STATE OF NEW JERSEY

N J L R C

NEW JERSEY LAW REVISION COMMISSION

Final Report
Relating to

Uniform Prudent Management of Institutional Funds Act

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INTRODUCTION

The National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the "Uniform Prudent Management of Institutional Funds Act" (UPMIFA) in 2006 recommending the Act for adoption in all states. The UPMIFA replaces and updates the 1972 Uniform Management of Institutional Funds Act (UMIFA) adopted in 47 states, including the State of New Jersey, effective 1975, and codified at *N.J.S.A.* 15:18 *et seq*. Thirteen States have adopted the UPMIFA and bills are presently pending in eight additional legislatures in 2007.[1] Pursuant to its statutory obligation, the NJLRC considers recommendations of NCCUSL.[2] Hence, the examination of the 2006 "Uniform Prudent Management of Institutional Funds Act" is within the purview of the functions of the Commission in reporting its recommendations to the Legislature. The Commission has reviewed and considered the Act and recommends that the Legislature enact the Official text of the Act, without adopting the optional provision contained in Section 4, subsection (d).[3]

Current New Jersey Law

The State of New Jersey adopted in 1975 the "Uniform Management of Institutional Funds Act" promulgated by NCCUSL in 1972. The case law reported under this statute is consistent with the principles of the UPMIFA. Consequently, if New Jersey were to adopt the 2006 Act, that adoption would not alter any case law. The adoption would change the language of the existing statute, but not to any detriment, and would improve the regulatory environment in which managers of charitable trusts operate to achieve the objectives of the funds. The UPMIFA incorporates prudential standards of money management consistent with modern portfolio theory of efficient markets and establishes a framework for money managers to obtain the highest returns for the funds subject to the overriding mandate of donor intent and to statutorily-defined prudent investment standards.

The Uniform Prudent Management of Institutional Funds Act

The first question that arises is: why has NCCUSL decided to revise the earlier Act. The answer to that question requires a deviation into the historical development of law governing

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[1] See NCCUSL at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upmifa.asp.

[2] *N.J.S.A.* 1:12A-8(c) provides that the NJLRC shall: "Receive and consider suggestions and recommendations from the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and other learned bodies and from judges, public officials, bar associations, members of the bar and from the public generally, for the improvement and modification of the general and permanent statutory law of the State, and to bring the law of this State, civil and criminal, and the administration thereof, into harmony with modern conceptions and conditions…."

[3] Appendix I of the Tentative report contains the Official Text of the UPMIFA, with the deleted subsection (d) of section 4 marked by a strikethrough. Appendix II contains a NCCUSL developed comparison table of the two Acts.

management of charities and endowments. In short, the law has not kept pace with market developments.

Brief History

"American charities manage substantial funds in conjunction with carrying out their charitable purposes, holding some funds for operating needs and others as endowments".[4] American universities, for example, manage endowment funds exceeding 100 billion. Given the sheer magnitude of assets under management, legal rules have developed gradually to provide a system of guidance for institutional money managers and Boards of Directors of charities.

Without repeating the historical backdrop of charities[5], certain factors are salient to an understanding of the emergence of the UMIFA and its successor, the UPMIFA. Prior to the American Revolution, most charities were established as trusts under English law and trust law applied to them. Shortly thereafter, most charities were organized as non-profit corporations, though some charities continued to be organized as charitable trusts. This development produced an ambiguity as to which law applied to charities: trust law or corporate law. Courts often used a combination of these disciplines to resolve questions, although the dominant trend was to organize a charity as a non-profit corporation.

The problem of applying trust law to charities was its inherent conservatism. The "prudent man rule" required a trustee to invest trust property as the trustee would invest his own property. Consequently, to avoid an accusation of imprudence, trustees adopted conservative investment strategies, essentially investing in bonds and high dividend yielding stocks, and avoiding growth equities, regardless of whether that strategy best served the interests of the charity. In addition, accounting definitions of "income" and "principle" derived from trust law exacerbated matters. Expendable income covered only interest and dividends, and explicitly excluded capital gains. Conservative accounting principles hence began to dictate investment decisions ignoring the effects on conservation of the principal of the charitable corpus. As the value of charities increased, this situation became untenable and led to the "Cary and Bright Study".

That study delineated the defects of applying trust law to charitable corporations and laid the foundations for the development of the UMIFA. In short, the Cary and Bright Study found trust law inconsistent with modern portfolio management based on the theory of efficient markets.[6]

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[4] Susan N. Gary, Charities, *Endowments, and Donor Intent: The Uniform Prudent Management of Institutional Funds Act*, 41 Ga. L. Rev. 1277 (2007). Note that Professor Gary was the reporter for the UPMIFA. See also for empirical data about the growth of charitable funds under management, Garry W. Jenkins, *Incorporation Choice, Uniformity, and the Reform of NonProfit State Law*, 41 Ga. L. Rev. 1113 (2007)(substantiating the declarations made by Professor Gary, summarising uniform law developments in the area, and demonstrating that, unlike for-profit entities, the nonprofit sector does not forum shop for state of incorporation. Nonprofits virtually are all incorporated in the State where their activities are centered).

[5] *Id*. at 1-4.

[6] The "efficient market" thesis states no more than that securities prices reflect all information and that their prices reflect their fair value.

For example, trust law forbid delegation, restricted risk analysis on an asset-by-asset basis, thereby forbidding total-return investing, and established a standard of prudential performance inconsistent with the responsible management of charitable corporations and trusts.[7] Hence, the UMIFA was developed, permitting investment on a total-return basis, expanding the range of portfolio management, revising the standard of care, and achieving state uniformity as attested by its adoption in 47 States and the District of Columbia.

Since 1972, legal developments in Trust Law, as demonstrated by the Uniform Prudent Investor Act[8], and the 1987 Revised Model Non-profit Corporation Act (RMNCA), have caught up with, and surpassed, the concepts captured by the UMIFA.[9] The UPIA modernised the standards guiding fiduciary investment decisions and implicitly applied to charities organised as non-profit corporations. In addition, the RMNCA articulated the duties a manager must follow in the management of a non-profit corporation. While these legal developments did not produce inconsistencies in the law between the UMIFA and the Prudent Investor Act, NCCUSL decided it was appropriate to update and modernize the provisions of the UMIFA.

Key Points of the UPMIFA

1. *Sphere of application*. The UPMIFA applies to most charitable trusts, except those managed by corporate trustees and individuals. Thus all trusts managed by bank trustees are excluded from the scope of the UPMIFA. The Act applies to institutions organized and operated exclusively for charitable purposes, broadly defined, and the term “institutions” includes charitable organizations created as non-profit corporations, unincorporated associations, governmental subdivisions and agencies, and “any other form of entity” organized and operated exclusively for charitable purposes. *Result*: no change in coverage; however, it should be noted that the Drafting Committee considered expanding the scope to include funds held by all charities, a proposition ultimately rejected due to opposition by the American Bankers Association.[10]

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[7] The phrase “risk analysis on an asset-by-asset basis” reflects textbook theory on the relationship between risk and return. Risk is a measure of volatility or uncertainty of returns, while returns are the expected receipts or cash flows expected from any investment. *E.g.*, A.A. Gropelli, *Finance*, 76 (5^{th} ed. 2006). Hence, the term “total return investing”.

[8] New Jersey enacted the Prudent Investor Act in 1997 codified at *N.J.S.A*. 3B:20-11.1 et seq.

[9] The New Jersey Non-profit Corporation Act, enacted in 1983, codified at *N.J.S.A*. 15A:1-1 *et seq*., is not based on the 1987 Revised Model Non-profit Corporation Act. Rather, it is based on the then existing New Jersey Business Corporation Act, enacted in 1968 as expressly noted in *N.J.S.A* 15A:1-1(c)(3). The current New Jersey Business Corporation Act was enacted in 1988, *N.J.S.A*. 14A:1-1 et seq. The Commission responsible for drafting the Revised New Jersey Business Corporation Act drew upon various sources to draft the statute, including the extant version of the Model Business Corporation. In any event the different derivation of New Jersey non-profit law does not impact the decision to adopt the UPMIFA.

[10] The bankers feared that, if a state did not adopt the Uniform Prudent Investment Act, the Uniform Principal and Income Act, and the Uniform Trust Code, a trustee might confront conflicting rules. The bankers also maintained that the retroactive application of UPMIFA had the potential to cause problems with trusts created under the UMIFA that did not apply to trusts with corporate trustees. Professor Gary at page 6 persuasively picks apart these arguments and suggests a state may wish to provide blanket coverage to all charitable trusts. New Jersey has adopted the Uniformed Principal and Income Act of 2001 codified at *N.J.S.A.* 3B:19A-35; and has adopted the Uniform Prudent Investor Act confided at *N.J.S.A* 3B:20-11.1 to 11.12. New Jersey has not adopted the Uniform Trust Code.

2. *Standard of care*. Section 3 delineates the prudential standards applicable to managing and investing an intuitional fund. The Act gives primacy to the intent of the donor as expressed in the gift instrument. Subject to this intent, the institution is given broad discretion to appropriate and accumulate funds to carry out the purposes of the charity, provided the institution acts in "good faith" and "with the care that an ordinarily prudent person in a like position would exercise under similar circumstances". Subsection (a) of Section (4) also sets forth a list of factors the institution is obligated to consider if relevant and thereby provides certain explicit guidelines for institutional management that the UMIFA did not contain. Portfolio managers are given freedom to invest in a broad range of assets consistent with modern portfolio theory. The standard is borrowed from the RMNCA. *Result*: clearer standards, more investment freedom.

The standard of care for trustees and members of any committee of a non-profit corporation established under New Jersey law is: "Trustees and members of any committee designated by the board shall discharge their duties in good faith and with that degree of diligence, care and skill which ordinary, prudent persons would exercise under similar circumstances in like positions". *N.J.S.A.* 15A:6-14. This standard does not differ in any significant respect from the standard set forth for directors in the RMNCA. Section 8.30 of the Model Act, in pertinent part, provides, "A director shall discharge his or her duties as a director, including his or her duties as a member of a committee: (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interests of the corporation.[11]

3. *Endowment Spending and the Historic Dollar Value Rule*. Section 2 of the UMIFA distinguishes between an "endowment fund" and an "institutional fund". The distinction is extremely nuanced. An "endowment fund" is an institutional fund that under the terms of the gift instrument is not wholly expendable on current basis". In practical terms, it is a restricted fund meaning that the trustees may not spend the principal of the endowment, but only expend its appreciation, investing the principal to produce income and maintain the fund in perpetuity. Special rules for endowment funds are set forth in Section 4. The UMIFA permitted expenditures from the endowment fund provided the appreciation exceeded the historic dollar value of the fund at the time of contribution. If the current value of the fund fell below the HDV, investment managers were prohibited from spending any of the funds assets. The UPMIFA abolishes the historic dollar value rule for cogent reasons. Under UPMIFA, managers can spend an amount deemed prudent after consideration of donor intent that the fund continues indefinitely, the purposes of the fund, and relevant economic circumstances. The Official Comment to Section 4 provides, "The Drafting Committee concluded that eliminating historic dollar value and providing institutions with more discretion would not lead to depletion of endowment funds." Instead, the new policy enables institutional managers "to be responsive to short-term

[11] The standard set for directors and officers of a for-profit business corporation is set forth in *N.J.S.A.* 14A:6-1(2). It is a characterisation of the business judgment rule, that is, provided a director acts within his or her powers conferred by the articles of association, and acts in good faith in arriving at a decision, that decision is protected against a liability claim.

fluctuations in the value of the fund." Under this rule, with obligatory requirements still applicable, managers will make expenditure or accumulation decisions based on business cycles and pertinent economic data. *Result*: reasonable improvement away from statutorily fixed standard, but clear departure from existing law. The concern is to maintain purchasing power while allowing for making a distribution representing a reasonable spending rate.[12]

4. *Optional 7% rule of imprudence*. To rebut concerns that the abolition of the HDV rule would run contrary to donor intent in certain cases and lead to an acceleration of expenditure, the UPMIFA contains an optional rule in subsection (d) of section (4) establishing a presumption of imprudence if the fund spends more than 7% of its value in one year as the fund's value is measured over a three year rolling average period. The presumption is reputable. However, once triggered, the institution carries the burden of going forward to demonstrate that its decision was prudent as measured by the standard set fort in Section 4. The optional rule does not create a "safe harbour" rule for institutions. Even if the institution spends less than 7% of its value, as computed under the 3-year rolling average formula, the institution may be found to have acted imprudently. For example, the 7% figure includes management and administrative expenses that may be deemed too high, or the institution may be found to have violated the standards of Section 4 despite expenditures beneath the 7% ceiling. *Result*: State must choose; there are pros and cons to statutorily fixed limits.[13] However, in the opinion of the Commission, the New Jersey State Legislature should avoid adoption of the mechanical rule of subsection (d) of Section 4. It is an anachronism deriving from the tradition of identifying "legally approved lists" of investments and spending limits applicable to charities and endowments, the very tradition the UPMIFA has rejected.

5. *Delegation*. Section 5 provides that the institution may delegate to an "external agent" management and investment of the fund subject to donor restriction and to the standards of prudential management. The delegation provision incorporates the delegation rule found in Section 9 of the UPIA. Section 5 imposes duties of care and responsibility upon the agent, and permits cascading delegation, that is, a re-delegation is permitted for managers with special expertise in certain areas. *Result*: reasonable rule, given developments under UPIA and RMNCA.

6. *Cy pres and deviation*.[14] The UMIFA provided for the release and modifications of restrictions on the fund. Section 6 of the UPMIFA follows this principle, but clarifies the application of cy pres. First, the donor may always release or modify a restriction contained in the gift instrument provided the decision is memorialised in a "record," a defined UPMIFA term. In addition, the institution, upon application to a court, may request modification of a restriction,

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[12] *Note*: Legal and accounting rules often do not coincide. This is the case with the abolition of the HDV rule. Because no part of an endowment fund may be considered permanently restricted under accounting rules, the Financial Accounting Standard Board may wish to consider how it classifies gains. This question was beyond the scope of the NCCUSL project.

[13] Professor Gary notes, "a prudence standard coupled with more detailed guidance … [provides] the best rule to govern endowment spending". In addition, donor intent provisions, investment policies, and the rules of prudence set forth in the Act taken together are sufficient restraints on money managers.

[14] The two terms often are interchangeable and difficult to distinguish.

if the restriction: (1) “has become impracticable or wasteful [a UTC term], (2) impairs the management and investment of the fund, or (3) due to circumstances not anticipated by the donor, the modification shall promote the purposes of the fund. The Attorney General is notified of any action and has the right to be heard. Subsection (c) parallels subsection (b) but covers “a particular charitable purpose” as well as restriction. These rules conform to, and derive from, the Uniform Trust Act. However, under the UPMIFA, “modification due to unanticipated circumstances applies to administrative provisions, termed restrictions on management or investment, and not to restrictions on use”, that may be modified only by cy pres. Hence, the law creates three categories: (1) release, (2) deviation, and (3) cy pres.

An exception for a court action is permitted for a small and old fund defined as an institutional fund valued at less than $25,000, more tan 20 years old, the institution uses the fund’s property consistent with its intended purposes. Under the exception, the institution need only notify the Attorney General. The reasoning for the exception is that, given the size of the fund, it is impractical and wasteful to require a court proceeding. In any event, the Attorney General has supervisory powers. *Result*: clarification, with reasonable exception.

7. *Retroactivity*. The UPMIFA applies retroactively as well as prospectively.

Impact on New Jersey Law

Adoption of the UPMIFA does not produce an adverse effect on New Jersey Law. Reported litigation is sparse and that which is reported reveals that New Jersey law would be improved by adoption of the Act as providing improved clarity for the judiciary. New Jersey courts have considered three decisions related to the UMIFA: *Midlantic Nat. Bank v. Frank G. Thompson Foundation*, 170 *N.J. Super*. 128 (CH. 1979), *Johnson v. Johnson*, 212 *N.J. Super*. 368 (Ch. 1986), and the *Matter of Estate of Dickerson*, 193 *N.J. Super*. 353 (Ch. 1983). Nothing stated or held in these cases contradicts, or is inconsistent with, any principle contained in the UPMIFA. In the *Matter of Estate of Dickerson*, Rutgers University, the administrator of two privately funded trusts, challenged the legality of restrictions limiting scholarships to students intending to study for the Protestant Ministry. Joined by the Attorney General, Rutgers based its claims upon violations of the Establishment Clause, the New Jersey Constitution [Article 1, par. 5], and the Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq*. The court found that the restrictions did not violate the law. Since the UPMIFA does not preclude a release, cy pres or deviation action, the *Matter of Estate of Dickerson* is consistent with the approach of the revised UPMIFA. The court in *Midlantic* confirmed the right of delegation, that is, the non-profit corporation was not precluded from entering into a contract with the executor-bank for custodial and investment advice. It also confirmed the right of investment managers to recover reasonable compensation for their services, and distinguished between the standard of performance between charitable corporations and a trust for a charitable purpose. Consistent with the existing law of the UMIA, the court found that the appropriate standard was expressed in *N.J.S.A.* 15:18-20 [a standard of ordinary business care and prudence], and was not expressed by any heightened standard of performance applicable to trustees under trust law. The case of *Johnson* involved a determination of whether the managers of a trust committed negligence in their administration of the endowment; the court found that the theory of portfolio management adopted by the administrators did not amount to a violation of their duty of care, though the fund underperformed benchmark indexes in certain years. Section 4 of the UPMIFA sets out clearly the standard by which to evaluate the conduct of the institution managing the trust, and therefore provides better guidance for the court should a court be faced with an argument similar to the one posed in *Johnson*. That standard does not conflict with New Jersey law governing non-profit entities. *N.J.S.A.* 15A:6-14. Consequently, adoption of the UPMIFA in New Jersey would not unsettle established law.

Conclusion

The New Jersey Law Revision Commission therefore recommends that the New Jersey Legislature adopt the Official Text of the Uniform Prudent Management of Institutional Funds Act, without adopting the optional subsection (d) provision of Section 4 and with select language amendments set forth in the draft submission, and recommends repeal of the Uniform Management of Institutional Funds Act.

UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT

SECTION 1. SHORT TITLE. This act may be cited as the Uniform Prudent Management of Institutional Funds Act.

SECTION 2. DEFINITIONS. In this act:

(1) "Charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of a governmental purpose, or any other purpose the achievement of which is beneficial to the community.

(2) "Endowment fund" means an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis. The term does not include assets that an institution designates as an endowment fund for its own use.

(3) "Gift instrument" means a record or records, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution as an institutional fund.

(4) "Institution" means:

(A) a person, other than an individual, organized and operated exclusively for charitable purposes;

(B) a government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose; and

(C) a trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated.

(5) "Institutional fund" means a fund held by an institution exclusively for charitable purposes. The term does not include:

(A) program-related assets;

(B) a fund held for an institution by a trustee that is not an institution; or

(C) a fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, for-profit corporation, non-profit corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(7) "Program-related asset" means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.

(8) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

Comment

Section 2(6) of the New Jersey Act differs from the Official Text in that the term "for-profit corporation" is substituted for the term "public corporation", and that the term "non-profit corporation" is added in the definition of "person".

SECTION 3. STANDARD OF CONDUCT IN MANAGING AND INVESTING INSTITUTIONAL FUND.

(a) Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.

(b) In addition to complying with the duty of loyalty imposed by law other than this [act], each person responsible for managing and investing an institutional fund shall manage and invest the fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(c) In managing and investing an institutional fund, an institution:

(1) may incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution, and the skills available to the institution; and

(2) shall make a reasonable effort to verify facts relevant to the management and investment of the fund.

(d) An institution may pool two or more institutional funds for purposes of management and investment.

(e) Except as otherwise provided by a gift instrument, the following rules apply:

(1) In managing and investing an institutional fund, the following factors, if relevant, must be considered:

(A) general economic conditions;

(B) the possible effect of inflation or deflation;

(C) the expected tax consequences, if any, of investment decisions or strategies;

(D) the role that each investment or course of action plays within the overall investment portfolio of the fund;

(E) the expected total return from income and the appreciation of investments;

(F) other resources of the institution;

(G) the needs of the institution and the fund to make distributions and to preserve capital; and

(H) an asset's special relationship or special value, if any, to the charitable purposes of the institution.

(2) Management and investment decisions about an individual asset must be made not in isolation but rather in the context of the institutional fund's portfolio of investments as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the fund and to the institution.

(3) Except as otherwise provided by law other than this [act], an institution may invest in any kind of property or type of investment consistent with this section.

(4) An institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the fund are better served without diversification.

(5) Within a reasonable time after receiving property, an institution shall make and carry out decisions concerning the retention or disposition of the property or to rebalance a portfolio, in order to bring the institutional fund into compliance with the purposes, terms, and distribution requirements of the institution as necessary to meet other circumstances of the institution and the requirements of this act.

(6) A person that has special skills or expertise, or is selected in reliance upon the person's representation that the person has special skills or expertise, has a duty to use those skills or that expertise in managing and investing institutional funds.

SECTION 4. APPROPRIATION FOR EXPENDITURE OR ACCUMULATION OF ENDOWMENT FUND; RULES OF CONSTRUCTION.

(a) Subject to the intent of a donor expressed in the gift instrument , an institution may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines is prudent for the uses, benefits, purposes, and duration for which the endowment fund is established. Unless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:

(1) the duration and preservation of the endowment fund;

(2) the purposes of the institution and the endowment fund;

(3) general economic conditions;

(4) the possible effect of inflation or deflation;

(5) the expected total return from income and the appreciation of investments;

(6) other resources of the institution; and

(7) the investment policy of the institution.

(b) To limit the authority to appropriate for expenditure or accumulate under subsection (a), a gift instrument must specifically state the limitation.

(c) Terms in a gift instrument designating a gift as an endowment, or a direction or authorization in the gift instrument to use only “income”, “interest”, “dividends”, or “rents, issues, or profits”, or “to preserve the principal intact”, or words of similar import:

(1) create an endowment fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the fund; and

(2) do not otherwise limit the authority to appropriate for expenditure or accumulate under subsection (a).

Comment

The New Jersey Act deletes subsection (d) and prior references to that subsection. The Commission decided that the 7% rule of imprudence was an anachronism deriving from outdated sources of law and was contrary to the objectives of the Revised Uniform Prudent Management of Institutional Funds Act.

SECTION 5. DELEGATION OF MANAGEMENT AND INVESTMENT FUNCTIONS.

(a) Subject to any specific limitation set forth in a gift instrument or in law other than this act, an institution may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances. An institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in:

(1) selecting an agent;

(2) establishing the scope and terms of the delegation, consistent with the purposes of the institution and the institutional fund; and

(3) periodically reviewing the agent’s actions in order to monitor the agent’s performance and compliance with the scope and terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation.

(c) An institution that complies with subsection (a) is not liable for the decisions or actions of an agent to which the function was delegated.

(d) By accepting delegation of a management or investment function from an institution that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state in all proceedings arising from or related to the delegation or the performance of the delegated function.

(e) An institution may delegate management and investment functions to its committees, officers, or employees as authorized by law of this state other than this act.

SECTION 6. RELEASE OR MODIFICATION OF RESTRICTIONS ON MANAGEMENT, INVESTMENT, OR PURPOSE.

<u>(a) An institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund if the release or modification does not allow a fund to be used for a purpose other than a charitable purpose of the institution, and:</u>

<u>(1) The donor consents to the modification of the gift instrument in a record, or, if the donor is deceased, the surviving spouse of the donor consents to the modification of the gift instrument in a record, or</u>

<u>(2) The donor is deceased without a surviving spouse, the children of the donor unanimously consent in a record to the modification of the gift instrument.</u>

(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 must be given an opportunity to be heard. To the extent practicable, any modification must 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, impossible 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 donor. The institution shall give notice to the Attorney General of the application in accordance with the rules of court, and the Attorney General must be given an opportunity to be heard.

(d) An institution should release, in whole or in part, a restriction contained in the gift instrument without application to the court, if: (1) an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, (2) the institutional fund subject to the restriction has a total value less than $100,000, (3) the institution will use the property in a manner consistent with the charitable purposes of the institution or charitable intent of the donor, and (4) the institution gives 60 days notice by certified mail to the Attorney General and any charity that is a contingent beneficiary named in the gift instrument.

Comment

Subsection (a) deviates from the Official Text by providing an option for the surviving spouse of the donor, or if deceased, the surviving children of the donor, to consent to a modification of the gift instrument in a record under the circumstances set forth in that subsection. Subsection (b) and (c) clarify that an institution provides notice to the Attorney General in accordance with New Jersey Court Rules. Subsection (d) is rewritten for clarity and enlarges the scope of the exception for modification on notice alone by increasing the value of the fund to $100,000 from $25, 000. Subsection (d) also specifies that notice is to be sent by certified mail to the Attorney General and to any charity that is a named contingent beneficiary in the gift instrument.

SECTION 7. REVIEWING COMPLIANCE. Compliance with this [act] is determined in light of the facts and circumstances existing at the time a decision is made or action is taken, and not by hindsight.

SECTION 8. APPLICATION TO EXISTING INSTITUTIONAL FUNDS. This act applies to institutional funds existing on or established after the effective date of this act. As applied to institutional funds existing on the effective date of this act this act governs only decisions made or actions taken on or after that date.

SECTION 9. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This act modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101 of that act, 15 U.S.C. Section 7001(a), or authorize electronic delivery of any of the notices described in Section 103 of that act, 15 U.S.C. Section 7003(b).

SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 11. EFFECTIVE DATE. This act takes effect . . . .

SECTION 12. REPEAL. The following acts and parts of acts are repealed:

(a) The Uniform Management of Institutional Funds Act, N.J.S. 15:18 *et seq*.