

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

In the Matter of
FISK UNIVERSITY,
Petitioner.

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NO. 05-2994-III

2010 SEP 14 PM 3:49
CLERK OF CHANCERY Ct.
D. B. SMITH

FILED

MEMORANDUM AND ORDER

The status of this case is that following the conclusion of the August 11, 2010 trial, the Court sent the issue of a plan for the maintenance and display of the Alfred Stieglitz Collection of art back to both the parties in the lawsuit, Fisk and the Attorney General, to make one more attempt to propose solutions. The Attorney General's deadline for filing a proposed plan for the Collection was September 10; Fisk's deadline is coming up—October 8. October 22 is set as the reply deadline for the Attorney General. This past Friday the Court received the proposal of the Attorney General in accordance with the September 10 deadline.

Now that the Court knows the alternative the Attorney General proposes¹, it appears that there is no long-term solution to keep the Collection in Nashville full-time.

The Court appreciates the quick work of many people to try to craft a solution to keep the Collection in Nashville full-time. The Attorney General did try, as he was instructed by the

¹The alternative provides for a public/private partnership between the State of Tennessee (through the Tennessee Arts Commission ("TAC")), the Frist Center for the Visual Arts ("FCVA") and the Metropolitan Government of Nashville and Davidson County ("Metro") to take temporary custody of the Collection until such time as Fisk has the financial ability to resume its role. At the request of the State, the FCVA would display and maintain the Collection in gallery space devoted solely to the Collection and accessible to the public at no charge. As owner of the building in which the Frist Center is located, Metro would assist financially with the renovations needed to prepare the gallery space. To address the concerns expressed by this Court about the conditions under which the Collection is maintained and displayed, an advisory committee of nationally recognized experts would propose best practices for the maintenance and display of the Collection, on the basis of which the Attorney General would ask the Court to modify those conditions.

Court, to come up with, in 20 days, a plan. The best the Attorney General has been able to do is to propose a short-term solution. A temporary fix, however, is insufficient, the Court concludes. The parties have been in court over the Collection long enough. Finality and certainty is needed.

In that the Tennessee Court of Appeals has instructed this Court that it cannot return the Collection to the Georgia O'Keeffe Foundation (Museum), the option the Court must turn to at this point is to modify the Crystal Bridges Museum Agreement, Fisk has proposed, to make the Agreement more closely approximate the donor's intent.

As explained in the August 20, 2010 Memorandum and Order at page 16, an unusual aspect of the *cy pres* law is that the Court can solicit information and proposals from the parties,² and this approach the Court shall now use again. In examining the alternative of modifying the Crystal Bridges Museum Agreement, the Court solicits the following information from counsel.

In addition to whatever proposals and comments the parties determine to submit by the October 8 and 22 briefing deadlines, the Court ORDERS the parties, in their upcoming final briefings, to address the feasibility of modifying the Crystal Bridges Agreement along the following lines:

1. Court approval would be given for Fisk to sell its one-half interest in the Collection to the Crystal Bridges Museum for \$30 million upon the terms of a modified Crystal Bridges Agreement, detailed below.

²The law requires this Court to consider and, if necessary, solicit different proposals to formulate an appropriate plan for the Collection in line with the donor's charitable intent. Application of *Abrams*, 574 N.Y.S.2d 651, 656 (N.Y. Sup. 1991); see also RONALD CHESTER, GEORGE GLEASON BOGERT, & GEORGE TAYLOR BOGERT, *BOGERT'S TRUSTS AND TRUSTEES* § 442 (2010).

2. The Crystal Bridges Museum receives a one-half ownership and sharing arrangement as per a modified Crystal Bridges Agreement, detailed below, that eliminates potential divestment of a Nashville connection to the Collection which provisions were objectionable to the Court in its previous Memorandum and Order.
3. Provisions of the Crystal Bridges Agreement shall be removed or modified that are contrary to the donor's conditions and that have the potential to divest Nashville of a connection to the Collection. The donor's conditions are attached hereto as Exhibit 1. Attached hereto as Exhibit 2 is a copy of the Joint Ownership Agreement ("JOA") with these possible modifications.
 - Add an item (f) to paragraph 1 "Purpose" of the JOA to include the general charitable intent of the donor, stated by the Tennessee Court of Appeals, "(f) to enable the public in Nashville and the South to have an opportunity to study the Collection in order to promote the general study of art."
 - As to paragraph 2 "Right to Possession" of the JOA, Fisk and Crystal Bridges determine a definite schedule to provide for the Collection to be in Nashville half the time and Bentonville half the time, and submit that same plan to the Chancery Court, Davidson County, Tennessee, for prior approval.
 - Paragraph 3(c) "Overriding Conditions" of the JOA shall be those contained on Exhibit 1, attached hereto, i.e. the donor's conditions to the extent that those are still consistent with best industry practices.
 - As to Paragraph 5(e) of the JOA, for clarity, strike "highest standards" and use simply "best industry practices."
 - Paragraphs 5(c), 6(g), 7(b) and 9 on loaning the Collection and reproductions would be modified to reflect the donor's intention.
 - Paragraph 12 of the JOA, providing a security interest to one party if the other does not pay its share of the Agreement's obligations, would be deleted to minimize divesting Fisk of the Collection.

- Paragraph 14 of the JOA, regarding the sale of the Collection and the right of first refusal, would be removed to minimize divesting Fisk of the Collection.
- Paragraph 15 of the JOA on the formation of a Delaware LLC would be removed as this provision has the potential to divest Nashville of a connection to the Collection.
- Paragraph 17 would be simplified to vest jurisdiction of disputes regarding the Agreement in the Chancery Court of Davidson County, Tennessee to maintain the Nashville connection with the Collection. For this same reason, paragraph 20, on mediation, would be removed.

The theory of law that would authorize the Court to modify the Crystal Bridges Agreement, as outlined above, relates to the instructions of the Tennessee Court of Appeals. In instructing this Court on the law it must follow, the Court of Appeals in its remand³ provided that a plan for the Collection had to be consistent with the donor's intent of enabling Nashville to have access to the Collection. The Court of Appeals, however, did not decide and did not

³If an appellate court remands with specific instructions, those instructions must be followed exactly to ensure that the lower court's decision is in accord with that of the appellate court.

* * * *

A mandate does not generally preclude further proceedings not inconsistent with the mandate; thus, the lower court's actions after the mandate is issued need not be specifically mentioned in the opinion of the appellate court, but only need be consistent with it.

Where the remanding court does not give specific instructions, the trial court on remand is required to examine the appellate court's decision and determine what further proceedings would be proper and consistent with the opinion. Thus, a court on remand may be required to take actions not specified in the mandate, but which are necessary to effectuate the appellate court's decision.

instruct this Court on what the donor's intent was with respect to Fisk. One could argue that by saying that the donor's intent was to enable Nashville to have access to the Collection, the Court of Appeals implicitly ruled that that was the donor's exclusive intention. By not mentioning Fisk, the Court of Appeals' decision could be read to imply that Fisk, the institution, should not be considered in a plan for the Collection. The Court rejects that argument.⁴


Although the donor's intent was to enable Nashville to have access to the Collection, the evidentiary record before the Court establishes that the donor was deliberate about where the Collection was placed in Nashville. That deliberate placement was Fisk University. The evidentiary record is clear that without Fisk, Nashville would never have been the beneficiary of the Collection. The donor's connection to Nashville was Fisk University.

It would not be in keeping, then, with the donor's intent to keep the Collection in Nashville at the cost of sacrificing the existence of Fisk University. When the donor specified that she did not want the Collection sold and she wanted it located in Nashville 100% of the time, Fisk was not on the brink of closing. But the circumstances have changed with Fisk's current financial failure. Having the Collection in Nashville only half of the time and reducing Fisk's ownership to a half is not a perfect solution but it does keep Fisk afloat, thereby maintaining and holding true to the law's recognition of the donor's deliberate selection of Fisk for the art. This is true, though, only if the Crystal Bridges Agreement is modified to be less

⁴Judge Dinkins discusses this point in his concurrence. However, because it is a concurrence it is entitled to consideration but is not within the rule of *stare decisis* nor a decision of the court. See 21 C.J.S. *Courts* § 198 (West 2010) ("A concurring opinion, while persuasive, is not binding, and does not constitute authority under the doctrine of *stare decisis*, or have any precedential value.").

one-sided in favor of Crystal Bridges and to eliminate forfeiture provisions that threaten a continued, permanent Nashville connection to the Collection.

It is for these reasons, that the Court seeks from the parties in their final October 8 and 22 briefings, the information outlined above.



ELLEN HOBBS LYLE
CHANCELLOR

cc: Stacey Garrett
John Branham
C. Michael Norton
C. David Briley
Janet Kleinfelter
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