As Introduced

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S. B. No. 368

Senator Roegner

To amend sections 109.25, 1715.51, and 5813.06 and to enact sections 1715.551, 1715.552, 1715.553, 1715.554, 1715.555, 1715.556, 1715.557, 1715.558, and 1715.559 of the Revised Code to establish the scope and procedures for a civil action when an institution violates a restriction in an endowment agreement.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 109.25, 1715.51, and 5813.06 be amended and sections 1715.551, 1715.552, 1715.553, 1715.554, 1715.555, 1715.556, 1715.557, 1715.558, and 1715.559 of the Revised Code be enacted to read as follows:

Sec. 109.25. The attorney general is a necessary party to and shall be served with process or with summons by registered mail in all judicial proceedings, the object of which is to:

(A) Terminate a charitable trust or distribute assets;

(B) Depart from the objects or purposes of a charitable trust as the same are set forth in the instrument creating the trust, including any proceeding for the application of the doctrine of cy pres or deviation;

(C) Construe the provisions of an instrument with respect

to a charitable trust;

(D) Determine the validity of a will having provisions for a charitable trust;

(E) Enforce the express terms of an endowment agreement under sections 1715.551 to 1715.559 of the Revised Code.

A judgment rendered in such proceedings without service of process or summons upon the attorney general is void, unenforceable, and shall be set aside upon the attorney general's motion seeking such relief. The attorney general shall intervene in any judicial proceeding affecting a charitable trust when requested to do so by the court having jurisdiction of the proceeding, and may intervene in any judicial proceeding affecting a charitable trust when ~~he~~ the attorney general determines that the public interest should be protected in such proceeding.

Sec. 1715.51. As used in sections 1715.51 to 1715.59 of the Revised Code:

(A) "Benefactor" means each person signing an endowment agreement who committed in the agreement to transfer property to an institution with the institution's consent.

(B)(1) "Benefactor representative" means either:

(a) A person designated in an endowment agreement, whether or not born or existing at the time of such designation, to act in place of the benefactor for the purpose of resolving disputes about the agreement, including the agreement's validity, interpretation, performance, and enforcement, and any action that the agreement contemplates;

(b) If no person is designated in the endowment agreement,

as described in division (B)(1)(a) of this section, the administrator or executor of a benefactor's estate.

(2) "Benefactor representative" does not mean the institution receiving or administering property under an endowment agreement or any person designated by such institution for any purpose.

(C) "Charitable purpose" means any purpose the achievement of which is beneficial to the community, including the relief of poverty, the advancement of education or religion, the promotion of health, and the promotion of a governmental purpose.

~~(B)~~ (D) "Institution" means any of the following:

(1) A person, other than an individual, organized and operated exclusively for charitable purposes;

(2) A governmental organization to the extent that it holds funds exclusively for a charitable purpose;

(3) A trust that had both charitable and noncharitable interests and the noncharitable interests have terminated.

~~(C)~~ (E) "Institutional fund" means a fund that is held by an institution exclusively for charitable purposes. "Institutional fund" does not include any of the following:

(1) ~~Program related~~ Program-related assets;

(2) A fund held for an institution by a trustee that is not an institution;

(3) A fund in which a beneficiary that is not an institution has an interest other than an interest that may arise upon a violation of or the failure of the purposes of the fund.

~~(D)~~ (F) "Endowment agreement" means a gift instrument signed by a benefactor and by a state institution of higher education or another institution whose corporate purpose is to benefit an identified state institution of higher education and receives, holds, or administers charitable transfers of property for such state institution of higher education; and that contains both of the following obligations:

(1) The benefactor commits to transfer property to a state institution of higher education or to another institution to receive, hold, or administer the property for the use or benefit of a state institution of higher education with the consent of such state institution of higher education.

(2) An institution signing the instrument commits that the institution or a state institution of higher education will receive, hold, or administer the transferred property as an endowment fund for the use or benefit of a state institution of higher education subject to any restrictions on management, investment, spending, or purpose expressed in the instrument.

(G) "Endowment fund" means an institutional fund or any part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis. "Endowment fund" does not include assets that an institution designates as an endowment fund for its own use.

~~(E)~~ (H) "Gift instrument" means a record or records, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution as an institutional fund.

~~(F)~~ (I) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company,

association, joint venture, public corporation, governmental organization, or any other legal or commercial entity.

~~(G)~~ (J) "~~Program related~~ Program-related asset" means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.

~~(H)~~ (K) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(L) "State institution of higher education" has the same meaning as in section 3345.011 of the Revised Code and is an "institution" within the meaning of this chapter.

Sec. 1715.551. If an institution violates a restriction contained in an endowment agreement on the management, investment, spending, or purpose of the endowment fund, a benefactor or benefactor representative may notify the charitable law section of the office of the attorney general in writing of the violation.

Sec. 1715.552. The attorney general may enforce the interests of the beneficiaries of an endowment agreement by filing a complaint for breach or to obtain a declaratory judgment of rights and duties expressed in the agreement and as to all of the actions it contemplates, including the interpretation, performance, and enforcement of the agreement and determination of its validity.

Sec. 1715.553. (A) If, within one hundred eighty days after receiving the notice under section 1715.551 of the Revised Code, the attorney general has not obtained full compliance with the restriction and restitution to the endowment fund of

property approximately equal to any value lost due to the violated restriction, a benefactor or benefactor representative may file a complaint for either or both of the following:

(1) Breach of the endowment agreement;

(2) To obtain a declaratory judgment of rights and duties expressed in the agreement as to all of the actions it contemplates, including the interpretation, performance, and enforcement of the agreement and determination of its validity.

(B) Each of the following applies to the complaint:

(1) It may be filed regardless of whether the agreement expressly reserves a right to sue or enforce.

(2) The filing of a complaint by the attorney general under section 1715.552 of the Revised Code is not a requirement for filing a complaint under this section.

(3) It shall not seek a judgment awarding to the plaintiff damages, court costs, attorney's fees, or any other award of money or other property.

(4) It shall seek only one or both of the following:

(a) Declaratory relief;

(b) Equitable relief consistent with the charitable purposes expressed in the endowment agreement and consistent with the charitable purposes of the institution administering the endowment fund under the endowment agreement and the state institution of higher education receiving the use or benefit of the endowment fund.

Sec. 1715.554. An institution that is a party to an endowment agreement, or the state institution of higher

education receiving the use or benefit of the endowment fund established through an endowment agreement, may obtain a declaratory judgment of rights and duties expressed in an endowment agreement and as to all of the actions it contemplates, including the interpretation, performance, and enforcement of the agreement and determination of the agreement's validity. The institution shall seek such declaration in response to any complaint brought under sections 1715.551 to 1715.559 of the Revised Code.

Sec. 1715.555. Every complaint authorized by sections 1715.551 to 1715.559 of the Revised Code shall be filed in a court of competent general jurisdiction in the county where the state institution of higher education receiving the use or benefit of the endowment fund has its principal office. Every such complaint shall:

(A) Name the attorney general as a party;

(B) Name as parties each institution that signed the endowment agreement or its successor, the state institution of higher education receiving the use or benefit of the endowment fund, and any institution that currently holds or administers property subject to the agreement;

(C) Name as parties each benefactor and benefactor representative.

Sec. 1715.556. The failure to join as a party a benefactor or benefactor representative is not jurisdictional. The court, however, shall afford a benefactor or benefactor representative an opportunity to be heard or to intervene if sought within a reasonable time before the court renders final judgment.

Sec. 1715.557. The interest of a benefactor and the

interest represented by a benefactor representative shall not be presumed to be identical with the interest of the attorney general or a state institution of higher education or an institution administering an endowment fund under an endowment agreement.

Sec. 1715.558. (A) Except as allowed by division (B) of this section, a benefactor or benefactor representative shall not file a complaint authorized by sections 1715.551 to 1715.559 of the Revised Code based on a breach of an endowment agreement if the person filing the complaint discovered the breach more than six years before filing the complaint.

(B) If, during the sixth year after discovery of the breach of an endowment agreement, a benefactor or benefactor representative notifies the charitable law section of the office of the attorney general in writing of the breach of an endowment agreement as authorized by sections 1715.551 to 1715.559 of the Revised Code, the period within which such benefactor or benefactor representative must file a complaint authorized by sections 1715.551 to 1715.559 of the Revised Code is extended automatically by two hundred ten days.

Sec. 1715.559. Sections 1715.551 to 1715.559 of the Revised Code apply only to the following:

(A) Endowment funds established on and after the effective date of this section;

(B) Endowment funds established before the effective date of this section, but only with respect to breaches of such endowment agreements if those breaches occur on or after the effective date of this section.

Sec. 5813.06. (A) Nothing in sections 5813.01 to 5813.05

of the Revised Code affects the construction or interpretation of sections 1715.51 to 1715.59 of the Revised Code relating to the uniform prudent management of institutional funds act. Specifically, neither the percentage set forth in division (B) of section 5813.02 of the Revised Code nor the amount actually requested by a governing board pursuant to that section shall be construed or interpreted to limit or expand what is a prudent amount that can be expended by a governing board of an institution under sections 1715.51 to 1715.59 of the Revised Code.

(B) If an institutional trust fund is also an institutional fund as defined in division ~~(C)~~ (E) of section 1715.51 of the Revised Code with the result that sections 1715.51 to 1715.59 of the Revised Code also are applicable to the institutional trust fund, then sections 1715.51 to 1715.59 of the Revised Code apply to the institutional trust fund, and sections 5813.01 to 5813.07 of the Revised Code do not apply to the institutional trust fund.

Section 2. That existing sections 109.25, 1715.51, and 5813.06 of the Revised Code are hereby repealed.