SENATE BILL NO. 424

INTRODUCED BY L. MOSS

A BILL FOR AN ACT ENTITLED: "AN ACT ADOPTING THE UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT; PROVIDING GUIDANCE AND AUTHORITY TO CHARITABLE ORGANIZATIONS CONCERNING THE MANAGEMENT AND INVESTMENT OF FUNDS HELD BY THOSE ORGANIZATIONS; IMPOSING DUTIES ON THOSE WHO MANAGE AND INVEST CHARITABLE FUNDS; PROVIDING ADDITIONAL PROTECTIONS FOR CHARITIES AND THE INTERESTS OF DONORS; AMENDING SECTIONS 72-30-101, 72-30-102, 72-30-103, AND 72-30-207, MCA; AND REPEALING SECTIONS 72-30-201, 72-30-202, 72-30-203, 72-30-204, 72-30-205, AND 72-30-206, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 72-30-101, MCA, is amended to read:

"72-30-101. Short title. This chapter may be cited as the "Uniform Prudent Management of Institutional Funds Act"."

Section 2. Section 72-30-102, MCA, is amended to read:

"72-30-102. Definitions. In this chapter, the following definitions apply:

(1) "Charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of a governmental purpose, or any other purpose the achievement of which is beneficial to the community.

~~(1)~~(2) (a) "Endowment fund" means an institutional fund or any part ~~thereof~~ of the fund that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis ~~under the terms of the applicable gift instrument~~.

(b) The term does not include assets that an institution designates as an endowment fund for its own use.

~~(2)~~(3) "Gift instrument" means a ~~will, deed, grant, conveyance, agreement, memorandum, writing, or other governing document (~~ record or records, including ~~the terms of any~~ an institutional ~~solicitations~~ solicitation, ~~from which an institutional fund resulted)~~ under which property is granted to, transferred to, or held by an institution as an institutional fund.

~~(3) "Governing board" means the body responsible for the management of an institution or of an institutional fund.~~

~~(4) "Historic dollar value" means the aggregate fair value in dollars of:~~

~~(a) an endowment fund at the time it became an endowment fund;~~

~~(b) each subsequent donation to the fund at the time it is made; and~~

~~(c) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund.~~

~~(5)~~(4) "Institution" means:

(a) ~~an incorporated or unincorporated organization~~ a person, other than an individual, organized and operated exclusively for ~~educational, religious,~~ charitable~~, or other eleemosynary~~ purposes;

(b) ~~or~~ a government or governmental ~~organization~~ subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for ~~any of these purposes~~ a charitable purpose; and

(c) a trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated.

~~(6)~~(5) (a) "Institutional fund" means a fund held by an institution ~~for its exclusive use, benefit, or~~ exclusively for charitable purposes.

(b) ~~but~~ The term does not include:

(i) program-related assets;

~~(a)~~(ii) a fund held for an institution by a trustee that is not an institution; or

~~(b)~~(iii) a fund in which a beneficiary that is not an institution has an interest, other than ~~possible rights~~ an interest that could arise upon violation or failure of the purposes of the fund.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(7) "Program-related asset" means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.

(8) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."

Section 3. Section 72-30-103, MCA, is amended to read:

"72-30-103. Uniformity of application and construction. ~~This~~ In applying and construing this chapter,

~~shall be so applied and construed as to effectuate its general purpose to make uniform~~ consideration must be given to the need to promote uniformity of the law with respect to ~~the~~ its subject ~~of this chapter~~ matter among those states ~~which~~ that enact it."

Section 4. Section 72-30-207, MCA, is amended to read:

"72-30-207. Release or modification of restrictions ~~in gift instrument~~ on management, investment, or purpose. (1) ~~With the written consent of~~ If the donor consents in a record, ~~the governing board~~ an institution may release or modify, in whole or in part, a restriction ~~imposed by the applicable~~ contained in a gift instrument on the ~~use or~~ management, investment, or purpose of an institutional fund.

~~(2) If written consent of the donor cannot be obtained by reason of his death, disability, unavailability, or impossibility of identification, the governing board may apply in the name of the institution to the appropriate court for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. The attorney general shall be notified of the application and shall be given an opportunity to be heard. If the court finds that the restriction is obsolete, inappropriate, or impracticable, it may by order release the restriction in whole or in part. A release under this subsection may not change an endowment fund to a fund that is not an endowment fund.~~

~~(3)~~ A release or modification ~~under this section~~ may not allow a fund to be used for ~~purposes~~ a purpose other than ~~the educational, religious,~~ a charitable~~, or other eleemosynary purposes~~ purpose of the institution ~~affected~~.

~~(4) This section does not limit the application of the doctrine of cy-pres.~~

(2) The court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. The institution shall notify the attorney general of the application, and the attorney general must be given an opportunity to be heard. To the extent practicable, any modification must be made in accordance with the donor's probable intention.

(3) If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the attorney general of the application, and the attorney general must be given an opportunity to be heard.

(4) If an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution, 60 days after notification to the attorney general, may release or modify the restriction, in whole or part, if:

(a) the institutional fund subject to the restriction has a total value of less than $25,000;

(b) more than 20 years have elapsed since the fund was established; and

(c) the institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument."

NEW SECTION. **Section 5. Standard of conduct in managing and investing institutional fund.** (1) Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.

(2) In addition to complying with the duty of loyalty imposed by law other than this chapter, each person responsible for managing and investing an institutional fund shall manage and invest the fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(3) In managing and investing an institutional fund, an institution:

(a) may incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution, and the skills available to the institution; and

(b) shall make a reasonable effort to verify facts relevant to the management and investment of the fund.

(4) An institution may pool two or more institutional funds for purposes of management and investment.

(5) Except as otherwise provided by a gift instrument, the following rules apply:

(a) In managing and investing an institutional fund, the following factors, if relevant, must be considered:

(i) general economic conditions;

(ii) the possible effect of inflation or deflation;

(iii) the expected tax consequences, if any, of investment decisions or strategies;

(iv) the role that each investment or course of action plays within the overall investment portfolio of the fund;

(v) the expected total return from income and the appreciation of investments;

(vi) other resources of the institution;

(vii) the needs of the institution and the fund to make distributions and to preserve capital; and

(viii) an asset's special relationship or special value, if any, to the charitable purposes of the institution.

(b) Management and investment decisions about an individual asset must be made not in isolation but rather in the context of the institutional fund's portfolio of investments as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the fund and to the institution.

(c) Except as otherwise provided by law other than this chapter, an institution may invest in any kind of property or type of investment consistent with this section.

(d) An institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the fund are better served without diversification.

(e) Within a reasonable time after receiving property, an institution shall make and carry out decisions concerning the retention or disposition of the property or to rebalance a portfolio, in order to bring the institutional fund into compliance with the purposes, terms, and distribution requirements of the institution as necessary to meet other circumstances of the institution and the requirements of this chapter.

(f) A person that has special skills or expertise, or is selected in reliance upon the person's representation that the person has special skills or expertise, has a duty to use those skills or that expertise in managing and investing institutional funds.

NEW SECTION. **Section 6. Appropriation for expenditure or accumulation of endowment fund -- rules of construction.** (1) Subject to the intent of a donor expressed in the gift instrument and to subsection (4), an institution may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines is prudent for the uses, benefits, purposes, and duration for which the endowment fund is established. Unless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:

(a) the duration and preservation of the endowment fund;

(b) the purposes of the institution and the endowment fund;

(c) general economic conditions;

(d) the possible effect of inflation or deflation;

(e) the expected total return from income and the appreciation of investments;

(f) other resources of the institution; and

(g) the investment policy of the institution.

(2) To limit the authority to appropriate for expenditure or accumulate under subsection (1), a gift instrument must specifically state the limitation.

(3) Terms in a gift instrument designating a gift as an endowment, or a direction or authorization in the gift instrument to use only "income", "interest", "dividends", or "rents, issues, or profits", or "to preserve the principal intact", or words of similar import:

(a) create an endowment fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the fund; and

(b) do not otherwise limit the authority to appropriate for expenditure or accumulate under subsection (1).

(4) The appropriation for expenditure in any year of an amount greater than 7% of the fair market value of an endowment fund, calculated on the basis of market values determined at least quarterly and averaged over a period of not less than 3 years immediately preceding the year in which the appropriation for expenditure was made, creates a rebuttable presumption of imprudence. For an endowment fund in existence for fewer than 3 years, the fair market value of the endowment fund must be calculated for the period the endowment fund has been in existence. This subsection does not:

(a) apply to an appropriation for expenditure permitted under law other than this chapter or by the gift instrument; or

(b) create a presumption of prudence for an appropriation for expenditure of an amount less than or equal to 7% of the fair market value of the endowment fund.

NEW SECTION. **Section 7. Delegation of management and investment functions.** (1) Subject to any specific limitation set forth in a gift instrument or in law other than this chapter, an institution may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances. An institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in:

(a) selecting an agent;

(b) establishing the scope and terms of the delegation, consistent with the purposes of the institution and the institutional fund; and

(c) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the scope and terms of the delegation.

(2) In performing a delegated function, an agent owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation.

(3) An institution that complies with subsection (1) is not liable for the decisions or actions of an agent to which the function was delegated.

(4) By accepting delegation of a management or investment function from an institution that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state in all proceedings arising from or related to the delegation or the performance of the delegated function.

(5) An institution may delegate management and investment functions to its committees, officers, or employees as authorized by law of this state other than this chapter.

NEW SECTION. **Section 8. Reviewing compliance.** Compliance with this chapter is determined in light of the facts and circumstances existing at the time a decision is made or action is taken and not by hindsight.

NEW SECTION. **Section 9. Application to existing institutional funds.** This chapter applies to institutional funds existing on or established after [the effective date of this act]. As applied to institutional funds existing on [the effective date of this act], this chapter governs only decisions made or actions taken on or after that date.

NEW SECTION. **Section 10. Relation to Electronic Signatures in Global and National Commerce Act.** This chapter modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001, et seq., but does not modify, limit, or supersede section 101 of that act, 15 U.S.C. 7001(a), or authorize electronic delivery of any of the notices described in section 103 of that act, 15 U.S.C. 7003(b).

NEW SECTION. **Section 11. Repealer.** Sections 72-30-201, 72-30-202, 72-30-203, 72-30-204, 72-30-205, and 72-30-206, MCA, are repealed.

NEW SECTION. **Section 12. Codification instruction.** [Sections 5 through 10] are intended to be codified as an integral part of Title 72, chapter 30, and the provisions of Title 72, chapter 30, apply to [sections 5 through 10].

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