

UMIFA Drafting Committee Meeting – January 2006

Issues for Discussion (as of Jan. 3, 2006)

The following issues were raised by Susan Budak, an observer who has been involved in our project. Following some comments I have added my thoughts or questions for the committee (indicated “SNG”).

Section 2 – definition of endowment fund

Budak: The definition of an endowment fund contains the phrase “or any part thereof.” Is that phrase necessary? Can a single fund be part endowment and part non-endowment?

Section 2 – definition of gift instrument

Budak: The definition of a gift instrument says that a solicitation can be a gift instrument “if the solicitation indicates the intent of the institution that the solicitation constitutes a gift instrument.” I don’t see that phraseology on solicitations I receive. Would you expect that UMIFA would change the wording on solicitations as a result of its enactment—or were you trying to describe current practice?

SNG: The term gift instrument is trying to pin down, to the extent possible, what rules govern a charity’s use of a fund. It has to be something in writing, to protect both the charity and the donor. Budak’s comment raises the question of whether an institution could say, “oh but we didn’t intend that solicitation card to be a gift instrument.” If the solicitation card is the only written document and the donor relied on it, I don’t think the charity should be able to say it doesn’t control. Should we change the definition or add clarifying language to the comments?

Budak: I think it would be helpful to discuss the circumstances in which bylaws and minutes could be part of a gift instrument. Perhaps I am too concerned about the donor, but because a donor typically does not see these two types of documents, it seems improper that his or her gift would be subject to language in them. For example, what if the bylaws or minutes of the governing board said that for all gifts received the institution had the unilateral power to change the donor’s purpose (referred to as variance power by community foundations and accounting literature). If the donor gives without knowledge of that power and without the incorporation by reference of those minutes or bylaws should the gift be subject to them? And what about minutes of meetings or changes to the bylaws that occur after the donor’s gift is given? Perhaps you could state that specific bylaw sections or minutes of a particular meeting can be one of several records constituting a gift instrument if they are incorporated by reference in one of the other records for that gift.

Section 4 – spending rule

Budak: Do you need to make clear whether traditional income (dividends, interest, rents, royalties) becomes part of the fund or remains separate? For example, let's say a fund earns 2% of its fair market value this year as dividends and interest. Can the institution then spend 9% (2% + 7% of the fund) before triggering the imprudence test? I don't think that is your intent since that is not how most spending rate policies are implemented, but because there still are institutions that use the traditional income/principal split and spend only income, I think it would help to make that clear by stating that the total return of the fund (dividends, interest, rents, royalties, and net realized and unrealized gains and losses) is added to the fund.

SNG: Do we need to add anything to the statute or comments?

Budak: Could UMIFA require that each year the governing board make a binding determination of how much of the return is added to hdv; how much is appropriated, and how much is saved for future years? The amount added to hdv would then be deemed "principal." This approach wouldn't solve the underwater endowment problem, however.

Budak: Section 4(a)(6) tells the institution to consider "other resources of the institution." The comments refer to "present and reasonably anticipated resources."

SNG: Is the statutory language ok as is?

Section 6(c) equitable deviation

Budak: In subsection (c) should the italicized language be added:

"If, because of circumstances not anticipated by the donor, a modification *of a restriction contained in the gift instrument* will further the purposes of the institutional fund, or a restriction *contained in the gift instrument* becomes impracticable or wasteful and impairs the management or investment of the fund, the court, upon application of an institution, may modify the restriction. [the last clause read: may modify a restriction contained in a gift instrument on the management or investment of an institutional fund.]

Section 6(d) – Small, old fund modification

Budak: Should you also consider whether this should be based on a percentage of the total assets of the institution? For some institutions, \$25,000 is a significant amount; for others \$25,000 (or even \$250,000) might be clearly insignificant.