

Kansas Association of Community Foundations

Kansas Donor Intent Protection Act

Wade Hauser, JD (Minneapolis)

July 13, 2023

© 2023 Lathrop GPM. All rights reserved. Dissemination and duplication are prohibited without express consent from the author. The content is intended for informational purposes and is not legal advice or a legal opinion of Lathrop GPM.



Agenda

- Overview of the Act
- Potential impact for community foundations and interaction with the variance power
- Best practices and drafting recommendations

Donor Intent Protection Act - Background

- Official title is Senate Substitute for HB 2170, available at http://www.kslegislature.org/li/b2023_24/measure/hb2170/
- Became effective July 1, 2023.
- In many jurisdictions, prior to this Act, the general rule was that only the Attorney General had standing to enforce restrictions on the use of charitable gifts.
- Goal of the Act is to give the donor to an “endowment fund” standing to sue a 501(c)(3) charity, if the charity does not abide by the donor restrictions in an “endowment agreement.”
 - Charity must have “principal office” in Kansas
- Of course, charities have lots of incentives to respect donor intent.

Donor Intent Protection Act – Application

- Confusingly drafted.
- Application is narrow.
- Only applies to an “endowment agreement,” which means “a written agreement between a donor and a charitable organization” relating to an “endowment fund,” if “such donor is the only donor gifting such endowment fund or property to an endowment fund.”
- Accordingly, the Act does not apply if there are multiple donors to the fund or if the fund is not a true endowment.
- Only applies to true endowments (not board-designated or quasi endowments or immediately expendable funds).

Donor Intent Protection Act – Rights

- Donor, or “legal representative,” may sue within 2 years of discovery of a breach of a donor restriction, but only within 40 years of the fund’s creation.
- Suit must be in Kansas district court where the charity has its principal office or principal place of business or “in the county of residence of the donor.”
- “Legal representative” includes an administrator or executor of an estate, a surviving spouse, or a “living, named individual designated in an endowment agreement”

Donor Intent Protection Act – Remedies

- Court cannot award damages to the plaintiff or order that the funds be returned to the donor or donor's representative.
- Court can order the charity to comply with the donor restrictions, to restore misspent funds, or restore a name required by a donor restriction.
- Does not address attorneys' fees.
- Alternatively, the court can modify or release a donor restriction as permitted by Kansas law (including UPMIFA).

Donor Intent Protection Act – Savings clause

- “Nothing in this act affects the authority of the attorney general to enforce any restriction in an endowment agreement, limits the application of the judicial power of *cy pres* or *alters the right of an institution to modify a restriction on the management, investment, purpose or use of an endowment fund in a manner permitted by the endowment agreement.*”
- Compliance with a donor restriction is not required if a federal or state law (including UPMIFA) requires or authorizes the charity not to comply.

Community Foundations and the Variance Power

- Under IRS rules, community foundations must have power to modify a restriction on the use of a charitable gift if, in the sole judgment of its governing body, the restriction becomes “in effect, unnecessary, incapable of fulfillment, or inconsistent with the charitable needs of the community or area served.”
 - It is ok if a state authority (like the AG) has power to review this decision, but it can’t be subject to the donor’s approval.
- Most community foundations include this power in their articles of incorporation, gift instruments, or both
- If incorporated into an “endowment agreement,” the Donor Intent Protection Act’s savings clause makes clear that the Act does not prohibit use of a variance power.

Donor Advised Funds

- Lawsuits under the Donor Intent Protection Act relating to DAFs seem less likely
- Charity must have “exclusive legal control” over a DAF, and donor’s recommendations are non-binding.
- Courts have held that donor does not retain any interest in a DAF.
- Donor unlikely to have standing to sue simply because the charity does follow the donor’s recommendations.
- DAF might have specific purpose (i.e., “make distributions to support the arts in Kansas”), and donor could potentially use Donor Intent Protection Act to sue if charity ignores that.

Best practices and drafting recommendations

- Only accept restricted gifts that are workable and clearly understood.
- Attract multiple donors (spouses, etc.) to the fund.
- Keep donors informed of how funds are used.
- Gift instruments (aka gift or endowment agreements) should reference and incorporate the foundation's governing documents and expressly include a variance power/change of circumstances clause.
- Include an integration/"entire understanding" clause.
- Make instrument governed by Kansas law.
- Monitor future legislative developments.

Questions?

Wade Hauser

wade.hauser@lathropgpm.com

612-632-3061

