

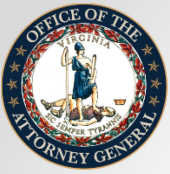


The Role of the Attorney General in Modifying the Purpose and Disposition of Charitable Assets

Flora T. Hezel

Senior Assistant Attorney General
Financial Law & Government Support Section

Office of the Attorney General
Barbara Johns Building, 202 North Ninth Street, Richmond Virginia 23219
Office: 804.786.8587
fhezel@oag.state.va.us



Introduction

- Financial Law & Government Support Section (FLAGS) oversees Attorney General's responsibilities with respect to Charitable Funds (not charitable solicitations)
 1. Attorney General's broad authority to act to protect public interest
 2. Modifications of Gift Restrictions (UPMIFA)
 3. Charitable Trust Modifications



Common Law Authority

- English Common Law
 - David Villar Patton, *The Queen, the Attorney General, and the Modern Charitable Fiduciary: A Historical Perspective on Charitable Enforcement Reform*, 11 *U. Fla. J.L. & Pub. Pol'y* 131 (2000).
- Notable Virginia cases:
 - *Clark v. Oliver*, 80 Va. 718 (1885).
 - *Tauber v. Commonwealth*, 255 Va. 445 (1998).
 - *Commonwealth ex rel. Beales v. JOCO Foundation*, 263 Va. 151 (2002).



Statutory Authority

- 2002 Va. Acts 792
 - Enacted by the General Assembly in the 2002 Session as a response to *JOCO* (decided January 11, 2002).
 - Codifies common law to apply to charitable corporations.
 - Added § 2.2-507.1 and § 17.1-513.01 to the Code of Virginia.



Va. Code § 2.2-507.1

Authority of Attorney General regarding charitable assets.

A. The assets of a charitable corporation incorporated in or doing any business in Virginia shall be deemed to be held in trust for the public for such purposes as are established by the governing documents of such charitable corporation, the gift or bequest made to such charitable corporation, or other applicable law. The Attorney General shall have the same authority to act on behalf of the public with respect to such assets as he has with respect to assets held by unincorporated charitable trusts and other charitable entities, including the authority to seek such judicial relief as may be necessary to protect the public interest in such assets.

B. Nothing contained in this section is intended to modify the standard of conduct applicable under existing law to the directors of charitable corporations incorporated in or doing any business in Virginia.*

*Section B was added in 2004.



Uniform Prudent Management of Institutional Funds Act (UPMIFA)

- Provides guidance on investment decisions and endowment expenditures for nonprofit and charitable organizations.
- Requires the organization to consider the charitable purposes of the charity and the purposes of the endowment funds when making spending decisions.
- Applies to charities organized as charitable trusts, nonprofit corporations, or in some other manner,
- Does NOT apply to funds managed by trustees that are not charities.



UPMIFA

- Clarifies that the doctrines of cy pres and deviation apply to funds held by nonprofit corporations as well as to funds held by charitable trusts.
- Provisions derive from the UTC's approach for modifying charitable trusts.
- UPMIFA has been adopted in some form by 49 states and territories.
- UPMIFA is codified at §§ 64.2-1100 through 64.2-1108.



Va. Code § 64.2-1104

- No Notice to AG Required:

Sub. A	Donor consents in writing to a modification in line with charitable purpose of institution	No notice
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- Required permission and notice:

Sub. E	Funds older than 20 years and less than \$50,000	AG notice
Sub. D	Funds more than \$50,000 but less than \$250,000	AG notice AG approval
Sub. B & C	Funds more than \$250,000	AG notice Court approval



Va. Code § 64.2-1104

A. If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund. A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.



Va. Code § 64.2-1104

E. 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:

1. The institutional fund subject to the restriction has a total value of less than \$ 50,000;
2. More than 20 years have elapsed since the fund was established; and
3. The institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.



Va. Code § 64.2-1104

D. 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, without application to the court but with the consent of the Attorney General, 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 if the fund subject to the restriction has a total value of less than \$ 250,000.



Va. Code § 64.2-1104

B. 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 shall be given an opportunity to be heard. To the extent practicable, any modification shall be made in accordance with the donor's probable intention.

C. If a particular charitable purpose or 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 shall be given an opportunity to be heard.



Contacting the OAG

- When you have a request to modify or release a restriction pursuant to § 64.2-1104 B-D or need to notify the OAG of a modification or release pursuant to subsection E:
 - **CALL US**
 - Then, send a written request containing:
 - A description of the proposed modification;
 - A description of the factors motivating the request;
 - A description and copy of any communication with the donor regarding the proposed modification
 - The gift instrument and/or other relevant documents which demonstrate the gift's purpose.
 - For subsection D & E, a draft “no objection” letter.
 - For subsection B & C, a draft consent order with a “SEEN AND NOT OBJECTED TO” signature block for the OAG.



Five or More Funds

- When, seeking a release or modification for five or more funds, include a spreadsheet containing the following information about each fund:
 - Date gift was made
 - Whether the request is pursuant to subsection B, C, D, or E
 - The current value of the fund
 - Purpose
 - Proposed modification
 - Donor communications



Additional Resources

- UPMIFA Program Related Assets Article
 - <http://www.uniformlaws.org/Shared/Docs/Prudent%20Mgt%20of%20Institutional%20Funds/UPMIFA%20Program%20Related%20Assets%20Article.pdf>
- UPMIFA Summary
 - [http://uniformlaws.org/ActSummary.aspx?title=Prudent Management of Institutional Funds Act](http://uniformlaws.org/ActSummary.aspx?title=Prudent%20Management%20of%20Institutional%20Funds%20Act)



Trust Modifications

- Uniform Trust Code (UTC) gives AG authority to act in charitable trust matters.
 - AG designated as qualified beneficiary of all trusts in the Commonwealth.
- Common reasons for seeking a trust modification include:
 - Disagreements among beneficiaries
 - Original purpose of trust no longer possible
 - Amending terms to qualify for federal tax exemptions
- The OAG will rarely agree to a modification if any other trust beneficiary has a reasonable objection.



Trust Modifications

- Uniform Trust Decanting Act, §64.2-779.1, et seq
 - Adopted by Virginia General Assembly in 2017
 - Authorized fiduciary must give notice to AG of exercise of decanting power if § 64.2-779.11 (B) applies
 - § 64.2-779.11 (B) provides that “if a first trust contains a determinable charitable interest, the AG has the rights of a qualified beneficiary and may represent and bind the charitable interest.”



Trust Modifications

- If first trust has determinable charitable interest, second trust that includes same must be administered under the laws of the Commonwealth unless
 - AG fails to object in signed writing delivered to fiduciary within notice period
 - AG consents in signed writing to administration of second trust in another jurisdiction; or
 - Court approves exercise of decanting power



Public Notice

- §64.2-713 requires notice to public at large if judicial proceeding seeks to modify or terminate a charitable trust
 - Notice occurs by order of publication
 - Purpose is “solely to make the public aware of the nature of such proceedings, the remedy being sought therein, and the opportunity to share their views in regard thereto with the Attorney General.”
 - Court may not conduct hearing until it finds that required notice to the public has been given



Questions?