



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY
ATTORNEY GENERAL

(617) 727-2200
(617) 727-4765 TTY
www.mass.gov/ago

**Attorney General Guidance on Endowments for Charities
Facing Financial Challenges Due to COVID-19
April 28, 2020**

The Commonwealth of Massachusetts, along with the rest of the nation, is facing a multi-faceted adversary in COVID-19. While we are confident that our researchers, scientists, first responders, and health care workers will help us to overcome this challenge, this crisis has affected the very institutions that educate, train, employ, and deploy our frontline workers, as well as other important public charities such as museums and community organizations. Massachusetts public charities are facing revenue shortfalls, unexpected debt and repayment obligations, and other unanticipated circumstances resulting from this crisis. In these circumstances, charities may find themselves considering extraordinary measures to ensure survival and continued fidelity to their charitable missions.

Donor-restricted endowment funds are an important, perpetual source of support for charities and their missions; they are not available for unlimited discretionary spending. The Massachusetts Attorney General's Office ("AGO"), through its Non-Profit Organizations/Public Charities Division (the "Division"), offers these guidelines to public charities examining their endowments as a potential source of funding to address current challenges.

The Division provides this guidance for informational purposes only and not as a substitute for legal advice. The Division encourages institutions and the leaders that govern them to seek legal counsel when considering the issues discussed herein.

Overview

This Guidance covers the following:

- Part I Background on Endowment Funds and Governing Law
- Part II Exploring Other Sources of Funding Before Seeking Court Approval to Modify Donor-Imposed Restrictions on Endowment Funds
- Part III Accessing Donor-Restricted Endowment Funds Without Court Approval
- Part IV Seeking Court Approval to Access Donor-Restricted Endowment Funds
- Part V Submitting Requests to Modify Endowment Funds to the AGO for Review
- Part VI How the Division Can Help

I. Background on Endowment Funds and Governing Law

Many charities hold endowment funds, which broadly speaking are donor-restricted funds that are intended to be invested and used to perpetually sustain charities and their missions. The AGO oversees the administration of endowment funds and other assets that charitable nonprofits and charitable trusts hold throughout the Commonwealth. This authority arises under common law and the AGO's statutory mandate to "enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof." M.G.L. c. 12, § 8. In particular, the AGO is a necessary party to a charity's request for judicial relief to modify charitable restrictions – including endowment restrictions subject to the Uniform Prudent Management of Institutional Funds Act, M.G.L. c. 180A, §§ 1-9 (UPMIFA).

Most Massachusetts public charities (referred to by UPMIFA and herein as an "institution") holding donor-restricted endowment funds are subject to UPMIFA. M.G.L. c. 180A, § 1. Pursuant to UPMIFA, endowment funds have three necessary characteristics. First, endowment funds are held exclusively for charitable purposes. These purposes may be for the institution's general charitable purposes or for more specific purposes that fall within the overall charitable purposes of the institution. Second, endowment funds cannot be spent by the institution all at once. Only a portion of an endowment fund may be spent throughout the year (most often some or all of the income earned) in accordance with UPMIFA's rules on prudent expenditures and the institution's internal spending policies.¹ Finally, generally speaking, the spending restrictions on endowment funds are donor imposed—expressly through a gift instrument or impliedly in response to fundraising solicitations, in contrast to restrictions the institution itself imposed through action of its board.² A fund with these three characteristics is subject to UPMIFA except to the extent that a donor has clearly provided otherwise. M.G.L. c. 180A, § 3(b).

The distinction between donor-restricted endowment funds and board-restricted institutional funds is important: an institution may modify the terms of board-restricted institutional funds without court approval, but only the donor or a court has the power to modify donor-imposed restrictions on endowment funds. This proscription on extrajudicial modifications of donor-restricted endowment funds protects the perpetual duration of endowment funds and the charitable purposes for which they were established. Accordingly, institutions that are looking to their endowment funds for financial relief during this crisis should

¹ The average effective spending rate from endowments in fiscal year 2019 was 4.5%. Press Release, 2019 NACUBO-TIAA Study of Endowments, National Association of College and University Business Officers & TIAA, available at <https://www.nacubo.org/Press-Releases/2020/US-Educational-Endowments-Report-5-3-Percent-Average-Return-in-FY19>. As a practical matter, the institution's governing board decides what percentage of the endowment fund to spend on the fund's charitable purposes in any given year. Note, in addition to expenditure restrictions, endowment funds may also be subject to specific use or purpose restrictions.

² Although by definition endowment funds are necessarily also institutional funds, this guidance is limited to endowment funds because institutional funds (as defined by UPMIFA) are a broader category of funds that are not subject to the same spending restrictions as endowment funds (institutional funds may or may not be subject to donor restrictions).

consider the potential alternatives to, as well as the myriad implications of, this extraordinary measure.

II. Exploring Other Sources of Funding Before Seeking Court Approval to Modify Donor-Imposed Restrictions on Endowment Funds

As a practical matter, institutions facing acute financial needs should explore other funding sources before considering expanded use of their endowment funds. The Division expects that, prior to submitting to the AGO (and the court) a request to modify donor-imposed restrictions on endowment funds, institutions will have explored the following questions:

- Can the institution raise new, unrestricted donations?
- Is there funding available through federal or state sources, such as the Coronavirus Aid, Relief and Economic Security Act (CARES Act), Small Business Recovery Loan Fund, or Economic Injury Disaster Loan Program?
- Is there grant funding available through COVID-19 relief funds or private foundations?
- Are there other financing or refinancing options, including through commercial banks?

Institutions should consult with legal counsel to assess the above questions. These other funding mechanisms may be effective ways to address financial gaps the COVID-19 emergency has created, without seeking to modify restricted endowment funds.

III. Accessing Donor-Restricted Endowment Funds Without Court Approval

If alternative funding sources are unavailable or insufficient, institutions may be looking to their endowment funds to address unanticipated costs and monetary shortfalls related to COVID-19. Before asking the court to modify endowment fund restrictions, institutions should first assess whether the following nonjudicial remedies are viable options.

Ask donors to release spending restrictions

Institutions and counsel should consider whether it is feasible to contact donors to obtain their consent to lift or modify the spending restrictions on donor-restricted endowment funds.³ UPMIFA expressly provides that institutions may release or modify restrictions imposed on endowments funds with donor consent. M.G.L. c. 180A, § 5(a). The particular modification will depend on any agreement reached between the institution and the donor. But, with donor consent, the institution may access the modified fund (or relevant portion thereof) to further the fund's charitable purpose, subject to applicable fiduciary duties of care and loyalty.

Consider endowment spending adjustments

Institutions anticipating revenue shortfalls or extraordinary costs due to COVID-19 may be able to increase endowment fund spending in a given year, with the potential for downward

³ Institutions may consider similar measures in assessing other donor-restricted funds that are not subject to spending restrictions.

adjustments in later years.⁴ Although UPMIFA provides authority for an institution to increase or decrease the “take” from an endowment fund,⁵ the foundational principles of endowments remain: they must retain their purchasing power (i.e., the fund must grow to keep pace with inflation); they may not be expended all at once; and donor intent must be respected. Institutions should discuss carefully with legal counsel the options that UPMIFA’s expenditure provisions afford them.

Pursue administrative modification of small and old funds

In limited circumstances, court approval may not be required for modifications of endowment funds with less than \$75,000 and that have been in existence for 20 years or longer. Institutions may apply to the AGO for administrative modification of such funds, which in some cases may free up resources to address COVID-related shortfalls. The Division’s guidance on these administrative modifications may be found here: <https://www.mass.gov/service-details/donor-restricted-gifts>.

IV. Seeking Court Approval to Access Donor-Restricted Endowment Funds

For institutions that have exhausted alternative funding options or otherwise have determined that accessing endowment funds is necessary in light of COVID-19, modification proceedings before the court may be available. UPMIFA addresses such requests and describes the circumstances and standards that may be applicable. Institutions should consult with counsel for appropriate legal advice. What follows is a general overview of the potential legal remedies.

Massachusetts courts may modify certain endowment fund restrictions pursuant to two equitable doctrines, codified in UPMIFA. M.G.L. c. 180A, § 5. These two doctrines recognize that with the passage of time and changed circumstances, a donor’s original charitable intent—and the mechanisms for advancing that intent—may someday become obsolete. The *cy pres* doctrine permits a court to modify an endowment fund’s charitable purpose or use restriction if the purpose or restriction has become “unlawful, impracticable, impossible to achieve or wasteful”; *cy pres* modifications must be consistent with the charitable purposes reflected in the original gift instrument.⁶ *Id.* at § 5(c). The doctrine of equitable deviation permits a court to modify a management, investment, or durational restriction on an endowment 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

⁴ Model Uniform Prudent Management of Institutional Funds Act § 4 comment subsection (d) (2006).

⁵ Importantly, the institution’s board is subject to the fiduciary duty of care, and spending decisions must be based on the board’s consideration of several different statutory factors. These factors include: the duration and preservation of the endowment fund; the purposes of the institution and the endowment fund; general economic conditions; the possible effect of inflation or deflation; the expected total return from income and the appreciation of investments; other resources of the institution; and the investment policy of the institution. M.G.L. c. 180A, § 3(a).

⁶ Institutions that seek to modify a donor-imposed purpose or use restrictions (i.e., specific charitable purposes or uses within the overall charitable mission of the institution) must pursue *cy pres* relief.

restriction will further the purposes of the fund”]; deviation modifications should be consistent with the donor’s probable intent.⁷ *Id.* at § 5(b).

A threshold determination of whether to seek judicial relief under these equitable doctrines depends on the facts and circumstances of each case, the specific relief sought, and whether the institution meets the requisite evidentiary standards. When it is not clear which doctrine applies, it may be appropriate to plead in the alternative.⁸ Importantly, if an institution pursues judicial relief pursuant to either or both of these doctrines, the AGO is a necessary party to any such action.

The Division understands that some charitable institutions may consider borrowing from an endowment fund or making an outright distribution from the fund that exceeds the amount that the institution could spend from the fund using the standard UPMIFA rule described above. The Division’s position is that either remedy requires court approval.⁹ An important factor that the Division will consider is whether such borrowing or invasion of the endowment fund will materially increase the likelihood of the institution’s continued operations in furtherance of its mission. It is the Division’s position that if borrowing or invasion will merely delay impending closure, cessation of operations, or discontinuance of charitable activities, modification of an endowment fund’s spending restrictions may not be appropriate. Although legal counsel will advise on the best course of action, we note that courts are guided by the principle that the less extreme modification or deviation (in this case, borrowing) is the preferred outcome.¹⁰

V. Submitting Requests to Modify Endowment Funds to the AGO for Review

If, after exploring the above, the institution decides that it will request deviation or *cy pres* relief, it should contact the AGO to discuss the proposed petition, judicial relief, and any related considerations. As the AGO is a necessary party to any such action, the appropriate court will want to know whether the AGO assents to the relief requested. Accordingly, the institution should be prepared to provide the AGO, and include or attach to the petition as appropriate, the following:

⁷ Since general purpose endowment funds implicitly manifest, at a minimum, a donor’s intent to both further the institution’s charitable purposes and create a fund of perpetual duration, proposed deviations to facilitate access to endowment funds should be carefully drawn to hew closely to that intent.

⁸ *See, e.g.,* Ann Hetherwick Cahill & Lisa M. Cukier, Cy Pres and Deviation, in FIDUCIARY LITIGATION IN THE PROBATE COURT, MASSACHUSETTS CONTINUING LEGAL EDUCATION, INC. (2019) (“[I]t is sometimes difficult to determine which principle applies, particularly when the requested relief does not involve a traditional change of purpose under the *cy pres* doctrine, but also is not easily characterized as an administrative change.”).

⁹ We recognize that during the COVID-19 crisis, an institution may have an immediate need for funds. It is the Division’s position that emergency access to endowment funds does not abrogate the requirement that such action be sanctioned by the appropriate court. We encourage institutions and their counsel to carefully consider their fiduciary obligations under governing statutory and common law standards, including those articulated in the Restatement of the Law of Charitable Nonprofit Organizations. *See* Restatement of the Law of Charitable Nonprofit Org. § 3.03 comment c TD No 1 (2016).

¹⁰ *See* Restatement of the Law of Charitable Nonprofit Org. § 3.03 comment b(3) TD No 1 (2016).

- A description of the circumstances that led to the current financial situation and steps taken to ameliorate the financial crisis, including reference to any alternatives explored;
- If the institution seeks to take the extraordinary measure of borrowing from an endowment fund (which requires court approval), assurances that outline a business plan for repayment and viability post-COVID-19 crisis;
- A clear articulation of how the facts and circumstances necessitating relief meet either or both of the equitable deviation and *cy pres* standards, as articulated in UPMIFA;
- A description as to how such extraordinary measures will further the purposes of the endowment fund and donor's probable intent (deviation) or are as near as possible to the charitable purposes expressed in the gift instrument (*cy pres*); and
- An agreement to make periodic reports to the AGO regarding repayment and financial health, as appropriate.

VI. How the Division Can Help

The Division stands ready to assist public charities from our virtual office. Our legal team is available by phone and email to discuss these issues and answer your questions. For proposed judicial proceedings, we will review draft petitions and provide feedback. We will also provide sample documents if requested to assist institutions with their pleadings. And, we will cooperate as appropriate to help schedule emergency court hearings if needed.

Please note that we request that all drafts, correspondence, and other notices be submitted electronically, to the extent permitted by applicable court rules. Please contact the Division at charities@mass.gov or at 617-727-2200 ex. 2101.