

Donor Intent Protection Act; Senate Sub. for HB 2170

Senate Sub. for HB 2170 creates the Donor Intent Protection Act, which provides legal recourse to an individual charitable donor when the donor's gift restrictions are not followed by the recipient charitable organization.

Purpose

The bill states that its purpose is to provide legal recourse to an individual charitable donor. The bill states recourse is available when, pursuant to an endowment agreement, the donor's gift restrictions are not followed.

The bill requires the recipient to be a charitable organization governing an endowment fund that must contain only property gifted by that single, individual donor.

Definitions

The bill defines terms as follows:

- "Charitable organization" means an organization organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, educational, or other specified purposes that is exempt from federal income taxation as a 501(c)(3) entity under the Federal Internal Revenue Code and maintains its principal office in Kansas;
- "Donor" means an individual who has made a gift of property to an existing endowment fund of a charitable organization or that establishes a new endowment fund of the charitable organization pursuant to terms of an endowment agreement that may include donor-imposed restrictions or conditions governing the use of the gifted endowment property or funds;
- "Donor-imposed restriction" means a written statement within an endowment agreement that specifies obligations on the management or purpose of the property gifted by the donor of the gift as a condition of the charitable organization's receipt of property pursuant to an endowment agreement;
- "Endowment agreement" means an agreement between a donor and a charitable organization that gifts an endowment fund to a charitable organization or gifts property to an endowment fund of a charitable organization and the donor is the only donor gifting such endowment fund or gifting property to such endowment fund;
 - An "endowment agreement" may include donor-imposed restrictions or conditions governing the use of the gifted endowment property or fund;

- “Endowment fund” means an institutional fund that, under the terms of an endowment agreement, is not wholly expendable by the charitable institution on a current basis and contains only property gifted by a single donor. An endowment fund will not include assets that the charitable institution designates as an endowment fund for its own use;
- “Legal representative” means the administrator or executor of a person’s estate; a supervising spouse if a court judgment has settled the accounts of the estate; or a living, named person designated in an endowment agreement to act in place of a party to the agreement for all matters expressed in such endowment agreement and all of the actions such endowment agreement contemplates, including, but not limited to, interpreting, performing, and enforcing such endowment agreement and defending its validity; and
- “Property” means real or personal property or money, cryptocurrency, stocks, bonds, or any other asset or financial instrument.

Violations of Donor-imposed Restriction and Recourse

Except when specifically required or authorized by federal or state law, including the Uniform Prudent Management of Institutional Funds Act (UPMIFA), the bill specifies that no charitable organization that accepts a contribution of property of an endowment fund or to an endowment fund pursuant to an endowment agreement that imposes a written donor-imposed restriction may violate the terms of that restriction.

Under the bill, if the donor-imposed restriction is violated, the donor or the donor’s legal representative may file a complaint within two years after discovery of the breach of agreement, but not more than 40 years after the date of the endowment agreement that established the endowment fund. The complaint may be filed in a district court in the Kansas county where the charitable organization has its principal office or place of carrying out its charitable purpose, or in the county of residence of the donor. The bill allows the complaint to be filed regardless of whether the endowment agreement expressly reserves a right to sue or right of enforcement. A complaint filed under the bill may not seek, or result in a judgment awarding damages to the plaintiff.

If a court determines that a charitable organization violated a donor-imposed restriction, the bill allows the court to order any remedy in law or equity that is consistent with and restores, to the extent possible, the donor’s intent as expressed by the donor-imposed restrictions and conditions in the endowment agreement.

The bill states the remedies section shall not affect or conflict with the violation section. Remedies include, but will not be limited to:

- Future compliance with or performance of donor-imposed restrictions or conditions on the use or expenditure of the gifted endowment property;

- Restitution or restoration by the charitable organization of property to an endowment fund that have been expended or used by the charitable organization in contravention of donor-imposed restrictions;
- An accounting or the imposition of accounting requirements;
- Restoration or a change to a name required by the donor-imposed restrictions;
- Measures to preserve the property and value of the endowment fund;
- Modification or release of a donor-imposed restriction or reformation or dissolution of the endowment agreement as permitted by Kansas law;
- Transfer of property from the endowment fund to another charitable organization as directed by the donor, but only if the transfer would not jeopardize or be inconsistent with the tax-exempt status of the original charitable organization.

The bill does authorize the court to order the return of donated funds to the donor or the donor's legal representative or estate.

Judicial Declaration of Rights and Duties

For an endowment agreement containing donor-imposed restrictions, the bill allows a charitable organization to obtain a judicial declaration of rights and duties as to all of the actions the endowment agreement contemplates, including, but not limited to:

- The interpretation, performance, and enforcement of the agreement; and
- Determination of its validity, as provided in UPMIFA.

The charitable organization may also seek such declaration in any suit brought under the bill.

Non-Retroactivity

The bill states its provisions shall not apply to a modification or release of a donor restriction or purpose ordered or made pursuant to UPMIFA, prior to July 1, 2023, or to any appeal of any such release or modification that is pending on or after July 1, 2023.

The bill further states nothing in the bill affects the authority of the Attorney General to enforce any restriction in an endowment agreement, limits the application of the judicial power of *cy pres*, or alters the right of an institution to modify a restriction on the management, investment, purpose, or use of an endowment fund in a manner permitted by the endowment agreement. [Note: *Cy pres* is a legal term meaning, "The equitable doctrine under which a court reforms a written instrument with a gift to charity as closely to the donor's intention as possible, so that the gift does not fail."]