

State of South Dakota

SEVENTY-FIFTH SESSION
LEGISLATIVE ASSEMBLY, 2000

400D0620

SENATE BILL NO. 163

Introduced by: Senators Whiting, Everist, and Olson and Representatives Michels, Hunt, and Wilson

1 FOR AN ACT ENTITLED, An Act to establish guidelines for the management and use of
2 investments held by certain eleemosynary institutions and funds.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. Terms used in this Act mean:

- 5 (1) "Institution," an incorporated or unincorporated organization organized and operated
6 exclusively for educational, religious, charitable, or other eleemosynary purposes, or
7 a governmental organization to the extent that it holds funds exclusively for any of
8 these purposes;
- 9 (2) "Institutional fund," a fund held by an institution for its exclusive use, benefit, or
10 purposes, but does not include a fund held for an institution by a trustee that is not an
11 institution or a fund in which a beneficiary that is not an institution has an interest,
12 other than possible rights that could arise upon violation or failure of the purposes of
13 the fund;
- 14 (3) "Endowment fund," an institutional fund, or any part thereof, not wholly expendable
15 by the institution on a current basis under the terms of the applicable gift instrument;
- 16 (4) "Governing board," the body responsible for the management of an institution or of

1 an institutional fund;

2 (5) "Historic dollar value," the aggregate fair value in dollars of an endowment fund at
3 the time it became an endowment fund, each subsequent donation to the fund at the
4 time it is made, and each accumulation made pursuant to a direction in the applicable
5 gift instrument at the time the accumulation is added to the fund. The determination
6 of historic dollar value made in good faith by the institution is conclusive;

7 (6) "Gift instrument," a will, deed, grant, conveyance, agreement, memorandum, writing,
8 or other governing document (including the terms of any institutional solicitations
9 from which an institutional fund resulted) under which property is transferred to or
10 held by an institution as an institutional fund.

11 Section 2. The governing board may appropriate for expenditure for the uses and purposes
12 for which an endowment fund is established so much of the net appreciation, realized and
13 unrealized, in the fair value of the assets of an endowment fund over the historic dollar value of
14 the fund as is prudent under the standard established by section 6 of this Act. This section does
15 not limit the authority of the governing board to expend funds as permitted under other law, the
16 terms of the applicable gift instrument, or the charter of the institution.

17 Section 3. Section 2 of this Act does not apply if the applicable gift instrument indicates the
18 donor's intention that net appreciation may not be expended. A restriction upon the expenditure
19 of net appreciation may not be implied from a designation of a gift as an endowment, or from a
20 direction or authorization in the applicable gift instrument to use only income; interest; dividends;
21 rents, issues, or profits; or to preserve the principal intact; or a direction which contains other
22 words of similar import. This rule of construction applies to gift instruments executed or in effect
23 before or after the effective date of this Act.

24 Section 4. In addition to an investment otherwise authorized by law or by the applicable gift
25 instrument, and without restriction to investments a fiduciary may make, the governing board,

1 subject to any specified limitations set forth in the applicable gift instrument or in the applicable
2 law other than law relating to investments by a fiduciary, may:

3 (1) Invest and reinvest an institutional fund in any real or personal property deemed
4 advisable by the governing board, whether or not it produces a current return,
5 including mortgages, stocks, bonds, debentures, and other securities of profit or
6 nonprofit corporations, shares in or obligations of associations, partnerships, or
7 individuals, and obligations of any government or subdivision or instrumentality
8 thereof;

9 (2) Retain property contributed by a donor to an institutional fund for as long as the
10 governing board deems advisable;

11 (3) Include all or any part of an institutional fund in any pooled or common fund
12 maintained by the institution; and

13 (4) Invest all or any part of an institutional fund in any other pooled or common fund
14 available for investment, including shares or interests in regulated investment
15 companies, mutual funds, common trust funds, investment partnerships, real estate
16 investment trusts, or similar organizations in which funds are commingled and
17 investment determinations are made by persons other than the governing board.

18 Section 5. Except as otherwise provided by the applicable gift instrument or by applicable
19 law relating to governmental institutions or funds, the governing board may:

20 (1) Delegate to its committees, officers, or employees of the institution or the fund, or
21 agents, including investment counsel, the authority to act in place of the board in
22 investment and reinvestment of institutional funds;

23 (2) Contract with independent investment advisors, investment counsel or managers,
24 banks, or trust companies, so to act; and

25 (3) Authorize the payment of compensation for investment advisory or management

1 services.

2 Section 6. In the administration of the powers to appropriate appreciation, to make and retain
3 investments, and to delegate investment management of institutional funds, members of a
4 governing board shall exercise ordinary business care and prudence under the facts and
5 circumstances prevailing at the time of the action or decision. In so doing they shall consider long
6 and short term needs of the institution in carrying out its educational, religious, charitable, or
7 other eleemosynary purposes, its present and anticipated financial requirements, expected total
8 return on its investments, price level trends, and general economic conditions.

9 Section 7. With the written consent of the donor, the governing board may release, in whole
10 or in part, a restriction imposed by the applicable gift instrument on the use or investment of an
11 institutional fund. If written consent of the donor cannot be obtained by reason of the donor's
12 death, disability, unavailability, or impossibility of identification, the governing board may apply
13 in the name of the institution to the circuit court for release of a restriction imposed by the
14 applicable gift instrument on the use or investment of an institutional fund. The attorney general
15 shall be notified of the application and shall be given an opportunity to be heard. If the court
16 finds that the restriction is obsolete, inappropriate, or impracticable, it may by order release the
17 restriction in whole or in part. No release under this section may change an endowment fund to
18 a fund that is not an endowment fund. No release under this section may allow a fund to be used
19 for purposes other than the educational, religious, charitable, or other eleemosynary purposes
20 of the institution affected. This section does not limit the application of the doctrine of cy pres.