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CLIENT ALERT

New Options for Nonprofits on Donor-Restricted Funds

By Jennifer Gallop

Massachusetts public charities now have options for accessing, consolidating, and transferring smaller, older donor-restricted funds, including endowment funds, through an administrative process without having to seek court approval.

A recent ruling by the Massachusetts Supreme Judicial Court, S.J.C. Rule 1:23, pursuant to the Uniform Prudent Management of Institutional Funds Act (UPMIFA), permits public charities to modify restrictions on certain institutional funds without petitioning the court if they obtain the consent of the Massachusetts Attorney General.

In addition, under UPMIFA, public charities can also obtain written donor consent to modify or release—in whole or in part—a restriction on donated assets, provided that the released funds continue to be used for the organization's charitable purposes. After the donor has provided the release, the fund's remaining assets may qualify for treatment under the new S.J.C. Rule 1:23 process.

The court's rule, which became effective January 1, 2011, applies to institutional funds that (i) have been in existence for at least 20 years (measured from the original creation and funding date of the institutional fund, and looking back to origination of funds transferred from another charity), and (ii) have a total value of \$75,000 or less as of the end of the last fiscal year.

If a fund meets these criteria, the organization may apply to the Massachusetts Attorney General for consent to either:

1. Modify a restriction contained in a gift instrument on the management, investment, or duration of the institutional fund (Administrative Equitable Deviation); or
2. Modify the purpose of the institutional fund or a restriction on its use as long as (i) it is consistent with the charitable purposes expressed in a gift instrument, and

(ii) if a particular charitable purpose or a restriction included in a gift instrument on the use of such fund has become unlawful, impracticable, impossible to achieve, or wasteful (Administrative Cy Pres).

In response to S.J.C. Rule 1:23, the Attorney General has implemented a new procedure for reviewing administrative requests to modify donor-restricted funds. This procedure was recently updated on the Attorney General's website.

The new administrative procedure requires the organization to complete a Form PC-IF for the institutional fund. In addition to the Form PC-IF, the Attorney General also requires for these submissions:

- An officer's certificate of the Board of Directors' authorization for the administrative request.
- A copy of the gift instrument.
- A financial statement of the institutional fund for the most recent fiscal year.

Additionally, if the funds will be transferred to another institution, the Attorney General requests an affidavit from the recipient institution consenting to the transfer and to the use of the funds subject to any restrictions.

The Massachusetts Attorney General's Division of Public Charities will review the application to determine whether the proposed modifications are appropriate and consistent with applicable laws governing charitable funds. If so, the Attorney General's office will consent to the relief requested.

The new administrative procedure should prove useful in connection with transfers of program assets and corporate restructuring, as well as for simplifying financial operations generally.

To take advantage of the new rule, organizations may want to modify their record-keeping for restricted funds by including a record of creation and funding dates and monitoring fund balances.

Jennifer Gallop is a partner at Krokidas & Bluestein LLP, where she practices health care, nonprofit, and administrative law. She can be reached at jgallop@kb-law.com. Click to read Jennifer Gallop's recent article on this topic that appears at massnonprofit.org.