may not interfere

with the trustees' management of the University and may be applied only to state appropriated funds. *William C. Reichenbach Co. v. State*, 1979, 288 N.W.2d 622, 94 Mich.App. 323.

### § 8. [Severability]

If any provision of this Act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared severable.

#### Library References

Statutes ⇐64(2).  
C.J.S. Statutes § 96 et seq.

### § 9. [Uniformity of Application and Construction]

This Act shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.

#### Library References

Statutes ⇐226.  
C.J.S. Statutes § 371 et seq.

### § 10. [Short Title]

This Act may be cited as the "Uniform Management of Institutional Funds Act."

### § 11. [Repeal]

The following acts and parts of acts are repealed:

- (1)
- (2)
- (3)

#### Library References

Statutes ⇐152.

C.J.S. Statutes § 282.