

## Memorandum

To: UMIFA Drafting Committee

From: Susan Gary

Re: Draft Dated February 18, 2005

Date: February 18, 2005

I am sending a new draft of UMIFA, dated February 18, 2005. This draft is not an "official" draft and has not been formatted by the NCCUSL office. Please do not circulate it yet. I am only sending the draft to the committee and our most active advisors at this time. If you have comments or suggestions on the drafting, please send those in the next week. I hope to have revisions to the comments done by February 28 and at that time I will circulate and post an official draft.

I wanted to go ahead and send the draft now, so that if there is serious disagreement with what I have done we may be able to resolve it before the draft is circulated more widely. We may need to wait for discussion and changes until we have our conference call meeting, but if you have concerns at this point, let me know. If there is a consensus about any changes, I will go ahead and make those changes, but otherwise I will wait until we can discuss the draft.

I also wanted to send the draft now and let you know why the draft has been so slow in coming. My husband is fine, but the weekend of the UMIFA meeting I began coming down with a horrible flu that has lasted for weeks. I'm mostly back up to speed now, but I'm just beginning to catch up on work that should have been done weeks ago. I send my apologies.

As we discussed at the committee meeting, we will meet by conference call sometime before the NCCUSL Annual Meeting. I have been in contact with some folks at RPPT (the ABA section with which I am involved), and they hope to have feedback for us after their meeting at the end of April. Carol Kroch and I will be talking together as part of a panel at that meeting and will probably also be reporting to the Probate Subcouncil. The drafting committee may want to wait on the phone call until after the RPPT meeting. If we have the phone call in early May, I will still have time to prepare the Annual Meeting draft. I will be in touch with Dwight about scheduling the phone call after I finish this draft. He or I will then contact you about scheduling the call.

This rest of this memo explains what I have done in this draft and raises some questions.

## **Comments**

I have not yet revised the Comments, and I will be making many changes, especially in connection with Section 5 – Expenditure of Endowment Funds.

### **Section 2 - Definitions and Taking Trusts out of UMIFA**

My understanding is that in terms of coverage we agreed to return to the approach taken under old UMIFA. If a charity is a trustee of a trust, the trust will be subject to UMIFA. If a non-charity (a bank or an individual) is the trustee, then the trust is excluded from UMIFA. Although there was discussion at the meeting about taking the word “trust” out of the definitions of institution and person, I think that we do not want to do that because we will then exclude a trust of which a charity is the trustee. I have left trusts in those definitions, and I have excluded trusts managed by non-charities from the definition of institutional fund in two ways. An institutional fund is defined as a fund held by an institution (a person organized and operated exclusively for charitable purposes). A bank is not an institution, so this sentence excludes bank trustees. In addition, the definition specifically excludes a fund held by a trustee that is not an institution. I believe this additional language is necessary to clarify that bank trustees are not included. UMIFA (1972) contains both exclusions – first saying that an institutional fund is one held by an institution and then saying specifically that if a non-charity is the trustee, UMIFA does not apply. I think we should do both in new UMIFA.

### **Section 4 – Expenditure of Endowment Fund; Rules of Construction**

I have moved the presumption of imprudence to the comments, but I have not yet redrafted the comments. I did, however, make some changes to the presumption, so take a look at the language. Because the entire subsection was moved, the strike-and-score does not show the changes made. Sorry.

### **Section 6 – Release or Modification of Restrictions on Use or Administration**

This section has been substantially rewritten to bring the language closer in line with Sections 412 and 413 of the Uniform Trust Code. I have changed the word “investment” to “administration” throughout this section, both because “administration” tracks the UTC and because “administration” seems more appropriate.

The UTC subsections on deviation, 412(a) and (b) are now UMIFA 6(c) and (d). The UTC subsections both say that modification must be made “in accordance with the settlor’s probable intention.” I have kept that approach in the UMIFA version of deviation (substituting donor for settlor). The cy pres provision, UTC 413, says that the modification must be made “in a manner consistent with the settlor’s charitable purposes.” I have kept this approach in UMIFA 6(e) and (f), the two subsections that apply cy pres.

Shelly Kurtz and I have discussed whether the standard should be the same throughout Section 6, perhaps using “in accordance with the donor’s probable intention” in all sections. The advantage is the emphasis on the donor’s wishes for any modification. The disadvantage may be that we would be creating a difference between the UMIFA approach and the UTC approach. For the latter reason, I have drafted Section 6 to track the UTC approach, but we may want to discuss this further.

In our committee meeting we discussed having the modification provisions start with the institution (“an institution may apply”) rather than starting with the court (“a court may modify”). I drafted one version starting with the institution, but the language was awkward. I asked Shelly to review the preliminary draft, and he thought we should track the UTC language more closely, i.e., start with “a court.” I agree with Shelly, and the provisions read better now. I just wanted to explain why I had deviated from the committee’s instructions.