

I am Susan Gary. I am a Professor Emerita of Law at the University of Oregon.

I am a proponent of Senate Bill 135.

I served as Reporter of the Uniform Prudent Management of Institutional Funds Act (UPMIFA), a project of the Uniform Law Commission and the Act on which Ohio R.C. §§ 1715.51 -.59 are based.

I present this testimony on my own behalf, and I do not speak for the Uniform Law Commission.

The enactment of SB 135 will improve Ohio law in two ways.

Spending from an Endowment

When Ohio adopted UPMIFA, it added a provision related to spending from an endowment that was not in the uniform act: R.C. § 1715.53(D).

Section 1715.53(D) creates an irrebuttable presumption of prudence for spending from an endowment each year of an amount that does not exceed five percent of the fair market value of the endowment fund.

Spending above that amount may be prudent, but the charitable organization would have to show that the spending was prudent.

Under Ohio's law, spending below five percent could not be challenged as imprudent.

This provision in Ohio law reverses the approach taken in UPMIFA and raises concerns about overspending from endowments.

UPMIFA provides a rebuttable presumption of imprudence for spending above seven percent of the fair market value of an endowment fund.

The goal of the UPMIFA provision is to remind a charity to make a careful determination about spending. An endowment must consider factors listed in the statute before making a spending decision. These factors include the donor's wishes, current economic conditions, and the spending needs of the endowment.

The drafters of UPMIFA included the rebuttable presumption of imprudence for spending above seven percent due to a concern that a charitable organization might overspend its endowment and no one would notice until the endowment was depleted.

In contrast with UPMIFA, the current Ohio statute protects a charitable organization even if amounts spent may undermine the long-term viability of the endowment fund, as long as annual spending does not exceed five percent of the value of the fund.

In today's economic conditions, a spend rate above four percent is likely to be unsustainable, and even four percent may cause an endowment to lose value over time.

SB 135 amends R.C. § 1715.53, replacing the irrebuttable presumption of prudence with a rebuttable presumption of imprudence, following the original UPMIFA language.

This change would mean that universities and other charitable organizations in Ohio can spend the amount that is prudent, but they will need to make a determination of prudence, based on economic conditions and the purposes of the fund.

Protecting Donor Intent in a Purpose-Restricted Endowment

When a donor transfers property to an endowment, the donor may negotiate with the charitable organization, entering into a written endowment agreement.

The donor may commit to transfer assets to the charity, and in exchange the charity may commit to use the assets for a specific purpose or to name something such as a building, a scholarship, or an event for the donor.

If the charity commits to a restriction on the use of the assets, the charity is bound by that commitment. But under current law, the right of the donor to enforce the agreement is unclear. The Attorney General can enforce the agreement, but the Attorney General is not required to enforce the agreement and may not do so.

To protect the commitments in an endowment agreement that restrict endowment spending—and to encourage more charitable giving—SB 135 gives a donor or the donor's legal representative the right to enforce the restriction, if the Attorney General declines to act or does not cure the problem within six months.

This new provision would encourage charitable giving in Ohio, because it would help to ensure compliance with the charitable organization's commitment that induced the donor to establish the endowment.

Under current law, the charity can enforce the commitments made by the donor to provide the endowment fund. It makes sense to give the donor a parallel right to enforce the charitable organization's commitments that induced the donor to provide the fund.

The circumstances in which a donor can enforce a gift made to a charity are limited.

The donor must be a party to an endowment agreement, and the Attorney General must decline to act or fail to repair a breach promptly.

The new provision will not open a floodgate of litigation against charities, and this provision will likely be used infrequently, given the cost to the donor of pursuing enforcement. Enactment will protect an endowment's purpose and longevity, and by doing so will strengthen donor support of charities.