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## INTRODUCTION

Attorney General Robert E. Cooper, Jr., files this Answer in Opposition to Appellant's Application for Permission to Appeal, pursuant to Rule 11, Tennessee Rules of Appellate Procedure, from the decision of the Tennessee Court of Appeals, reversing the trial court's finding that Appellant had an "implied right of reversion" in the Stieglitz Collection and, therefore, had standing to pursue its claims against Fisk University. In doing so, the Court of Appeals found that Appellant had no reversionary interest and, therefore, no recognized legal right or interest in any of the works of art given by Georgia O'Keeffe to Fisk University. Without such an interest, the Court of Appeals found that Appellant lacked standing to be a party.

## ISSUES PRESENTED FOR REVIEW

- I. Whether the donor of a restricted charitable gift has standing to enforce the express restrictions which the donor placed on the gift and which the donee expressly accepted?
- II. Whether the Court of Appeals misapprehended and incorrectly limited the scope of the traditional, inherent powers of a court of equity to fashion relief for breach of contract, anticipatory breach of contract, or breach of the conditions of a restricted gift?

## STATEMENT OF THE CASE

This case began on December 6, 2005, when Fisk University filed a petition for declaratory judgment seeking a ruling permitting it to sell two paintings from the Alfred Stieglitz Collection. (R. Vol. I, p. 1-10). Shortly thereafter, the Appellant, the Georgia O'Keeffe Foundation of Santa Fe, New Mexico,<sup>1</sup> was allowed to intervene: (1) to oppose the sale of the paintings; (2) to seek enforcement of the conditions imposed by O'Keeffe on the Stieglitz Collection, and alternatively, (3) to seek a reversion of the Collection to the Foundation, as O'Keeffe's beneficiary, for breach of the conditions. (R. Vol. 1, p. 51-60, 99-101). The Attorney General and Reporter also sought to intervene pursuant to the provisions of the Charitable Beneficiaries Act of 1997, Tenn. Code Ann. § 35-13-110, to represent the interests of the charitable beneficiaries, the potential charitable beneficiaries and the people of the State of Tennessee in the charitable gift at issue. However, the Museum opposed the Attorney General's intervention and successfully convinced the trial court that such intervention was inappropriate because the Attorney General had failed to fully identify himself as either a plaintiff or defendant

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<sup>1</sup> The Georgia O'Keeffe Museum, also located in Santa Fe, New Mexico, was substituted for the Foundation as a result of the execution of an agreement between the parties assigning all of the Foundation's assets, including its interest in this litigation, to the Museum. (R. Vol. I, 141-142, 145-147).

in the matter. (R. Vol. I, 102-105, 106-108 and 117-119).

After Fisk amended its complaint in April 2007, the Attorney General once again sought to intervene pursuant to the Charitable Beneficiaries Act, and to defend the constitutionality of Tenn. Code Ann. § 35-13-113, which the Museum had challenged. (R. Vol. VII, p. 904-06). The Museum once again opposed the Attorney General's intervention; however, this time the trial court allowed the Attorney General to intervene. (R. Vol. X, p. 1313-1315).

On May 4, 2007, the Museum filed a motion for summary judgment only on Fisk's complaint for declaratory judgment. (R. Vol. VII, p. 989-992). The trial court granted this motion, finding that the conditions imposed by Georgia O'Keeffe on the Stieglitz Collection otherwise prevented the sale of any art from the Collection. (R. Vol. XIII, p. 1712-1729). Thereafter, the Museum and Fisk sought to settle the remaining issues in the case by entering into a settlement agreement, which included among other things, the sale of Georgia O'Keeffe's painting, *Radiator Building-Night, New York*, for seven and a half million dollars (\$7,500,000) to the Museum, and the Museum's agreement not to oppose the sale of another painting from the Collection, Marsden Hartley's *Painting No. 3*.<sup>2</sup> (R. Vol. XIII, p. 1740-1756). The Attorney General strongly opposed court approval of this settlement agreement, and the trial court agreed rejecting the settlement. (R. Vol. XIII, p. 1763-1781, 1841-1846).

Fisk then entered into an agreement with the Crystal Bridges Museum in Bentonville, Arkansas, to sell an undivided half-interest in the Collection. Fisk was allowed to file an amended petition for approval of that agreement under the *cy pres* doctrine. (R. Vol. XIV, p.

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<sup>2</sup> This was the second settlement agreement between the Museum and Fisk. In February 2007, these parties entered into an agreement which provided that the Museum would purchase the *Radiator Building* painting for seven million dollars (\$7,000,000) and would not oppose the sale of Hartley's *Painting No. 3*. This agreement was specifically conditioned upon the approval of the Attorney General, who declined to approve the agreement as not being in the best interests of the people of the State of Tennessee. (R. Vol. IX, 1283; Vol. X, 1284; Vol. XIV, 1809-1813, 1816-19, 1825-29, 1832-35).

1858-1861, 1862-81; Vol. XVI, p. 2156-2159). The Museum filed an answer to this amended petition in which it once again asserted its counterclaim for reversion for breach of the conditions. (R. Vol. XVI, p. 2166-2201).

Fisk University subsequently filed a motion for summary judgment on the issue of the Museum's standing and its right of reversion in the Stieglitz Collection. (R. Vol. XVI, p. 2226-2227). The trial court denied this motion finding that the Museum had standing as the successor-in-interest to O'Keeffe's estate and that the Museum had an "implied reversionary interest" in the Collection. (R. Vol. XVIII, p. 2481-2486). On appeal, the Court of Appeals reversed this decision finding that, as a matter of law, the Museum had no reversionary interest in the ninety-seven pieces of artwork from the Stieglitz Collection and no reversionary interest in the four pieces formerly owned by Georgia O'Keeffe. Accordingly, without any right or interest in the Collection, the Court of Appeals found that the Museum had no standing to participate as a party in the case.

### **STATEMENT OF RELEVANT FACTS**

The issues in this case arise from the gift of ninety-seven pieces of art from Alfred Stieglitz's art collection to Fisk University in 1949, and the subsequent gift of four pieces of art by Georgia O'Keeffe from her personal collection. Mr. Stieglitz died in 1946 and under the terms of his Last Will and Testament, his wife, Georgia O'Keeffe, was named Executrix of his estate. The provisions of the Will relevant to these proceedings appear in Article SECOND and THIRD. Article SECOND of the Will granted Miss O'Keeffe a life estate in all of Mr. Stieglitz's property, both real and personal, and three separate and distinct powers with respect to that property: (1) the power to use all income from such property for the payment of debts, taxes

and administration expenses; (2) the power to sell any property and hold the proceeds of such sale for the express purposes set forth in Article THIRD of the Will; and (3) the power to transfer, without any consideration, any of the property to a nonprofit corporation as described in Article THIRD of the Will. (R. Vol. IV, p. 480-485; Ex. 52, 67).

Article THIRD of the Will provided that, upon Miss O’Keeffe’s death, any of Mr. Stieglitz’s photographs and art works not disposed of by Miss O’Keeffe during her lifetime would be transferred to nonprofit corporations under arrangements allowing public access to promote the study of art. To facilitate the transfer of art, Article THIRD authorized the transfer of cash and securities from the estate to the chosen nonprofit corporations to be used to defray the expenses of managing and preserving the artworks. Any cash and securities remaining after such transfer were to be given to Mr. Stieglitz’s grandson. (*Id.*).

At the time of his death, Mr. Stieglitz had a surviving daughter who was disabled. A special guardian appointed to represent the daughter during the probate of the estate raised an issue suggesting that the will could violate Section 17 of the Decedent’s Estate Law, which prohibited a testator from making charitable gifts of a value greater than 50% of the entire estate if the testator was survived by a spouse or child. (R. Vol. IV, p. 493-500; Ex. 52).

In order to address these concerns, Miss O’Keeffe petitioned the court seeking permission to donate all of Mr. Stieglitz’s collection of photographs and art, pursuant to the powers granted to her in Article SECOND, to six named institutions: 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, the Library of Congress and Fisk University. Miss O’Keeffe additionally waived her individual right to bequeath any remaining part of Stieglitz’s estate to charity and, acting in her capacity as Executrix, she renounced the right of the Estate to do the

same. (R. Vol. IV, p. 503-521, Ex. 52, 68). None of the pleadings filed by Miss O’Keeffe with the probate court contained any language or other evidence indicating that she intended to retain or create a right of reversion in any of Stieglitz’s artwork (or any other right in the works of art). (*Id.*).

The Surrogate Court found that Miss O’Keeffe’s proposal sufficiently addressed the concerns raised under Section 17 and, accordingly, ordered that “all of the photographs and other works of art be entirely transferred and delivered to the six charitable and educational institutions within thirty (30) days.” (R. Vol. IV, p. 559-569, Ex. 52, 68). The order of the Surrogate Court also contained no indication of any right of reversion or other right in the collection that was retained by Miss O’Keeffe but, rather, clearly directed that the “entire collection” be transferred and delivered to the six identified institutions. (*Id.*).

In a letter dated June 8, 1949, Miss O’Keeffe, in her capacity as Executrix, transferred title in the respective pieces of the Stieglitz Collection to Fisk University. That letter stated in pertinent part:

Pursuant to the authorization given me as Executrix of the Last Will and Testament of Alfred Stieglitz, deceased, by the decision of the Surrogate’s Court of New York County rendered May 19, 1949, I do hereby assign and transfer to Fisk University the various objects previously delivered to it from the Stieglitz Estate on permanent loan.

....

It is my understanding that Fisk University will not at any time sell or exchange any of the objects in the Stieglitz Collection . . . and that it will lend The Gaboon Figure to the Museum of Modern Art every three years for a period of three months if requested to do so.

(R. Vol. V, p. 593; Ex. 8). These conditions were accepted by Fisk President Dr. Charles Johnson in a letter dated June 13, 1949. (R. Vol. V, p. 594; Ex. 9).

In two earlier letters to President Johnson, Miss O’Keeffe had set out a number of other conditions for the artwork and photographs in the Collection, including the following:

- The artwork is to be designated as the Alfred Stieglitz Collection.
- No photographs in the Collection may be loaned to any other person or institution, and the other works of art may only be loaned under certain limited circumstances.
- The photography mounting and matting may not be removed or changed.
- The Collection is to be exhibited intact and no other artwork is to be shown in the same room without Miss O’Keeffe’s consent.
- The Collection must be under surveillance at all times when the room is not locked.
- The Collection should be housed in as safe a building as possible.
- The walls are to be painted white or a very light color designated by Miss O’Keeffe.

(R. Vol. V, p. 574-82; Ex. 2; p. 587-88, Ex. 4). President Johnson responded in writing both times advising O’Keeffe that Fisk had accepted all of the conditions. (R. Vol. V, p. 584-85; Ex. 3; p. 589-90, Ex. 5).

In addition to the artwork from the Stieglitz Collection, Miss O’Keeffe loaned Fisk four paintings which she personally owned with the direction that they be hung and exhibited as part of the Stieglitz Collection. These four paintings consisted of *Calla Lilies* and *In Vaudeville*, by Charles Demuth, and *Radiator Building-Night, New York*, and *Flying Backbone*, both paintings by Miss O’Keeffe. Miss O’Keeffe ultimately decided to give each of these paintings to the University. By letter dated December 27, 1949, Miss O’Keeffe stated: “I should like to make a gift to Fisk University of my painting by Charles Demuth, “Calla Lilies,” which I have placed at Fisk on loan.” Thereafter in January 1955, Miss O’Keeffe sent a telegram to President Johnson that asked, “Can Fisk accept my painting you have on permanent loan ‘Radiator Building Night N.Y.27’ as a [19]54 gift?” In both instances, President Johnson responded in writing accepting the paintings in question as gifts to the University. With respect to the other two paintings, while there is no correspondence in the record, Miss O’Keeffe’s tax returns indicate that she also made

a gift of these paintings to Fisk in the tax year 1956. None of this correspondence, or any of the other correspondence between Miss O’Keeffe and President Johnson, contained any evidence of an intent to maintain a right to revoke the gift of these four paintings or to otherwise make the gifts conditional.

Georgia O’Keeffe died in 1986, almost forty years after transferring the Stieglitz Collection to Fisk. During that time, while she expressed concern and/or frustration with Fisk’s care and use of the Collection, at no time did Miss O’Keeffe assert that she had a right of reversion in the Collection, nor did she make any demand for the return of any of the four paintings she had gifted to Fisk. (Ex. 59, 63). Additionally, Miss O’Keeffe made no reference in her Last Will and Testament to any rights – whether a right of reversion, right of specific performance or otherwise, that she had retained in the Stieglitz Collection or the four paintings she had given Fisk. (Ex. 53).

Miss O’Keeffe left most of her estate to her companion and assistant, John (“Juan”) Hamilton. This action led to a will contest by Miss O’Keeffe’s relatives and eventually resulted in a Settlement Agreement. Under the terms of that Agreement, the parties agreed to form the Georgia O’Keeffe Foundation and to transfer to it a large portion of O’Keeffe’s estate (primarily in the form of artworks). The purpose of the Foundation was to “perpetuate the artistic legacy of Georgia O’Keeffe for the public benefit.” The Agreement required that the Foundation distribute all of its assets, including the works of art, to charitable institutions by March 6, 2006. (Ex. 53). Accordingly, on March 6, 2006, the Foundation and the Georgia O’Keeffe Museum, which had been established in 1997, entered into an agreement whereby the Foundation assigned all of its assets, including its interest in this lawsuit, to the Museum. (Ex. 54). Thus, by virtue of this Agreement, the Museum became the successor-in-interest to the residuary beneficiary of

O’Keeffe’s estate, *i.e.*, the Foundation.

### ARGUMENT

In determining whether to grant permission to appeal, Rule 11 of the Rules of Appellate Procedure lists the following factors, which neither fully control nor fully measure the Court’s discretion, but indicate the character of reasons that will be considered:

1. The need to secure uniformity of decision;
2. The need to secure settlement of important questions of law;
3. The need to secure settlement of questions of public interest; and
4. The need for the exercise of the Supreme Court’s supervisory authority.

The Museum argues that this case presents an important question of first impression in Tennessee with significant public policy implications: whether *donors* of restricted charitable gifts have standing to enforce the conditions of their gifts or to insure that their donative intent is properly preserved. The Museum argues that the Court of Appeals’ decision finding that the Museum did not have standing in this case threatens to seriously undermine the status of charitable gifts made to all charitable, tax-exempt organizations in Tennessee. For this reason, the Museum asserts that review by this Court is needed to secure the proper settlement of this key question of law and public interest.

However, the issue of whether a *donor* has standing to enforce the conditions of their gifts or to insure that their donative intent is properly preserved was not the issue before the Court of Appeals. The Museum is not the donor of the Collection; Georgia O’Keeffe was the donor of the Collection by virtue of the powers given to her under the Last Will and Testament of Alfred Stieglitz. The Museum is the successor-in-interest to the Georgia O’Keeffe Foundation, which was the residuary beneficiary of Miss O’Keeffe’s estate as a result of a

settlement agreement. Thus, contrary to the Museum's assertions, the issue before the Court of Appeals was not whether the donor, Miss O'Keeffe, had standing to enforce the conditions of her gift to Fisk, but whether the *Museum* had a sufficient interest or right in the Collection necessary to establish standing.

The Museum glosses over this distinction in its Application and instead asserts that it should be allowed to enforce the conditions and/or seek return of the Collection to the same extent as any other donor of a charitable gift with conditions. Indeed, all of the Museum's arguments as to why this Court should review the Court of Appeals' decision are premised upon the assumption that it is the donor of the charitable gift. The Court of Appeals correctly recognized, however, that the Museum was not the donor of the gift, and, therefore, in order for the Museum to have standing, it must have a sufficiently recognized legal right or interest in the Collection. *See City of Brentwood v. Metropolitan Board of Zoning Appeals*, 149 S.W.3d 49, 56 (Tenn. Ct. App.), *p.t.a. denied* (2004) ("The sort of distinct and palpable injury that will create standing must be an injury to a recognized legal right or interest.").

The Court of Appeals appropriately applied New York law in determining this substantive issue and found that, because Georgia O'Keeffe had only a life estate in Alfred Stieglitz's art collection, whatever interest she had in his art collection terminated upon her death. Consequently, the only way the Museum could be the successor to any legal right or interest in the Collection was if Miss O'Keeffe had created such a right in herself or her heirs at the time she exercised the powers given to her under the terms of Stieglitz's Will. The Court of Appeals correctly found, however, that there was no evidence Miss O'Keeffe had intended or attempted to create any such rights; rather, she expressly renounced and released her power of appointment and, thus, did not retain a right of reversion (or any other right) in the Stieglitz

Collection. Accordingly, with this renunciation and release of the power of appointment, there were no rights or interests remaining in the Collection for the Museum to inherit as the successor to the residuary beneficiary of Miss O’Keeffe’s estate. Without any such rights or interests, the Court of Appeals correctly found that the Museum lacked standing to participate in this case.<sup>3</sup> See *Rainey v. Rainey*, 795 S.W.2d 139, 148 (Tenn. Ct. App.), *p.t.a. denied* (1990) (parties with no interest in property lacked standing to raise any question concerning trial court’s decision regarding ownership in property).

In its Application, the Museum fails to identify any errors in the Court of Appeals’ analysis of this issue under New York law. Instead, it criticizes the Court of Appeals for analyzing this case as simply one of property rights and argues that the Court of Appeals ignored other rights or remedies that Miss O’Keeffe, and correspondingly her successor the Museum, had in the “contract” between Miss O’Keeffe and Fisk University.<sup>4</sup> Specifically, the Museum asserts that Miss O’Keeffe and her successors had the right to seek specific enforcement of the “bilateral contract” between herself and Fisk, citing to *Allegheny College v. National Chatauqua County Bank*, 159 N.E. 173 (N.Y. 1927), as authority for that proposition.

The Museum’s reliance upon *Allegheny College* is misplaced for several reasons. First, the donor in that case owned the property in question outright, and thus whatever rights she had or created in the property could survive her death. Here, Miss O’Keeffe had only a life estate

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<sup>3</sup> With respect to the four paintings Miss O’Keeffe gave to Fisk from her own personal collection, the Court found that there was no evidence in any of the gift instruments that Miss O’Keeffe retained a right of reversion or that Miss O’Keeffe or her estate could revoke the gifts for any reason.

<sup>4</sup> It should be noted that, in a recent decision, the Tennessee Court of Appeals, analyzing the rights of the parties with respect to a charitable gift with conditions, applied the law of property on donative transfers and not contract law. *Weston v. Community Baptist Church of Wilson County*, 2007 WL 394644, slip op. at 6-7 (Feb. 5, 2007). In that case, the Court of Appeals found that the amendment to the church’s constitution, adopted at the time of the gift, “evidences the intent of the church to accept the gift with the condition attached” and that such condition “has clear language of reversion. In other words, the language states that if the condition failed, the money or its equivalent would be returned to the donors or their heirs.” *Id.* at 8.

with a special power of appointment in Stieglitz's art collection. New York law is clear that a life estate and all the rights associated with it terminate upon the death of the donee. *See In re Estate of Carey*, 672 N.Y.S.2d 131, 133 (N.Y.App. Div. 1998). Accordingly, whatever rights Miss O'Keeffe had in the Collection by virtue of her life estate, including any right to enforce the "contract" with Fisk, terminated at her death and could not have been part of her estate. *See In re Moeller's Estate*, 39 N.Y.S.2d 180, 185 (Sur. Ct. 1942).

Miss O'Keeffe also could not have created such a right through the exercise of the special power of appointment granted to her under the Will. The Court of Appeals found that Miss O'Keeffe expressly renounced and released her power of appointment and did not retain a right of reversion in the Collection. The Court further found that Miss O'Keeffe could not have created or retained any rights for herself or her estate in the Collection, because the special power of appointment only gave her the power to transfer her late husband's collection to nonprofit corporations to promote the study of art. *See also In re Bennett's Estate*, 297 N.Y.S. 396, 400-01 (Sup.Ct.App.Div. N.Y. 1937). Thus, unlike the donor in *Allegheny College*, whatever rights Miss O'Keeffe had with respect to the Stieglitz Collection – whether a right of reversion, right of specific performance or other right – terminated either upon her renunciation of the special power of appointment or upon her death, leaving no rights to be inherited, much less enforced by her heirs or successors.

Additionally, in the *Allegheny College* case, Judge Cardozo specifically differentiated the situation presented there from that of a charitable gift with conditions that did not amount to consideration. 159 N.E. at 378. Cardozo wrote, "No doubt there are times and situations in which limitations laid upon a promisee in connection with the use of what is paid by a subscriber lack the quality of a consideration, and are to be classed merely as conditions." *Id.* He further

stated, “It is often difficult to determine whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise. An aid, though not a conclusive test in determining which construction of the promise is more reasonable is an inquiry whether the happening of the condition will be a benefit to the promisor. If so, it is a fair inference that the happening was requested as consideration.” *Id.* (internal citations omitted).

While Judge Cardozo was correct that the distinction can sometimes be a difficult one to make, here it is very simple. The Will of Alfred Stieglitz, Ms. O’Keeffe’s petition to the Surrogate Court, and the order of the Surrogate Court all state that the transfer of the artwork was to be made “*without consideration.*” This commands the conclusion that the conditions placed by Miss O’Keeffe on the gift were “mere condition[s] in a gratuitous promise[,]” which, by implication, do not create an enforceable bilateral agreement like the one in *Allegheny College*. It is also noteworthy that the conditions do not benefit the promisor, Miss O’Keeffe, in any way, and even without the express statement that the transfer was made without consideration, would fall into the category of a mere condition unlike the consideration in the *Allegheny College* case.<sup>5</sup>

The Museum also argues that review by this Court is needed in order to secure uniformity of decision. Specifically, the Museum asserts that the Court of Appeals’ decision is “in considerable tension” with the decision in *United Daughters of the Confederacy v. Vanderbilt University*, 174 S.W.3d 98 (Tenn. Ct. App. 2005) (hereinafter referred to as “UDC”), in which the donor of a conditional charitable gift sought an injunction to prevent the donee from violating the conditions of that gift, or, in the alternative, return of the gift.

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<sup>5</sup> It should be noted that the *Allegheny College* case is also factually distinguishable. There, it was the recipient of the charitable gift that sought to enforce the “contract” against the donor and the donor’s estate, not the donor of a restricted charitable gift seeking to enforce the conditions against the donee. Indeed, prior to the court’s decision in *Allegheny College*, the recipients or donees of pledged charitable gifts had been unable to enforce those pledges against donors or their estates.

While the Museum has tried to create a tension between the *UDC* case and the present case, the *UDC* case is clearly distinguishable for several reasons. First, the party seeking to enforce the conditions imposed on the gift was the donor itself, the Tennessee Division of the United Daughters of the Confederacy. Thus, unlike the present case, there was no issue as to whether the Tennessee UDC had an interest in the property in question.

Second, unlike the present case, in the *UDC* case there was a specific written instrument between the parties containing the conditions to the gift and the express reservation of the right to recall the gift.

The 1913, 1927, and 1933 contracts do not, however, described the proposed transfer to Peabody College as a gift with no strings attached. The three contracts attach specific conditions to the gift, and the 1927 contract *expressly reserves to the Tennessee U.D.C. the right to recall the gift if Peabody College fails or ceases to comply with these conditions*. Where a party makes a donation to a charitable organization accompanied by conditions and a right to reclaim the donation if the conditions are not met, the law treats the arrangement between the parties as either a revocable charitable trust or a charitable gift subject to conditions. (emphasis added).

174 S.W.3d at 112-113 (citations omitted). Relying upon these three written contracts, the *UDC* court found that the gift was a charitable gift subject to conditions that the donee was required to comply with and that the donor's remedy for noncompliance was a return of the gift.<sup>6</sup>

In making this finding, the *UDC* court specifically applied § 35-13-103 of the Charitable Beneficiaries Act, which provides that a conditional gift is governed by the terms of the document or documents that created the gift.

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<sup>6</sup> Throughout its application, the Museum attempts to confuse the issue of remedies for noncompliance available to the donor of a charitable gift with conditions, which is governed by Tennessee law, with the issue of whether the donor of a charitable gift with conditions has a right of reversion, a question governed by New York law.

A conditional gift is enforceable according to the terms of the document or documents that created the gift. Tenn. Code Ann. § 35-13-103 (2001); 38 Am.Jur.2d *Gifts* § 72, at 767-69; 14 C.J.S. *Charities* § 30, at 199-200 (1991). If the recipient fails or ceases to comply with the conditions, the donor's remedy is limited to recovery of the gift. Because noncompliance results in forfeiture of the gift, the conditions must be created by express terms or by clear implication and are construed strictly.

174 S.W.3d at 114-115 (internal citations omitted).<sup>7</sup>

Similarly, in the present case, the Court of Appeals also looked to the terms of the written gift instruments and correctly determined that there was no evidence in any of those documents, including the court pleadings filed by Miss O'Keeffe, the orders of the New York probate court and the correspondence between Miss O'Keeffe and Fisk President Johnson, of any right of reversion or that Miss O'Keeffe or her estate could revoke the gift of the Collection and the four paintings for failure to comply with the conditions. This finding demonstrates that the two decisions are actually in harmony rather in conflict and, thus, that the decision below presents no occasion to grant review for the purpose of securing uniformity of decisions.<sup>8</sup>

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<sup>7</sup>See also *Walker v. Shelby Co. School Bd.*, 263 S.W. 792, 792 (Tenn. 1924) ("A conveyance of land to be used 'for public school purposes' did not create a condition causing reversion on ceasing to use the land for such purposes. ... Such expressions of purpose are not construed to create conditions. 'Such conditions when relied on to work a forfeiture must be created by express terms or clear implication, and are strictly construed.'" (quoting *Southwestern Presbyterian University v. Clarksville*, 149 Tenn. 256, 282 (1923)); *Michell v. Jerrolds*, 1991 WL 39587, slip op. at 4-5 (March 26, 1991) (Court found that words contained in deed to church "for the purpose for the home for the Missionary Baptist Pastor and no Pastor shall occupy said place as a home unless he preaches 'that you are saved by Grace through Faith in Jesus Christ and not by works,'" were merely words stating the purpose of the gift and did not constitute a determinable fee with possibility of reverter or a condition subsequent, relying upon the cases of *Walker v. Shelby County School Board*, 150 Tenn. 202, 263 S.W. 792; *Nashville C. & St. L. Ry. v. Bell*, 162 Tenn. 661, 39 S.W.2d 1026, 1028; and *Boyd v. Ducktown Chemical and Iron Co.*, 19 Tenn.App. 392, 396, 89 S.W.2d 360. ).

<sup>8</sup> The Museum also claims that the decision below conflict with to the unreported decision of *Roberts v. The Baylor School*, 2008 Tenn. App. LEXIS 37 (January 25, 2008). But *Roberts* involves the actual donor of a charitable gift (who owned the property outright before making the gift) seeking return of the gift for failure to comply with the conditions imposed upon the gift. It is, therefore, wholly inapposite.

## CONCLUSION

The fundamental issue before the Court of Appeals was whether the Georgia O’Keeffe Museum, as the successor in interest to the Georgia O’Keeffe Foundation, the residuary beneficiary of the estate of Georgia O’Keeffe by virtue of a settlement agreement, had a recognized legal right or interest in the Alfred Stieglitz Collection given by Miss O’Keeffe to Fisk University. This substantive issue is clearly one that is determined under New York and not Tennessee law. Applying New York law, the court below correctly determined that the Museum lacked such an interest in the Collection. Thus, this case does not present an important question of Tennessee law and public policy, nor does it present any need to secure uniformity of decision.

The Museum argues that its presence in this litigation is necessary to protect Miss O’Keeffe’s intent in donating the Stieglitz Collection to Fisk as a restricted charitable gift. Yet, while the Museum claims that, but for its intervention, “the two most significant works of art in Fisk’s Stieglitz Collection would no longer be at Fisk,” the Museum and Fisk have twice entered into settlement agreements with that exact result, transferring O’Keeffe’s *Radiator Building* to the Museum for consideration and allowing Fisk to sell Hartley’s *Painting No. 3* on the market. The record reflects that both the Museum and Fisk are willing to subordinate the donor’s intentions to their own respective priorities: augmenting the Museum’s art collection and generating money for Fisk’s general business plan.

The Museum correctly notes that the proposed contract between Fisk and Crystal Bridges Museum, which would result in the sale by Fisk of half of the entire Collection, would alter or abolish Miss O’Keeffe’s conditions in a radical manner, and, as this Office suggested to the Court of Appeals, such a proposal would likely fall short of satisfying the stringent requirements

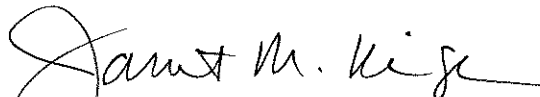
for *cy pres* relief. The statutory obligation of the Attorney General's Office in this case is to ensure that the charitable purposes of Miss O'Keeffe's gift are carried out in a manner that is most consistent with her intent, that protects the interests of the citizens of the State, and that does not discourage future charitable giving. The Attorney General's Office, not the Museum, is the only appropriate party to play that role, and the Office will continue to do so as this litigation moves forward.

Accordingly, the Application for Permission to Appeal should be denied.

Respectfully submitted,

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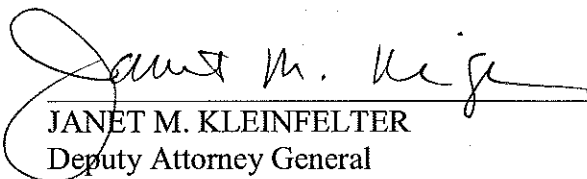
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Response has been sent by first class U.S. Mail, postage prepaid to:

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this 28<sup>th</sup> day of September, 2009.

  
JANET M. KLEINFELTER  
Deputy Attorney General

## **APPENDIX**

### **Copies of Unpublished Opinions**

1. *Weston v. Community Baptist Church of Wilson County*, 2007 WL 394644 (Tenn. Ct. App. Feb. 5, 2007)
2. *Mitchell v. Jerrolds*, 1991 WL 39587 (Tenn. Ct. App. March 26, 1991)
3. *Robertis v. The Baylor School*, 2008 WL 204114 (Tenn. Ct. App. January 25, 2008)