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Donating Art . . . With Strings Attached?

Four practice pointers on how to approach charitable bequests

Collectors often take pride not so much in their individual acquisitions of artwork, but rather in their collection as a whole. A collector wishing to donate her collection to a museum or other charitable organization may want to ensure that it remains intact in perpetuity. This intent may be difficult, or even impossible, for donees to honor down the road because of changes in circumstances, such as shifts in the relevance of the artwork, the donee's own finances and downturns in the economy. Administrative headaches and even litigation can result over restrictions to donations. Therefore, collectors should structure their charitable donations to maximize the likelihood that their primary intentions will be honored, while avoiding legal battles over unduly burdensome restrictions.

To highlight the legal issues at stake when collections are gifted to charities, let's review several cases in which donee institutions challenged collectors' gift restrictions. We'll also provide practice pointers to mitigate the risk that future issues will arise with clients' charitable gifts of art.

Legal Battles

As the following examples show, when donors couple gifts with onerous restrictions, donees may seek to avoid those restrictions through court action, resulting in costly litigation.

The Barnes collection. The saga of the Barnes collection has been publicized widely and is the subject of the 2009 documentary, "The Art of the Steal." In a nutshell, the fate of this priceless collection, which includes works

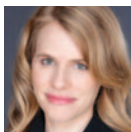
by Paul Cézanne, Vincent van Gogh, Henri Matisse, Pablo Picasso and Pierre-Auguste Renoir, was the subject of over a decade of litigation seeking to avoid various gift restrictions.

In 1922, Dr. Albert C. Barnes established the Barnes Foundation (the Foundation) to found and maintain an art gallery in Lower Merion, Penn., and, through a trust indenture, Barnes donated his artwork to the Foundation to accomplish his charitable purposes. In the indenture, Barnes set strict rules governing the maintenance of his collection. The Foundation subsequently challenged many of these restrictions through litigation.

For example, the indenture provides that after Barnes' death, none of the works in the collection can ever be loaned, sold or otherwise disposed of unless in a state of actual decay.¹ Despite this restriction, in 1992, a Pennsylvania court permitted a tour of selected artworks from the Barnes collection to generate revenue for building renovations. This tour was extended through subsequent court proceedings.²

In 1998, a Pennsylvania court approved a deviation from the language in Barnes' indenture requiring the gallery to be closed during the months of July and August. The court determined that Barnes couldn't have anticipated modern climate-control technology, and therefore, the court allowed the deviation to permit year-long access to the gallery.³

In 2004, a Pennsylvania court approved an expansion of the size of the Foundation's board of trustees from five to 15 trustees under the doctrine of deviation. The court stated that, "Dr. Barnes could have foreseen neither the complicated, competitive and sophisticated world in which nonprofits now operate, nor the range of expertise and influence the members of their governing bodies must now possess."⁴ The court held that maintaining the status quo in this regard would substantially impair the accomplishment of the Foundation's charitable



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purposes, and therefore, expansion of the board of trustees was necessary.⁵

And, most notably, the Foundation petitioned a Pennsylvania court to modify the indenture so it could relocate its gallery from Lower Merion to Philadelphia based on financial necessity. The relevant provision of the indenture provides that “[a]ll the paintings shall remain in exactly the places they are” at the time of the death of Barnes and his wife.⁶ After a 10-day trial, in 2004, the court entered a decree approving the petition and permitting the proposed relocation.⁷ Following an appeal and several unsuccessful attempts by members of the public to re-open the case, the Barnes collection’s new location in Philadelphia opened to the public in May 2012.⁸

The Brooklyn Museum. In 1932, The Brooklyn Museum in New York received a large collection of paintings, porcelains, jewelry and furniture from the estate of retailer Colonel Michael Friedsam. Eight decades later, the museum decided that it no longer wanted 229 of the 926 works, which had turned out to be fakes, misattributed works or of poor quality. Because the cost of storing and maintaining these works in compliance with applicable standards set forth by the American Alliance of Museums is high, the museum sought to deaccession (that is, to remove from their collection) these unwanted works. However, it was hamstrung by the terms of Friedsam’s will, which required the museum to obtain permission to deaccession works from the estate’s executors, the last of whom died more than 50 years ago. The will further stated that, if the collection wasn’t kept together, the art should go to the colonel’s brother-in-law and two friends. Faced with these express wishes from the donor, the museum has resorted to legal action to seek court approval of a sale.⁹

Fisk University. In the late 1940s and early 1950s, Georgia O’Keeffe donated over one hundred artworks that were owned by her and her late husband, Alfred Stieglitz, to Fisk University (Fisk), a college located in Nashville, Tenn.¹⁰ The donations were subject to several restrictions, including provisions forbidding the sale of the works and requiring that they be displayed at Fisk as

one collection.¹¹ In 2005, faced with financial difficulties, Fisk filed a petition in Tennessee state court to modify these restrictions under the doctrine of cy pres, which relieves a charity from compliance with restrictions on donations that are impossible or impracticable to fulfill, so that it could sell two valuable paintings from the collection.¹² During the proceedings, Fisk’s request for relief transformed into a request for the court to approve

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an agreement between Fisk and the Crystal Bridges Museum (Crystal Bridges), located in Bentonville, Ark., which was founded by Walmart heiress Alice Walton.¹³ Pursuant to that agreement, Crystal Bridges would purchase from Fisk a 50 percent undivided interest in the entire collection for \$30 million and would, thereafter, share in the display and maintenance of the collection.¹⁴ In 2011, a Tennessee appellate court upheld a decision by a lower court approving the sale.¹⁵

Four Practice Pointers

In light of the often unanticipated and costly complexities that can arise when a collector includes prohibitive gift restrictions on her donation of an artwork collection to a museum or other charitable organization, a savvy planner should keep the following practice pointers in mind.



1. Do your homework. Once a collector has identified one or more potential donee institutions, she should engage in an active dialogue with each institution, particularly if she doesn't already have a relationship with the entity. As a prospective donor, a collector should review the general mission and purposes of each institution, along with any other documentation that will provide insight into its history and direction. Even if the donor has a relationship with the potential donee, the donor may not be familiar with, for example, the donee's deaccessioning or gift acceptance policies. Although these policies may be subject to modification, they can be instructive as to the donee's overall approach to

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maintaining its own collection and accepting gifts. For instance, some deaccessioning policies include as factors the quality and condition of the work, the ability of the institution to preserve and care for the work and the cost of insuring the work. A deaccessioning policy that focuses significant attention on the cost of maintenance might signal the institution's sensitivity to that particular issue.

The donor should also review each potential donee's tax returns and other relevant financial information. Tax returns for Internal Revenue Code Section 501(c)(3) tax-exempt organizations are required to be made available to the public and can be accessed online (through *Guidestar.com*, for example) or by requesting the returns from the entity itself. A careful review of a donee's tax return can provide a donor with insight into the donee's financial history and footing, including whether its spending on employee salaries has increased significantly when its revenues haven't. This knowledge, in turn, may lead to further insight into

the general management of the institution's finances, including how likely it is that the institution can maintain a costly collection from a donor or whether or to what extent a donor should consider gifting or bequeathing additional funds to assist in the maintenance of her collection.

2. Consider the impact of gift restrictions on the donor's charitable deduction.¹⁶ The opportunity to receive a charitable income, gift and/or estate tax deduction may motivate a collector to donate artwork to a tax-exempt organization. However, the donor should keep in mind that gift restrictions may result in a reduction of the valuation of the charitable deduction that accompanies the gift or bequest. In one case, a collector couple contributed 148 paintings to 22 tax-exempt organizations, including museums and universities. Accompanying each gift was the restriction that the painting could not be sold or disposed of for a 3-year period. Although the Tax Court permitted the collectors to take a charitable income tax deduction for their contributions to the tax-exempt organizations, it determined that the restriction "certainly had an adverse effect on fair market value."¹⁷

In the case of an estate's ability to take a charitable estate tax deduction for the bequest of artwork accompanied by restrictions, the Internal Revenue Service has indicated that in determining the extent of an estate's charitable deduction versus the value of the property passing to the donee institution, it will take into account numerous factors, including whether: (1) the donee can be divested of its ownership of the collection; (2) works in the collection can be sold and the types of limitations on the sales of works of art in the collection; and (3) the donee institution may freely loan artworks to others.¹⁸

A collector wishing to donate her collection to a museum may also seek to include a reverter clause in her gift instrument or will, which would provide that if certain stated conditions aren't met, ownership of the collection would revert back to the collector or her heirs. However, the attendant risk in retaining such a reversionary interest is that the collector won't be entitled to a charitable gift or estate tax deduction, unless the likelihood of reversion is "so remote as to be negligible."¹⁹ This phrase has been defined as a chance "which persons generally would disregard as so highly improbable that it might be ignored with reasonable safety in



undertaking a serious business transaction,” and “which every dictate of reason would justify an intelligent person in disregarding as so highly improbable and remote as to be lacking in reason and substance.”²⁰ In Revenue Ruling 70-452, the IRS determined that the probability of reversion must be 5 percent or less to be deemed “so remote as to be negligible.”²¹ Reverter clauses should be employed with caution because it’s not easy to determine what conditions will cause the likelihood of reversion to fall into the 5 percent-or-less category.²²

3. Memorialize the gift in a written document.

The best way to confirm a collector’s intent is to do so in a clearly drafted document, whether through a gift agreement in conjunction with a gift made during the collector’s lifetime or by making a specific provision for a bequest in her will. Rather than including a reverter clause, the donor should consider naming an alternative beneficiary institution as a back-up in the event that the original donee institution fails to comply with the purposes of the gift. Also, as noted previously, the donor should consider contributing a sum of money to the institution to ensure that sufficient funds are available for the preservation, restoration, storage, display and other costs associated with maintaining the collection.

In the case of a lifetime gift subject to a gift agreement, the collector should maintain the right to oversee aspects of the gift during her lifetime, including reserving editorial control or approval rights over the catalogue, marketing and publicity materials and gallery or installation design. The donee institution should also be required to report regularly to the collector on the institution’s plans for the collection, exhibitions featuring the collection or works from it, the use of any funds contributed by the collector to support the maintenance of the collection and the institution’s general strategic plans. **By mandating regular reporting and accounting by the donee, the donor can keep closer tabs on how well the donee is adhering to the donor’s goals and the purposes of the gift.** These rights should carry over to the collector’s personal representatives or others so that they can continue to monitor the institution’s activities. The gift agreement itself should inure to the benefit of the collector’s successors, heirs and personal representatives and give these parties, and perhaps family members or other trusted individuals, standing to enforce the terms of the agreement and bring suit in the event of a breach

of the agreement.²³

With respect to the bequest of a collection to an institution pursuant to a will (or revocable trust), while a collector may stipulate the terms of the bequest in similar detail, it can be cumbersome and impractical to include this degree of detail in a will. It may make more sense for the collector to bequeath her artwork to a particular institution but provide her personal representatives with the leeway to negotiate a suitable written agreement with it.²⁴

4. Understand that change is inevitable. A collector should balance her desire for control with practicality. Given that it’s nearly impossible to predict


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the multitude of ways in which a donee institution’s social, cultural and economic backdrop will change, particularly 50 years down the road, **a donor should understand that some degree of change is inevitable.** Again, a donor should maintain back-up plans. For example, if the donee institution’s mission changes such that its focus shifts from collecting and maintaining its modern art collection to supporting contemporary art and artists, then a collector who gifts a modern art collection might consider permitting the sale or donation of her collection, or groups of works, to another institution, perhaps on consultation with the donor, family members, personal representatives or other trusted advisors. The same approach would apply if the donee entity merged with another charity or dissolved. Additionally, **the donor, her heirs or personal representatives should engage in an ongoing dialogue and relationship with the institution.** By doing so, the donor, her heirs or personal representatives can continue to monitor the shifting landscape and, perhaps, identify mutually acceptable ways to approach any changes—and avoid being caught by surprise. Even if



museums may be resistant to gift restrictions, they certainly don't wish to alienate donors, particularly given the rising cost of art and their reliance on the generosity of art-collector donors.

Beware of Roadblocks

Collectors seeking to donate art to an institution should be mindful of the roadblocks that can arise from onerous gift restrictions. Therefore, collectors and their counsel should: (1) conduct due diligence on any prospective donee to investigate whether that institution can appropriately maintain the gifted collection, (2) consider the effect potential gift restrictions may have on the availability of a charitable deduction, (3) memorialize any gift in a written document, whether in a gift agreement or pursuant to a will or revocable trust, and (4) recognize that they simply can't control everything that happens in the future and consider incorporating back-up plans into their gift plans. 

Endnotes

1. *In re Barnes Foundation*, No. 58,788, 2004 WL 1960204, at *3 and *6 (Montgomery Cnty. Pa. Com. Pl., Jan. 29, 2004).
2. *In re Barnes Foundation*, 672 A.2d 1364, 1370 (Pa. Super. 1996).
3. *In re Barnes*, *supra* note 1, at *6; See *Barnes Foundation*, 18 Fid. Rep. 2d 393 (Montgomery Cnty. Pa. Com. Pl., 1998).
4. *In re Barnes Foundation*, *supra* note 1, at *6.
5. *Ibid.*
6. *Ibid.*
7. *In re Barnes Foundation*, 74 A.3d 129, 131 (Pa. Super. June 19, 2013).
8. *Ibid.*; Roberta Smith, "A Museum, Reborn, Remains True to Its Old Self, Only Better," *N.Y. Times* (May 17, 2012), www.nytimes.com/2012/05/18/arts/design/the-barnes-foundation-from-suburb-to-city.html?pagewanted=all.
9. Patricia Cohen, "Brooklyn Museum Finds Some Problematic Gifts Can't Be Returned," *N.Y. Times* (Jan. 15, 2013), www.nytimes.com/2013/01/16/arts/design/brooklyn-museum-finds-some-problematic-gifts-cant-be-retained.html; "Full Text of Colonel Michael Friedsam's Will," *N.Y. Times* (April 14, 1931).
10. *Georgia O'Keeffe Foundation v. Fisk Univ.*, 312 S.W.3d 1, 4 (Tenn. Ct. App. 2009); Randy Kennedy, "Legal Battle Over Fisk University Art Collection Ends," *N.Y. Times* (Aug. 3, 2012), http://artsbeat.blogs.nytimes.com/2012/08/03/legal-battle-over-fisk-university-art-collection-ends/?_php=true&_type=blogs&ref=georgiaokeeffe&r=0.
11. *Ibid.*
12. *Ibid.*
13. *Georgia O'Keeffe Foundation*, *supra* note 10 at 5; Randy Kennedy, *supra* note 10.
14. *Georgia O'Keeffe Foundation*, *supra* note 10 at 5.
15. *In re Fisk Univ.*, 392 S.W.3d 582 (Tenn. Ct. App. 2011) (application for permission to appeal denied by Tenn. Supreme Court, April 20, 2012).
16. There are issues other than those involving gift restrictions that will impact the availability of a charitable deduction for a donor, including the type of charity that the donee is, the type of property being contributed, whether the use of the artwork is related to the charity's purposes and whether a qualified appraisal has been prepared, but these questions are beyond the scope of this article. See Ralph E. Lerner and Judith Bresler, *Art Law: The Guide for Collectors, Investors, Dealers and Artists* (4th ed. 2012), 1264.
17. *Silverman v. Commissioner*, T.C. Memo. 1968-216 at 68-1182.
18. See Private Letter Ruling 200202032 (Oct. 26, 2001), in which an individual owning a collection of Impressionist and Post-Impressionist artwork bequeathed the collection to an art museum, subject to the museum agreeing to maintain and display the collection in accordance with specified terms and conditions. In this case, although the Internal Revenue Service determined that the restrictions imposed by the testator didn't reduce the value of the estate's charitable deduction, the IRS lays out the factors it considers and implies that, for example, including a permanent restriction on the deaccessioning of artwork would result in a potential valuation issue.
19. Treasury Regulations Sections 20.2055-2(b)(1) and 25.2522(a)-2(b).
20. *United States v. Dean*, 224 F.2d 26, 29 (1st Cir. 1955); *Estate of Woodworth v. Commissioner*, 47 T.C. 193, 196 (1966).
21. Revenue Ruling 70-452, 1970-2 CB 199.
22. *But see* PLR 9303007 (Jan. 22, 1993), in which the IRS determined that the possibility that certain donated artwork, which was the subject of a loan and gift agreement with a museum, would revert back to the donor or the donor's estate was "so remote as to be negligible," thereby permitting a charitable gift tax deduction. The gift agreement appears to have required, among other things, compliance with certain loan obligations, continuous display of the works in the collection and the grant to the donor of certain display control rights and final editorial control over publicity concerning the collection. It also provided the museum with the opportunity to cure a breach by it.
23. Note that under common law, once a donor has made a completed gift to charity, that donor doesn't have standing to enforce the terms of the gift unless she's expressly reserved the right to do so. See *Carl J. Herzog Foundation v. Univ. of Bridgeport*, 243 Conn. 1, 5-6 (Conn. Sup. Ct. 1997). In many states, the Attorney General typically enforces charitable gifts on behalf of the public. However, there's some indication that courts may be growing increasingly willing to grant donors and their estates standing to sue to enforce the terms of the donor's charitable gift. See, e.g., *Smithers v. St. Luke's-Roosevelt Hospital Ctr.*, 281 A.D.2d 127 (1st Dept. 2001).
24. Keep in mind that, depending on the circumstances, if a charitable estate tax deduction is important to the collector, timing issues may apply. Negotiations with respect to the agreement should be completed, and the agreement should be finalized well in advance of the date on which the collector's estate tax return is due, to ensure that the collector's estate will be entitled to a charitable estate tax deduction.