



The **23rd Annual**

Planned Giving CONFERENCE

presented by the **Northern California Planned Giving Council**
in association with Colonial Consulting, LLC

MASTERS TRACK

Session 2: 11:00 am - 12:15 pm

Topic:

What Can We Do With Those Old Restricted Funds?

Presented by:

Jill S. Dodd, Esq.

Workshop Summary:

Many charitable organizations are managing restricted funds whose terms have become obsolete in some fashion, or they are approached by the original donors--or perhaps their descendants--to change the terms of a prior gift. This workshop will use both statutory analysis and real life case studies to illustrate when and how charities can respond to changed circumstances or donor requests when considering changing the terms of older restricted funds.

Workshop Presenter



Jill S. Dodd, Esq., chairs the firm's Family Wealth Transfer Planning and Trust & Estate Administration practice, focusing on gift, estate and philanthropic planning for very-high-net-worth individuals and families. She also chairs the firm's Not-for-Profit Organizations practice.

Ms. Dodd counsels very-high-net-worth individuals in all aspects of gift, estate and philanthropic planning. She has extensive experience designing and implementing a variety of sophisticated structures, including family limited partnerships, grantor retained annuity trusts, insurance trusts, defective grantor trusts, qualified personal residence trusts, charitable lead trusts and charitable remainder trusts, all designed to transfer assets to heirs and to charities in a tax-efficient manner that respects the values of the families. Ms. Dodd routinely represents individuals in gift and estate tax audits before the IRS. She also counsels clients on all aspects of trust administration.

In her Not-for-Profit practice, Ms. Dodd acts as outside general counsel to charitable organizations of all types, including community foundations large and small; operating charities, such as museums and schools; and private family foundations. She has extensive experience in all aspects of a charity's activities, including structuring start-ups and obtaining exemptions; advising on compliance issues with respect to local, state and federal law; advising on governance issues, including conflict of interest and fiduciary duties; and working with charities to structure subsidiaries and joint ventures. She has successfully represented charities in audits before the California Attorney General and the IRS.

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WHAT CAN WE DO WITH THOSE OLD RESTRICTED FUNDS?

Northern California Planned Giving Council

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What's the Problem?

What are the governing rules?

Real Life Adventures in Fund Modification

THE PROBLEMS

- Outdated charitable purposes
 - Cures for diseases that no longer exist
 - Scholarships limited by race or gender
 - Number of potential scholarship recipients has become too small
 - Support for an athletic program – or a performing arts organization – that no longer exists

- Outdated/impractical management restrictions
 - “Invest only in [Treasury bills/municipal bonds/blue chip stocks]”
 - Unwieldy committee structure to administer the fund
 - Certain required number of scholarships/year – too few or too many
 - Limit on size of scholarships such that each is so small as to be of little practical value

- Unclear Endowment Restrictions
 - Do the distribution provisions subject the fund to UPMIFA – or not?
 - Is the fund donor-endowed, board-endowed, or (Heaven forbid!) a little bit of both?

- The fund has become too small
- Donors – or their descendants - want to change the original terms

GOVERNING RULES

Variance Power

- Unnecessary, incapable of fulfillment or inconsistent with charitable needs of community served
- Is this language in the fund agreement?
- Is this language in the governing documents?

Uniform Prudent Management of Institutional Funds Act (UPMIFA)

- Effective January 1, 2008
- Updated definition of prudent investor rule
- Defined endowments
- Statutory road map to revising the terms of a restricted fund

UPMIFA Section 18502(b)

- An endowment fund means a fund that, under the terms of the gift instrument, is not wholly expendable.
- Excludes funds that have been designated as endowed by the institution itself (“board-designated endowment”, “quasi-endowment”)

UPMIFA Section 18504(a)

An institution may appropriate for expenditure from an endowment so much of the funds as is “prudent for the uses, benefits, purposes and duration of the fund,” taking into account a variety of factors.

- The so-called “spend guideline”

UPMIFA Section 18504(c)

Terms in a gift instrument directing the use of “only income,” “interest,” “dividends,” or “to preserve the principal intact” are no longer literally applicable: the “prudent” standard applies.

- The terms in a gifting instrument are not always clear

UPMIFA Section 18506: Release or modification of restrictions

- May release or modify a restriction on “management, investment or purpose” with consent of donor
- Court may approve a modification of management or investment if “impracticable or wasteful” with notice to the Attorney General
- Court may modify charitable purpose if it becomes “unlawful, impracticable, impossible to achieve or wasteful” with notice to the Attorney General

UPMIFA Section 18506 (cont.'d)

- Funds with less than \$100,000 and more than 20 years old may be modified without donor or court consent 60 days after notice to the Attorney General and to donors
- Applies to management, investment and purpose restrictions but:
 - Charitable purposes must remain consistent with gift instrument; and
 - Endowment restriction may not be released

Real Life Adventures in Fund Modification

Example #1: Is endowed fund subject to UPMIFA?

A \$20+ million dollar fund with restrictive endowment provisions and an unwieldy committee structure established in the early 1980s

- “Spend all income and up to \$75,000 principal” each year
- Advisory Committee recommends substantial grants out of sync with foundation’s grants from unrestricted endowment

Solution: court petition to amend endowment restrictions to come under standard UPMIFA guidelines and to restructure Advisory Committee

- The case we had to make to the court

Example #2: Is the fund fully expendable or endowed?

- Document states it's endowed
- But also appears to give sons of donor the ability to spend down, although language is not clear
- Cost-effective Solution: no-objection letter from the Attorney General
 - Contained declarations of sons and donor's attorney regarding donor intent

Example #3: The unhappy surviving donor

- Multi-million dollar fund established by two siblings to support a local wildlife preserve.
 - Surviving sibling wants to move the fund to a very small, New York-based foundation whose charitable purpose is unrelated to supporting a Northern California wildlife preserve, and which foundation is run by her son
 - Is this foundation the proper steward?
 - Impermissible donor benefit?
- What are the charity's obligations under the law?
- Solution: propose transfer of the fund to a local independent charitable organization able to manage the Fund effectively.

Example #4: Fund too small to administer

Problem: Endowed scholarship fund decreasing in size and with too small an applicant pool

Issues: 150+ donors (some deceased), so donor notification/consent onerous and impractical

Endowment restriction can't be lifted without donor consent

Solution: Use Board's variance power to combine into larger endowed scholarship fund

Example #5: Operating charity no longer wants to manage a donor-endowed fund. Can they move it to a community foundation, to be held under the same restrictions?

- Will community foundation hold as a true agency fund or a fund over which the community foundation has variance power?
 - The latter is a change in a management restriction
 - Need donor consent
 - With possible Attorney General notification
 - Or court approval

QUESTIONS?

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