

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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HOUSE BILL 133*

Short Title: Prudent Management of Institutional Funds. (Public)

Sponsors: Representatives Ross; K. Alexander, M. Alexander, Allred, E. Floyd, Glazier, Insko, Lucas, and Weiss.

Referred to: Judiciary I.

February 12, 2009

1 A BILL TO BE ENTITLED
2 AN ACT TO ENACT THE UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL
3 FUNDS ACT AND TO MAKE RELATED AMENDMENTS TO THE NORTH
4 CAROLINA UNIFORM TRUST CODE, AS RECOMMENDED BY THE GENERAL
5 STATUTES COMMISSION.

6 The General Assembly of North Carolina enacts:

7 **SECTION 1.** Chapter 36B of the General Statutes is repealed.

8 **SECTION 2.** The General Statutes are amended by adding a new Chapter to read:

9 **"Chapter 36E.**

10 **"Uniform Prudent Management of Institutional Funds Act.**

11 **"§ 36E-1. Short title.**

12 This Chapter may be cited as the Uniform Prudent Management of Institutional Funds Act.

13 **"§ 36E-2. Definitions.**

14 The following definitions apply in this Chapter:

- 15 (1) Charitable purpose. – The relief of poverty, the advancement of education or
16 religion, the promotion of health, scientific, benevolent, literary,
17 governmental, or municipal purposes, or any other purpose the achievement
18 of which is beneficial to the community.
- 19 (2) Endowment fund. – An institutional fund or part thereof that, under the
20 terms of a gift instrument, is not wholly expendable by the institution on a
21 current basis. The term does not include assets that an institution designates
22 as an endowment fund for its own use.
- 23 (3) Gift instrument. – A record or records, including an institutional solicitation
24 or a response to an institutional solicitation, under which property is granted
25 to, transferred to, or held by an institution as an institutional fund.
- 26 (4) Institution. – Any of the following:
27 a. A person, other than an individual, organized and operated
28 exclusively for charitable purposes;
29 b. A government or governmental subdivision, agency, or
30 instrumentality, to the extent that it holds funds exclusively for a
31 charitable purpose; or
32 c. A trust that had both charitable and noncharitable interests, after all
33 noncharitable interests have terminated.
- 34 (5) Institutional fund. – A fund held by an institution exclusively for charitable
35 purposes. The term includes tangible assets but does not include:
36 a. Program-related assets;



1 b. A fund held for an institution by a trustee that is not an institution; or
2 c. A fund in which a beneficiary that is not an institution has an interest,
3 other than an interest that could arise only upon violation or failure of
4 the purposes of the fund.

5 (6) Person. – An individual, corporation, business trust, estate, trust, partnership,
6 limited liability company, association, joint venture, public corporation,
7 government or governmental subdivision, agency, or instrumentality, or any
8 other legal or commercial entity.

9 (7) Program-related asset. – An asset held by an institution not primarily for
10 investment.

11 (8) Record. – Information that is inscribed on a tangible medium or that is stored
12 in an electronic or other medium and is retrievable in perceivable form.

13 **"§ 36E-3. Standard of conduct in managing and investing institutional fund.**

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

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

21 (c) In managing and investing an institutional fund, an institution:

22 (1) May incur only costs that are appropriate and reasonable in relation to the
23 assets, the purposes of the institution, and the skills available to the
24 institution; and

25 (2) Shall make a reasonable effort to verify facts relevant to the management
26 and investment of the fund.

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

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

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

32 a. General economic conditions;

33 b. The possible effect of inflation or deflation;

34 c. The expected tax consequences, if any, of investment decisions or
35 strategies;

36 d. The role that each investment or course of action plays within the
37 overall investment portfolio of the fund;

38 e. The expected total return from income and the appreciation of
39 investments;

40 f. Other resources of the institution;

41 g. The needs of the institution and the fund to make distributions and to
42 preserve capital; and

43 h. An asset's special relationship or special value, if any, to the
44 charitable purposes of the institution.

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

- 1 (3) Except as otherwise provided by law other than this Chapter, an institution
2 may invest in any kind of property or type of investment consistent with this
3 section.
- 4 (4) An institution shall diversify the investments of an institutional fund unless
5 the institution reasonably determines that, because of special circumstances,
6 the purposes of the fund are better served without diversification.
- 7 (5) Within a reasonable time after receiving property, an institution shall make
8 and carry out decisions concerning the retention or disposition of the
9 property or to rebalance a portfolio in order to bring the institutional fund
10 into compliance with the purposes, terms, and distribution requirements of
11 the institution as necessary to meet other circumstances of the institution and
12 the requirements of this Chapter.
- 13 (6) A person that has special skills or expertise, or is selected in reliance upon
14 the person's representation that the person has special skills or expertise, has
15 a duty to use those skills or that expertise in managing and investing
16 institutional funds. This subdivision does not apply to a volunteer who is not
17 compensated beyond reimbursement for expenses.

18 **§ 36E-4. Appropriation for expenditure or accumulation of endowment fund; rules of**
19 **construction.**

20 (a) Subject to the intent of a donor expressed in the gift instrument, an institution may
21 appropriate for expenditure or accumulate so much of an endowment fund as the institution
22 determines is prudent for the uses, benefits, purposes, and duration for which the endowment
23 fund is established. Unless stated otherwise in the gift instrument, the assets in an endowment
24 fund are donor-restricted assets until appropriated for expenditure by the institution. In making
25 a determination to appropriate or accumulate, the institution shall act in good faith, with the
26 care that an ordinarily prudent person in a like position would exercise under similar
27 circumstances, and shall consider, if relevant, the following factors:

- 28 (1) The duration and preservation of the endowment fund;
29 (2) The purposes of the institution and the endowment fund;
30 (3) General economic conditions;
31 (4) The possible effect of inflation or deflation;
32 (5) The expected total return from income and the appreciation of investments;
33 (6) Other resources of the institution; and
34 (7) The investment policy of the institution.

35 (b) To limit the authority to appropriate for expenditure or accumulate under subsection
36 (a) of this section, a gift instrument must specifically state the limitation.

37 (c) Terms in a gift instrument designating a gift as an endowment, or a direction or
38 authorization in the gift instrument to use only "income," "interest," "dividends," or "rents,
39 issues, or profits," or "to preserve the principal intact," or words of similar import:

- 40 (1) Create an endowment fund of permanent duration unless other language in
41 the gift instrument limits the duration or purpose of the fund; and
42 (2) Do not otherwise limit the authority to appropriate for expenditure or
43 accumulate under subsection (a) of this section.

44 **§ 36E-5. Delegation of management and investment functions.**

45 (a) Subject to any specific limitation set forth in a gift instrument or in law other than
46 this Chapter, an institution may delegate to an external agent the management and investment
47 of an institutional fund to the extent that an institution could prudently delegate under the
48 circumstances. An institution shall act in good faith, with the care that an ordinarily prudent
49 person in a like position would exercise under similar circumstances, in:

- 50 (1) Selecting an agent;

1 (2) Establishing the scope and terms of the delegation, consistent with the
2 purposes of the institution and the institutional fund; and

3 (3) Periodically reviewing the agent's actions in order to monitor the agent's
4 performance and compliance with the scope and terms of the delegation.

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

7 (c) An institution that complies with subsection (a) of this section is not liable for the
8 decisions or actions of an agent to which the function was delegated.

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

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

15 **"§ 36E-6. Release or modification of restrictions on management, investment, or purpose.**

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

20 (b) The superior court, upon application of an institution, may modify a restriction
21 contained in a gift instrument regarding the management or investment of an institutional fund
22 if the restriction has become impracticable or wasteful, if it impairs the management or
23 investment of the fund, or if, because of circumstances not anticipated by the donor, a
24 modification of the restriction will further the purposes of the fund. The institution shall notify
25 the Attorney General of the application, and the Attorney General must be given an opportunity
26 to be heard. To the extent practicable, any modification must be made in accordance with the
27 donor's probable intention.

28 (c) If a particular charitable purpose or restriction contained in a gift instrument on the
29 use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or
30 wasteful, the superior court, upon application of an institution, may modify the purpose of the
31 fund or the restriction on the use of the fund in a manner consistent with the charitable purposes
32 expressed in the gift instrument. The institution shall notify the Attorney General of the
33 application, and the Attorney General must be given an opportunity to be heard.

34 (d) If an institution determines that a restriction contained in a gift instrument on the
35 management, investment, or purpose of an institutional fund is unlawful, impracticable,
36 impossible to achieve, or wasteful, the institution may release or modify the restriction, in
37 whole or part, if:

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

40 (2) More than 10 years have elapsed since the fund was established; and

41 (3) The institution uses the property in a manner consistent with the charitable
42 purposes expressed in the gift instrument.

43 The institution must provide written notice of the proposed release or modification of the
44 restriction to the Attorney General not less than 60 days before releasing or modifying the
45 restriction. The Attorney General may make application to the superior court to contest the
46 institution's determination that the restriction should be released or modified within 60 days of
47 receipt of the institution's written notice.

48 **"§ 36E-7. Reviewing compliance.**

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

51 **"§ 36E-8. Application to existing institutional funds.**

1 This Chapter applies to institutional funds existing on or established after the effective date
2 of this act. As applied to institutional funds existing on the effective date of this act, this
3 Chapter governs only decisions made or actions taken on or after that date.

4 **"§ 36E-9. Relation to Electronic Signatures in Global and National Commerce Act.**

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

9 **"§ 36E-10. Conflict with other law; exemptions.**

10 (a) To the extent that the provisions of this Chapter are inconsistent with the provisions
11 of Chapter 36C, Chapter 36D, Chapter 37A, or Chapter 55A of the General Statutes, the
12 provisions of this Chapter shall control.

13 (b) The provisions of this Chapter do not apply to The University of North Carolina or
14 to funds other than endowment funds held by a government or governmental subdivision,
15 agency, or instrumentality.

16 **"§ 36E-11. Uniformity of application and construction.**

17 In applying and construing this Chapter, consideration may be given to promoting
18 uniformity of interpretation with respect to its subject matter among the states that enact it."

19 **SECTION 3.** Article 4 of Chapter 36C of the General Statutes is amended by
20 adding a new section to read:

21 **"§ 36C-4-405.2. Spending rules applicable to charitable trusts.**

22 Subject to the intent of a settlor specifically expressed in a trust instrument, including a
23 document making a gift to a charitable trust after it is established, a trustee of a charitable trust
24 may appropriate for expenditure or accumulate so much of the trust property as the trustee
25 determines is prudent for the uses, benefits, purposes, and duration for which that charitable
26 trust is established. In making a determination to appropriate or accumulate trust property, a
27 trustee shall act in good faith, with the care that an ordinarily prudent person in a like position
28 would exercise under similar circumstances, and shall consider, if relevant, the following
29 factors:

- 30 (1) The duration and preservation of the trust;
31 (2) The purposes of the trust;
32 (3) General economic conditions;
33 (4) The possible effect of inflation or deflation;
34 (5) The expected total return from income and the appreciation of investments;
35 (6) Other resources of the trust; and
36 (7) The investment policy of the trust."

37 **SECTION 4.** G.S. 36C-4-413 reads as rewritten:

38 **"§ 36C-4-413. Cy pres.**

39 (a) Except as otherwise provided in ~~subsection (d)~~ subsections (c1) and (d) of this
40 section, if a charitable trust becomes unlawful, impracticable, impossible to achieve, or
41 wasteful:

- 42 (1) The trust does not fail, in whole or in part;
43 (2) The trust property does not revert to the settlor or the settlor's successors in
44 interest; and
45 (3) The court may apply cy pres to modify or terminate the trust by directing
46 that the trust property be applied or distributed, in whole or in part, in a
47 manner consistent with the settlor's charitable purposes.

48 (b) The settlor or a trustee of a charitable trust, the Attorney General, a beneficiary, or
49 any other interested party may maintain a cy pres proceeding under Article 2 of this Chapter.

50 (c) Repealed by Session Laws 2007-106, s. 17.1, effective October 1, 2007.

1 (c1) If a trustee of a charitable trust determines that a restriction contained in the trust
2 instrument, including a document making a gift to a charitable trust after it is established,
3 relating to the management, investment, or purpose of the trust or gift is unlawful,
4 impracticable, impossible to achieve, or wasteful, the trustee may release or modify the
5 restriction, in whole or part, if:

6 (1) The trust property to which the restriction applies has a total value of less
7 than one hundred thousand dollars (\$100,000);

8 (2) More than 10 years have elapsed since the trust property to which the
9 restriction applies was given to the charitable trust; and

10 (3) The trustee uses the trust property in a manner consistent with the charitable
11 purposes expressed in the applicable trust instrument.

12 The trustee must provide written notice of the proposed release or modification of the
13 restriction to the Attorney General not less than 60 days before releasing or modifying the
14 restriction. The Attorney General may make application to the court to contest the trustee's
15 determination that the restriction should be released or modified within 60 days of receipt of
16 the trustee's written notice.

17 (d) This section is not applicable if the settlor has provided, either directly or indirectly,
18 for an alternative plan in the event that the charitable trust is or becomes unlawful,
19 impracticable, impossible to achieve, or wasteful. However, if the alternative plan is also a
20 charitable trust and that trust fails, the intention shown in the original plan shall prevail in the
21 application of this section."

22 **SECTION 5.** The Revisor of Statutes shall cause to be printed along with this act
23 all relevant portions of the official comments to the Uniform Prudent Management of
24 Institutional Funds Act and all explanatory comments of the drafters of this act as the Revisor
25 deems appropriate.

26 **SECTION 6.** This act is effective when it becomes law.