

**CONFERENCE COMMITTEE REPORT BRIEF  
SENATE SUBSTITUTE FOR HOUSE BILL NO. 2170**

As Agreed to April 5, 2023

**Brief\***

Senate Sub. for HB 2170 would create the Donor Intent Protection Act, which would provide legal recourse to an individual charitable donor when the donor's gift restrictions are not followed by the recipient charitable organization.

***Purpose (Section 1)***

The bill would state that its purpose is to provide legal recourse to an individual charitable donor. The bill would state recourse is available when, pursuant to an endowment agreement, the donor's gift restrictions are not followed.

The bill would require the recipient to be a charitable organization governing an endowment fund that must contain only property gifted by that single, individual donor.

***Definitions (Section 2)***

The bill would define terms as follows:

- "Charitable organization" would mean an organization organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, educational, or other specified purposes that is exempt from federal income taxation as a 501(c)(3) entity under the Federal Internal Revenue Code and maintains its principal office in Kansas;
- "Donor" would mean an individual who has made a gift of property to an existing endowment fund of a charitable organization or that establishes a new endowment fund of the charitable organization pursuant to terms of an endowment agreement that may include donor-imposed restrictions or conditions governing the use of the gifted endowment property or funds;
- "Donor-imposed restriction" would mean a written statement within an endowment agreement that specifies obligations on the management or purpose of the property

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gifted by the donor of the gift as a condition of the charitable organization's receipt of property pursuant to an endowment agreement;

- “Endowment agreement” would mean an agreement between a donor and a charitable organization that gifts an endowment fund to a charitable organization or gifts property to an endowment fund of a charitable organization and the donor is the only donor gifting such endowment fund or gifting property to such endowment fund;
  - An “endowment agreement” may include donor-imposed restrictions or conditions governing the use of the gifted endowment property or fund;
- “Endowment fund” would mean an institutional fund that, under the terms of an endowment agreement, is not wholly expendable by the charitable institution on a current basis.
  - “Endowment fund” would not include assets that the charitable institution designates as an endowment fund for its own use and would include only those endowment funds containing only property gifted by a single donor;
- “Legal representative” would mean the administrator or executor of a person's estate; a supervising spouse if a court judgment has settled the accounts of the estate; or a living, named person designated in an endowment agreement to act in place of a party to the agreement for all matters expressed in such endowment agreement and all of the actions such endowment agreement contemplates, including, but not limited to, interpreting, performing, and enforcing such endowment agreement and defending its validity; and
- “Property” would mean real or personal property or money, cryptocurrency, stocks, bonds, or any other asset or financial instrument.

### ***Violations of Donor-Imposed Restriction and Recourse (Section 3)***

Except when specifically required or authorized by federal or state law, including the Uniform Prudent Management of Institutional Funds Act (UPMIFA), the bill would specify that no charitable organization that accepts a contribution of property of an endowment fund or to an endowment fund pursuant to an endowment agreement that imposes a written donor-imposed restriction could violate the terms of that restriction.

Under the bill, if the donor-imposed restriction is violated, the donor or the donor's legal representative could file a complaint within two years after discovery of the breach of agreement, but not more than 40 years after the date of the endowment agreement which established the endowment fund. The complaint could be filed in a district court in the Kansas county where the charitable organization has its principal office or place of carrying out its charitable purpose, or in the county of residence of the donor. The bill would allow the complaint to be filed whether or not the endowment agreement expressly reserves a right to sue or right of enforcement. A complaint filed under the bill would not be able to seek, or result in a judgment awarding damages to the plaintiff.

If a court determines that a charitable organization violated a donor-imposed restriction, the bill would allow the court to order any remedy in law or equity that is consistent with and restores, to the extent possible, the donor's intent as expressed by the donor-imposed restrictions and conditions in the endowment agreement.

The bill would state the remedies section would not effect or conflict with the violation section. Remedies would include, but would not be limited to:

- Future compliance with or performance of donor-imposed restrictions or conditions on the use or expenditure of the gifted endowment property;
- Restitution or restoration by the charitable organization of property to an endowment fund that have been expended or used by the charitable organization in contravention of donor-imposed restrictions;
- An accounting or the imposition of accounting requirements;
- Restoration or a change to a name required by the donor-imposed restrictions;
- Measures to preserve the property and value of the endowment fund;
- Modification or release of a donor-imposed restriction or reformation or dissolution of the endowment agreement as permitted by Kansas law;
- Transfer of property from the endowment fund to another charitable organization as directed by the donor, but only if the transfer would not jeopardize or be inconsistent with the tax-exempt status of the original charitable organization.

The bill would not allow for the court to order the return of donated funds to the donor or the donor's legal representative or estate.

#### ***Judicial Declaration of Rights and Duties (Section 4)***

For an endowment agreement containing donor-imposed restrictions, the bill would allow a charitable organization to obtain a judicial declaration of rights and duties as to all of the actions the endowment agreement contemplates, including, but not limited to:

- The interpretation, performance, and enforcement of the agreement; and
- Determination of its validity, as provided in UPMIFA.

The charitable organization would also be able to seek such declaration in any suit brought under the bill.

#### ***Non-Retroactivity (Section 5)***

The bill would state its provisions would not apply to a modification or release of a donor restriction or purpose ordered or made pursuant to UPMIFA, prior to July 1, 2023, or to any appeal of any such release or modification that is pending on or after July 1, 2023.

The bill would further state nothing in the bill 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. [*Note: Cy pres* is a legal term meaning, "The equitable doctrine under which a court

reforms a written instrument with a gift to charity as closely to the donor's intention as possible, so that the gift does not fail.”]

### **Conference Committee Action**

The Conference Committee agreed to the contents of Senate Sub. for HB 2170 as passed by the Senate with the following modifications:

- Requiring charitable organizations to have their principal office in Kansas;
- Limiting endowment funds to those donated by a particular individual donor;
- Adding cross references to UPMIFA to govern possible changes in donor-imposed restrictions;
- Specifying that the forum for lawsuits brought under the bill is within Kansas;
- Inserted a 40-year statute of limitations to bring an action under the bill;
- Clarified that charitable organizations are required to maintain their tax exempt status for purposes of the bill;
- Specifying that the Attorney General could enforce the bill's provisions;
- Providing that a court may apply the *cy pres* doctrine; and
- Clarifying that a charity could exercise powers granted to it by an endowment agreement.

### **Background**

HB 2170, as passed by the House, would have amended law concerning samples of products provided to retailers and to club and drinking establishment licensees. [*Note:* These provisions were added into HB 2059 by the Senate Committee on Federal and State Affairs.]

The Senate Committee removed the contents of HB 2170, inserted the contents of SB 133, as amended by the Senate Committee, and recommended a substitute bill be passed. [*Note:* The provisions of HB 2170 relating to product samples were not retained in the substitute bill.]

### ***SB 133 (Donor Intent Protection Act)***

SB 133 was introduced by the Senate Committee on Federal and State Affairs at the request of Senator Kloos.

### ***Senate Committee on Federal and State Affairs***

In the Senate Committee hearing on SB 133, **proponent** testimony was provided by two representatives of Philanthropy Roundtable, who provided examples of instances in which

donor intentions were violated, resulting in litigation. Proponents expressed that the bill would provide a legal pathway for the enforcement of written endowment agreements and increase trust between donors and charities.

Written-only proponent testimony was provided by a private citizen.

**Opponent** testimony was provided by a representative of the Kansas State University Foundation, who expressed concern that the bill would create confusion and be a drain on the resources of charitable organizations. The opponent stated the bill would conflict with current Kansas laws that protect donor intent.

On March 23, 2023, the Senate Committee amended SB 133 to:

- Specify that the provisions of the bill apply to a endowment agreement that is governing an endowment fund containing only property gifted by the single, individual donor who sought the agreement [*Note: The Conference Committee retained this amendment.*];
- Amend the definition of “endowment agreement” to specify that the agreement would apply only to the donor gifting the endowment fund or property to the endowment fund [*Note: The Conference Committee retained this amendment.*];
- Amend the definition of “endowment fund” to specify that an endowment fund would contain only property gifted by a single donor [*Note: The Conference Committee retained this amendment.*];
- Add the definition of “legal representative” [*Note: The Conference Committee retained this amendment.*];
- Change the statute of limitations on filing complaints after discovery from six years to two years [*Note: The Conference Committee did not retain this amendment.*]; and
- Specify that the Act is not retroactive. [*Note: The Conference Committee retained this amendment.*]

The Senate Committee removed the contents of HB 2170 concerning product samples, inserted the amended contents of SB 133 concerning the Donor Intent Protection Act, and recommended a substitute bill be passed.

## **Fiscal Information**

### ***SB 133 (Donor Intent Protection Act)***

According to the fiscal note prepared by the Division of the Budget on SB 133, as introduced, the Office of Judicial Administration indicates enactment of the bill could increase the number of cases filed in district court because the bill’s provisions would allow for a lawsuit to be filed for violations, which would increase the time spent by judges and court employees processing and researching these cases. The Office estimates enactment of the bill could result in the collection of docket fees in those cases filed under the bill’s provisions, which would be

credited to the State General Fund. According to the Office, a fiscal effect cannot be estimated until the Judicial Branch has had an opportunity to operate under the bill's provisions. Any fiscal effect associated with the bill is not reflected in *The FY 2024 Governor's Budget Report*.

Donor intention protection act; philanthropic gifts; donor-imposed restrictions; charitable organizations; endowment funds

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