This document contains an email from James LoPrete, received June 8, 2005; my response to the issues he raised in the email; and his follow-up email to me.

I have been able to address some of Mr. LoPrete's concerns in the comments. I will indicate in brackets, within his email, changes I have made.

----- Original Message -----
From: "Mary Freeman" _____
To: "'Susan Gary'" _____
Sent: Wednesday, June 08, 2005 8:07 AM
Subject: UMIFA (from James LoPrete)

➢

> Dear Ms. Gary,
>
> Thank you for sending me a revised draft of UMIFA. My principal interest is
> enforcing donor intent so my comments will be primarily addressed to those
> portions of the act and the comments. I still feel there is too much bias
> toward giving the donee too much freedom to disregard the donor's intent.
> My concerns are:
>
> 1. Page 18, last paragraph. I would prefer that the comment be specific
> that donor intent be the primary concern.
>
> 2. Page 19, last paragraph. To follow up on comment one, I would like to
> insert the word "both" in the 4th line of the last paragraph between
> "operate" and "with". You may feel the "and" is sufficient but as a
> practitioner, I would go with the "belt and suspenders" approach. There is a
> plethora of cases where courts have found "and" to mean "or" to suit the
> outcome they want to reach.

➢ [done]

>
> 3. Page 20, 1st paragraph, line 7 sentence starting "Institutions have done
> a good job". What is the basis for this statement? Compare this "intuitive
> dicta" to page 21, 2nd full paragraph where you back up your "observation"
> comment. My 50 years of practice tells me "some have, some haven't" when it
> comes to evaluating the job done by charitable institutions.
>

➢ [changed to "Many institutions" – I would like to add a cite here]

➢

> 4. Page 21, 1st full paragraph, line 5 "subject to public policy." What
> does this mean? It just gives someone trying to ignore the donor's intent
> another basis for an argument to disregard the donor's intent. I would
> prefer it be deleted.
>

- [The public policy limitation is a basic rule from trust law (Restatement (Third) of Trusts § 29 (2003)) and means that a donor cannot require a charity to do something against public policy. I had thought I might add a cite to the Restatement to the Comment, but in the context of the comment (talking about donor restrictions), I ended up agreeing with Mr. LoPrete that "subject to public policy" is confusing. Maybe there is a better place to include the concept, but I have deleted it here.]
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> 5. Page 21, last sentence. Same as 3, what is your basis for this dicta?
> Remember, a majority of your committee have conflicts based on their
> employment.
>

- [The comments just state the view of the Committee, so I don't think I need a cite, but if anyone has ideas about how to improve this paragraph, let me know.]
-

> 6. Section 6, paragraphs (c) and (d). I find the lack of having an
> existing donor as a necessary party to either of these actions is
> unconscionable. The reliance on the attorney general is nothing but window
> dressing. It gives no real world protection except in highly publicized
> cases. If an attempt to have this act enacted in Michigan is made, I would
> vigorously oppose the absence of this requirement.
>

- [This is already the law. See my email response below.]
-

> 7. Overall. There is still too much bias toward letting the donee only give
> lip service to "donor intent". In my view, it truly is special interest
> legislation to permit the donee to ignore donor intent. The efforts made
> really don't have any teeth if the donor doesn't have a say under § 6 (c)
> and (d).
>
>
> Very truly yours,
> James H. LoPrete
>
>
>

Email from Susan Gary, dated June 8, 2005

Mr. LoPrete,

Thanks so much for getting your comments to me quickly, by email, because I can make some adjustments before the next draft goes out. A couple of the clarifications are easy to make, and I'll do so. I'm going to look for a cite for item 3 (this was discussed in meetings, and I think I should be able to find a citation). Some of the work will take longer, but I can continue to work on the Comments even after the July meeting.

Finding a citation for item 5 may be difficult. The sense of the committee comes less from those who work for universities than from comments we have gotten from lawyers who represent donors, but in the end there is no empirical study that would give us hard data. We have heard conflicting reports about what "donors" want or intend, and the truth is probably that different donors intend different things. My view is that new UMIFA will be at least as restrictive as old UMIFA in that spending decisions are more focused on the fact that the fund is to be held as an endowment rather than on the general needs of the charity (which is implied in the words of current UMIFA). Although hdv is gone, the goal is preserving the purchasing power of the fund, which isn't part of current UMIFA. For that reason, I think it's possible that new UMIFA will do a better job of protecting donor's intent than old UMIFA - but of course I really can't know.

On item 4, your question about public policy, I'll try to add more to the Comments. The concept here is something that is fairly seriously against public policy - something like racial restrictions. The concept already exists in trust law, so there should be a way that I can explain it in the comments so that it doesn't sound wishy-washy or sound like something that could be used to subvert donor restrictions. The problem with taking it out is that we don't want to say that a donor can require the charity to contravene public policy. The charity should refuse such a gift, but a charity may accept a gift without thinking through consequences. I'll see what I can do with the language, because if you read it as creating a gap, others will, too.

Item 6 is probably already the law. Equitable deviation (Section 6(c)) and cy pres (Section 6(d)) already apply to charities that are organized as trusts and probably apply to charities organized as nonprofit corporations. I say probably because there are no statutory rules, but the rules from trust law, including these rules, have been applied to npcs. Although the AG may not offer much protection, the courts take these cases seriously and do provide protection for the donors' intent. The reason for not requiring notification to donors is that doing so may be difficult to impossible. If a fund has 1,000 donors, notification isn't feasible (and notice by publication seems futile to me). If donors cannot be found, then any needed modification would be blocked. We thought about trying to require a "good faith effort" or some such, but couldn't come up with anything that would work across the board, for the many different sorts of charities and funds covered by the act. Of course, if a fund has one or two significant donors, and the donors are still alive, then clearly it is in the charity's best interests to notify those donors and consult about any needed changes.

Again, thanks so much for your comments. They will certainly improve the draft. Part of my goal as we go forward is to strengthen the emphasis on donor intent, and it really helps to have specific suggestions.

Susan Gary
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Dear Ms. Gary,

1. If there is no "empirical study" to back up the comment and you have conflicting responses as to what donors want, you should delete the comment. Some donors may want their funds to grow, not just maintain purchasing power. I would put most of my clients in that category.

2. You are correct, the charity should not accept a gift that has racial restrictions or other commonly recognized "against public policy" restrictions. If it did, the courts have had no hesitation to strike down those types of restrictions. Why muddy the waters with this gratuitous comment?

3. Your position on 6(c) and (d) may or may not be the law in all states. Your reason for not requiring donor participation seems to be based on large multi- donor endowment funds. You should be able to easily craft a donor participation provision with an exception for funds with over a certain number of donors, say 10-15 or 25.
Jim LoPrete

[SNG comment on #3: Even if we could agree on notice to a small number of donors, I think the bigger problem is that we would be creating a rule for npcs that would be different from the rule that currently applies to charitable trusts. We would also be leaving open the question of whether a nonprofit corporation could still use the alternative version of deviation or cy pres under trust law.]