

Estate Planning & Elder Law

Evolving Standards For 'Institutional Funds': New Jersey Adopts New Uniform Statute

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The New Jersey legislature recently enacted the Uniform Prudent Management of Institutional Funds Act ("UPMIFA"), N.J.S.A. Section 15:18-25 et seq. UPMIFA took effect in New Jersey on June 10, and succeeds and repeals the Uniform Management of Institutional Funds Act ("UMIFA"), N.J.S.A. Section 15:18-15 (repealed) et seq. The new statute applies to "institutional funds" existing on or established after that effective date. N.J.S.A. Section 15:18-32.

UMIFA was enacted in New Jersey almost 35 years ago, in 1975, and in fact had been enacted in the great majority of states. Since the National Conference of Commissioners on Uniform State Laws issued UPMIFA in 2006, approximately 30 states have enacted it. New Jersey is now among them.

Both statutes provide guidance to charitable institutions (including colleges, universities, religious organizations and hospitals) and the individuals who

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make gifts to them. UPMIFA applies to "institutional funds," which the statute defines as a "fund held by an institution exclusively for charitable purposes." An "institution" is defined broadly under the statute. A "charitable purpose" refers to, among others, the relief of poverty, the promotion of health and advancement of religion or education.

UPMIFA (like its predecessor) provides guidance in interpreting and applying donor intent. Donor intent is not to be changed, unless, for instance, the donor provides written consent to such a change as contemplated by the statute. In addition, UPMIFA authorizes an institution to bring a court action that does not involve the donor's consent — for the practical reason that the donor will have since passed away in most cases — for a modification consistent with the donor's intent.

UPMIFA regulates numerous facets of institutional fund management including: fund expenditure; investment management as well as delegation thereof; and the release or modification of restrictions on institutional funds. This last subject is the focus of this article, in that UPMIFA makes three pivotal changes.

First, the new statute makes *cy pres* applicable to an institutional fund, thus making available a wider range of cases

assisting institutions and courts. For example, a 1980 case involved a restriction capping the annual award at \$400 — when the annual income produced by the fund was many times that — as well as one prohibiting female scholarship recipients. See *Matter of Crichfield Trust*, 177 N.J. Super. 258 (Ch. Div. 1980). The trust containing those restrictions was modified "to allow for adaptation to circumstances which the settlor may not have foreseen." The court authorized female students to apply and the full income to be awarded annually.

In *Crichfield*, the Chancery Division cited the *cy pres* doctrine as authority for the relief provided, with only fleeting reference in a footnote to UMIFA, N.J.S.A. Section 15:18-21(b) (now repealed). The prior statute, UMIFA, provided that the section on release of restrictions did "not limit the application of the doctrine of *cy pres*." N.J.S.A. Section 15:18-21(d) (repealed). Thus, UMIFA did not expand the doctrine of *cy pres* to apply to all institutional funds. As such, *cy pres* relief was available in *Crichfield* primarily because that matter involved a charitable trust. See *Raque v. City of Speyer, Germany*, 97 N.J. Eq. 447, 450 (Ch. Div. 1925) (providing that the *cy pres* "doctrine is only applicable to technical charitable trusts"). Under UMIFA, *cy*

pres was not applicable to an institutional fund conveyed in the form of a restricted gift, as opposed to a technical charitable trust.

This has changed with the enactment of UPMIFA. In the official comments to section 6 of the model act — which became N.J.S.A. Section 15:18-30 — the drafting committee stated that “Subsections (b) and (c) make clear that an institution can always ask a court to apply equitable deviation or cy pres to modify or release a restriction, under appropriate circumstances.” The statute provides, in pertinent part:

(b) The court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. The institution shall give notice to the Attorney General in accordance with the Rules of Court of the application, and the Attorney General shall be given an opportunity to be heard. To the extent practicable, any modification shall be made in accordance with the donor’s probable intention.

(c). If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impos-

sible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purpose of the institution or charitable intent of the donor. The institution shall give notice to the Attorney General of the application in accordance with the Rules of Court, and the Attorney General shall be given an opportunity to be heard.

With the incorporation of the cy pres doctrine, UPMIFA adopts a substantial body of case law, which UPMIFA and its predecessor, UMIFA, otherwise lack.

Second, as noted above, UPMIFA refers to “modification” of restrictions. By comparison, UMIFA apparently only authorized “release of restrictions.” N.J.S.A. Section 15:18-21 (repealed). The drafting committee stated in the UPMIFA official comments that the UMIFA “all-or-nothing approach did not adequately protect donor intent.” The New Jersey version of UPMIFA expressly requires a court to consider donor’s intent in the context of a request for a modification. N.J.S.A. Section 15:18-30.

An example of a situation where cy pres has been applied in a manner that preserves donor’s intent while at the same time permitting a modification is where there are surplus funds. “If income from the charitable trust exceeds that which is necessary to achieve the donor’s charitable objective, *cy pres* may be applied to the surplus income ‘since there is an impossibility of using the income to advance any of the charitable purposes of the settlor.’” *Sharpless v. Medford Monthly Meeting of Religious Soc. of Friends*, 228 N.J. Super. 68, 74 (App. Div. 1988) (quoting Bogert, Trusts

& Trustees, (Rev. 2d Ed.1977), § 438 at 554-555).

In *Sharpless*, a religious society had established trust funds by soliciting contributions from its members, including gifts and bequests, for the purpose of graveyard maintenance. Many decades after the funds were established, the principal had grown to the point where annual income exceeded the necessary annual maintenance expenses by a magnitude of approximately 10 times. Applying cy pres, the Appellate Division held that surplus income = i.e., annual income left over after graveyard maintenance was fully funded as intended by the donors — could be used by the religious society for its general purposes. Thus, donor’s intent was fully protected while the fund was modified to permit the charity to make the best use of the surplus annual income

Third, while institutions retain the right to apply to the courts for the release or modification of restrictions, the institutions themselves also now have the right to release or modify the restriction if: the fund subject to the restriction has a value of less than \$250,000; more than twenty years have elapsed since the fund was established; and the institution uses the property in a manner consistent with the charitable purpose expressed in the gift instrument. While a court application is not needed in this instance, the institution must still provide sixty days’ notice to the New Jersey Attorney General. N.J.S.A. Section 15:18-30(d). The statute does not require notification of donors, and instead relies on the traditional role of the Attorney General in protecting public interest in the funds.

For those reasons, UPMIFA appears to be an improvement over its predecessor. Even with the heightened protection of donor intent, charitable institutions should be able to receive relief more easily in appropriate circumstances. ■