

ISSUES MEMO FOR UNIFORM FUNDRAISING THROUGH PUBLIC APPEALS ACT

Introduction

This act stems from a proposal to the Committee on Scope and Program from the drafting committee's reporter. The original suggestion was limited to a scheme for creating a trust format for funds raised through public appeals for minors. The proposal raised several timely concerns, absent applicable state law, including: 1) lack of guidelines regarding the use of public appeal funds; 2) disposition of excess funds and the role of the courts in those instances; and 3) misuse of public appeal funds. While informal public appeals for people in need have in the past been conducted through traditional media, such as pleas on radio and television shows, the advent of crowdfunding sites have increased the ease of such appeals and the amount of money raised. The increase in frequency and the amounts being raised have increased the risks due to the informality of these appeals. The proposal cited an Oklahoma "statutory support trust" enacted in 1995 but there was nothing comparable in any other jurisdiction.

Earlier, in 2011, the Uniform Law Conference of Canada had promulgated its Uniform Informal Public Appeals Act (the "Canadian Act"), a product not restricted to fundraising efforts for the benefit of minors. The Canadian Act was inspired in large part by examples of difficulties in disposing of excess funds. The drafting committee consulted the Canadian Act as a starting point. However, this act does not contain some of the Canadian Act's framework, in particular its labelling of all such public appeals as trusts, though it considered all of them as well as other possible provisions. This memo discusses the major issues examined by the committee.

1. THE ACT'S TITLE

The ULC Executive Committee subsequently authorized creation of a committee "to study the need for and feasibility of state legislation concerning trust management of funds raised for individuals and families by public fundraising efforts, such as crowdfunding." That is, the study committee was charged with exploring the possibility of an act applicable to all beneficiaries, not just minors. Further, the committee was to examine the feasibility of an act that would include a vehicle for trust management of public appeal funds. After the study committee concluded its work, the Executive Committee approved the Committee on Scope and Program resolution for "a Drafting Committee to Regulate the Management of Funds Raised Through Crowdfunding Efforts." The contemplated act was "to require transparency (including identity of the sponsor, stating the purpose or purposes of the endeavor, identifying application of surplus funds and addressing how funds should be applied if the target amount is not raised); and civil sanctions and remedies for non-compliance."

The drafting committee initially deemed its project the "Management of Funds Raised Through Crowdfunding Efforts Act." In time, however, the drafting committee realized that title did not adequately reflect the mechanics of the ever increasing popularity of raising funds for benevolent purposes through largely online campaigns. First, the term "crowdfunding" could be construed by some as a reference to raising equity for commercial ventures as authorized in many states. The committee considered a title with the term "social fundraising," but in the end settled on something closer to the title of the Canadian Act. Second, because its focus shifted in

time from management to organizing and commencing a public appeal, the committee thought it appropriate that the Act's title mention fundraising. The Executive Committee endorsed the name change.

2. ACT NOT CONFINED TO PUBLIC APPEALS FOR THE BENEFIT OF MINORS

The expanding popularity of fundraising for benevolent purposes has produced all manner of imaginative public appeals. By the time it began its work there really was every reason for the drafting committee to create an act applicable, as the Executive Committee put it, to "individuals and families," as well as any other person or project intended to benefit from the public appeal.

3. NO REFUND TO CONTRIBUTOR TO PUBLIC APPEAL FUND

Mindful of the Canadian Act, the drafting committee devoted extensive thought and discussion as to whether this act should similarly extend to a public appeal contributor the right to a refund of any unused public appeal fund, what the act refers to as an unused balance. The committee's deliberations included: 1) an unused balance with a minimum threshold amount from which any refund would be dispensed; 2) a minimum threshold amount for any refund; and 3) whether any refund should be pro-rated taking into account the total amount of the unused balance as a percentage of all contributions. Ultimately, the committee took the approach that any contributor should be treated no differently than a contributor to a charity.

Although no unused balance would arise in the case of, say, the American Red Cross, a contribution to either a public appeal fund or a charity is an expression of benevolent faith for which the contributor normally expects nothing for him or herself other than the satisfaction of helping. Also, the most common gifts to such appeals are very small. The act provides in most cases that if the appeal does not specify a plan for unused funds, then an unused balance be directed, at the fund manager's discretion, to an individual or project similar to the one for which the public appeal was intended to benefit.

Finally, the committee concluded that the fund manager of a comparatively informal public appeal not organized through an online platform might not be capable of adequately determining and dispensing refunds. The cost of trying to return all gifts would not be outweighed by the benefit to the individual donors of the return of small sums of money.

4. NO CAUSE OF ACTION FOR CONTRIBUTOR

Just as the act contains no provision for the return of any portion of an unused balance to a public appeal contributor, so, too, the Act is without civil recourse for a contributor. The scorned contributor will usually arise in one of two circumstances: 1) the contributor has been scammed by the public appeal; or 2) the contributor takes exception to the unused balance being redirected to a particular individual or project.

Nothing in the act exempts fraudulent misconduct by a public appeal organizer or fund manager from criminal prosecution. Further, where state law allows, the attorney general may pursue a civil action against an organizer or fund manager. Additionally, the act bestows upon

an organizer, fund manager and individual or project intended to benefit from the public appeal standing to bring suit, presumably against one another where a dispute arises as to disbursement of funds.

But as to a contributor, the committee's approach is that lack of standing is consistent with lack of any right to a refund.

It should be noted, however, that the online platform, such as GoFundMe, may offer refunds in particular instances. For example, GoFundMe offers a guarantee to both donors and intended beneficiaries. The recent campaign to raise money to build the border wall is an example of GoFundMe protecting donors. The campaign initially claimed that if it did not reach its \$1 billion goal to finance the wall, all donations would be refunded. It indeed fell short, raising \$20 million, and the organizer said that instead the money raised would go to a nonprofit organization that would build parts of the wall. GoFundMe stepped in, because of the promise in the original campaign, and now donors are being offered a choice of a refund or a donation to the nonprofit. <https://www.washingtonpost.com/nation/2019/01/12/border-wall-gofundme-refund-million-unless-donors-want-give-it-again/> In the highly publicized case of the homeless veteran GoFundMe scam, GoFundMe reimbursed donors from its own coffers. <http://www.newsweek.com/gofundme-homeless-veteran-scam-donors-all-given-full-refund-1271317> The drafters determined that fraudulent campaigns were covered under existing criminal law, and while some platforms may choose to offer refund protection, mandating refunds may be too onerous to the more informal arrangements for the reasons explained above.

5. EXCLUSION OF INTERMEDIARY AS FUND MANAGER

The act defines a fund manager as “a person that controls or manages a public-appeal fund for the benefit of another person or a project.” Funds generated by most public appeals, prior to distribution, will be parked in an account in a financial institution or held by an online platform. The Canadian Act specifies that an account in a particular financial institution in which funds are held is not, by that fact alone, a fund manager. This is simply common sense policy that should apply as well to an online platform, and financial institutions and the online platforms desire confirmation that none of the duties of fund manager will be imposed on them. As long as the intermediary acts at the direction of a fund manager, and does nothing more, the provisions applicable to a fund manager in the Act do not apply to it.

6. EXCLUSION OF ORGANIZED CHARITY AS FUND MANAGER

The act does not apply to a public appeal fund where the organizer is “a qualified entity or the fund is payable directly to a qualified entity.” A qualified entity, in turn, is defined in part as “an entity, organization, or association” that is registered with the enacting state as a charity or qualifies as tax exempt under IRC § 501(c)(3). Such charities are sufficiently subject to existing state statutes and regulations that obviate any need to sweep them into the act. The definition of qualified entity also includes governmental entities and agencies. Additionally, the act's language regarding an unused balance would not apply to a qualified entity. This provision is consistent with the Canadian Act.

7. DISPOSITION OF UNUSED BALANCE

A primary goal of the act is providing a mechanism to dispose of excess funds when the terms of the fundraising appeal do not provide a “Plan B.” There was considerable discussion about how to deal with this, as well as consideration of the Canadian approach. Under the current draft, if the terms of the appeal do not provide for disposition of excess funds, the person controlling the funds is directed to distribute the excess to a qualified entity that will apply the balance in a manner substantially similar to the original purpose of the appeal. If for some reason this is not possible, then the unused balance escheats to the state.

Such a provision would resolve disputes such as the one in In Re Estate of Filbeck, 305 Mich. App. 550 (2014). In that case, a daughter of a man with leukemia who had lost his medical benefits raised significant funds for his medical bills. He then regained his medical coverage, and upon his death there was a dispute over disposition of the excess funds. The court imposed a constructive trust and required the funds be paid to his estate (and his second wife), even though they were held in the name of the daughter.

8. NO CREATION OF STATUTORY TRUST

Under the Canadian act, all funds created through a public appeal are considered trusts, and whoever controls the funds is considered a trustee. There are some limitations on the duties and liability of trustees under the act, but otherwise the full law of trusts applies. There was significant discussion about the use of trusts for appeals raising funds for others, in particular appeals for minors and incapacitated adults, but there was concern about imposing full fiduciary duties on a person in a good Samaritan role, who may be unsophisticated with respect to managing property for others. Instead, the act outlines the duties of a fund manager who is in a position similar to a trustee, holding funds for a purpose or for a person other than himself or herself. The act also limits the liability of such a fund manager to acts involving willful misconduct or dishonesty.

9. APPLICABILITY AND JURISDICTION

Choice of law was an extremely difficult issue, because the relevant parties could be in a number of jurisdictions. The Canadian act allows the act to apply if a fund organizer or an intended beneficiary is a resident in the province, but the drafters chose to limit applicability to the residence of the fund organizer in order to provide clarity.