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Who Are the Beneficiaries of Fisk University's Stieglitz Collection?

Alan Feld

Boston University School of Law

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WHO ARE THE BENEFICIARIES OF FISK UNIVERSITY'S STIEGLITZ COLLECTION?

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Alan L. Feld

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**WHO ARE THE BENEFICIARIES OF FISK UNIVERSITY'S
STIEGLITZ COLLECTION?**

ALAN L. FELD*

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INTRODUCTION

Most trusting relationships involve clearly defined parties. A banker and her customer or a physician and his patient know who will rely on whom. Questions may arise as to the exact nature of the expectations each party has of the other or the scope of the entrusted matter, but both sides have no doubt as to the identity of the affected parties. Similarly, when the entrustor engages the entrusted party to act for a beneficiary, the entrusted party can identify the entrustor and the beneficiary. Furthermore, both of these parties may assert claims against the entrusted party for mismanagement or malfeasance.

For an important class of actors, however, indeterminacy as to the affected party or parties exists on one side of the trusting relationship. Charitable trusts serve an unspecified set of beneficiaries, sometimes characterized as the general public. Indeed, this characteristic distinguishes them from conventional trusts with a limited and determined class of beneficiaries. Most

* Maurice Poch Faculty Research Scholar and Professor of Law, Boston University School of Law.

charities now operate in not-for-profit corporate form, with no stockholders, and they similarly serve an indeterminate set of ultimate beneficiaries.

This attribute – that charities operate for the benefit of the general public rather than a restricted and identified class of beneficiaries – shapes the legal accountability of charities. Donors transfer property to a charity so that it can provide a public benefit. Once the donor has made the gift, however, the donor traditionally has no legal standing to call the charity to account.¹ Recent changes to trust law allow donors to sue in order to enforce express conditions on a gift, but continue to limit donor standing when the gift lacks explicit limitations.² Donors to charities in corporate form generally continue to lack standing even as to conditions on a gift.³ Recipients of benefits from a charity likewise lack standing to sue. Individuals who might derive goods or services from the charity's actions ordinarily cannot bring the institution to account in court for misbehavior.⁴ It falls to the state attorney general to defend the public's interest in the charity's conduct of its affairs.⁵ These officers have many other duties, however, and the extent of supervision of not-for-profit activities tends to range from the reactive to the inactive.⁶

¹ Kenneth L. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433, 447 (1960) (“[I]t is universally held that contributors to public charities have no standing to enforce the duties of their fiduciaries.”).

² UNIF. TRUST CODE § 405(c) (amended 2005) (“The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.”); *id.* § 405 cmt. (contrasting Uniform Trust Code § 405(c) with the 1959 Restatement (Second) of Trusts and referencing Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. HAW. L. REV. 593 (1999) as a source “[f]or the law on the enforcement of charitable trusts”); Gary, *supra*, at 617 (“[E]xcept for donors who have made restricted gifts, donors will not have standing to take legal action against the fiduciaries.”). Over twenty jurisdictions have adopted the Uniform Trust Code. *Legislative Fact Sheet – Trust Code*, UNIFORM L. COMMISSION, <http://uniformlaws.org/LegislativeFactSheet.aspx?title=Trust%20Code> (last visited Feb. 18, 2011).

³ *See, e.g.*, *Hardt v. Vitae Found., Inc.*, 302 S.W.3d 133, 138-39 (Mo. Ct. App. 2009) (distinguishing between charitable trust law and charitable corporation law to hold that the donor to a non-profit charitable corporation had no standing to enforce the conditions and terms of the donation).

⁴ *See, e.g.*, *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 28 (1976) (holding that indigent defendants lacked standing to sue the Treasury Secretary and the Internal Revenue Commissioner for “issuing a Revenue Ruling allowing favorable tax treatment to a nonprofit hospital that offered only emergency-room services to indigents”). For a discussion of beneficiary standing, see *Lefkowitz v. Lebensfeld*, 415 N.E.2d 919, 921 (N.Y. 1980).

⁵ *See* Mary Grace Blasko et al., *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. REV. 37, 43 (1993) (“[The state attorney general] does have the power to bring suit to enforce the charitable purposes of the organization.”).

⁶ *See id.* at 42-43; Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 939 (2004) (“[A]s a practical matter, few state attorneys general have the funding and inclination to engage in aggressive charity

The officers and directors of a charitable enterprise operate subject to the twin duties of care and loyalty in acting for the institution.⁷ When matters do come to court, judges give great deference to the institution's actions that are based on honest judgment.⁸ Legislation in some instances relieves a charity's officers and directors of liability for all but the worst duty violations.⁹ As a practical matter, the legal regime accords the decision makers of not-for-profits great scope in defining for themselves the nature of their mission and the manner in which they carry it out. In this sense they can select the particular subgroup of individuals who will benefit most directly from the charity's activities.

The broad scope accorded to the managers of a charity and the weak oversight resulting from the legal standing rules create risks of frustration, or worse, for a trusting relationship. For some not-for-profits, American society has responded with direct regulation of aspects of their operation. Health institutions constitute a prime example. For others, the legal system relies on the members and supporters of the institution who have direct contact with it to provide primary oversight through the mechanism of "voting" with their feet or their checkbooks. Churches provide an example of not-for-profit institutions for which direct governmental involvement would violate important norms. Instead of direct government involvement in churches, society relies on those closest to the institution to monitor its activities. Other not-for-profit institutions sell services in partially competitive markets, where market

enforcement."). Some recent scholarship has criticized certain attorney general interventions as harmful. *Id.* at 940-43 (arguing that parochialism and paternalism have motivated attorneys general to initiate harmful interventions into the activities of charitable boards); Jonathan Klick & Robert H. Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-Off*, 108 COLUM. L. REV. 749, 755-59 (2008) (explaining that the Pennsylvania Attorney General's intervention in the Hershey Trust's sale of a controlling interest in the Hershey Company exposed the trust to unnecessary costs and risks).

⁷ See PRINCIPLES OF THE LAW OF NONPROFIT ORGS. §§ 310, 315 (Tentative Draft No. 1, 2007) (describing a board member's duty of loyalty and duty of care to the organization).

⁸ See, e.g., *Janssen v. Best & Flanagan*, 622 N.W.2d 876, 883 (Minn. 2003) ("[W]e conclude that the boards of nonprofit corporations may receive the protection of the business judgment rule."); see also PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 365 (Tentative Draft No. 1, Partial Reprint, 2008) (describing the business judgment rule that protects board members from duty of care claims).

⁹ See, e.g., IDAHO CODE ANN. § 6-1605(1) (2010) (providing immunity from liability to uncompensated officers and directors of nonprofit organizations except for certain conduct, including fraud, intentional breach of a fiduciary duty, and wanton behavior); MASS. GEN. LAWS ch. 231, § 85K (2008) (limiting the liability of uncompensated directors, officers, and trustees of charitable educational institutions to "damage or injury . . . caused by willful or wanton misconduct").

discipline may constrain some behaviors. For example, not-for-profit performing arts companies compete for audiences with for-profit enterprises.

Federal tax rules that qualify the institution for tax exemption¹⁰ and allow it to receive tax-deductible donations¹¹ provide limited constraints for not-for-profit organizations. Liberal in scope, these rules establish outer bounds of conduct but generally do not seriously inhibit the institution's choice of activities within this framework. A qualifying charity must be organized and operated "exclusively" for one or more broadly specified purposes, such as educational or religious.¹² These purposes grant in practice an enormous range of choice for exempt organizations. Almost one million not-for-profit organizations exist and qualify for exempt status,¹³ creating a welcome decentralization and diffusion of charitable sector decision making.

All charitable not-for-profits operate subject to a nondistribution rule. The charity may not distribute any part of its income to the charity's insiders.¹⁴ Professor Hansmann posited that this attribute cured a particular kind of market failure and enhances trust.¹⁵ Those who pay for the services offered by some charities cannot easily verify whether and how performance took place.¹⁶ For example, the donor of a relief package for delivery in a third world country cannot easily check whether the charity made the delivery or whether it simply pocketed the funds.¹⁷ The nondistribution constraint reassures donors that the individuals in control of the charity have no direct personal incentive to profit.¹⁸ The possibility that the charity could enrich its managers in other ways, however, weakens the constraint. High salaries and elaborate fringe benefits can substitute to some extent for direct distributions.¹⁹ The tax law requires that compensation of charity managers meet a reasonableness test, but the test allows for considerable flexibility.²⁰

¹⁰ I.R.C. § 501 (2006).

¹¹ *Id.* § 170.

¹² *Id.* § 501(c)(3).

¹³ KENNARD T. WING, KATIE L. ROEGER & THOMAS H. POLLAK, URBAN INST., *THE NONPROFIT SECTOR IN BRIEF: PUBLIC CHARITIES, GIVING, AND VOLUNTEERING*, 2010, at 1 (2010), available at <http://www.urban.org/UploadedPDF/412209-nonprof-public-charities.pdf> (stating that more than 950,000 organizations qualified for 501(c)(3) status in 2008).

¹⁴ See 26 C.F.R. § 1.501(c)(3)-1(c)(2) (2010) ("An organization is not operated exclusively for one or more exempt purposes if its net earnings inure in whole or in part to the benefit of private shareholders or individuals.").

¹⁵ Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 *YALE L.J.* 835, 844-49 (1980).

¹⁶ *Id.* at 847.

¹⁷ See *id.* at 846-47.

¹⁸ *Id.* at 847.

¹⁹ *Id.* at 844.

²⁰ See 26 C.F.R. § 53.4958-6 (2010) (applying a rebuttable presumption of reasonableness to the compensation arrangements of nonprofit executives).

For any particular institution, different constituencies may trust the not-for-profit to behave in a particular way – to distribute food to the needy, educate children, or support performing arts. Conflict arises when the institution seeks to make changes that disappoint one or more of the trusting groups. As an example, if an organization engaged in funding research on breast cancer decided instead to provide supportive care for children with cancer, disagreement and conflict could arise.²¹

This Essay discusses one example of change, the proposed sale by Fisk University of certain unique works of art. Much valuable artwork resides in not-for-profit institutions, primarily museums. As the American Association of Museums Code of Ethics states: “Museums make their unique contribution to the public by collecting, preserving, and interpreting the things of this world.”²² Museums qualify for tax exemption as serving “educational” purposes.²³ These general goals may require the officers and directors to choose among different strategies and different constituencies of the museum. The choices become more complex when the institution that owns the art performs other educational missions that overshadow its museum-like functions. Works of art generate great passion in viewers, critics, and even others who may never have seen the works. The works combine aesthetic values, historical perspectives, and philosophical dimensions in a unique physical object. The desire to maintain and preserve a work in its place can equal the care and concern shown for a loved one. Some artworks sell for millions of dollars, and their monetary value both adds to their allure and raises the stakes for institutional decision making. Each work is unique. The paradox lies in the fact that many millions of unique objects exist.

Support for an institution – both public and private – flows from and creates expectations as to the nature of the public benefits that the institution will provide. These expectations may differ and sometimes may conflict. As already noted, broad discretion allows the institution’s decision makers to choose the particulars of the activities in which a museum or other recipient of artworks will engage. The institution often cannot fulfill all of the different roles that its supporters expect of it.

²¹ “[T]hose who give to a home for abandoned animals do not anticipate a future board amending the charity’s purpose to become research vivisectionists.” *Attorney Gen. v. Hahnemann Hosp.*, 494 N.E.2d 1011, 1021 n.18 (Mass. 1986) (internal quotation marks omitted).

²² *Code of Ethics for Museums*, AM. ASS’N OF MUSEUMS (2000), <http://www.aam-us.org/museumresources/ethics/coe.cfm>.

²³ See 26 C.F.R. § 1.501(c)(3)-1(d)(3)(ii) example 4 (2010); *Code of Ethics for Museums*, *supra* note 22 (“Museums serve society by advancing an understanding and appreciation of the natural and cultural common wealth through exhibitions, research, scholarship, publications, and educational activities.”).

The possibility of conflicting expectations becomes more probable when an educational institution functions only secondarily as a conservator of the valuable artworks. The institution may seek to realize the monetary appreciation in its art, by way of sale or otherwise, in order to support its other purposes. The strong expectation that a museum or other educational institution will hold and preserve the artworks it owns in perpetuity renders decisions to sell or otherwise dispose of any of the works highly controversial. Museum professionals strongly discourage deaccessioning, except when the institution reinvests the proceeds in other artwork.²⁴ They condemn sale of works for other purposes, such as support for the institution's day-to-day operations.²⁵ Sale of a work removes it from public view and places it in private hands, away from public view. In a recent example, the National Academy – a prestigious institution “that integrates a museum, art school, and association of artists and architects”²⁶ – sold two Hudson River paintings in 2008 for \$15 million.²⁷ It planned to use the money for its operating budget and general maintenance.²⁸ The Association of Art Museum Directors imposed sanctions on the Academy that included banning loans of artworks from other Association members as well as other program collaborations.²⁹

In many cases, once a proposed sale of art becomes public, the outcry from donors, critics, and others causes the institution to reverse course and to continue to retain the work. For major, high-profile institutions, the decision to sell a work of art frequently follows from the need for money to fund the purchase of something of importance. But even a plan to purchase other artworks with the proceeds of the sale can generate controversy. Use of the sale proceeds for building maintenance, construction of a new facility, or other

²⁴ AAMD TASK FORCE ON DEACCESSIONING, AAMD POLICY ON DEACCESSIONING 4 (2010), available at <http://www.aamd.org/papers/documents/FINALDEACCESSIONINGREPORT060910.pdf> (“Funds received from the disposal of a deaccessioned work . . . may be used only for the acquisition of works in a manner consistent with the museum’s policy on the use of restricted acquisition funds.”); ASS’N OF ART MUSEUM DIRS., ART MUSEUMS AND THE PRACTICE OF DEACCESSIONING (2007), available at <http://www.aamd.org/papers/> (approving deaccessioning when “[p]roceeds from a deaccessioned work are used *only* to acquire other works of art”).

²⁵ AAMD TASK FORCE ON DEACCESSIONING, *supra* note 24, at 4 (“Funds received from the disposal of a deaccessioned work shall not be used for operations or capital expenses.”); ASS’N OF ART MUSEUM DIRS., *supra* note 24 (stating that deaccessioning proceeds should never be used “as operating funds, to build a general endowment, or for any other expenses”).

²⁶ *About Us*, NATIONAL ACADEMY, <http://www.nationalacademy.org/pageview.asp?mid=4&pid=94> (last visited Feb. 11, 2011).

²⁷ Donn Zaretsky, *AAMD Rules Need To Be Deaccessioned*, ART IN AM. (Mar. 31, 2009), <http://www.artinamericamagazine.com/news-opinion/the-market/2009-03-31/aamd-rules-need-to-be-deaccessioned/>.

²⁸ *Id.*

²⁹ *Id.*

purposes that do not preserve a unique work of art in the collection almost certainly brings a loud chorus of negatives.

Another example involved the monumental painting *Numbers, 1964*, which Jasper Johns created specifically for the north lobby wall of the New York State Theater at Lincoln Center.³⁰ The painting hung in that same location for thirty-five years.³¹ In December 1998 the Lincoln Center Board endorsed the idea of selling the painting, for which it had received offers of up to \$15 million.³² The Board would have applied the funds to repair and improve the buildings at Lincoln Center.³³ Criticism from the artist, major donors, and Philip Johnson – who was one of the theater’s architects – caused the Board to reverse itself one month later.³⁴ The Chairwoman and the President of Lincoln Center then opined that they would raise the needed money without selling assets.³⁵

As noted, more complex issues arise when the museum function of the institution exists within a larger frame that serves a different but related purpose. Several universities recently have sought to sell artworks. Arts professionals assert that an institution’s responsibility with respect to a unique work consists primarily in preservation. When a university rather than a museum owns artwork, however, the institutional calculus becomes more complex. The university appropriately considers the educational value of the artworks, their relationship to the core educational mission, and the university’s capacity to derive maximum educational utility from continued ownership of the work. Other educational needs may deserve higher priority. The public reaction to any proposed sale often fails to balance the school’s multiple obligations. Just as discontinuing a program of study brings angry disappointment, a plan to dispose of works of art generates howls of protest. In each of several recent instances, when a university proposed to dispose of artworks, vocal opposition emerged from contributors, beneficiaries, and the general public. This public protest usually slowed and often prevented a sale.

Thus, when Brandeis University planned to reduce some of its operating deficit in early 2009 by closing its Rose Art Museum and selling the museum’s valuable collection of contemporary works, the angry chorus of critics and

³⁰ Carol Vogel, *Outcry at Talk of Selling Lincoln Center Art*, N.Y. TIMES, Jan. 11, 1999, <http://www.nytimes.com/1999/01/11/theater/outcry-at-talk-of-selling-lincoln-center-art.html>; Editorial, *How Not to Sell a Public Painting*, N.Y. TIMES, Jan. 25, 1999, <http://www.nytimes.com/1999/01/25/opinion/how-not-to-sell-a-public-painting.html>.

³¹ Vogel, *supra* note 30.

³² Carol Vogel, *Lincoln Center Drops Plan To Sell Its Jasper Johns Painting*, N.Y. TIMES, Jan. 26, 1999, <http://www.nytimes.com/1999/01/26/nyregion/lincoln-center-drops-plan-to-sell-its-jasper-johns-painting.html>.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

donors quickly produced an about-face.³⁶ The trustees had proposed giving up a museum facility with low attendance but high-value assets in order to shore up what they saw as the primary mission of the university.³⁷ In the face of vocal opposition, the Brandeis administration later agreed to seek revenue from the artworks through loan programs, not sales.³⁸

In one instance with a different outcome, in 2006 Thomas Jefferson University decided to sell *The Gross Clinic* by Thomas Eakins.³⁹ Alumni of this medical school in 1878 collected \$200 for the institution to buy a painting of a beloved professor performing a bloody operation on a man's thigh.⁴⁰ The work since has gained acknowledgement as one of the great nineteenth-century American canvases.⁴¹ The University proposed to sell the work for \$68 million to the Crystal Bridges Museum of American Art and the National Gallery of Art.⁴² After hearing bitter criticism of the proposal, the University offered to allow the painting to remain in Philadelphia if it received a comparable offer.⁴³ Contributors and cultural foundations raised the money and the Philadelphia Museum of Art and the Pennsylvania Academy of the Fine Arts now share the work.⁴⁴ The Chairman of Jefferson's Board of Trustees stated that "the retention and preservation of [the painting was] outside the scope of [the University's] central mission," and selling it would allow the school to focus on its "essential responsibility to educate, teach and heal."⁴⁵

³⁶ Daniel Grant, *Is the University's Museum Just a Rose To Be Plucked?*, WALL ST. J., Feb. 3, 2009, <http://online.wsj.com/article/SB123361710970041349.html>.

³⁷ Randy Kennedy & Carol Vogel, *Outcry Over a Plan To Sell Museum's Holdings*, N.Y. TIMES, Jan. 27, 2009, http://www.nytimes.com/2009/01/28/arts/design/28rose.html?_r=2.

³⁸ Geoff Edgers, *Brandeis To Loan Art To Boost Budget: Museum, Sotheby's Team Up To Ease Crunch*, BOSTON GLOBE, May 28, 2010, http://www.boston.com/ae/theater_arts/articles/2010/05/28/brandeis_may_loan_out_rose_art_for_a_fee/.

³⁹ Press Release, Thomas Jefferson Univ., Thomas Jefferson University Trustees Agree to Sale of *The Gross Clinic* (Nov. 11, 2006), available at http://www.jefferson.edu/eakins/documents/Eakins_Release_FINAL_%2011_10_06.pdf.

⁴⁰ Carol Vogel, *Eakins Masterwork Is To Be Sold to Museums*, N.Y. TIMES, Nov. 11, 2006, <http://www.nytimes.com/2006/11/11/arts/design/11pain.html>.

⁴¹ *The Eakins Gallery: The Gross Clinic*, T. JEFFERSON U., <http://www.jefferson.edu/eakins/grossclinic.cfm> (last visited Feb. 11, 2011).

⁴² Vogel, *supra* note 40.

⁴³ *Id.*

⁴⁴ Press Release, Phila. Museum of Art, Newly Restored, Eakins's 'The Gross Clinic' To Be Centerpiece of Exhibition Shedding New Light on Artist's Original Vision (July 18, 2010), available at <http://www.philamuseum.org/press/releases/2010/824.html>.

⁴⁵ Press Release, Thomas Jefferson Univ., *supra* note 39 (internal quotation marks omitted). A similar outcry emerged when the Boston Athenaeum proposed to sell its Gilbert Stuart portraits of George and Martha Washington. See *The Stuart Solution*, AM. HERITAGE, Aug.-Sept. 1980, at 110, 110, available at http://www.americanheritage.com/articles/magazine/ah/1980/5/1980_5_110.shtml.

This Essay analyzes one recent controversy concerning a university's proposed sale of artworks. The case of *Georgia O'Keeffe Foundation (Museum) v. Fisk University*⁴⁶ raised a number of issues relevant to trust: fidelity to donors; respect for historic mission; choice of current educational practices; designation of the appropriate public beneficiaries; and issues of race and place.

I. GEORGIA O'KEEFFE FOUNDATION V. FISK UNIVERSITY

A. Fisk University

Fisk University, Nashville's oldest college, held its first classes in January 1866.⁴⁷ From its initial focus on educating poor African Americans and former slaves, Fisk has become a respected research university⁴⁸ and ranks in the top half dozen of historically black universities in the United States.⁴⁹ It currently enrolls about 700 students, approximately half of whom come from low-income families.⁵⁰ Fisk has had financial difficulties, however, and has operated at a deficit averaging \$2 million annually in recent years.⁵¹

Fisk brought suit in 2005 in Davidson County Chancery Court, seeking a declaratory judgment to allow it to sell two works of art in order to restore its endowment and improve the mathematics, business, and science departments.⁵² The Fisk University Galleries house works of modern and contemporary African-American artists, contemporary African art and mainstream contemporary art, as well as the Alfred Stieglitz Collection,⁵³ the subject of the litigation discussed below. The University acquired both of the works it proposed to sell by gift from Georgia O'Keeffe in the late 1940s and early

⁴⁶ 312 S.W.3d 1 (Tenn. Ct. App. 2009). At the heart of this case was Fisk University's desire to sell artworks originally received as donations subject to certain conditions, including a no-sale provision. *Id.* at 4-5.

⁴⁷ *Georgia O'Keeffe Found. v. Fisk Univ.*, No. 05-2994-III, slip op. at 2 (Tenn. Ch. Ct. Feb. 8, 2008), *vacated*, 312 S.W.3d 1 (Tenn. Ct. App. 2009); *Fisk's Storied Past*, FISK, <http://www.fisk.edu/AboutFisk/HistoryOfFisk.aspx> (last visited Feb. 11, 2011).

⁴⁸ *Fisk's Storied Past*, *supra* note 47.

⁴⁹ *In re Fisk Univ.*, No. 05-2994-III, slip op. at 5 (Tenn. Ch. Ct. Aug. 20, 2010), available at <http://tn.gov/attorneygeneral/cases/fisk/fiskorder.pdf>.

⁵⁰ *Id.*

⁵¹ *Id.* at 6-7 ("Fisk . . . regularly runs a two million dollar deficit annually."); Marybeth Gasman, *Leadership and Fund Raising at Fisk University*, CHRON. OF HIGHER EDUC. (Nov. 15, 2010, 9:03 PM), <http://chronicle.com/blogs/innovations/what%E2%80%99s-happening-at-fisk/27857> (reporting that Fisk University is averaging a \$2 million annual deficit).

⁵² *Georgia O'Keeffe Found.*, 312 S.W.3d at 4.

⁵³ *Fisk University Galleries: Collections*, FISK, <http://www.fisk.edu/campuslife/FiskUniversityGalleries/Collections.aspx> (last visited Feb. 19, 2011).

1950s and displayed them as part of the Stieglitz Collection.⁵⁴ The more famous of the two works, *Radiator Building – Night, New York*, was valued in the millions of dollars.⁵⁵

B. *The Stieglitz Collection*

Alfred Stieglitz, a famous pioneering photographer and collector of modern American art, died in 1946, survived by his wife Georgia O’Keeffe, a famous artist in her own right, and a disabled daughter.⁵⁶ His estate included about 900 works of art, including photographs.⁵⁷ The will named Ms. O’Keeffe executrix of the estate and granted her a life interest.⁵⁸ Article Third of Stieglitz’s will provided that, upon Ms. O’Keeffe’s death, any artworks not previously disposed of would go to charities under arrangements that “assure to the public . . . access thereto to promote the study of art.”⁵⁹ The will also authorized transfers of funds from the estate to cover expenses of managing and preserving the artwork.⁶⁰ Article Second of the will gave Ms. O’Keeffe power to transfer property from the estate to such charities as she might select.⁶¹

Under then applicable New York law, a testator could not make testamentary gifts to charity of more than fifty percent of the estate if a spouse or child survived.⁶² A special guardian for the daughter raised the possibility that the will violated this prohibition.⁶³ To resolve this problem, Ms. O’Keeffe, with probate court approval, exercised her power under Article Second to transfer all the estate’s artworks and photographs, constituting less than fifty percent of the estate, to not-for-profit institutions.⁶⁴ Ms. O’Keeffe waived her right to appoint any remaining property to charity, individually and for the estate.⁶⁵ She then obtained a life estate in the remainder of the Stieglitz estate.⁶⁶

⁵⁴ *Georgia O’Keeffe Found.*, 312 S.W.3d at 4, 7.

⁵⁵ *See id.* at 5.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See* N.Y. DECEDENT ESTATE LAW § 17 (1909) (repealed 1967) (“No person having a husband, wife, child or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable . . . association or corporation, in trust or otherwise, more than one-half part of his or her estate”); *Georgia O’Keeffe Found.*, 312 S.W.3d at 5-6.

⁶³ *Georgia O’Keeffe Found.*, 312 S.W.3d at 5-6.

⁶⁴ *Id.* at 6.

⁶⁵ *Id.*

⁶⁶ *Id.*

Ms. O’Keeffe selected six not-for-profit recipients of the artworks.⁶⁷ Five of the grantee institutions constituted conventional art repositories.⁶⁸ Fisk University, the sixth, was not.⁶⁹ Ms. O’Keeffe did not state why she selected Fisk University as one of the recipients, other than once describing the gift as “a good thing to do.”⁷⁰ The most likely reason involves Carl Van Vechten, a photographer, critic, and writer, who had a “working relationship” with both Stieglitz and O’Keeffe.⁷¹ As a friend of Charles Johnson, the first black President of Fisk, Van Vechten seems to have played the decisive role of intermediary.⁷² Ms. O’Keeffe had no other known connection to Fisk.⁷³ At the time, Nashville was a racially segregated city.⁷⁴ A gift of valued artworks to a black university in that context made a significant social statement.⁷⁵ Viewed from a present-day perspective, however, the nature of the social statement contains ambiguity. Was it an affirmation that a black college deserved to own first-class, mainstream artwork? Or, as the Chancery Court later opined, was it an effort to promote integration in the city because whites could visit Fisk but blacks would not have been welcome in all-white institutions?⁷⁶

In her letter transferring title to ninety-seven pieces from the Stieglitz estate to Fisk, Ms. O’Keeffe wrote that Fisk would not at any time sell or exchange any of the objects in the Stieglitz Collection.⁷⁷ Fisk’s President, Charles Johnson, acknowledged the assignment and transfer of the artworks and repeated that Fisk would not sell or exchange the works in the collection.⁷⁸

⁶⁷ *Id.*

⁶⁸ *See id.* (listing the Metropolitan Museum of Art in New York, the Philadelphia Museum of Art, the National Gallery of Art in Washington, the Art Institute of Chicago, and the Library of Congress as five of Ms. O’Keeffe’s donees).

⁶⁹ *Id.* at 21 (Dinkins, J., concurring) (“[T]he primary mission of Fisk is education and . . . it was the only university amongst the donees of Alfred Stieglitz’s artwork.”).

⁷⁰ *Georgia O’Keeffe Found. v. Fisk Univ.*, No. 05-2994-III, slip op. at 9 (Tenn. Ch. Ct. Feb. 8, 2008) (internal quotation marks omitted), *vacated*, 312 S.W.3d 1 (Tenn. Ct. App. 2009).

⁷¹ *Id.* at 10.

⁷² *Id.* at 9-10.

⁷³ *Id.* at 9.

⁷⁴ *See id.* at 2-3, 8-9.

⁷⁵ *Id.* at 8-9.

⁷⁶ *See id.* at 8 (“The donation to an African-American university made a public statement and gesture to heighten the consciousness of a segregated society that African Americans and their institutions ranked equally, among and as a vital part of American society and the cultural arts.”).

⁷⁷ *Georgia O’Keeffe Found. (Museum) v. Fisk Univ.*, 312 S.W.3d 1, 6-7 (Tenn. Ct. App. 2009).

⁷⁸ *Id.* at 6.

Prior correspondence had set out other conditions for display of the works, including that the collection “be exhibited intact.”⁷⁹ In addition to the assignments from the Stieglitz estate, Ms. O’Keeffe contemporaneously transferred to Fisk four paintings from her personal collection on permanent loan, to be exhibited as part of the Stieglitz Collection.⁸⁰ Over the next several years, Ms. O’Keeffe gave those paintings to Fisk.⁸¹ The artworks gifted from Stieglitz’s estate and the paintings gifted from Ms. O’Keeffe’s personal collection included the two paintings Fisk had asked the court for permission to sell.⁸²

Fisk established and maintained a separate gallery to house the Stieglitz Collection, named the Van Vechten Gallery.⁸³ Although it includes works by renowned artists such as Picasso, Cezanne, and Renoir, as well as Stieglitz’s own work,⁸⁴ the collection attracts relatively few visitors each year.⁸⁵

C. *The Court Proceedings*

In its initial petition to the court, Fisk argued that the conditions applicable to the Stieglitz Collection did not apply to the four paintings O’Keeffe had given individually.⁸⁶ The court found, however, that contemporaneous statements by Ms. O’Keeffe showed that she intended the paintings to become part of the Stieglitz Collection, and accordingly held the restrictions applicable to them.⁸⁷ The University then argued that its current financial condition rendered it incapable of maintaining the collection intact and moved the court to allow a sale under the doctrine of *cy pres*.⁸⁸ The Georgia O’Keeffe Foundation sought to intervene, claiming that a sale would violate the conditions of the gift and that the collection accordingly should revert to the Foundation, as successor in interest to Ms. O’Keeffe.⁸⁹ The Foundation’s

⁷⁹ *Id.*

⁸⁰ *Id.* at 7.

⁸¹ *Id.*

⁸² *See id.* at 4.

⁸³ *Id.* at 21 (Dinkins, J., concurring).

⁸⁴ *Fisk University Galleries: The Carl Van Vechten Gallery*, FISK, <http://www.fisk.edu/campuslife/FiskUniversityGalleries/CarlVanVechtenGallery.aspx> (last visited Feb. 11, 2011).

⁸⁵ *See* Lee Rosenbaum, *Fisk at Frist: AG Proposes “Temporary Arrangement” for Stieglitz Collection*, ARTSJOURNAL (Sept. 14, 2010, 11:27 AM), <http://www.artsjournal.com/culturegrl/2010/09/> (estimating visitors to the Stieglitz Collection at five to seven people a day).

⁸⁶ *Georgia O’Keeffe Found. v. Fisk Univ.*, No. 05-2994-III, slip op. at 3 (Tenn. Ch. Ct. Feb. 8, 2008) (internal quotation marks omitted), *vacated*, 312 S.W.3d 1 (Tenn. Ct. App. 2009).

⁸⁷ *Id.*

⁸⁸ *Id.* at 3-4.

⁸⁹ *Georgia O’Keeffe Found. (Museum) v. Fisk Univ.*, 312 S.W.3d 1, 7 (Tenn. Ct. App.

succession in interest came about after Georgia O'Keeffe died in 1986, prompting a will contest.⁹⁰ As part of the settlement, the parties created the Georgia O'Keeffe Foundation and designated it as the residuary beneficiary of the O'Keeffe estate.⁹¹ Over Fisk's objections, the court granted the Foundation's motion to intervene in the Fisk case, after which the Foundation transferred all its assets, including any interest in this litigation, to the Georgia O'Keeffe Museum.⁹² The court then substituted the Museum as intervenor.⁹³ The court later admitted the Attorney General of Tennessee as an additional intervenor.⁹⁴

While the case was pending, Fisk asked the court to approve an agreed settlement with the Georgia O'Keeffe Museum to sell *Radiator Building* to it for \$7.5 million.⁹⁵ Subsequently, Fisk presented a broader settlement agreement for its approval, this time with the Crystal Bridges Museum of Bentonville, Arkansas.⁹⁶ Alice Walton, the Walton Foundation, and members of the Walton family had contributed \$317 million to create Crystal Bridges as a premier American art museum and center.⁹⁷ Under the proposal, Crystal Bridges would pay Fisk \$30 million for an undivided half interest in the collection.⁹⁸ Fisk and Crystal Bridges each would display the collection for six months of each year.⁹⁹ The proposed sale to Crystal Bridges thus would reallocate some of Fisk's ownership rights to a public institution pursuing an arts education mission, keeping the works out of private hands, while enabling Fisk to proceed with its proposed educational improvements.

In a series of rulings, the Chancery Court found against Fisk.¹⁰⁰ Applying the substantive law of the state where the gift took place, New York, it held that the gift documents between Ms. O'Keeffe and Fisk created an implied reverter in Ms. O'Keeffe that had passed on her death to the Foundation and then to the Museum.¹⁰¹ The Museum thus had standing to enforce the no-sale

2009).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 7-8.

⁹³ *Id.* at 8.

⁹⁴ *Id.*

⁹⁵ *Id.* 8-9.

⁹⁶ *Id.* at 9.

⁹⁷ *Wal-Mart Heiress's Art Museum May Be Delayed*, USA TODAY (Mar. 10, 2009, 5:00 AM), http://www.usatoday.com/travel/destinations/2009-03-10-crystal-bridges-museum_N.htm.

⁹⁸ *Georgia O'Keeffe Found.*, 312 S.W.3d at 5.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 8-10.

¹⁰¹ *Id.* at 9-10. Applying an interest analysis to the choice of law question, perhaps Tennessee law should have applied. It is unclear whether a different result would have

and other conditions.¹⁰² These conditions, the court held, continued to apply to Fisk and extended to the four paintings Ms. O’Keeffe had given.¹⁰³ Further, the court denied *cy pres* relief on two grounds: first, that Ms. O’Keeffe had a specific rather than a general charitable intent in making the gift and therefore if Fisk could not carry out its terms the collection should be returned to her or her heirs;¹⁰⁴ and second, as to the proposed sale of a half interest to the Crystal Bridges museum, that Ms. O’Keeffe wanted the collection to reside at Fisk to make a social statement and that a transfer would dilute this intention.¹⁰⁵ The court accordingly denied Fisk’s petition to sell the collection.¹⁰⁶ Fisk appealed the rulings.¹⁰⁷

The Court of Appeals reversed and remanded.¹⁰⁸ It determined first that the Stieglitz gift did not create a reversion in Ms. O’Keeffe, and therefore the Museum had no property interest in the collection.¹⁰⁹ The Museum accordingly lacked standing.¹¹⁰ Ms. O’Keeffe had a life estate in the Stieglitz estate and a limited power of appointment, both of which terminated upon her death.¹¹¹ She exercised the power in favor of six charitable institutions and renounced any further exercise of the power.¹¹² Her estate and its successors in interest received no rights in the artworks from the estate after her death.¹¹³ As to the four paintings Ms. O’Keeffe donated individually, her letters evidencing the gifts make no mention of any reversionary interest.¹¹⁴ Expressions by Ms. O’Keeffe of dissatisfaction with certain aspects of the University’s maintenance of the artworks evidenced frustration, but not any reversion.¹¹⁵ To the contrary, they show she believed her gift had transferred all ownership rights and that she lacked the right to revoke the gift.¹¹⁶

obtained in any event.

¹⁰² *Id.* at 9.

¹⁰³ *Georgia O’Keeffe Found. v. Fisk Univ.*, No. 05-2994-III, slip op. at 3 (Tenn. Ch. Ct. Feb. 8, 2008) (internal quotation marks omitted), *vacated*, 312 S.W.3d 1 (Tenn. Ct. App. 2009).

¹⁰⁴ *Id.* at 5, 20.

¹⁰⁵ *Id.* at 22.

¹⁰⁶ *Id.* at 23.

¹⁰⁷ *Georgia O’Keeffe Found.*, 312 S.W.3d at 10.

¹⁰⁸ *Id.* at 20.

¹⁰⁹ *Id.* at 13.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 12-13.

¹¹³ *Id.* at 13.

¹¹⁴ *Id.* at 14.

¹¹⁵ *Id.*

¹¹⁶ *See id.*

The appellate court also held that Fisk could qualify for cy pres relief.¹¹⁷ It found Ms. O’Keeffe demonstrated a general rather than a specific charitable intent.¹¹⁸ The simultaneous gifts made to other institutions, the court said, fortified this conclusion.¹¹⁹ She wanted to make the collection available for educational study to the public “in Nashville and the South.”¹²⁰ This phrase, which the lower court and the parties later took as a guiding principle, does not appear in Ms. O’Keeffe’s letters to Fisk’s President Johnson nor in Alfred Stieglitz’s will.¹²¹ On remand, the court said, Fisk would need to show that a change in circumstances had occurred rendering literal compliance with the conditions impracticable.¹²² Upon such a showing, the trial court should fashion relief close to Ms. O’Keeffe’s original intent.¹²³ A concurring judge added that the cy pres relief also should take account of Fisk’s primary mission as an educational institution.¹²⁴

On remand, the Chancery Court held a trial on the cy pres issues highlighted by the appellate court.¹²⁵ In its August 2010 opinion, it found that Fisk had indeed suffered continuing financial difficulties that satisfied the change of circumstances condition for cy pres.¹²⁶ To come as near as possible to the donor’s intent, however, the collection should remain available for study in Nashville and the South.¹²⁷ The court stated eight reasons why the proposed agreement with Crystal Bridges Museum did not meet this standard.¹²⁸ It directed the University and the Attorney General to submit alternative proposals.¹²⁹ Fisk and Crystal Bridges modified their proposed agreement to meet the court’s objections.¹³⁰ The Attorney General proposed a temporary plan for housing the collection elsewhere in Nashville, contingent on funding approval from outside sources.¹³¹

¹¹⁷ *Id.* at 15.

¹¹⁸ *Id.* at 19.

¹¹⁹ *Id.* at 18.

¹²⁰ *Id.* at 19.

¹²¹ *See id.*

¹²² *Id.* at 20.

¹²³ *Id.*

¹²⁴ *Id.* at 22 (Dinkins, J., concurring).

¹²⁵ *In re Fisk Univ.*, No. 05-2994-III, slip op. at 3 (Tenn. Ch. Ct. Aug. 20, 2010), available at <http://tn.gov/attorneygeneral/cases/fisk/fiskorder.pdf>.

¹²⁶ *Id.* at 4, 6-7.

¹²⁷ *Id.* at 12-13.

¹²⁸ *Id.* at 13-15.

¹²⁹ *Id.* at 16.

¹³⁰ *In re Fisk Univ.*, No. 05-2994-III, slip op. at 19-20 (Tenn. Ch. Ct. Nov. 3, 2010), available at <http://tn.gov/attorneygeneral/cases/fisk/fiskorder11-3-2010.pdf>.

¹³¹ *Id.* at 18.

Finally, in November 2010, the court, seeking a more permanent solution, rejected the Attorney General's plan and approved a modified version of the agreement with Crystal Bridges.¹³² It conditioned its approval on setting aside \$20 million of the \$30 million purchase price in a segregated endowment fund, the income of which would secure the continued maintenance of the Stieglitz Collection.¹³³ Fisk initially estimated that it was spending \$131,000 per year on collection maintenance.¹³⁴ Evidence at trial established that "[b]est [p]ractices" for the collection would require \$1.3 million annually.¹³⁵ Fisk would have no access to the escrowed fund or management of the principal.¹³⁶ In the event Fisk filed for bankruptcy, creditors would have no rights in the fund, which would pass, with the collection, to a new fiduciary.¹³⁷ Fisk will appeal the order.¹³⁸

II. RELEVANT INTERESTS

The Fisk case revolves around a valuable asset. The Stieglitz Collection represents important historic, educational, and aesthetic values. It also carries substantial monetary value. The collection provides present benefits to Fisk, students and other visitors to the Van Vechten Gallery, and the City of Nashville. The sale Fisk proposed raises questions as to who should receive the benefits of owning and displaying the collection in the future and who should decide how to allocate those benefits. Several different interests appear in this case. Which deserve attention, assuming consideration started afresh without the existing legal or doctrinal frameworks? Whose trust and expectations should matter? Answers to these questions can help determine the proper parties to a lawsuit to decide the future of the collection.

A. *Fisk University*

Consider the claims of Fisk, given its status as a university, from two perspectives: its current educational mission and its historic importance as a black college. Fisk cannot survive as an institution if it runs perpetual deficits. In carrying out its mission of educating students, Fisk constantly must make choices as to which activities should receive support and resources. Budget shortfalls constrain those choices. The need to reduce expenses led Fisk to

¹³² *Id.* at 21-25.

¹³³ *Id.* at 2-3.

¹³⁴ *In re Fisk Univ.*, No. 05-2994-III, slip op. at 7 (Tenn. Ch. Ct. Aug. 20, 2010).

¹³⁵ *In re Fisk Univ.*, No. 05-2994-III, slip op. at 30 (Tenn. Ch. Ct. Nov. 3, 2010) (citing trial exhibit).

¹³⁶ *Id.*

¹³⁷ *Id.* at 31-34.

¹³⁸ Robin Pogrebin, *Fisk University Plans To Appeal Ruling on Stieglitz Art Sale*, ARTS BEAT (Dec. 1, 2010, 8:44 PM), <http://artsbeat.blogs.nytimes.com/2010/12/01/fisk-university-plans-to-appeal-ruling-on-stieglitz-art-sale/>.

eliminate degree programs in dramatic speech and dance and in philosophy and religion.¹³⁹ Fisk's proposal to strengthen science, business, and mathematics forwards its core function to enable low-income, African-American students to enjoy enhanced educational options.¹⁴⁰ The University rationally might choose to put resources toward science, business, and mathematics in preference to educating some of its students through the Stieglitz Collection. As the first college in Nashville and a leading historically black college, its alumni and members of the larger public expect the institution to continue in its mission. To do so, Fisk sought to restore its finances by selling a valuable asset. Even within its arts education program, Fisk rationally might prefer to emphasize the art of African and African-American artists whose works Fisk also displays, rather than the more conventional iconic works of the white mainstream.

As the litigation progressed, Fisk developed the proposal to share the Stieglitz Collection with the Crystal Bridges Museum.¹⁴¹ The proposal enables Fisk to enjoy the collection for half the time and to monetize some of its value¹⁴² – to have its cake and eat it too.

B. *The Crystal Bridges Museum*

Creation of a new museum, even one with great financial resources, presents unique difficulties. Crystal Bridges needs to acquire first-class works for its collection. As a latecomer to the museum world, it finds that most of the artwork it would want already resides in the permanent collections of other institutions. The acquisition of a part interest in the Stieglitz Collection enables Crystal Bridges to fulfill its mission of creating an important collection of American art in Bentonville, Arkansas.¹⁴³

C. *The Georgia O'Keeffe Museum*

This museum preserves Ms. O'Keeffe's artistic reputation and legacy and provides research and study of American Modernism.¹⁴⁴ The Museum collection of more than 3,000 works includes 1,149 by Ms. O'Keeffe.¹⁴⁵ Acquisition of additional O'Keeffe works would further enhance the collection. Secondly, maintenance of a public collection attached to her

¹³⁹ *In re* Fisk Univ., No. 05-2994-III, slip op. at 6 (Tenn. Ch. Ct. Aug. 20, 2010).

¹⁴⁰ See *Our Mission & Values*, FISK, <http://www.fisk.edu/AboutFisk/OurMissionAndValues.aspx> (last visited Feb. 20, 2011).

¹⁴¹ *In re* Fisk Univ., No. 05-2994-III, slip op. at 19 (Tenn. Ch. Ct. Nov. 3, 2010).

¹⁴² *Id.*

¹⁴³ See *About Crystal Bridges*, CRYSTAL BRIDGES MUSEUM OF AM. ART, <http://crystalbridgesmuseum.org/public/about-2/> (last visited Feb. 5, 2011).

¹⁴⁴ *Museum History*, GEORGIA O'KEEFFE MUSEUM, <http://www.okeeffemuseum.org/history.html> (last visited Feb. 20, 2011).

¹⁴⁵ *Id.*

name advances the Museum's core objective of making Ms. O'Keeffe's work available to the public.¹⁴⁶ The arrangement between Fisk and Crystal Bridges forwards this objective by making the Stieglitz Collection available to a wider potential audience.

D. *Nashvillians*

Both the Court of Appeals and the Chancery Court emphasized the importance of the collection for Nashville and the South.¹⁴⁷ The presence of the collection at Fisk enables local citizens to view it and appreciate the educational and aesthetic experience it provides. But even if they never visit the collection, members of the Nashville public may take pride in the presence of the Stieglitz Collection in their city. They may expect Fisk to maintain the collection in Nashville and may perceive the collection's removal as diminishing their city.

E. *Donors*

Since the Stieglitz Collection originated in Alfred Stieglitz's estate but came to Fisk through Georgia O'Keeffe's exercise of an appointment power, a preliminary question arises as to whose intent matters concerning the conditions placed on the gift.¹⁴⁸ The evidence as to Alfred Stieglitz's intentions appears only from brief language in his will. It states that the collection should reside in public institutions so as to assure public access to the works for the study of art.¹⁴⁹ The will makes no further specification of recipients or conditions. Georgia O'Keeffe, in exercising her power under the will to appoint ninety-seven of the works to Fisk, manifested her desire to safeguard the Stieglitz Collection and keep it intact so as to convey to the viewer or art student the aesthetic experience of the works as a group.¹⁵⁰ These purposes seem congruent with her late husband's intent.¹⁵¹ She did not state why she chose Fisk as a recipient, but at least one statement she made – that it was “a good thing to do”¹⁵² – may imply that she wanted to make a social statement of inclusion for a leading institution serving the African-American

¹⁴⁶ See *id.* (“The Georgia O'Keeffe Museum is dedicated to perpetuating the artistic legacy of Georgia O'Keeffe . . .”).

¹⁴⁷ See *Georgia O'Keeffe Found. (Museum) v. Fisk Univ.*, 312 S.W.3d 1, 18 (Tenn. Ct. App. 2009); *In re Fisk Univ.*, No. 05-2994-III, slip op. at 12-13 (Tenn. Ch. Ct. Aug. 20, 2010), available at <http://tn.gov/attorneygeneral/cases/fisk/fiskorder.pdf>.

¹⁴⁸ In considering the *cy pres* remedy, the Court of Appeals instructed the Chancery Court to approximate Ms. O'Keeffe's intent. *Georgia O'Keeffe Found.*, 312 S.W.3d at 20.

¹⁴⁹ *Id.* at 5.

¹⁵⁰ See *id.* at 6.

¹⁵¹ Stieglitz's will did not require that the collection remain intact. See *id.* at 5.

¹⁵² *Georgia O'Keeffe Found. v. Fisk Univ.*, No. 05-2994-III, slip op. at 9 (Tenn. Ch. Ct. Feb. 8, 2008) (internal quotation marks omitted), *vacated*, 312 S.W.3d 1 (Tenn. Ct. App. 2009).

community.¹⁵³ On the other hand, the gift to Fisk came as part of her exercise of the appointment power as to all the works, motivated by the need to clear the way for her enjoyment of a life interest in the remainder of the estate.¹⁵⁴ The choice of institutional recipients may have mattered to her less than the fact of transferring the works out of the estate. The scantiness of the evidence on some critical aspects of her intention raises doubt as to how much to rest present day decisions on this evidence.

In any event, both Mr. Stieglitz and Ms. O’Keeffe died years ago. Nevertheless, we give current weight to their intentions, as the law generally does for the conditions imposed by deceased donors, for several reasons. First, in accepting the gift with its conditions, Fisk undertook a moral and contractual obligation to observe them. That obligation continues, although the passage of time and changes in circumstances may affect the shape of that claim. Second, and more generally, we fear that the failure to respect donor wishes after they make the gift will discourage subsequent donors from donating gifts to charity. But this disincentive should have only modest effect on rational donors who see that the modification of conditions results from the combination of changed circumstances and the passage of a long period of time.

F. *The Attorney General*

The attorney general acts as advocate for the diffuse public interests that benefit from charity.¹⁵⁵ He may seek to prevent waste or misappropriation of charitable assets.¹⁵⁶ The attorney general has considerable discretion to choose which aspect of the public interest to emphasize. At times the choice may slight the best interests of the institution.¹⁵⁷ Here, the Tennessee Attorney General gave top priority to a Nashville situs for the collection. He argued for a transfer away from Fisk to another institution if necessary to keep the collection in Nashville, even if that left Fisk without the infusion of cash that could help Fisk avoid bankruptcy.¹⁵⁸

¹⁵³ See *id.* at 8-9.

¹⁵⁴ See *Georgia O’Keeffe Found.*, 312 S.W.3d at 5-6.

¹⁵⁵ See, e.g., *id.* at 7 (“The Attorney General . . . sought to intervene to represent the interests of the charitable beneficiaries, the potential charitable beneficiaries, and the people of Tennessee . . .”).

¹⁵⁶ See Brody, *supra* note 6, at 976.

¹⁵⁷ See, e.g., *id.* at 998-99 (questioning the Attorney General’s role in the Hershey Trust case).

¹⁵⁸ *In re Fisk Univ.*, No. 05-2994-III, slip op. at 18 (Tenn. Ch. Ct. Nov. 3, 2010), available at <http://tn.gov/attorneygeneral/cases/fisk/fiskorder11-3-2010.pdf>.

G. *The Stieglitz Collection*

At the center of the controversy sits the Stieglitz Collection itself. First, its artistic and historical importance makes a strong claim for proper care and maintenance. Climate control and security impose substantial costs. Fisk estimated it currently spends \$131,000 annually for these purposes¹⁵⁹ and requires considerably more for “[b]est [p]ractices.”¹⁶⁰ All the relevant parties, from the deceased donors to the present parties, trust that Fisk or whoever possesses the work will take the necessary steps to ensure proper care of the collection. Apart from the aesthetic dimension, simple financial prudence would require a fiduciary to maintain the collection as a financially valuable asset. Second, the intangible values that the collection represents would have little consequence unless people viewed and studied the works. Fisk estimated that the collection received relatively few visits each year.¹⁶¹ Steps to ensure a wider audience for the collection would generate greater appreciation for the collection’s value. This consideration strongly counsels against Fisk selling the collection to a private collector, who would limit public access. A transfer to another public institution, however, could satisfy the goal of maintaining the collection’s accessibility.

III. THE LEGAL SETTING

Both courts in the Fisk case gave great weight to donor intent. The legal rules affecting charities, however, generally reflect an ambivalence concerning the role of donors in connection with the institutions they support. On the one hand, living donors generally have no legal standing to challenge a charity’s activities in court.¹⁶² An owner of a property interest in the gift, such as a right of reverter, could bring suit, whether that party had donated the gift or had received it from the donor. But the donor of an absolute gift could not.¹⁶³ On the other hand, the desires expressed in their lifetime by donors now dead determine judicial remedies many years later under the doctrine of cy pres.

A. *Donor Standing*

An individual who contributes to any charity does so to support activities the donor prefers, such as distribution of canned goods to indigents, research

¹⁵⁹ *In re Fisk Univ.*, No. 05-2994-III, slip op. at 7 (Tenn. Ch. Ct. Aug. 20, 2010), available at <http://tn.gov/attorneygeneral/cases/fisk/fiskorder.pdf>.

¹⁶⁰ *In re Fisk Univ.*, No. 05-2994-III, slip op. at 30 (Tenn. Ch. Ct. Nov. 3, 2010) (citing trial exhibit).

¹⁶¹ See *In re Fisk Univ.*, No. 05-2994-III, slip op. at 7 (Tenn. Ch. Ct. Aug. 20, 2010) (stating that Fisk estimated visitors to *all* of its art collections at less than 10,000 per year).

¹⁶² But with regard to charitable trusts, see UNIF. TRUST CODE § 405(c) (amended 2005) and RESTATEMENT (THIRD) OF TRUSTS § 94(2) (Tentative Draft No. 5, 2009).

¹⁶³ For a discussion of the standing of a charitable trust settlor regardless of a retained interest, see RESTATEMENT (THIRD) OF TRUSTS § 94 cmt. g(3).

on viruses, or performance of live concerts. Generally, donors rely on the charity to pursue its mission under the direction of its officers and directors or trustees. Occasionally, donors attach specific conditions for the use of the property contributed. A donor may retain a reversionary interest that returns the property if the charity violates the condition.

When a donor contributes property to a charity subject to a specific condition, the charity accepts an obligation to perform in accordance with the requirement. Absent the donor's retention of a right of reverter, however, the long-standing common law rule has denied the donor the legal capacity to enforce the condition.¹⁶⁴ Ordinarily, only the attorney general, representing the interest of the general public, has standing to sue the charity.¹⁶⁵ A donor could include a provision allowing donor standing in the gift document.¹⁶⁶ On the other hand, if the donor retained a property right, such as a right of reverter, in the charitable gift, the donor would have standing to sue for violation of the condition.¹⁶⁷ Thus, for example, a donor who gave a museum a valuable work of art on the condition that the museum display it perpetually, could not sue the museum if, after several years, the museum placed the work in its storage basement. In contrast, if the donor retained or transferred a property right in the work, as the O'Keeffe Museum claimed had occurred in the Fisk case, then upon the failure to display the work, the donor or other possessor of the property right would have standing to enforce the condition.

Income tax considerations may affect the form of a gift made by a well-advised donor. The Internal Revenue Code ordinarily denies a tax deduction for a gift of a partial interest in property except in narrowly specified forms, so that retention by the donor of a contingent remainder interest in donated property could cost the donor the tax deduction.¹⁶⁸ But the Regulations make an exception and allow the deduction if, after property vests in the charity, it could be defeated by some subsequent act or event "so remote as to be negligible."¹⁶⁹ If a donor contributes a work of art to a museum on the condition that the museum display it perpetually, the donor at the time of the gift may treat the possibility that the museum will fail to do so as sufficiently

¹⁶⁴ See *Cathedral of the Incarnation in the Diocese of Long Island, Inc. v. Garden City Co.*, 697 N.Y.S.2d 56, 59 (App. Div. 1999) (preventing assignee from interfering with land sale because the original deed did not create a right of reverter); Karst, *supra* note 1, at 445-46.

¹⁶⁵ Karst, *supra* note 1, at 437.

¹⁶⁶ Cf. *id.* at 446-47 (discussing the doctrine of visitation, which could appear in the charters of charitable corporations and which allows founders and substantial donors to provide management supervision over the charity).

¹⁶⁷ But see *Cathedral of the Incarnation*, 697 N.Y.S.2d at 59 (denying relief to assignee because no reversionary interest existed).

¹⁶⁸ I.R.C. § 170(f)(3) (2006); see also *id.* § 170(f)(2).

¹⁶⁹ 26 C.F.R. § 1.170A-1(e) (2010).

remote and therefore negligible, entitling the donor to a full fair market value deduction. The existence of a condition does not reduce the amount of the tax deduction, notwithstanding that a work of art subject to a condition has less value in the market than the same work unencumbered by a condition. But if the donor retained a contingent remainder interest in the donated property, the donor could lose the benefit of the tax deduction. If the donor actually received the property back from the charity, the donor would have to include it in income.¹⁷⁰ To meet this potential difficulty, donors occasionally have created a gift to a second charity conditional upon the first charity's failure to comply with the donor's condition. In theory, the second charity supervises the actions of the first, with the incentive that it will own the property upon a proven violation.

Scholars have advocated and debated the case for broader donor standing for decades.¹⁷¹ Courts and legislatures, however, have maintained and sometimes strengthened the traditional limited standing rules.¹⁷² An exception, suggesting a possible judicial shift, occurred in *Smithers v. St. Luke's-Roosevelt Hospital Center*.¹⁷³ The court allowed the donor's widow and representative of her husband's estate to challenge the hospital's redirection of the restricted charitable gift.¹⁷⁴

Other courts thus far have rejected the invitation to enlarge standing to sue charities for failure to carry out the donor's intended purposes. In *Rettek v. Ellis Hospital*,¹⁷⁵ the federal district court denied standing to the donors' niece, who alleged that the donee hospital had misused the substantial legacy.¹⁷⁶ In *Hardt v. Vitae Foundation, Inc.*,¹⁷⁷ executors of the estate who exercised their discretion to make conditional gifts from the estate to the Foundation sued for failure to comply with the conditions attached to the gift.¹⁷⁸ The Missouri Court of Appeals held they lacked standing.¹⁷⁹ It added that the Attorney General, whose intervention the Hardts had not sought in this case, had the duty to protect donor intent and the public interest.¹⁸⁰

Legislative projects also have considered the question of donor standing. Amendments to the Uniform Trust Code reversed the Code's prior position and

¹⁷⁰ See, e.g., *Alice Phelan Sullivan Corp. v. United States*, 381 F.2d 399, 400, 403 (Ct. Cl. 1967) (explaining that when a charity returned property to the donor almost twenty years later, the donor had to include any previous tax benefit as income).

¹⁷¹ See, e.g., Karst, *supra* note 1, at 445-49.

¹⁷² See *infra* notes 175-187 and accompanying text.

¹⁷³ 723 N.Y.S.2d 426 (App. Div. 2001).

¹⁷⁴ *Id.* at 435-36.

¹⁷⁵ No. 1:08-CV-844, 2009 WL 87592 (N.D.N.Y. Jan. 12, 2009).

¹⁷⁶ *Id.* at *2, *5.

¹⁷⁷ 302 S.W.3d 133 (Mo. Ct. App. 2009).

¹⁷⁸ *Id.* at 135-36.

¹⁷⁹ *Id.* at 138-40.

¹⁸⁰ *Id.*

granted the settlor of a charitable trust standing to enforce the trust.¹⁸¹ Drafters of the Uniform Prudent Management of Institutional Funds Act (UPMIFA),¹⁸² which revised the Uniform Management of Institutional Funds Act (UMIFA),¹⁸³ considered a similar provision but ultimately did not include it.¹⁸⁴ UPMIFA did carry forward the UMIFA provision that permits a charity to eliminate or alter a condition by agreement with the donor.¹⁸⁵ In the *Vitae Foundation* case, the Hardts argued that adoption of the Uniform Trust Code in Missouri, granting donors standing to sue charitable trusts, should apply as well to charitable corporations.¹⁸⁶ The court rejected the argument, noting that the state also had adopted UPMIFA, whose drafters had considered and rejected donor standing.¹⁸⁷

B. *Beneficiary Standing*

The indeterminate nature of the beneficiaries of not-for-profit entities led courts to impose even stricter limits on beneficiary standing, lest frivolous complaints beset the institution. Allowing all potential beneficiaries to challenge decisions of a not-for-profit institution creates a risk of perpetual interference with the operation of the institution. The New York courts have recognized an exception, however, when a particular subclass has a special interest in the charitable fund and “is sharply defined and limited in number.”¹⁸⁸

The question of beneficiary standing arose in the recent litigation surrounding the proposal to move the Barnes Foundation into Philadelphia, contrary to the deceased donor’s express wishes and pursuant to a proceeding to modify the initial terms of the gift.¹⁸⁹ Students in Barnes Foundation programs sought to appear in opposition to the plan.¹⁹⁰ The court denied them beneficiary standing, but allowed them to present their arguments to the court

¹⁸¹ See UNIF. TRUST CODE § 405(c) (amended 2005).

¹⁸² UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT (2006).

¹⁸³ UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT (1972).

¹⁸⁴ Marion R. Fremont-Smith, *The Search for Greater Accountability of Nonprofit Organizations: Recent Legal Developments and Proposals for Change*, 76 FORDHAM L. REV. 609, 621-22 (2007).

¹⁸⁵ UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(a) (2006); *id.* § 6 cmt.

¹⁸⁶ *Hardt v. Vitae Found., Inc.*, 302 S.W.3d 133, 137 (Mo. Ct. App. 2009).

¹⁸⁷ *Id.* at 138-39.

¹⁸⁸ *Alco Gravure, Inc. v. Knapp Found.*, 479 N.E.2d 752, 755 (N.Y. 1985) (referencing RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. c (1959)).

¹⁸⁹ See *Court Allows Barnes Foundation To Move Collection To Philadelphia*, NONPROFIT ISSUES (Dec. 16, 2004 - Jan. 15, 2005), <http://www.nonprofitissues.com/public/features/leadfree/2004dec2-IS.html>.

¹⁹⁰ *In re Barnes Found.*, 871 A.2d 792, 793 (Pa. 2005).

by way of amicus briefs.¹⁹¹ As nonparties, they could not lodge an appeal from an adverse ruling.¹⁹²

C. *Cy Pres*

Recognizing that charitable institutions may exist over long periods of time and circumstances unforeseen by the donor may arise, courts apply the doctrine of *cy pres* to charitable gifts. The doctrine permits courts to allow the institution to alter the use of the gift from the donor's stated intention in order to accommodate the new context, but the change must come as near as possible to the original purpose.¹⁹³ Many scholars have criticized the influence of the "dead hand" and have proposed changes in the *cy pres* doctrine.¹⁹⁴ Planning for a charitable gift can avoid *cy pres*. At the point of the initial gift, before the donor has parted with the property, the parties could build into the gift documents future flexibility in administering the donation.¹⁹⁵ After the charity receives the gift, both UMIFA and UPMIFA allow a donor and a charity to agree to modify a condition placed on a gift.¹⁹⁶ But if the gift instrument has no such provision or the donor has died, *cy pres* becomes the charity's legal route to modify an onerous condition.

Cy pres, with its emphasis on the donor, fails to give adequate weight to the interests of other constituencies. Their concerns may enter covertly, as in the Tennessee courts' elevation of "Nashville and the South" into a governing rubric for the Stieglitz Collection.¹⁹⁷ Moreover, courts frequently must deal with thin or cryptic evidence of donor intent. If *cy pres* requires a court to ask, "what would the donor do in the face of changed circumstances?," the answer comes close to guesswork in such cases. We simply cannot know precisely what either Stieglitz or O'Keefe would have directed had they known of

¹⁹¹ *Id.*; *Court Allows Barnes Foundation To Move Collection To Philadelphia*, *supra* note 189.

¹⁹² *In re Barnes Found.*, 871 A.2d at 794-95.

¹⁹³ Ilana Eisenstein, Comment, *Keeping Charity in Charitable Trust Law: The Barnes Foundation and the Case for Consideration of Public Interest in Administration of Charitable Trusts*, 151 U. PA. L. REV. 1747, 1768 (2003).

¹⁹⁴ See, e.g., Rob Atkinson, *The Low Road to Cy Pres Reform: Principled Practice To Remove Dead Hand Control of Charitable Assets*, 58 CASE W. RES. L. REV. 97, 101, 103, 141 (2007); Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111, 1115-16, 1142 (1993); Roger G. Sisson, Comment, *Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 VA. L. REV. 635, 635-36, 653-54 (1988). See generally Ray D. Madoff, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD (2010) (discussing how legal protections for the dead affect the living).

¹⁹⁵ PRINCIPLES OF THE LAW OF NONPROFIT ORGS. § 430 cmt. b(3) (Tentative Draft No. 2, 2009).

¹⁹⁶ UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(a) (2006); UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7(a) (1972).

¹⁹⁷ See *supra* notes 120-121, 127, 147 and accompanying text.

Fisk's current economic difficulties. We can surmise that protection of the collection and its continued availability to the public would have been a part of that direction, but we cannot assume more. Would they have favored the sale to Crystal Bridges of a half interest in the collection? We do not know.

CONCLUSION

The fact that not-for-profit institutions operate without specified beneficiaries may create too much flexibility in selecting and carrying out the institution's mission as represented to donors. On the other hand, donor conditions to which the institution agreed may turn out, with the passage of time and changes in circumstances, to restrict the institution unduly. Current legal doctrine seems to treat both possible problems inadequately. More liberal standing rules, to allow donors and special subclasses of intended beneficiaries to bring suit, would provide more assurance of fiduciary adherence to the original purposes of the charitable gift. Heirs or transferees of donors, on the other hand, lack the same direct connection to the charity and often have their own agendas. They should continue to lack standing. The institution should maintain fidelity to donor conditions until circumstances have changed. At that point, an inquiry broader than donor intent should ensue. The court, with the aid of the attorney general and the institution, should identify the parties whose interests bear on the matter at hand – including, but not limited to, the explicit concerns that the donors expressed when they made the gift – and determine the best current outcome.