

Senate Bill No. 1329

CHAPTER 715

An act to amend Sections 5240 and 6518 of the Corporations Code, and to add Part 7 (commencing with Section 18501) to Division 9 of, and to repeal Part 7 (commencing with Section 18500) of Division 9 of, the Probate Code, relating to charitable institutions.

[Approved by Governor September 30, 2008. Filed with
Secretary of State September 30, 2008.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1329, Harman. Charitable institutions: fund management: dissolution.

Existing law, the Uniform Management of Institutional Funds Act (UMIFA), governs the management and use of endowed institutional funds held by charitable institutions. UMIFA governs, among other things, the standard of conduct of a person managing and investing an institutional fund, the delegation of investment management, the appropriation for expenditure of an institutional fund's net appreciation, the investment authority of the institution's governing board, and the release of donor restrictions on the use or investment of an institutional fund.

This bill would repeal these provisions. The bill would instead enact the Uniform Prudent Management of Institutional Funds Act (UPMIFA), which would revise and reenact the provisions contained in UMIFA. Among other things, the bill would require an institution, when managing and investing an institutional fund, to consider the charitable purposes, as defined, of the institution and the purposes of the fund, to act in good faith and with the care of an ordinarily prudent person, to incur only reasonable and appropriate costs, and to take specified factors into consideration. The bill would establish procedures for the modification of restrictions on the use of institutional funds and would authorize a charitable institution to modify a restriction on the use of institutional funds not exceeding \$100,000 and older than 20 years by making a filing with the Attorney General rather than seeking court relief. The bill would also modify the requirements with respect to expenditures and accumulation of endowment funds. The bill would make various other changes to current UMIFA provisions.

Existing law sets forth the requirements for the winding up and involuntary dissolution of a nonprofit public benefit corporation, which include the final settlement of accounts and the filing of a final franchise tax return, among other things.

This bill would authorize a court, in an action brought by and at the request of the Attorney General, to make an order declaring that a nonprofit public benefit corporation is wound up and dissolved without meeting these

requirements, upon a finding by the court that it is impossible or impracticable to meet some or all of those requirements.

The people of the State of California do enact as follows:

SECTION 1. Section 5240 of the Corporations Code is amended to read:

5240. (a) This section applies to all assets held by the corporation for investment. Assets which are directly related to the corporation's public or charitable programs are not subject to this section.

(b) Except as provided in subdivision (c), in investing, reinvesting, purchasing, acquiring, exchanging, selling and managing the corporation's investments, the board shall do the following:

(1) Avoid speculation, looking instead to the permanent disposition of the funds, considering the probable income, as well as the probable safety of the corporation's capital.

(2) Comply with additional standards, if any, imposed by the articles, bylaws or express terms of an instrument or agreement pursuant to which the assets were contributed to the corporation.

(c) No investment violates this section where it conforms to provisions authorizing the investment contained in an instrument or agreement pursuant to which the assets were contributed to the corporation. No investment violates this section or Section 5231 where it conforms to provisions requiring the investment contained in an instrument or agreement pursuant to which the assets were contributed to the corporation.

(d) In carrying out duties under this section, each director shall act as required by subdivision (a) of Section 5231, may rely upon others as permitted by subdivision (b) of Section 5231, and shall have the benefit of subdivision (c) of Section 5231, and the board may delegate its investment powers as permitted by Section 5210.

(e) Nothing in this section shall be construed to preclude the application of the Uniform Prudent Management of Institutional Funds Act (Part 7 (commencing with Section 18501) of Division 9 of the Probate Code) if that act would otherwise be applicable, but nothing in the Uniform Prudent Management of Institutional Funds Act alters the status of governing boards, or the duties and liabilities of directors, under this part.

SEC. 2. Section 6518 of the Corporations Code is amended to read:

6518. (a) Upon the final settlement of the accounts of the directors or other persons appointed pursuant to Section 6515 and the determination that the corporation's affairs are in condition for it to be dissolved, the court may make an order declaring the corporation duly wound up and dissolved. The order shall declare:

(1) That the corporation has been duly wound up, that a final franchise tax return, as described by Section 23332 of the Revenue and Taxation Code, has been filed with the Franchise Tax Board, as required under Part 10.2 (commencing with Section 18401) of Division 2 of the Revenue and Taxation Code and that its known debts and liabilities have been paid or

adequately provided for, or that those debts and liabilities have been paid as far as its assets permitted, as the case may be. If there are known debts or liabilities for payment of which adequate provision has been made, the order shall state what provision has been made, setting forth the name and address of the corporation, person or governmental agency that has assumed or guaranteed the payment, or the name and address of the depository with which deposit has been made or such other information as may be necessary to enable the creditor or other person to whom payment is to be made to appear and claim payment of the debt or liability.

(2) That its known assets have been distributed to the persons entitled thereto or that it acquired no known assets, as the case may be.

(3) That the accounts of directors or such other persons have been settled and that they are discharged from their duties and liabilities to creditors and members.

(4) That the corporation is dissolved.

(b) In an action brought by, and at the request of, the Attorney General, the court may make an order declaring that a corporation is wound up and dissolved without meeting the requirements in subdivision (a), upon a finding by the court that it is impossible or impracticable to meet some or all of those requirements.

(c) The court may make such additional orders and grant such further relief as it deems proper upon the evidence submitted.

(d) Upon the making of the order declaring the corporation dissolved, corporate existence shall cease except for the purposes of further winding up if needed; and the directors or such other persons shall be discharged from their duties and liabilities, except as otherwise ordered by the court and in respect to completion of the winding up.

SEC. 3. Part 7 (commencing with Section 18500) of Division 9 of the Probate Code is repealed.

SEC. 4. Part 7 (commencing with Section 18501) is added to Division 9 of the Probate Code, to read:

PART 7. UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT

18501. This part may be cited as the Uniform Prudent Management of Institutional Funds Act.

18502. As used in this part, the following terms shall have the following meanings:

(a) “Charitable purpose” means the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of a governmental purpose, or any other purpose the achievement of which is beneficial to the community.

(b) “Endowment fund” means an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expendable by the

institution on a current basis. The term does not include assets that an institution designates as an endowment fund for its own use.

(c) “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.

(d) “Institution” means any of the following:

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

(2) A government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose.

(3) A trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated.

(e) “Institutional fund” means a fund held by an institution exclusively for charitable purposes. The term does not include any of the following:

(1) 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 could arise upon violation or failure of the purposes of the fund.

(f) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(g) “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) “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.

18503. (a) Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.

(b) In addition to complying with the duty of loyalty imposed by law other than this part, each person responsible for managing and investing an institutional fund shall manage and invest the fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(c) In managing and investing an institutional fund, an institution is subject to both of the following:

(1) It may incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution, and the skills available to the institution.

(2) It shall make a reasonable effort to verify facts relevant to the management and investment of the fund.

(d) An institution may pool two or more institutional funds for purposes of management and investment.

(e) Except as otherwise provided by a gift instrument, the following rules apply:

(1) In managing and investing an institutional fund, all of the following factors, if relevant, must be considered:

(A) General economic conditions.

(B) The possible effect of inflation or deflation.

(C) The expected tax consequences, if any, of investment decisions or strategies.

(D) The role that each investment or course of action plays within the overall investment portfolio of the fund.

(E) The expected total return from income and the appreciation of investments.

(F) Other resources of the institution.

(G) The needs of the institution and the fund to make distributions and to preserve capital.

(H) An asset's special relationship or special value, if any, to the charitable purposes of the institution.

(2) Management and investment decisions about an individual asset must be made not in isolation but rather in the context of the institutional fund's portfolio of investments as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the fund and to the institution.

(3) Except as otherwise provided by law other than this part, an institution may invest in any kind of property or type of investment consistent with this section.

(4) An institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the fund are better served without diversification.

(5) Within a reasonable time after receiving property, an institution shall make and carry out decisions concerning the retention or disposition of the property or to rebalance a portfolio, in order to bring the institutional fund into compliance with the purposes, terms, and distribution requirements of the institution as necessary to meet other circumstances of the institution and the requirements of this part.

(6) A person that has special skills or expertise, or is selected in reliance upon the person's representation that the person has special skills or expertise, has a duty to use those skills or that expertise in managing and investing institutional funds.

(f) Nothing in this section alters the duties and liabilities of a director of a nonprofit public benefit corporation under Section 5240 of the Corporations Code.

18504. (a) Subject to the intent of a donor expressed in the gift instrument, an institution may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines is prudent for

the uses, benefits, purposes, and duration for which the endowment fund is established. Unless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, all of the following factors:

- (1) The duration and preservation of the endowment fund.
- (2) The purposes of the institution and the endowment fund.
- (3) General economic conditions.
- (4) The possible effect of inflation or deflation.
- (5) The expected total return from income and the appreciation of investments.

- (6) Other resources of the institution.
- (7) The investment policy of the institution.

(b) To limit the authority to appropriate for expenditure or accumulate under subdivision (a), a gift instrument must specifically state the limitation.

(c) Terms in a gift instrument designating a gift as an endowment, or a direction or authorization in the gift instrument to use only “income,” “interest,” “dividends,” or “rents, issues, or profits,” or “to preserve the principal intact,” or words of similar import have both of the following effects:

(1) To create an endowment fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the fund.

(2) To not otherwise limit the authority to appropriate for expenditure or accumulate under subdivision (a).

(d) The appropriation for expenditure in any year of an amount greater than 7 percent of the fair market value of an endowment fund, calculated on the basis of market values determined at least quarterly and averaged over a period of not less than three years immediately preceding the year in which the appropriation for expenditure is made, creates a rebuttable presumption of imprudence. For an endowment fund in existence for fewer than three years, the fair market value of the endowment fund shall be calculated for the period the endowment fund has been in existence. This subdivision does not do any of the following:

(1) Apply to an appropriation for expenditure permitted under law other than this part or by the gift instrument.

(2) Apply to a private or public postsecondary educational institution, or to a campus foundation established by and operated under the auspices of such an educational institution.

(3) Create a presumption of prudence for an appropriation for expenditure of an amount less than or equal to 7 percent of the fair market value of the endowment fund.

18505. (a) Subject to any specific limitation set forth in a gift instrument or in law other than this part, an institution may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances. An

institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in all of the following:

- (1) Selecting an agent.
- (2) Establishing the scope and terms of the delegation, consistent with the purposes of the institution and the institutional fund.
- (3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the scope and terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation.

(c) An institution that complies with subdivision (a) is not liable for the decisions or actions of an agent to which the function was delegated except to the extent a trustee would be liable for those actions or decisions under Sections 16052 and 16401.

(d) By accepting delegation of a management or investment function from an institution that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state in all proceedings arising from or related to the delegation or the performance of the delegated function.

(e) An institution may delegate management and investment functions to its committees, officers, or employees as authorized by law of this state other than this part.

18506. (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.

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

(c) If a particular charitable purpose or a 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 must be given an opportunity to be heard.

(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, 60 days after notification to the Attorney General and to the donor at the donor's last known address in the records of the institution, may release or modify the restriction, in whole or part, if all of the following apply:

(1) The institutional fund subject to the restriction has a total value of less than one hundred thousand dollars (\$100,000).

(2) More than 20 years have elapsed since the fund was established.

(3) The institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument. An institution that releases or modifies a restriction under this subdivision may, if appropriate circumstances arise thereafter, use the property in accordance with the restriction notwithstanding its release or modification, and that use is deemed to satisfy the consistency requirement of this paragraph.

18507. Compliance with this part is determined in light of the facts and circumstances existing at the time a decision is made or action is taken, and not by hindsight.

18508. This part applies to institutional funds existing on or established after January 1, 2009. As applied to institutional funds existing on January 1, 2009, this part governs only decisions made or actions taken on or after that date.

18509. This part modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act (15 U.S.C. Sec. 7001 et seq.), but does not modify, limit, or supersede Section 101 of that act (15 U.S.C. Sec. 7001(a)), or authorize electronic delivery of any of the notices described in Section 103 of that act (15 U.S.C. Sec. 7003(b)).

18510. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.