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Business Report: Nonprofit Economic Relief During COVID-19

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Generosity is the lifeblood of a nonprofit organization. Donations can often sustain a charity for generations. But among the devastating impacts of COVID-19 on local communities this year is, unfortunately, the understandable decrease in charitable donations. This has resulted in many nonprofit organizations experiencing unanticipated financial difficulties. In such times, organizations often look to their institutional funds for support.

Institutional funds, such as an endowment fund, typically consist of donations established either through a gift agreement or estate planning document, such as a will or trust. Donors are oftentimes interested in the long-term survival of the organization and want to ensure that the charitable services will be available to their communities for years to come. For this reason, donors often place restrictions on access to the principal (original gift amount), only allowing the organization to access the income (interest) generated by the fund. Normally, this model can sustain a charitable organization, but it can be challenging during times of financial crisis.

Fortunately, New York law provides for a procedure under the doctrine of “cy pres,” which means at or near the donor’s intentions when they cannot be precisely followed. This doctrine allows an organization to modify or release donor restrictions placed on the use of charitable gifts (including gaining access to principal) to provide greater flexibility to weather difficult financial times. Two options are available when seeking cy pres relief.

Not-for-Profit Corporation Law

The New York State legislature recognized the importance for not-for-profit organizations to have the ability to modify institutional funds under certain limited circumstances. NPCL § 555 was enacted as part of the New York Prudent Management of Institutional Funds Act (NYPMIFA), which governs the management and investment of charitable gifts and funds held by not-for-profit organizations. One of the most significant changes to result from this legislation were the rules regarding the modification of donor restrictions on the use of institutional funds.

NYPMIFA expanded the process for modifying donor restrictions placed on the *management* or *investment* of these funds, allowing such changes if the restriction has become impracticable or wasteful or if it impairs the management or investment of the fund. Additionally, there are sometimes changes in circumstances that could not have been anticipated by the donor, and a modification will be allowed if it will ultimately further the donor's original purposes and intentions for the fund. NYPMIFA also expanded the process for modifying donor restrictions placed on the *purpose* or *use* of these funds, particularly when a fund becomes unlawful, impracticable, impossible to achieve, or wasteful.

Both provisions give courts discretion in modifying the restrictions placed on an institutional fund when a donor could not possibly have predicted changing circumstances beyond the control of the nonprofit organization.

Estates, Powers and Trusts Law

NYPMIFA explicitly provides that the statutory provisions expanding opportunities for relief will not prohibit the application of the doctrines of cy pres and deviation. A surrogate's court may hear a cy pres application with respect to a charitable gift established by a will. More specifically, the surrogate may direct that a testamentary charitable gift be administered and applied such that it will most effectively accomplish the gift's general purposes, whenever circumstances have so changed that literal compliance with the will as written would be impracticable or impossible.

For cy pres relief to be granted, three conditions must be satisfied: the gift in question must be charitable in nature; the donor must have demonstrated a general, rather than a specific, charitable intent; and circumstances must have changed subsequent to the gift to render literal compliance with the restriction impossible or impracticable. Satisfaction of such conditions demonstrates that a discretionary modification of the charitable gift is warranted, however, it is a high bar to reach and generally, the circumstances need to be quite compelling to obtain desired relief.

Ultimately, during these unprecedented times, organizations may want to consider whether their institutional funds may be available to them through a cy pres proceeding to help them get through the current crises, even if only on a limited, temporary basis.