

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

In the Matter of
FISK UNIVERSITY,
Petitioner/Appellant

)
) Appeal No. M2010-02615-COA-R3-CV
)
) On Appeal from the Judgment of the
) Chancery Court of Davidson County
)
)

REPLY OF APPELLANT FISK UNIVERSITY TO BRIEF OF
INTERVENOR-APPELLEE ATTORNEY GENERAL

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**REPLY OF APPELLANT FISK UNIVERSITY TO BRIEF OF
INTERVENOR-APPELLEE ATTORNEY GENERAL**

Fisk University ("Fisk") filed an appellate brief in this case in which it agreed with the decision of the Chancery Court to approve the equal time sharing arrangement ("Crystal Bridges Arrangement") between Fisk and the Crystal Bridges Museum of American Art ("Crystal Bridges") for the Stieglitz Art Collection ("Collection") owned by Fisk. Fisk, however, argued that the Chancery Court abused its discretion in regard to the \$30 million of proceeds to be received by Fisk from the Crystal Bridges Arrangement, by requiring that an excessive amount of \$20 million be placed into a permanent endowment to which Fisk would never have access to the principal, and that the income (perhaps \$1 million a year) would be required to be used only for the upkeep of the Collection and for carrying out Fisk's educational activities related to the Collection. The Attorney General subsequently filed a Brief of Intervenor-Appellee in which he does not attempt to defend the Chancery Court's allocation decision. Accordingly, briefing is now closed with respect to the only issue raised by Fisk in its initial brief.

The Attorney General's brief, however, sets out certain arguments as a cross-appeal, and this brief is Fisk's reply to the Attorney General's specific arguments.

Attorney General's Cross-Appeal

In his cross-appeal, the Attorney General asks this Court to approve a hypothetical, illusory plan to have a third party fund (the "Creswell Plan") pay Fisk the annual amount of \$131,000 to cover Fisk's direct costs of exhibiting the Collection. The Attorney General asserts that this amount of money will "*relieve Fisk of the very financial burdens that prompted the university to file this case.*" Attorney General's Brief, p. 48. This statement represents a fundamental misstatement of the reason the parties are before the Court. Since the beginning of

this case, it has been clear that the problem is not whether Fisk has the funds necessary to pay the direct costs of exhibiting the art, but whether Fisk has enough money to avoid closing. O’Keeffe intended for Fisk to display the Collection, and Fisk must remain open to do so. The Attorney General continues to ignore that reality, and he seeks to impose his misstatement on the Court by ignoring the law of this case, mischaracterizing the proof on remand and creatively misreading New York law. The Court should reject the Attorney General’s illogical acrobatics, confirm that it is impracticable for Fisk to continue to comply with the conditions on the Stieglitz Collection, and approve the only concrete plan presented to the Chancery Court that realizes O’Keeffe’s intent that the Collection be displayed to the public by Fisk – the amended Crystal Bridges Arrangement. That is, this Court now has before it the only proposal that has been offered during the many years this litigation has been pending that actually addresses O’Keeffe’s intent, as well as the evidence necessary to rule upon that proposal. Fisk requests that the Court resolve this litigation by striking the ill-conceived \$20 million restricted endowment and approving the modified Crystal Bridges Agreement.

Elements of *Cy Pres* Relief

This is a *cy pres* case governed by New York statutory and case law. Obtaining *cy pres* relief is a two-part process. First, the petitioner must establish that it is entitled to *cy pres* relief. To do so, the petitioner must satisfy three tests. They are: (1) the gift must be charitable, (2) the donor must have a general charitable intent rather than a specific charitable intent (referred to herein as “Test Two”), and (3) compliance with the specific conditions of the gift must be impossible or impracticable. If the petitioner successfully satisfies all three tests, then the second part of obtaining relief calls for the court to fashion an appropriate remedy which removes the cause of the impossibility or impracticability of compliance. Georgia O’Keeffe Foundation

(Museum) v. Fisk University, 312 S.W.3d 1, 16-17 (Tenn. Ct. App. 2009). Once the three preliminary tests are satisfied, it is the obligation of the court to fashion a remedy. In re Hummel, 817 N.Y.S.2d 424, 427 (N.Y. App. Div. 2006)(“*the court was obligated to fashion a disposition of the trust property, that, in the court’s judgment, would ‘most effectively accomplish its general purposes’*”).

In this case, all parties have agreed that the gift of the Collection was a charitable gift, satisfying the first test. This Court previously ruled that Test Two has been satisfied, and is no longer an issue. Specifically, this Court found the donor had a general charitable intent in giving the art to Fisk which this Court defined, for purposes of Test Two, as making the art available to the public in Nashville and the South to promote the study of art.

As for the third test, this Court remanded this case to the Chancery Court for it to determine if the third test has been satisfied. The Chancery Court ruled that this test had been satisfied because compliance with the specific conditions is impracticable. The Court specifically found that unless Fisk receives a large infusion of cash it will close, and if it closes it will not be able to comply with the specific conditions of the gift which require the Collection to be cared for and exhibited. The Attorney General does not contest the Chancery Court’s decision regarding Fisk’s satisfaction of the third test. The only arguments made by the Attorney General relate to the issue of whether or not the Chancery Court should have approved the Crystal Bridges Arrangement rather than the hypothetical Creswell Plan as the remedy. In other words, the sole issue presented in the Attorney General’s brief is whether or not the remedy ordered by the Chancery Court “*most effectively accomplishes the donor’s general purposes.*” N.Y. Est. Powers & Trusts Law 8-1.1[c][2].

Arguments

Fisk identifies below the basic contentions underlying the Attorney General's arguments and explains why each is invalid.

1. The Attorney General's argument, that the only purpose of the gift of the art which may be considered in fashioning the cy pres remedy is making the art available to the public in Nashville and the South to support the study of art, is invalid.

In an effort to avoid having to prove what is unprovable—that O'Keeffe's deliberate choice of Fisk to display the Collection is irrelevant to the fashioning of a remedy in this case—the Attorney General claims that this Court has already ruled that the selection of Fisk was not a significant part of O'Keeffe's intent or purpose. This Court has issued no such ruling. The Attorney General's position does not survive a simple review of the procedural history.

As this Court will recall, in its prior decision in this matter it was called upon to rule on the question of whether O'Keeffe displayed "general intent" or "specific intent" in donating the Collection to Fisk. As Fisk explained in its briefing, and as this Court observed in its opinion, "intent" is not, for the purposes of this element of *cy pres* analysis, used in its everyday sense; rather, this element of *cy pres* involves a narrow and somewhat obscure technical definition. Under well-settled New York law, resolution of the issue does not involve an examination of the full extent of a donor's intent or purposes, but instead the quite different question of whether a donor would wish for the charitable gift to fail where the conditions are not satisfied. The evidence relevant to this element of *cy pres* analysis includes, for example, whether there are express words of reversion in the gift, and whether the donor gave similar gifts to multiple charitable institutions. This Court ruled that based upon the evidence before it, it was clear that O'Keeffe did not intend for the gift to fail if the conditions were not satisfied—i.e. O'Keeffe manifested a "general intent" under New York law.

Seizing upon a statement that this Court made in the course of considering the “general vs. specific intent” issue, the Attorney General claims that it is the “law of this case” that the full extent of O’Keeffe’s intent and purposes was “*to enable the public – in Nashville and the South – to have the opportunity to study the Collection in order to promote the general study of art.*” See Attorney General’s Brief at 6, 21, 23. Based upon his reading of this statement, the Attorney General claims that this Court has already ruled that it was not a significant part of O’Keeffe’s intent and purposes to have Fisk, specifically, display the Collection.

But as this Court will recall, it was very clear in its ruling that the element of *cy pres* that the Attorney General is now attempting to claim was previously addressed by this Court, that the proposed relief “*most effectively accomplishes [the gift’s] general purposes,*” was not before it and that a trial on that issue was necessary. See Georgia O’Keeffe Foundation, 312 S.W.3d 1, 20.

This Court therefore did not rule upon, nor did it have before it all evidence related to, the final element of *cy pres* relief—the question of whether the proposed Crystal Bridges Agreement would more effectively accomplish the gift’s general purposes than any other option that existed. A ruling that has never been issued cannot be the “law of the case.” This Court only now has before it the question of what relief would most effectively accomplish O’Keeffe’s general purposes, and the evidence related thereto. This Court should reject the Attorney General’s claim that this Court has already ruled upon the full extent of O’Keeffe’s purposes and intent.

In addition, this argument by the Attorney General is invalid because it fails to take into consideration the governing New York statute, which sets out the precise language which the Chancery Court is obligated to comply with in deciding upon the appropriate remedy. The

statute provides that the remedy will be that “*which most effectively accomplishes its general purposes.*” N.Y. Est. Powers & Trusts Law § 8-1.1[c][2].

As is evident, when this Court used the phrase “*fashion a form of relief which most closely approximates [the donor’s] charitable intent*” it stated the same concept as set out in the statute but substituted the word “relief” for “remedy,” the words “most closely approximates” for “most effectively accomplishes” and “charitable intent” for “general purposes.” The requirement that the *cy pres* remedy accomplish the “general purposes” of the donor is important because New York law plainly provides that there can be more than one such general purpose. Accordingly, the Chancery Court did not fail to comply with its instructions, and certainly did not abuse its discretion, by finding that an additional general purpose of the gift was donor’s intent to locate the Collection at Fisk, and such conclusion should be factored into the remedy decided upon by the Chancery Court.

The principal case which holds that there can be multiple general purposes is In re Scott's Will, 8 N.Y.2d 419 (N.Y. 1960). This case is very important to the consideration of the issues in this case for a number of reasons. First, it is one of very few *cy pres* decisions handed down by the New York Court of Appeals, that state’s highest appellate court. As a result, its decision is binding on New York courts, unlike the trial court decisions that the Attorney General is prone to citing.¹ The second reason the case is important is because, despite citing twelve New York cases in his brief (none of which is a New York Court of Appeals decision), the Attorney General never cites this case. Third, the case is the single most important case cited by the Chancery Court on the issue of multiple general purposes, taking up three pages of the Court’s

¹ Unlike Tennessee, New York publishes the decisions of the Supreme Court and the Surrogate’s Court, both trial courts, leaving it up to the reader to discern the binding effect of each case.

ruling. Memo. & Order, Nov. 3, 2010, pp. 10-12. The final, and probably most important, reason is that the case is on point and answers the issue in question.

In Scott's Will, a decedent left a large sum of money to a church with directions that the church establish a treatment facility for tuberculosis to be named in the decedent's honor. When the testator died there was no longer a need for such treatment facilities, so the church filed a cy pres petition to establish an alternative use or uses. The court evaluated this fact pattern and found there were three "general purposes," which were (1) to aid persons with tuberculosis, (2) to benefit the church and (3) as a memorial to the decedent. In regard to benefitting the church, the court concluded

Determining that it was not Mr. Scott's purpose to benefit St. Thomas Church or to advance its objectives, the Surrogate directed that the fund be administered by some other organization whose objectives presumably would be served if St. Thomas Church declined to execute what was regarded as equivalent to an ultra vires assignment. The decree erroneously directs the use of the money in a manner designed not to benefit St. Thomas Church . . .

This disposition failed as matter of law, we think, to give effect insofar as practicable to the full design of the testator as manifested by his will and codicil. His purpose was not exclusively to aid tuberculars. Even that aim was found to be impractical except by broadening it to encompass all respiratory and thoracic diseases. There was an accompanying intent to promote the objectives of St. Thomas Church by assisting it to engage in good works without which faith alone is dead.

8 N.Y.2d at 427.

The significance of this case is that the purpose of benefitting this church was derived from the fact that the decedent left his money to the church, which fact alone was sufficient for that purpose to be considered in formulating the cy pres relief. The court states the point clearly: "*The testator would not have named St. Thomas Church in this capacity unless part of his intention was to advance its objectives.*" 8 N.Y.2d at 425.

Here, as the Chancery Court realized, the same is true of O’Keeffe. There is no question that she made a deliberate selection of Fisk in donating the Collection. In the first catalogue for the Stieglitz Collection, O’Keeffe wrote the following:

This part of the Stieglitz Collection goes to Fisk University with the hope that it may show that there are many ways of seeing and thinking, and possibly, through showing that there are many ways, give some one confidence in his own way, which may be different, whatever its direction.

Tr. Exh. 72.

O’Keeffe, in her remarks at the opening ceremonies for the Collection in 1949, said:

These paintings and sculptures are a gift from Stieglitz. They are for the students. I hope you will go back and look at them more than once.

Tr. Exh. 205, The Crisis Magazine, “*Fisk University Dedicates Alfred Stieglitz Collection*, March 1950.

Indeed, in a different part of his brief, even the Attorney General concedes that:

[T]he evidence shows that Ms. O’Keeffe chose Fisk because, as an educational institution located in the South that served a minority population and with a reputation for being accessible to persons of all races, the university would be an effective means to further her intent (and that of her husband, Alfred Stieglitz) to promote the study of art.

Attorney General’s Brief, p. 34.

Despite such noble intent, the Attorney General argues that this intent should be simply ignored in fashioning a remedy, and that it is acceptable to put the art just about anywhere in Nashville and the South so long as it is available to the public. That conclusion stretches credulity beyond the breaking point. O’Keeffe intended for Fisk to display the Collection, and for Fisk to do so, it must continue to exist. There is no way around that fact.

The Chancery Court did not abuse its discretion by concluding that a part of the donor’s intent was to benefit Fisk.

2. The Attorney General's argument, that if the donor had an intent to benefit Fisk that intent may not be used in fashioning the remedy because it did not include the intent to aid Fisk financially, is invalid.

In his third and fourth arguments in the brief (numbered I.C. and I.D.), the Attorney General argues that, even if one of the donor's intentions was to benefit Fisk, that intent is insufficient in fashioning a remedy because Fisk must establish that the purpose of the donor was not simply to benefit Fisk, but to benefit Fisk financially. The Attorney General argues that, as a result, the Chancery Court applied an incorrect legal standard under New York cy pres law. His argument is that the purpose of making the art available to the public for the study of art is the "overriding" charitable purpose and the intent of the donor to benefit Fisk is a "subsidiary intent." He then asserts that the Court must give effect to the overriding charitable purpose even if the subsidiary intent is impossible or impracticable to achieve. He cites the Huntington Library² case for this proposition, arguing that that case found there to be a single "overriding charitable purpose" of benefitting the library and its future existence as both a memorial and charitable institution. Attorney General's Brief, p. 41, fn. 54. This argument of the Attorney General represents a creative misreading at best and misrepresentation at worst. This case states that the "overriding charitable intent" was actually two purposes, both of which were given effect in fashioning the cy pres relief. In context, the case reads:

[T]he [trial] court improvidently exercised that discretion by failing to devise the most efficacious and dispositionally faithful alternative plan to advance the charitable objectives of the 1930 indenture. In Bd. of Trustees we expressly found that the dual purpose of the 1930 indenture was to ensure the Library's standing as a charitable and educational institution and to be a lasting memorial to its founder Collis Huntington. In essence, this Court determined that the overriding charitable purpose of the 1930 indenture was to benefit the Library and its future existence as both a memorial and a charitable institution. By declining to approve the \$2.5 million payment, which is essential to the Library's future existence, the [trial] court effectively frustrated the dual objectives of the indenture. [Citations omitted.]

² In re Huntington Free Library and Reading Room, 771 N.Y.S.2d 69 (N.Y. App. Div. 2004)

771 N.Y.S.2d at 71.

There were two charitable purposes in the above case, and the court appears to have given weight to both of them, contrary to the Attorney General's assertions.

The Attorney General argues further that there must be an intent by the donor to benefit Fisk financially in order to have that purpose be considered a valid purpose for fashioning the remedy. He attempts to provide support for this conclusion by citing the Knickerbocker³ and Othmer⁴ cases (more trial court decisions) pointing out that those courts found that the intent of the donor was to ensure the viability of the donee. He argues that because those cases were decided on that basis, an explicit provision that the gift is intended to benefit the donee financially is required in order to make that finding. That, however, is a logical fallacy. Just because those courts found the intent to benefit the donee to be a purpose of the gift does not mean that a fact pattern with less than a direct statement of that intention would not be sufficient.

The one, and only case, cited for the direct proposition that the donor's intent must have been to benefit Fisk financially is Lutheran Hospital⁵ (not only a trial court decision, but a 1944 trial court decision). The Attorney General argues that the case states that cy pres relief was denied because the court found no proof of an intent that the gift be used to insure the survival of the hospital. First, no subsequent New York case has ever cited Lutheran Hospital for that proposition,⁶ and, second, if it stood for that proposition (a conclusion not evident from reading the case), it would have been overturned by the Scott's Will decision. In addition Lutheran

³ Knickerbocker Hospital v. Goldstein, 41 N.Y.S.2d 32 (N.Y. Sup. Ct. 1943).

⁴ In re Estate of Othmer, 710 N.Y.S.2d 848 (N.Y. Sur. 2000); In re Estate of Othmer, 815 N.Y.S.2d 444 (N.Y. Sur. 2006); In re Polytechnic University, 812 N.Y. 304 (N.Y. Sur. 2006) [the citation in the Attorney General's brief is incomplete]; and In re Polytechnic Institute of New York University, 901 N.Y.S.2d 902 (N.Y. Sur. 2009).

⁵ Lutheran Hospital of Manhattan v. Goldstein, 46 N.Y.S.2d 705 (N.Y. Sup. 1944).

⁶ In fact, no prior case is cited either. The Court concluded that "by virtue of what I regard as well established and settled law on the subject" it was constrained to deny relief. 46 N.Y.S.2d at 708. The court, however, does not cite any cases to support that conclusion.

Hospital did not invalidate a cy pres plan after the three tests had been met. In fact, the court in that case denied the relief because the petitioner had not shown that the compliance with the specific conditions was impossible or impracticable. The Court concluded:

It is thus seen that it is not wholly and entirely impossible or impracticable to carry out the donor's intent . . .

46 N.Y.S.2d at 710.

In this case, the Attorney General agrees that the third test has been satisfied. There is no case law to support the Attorney General's argument that Fisk must prove that O'Keeffe meant for the gift to be used by Fisk as a financial benefit. It is interesting to note, however, that if that was important, former Fisk President Walter Leonard testified during his deposition that O'Keeffe gave Fisk a total of \$100,000 in 1981 and 1982:

To my great surprise, shortly after I visited with Ms. O'Keeffe with my wife [in 1981] we received in the mail a check for \$50,000 and if I recall there was a little note. I hope this will help you in your efforts and then to my even greater surprise, in January of the next year there was a gift from Ms. O'Keeffe in the amount of \$50,000 so I believe the record should show that there was probably \$100,000 from Ms. O'Keeffe. Tr. 60.

To this day, that gift remains among the largest individual cash donations Fisk has ever received. Tr. 141-142.

The point, rather, as Fisk explained in its opening brief, is that *cy pres* relief is highly fact-dependent and must be adapted to the particular circumstances of each case; here, O'Keeffe intended for Fisk to display the Collection, and given Fisk's financial situation, any solution must involve, as the Chancery Court acknowledged, funding for Fisk.

3. The Attorney General's argument, that the Creswell Plan provides the requisite relief or remedy mandated by New York law, is invalid.

As noted above, once the three preliminary tests are met, it is the obligation of the court to fashion a remedy. In re Hummel, 817 N.Y.S.2d 424, 427 (N.Y. App. Div. 2006). Continuing

his head-in-the-sand approach to the “impracticability” element, the Attorney General claims that the hypothetical Creswell Plan will “*relieve Fisk of the very financial burden that prompted the university to file this case.*” P. 48. Of course, a \$2.7 million endowment paying Fisk \$131,000 per year does not even approach what was proven at trial as the level of funding Fisk needs to solve its financial difficulties and is nothing short of a prescription for failure.⁷ That is, the Attorney General’s latest “solution” to the impracticability issue reflects his continued insistence on obscuring what makes Fisk’s compliance with the conditions “impracticable.” Compliance is not impracticable because it costs too much to maintain the Collection. Compliance is impracticable because Fisk is in danger of closing its doors unless it receives a large infusion of cash, and if that happens Fisk cannot display the Collection. Again, O’Keeffe intended for Fisk to display the Collection, and if Fisk closes it cannot display the Collection. It is that fact that provides the basis for the impracticability of compliance. Indeed, the Attorney General took the position at trial that Fisk needs over \$100 million to stay afloat. Tr. p. 704-705. In light of this admission, Fisk finds his continued insistence on offering proposals that temporarily defray the cost of maintaining the Collection while Fisk is left to fail, as if he does not understand what the issue is, increasingly offensive and disappointing in light of the gravity of the situation. The Attorney General should stop offering proposals that avoid the issue. It is a matter of public record that the only proposal that has ever been offered in the several years this litigation has been pending that actually addressed the impracticability issue—i.e., that gives Fisk a chance to stay open and display the Collection as O’Keeffe intended—is the Crystal Bridges Arrangement.

4. The Attorney General’s argument that any valid cy pres relief must have the art located in Nashville 100% of the time is invalid.

⁷ The Attorney General’s belief that a \$2.7 million endowment will be sufficient to pay for the upkeep on the Collection, at least, confirms that the Attorney General agrees that a \$20 million endowment, as ordered by the Chancery Court, is excessive.

The Attorney General argues that the hypothetical Creswell Plan more closely approximates the donor's intent of having the art work "*in its entirety be made available in Nashville and the South to promote the study of art.*" Attorney General's Brief, p. 51. The Attorney General argues further that sharing the Collection with a museum in Arkansas is not making the art available in Nashville and the South. For example, the Attorney General states that the Crystal Bridges Arrangement "*will remove the Collection from Nashville and the South at least fifty percent of the time.*" Attorney General's Brief, p. 48, fn. 75. He states further that the Collection "*obviously will not be available to the public in Nashville and the South for the study of art when it resides*" in Arkansas. Attorney General's Brief, p. 23.

This argument of the Attorney General is illogical. The Attorney General is arguing that either [1] Arkansas is not in the South or [2] the Collection must always be in Nashville to comply with the "in Nashville and the South" requirement. The first alternative is obviously wrong. Of course, Arkansas is in the South. The Attorney acknowledges that fact in his brief.⁸ The other argument appears to be that the phrase "in Nashville and in the South" means it must be in Nashville, perhaps reading the conjunctive "and" to require that the art must comply with both locations, although he does not say so. That argument, if made, would be illogical. If that were the case, this Court would have simply said the Collection had to be "in Nashville."⁹

⁸ Attorney General's Brief, p. 9, fn. 3.

⁹ The word "and" can be read to mean "or" if the context supports that meaning. City of Knoxville v. Gervin, 89 S.W.2d 348 (Tenn. 1936),

5. The Attorney General's argument, that the no-sale condition prohibits the Crystal Bridges Arrangement, is invalid.

At various places in his brief, the Attorney General argues that the no-sale condition imposed by the donor is a barrier that cannot be crossed and that it prohibits the Crystal Bridges Arrangement from being approved. For example, the Attorney General argues that “*the clearest evidence that Ms. O’Keeffe did not intend for Fisk to be able to use the Collection to benefit itself financially is the ‘no-sale’ condition itself.*” Attorney General’s Brief, p. 38. The Attorney General argued further that by imposing the no-sale condition the donor “*plainly sought to prohibit the use of the Collection for any purpose other than the study of art, including the continuing viability of the institution.*” Attorney General’s Brief, p. 45. Those conclusions are a fundamentally misstatements regarding the status of the no-sale condition in this case. The no-sale condition is not the brick wall represented by the Attorney General but is one of several “specific conditions” imposed by the donor. As such, once the three preliminary tests are proven the court is obligated to fashion a remedy “*free from any specific restriction, limitation or direction contained therein.*” N.Y. Est. Powers & Trusts Law § 8-1.1[c][1].

In any event, Fisk’s proposal that it be allowed to enter into a sharing arrangement with Crystal Bridges is fundamentally different than an outright sale of the art. It is a sharing arrangement, under which the art collection will remain intact, it will continue to known as the Alfred Stieglitz Collection and it will be well cared for. What the Attorney General is trying to accomplish is the promotion of the no-sale condition from its status as one of several specific conditions placed on the art to the status of being a basic purpose of the gift which operates to defeat O’Keeffe’s actual purpose of providing for Fisk to display the Collection. Such an argument stands *cy pres* relief on its ear. *Cy pres* is not available when all of the specific conditions can be complied with, but is available when the gift is in danger of failing. This gift

will fail unless Fisk receives a large infusion of cash, because Fisk will close and will not be able to meet any of the conditions requiring it to take care of and exhibit the art. The hypothetical Creswell Plan does little or nothing to solve the problem of the failure of the gift. The Chancery Court simply had no other sensible option, once it decided that all three of the qualifying tests had been satisfied, but to approve the revised Crystal Bridges Arrangement, with the multiple modifications it obtained to ensure that the agreement would comply with O’Keeffe’s conditions, rather than the hypothetical Creswell Plan. Otherwise, the Court would have to breach its duty to fashion a remedy which has the best opportunity to solve the fact that Fisk’s compliance with the specific conditions is impracticable. If the Attorney General is right, this 100 plus year-old New York law which has been used hundreds of times to solve problems of gift failures, is utterly meaningless. The Attorney General, fortunately, is wrong.

Conclusion

Hopefully, this five-year lawsuit and legal gauntlet is near an end. There is only one substantive issue before this Court, and that is what remedy under the New York cy pres law is Fisk entitled to. It is uncontested that Fisk is entitled to some form of relief, which relief must remove the impracticability of Fisk’s compliance with the specific conditions imposed by the donor. That impracticability is the result of the uncontested fact that unless Fisk receives a large infusion of cash, it will close and will then be unable to care for the Collection. The Chancery Court has approved the equal sharing arrangement with the Crystal Bridges Museum in Arkansas, as such arrangement has been revised and amended to conform to the requirements of the Chancery Court. The only change in the Chancery Court’s approval requested by Fisk is for this Court to strike the requirement that \$20 million of the \$30 million received by Fisk be

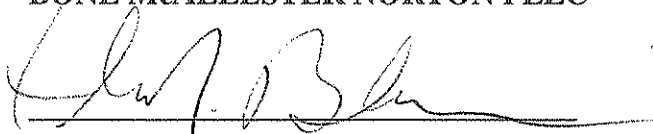
dedicated exclusively to the upkeep and use of the Collection. This plan has the advantage of returning Fisk to economic viability, if the change requested by Fisk is ordered by this Court.

The above is one of only two choices of cy pres relief advocated by the parties and before this Court. The second is the Attorney General's plan to have a private fund raise \$2.7 million (for which it represents it has "commitments") and pay Fisk the sum of \$131,000 each year to offset Fisk's direct cost of maintaining the Collection. This plan ostensibly has the advantage of keeping the Collection in Nashville and at Fisk; however, this advantage is illusory. The \$131,000 is not nearly enough money to keep Fisk open, and if this plan is adopted, the uncontested evidence is that Fisk will close. The plan advocated by the Attorney General has no provisions for what happens to the Collection when Fisk closes.

Accordingly, Fisk asks this Court to approve its sharing arrangement with Crystal Bridges and to strike from the plan the requirement that \$20 million be paid into a special endowment to support the art.

Respectfully submitted,

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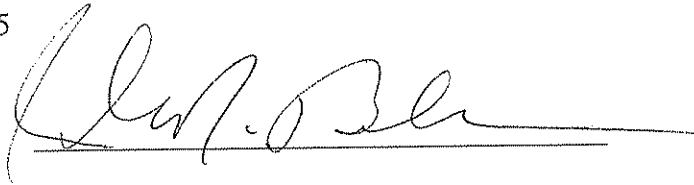
Counsel for Fisk University

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply of Appellant was served by First Class Mail, postage prepaid, upon the following this the 23th day of May, 2010.

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A handwritten signature in black ink, appearing to read "W. N. Helou", is written over a horizontal line. The signature is cursive and extends to the right of the line.