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## ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred by exceeding its authority on remand, by failing to adhere to the law of the case, by making factual findings based on a clearly erroneous assessment of the evidence, and by applying an incorrect legal standard.
2. Whether the trial court abused its discretion by fashioning *cy pres* relief that fails to most closely approximate Ms. O’Keeffe’s charitable intent as declared by this Court.

## STATEMENT OF THE FACTS AND CASE

### FIRST TRIAL

The events leading to this case began on July 13, 1946, when famed photographer and art collector Alfred Stieglitz died, leaving an estate containing a vast collection of paintings, photographs, and other works of art. Mr. Stieglitz's Last Will and Testament, probated in the New York Surrogate Court, named his wife, Georgia O'Keeffe, as Executrix and granted her a life estate in all of Mr. Stieglitz's personal and real property along with the power to transfer, without any consideration, any of the property to a nonprofit corporation as described in Article III of the Will. Article III of the Will provided that upon Ms. O'Keeffe's death, Mr. Stieglitz's art collection was to be given to nonprofit corporations for public viewing and to promote the study of art. *Georgia O'Keeffe Foundation (Museum) v. Fisk University*, 312 S.W.3d 1, 5 (Tenn.Ct.App. 2009), *appeal denied* (Tenn. Feb. 22, 2010) (TR Vol. I at pp. 2-24).

In order to address certain issues arising under New York's Decedent's Estate Law, Ms. O'Keeffe filed a petition with the Surrogate Court in which she proposed to transfer all of Mr. Stieglitz's art collection to six 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. Finding that this proposal sufficiently addressed the issues, the Surrogate Court granted the petition. *Id.* at 5, 6.

Prior to the actual transfer of the artworks, Ms. O'Keeffe exchanged a series of letters with Charles S. Johnson, then President of Fisk University, in which she outlined a number of conditions to be imposed upon the works of art to be given to Fisk. *Id.* At the time she formally assigned and transferred the artwork to Fisk University in June 1949, Ms. O'Keeffe imposed additional conditions, including the condition that is central to this case, that Fisk not at any time

sell or exchange any of the objects in the Stieglitz Collection. These conditions were fully accepted by President Johnson on repeated occasions. *Id.* at 6.

Georgia O’Keeffe died in 1986, almost forty years after transferring the Stieglitz Collection to Fisk University. *Id.* at 7. During that time period, Ms. O’Keeffe never lifted or otherwise modified the prohibition on the sale or exchange of any of the works in the Collection, even though Fisk’s financial situation deteriorated during the intervening forty years.

In 2005, Fisk commenced this proceeding initially seeking permission to sell two valuable pieces of the Collection because, Fisk asserted, that it could no longer afford to maintain the Collection pursuant to the conditions imposed by Ms. O’Keeffe. *Id.* at 4. The Georgia O’Keeffe Museum (“Museum”), the residuary beneficiary of Ms. O’Keeffe’s estate, immediately intervened in order to oppose the sale of the paintings, seek enforcement of the conditions imposed by Ms. O’Keeffe on the Collection, and assert a counterclaim for breach of the conditions and reversion of the Collection to the Museum.

In April 2007, Fisk amended its complaint to include a request for relief from the conditions under the *cy pres* doctrine. The Attorney General and Reporter was subsequently granted permission to intervene to represent the interests of the people of Tennessee. The Museum filed a motion for summary judgment on Fisk’s complaint, which the trial court granted, finding that the conditions imposed by Georgia O’Keeffe prevented the sale of any art from the Collection and that Fisk was not entitled to any relief pursuant to the *cy pres* doctrine. *Id.* at 8.

Prior to the trial on the Museum’s counterclaim for breach of conditions, the Museum and Fisk entered into a settlement agreement that was submitted for court approval. Under the settlement, Fisk agreed to sell Georgia O’Keeffe’s painting *Radiator Building-Night, New York*,

to the Museum for \$7.5 million and the Museum agreed not to oppose Fisk's efforts to sell a second painting, Marsden Hartley's *Painting No. 3*. The Attorney General strongly opposed approval of this settlement agreement as not being in the best interests of the people of the State of Tennessee as the ultimate beneficiaries of the Stieglitz Collection. The trial court agreed, finding that the settlement agreement was not consistent with the conditions imposed by Ms. O'Keeffe. The trial court further declared that Fisk should consider other potential offers, including an offer from the Crystal Bridges Museum located in Bentonville, Arkansas. *Id.* at 8-9.

Following this directive of the trial court, Fisk reached an agreement with the Crystal Bridges Museum whereby Fisk would sell a fifty-percent (50%) ownership interest in the entire Stieglitz Collection to Crystal Bridges for thirty million dollars (\$30,000,000). Immediately upon reaching this agreement, Fisk sought to amend its complaint again to seek approval of the agreement under the *cy pres* doctrine. *Id.* at 9.

In January 2008, the Museum once more sought summary judgment on Fisk's amended petition for *cy pres* relief. The trial court granted this motion, ruling that Fisk had failed to establish two of the essential elements of the *cy pres* doctrine: (1) that the gifts to Fisk were motivated by a general charitable intent and (2) that the relief sought (the agreement with Crystal Bridges) was as near as possible to effectuating the purpose of the charitable gift. *Id.*

A trial on the only remaining claim – the Museum's counterclaim for breach of the conditions – was held in February 2008. The trial court subsequently issued a memorandum opinion finding that Fisk had breached the conditions when it declared it could not care for and display the Collection but that such breach was insufficient to justify reversion. The trial court

imposed a permanent injunction preventing Fisk from selling the Collection and setting a deadline for Fisk to again display the Collection.

### **FIRST APPEAL**

Fisk filed a notice of appeal with this Court. This Court subsequently determined that, as a matter of law, the Museum had no reversionary interest in the Stieglitz Collection and, therefore, had no standing to participate as a party in this proceeding. Accordingly, this Court ordered that the Museum's pleadings and motions be stricken and the trial court's orders granting relief in accordance therewith be vacated. *Id.* at 15.

This Court further determined that the trial court had erred by entering summary judgment against Fisk's petition for *cy pres* relief. *Id.* In remanding that issue, this Court made several rulings that were binding on the parties and trial court on remand. Central to this Court's holdings on *cy pres* were its detailed findings as to the charitable intent behind Ms. O'Keeffe's gift to Fisk:

It is apparent from Alfred Stieglitz's will, the 1948 Petition Georgia O'Keeffe filed in the surrogate's court, and Ms. O'Keeffe's letters to President Johnson that followed, that the charitable intent motivating the gifts of the Stieglitz Collection and Ms. O'Keeffe's four pieces to the University was to make the Collection available to the public in *Nashville* and *the South* for the benefit of those who did not have access to comparable collections to promote the general study of art.

*Id.* at 17 (emphasis in original). In making this determination, this Court noted that the express language in Alfred Stieglitz's will "reveals that he desired his collection be donated to institutions *to promote the study of art*" and that Georgia O'Keeffe not only affirmed this express intent when making the gifts of artwork from his collection, "but she also adopted her husband's charitable intent when she donated four pieces from her personal collection to the University."

*Id.* at 17-18 (emphasis in original). This Court further found that in her correspondence to Fisk

President Charles Johnson, before and after the completion of the gifts, “Ms. O’Keeffe expressed her intent that the Collection, *inter alia*, be identified as the Stieglitz Collection (including her four pieces) and preserved intact, for its *educational study and historical value to the public.*” *Id.* Finally, based upon the facts in the record, this Court again concluded that “the clear intent for giving the Collection to the University 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.” *Id.* at 18.

Having defined Ms. O’Keeffe’s charitable intent, this Court then had to determine whether that intent was general or specific, as only gifts motivated by a general charitable intent are eligible for *cy pres* relief. This Court considered several factors – including not just Ms. O’Keeffe’s intent but also that she made similar gifts to several other charities at the same time, that she imposed no express divesting clause and the legal principle favoring general intent – to conclude that the gifts to Fisk were motivated by a general charitable intent. *Id.*

As the trial court had based its rulings on a finding of specific, not general, intent, this Court accordingly reversed the trial court’s summary dismissal of Fisk’s petition for *cy pres* relief. *Id.* This Court did not grant any *cy pres* relief but, instead, remanded the case to the trial court with instructions, in light of its holdings, to determine whether Fisk could satisfy the final precondition for *cy pres* relief – that literal compliance with the conditions imposed by Ms. O’Keeffe is impossible or impracticable – and if so, to determine the form of *cy pres* relief that most closely approximates Ms. O’Keeffe’s charitable intent. *Id.* at 19-20.

## **REMAND AND SECOND TRIAL**

The mandate of this Court issued on March 10, 2010. (TR Vol. I at p. 1). On April 1, 2010, Fisk filed a motion to set the second trial. (TR Vol. I at p. 53). On April 16, 2010, the trial

court issued an order reopening the case, setting aside the prior final order, and setting the matter for a four-day trial to commence on August 9, 2010. (TR Vol. I at pp. 77-78). The trial court further ordered Fisk to file an amended petition to reflect its current circumstances and the *cy pres* relief it sought. (*Id.*).

On April 27, 2010, Fisk filed a second amended petition seeking *cy pres* relief. (TR Vol. I at pp. 92 - Vol. II, p. 222). Fisk asserted that circumstances had so changed since it received the gift from Ms. O'Keeffe that it was impractical to fulfill its duty to make the art available to the public and promote the study of art. (TR Vol. I at p. 107). In support of that assertion, Fisk further alleged that it could not justify the expenditure of school funds on maintenance and display of the Stieglitz Collection when the money was needed for the university's educational mission and overall survival. (*Id.*). Fisk further alleged that most of the Stieglitz Collection is comprised of art by artists no longer famous enough to draw significant numbers of visitors to view the Collection (naming Hartley, Dove, Demuth, Stetheimer, MacDonald-Wright, and Walkowitz as such obscure artists). (*Id.*). The crux of Fisk's amended petition is found in

Paragraph 34:

Even if Fisk were to survive financially, it would do so in a severely weakened financial condition. Considering its purpose, the education of its students must, and will, take priority over the operation of the art gallery where the [Stieglitz] Collection is located. This will mean when funds are allocated to the maintenance and preservation of the art, those funds will be taken away from use in its primary mission.

(TR Vol. I at p. 106).

Fisk's second amended petition set forth a *cy pres* remedy substantially similar to the one presented in its first petition – an agreement with the Crystal Bridges Museum that provided for, among other things: (1) the payment of \$30,000,000 to Fisk in exchange for a fifty percent

interest in the Stieglitz Collection (TR Vol. I at pp. 113-114); (2) provisions allowing Crystal Bridges to loan Fisk money to care for the collection, and in return receive a secured interest in Fisk's fifty percent interest in the art (TR Vol. I at p. 150); (3) provisions allowing Fisk to sell its fifty percent interest to another non-profit organization with a right of first refusal given to Crystal Bridges Museum (TR Vol. II at pp. 151-152); (4) provisions requiring Fisk to maintain the art with “the highest standards and best museum industry practices” with the parties sharing equally in the costs of such maintenance (TR Vol. I at pp. 141-149); and, (5) provisions requiring arbitration of any disagreements between the parties, rather than jurisdiction remaining with the trial court. (TR Vol. I, p. 126). The Agreement contained no specific provisions regarding when the art would be displayed at Fisk or at Crystal Bridges Museum other than to provide that it would be displayed at each institution fifty percent of the time. (TR Vol. I, p. 140).

After expedited discovery, trial began on August 11, 2010. Fisk called only one witness, its president, Hazel O’Leary.<sup>1</sup> President O’Leary testified generally about Fisk’s financial condition and its need for the \$30 million proceeds from the sale of a half ownership interest in the Stieglitz Collection. President O’Leary did not provide any details about how the university would apply the money to address its difficulties; rather she testified that the Fisk Board of Trustees had not formalized any plan for use of the \$30 million “because they’re afraid they’ll put something in the plan that the attorney general does not like.” (Trial Transcript, Vol. II at pp. 301-302).<sup>2</sup> President O’Leary further testified that even if Fisk received the \$30 million, those

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<sup>1</sup>Even though the trial court postponed the trial date at Fisk’s request to accommodate its financial expert witness, the University did not call that witness to testify.

<sup>2</sup> This testimony is consistent with Fisk’s discovery responses (“No final decision has been made.”). (TR Vol. IV at p. 568).

funds would only be a “foundation piece” and that Fisk needed to raise \$100 to \$150 million in order “to right its ship.” (*Id.* at pp. 300, 303).

The Attorney General presented the testimony of four witnesses, including two experts, Dr. Foster Amey and Dr. William U. Eiland. Dr. Foster Amey, a full professor at Middle Tennessee State University with education, training, and experience in the field of demography and population studies, was qualified as an expert to testify concerning the demographic profiles and characteristics of Bentonville, Arkansas, the home of the Crystal Bridges Museum, compared to Nashville and the South, the regions identified as the objects of Ms. O’Keeffe’s charitable intent. (Trial Transcript, Vol. III at pp. 554-556; TE 130). In his unrebutted testimony, Dr. Amey testified about the accessibility of Bentonville, noting that the driving distance between Nashville and Bentonville is approximately 555 miles; in comparison, the cities of Milwaukee, Wisconsin, and Pittsburgh, Pennsylvania, are approximately the same driving distance from Nashville, while Detroit, Michigan, and Cleveland, Ohio, are actually closer to Nashville. (*Id.* at pp. 557-558). Dr. Amey also compared various demographics between Bentonville, Nashville and the South,<sup>3</sup> including:

- Municipal Population – Bentonville has a population of approximately 32,000 and Nashville has a population of more than 590,000 (*Id.* at pp. 558-559).
- Population within 150 mile radius – the Nashville area has a population over 9 million and the Bentonville area has a population over 5 million. (*Id.* at pp. 564-565). Furthermore, over twice as many residents of the South live within a 150-mile radius of Nashville than of Bentonville – 8.3 million for Nashville and 3.5 million for Bentonville. (*Id.* at pp. 565-66).

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<sup>3</sup>Dr. Amey adopted the definition of “South” used by the American Community Survey of the U.S. Bureau of Census, which defines the “South” as a geographic location that includes the states of Delaware, Maryland, Virginia, West Virginia, North Carolina, South Carolina, Georgia, Florida, Tennessee, Kentucky, Arkansas, Oklahoma, Texas, Louisiana, Alabama and Mississippi. (Trial Transcript, Vol. III at p. 559).

- Racial composition – Nashville population is approximately 65% white and 28% black; the South approximately 72% white and 19% black, and Bentonville 85% white and 3% black. (*Id.* at p. 540).
- Household income – Nashville has a median household income of \$46,000; the South has a median household income of \$48,000; and Bentonville has a median household income of \$52,584. (*Id.* at p. 561).
- Education – 84% of the Nashville population has obtained a high school degree or higher; 83% of the South has obtained a high school degree or higher; and 89% of the Bentonville population has obtained a high school degree or higher. (*Id.* at 562).
- School enrollment – Nashville has 76,000 students enrolled in elementary schools, 28,000 enrolled in secondary and 45,000 enrolled in tertiary; and Bentonville has 5,054 students enrolled in elementary, 1,600 in secondary, and 1,500 in tertiary. (*Id.* at p. 563).
- Air traffic – Nashville has over 9 million passengers processed through the Nashville airport annually, and Bentonville has approximately 1.1 million passengers processed through the Northwest Arkansas Regional Airport annually. (*Id.* at p. 567.)

Based upon these comparisons, Dr. Amey concluded that the community of Nashville more closely resembled the South in terms of race, income, and education than does Bentonville and that Nashville is significantly more accessible to the population of the South than is Bentonville. (*Id.* at pp. 568-569). This testimony was unrefuted by Fisk and adopted by the trial court. (TR Vol. X at p. 1320).

The Attorney General also presented the un rebutted testimony of Dr. William U. Eiland, Director of the Georgia Museum of Art at the University of Georgia, much of which was adopted by the trial court. (TR Vol. XIII at pp. 1786-87). Dr. Eiland was qualified as an expert on donation practices and on the Stieglitz Collection and its educational, historic, and artistic significance, as well as the impact that the Crystal Bridges agreement would have on the Collection's physical condition. (Trial Transcript, Vol. III at pp. 594-602). Dr. Eiland testified that the Stieglitz Collection was significant for several reasons: (1) it represented a particular

period in the development of American art, *i.e.*, the formative years of American modernism; (2) it included works on paper, printmaking, and water color; and (3) it bridged the artistic gap from the 19<sup>th</sup> century into the 20<sup>th</sup> century. (*Id.* at pp. 603-604). Dr. Eiland further testified that the Collection was significant because it came from the estate of Alfred Stieglitz and included those artists mentored by Stieglitz, and because it was assembled by Georgia O’Keeffe, the pre-eminent American modernist of the 20<sup>th</sup> century. As such, Dr. Eiland testified that the Collection is important not just because of the quality of the individual pieces, but also because the Collection as a whole is “emblematic of this particular history of American collecting, history of American exhibition, history of American programming, if you will, in individual arts.” (*Id.* at p. 605).

Dr. Eiland also testified, based upon his own research and knowledge, that in both academic and popular circles, the Stieglitz Collection had “become emblematic of Nashville’s cultural history” and that it defines the history of the visual arts in Nashville. (*Id.* at pp. 606-607). When asked whether there was any other collection comparable to the Stieglitz Collection, Dr. Eiland testified as follows:

Well, you’re not going to find a collection that is comparable to the Stieglitz Collection. What you’re going to find are individual works or museums that may put together special exhibitions on American modernism or that have good collections of these representative artists.

But that collection is incomparable. It is irreproducible because of its history from Stieglitz, from Georgia O’Keeffe, the connections there, and also because it is a – from the earliest years of the Stieglitz Gallery Association to the end, when he opened the American gallery, the collection itself represents an important chapter, a significant chapter, in the history of American art, that is not reproducible elsewhere in other collections.

(*Id.* at p. 610).

Dr. Eiland also testified about the importance to charitable organizations of donor intent and the effect on future charitable giving when donor intent is not followed:

To my experience – and my experience has been that even the reports of this trial that have been in the paper have had a chilling effect on donor relations, and certainly over the past two years, which we – when we have been reading about it from other institutions, then I have gotten quite a few phone calls – and I mean by that enough significant enough for me to count – of even board members who are calling and saying, “Are you going to protect my donation when I make it?”

(*Id.* at pp. 611-613).

Dr. Eiland also testified about the physical impact that implementation of the Crystal Bridges Agreement would have on the Stieglitz Collection. In particular, Dr. Eiland testified that the Agreement requires the artwork to be transported regularly between the two institutions and that this frequent travel would have a harmful effect on the artwork because of its inherent fragility. Dr. Eiland further testified that, based upon a conservation report on the Collection prepared on behalf of the Crystal Bridges Museum, there were at least five pieces of art that should not be allowed to travel at all due to the risk of harm. (*Id.* at pp. 614-620).

Finally, the Attorney General presented the testimony of Dr. Tommy Frist and Lee Barfield concerning a proposal Dr. Frist made the previous year to assist Fisk with the display of the Stieglitz Collection. As described in length in the trial court’s first post-trial order (issued August 20, 2010), Dr. Frist testified that in May 2008, he, along with other representatives of the Frist Center for the Visual Arts, met with President O’Leary and two members of the Fisk Board of Trustees. During that meeting, Dr. Frist suggested that Fisk could be provided “condominium” space at the Frist Center where it could display the Collection. Dr. Frist indicated that this concept was one that he had seen in practice at the Frazier Armament Museum in Louisville, Kentucky. The Frazier Museum had a permanent exhibit on loan from the Royal

Armament Society in the United Kingdom of a collection with ownership covenants similar to the no-sale condition on the Stieglitz Collection. (Trial Transcript, Vol. III at p. 535-537; TR Vol X at p. 1326-1327). Dr. Frist testified that this “condominium” concept could be applied to the Stieglitz Collection, whereby Fisk would be given ownership of prominent space within the Frist Center. As owner of this “condominium,” Fisk could display the Stieglitz Collection in that space in compliance with Georgia O’Keeffe’s conditions. The space would “be just like another campus of Fisk under the direction of their university.” (*Id.* at pp. 538-539). By displaying the Collection at this “satellite campus,” Fisk would honor the no-sale condition and at the same time defer some of the cost of displaying and maintaining the Collection while exposing it to a larger viewing audience. (*Id.*).

#### **TRIAL COURT’S FIRST POST-TRIAL ORDER**

After the trial, on August 20, 2010, the trial court issued the first of four, substantive, post-trial orders (the “First Order”). (TR Vol. X at pp. 1309-1329). The trial court made two key holdings in its First Order: (1) it was impracticable for Fisk to continue to maintain and display the Stieglitz Collection according to Ms. O’Keeffe’s conditions; and (2) the Crystal Bridges proposal, as written, did not most closely approximate Ms. O’Keeffe’s intent. (*Id.* at pp. 1315, 1323-24).

The trial court made several findings of fact to support its conclusion that the Crystal Bridges proposal did not most closely approximate Ms. O’Keeffe’s intent. First, based upon the undisputed testimony of Dr. Amey, the trial court found that Nashville is closer and more accessible to more southern states than Bentonville, Arkansas, the future home of the Crystal Bridges Museum, and that Nashville’s population is almost twenty times that of Bentonville, much more racially diverse than Bentonville’s, and much closer to the demographics of other

southern states. (*Id.* at p. 1320). In light of these differences, the trial court found that displaying the Stieglitz Collection in Bentonville fifty percent of the time, as required by the Crystal Bridges proposal, would dilute Ms. O’Keeffe’s intent to make the collection accessible to Nashvillians and Southerners. (*Id.*). In addition, selling a fifty-percent interest in the Stieglitz Collection to the Crystal Bridges Museum would also dilute the connection between the art and Nashville and the South intended by Ms. O’Keeffe. (*Id.*).

The trial court also stated that Dr. Frist’s “condominium alternative [was] an innovative and resourceful idea,” but stated it was “hypothetical” because no proof had been offered about whether the Frist Center had sufficient room for the Collection and whether Fisk would the cost of any expense or redesign that might be required. (TR Vol. X at p. 1327) In light of these outstanding questions, the Court direct the parties to submit a second round of proposals “*for the display and maintenance of the Alfred Stieglitz Collection,*” noting that possible plans the Attorney General could submit would be a “sharing arrangement in Nashville” or “an institution capable and willing to permanently house and maintain the Collection to replace Fisk.” (*Id.* at p. 1312-13).<sup>4</sup> The court then directed the Attorney General to submit a proposal on September 10, 2010; for Fisk to respond to the Attorney General’s proposal and submit one of its own on October 8, 2010; and for the Attorney General to reply to Fisk’s submission on October 22, 2010. (TR Vol. X at pp. 1328, 1331).

#### **ATTORNEY GENERAL’S FIRST PROPOSAL**

In response to the trial court’s directive to submit additional proposals, on September 10, 2010, the Attorney General proposed that the State of Tennessee, through the Tennessee Arts

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<sup>4</sup>The trial court noted that its legal research had failed to disclose any New York cases in which financially unstable institutions had been allowed to sell a restricted charitable gift to generate money for the institution. Instead, the court found, “in the case of a bankrupt institution, the charitable gift was given to another institution to carry out the charity.” (TR Vol. X at p. 1318).

Commission and on behalf of the citizens of Tennessee who are the ultimate beneficiaries of this charitable gift, would take custody of the Collection until such time as Fisk regained the financial ability to resume its role as custodian. During that time, the Collection would be displayed at and maintained by the Frist Center for the Visual Arts in gallery space devoted solely to the Collection and accessible to the public at no charge. The cost of the necessary renovations at the Frist Center and of the display and maintenance of the Collection would be shared by the Frist Center, the State and the City of Nashville.<sup>5</sup> Fisk would pay none of the expenses and would be relieved of its current ongoing costs related to the Collection. While on display at the Frist Center, the Collection would continue to be known and identified as the “Alfred Stieglitz Collection at Fisk University,” and visitors would be provided detailed information about Fisk and its unique connection to this artistic treasure. Fisk students and faculty would be provided additional access to the Collection for research, scholarship, and teaching.<sup>6</sup> (TR Vol. X at pp.1332 – Vol. XI, p. 1582).

#### **TRIAL COURT’S SECOND POST-TRIAL ORDER**

On September 14, 2010, before Fisk filed its response to the Attorney General’s proposal or made one of its own, the trial court issued its second post-trial order (the “Second Order”).

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<sup>5</sup> In response to criticism that the renovations were contingent upon approval of funding by the Metropolitan Development and Housing Agency, the Attorney General submitted an affidavit from the Tennessee State Museum’s Executive Director stating that the Museum is ready and willing and has the necessary space and funding available to display the Stieglitz Collection, in accordance with Georgia O’Keeffe’s conditions, in the event the Frist Center is unable to do so. (TR Vol. XII at p. 1734).

<sup>6</sup>In order to address concerns raised by the trial court concerning some of the outdated conditions under which the Collection is currently maintained and displayed, the Attorney General also proposed the creation of an advisory committee composed of nationally recognized experts (all who had agreed to serve). This advisory committee would recommend modifications to the conditions to reflect current best practices. The committee would also identify and recommend any remedial preservation or conservation work needed for each individual piece of artwork. The State, as custodian of the Collection, agreed to pay for this preservation/conservation work. (TR Vol. X at p. 1345).

(TR Vol. XII at p. 1583-1613). In its order, the trial court rejected the Attorney General's proposal with the following brief explanation:

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

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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.

(*Id.* at pp. 1583). The trial court then ordered the parties to comment on the feasibility of modifying the Crystal Bridges Agreement to address the concerns raised in the trial court's First Order. (TR Vol. XII at pp. 1584-86). The trial court, for the first time, made additional findings as to the scope of Ms. O'Keeffe's charitable intent – an issue neither party had identified as an issue in their pre-trial briefs and on which no new proof had been offered at trial. (*Id.* at pp. 1586-87). The trial court found for the first time in this litigation that by placing the Stieglitz Collection at Fisk University, Ms. O'Keeffe was motivated by an intent to ensure the continued existence of the institution. (*Id.*). As a result, the trial court concluded that “it would not be keeping, then, with the donor's intent to keep the Collection in Nashville at the cost of sacrificing the existence of Fisk University.” (*Id.*).

### **FISK'S PROPOSAL**

On October 8, 2010, Fisk University submitted a revised sale agreement with Crystal Bridges Museum that maintained the fundamental elements of the transaction but modified the terms that the trial court has identified as problematic: eliminating the secured loan provision, the Delaware LLC provision, and the arbitration/mediation provision and requiring court approval for any future transfer of ownership interest by Fisk or Crystal Bridges. (TR Vol. XII at pp. 1622-1713).

## ATTORNEY GENERAL'S SECOND PROPOSAL

On October 22, 2010, the Attorney General submitted a second proposal to the trial court that would fully achieve two goals: it would relieve Fisk University of any expenses associated with the Stieglitz Collection, and it would adhere completely to the intent and conditions placed upon the gift by Ms. O'Keeffe, most significantly by keeping the Collection on campus full time. (TR Vol. XIII at pp. 1728-1749). The Attorney General notified the trial court that a designated fund had been established by Carol Creswell-Betsch, a Fisk alumna, at The Community Foundation of Middle Tennessee ("The Community Foundation"). This fund is named the "Pearl Creswell Fund for the Alfred Stieglitz Collection at Fisk University" in honor of Ms. Creswell-Betsch's mother, who was the first curator of the Stieglitz Collection at Fisk, and it was established "to benefit, in perpetuity, the display and care of the Alfred Stieglitz Collection at the Van Vechten Gallery at Fisk University." (*Id.* at p. 1728-1729). In other words, this Fund established a permanent endowment to pay for the annual costs associated with the care and display of the Collection at Fisk University.

Based upon the proof at trial, the trial court determined that Fisk currently spends approximately \$131,000 on an annual basis in maintaining and displaying the Collection.<sup>7</sup> (TR Vol. X at p. 1315, Vol. XIII at 1799). The Pearl Creswell Fund has been organized to generate at least that amount in income to assume those costs. More specifically, The Community Foundation has received binding commitments of both leadership and leadership gifts that ensure the Pearl Creswell Fund will have a corpus sufficient to generate the proceeds needed to pay the

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<sup>7</sup>This factual finding is supported by President O'Leary's testimony that Fisk currently spends approximately \$200,000 - \$205,000 annually on the Collection; but \$80,000 of that amount is funded by an annual grant from the State of Tennessee. (Trial Transcript, Vol. II at pp. 325-26; TE 207, Vol. VII at p. 997-999).

cost of keeping the Collection on display full-time at Fisk.<sup>8</sup> (*Id.* at 1730). Based on these commitments, the Pearl Creswell Fund will have a sufficient balance, at least \$2.62 million, so that distribution of five percent of the balance would generate a grant of at least \$131,000 each year to Fisk for the sole purpose of caring for and displaying the Stieglitz Collection in the Van Vechten Gallery. (*Id.* at p. 1731). Additionally, the Pearl Creswell Fund will operate with the full benefit of the record and reputation for good stewardship of The Community Foundation, one of the most credible philanthropic institutions in Tennessee. (*Id.*). Thus, with this proposal, Fisk University could continue to display the Stieglitz Collection at Fisk full-time and without diverting a single dollar from its academic programs or its primary educational mission.

The Attorney General also filed on October 22 a brief in response to Fisk's proposed modified Crystal Bridges Agreement. (TR Vol. XII at pp. 1714-1727). The Attorney General noted that no possible modification to the Crystal Bridges Agreement could ensure that the Collection would be protected from Fisk's creditors in the event of financial distress because, in order to lift the no-sale condition and approve the modified Crystal Bridges Agreement, the trial court would have to find that Georgia O'Keeffe gave the Collection to Fisk to ensure the university's continued financial existence. (*Id.*) Such a ruling would irrevocably change the character of the Collection from a restricted charitable gift into an unrestricted financial asset of the University and would remove the protected status the Collection now enjoys from creditors, particularly in any federal bankruptcy proceedings involving Fisk. The Attorney General asserted that voiding the no-sale restriction and allowing the sale to Crystal Bridges to proceed would be a clear breach of Ms. O'Keeffe's intent and an abuse of *cy pres* law. (*Id.*)

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<sup>8</sup>These commitments are contingent upon a final, non-appealable order being entered in this case approving the use of the Pearl Creswell Fund to pay for the full-time display and care of the Collection in the Van Vechten Gallery at Fisk as the appropriate *cy pres* relief and denying Fisk's petition to sell a half interest in the Collection to the Crystal Bridges Museum. (TR Vol. XIII at p. 1730).

### **TRIAL COURT'S THIRD POST-TRIAL ORDER**

On November 3, 2010, the trial court issued its third post-trial order (the "Third Order"). (TR Vol. XIII at pp. 1750-1784). In the Third Order, none of the submitted plans was adopted outright; instead, the court designed its own plan based on the modified Crystal Bridges proposal. The main difference between the modified Crystal Bridges proposal, as submitted by Fisk, and the plan the trial court adopted is the trial court's requirement that Fisk use \$20 million of the \$30 million sale proceeds to establish an endowment, the income from which would be restricted to benefiting the Stieglitz Collection and promoting the study of art. (*Id.*).

The trial court's November 3 order adopted and incorporated the prior orders of the court as to the findings of impracticability. (TR Vol. XIII at pp. 1755-56). In the Third Order, however, the trial court further elaborated on its expanded interpretation of Ms. O'Keeffe's intent by invoking the concept, heretofore absent from this case, of Ms. O'Keeffe's "full dispositional design." (*Id.* at pp. 1757-1766). The crux of the trial court's finding on intent was that, in addition to Ms. O'Keeffe's "primary intent" identified by this Court, a "secondary consideration and motivating factor of the O'Keeffe dispositional design was placement of the Collection at Fisk." (*Id.* at p. 1766). In light of this "full dispositional design," the trial court concluded that both of the Attorney General's proposals would "frustrate the unique dispositional design of Ms. O'Keeffe's charitable gift" because "they provide no money for Fisk, the institution." (*Id.* at p. 1771). The Crystal Bridges sale, by supplying such funds, was held to more closely conform to this "dispositional design." (*Id.* at pp. 1774-1777).

### **TRIAL COURT'S FOURTH POST-TRIAL ORDER**

Finally, on November 9, 2010, the trial court issued its fourth of four, substantive, post-trial orders (the "Fourth Order"). (TR Vol. XIII at pp. 1785-1791). In that order, the trial court

made additional findings of fact. The trial court found, based upon the undisputed testimony of Dr. Eiland at trial, that there were no comparable art collections to the Stieglitz Collection; that the Collection provides the viewer, through its 101 pieces, an understanding of American Modernism; that it is an excellent teaching tool; that it is irreproducible; and that there is artistic and teaching value in placing it at Fisk. (*Id.* at p. 1786-87). Using Trial Exhibit 207 as a guide, the trial court also found that the proceeds from the \$20 million endowment it had ordered was necessary to provide the promotion and display of the Stieglitz Collection and to ensure that Fisk did not breach or default on its monetary obligations under the Crystal Bridges Agreement.<sup>9</sup> (*Id.* at pp. 1789-90).

Fisk timely filed a notice of appeal of the trial court's Final Judgment on December 1, 2010. (TR Vol. XIII at p. 1792-93). The Attorney General also filed a notice of appeal on December 2, 2010. (TR Vol. XIII at p.1794-95).

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<sup>9</sup> Trial Exhibit 207 is a response from Fisk, reviewed and sworn to by President O'Leary, to an interrogatory request that Fisk identify in list format what Fisk would need to address each of the respective reasons that Fisk claims compliance with the gift's conditions is impracticable or impossible and the cost of each item in the list.

## SUMMARY OF ARGUMENT

This is a case about the paramount role of donor intent under the doctrine of *cy pres*.

It is well understood that the *cy pres* power should be used “sparingly” because “a settlor must have assurance that his solemn arrangements and instructions will not be subject to the whim or suggested expediency of others after his death.”<sup>10</sup> This principle of judicial restraint is founded not just on respect for the particular donor but also on the importance of encouraging, or at least not discouraging, future charitable giving.

Here, Georgia O’Keeffe gave to Fisk University a unique charitable gift with conditions – the Alfred Stieglitz Collection, an assemblage of 101 pieces of early modernist art that is unequaled in the South. According to this Court, Ms. O’Keeffe’s charitable intent in making this gift was “to make the Collection available to the public in *Nashville* and *the South* for the benefit of those who did not have access to comparable collections to promote the general study of art.”<sup>11</sup> Her charitable intent did not include supporting Fisk financially.

Now, some sixty years later, Fisk states that it no longer has the financial capacity to display the Collection in accordance with Ms. O’Keeffe’s conditions. The trial court agreed, holding that Fisk’s continued compliance with Ms. O’Keeffe’s bequest is financially “impracticable.”

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<sup>10</sup>W. McGovern & S. Kurtz, *Wills, Trusts and Estates* § 9.7, at 370 (2d ed. 2001) (discussing New York law).

<sup>11</sup>*O’Keeffe Foundation*, 312 S.W.2d at 17 (emphasis in original).

Based on such a finding, the *cy pres* doctrine, reflecting the paramount role of donor intent, provides that the trial court should modify the bequest in a manner that “most closely approximates the donor’s charitable intent.”<sup>12</sup>

The trial court had before it such a proposal, one that would have required only a “sparing” use of the *cy pres* power. A fund created within The Community Foundation of Middle Tennessee, named in honor of Pearl Creswell, the first curator of the Stieglitz Collection at Fisk, would pay the maintenance and display costs of the Collection at the Van Vechten Gallery. Under this proposal, the Collection would continue to be displayed on the Fisk campus full-time, in the manner intended by Ms. O’Keeffe, and at no cost to the university. It is difficult if not impossible to conceive of a proposal that could more closely approximate Ms. O’Keeffe’s charitable intent. The trial court’s failure to adopt this proposal (or the alternatives offered by the Frist Center and the Tennessee State Museum) was a clear abuse of discretion.

Rather than use its power “sparingly” by adopting this proposal, the court below allowed expedience to overrule donor intent. Contrary to the explicit condition that the Collection cannot be sold or even loaned, the trial court ruled that Fisk can sell a half interest in the Collection to the Crystal Bridges Museum for \$30 million, move the art 555 miles back and forth to northwest Arkansas every two years, and apply sale proceeds to the university’s general operating expenses.

Recognizing that Ms. O’Keeffe’s charitable intent did not include use of the Collection to enhance Fisk’s financial standing,<sup>13</sup> the trial court based its ruling instead on what it called Ms. O’Keeffe’s “full dispositional design.” While the label is impressive, this “full dispositional

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<sup>12</sup>*Id.* at 16.

<sup>13</sup> As the trial court stated, “there was no general charitable intent by Georgia O’Keeffe to perpetuate the existence of Fisk.” (TR Vol. XIII at p. 1771).

design” is nothing more than the fact that Ms. O’Keeffe chose Fisk as one of the six institutions that received part of her deceased husband’s art collection. Based solely on that fact, the trial court held that Ms. O’Keeffe intended to allow the Collection to be monetized if necessary to avoid Fisk closing, notwithstanding Ms. O’Keeffe’s explicit instructions that the Collection could not be sold.

This ruling constitutes a clear abuse of discretion for several reasons.

First, it is in direct conflict with this Court’s statement of Ms. O’Keeffe’s charitable intent that is now law of the case. The Collection obviously will not be available to the public in Nashville and the South for the study of art when it resides in Bentonville, Arkansas, and the donor’s intent will have been diluted by half.

Second, any argument that preserving Fisk’s financial viability “most closely approximates” Ms. O’Keeffe’s charitable intent runs into the brick wall of her clearly stated condition that Fisk cannot sell the Collection. There is no way legally or factually to reconcile the two propositions.

Third, the lower court’s ruling confuses means with ends. As this Court previously noted, “The [*cy pres*] doctrine proceeds upon the principle that it is the duty of the court to give effect to the general charitable intention of the testator as nearly as possible, *when the subsidiary intent that a gift take effect in a particular manner is impossible to implement.*”<sup>14</sup> Ms. O’Keeffe obviously had a “subsidiary intent” to display the Collection at Fisk in order to accomplish her “general charitable intent” of promoting the study of art in Nashville and the South, particularly for those without access to comparable collections, and it is this “subsidiary intent” that the trial court has found is now “impossible to implement.”

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<sup>14</sup>*O’Keeffe Foundation*, 312 S.W.2d at 16 (quoting *In re Catholic Child Care Soc’y of Diocese of Brooklyn*, No. 3522/1968, 2009 WL 1194970, at \*1 (N.Y. Sur. Ct. Apr. 30, 2009)) (emphasis added).

The proper response to such a finding, however, is not to abandon the general charitable intent in order to preserve the manner of implementation. Otherwise, under the trial court's logic, a donor can never prohibit a cash-strapped recipient from selling a charitable gift, even one with an explicit no-sale condition. That is not the controlling law. Rather, under New York precedent, the financial distress of a recipient institution prevails over a restriction on a charitable gift only where *the overriding charitable purpose* of the gift was to ensure the continued existence and operation of the charitable institution. There is no such proof here.

If the ruling below stands, it will deprive Nashville and Tennessee of an irreplaceable art collection that is of unique value not just artistically but also historically and culturally. The ruling also will undermine future charitable giving in this state:

What the law recognizes in its imposition of far more stringent, dispositionally based conditions on the use of the *cy pres* power, is that *the consequences of so easily dispensing with a grantor's directions would be to discourage charitable giving, and to rob charitable institutions of the stability necessary to the discharge of their purposes.*<sup>15</sup>

As the trial court has recognized, Fisk faces significant financial challenges; yet even Fisk has testified that the proceeds from its proposal sale would only be a small fraction of its total needs, and it has offered no plan or proposal to bridge that gap. When the university accepted the Stieglitz gift in 1949, it agreed not to use the Collection as part of its financial planning, and that obligation should stand. The trial court has too easily dispensed with Ms. O'Keeffe's conditions in this case, and it has erred in doing so.

The judgment below should be reversed and the case remanded with instructions to adopt the Pearl Creswell Fund proposal as most closely approximating Ms. O'Keeffe's charitable intent.

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<sup>15</sup>*Board of Trustees of The Museum of the American Indian, Heye Foundation v. Board of Trustees of The Huntington Free Library and Reading Room*, 610 N.Y.S.2d 488, 501 (N.Y. App. Div. 1994) (emphasis added).

## STANDARD OF REVIEW

The determination by the trial court of the form of *cy pres* relief that most closely approximates the donor's intent requires the trial court to exercise its discretion to choose among several possible alternatives.<sup>16</sup> Such a discretionary decision is subject to appellate review using the "abuse of discretion" standard of review.<sup>17</sup> The abuse of discretion standard is a "review constraining concept," but it does not immunize discretionary decisions completely from appellate review.<sup>18</sup> While the standard prevents an appellate court from second-guessing the trial court<sup>19</sup> or from substituting its own discretion for that of the trial court,<sup>20</sup> it does not prevent an appellate court from examining a trial court's decision to determine whether it has taken the applicable law and the relevant facts into account.<sup>21</sup> Thus, an abuse of discretion occurs when a court strays beyond the framework of the applicable legal standards or when it fails properly to consider the factors customarily used to guide that discretionary decision.<sup>22</sup>

Appellate courts' deference to trial courts' "discretionary" decisions should not promote result-oriented opinions or seemingly irreconcilable precedents. The law's need for consistency,

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<sup>16</sup>See *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 708 (Tenn. Ct. App. 1999).

<sup>17</sup>See *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010).

<sup>18</sup>*Beard v. Board of Professional Responsibility*, 288 S.W.3d 838, 860 (Tenn. 2008); *Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1990).

<sup>19</sup>*White v. Vanderbilt Univ.* 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999).

<sup>20</sup>*Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998); *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000).

<sup>21</sup>*Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996).

<sup>22</sup>*State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007).

predictability, and reliability requires the elimination of apparently whimsical authority on both the trial and appellate levels.<sup>23</sup>

Accordingly, appellate courts have held that a trial court has “abused its discretion” when it has applied an incorrect legal standard, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or has employed reasoning that causes an injustice to the complaining party.<sup>24</sup> A trial court by definition abuses its discretion when it makes an error of law; “[t]he abuse-of-discretion standard includes review to determine that the decision was not guided by erroneous legal conclusions.”<sup>25</sup>

In reviewing a trial court’s discretionary decision, appellate courts should review the underlying factual findings using the preponderance of the evidence standard contained in Tenn.R.App.P. 13(d) and should review the trial court’s legal determinations de novo without any presumption of correctness.<sup>26</sup>

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<sup>23</sup>*Flautt & Mann v. Council of Memphis*, 285 S.W.3d 856, 872-73 (Tenn. Ct. App. 2008) (quoting *BIF, A Division of General Signal Controls, Inc. v. Service Construction Co., Inc.*, No. 87-136-II, 1998 WL 72409, slip op. at \* 3 (Tenn. Ct. App. July 13, 1988) (no appeal filed)).

<sup>24</sup>*Konvalinka v. Chattanooga-Hamilton County Hosp. Authority*, 249 S.W.3d 346, 358 (Tenn. 2008) (citing *Mercer v. Vanderbilt Univ.*, 134 S.W.3d 121, 131 (Tenn. 2004); *Perry v. Perry*, 114 S.W.3d 465, 467 (Tenn. 2003)).

<sup>25</sup>*Johnson v. Nissan North America, Inc.*, 146 S.W.3d 600, 605 (Tenn. Ct. App. 2004); *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 2047, 135 L.Ed.2d 392 (1996).

<sup>26</sup>*Lee Medical, Inc. v. Beecher*, 312 S.W.3d at 525.

## ARGUMENT

### I. THE TRIAL COURT ERRED BY EXCEEDING ITS AUTHORITY ON REMAND, BY FAILING TO ADHERE TO THE LAW OF THE CASE, BY MAKING FACTUAL FINDINGS BASED ON A CLEARLY ERRONEOUS ASSESSMENT OF THE EVIDENCE, AND BY APPLYING AN INCORRECT LEGAL STANDARD.

#### A. The trial court exceeded its authority by considering issues beyond the limited scope of this Court's remand.

In the previous appeal in this case, this Court reversed the trial court's dismissal of Fisk's petition for *cy pres* relief and remanded the case to the trial court with the following specific instructions:

[A] determination of whether any form of *cy pres* relief is available must be held in abeyance unless and until the trial court, on remand, finds that literal compliance with the conditions imposed by Ms. O'Keeffe are impossible or impracticable. If *cy pres* relief is available to the University, then the trial court is to fashion a form of relief that most closely approximates Ms. O'Keeffe's charitable intent.<sup>27</sup>

This Court also analyzed at length the charitable intent that motivated Ms. O'Keeffe in making the gift to Fisk and concluded from the full record that her "clear" charitable intent "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."<sup>28</sup> It is this charitable intent that the trial court was to use in fashioning any *cy pres* relief.

On remand, the trial court initially followed these instructions and found that based upon the evidence presented at trial, it was "impracticable for a struggling university on the brink of closing to literally comply with Ms. O'Keeffe's plan that Fisk maintain and display the Collection" and that under such circumstances, "a new plan for the Collection is necessary. Fisk

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<sup>27</sup>*Georgia O'Keeffe Foundation v. Fisk University*, 312 S.W.3d at 20.

<sup>28</sup>*Id.* at 18.

either needs assistance with the Collection or Fisk needs to be replaced.” (TR Vol. X at p. 1315).

In fact, the trial court acknowledged the specific instructions it had received as to Ms. O’Keeffe’s charitable intent and the limited scope of the remand:

In terms of Ms. O’Keeffe’s intentions in giving the Collection to Fisk, the Court of Appeals instructed this Court, “Considering the facts in the record, we have concluded that the clear intent for giving the Collection to the University 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.” . . . At the conclusion of its decision, the Court of Appeals sent the case back to this Court with instructions to decide the two issues of “impracticability” and a modification that closely approximates the donor’s intent.

(TR Vol. X at pp. 1310-1311). Relying on this Court’s plain language quoted above, neither party raised an issue about the scope of Ms. O’Keeffe’s charitable intent in their pre-trial briefs or presented any new evidence on the matter at trial.

In its subsequent orders, however, the trial court deviated significantly from this Court’s instruction that the relief “most closely approximate Ms. O’Keeffe’s charitable intent.” Notwithstanding this Court’s clear instructions, the trial court declared that, since this Court “did not decide and did not instruct [the trial court] on what the donor’s intent was with respect to Fisk,” the trial court should on remand determine that intent. (TR Vol. XIII at pp. 1586-87 ). The trial court proceeded to find that “although the donor’s primary intent was to enable Nashville to have access to the Collection, the evidentiary record establishes that a secondary consideration and motivating factor of the O’Keeffe dispositional design was placement of the Collection at Fisk” and that ignoring the situs of the Collection at Fisk in fashioning *cy pres* relief “would be incompatible with the unique and full dispositional O’Keeffe design.” (TR Vol. XIII at p. 1762). The trial court concluded that the best way to achieve the “full dispositional O’Keeffe design” was to remove the no-sale condition and allow Fisk to monetize the Collection

by selling a fifty-percent ownership interest in the Collection to the Crystal Bridges Museum for \$30 million, with \$10 million to be “paid to Fisk for its viability” and \$20 million “to endow a Nashville connection to the Collection.” (*Id.* at p. 1784).

In fashioning this *cy pres* relief and finding that the “deliberate” choice of Fisk University reflected Ms. O’Keeffe’s intent to support the continued existence of the institution, the trial court clearly acted in excess of its authority by considering a previously settled issue outside the scope of the remand.<sup>29</sup> Relying upon the principle of judicial economy, the Tennessee Supreme Court has long recognized the powers of appellate courts to limit remand orders.<sup>30</sup> The Tennessee Supreme Court has further stated that “inferior courts must abide the orders, decrees and precedents of higher courts. . . . [Otherwise] [t]here would be no finality or stability in the law and the court system would be chaotic in its operation and unstable and inconsistent in its decisions.”<sup>31</sup> And this Court has stated:

It is to the interest of all that there be a constraint on unnecessary litigation. Moreover, by remanding a case with limiting instructions when error exists as to only certain issues, the courts maintain the integrity of rulings previously made. Affording the trial court the latitude of [broadening the scope on remand] would present a likely conflict [with] the prior rulings of the trial court and this court. . . . It is for these and other meritorious reasons that appellate courts have the power to remand cases with limiting instructions to the trial courts.<sup>32</sup>

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<sup>29</sup>This Court’s finding as to Ms. O’Keeffe’s charitable intent became final on February 22, 2010, when the application for permission to appeal to the Supreme Court was denied. *See American Buildings Company v. DBH Attachments, Inc.*, 676 S.W.2d 558, 563 (Tenn. Ct. App. 1984).

<sup>30</sup>*Perkins v. Brown*, 132 Tenn. 294, 177 S.W. 1158 (1915); *Hutchison v. State*, 118 S.W.3d 720, 734 (Tenn. Crim. App. 2003).

<sup>31</sup>*Barger v. Brock*, 535 S.W.2d 337, 341 (Tenn. 1976) (quoted in *State v. Irick*, 906 S.W.2d 440, 443 (Tenn. 1995)).

<sup>32</sup>*Melton v. Melton*, No. M2003-01420-COA-R10-CV, 2004 WL 63437, at \*5 (Tenn. Ct. App. Jan. 13, 2004), *appeal denied* (Tenn. June 14, 2004).

**B. The trial court erred in reopening the issue of Ms. O’Keeffe’s charitable intent contrary to the doctrine of the law of the case.**

The trial court also acted erroneously in reopening the issue of Ms. O’Keeffe’s charitable intent contrary to the doctrine of “law of the case,” which is a longstanding rule of judicial practice that is based on the common sense recognition that issues previously litigated and decided by a court of competent jurisdiction ordinarily need not be revisited.<sup>33</sup> The rule promotes the finality and efficiency of the judicial process, avoids indefinite re-litigation of the same issue, fosters consistent results in the same litigation, and assures the obedience of lower courts to the decisions of appellate courts.<sup>34</sup> Accordingly, when an initial appeal results in a remand to the trial court, the ruling of the appellate court becomes the law of the case and generally must be followed by the trial court and by an appellate court if a second appeal is taken from the judgment of the trial court entered after remand.<sup>35</sup> The doctrine applies to issues that were actually before the appellate court in the first appeal and to issues that were necessarily decided by implication.<sup>36</sup> Additionally, the doctrine applies to both legal and factual conclusions.<sup>37</sup>

Three exceptional circumstances may justify a departure from the law of the case: (1) a significant change in controlling legal authority; (2) substantially different evidence offered after

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<sup>33</sup>*Memphis Publishing Company v. Tenn. Petroleum Underground Storage Tank Bd.*, 975 S.W.2d 303, 306 (Tenn. 1998) (citing *Ladd v. Honda Motor Co., Ltd.*, 939 S.W.2d 83, 90 (Tenn.Ct.App. 1996)).

<sup>34</sup>*Id.* (citing *Ladd*, 939, S.W.2d at 90; 5 Am.Jur.2d *Appellate Review* § 605 (1995); 1B James W. Moore, *Moore’s Federal Practice* ¶ 0.404[1] (2d ed. 1995); 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478, at 790 (1981)).

<sup>35</sup>*Memphis Publishing*, 975 S.W.2d at 306.

<sup>36</sup>*In re Estate of Boote, Jr.*, 265 S.W.3d 402, 413 (Tenn.Ct.App. 2007), *appeal denied* (2008). The doctrine does not, however, apply to dicta. *Id.*

<sup>37</sup>*See Carson v. Nashville Bank & Trust Co.*, 204 Tenn. 396, 401, 321 S.W.2d 798, 801 (1959).

remand; and (3) a clearly erroneous prior decision that, if not corrected, will result in a manifest injustice.<sup>38</sup>

As previously discussed, this Court's mandate to the trial court was limited. It did not direct the trial court to undertake additional fact finding or conduct evidentiary hearings as to Ms. O'Keeffe's charitable intent. Thus, because this Court's mandate was limited, the trial court was simply not at liberty to reopen the issue of Ms. O'Keeffe's intent, unless one of the exceptions to the law of the case doctrine was implicated. In the present case, there has been no significant change in controlling legal authority since the first appeal.<sup>39</sup> In addition, this Court's prior decision was not clearly erroneous such that manifest injustice is the result. Thus, the only possible exception to the law of the case doctrine into which the trial court's orders could fall is the exception for substantially different evidence.

In determining what constitutes substantially different evidence, it has been stated:

The "substantially different evidence" exception, as the phrase indicates, is fact specific. The evidence at issue should, at a minimum, be relevant and of consequence to the terms of the remand. Cumulative evidence, without more, is insufficient to depart from the law of the case. The evidence must be not only "different" but "substantially different" to upset the orders and rulings of a higher court.<sup>40</sup>

Here, none of the evidence relied upon by the trial court meets this standard. Rather, the evidence relied upon by the trial court was almost exclusively deposition testimony and

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<sup>38</sup>*In re Estate of Boote, Jr.* 265 S.W.3d at 413(citing *Memphis Publishing*, 975 S.W.2d at 306; *Watson's Carpet & Floor Covering, Inc. v. McCormick*, 247 S.W.3d 169, 180 (Tenn.Ct.App. 2007), *appeal denied* (May 14, 2007)); *Life & Casualty Ins. Co. v. Jett*, 175 Tenn. 295, 299, 133 S.W.2d 997, 999 (1939) ("The former opinion of the Court of Appeals was the law of the case on the second trial, and the evidence being the same, the circuit judge could not have done otherwise than to submit this issue of sound health to the jury. . . .").

<sup>39</sup>In fact, New York authority issued since the trial court's decision simply reaffirmed New York's long-standing policy honoring donors' restrictions on the use of the property they donate and the view that the public places greater importance on the limitations on the use of the assets than on which entity actually holds it. *See In the Matter of Friends For Long Island's Heritage*, 911 N.Y.S.2d 412, 420 (Sup.Ct.App.Div. 2010).

<sup>40</sup>*State v. Williams*, 52 S.W.3d 109, 125-26 (Tenn. Crim. App. 2001) (no appeal filed).

statements from documents produced during the first trial.<sup>41</sup> Additionally, neither party raised the issue of the scope of Ms. O’Keeffe’s charitable intent or asserted that this Court’s definition of her intent was deficient because it did not include Fisk’s financial status. Rather, the parties’ arguments and proof focused on whether the *cy pres* relief sought by Fisk (the sale and joint ownership agreements with the Crystal Bridges Museum) most closely approximates Ms. O’Keeffe’s charitable intent as declared by this Court.

As previously noted, the doctrine of law of the case applies to issues that were actually before an appellate court, as well as those necessarily decided by implication. The issues of Ms. O’Keeffe’s charitable intent, the scope of that intent and Ms. O’Keeffe’s relationship with Fisk were squarely before this Court in the previous appeal. This Court’s declaration of Ms. O’Keeffe’s charitable intent necessarily included by implication any intent with respect to Fisk University, the institution.<sup>42</sup>

In what appears to be tacit recognition that the trial court’s ruling failed to adhere to the controlling law of the case, Fisk argues in a footnote that the “full extent of O’Keeffe’s intent (or dispositional design) has never been before this Court.” Instead, its argument goes, because this Court was only called upon to determine whether Ms. O’Keeffe possessed “general intent,”

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<sup>41</sup>The trial court cited the following evidence: (1) deposition of Kevin Grogan; (2) deposition of Opal Baker; (3) deposition of Walter J. Leonard; (4) statements of Carl Van Vechten, Charles S. Johnson and Georgia O’Keeffe contained in the Catalogue of the Alfred Stieglitz Collection For Fisk University 1949; and (5) statement of Georgia O’Keeffe contained in article titled *Fisk University Dedicates Alfred Stieglitz Collection March 1950* in “*The Crisis*”. (TR Vol. XIII at pp. 1763-1766) All of these authorities are discussed at greater length in Section I.C., *infra*. With the exception of the last item, all of this evidence was part of the record in the first trial of this case. In fact, the three depositions were taken by the Georgia O’Keeffe Foundation (Museum), and the Attorney General did not participate in those depositions, as the trial court had not yet allowed the Attorney General to intervene. Moreover, the very same statement of President Carl Johnson in the *Catalogue of the Alfred Stieglitz Collection for Fisk University 1949* relied upon by the trial court was quoted by the Attorney General in his brief in the first appeal of this case in argument concerning Ms. O’Keeffe’s charitable intent.

<sup>42</sup>In fact, in the previous appeal the Attorney General specifically raised the issue of Ms. O’Keeffe’s intent in choosing to display the Collection at Fisk and argued that it was chosen because of its uniqueness as an educational institution primarily serving an African-American population.

rather than “specific intent,” there has been no occasion for this Court to rule on the full extent of O’Keeffe’s intent or dispositional design. (Appellant’s brief pp. 22-23, n.1).

But Fisk is wrong to say that this Court did not previously have occasion to examine the “full extent” of Ms. O’Keeffe’s intent. In the prior appeal, this Court determined whether Ms. O’Keeffe demonstrated a general, rather than a specific, charitable intent when the Collection was given to Fisk. The Court first determined that Ms. O’Keeffe’s intent was *charitable* by examining the express language used in Alfred Stieglitz’s will, Ms. O’Keeffe’s correspondence with Fisk University President Johnson, and Ms. O’Keeffe’s own actions. The Court specifically found that while Ms. O’Keeffe may have imposed specific conditions, the “motivation for the gifts to the University was to promote the study of art in Nashville and the South.”<sup>43</sup>

Then, having determined the charitable intent or motivation behind the gift, this Court looked to see if that intent was general or specific based upon other factors identified by New York courts as indicative of a general as opposed to specific charitable intent. These included the fact that Ms. O’Keeffe had made similar charitable gifts to several different charities at the same time; that an “express divesting condition” could not be found in the record; and that New York courts favor a finding of general charitable intent. Based upon all of these factors, this Court concluded that the gifts of the Collection to the University were motivated by a *general, not specific, charitable intent*. This analysis is consistent with applicable New York caselaw.<sup>44</sup>

Thus, contrary to Fisk’s assertions, this Court had every reason to, and did, examine the “full contours” of Ms. O’Keeffe’s charitable intent; the question was fully considered and ruled

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<sup>43</sup> *Id.* at 18.

<sup>44</sup> See *In re Trustees of Columbia University in City of New York*, 910 N.Y.S.2d 409 (N.Y. Sur. 2010) (court first determined charitable purpose of donor’s bequest to Columbia University and then determined that donor had general charitable intent based upon other charitable bequests contained in donor’s will).

upon by this Court. The trial court as a matter of law had no authority to expand the directive or purpose of the remand that limited the issues to be determined. Consequently, any additional findings as to Ms. O’Keeffe’s intent are precluded by the doctrine of law of the case; the trial court’s new finding that Ms. O’Keeffe’s charitable intent also included an intent to support the continued existence of Fisk University as an institution is therefore erroneous as a matter of law.<sup>45</sup>

**C. The trial court abused its discretion in making factual findings that Ms. O’Keeffe intended to ensure the continued viability of Fisk when she gave the Stieglitz Collection.**

Even assuming the trial court was not precluded from reopening the issue of Ms. O’Keeffe’s charitable intent, the evidence in the record does not support the trial court’s finding that Ms. O’Keeffe’s placement of the Collection at Fisk University was indicative of her intent *to ensure the University’s continued viability*. This finding is based on a clearly erroneous assessment of the evidence and therefore is an abuse of discretion.

This is not to say that Georgia O’Keeffe’s choice of Fisk University was not deliberate. Indeed, the evidence in the record demonstrates that Ms. O’Keeffe deliberately chose Fisk for the display of the Collection, but not because she intended to ensure the institution’s viability. Rather, the 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. It would further allow Ms. O’Keeffe to establish a collection of modern art in the South that would serve as a memorial to

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<sup>45</sup>See *Konvalinka v. Chattanooga-Hamilton County Hospital Authority*, No. E2010-00543-COA-R3-CV, 2010 WL 4272731, slip op. at \*8 (Tenn. Ct. App. Oct. 28, 2010), *appeal denied* (Tenn. March 9, 2011) (issue of whether Court’s judgment in previous appeal precludes Hospital from raising additional defenses is a question of law).

her husband, Alfred Stieglitz, and that would be available to all persons, particularly persons who did not otherwise have access to comparable art collections.

Even the evidence relied upon by the trial court reflects this intent. For example, Kevin Grogan, Director of Fisk University's Galleries and Collections from 1992 through 1999, testified in his deposition concerning the Collection's "representative value" as the "residuary evidence of the importance of Charles Johnson's tenure as the University's President" and the "vindication of the work of Charles Johnson as both sociologist and as the University Administrator," as cited by the trial court (TR Vol. XIII at p. 1763). But Mr. Grogan also testified specifically as to Ms. O'Keeffe's intent:

[P]art of the reasoning, as it was explained to me by older hands here, for O'Keeffe's gift to Fisk was that by giving this collection to an historically African American institution, it would assure that everyone would have access to it. And she was determined to establish a kind of niche for modernism in the south. If she were to give it to a majority institute in the south, African Americans would have been denied access to it. Fisk already had a well-established reputation as a place where races met, in Nashville.

(TR Vol. IX at pp. 1248-49). He further testified that in selecting the works of art to give to Fisk University, Ms. O'Keeffe intended to assemble a group of objects that represented the whole of Alfred Stieglitz's collection of artwork (*i.e.*, a memorial to Stieglitz's art collection as a whole). He stated unequivocally that a sale of the Stieglitz Collection at Fisk, or pieces from the Collection, would not be consistent with her intent.<sup>46</sup> (*Id.* at pp. 1251-1254, 1262). Finally, Mr.

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<sup>46</sup>That Georgia O'Keeffe intended the Stieglitz Collection at Fisk to be both a memorial to her husband, Alfred Stieglitz, and a memorial to his complete art collection is further evidenced by the following statement of Carl Van Vechten, Chairman of Fisk's Fine Art Commission at the time O'Keeffe gave the Collection to Fisk:

For myself I can say that my enthusiasm has increased since I have been working on this project with Dr. Johnson, the Fine Arts Commission of Fisk University, and Ms. O'Keeffe herself, because now it has become apparent to me that Stieglitz, one of the greatest talkers of all time, and he invariably had something interesting to say, still lives, that his ideas concerning art and artists still persist, and that the work of a lifetime is going on and ahead, rather than

Grogan testified that the Stieglitz Collection at Fisk was a “point of civic pride, because it [is] widely considered to be, not just by the casual but by people of taste and discernment, to be the only truly important art collection in Nashville” and that the Collection “represented an important education asset to the University, and an important civic aspect to the City of Nashville.” (*Id.* at pp. 1249, 1261-62).

The trial court also cited the deposition testimony of Opal Baker, Director of Fisk University’s Galleries from August 1999 to June 2002, concerning Ms. O’Keeffe’s insistence that the Collection go to Fisk and the historical significance of that decision. (TR Vol. XIII at p. 1764). Ms. Baker also testified, however, that *Ms. O’Keeffe’s insistence upon Fisk was not because of any desire or intent to help Fisk financially, (Id. at 1126), but because it was a “campus that everyone was welcome on as opposed to other campuses where, you know, black folks were not welcome.”* (TR Vol. IX at p. 1230) (emphasis added). In fact, Ms. Baker testified that it was her understanding, based upon her review of the correspondence between Georgia O’Keeffe and Fisk University, Ms. O’Keeffe gave the Collection to Fisk to be used as an educational tool and not as a financial gift. (*Id.* at pp. 1226-27).

In addition, the trial court cited the deposition testimony of Dr. Walter J. Leonard, Fisk University President from June 1977 through February 1984, and his understanding of Georgia O’Keeffe’s intent in placing the Collection at Fisk University. In doing so, however, the trial court overlooked Dr. Leonard’s testimony that he considered Fisk University to be serving in the role of “custodian” of the Collection with the responsibility to maintain it the way Georgia O’Keeffe wanted. (TR Vol. IX at pp. 1285, 1287, 1295-96). More importantly, Dr. Leonard

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declining with his physical death. . . . Indeed, I am fully aware that his whole life was a work of and for art, and it appears that his whole death likewise will continue his work for a very long time to come. (TE Vol II at p. 170).

testified that it was his understanding that “Fisk would not, could not, should not sell, lend, tour or in any way interfere with the way the collection had been put together either as a collection or its custodial position” and that his position was absolutely firm that neither the Collection nor any part of it was for sale, despite Fisk’s significant financial difficulties in the late 1970s. (*Id.* at pp. 1287, 1295, 1297-98, 1303-04, 1308).

Finally, while the trial court cited portions of the statement of Fisk President Charles S. Johnson at the installation of the Collection in 1949, it clearly overlooked an even more significant portion of his statement that clearly reflected President Johnson’s understanding that Georgia O’Keeffe was giving the Collection to Fisk to promote the study of art and not to benefit Fisk University financially:

The new collection will be a continuing source of inspiration for creative artists among Fisk students and, we hope and believe, among the students of the whole group of nine Nashville colleges. At the same time it will prove an effective means of stimulating wider appreciation of the arts among students and the general public in Nashville and throughout this area. It is a happy and great satisfaction that the Alfred Stieglitz Collection at Fisk can serve so well to build up new awareness of beauty and sensitiveness to great achievements of the human spirit in art.

(TE, Vol. I at p. 25, Vol. II at 172).<sup>47</sup> And, just a few days after the installation of the Stieglitz Collection at Fisk, President Johnson reaffirmed in a letter to Ms. O’Keeffe the university’s “sincere intention to carry out faithfully all of your wishes with respect to the handling and use of the paintings and sculpture which you have entrusted to us.” (TE Vol. II at p. 194).

Clearly, neither the deposition testimony nor President Johnson’s statement supports the trial court’s finding that by placing the Stieglitz Collection at Fisk University, Georgia O’Keeffe

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<sup>47</sup>President Johnson reiterated this position in a letter to Ms. O’Keeffe two years later wherein he stated: “The Collection is something in which we take great pride in having as a part of our program here. Not to have it would be a serious loss both to the school and the larger community.” (TE Vol. I at p. 63-64).

intended somehow to benefit the university financially or that she intended to allow Fisk to monetize the Collection in order to ensure the university's continued viability.<sup>48</sup> At best, the evidence reflects that Ms. O'Keeffe intended Fisk to be enriched simply by the presence of the Collection itself.

Perhaps 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. Ms. O'Keeffe imposed that condition and required Fisk to agree to it before she would give the Collection to the university in 1949. (TE Vol. 1 at p. 22). In the ensuing years until her death in 1986, Georgia O'Keeffe never once modified or removed that condition even though she was clearly aware that Fisk was suffering financial difficulties. (Trial Transcript, Vol. I at pp. 253-255; TE 30).<sup>49</sup> In fact, as early as 1951 when it appeared that Fisk was not properly taking care of and utilizing the Collection, Ms. O'Keeffe specifically inquired, "if you find the Collection too much of a problem and wish to consider giving it up, let me know so that I can plan what to do with it next." (TE 30, Vol. I at p. 62).<sup>50</sup>

Similarly, when Ms. O'Keeffe became aware of Fisk's financial difficulties in the 1970s and its effect on the care and maintenance of the Collection, instead of removing the "no-sale" condition to help Fisk financially, she took the Collection back into her custody and kept it in

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<sup>48</sup>The magazine article from *The Crisis* cited by the trial court also fails to support any finding that Ms. O'Keeffe intended the gift of the Stieglitz Collection to benefit Fisk financially. Ms. O'Keeffe is quoted by the court as stating in the article: "These paintings and sculptures are a gift from Stieglitz. They are for the students." This quotation lends no support to the conclusion that Ms. O'Keeffe sought to support Fisk financially through the gift. Furthermore, President Johnson is also quoted in the article as stating that the Collection makes a "valuable addition to the educational and cultural offerings of Fisk," once again reflecting his understanding that the Collection is to be an educational and cultural and not a financial asset of the University. (TE Vol. VII at p. 906).

<sup>49</sup> In contrast, she imposed a similar "no-sale" condition on the gifts of artwork to the Philadelphia Museum of Art, but only limited the restriction to twenty-five years. (TE 17, Vol. I at p. 21).

<sup>50</sup>This letter from Ms. O'Keeffe would appear to directly contradict any finding that she intended for the Collection to benefit Fisk financially. This letter would further suggest that while Ms. O'Keeffe had deliberately chosen Fisk, she had no expectation that the Collection would necessarily be permanently displayed at Fisk.

New York for the next eleven years. (Trial Transcript, Vol. I at pp. 275-76). Moreover, the uncontradicted evidence in the record established that the return of the Stieglitz Collection to Nashville and its reinstallation at Fisk was due primarily to the efforts of Nashville citizens and not the university itself. (TR Vol. IX at pp. 1258-59).

Finally, Ms. O’Keeffe’s own words reflect that her intent in displaying the Collection at Fisk was to further her husband’s vision of promoting the study of art and not to ensure Fisk’s continued viability. In a letter to President Johnson written a month after the installation of the Collection at Fisk, Ms. O’Keeffe stated:

I did not want to go to Fisk. I was astonished and annoyed when Carl told me I would have to go and hang the things that were to go there. . . . No one seemed to understand that I was at Fisk for only one reason to get those pictures up so that I could feel I had no apology of any kind to offer Alfred Stieglitz. I know very little about universities. I have become curious to know if Fisk is typical, however, not curious enough to make any effort to find out. . . . As for the Collection, I would say to the students to look at it rather than read about it. Pictures are like people. It takes time to make acquaintances, a long time to make friends.

(TE Vol. IX at pp. 538-39).<sup>51</sup>

Under New York law, the financial distress of a recipient institution prevails over a restriction on a charitable gift only where the overriding charitable purpose of the gift was to ensure the continued existence and operation of the charitable institution. Here, there is no proof of such an overriding charitable purpose. Despite the trial court’s reliance on select portions of testimony, the overall evidence in the record clearly demonstrates that Ms. O’Keeffe had no

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<sup>51</sup>Other than the visit in 1949 to install the Collection, Ms. O’Keeffe did not visit Fisk University again during her lifetime. Moreover, even Fisk’s President Hazel O’Leary testified that the gift of the Stieglitz Collection did not result from any relationship Ms. O’Keeffe had with Fisk, but that “the history behind the gift that had to do with a number of relationships emanating from Charles S. Johnson to Carl Van Vechten into that broad circle of the intelligentsia with artists and writers, critics in New York at the time of the Harlem Renaissance.” (TR Vol. VI at p 799).

intent to benefit Fisk financially or to support its future existence when she gave the Stieglitz Collection to the University in 1949.

**D. Because Ms. O’Keeffe had no charitable intent to benefit Fisk University financially, the trial court abused its discretion by applying an incorrect legal standard under New York *cy pres* law to allow Fisk to sell the Stieglitz Collection to fund its continued operations.**

Relying upon the case of *Board of Trustees of the Museum of the American Indian v. Board of Trustees of the Huntington Free Library & Reading Room*, 197 A.D.2d 64 (N.Y. App. Div. 1994), (“*Museum of the American Indian*”), the trial court found that, as a matter of law, it was required “to craft a remedy that will give effect, as much as possible, to the full unique dispositional design of Ms. O’Keeffe’s design.” (TR Vol. XIII at p. 1257). The trial court acknowledged that Ms. O’Keeffe had “officially stated that the general charitable purpose of the gift was to promote the study of art by giving Nashville and the South access to the Collection,” but the court concluded that “adhering to that purpose alone in fashioning *cy pres* relief and ignoring the situs by Ms. O’Keeffe of the Collection at Fisk would be incompatible with the unique and full dispositional O’Keeffe design,” based solely upon its finding that “locating the Stieglitz Collection at Fisk was a motivational factor and part of Ms. O’Keeffe’s dispositional design.” (*Id.* at pp. 1762, 1766).

This ruling is based upon a misinterpretation of the holding in the *Museum of American Indian* case and completely upends the doctrine of *cy pres* as applied by the New York courts. The doctrine of *cy pres* proceeds upon the “principle that it is the duty of the court to give effect to the general charitable intention of the testator as nearly as possible, when the subsidiary intent that a gift take effect in a particular manner is impossible to implement. If the general charitable purpose of the testator can be fulfilled, the *cy pres* doctrine will be invoked to save the gift.”<sup>52</sup>

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<sup>52</sup>*In re Catholic Child Care Soc. Of Diocese of Brooklyn*, 886 N.Y.S.2d 70 (N.Y. Sur. 2009).

Indeed, the New York statute articulating the *cy pres* doctrine, EPTL 8-1.1(c), is “specifically designed to prevent the failure of a charitable disposition while there remains a general purpose of the disposition possible of accomplishment.”<sup>53</sup>

In the *Museum of American Indian* case, the New York court did not reject the use of *cy pres* power because the proposed plan failed to give effect to any secondary or motivating factors within the donor’s “full dispositional design.” Instead, the court rejected the *cy pres* proposal because, it concluded, the requested relief would have completely dispensed with the overriding charitable purpose of the charitable gift.<sup>54</sup>

Here, Ms. O’Keeffe’s overriding charitable purpose, as declared by this Court and recognized by the trial court, was to make the Collection available to Nashville and the South to promote the study of art. The no-sale restriction ensured that Fisk would adhere to this charitable purpose. The trial court has not found that this charitable purpose is impossible to accomplish. Rather, the court has found that Ms. O’Keeffe’s “secondary consideration and motivating factor” of using Fisk to implement her general charitable purpose is impossible to accomplish due to Fisk’s financial problems. Based on its misreading of the *Museum of the American Indian* case, however, the trial court concluded that Ms. O’Keeffe’s secondary considerations were equal in importance to her primary charitable purpose. On that basis, the court justified lifting the no-sale condition and converting the Collection from a restricted charitable gift into a financial asset of the university, even though such action completely

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<sup>53</sup>*Museum of the American Indian*, 197 A.D.2d at 75.

<sup>54</sup>*Id.* at 83. In a subsequent case again seeking *cy pres* relief involving the same charitable gift, the New York appellate court characterized the charitable purpose it had identified in the prior case (to benefit the Huntington Free Library and its future existence as both a memorial and charitable institution) as the “overriding charitable purpose” of the gift. See *In re Application of Board of Trustees of Huntington Free Library & Reading Room*, 771 N.Y.S.2d 69, 71 (N.Y. App. Div. 2004).

dispenses with Ms. O’Keeffe’s overriding charitable purpose of promoting the study of art in Nashville and the South.

This is not the controlling law. Rather, under New York precedent, financially distressed institutions are only allowed to invade the corpus of restricted charitable gifts *where there was clear evidence that the donor’s charitable intent included the recipient’s financial survival*. For example, in *Knickerbocker Hospital v. Goldstein*, 41 N.Y.S.2d 32 (N.Y. Sup. Ct. 1943), the court granted *cy pres* relief to keep the hospital in operation because, in doing so, it would further the donor’s “*expressed charitable purpose . . . to have the hospital carry on the work of ministering to the sick and the indigent.*”<sup>55</sup>

There, the donor had left the Knickerbocker Hospital approximately \$1 million in his will with the limitation that only the income could be used for the hospital’s operating expenses. Some fifty years later, the hospital sought relief from this restriction, asserting “that unless it is granted the emergency relief sought in this action, it will be compelled to suspend operations and close its doors.”<sup>56</sup>

The court noted that the donor’s charitable intent to benefit Knickerbocker Hospital was set forth specifically in his will, which spoke of the hospital’s “continuing operation.”<sup>57</sup> The court further found that the donor’s close association with the hospital as its president for many years, his activities on its behalf, and his general support as a patron and benefactor during his lifetime evidenced the donor’s overriding charitable purpose that the hospital endure. The court further found that the donor could not have foreseen the vast changes that had occurred since his

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<sup>55</sup> *Id.* at 36 (emphasis added).

<sup>56</sup> *Id.* at 34-35.

<sup>57</sup> *Id.* at 36.

death, *i.e.*, the advent of a world war and of economic stress.<sup>58</sup> Accordingly, the court concluded that if the hospital were to cease operating this charitable purpose would be frustrated and, therefore, granted the requested *cy pres* relief.<sup>59</sup> Here, as discussed, there is no comparable evidence of Ms. O’Keeffe’s desire to fund Fisk’s continuing operation.

Similarly, in a set of related cases involving the bequest of restricted funds by Donald and Mildred Othmer to a university and to a hospital, the court found that unless it modified a restriction limiting the institutions’ use of the funds to income only, the overriding charitable purpose of the donors in ensuring the continued existence and operation of the charitable institutions would be frustrated.<sup>60</sup> In each of these related cases, just as in the *Knickerbocker Hospital* case, the court found that, during their lifetimes, the Othmers had enjoyed a significant relationship with the charitable institutions and had displayed a historic pattern of philanthropy and generosity to them.<sup>61</sup> In light of the donors’ substantial relationship with and support of the institutions during their lives, as well as the substantial gifts they left to the charitable institutions

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<sup>58</sup> *Id.* at 35-36.

<sup>59</sup> *Id.* at 37.

<sup>60</sup> See *Estate of Donald F. Othmer*, 710 N.Y.S.2d 848 (N.Y. Sur. Ct. 2000); *Estate of Mildred Othmer*, 815 N.Y.S.2d 444 (N.Y. Sur. Ct. 2006); *In the Matter of Polytechnic University*, 812 N.Y.S.2d (N.Y. Sur. Ct. 2006); *In the Matter of Polytechnic Institute of New York University*, 2009 WL 294892 (N.Y. Sur. Ct. Sept. 11, 2009).

<sup>61</sup> For example, the Othmers had given \$2 million to the hospital; Donald served on the hospital’s Board of Regents for 22 years and was a member of many hospital committees; and Mildred began volunteering with the hospital’s Women’s Guild in 1969 and promoted numerous fund-raising events for the hospital. *Estate of Donald Othmer*, 710 N.Y.S.2d at 850, n.1. With respect to the university, Donald Othmer had been a professor at the university, and he and his wife were part of the university community from the 1930s until their deaths in 1995 and 1998. They were involved in the educational mission and welfare of the university and contributed in a number of ways, from paying for renovations with their personal funds to giving personal financial assistance to students. *In the Matter of Application of Polytechnic Institute of New York University*, 2009 WL 2948492 at \*6.

in their wills,<sup>62</sup> the court concluded that the Othmers' overriding charitable intent was to ensure the continued operation and existence of the institutions.

Conversely, in *Lutheran Hospital of Manhattan v. Goldstein*, 46 N.Y.S.2d 705 (N.Y. Sup. Ct. 1944), the court refused to allow the financially distressed hospital to invade the corpus of a restricted charitable gift because there was no evidence that the donor had intended her gift to be used to ensure the survival of the hospital. In that case, the testatrix had died and left funds to the Lutheran Hospital with the limitation that "the income only [was] to be used by the said hospital for free beds for the poor in memory of my husband, Rev. Dr. George U. Wenner."<sup>63</sup> Several years later, the hospital filed a petition seeking relief from the "income only" restriction due to the hospital's deteriorating financial condition. Indeed, the court found that without access to the fund's principal, "the hospital may be compelled to close its doors."<sup>64</sup> The plaintiff hospital contended that this unfortunate result would defeat the donor's purpose.<sup>65</sup>

The court, however, concluded that "well established and settled law" in New York required that it deny relief to this "worthy and deserving institution."<sup>66</sup> The court noted that its duty in the application of the *cy pres* doctrine "is to give effect to the testator's general intent."<sup>67</sup> The court found that intent to be stated "in language entirely clear and wholly unambiguous" that

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<sup>62</sup> The hospital received approximately \$135 million combined from the estates of Donald and Mildred Othmer; the university received over \$130 million from the estate of Mildred Othmer and "substantial moneys" from the estate of Donald Othmer. *In the Matter of Polytechnic University*, 812 N.Y.S.2d at 306, 311; *Estate of Donald Othmer*, 710 N.Y.S.2d at 850, 853; *Estate of Mildred Othmer*, 815 N.Y.S.2d at 450; *In the Matter of Polytechnic Institute of New York University*, 2009 WL 2948492 at \*6.

<sup>63</sup> 46 N.Y.S.2d at 707.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 708.

<sup>67</sup> *Id.* at 709.

only income from the bequest was to be applied “for free beds for the poor in memory of her husband.”<sup>68</sup> By so restricting her gift, the court concluded, the testator plainly sought to prohibit the employment of the principal for any other purpose, including the survival of the hospital.<sup>69</sup> The court further noted that if it permitted the relief sought by Lutheran Hospital, and the fund’s principal was subsequently exhausted yet the hospital still closed its doors, “the ultimate result would be the complete frustration and destruction of the donor’s intent.”<sup>70</sup>

Such is the case here. By placing the no-sale condition on the charitable gift of the Stieglitz Collection, Ms. O’Keeffe plainly sought to prohibit the use of the Collection for any purpose other than the study of art, including the continued viability of the institution. Applying the language of *Lutheran Hospital*, “[Ms. O’Keeffe] was not desirous nor was it her intent that the [Collection] should be used for the continued operation of the [University]; she evidently felt that it had the necessary means to carry on as a [University] and would so continue. . . .”<sup>71</sup> And, as in *Lutheran Hospital*, if Fisk is allowed to monetize the Stieglitz Collection under the plan

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<sup>68</sup> *Id.*

<sup>69</sup> As the court explained:

The testatrix was not desirous nor was it her intent that the principal should be used for the continued operation of the hospital; she evidently felt that it had the necessary means to carry on as a hospital and would so continue; if she thought otherwise, it seems evident that she would have made some provision for use of the principal to that end; her intent and desire were to perpetuate the memory of her husband in the form expressed and she plainly sought to inhibit the employment of the principal for any purpose other than to produce an income which was to be used and applied for free hospital beds in memory of her husband and made that intent unequivocal by the phrase ‘income only.’

*Id.* at 709-10.

<sup>70</sup> *Id.* at 709. The *Lutheran Hospital* case, of course, dealt with money, which is fungible and capable of being restored through a reinfusion of cash. The art collection at issue in this case, in contrast, is unique and could never be reassembled or recaptured “for Nashville and the South” if lost. See *In the Matter of Friends For Long Island’s Heritage*, 911 N.Y.S.2d 412, 420 (Sup.Ct.App.Div. 2010) (recognizing that, once lost, items in a collection or the items or programs that a limited fund supports may be lost to the public forever if they may be used to pay debts).

<sup>71</sup> *Lutheran Hospital*, 46 N.Y.S.2d at 709.

adopted by the trial court, there is no guarantee that Fisk would become financially viable and remain open. In the event that it did not, who is to say what would become of the Collection? Ms. O’Keeffe’s intent would likely be completely frustrated and destroyed.<sup>72</sup>

In all of these cases, the intent of the donor was paramount. Here, Ms. O’Keeffe’s intent in giving the Stieglitz Collection to Fisk was not to perpetuate Fisk’s existence. Rather, as found by this Court, Ms. O’Keeffe’s only intent “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.”<sup>73</sup> The trial court’s conclusions as to secondary motivating factors run counter to Ms. O’Keeffe’s intent and serve to frustrate that intent completely. Accordingly, the trial court abused its discretion by applying an incorrect legal standard to craft a remedy that gives precedence to Ms. O’Keeffe’s subsidiary intent over her general charitable intent.

## **II. THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING *CY PRES* RELIEF THAT FAILS TO MOST CLOSELY APPROXIMATE MS. O’KEEFFE’S CHARITABLE INTENT AS DECLARED BY THIS COURT.**

Pursuant to this Court’s mandate, having found impossibility or impracticability, the trial court was directed to fashion *cy pres* relief that most closely approximates Ms. O’Keeffe’s charitable intent as declared by this Court. Despite this clear directive, the trial court adopted *cy pres* relief that not only does not most closely approximate Ms. O’Keeffe’s charitable intent, but also frustrates that intent and operates contrary to applicable New York *cy pres* law. Such action clearly constitutes an abuse of discretion by the trial court.

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<sup>72</sup> The trial court’s direction that proceeds from the Crystal Bridges sale be used to create a \$20 million endowment for the Collection and that neither Fisk nor Crystal Bridges can transfer its ownership interest in the Collection without the court’s approval would not protect the Collection from such a fate. As explained, *infra*, Section II.B., once the Collection has been held to be Fisk’s financial asset, federal bankruptcy law would likely strip the Collection of any state law protection from creditors.

<sup>73</sup> *Georgia O’Keeffe Foundation v. Fisk*, 312 S.W.3d at 18.

**A. The trial court abused its discretion in rejecting the Attorney General's proposals solely because they did not provide financial assistance for Fisk's continued viability.**

Having found that it was impracticable for Fisk to continue to comply with the conditions of Ms. O'Keeffe's gift, the trial court solicited proposals from the parties for the "display and maintenance of the Alfred Stieglitz Collection." (TR Vol. X at p. 1328). In response and in recognition of the trial court's express declaration that because of its financial situation, "Fisk either needs assistance with the Collection or Fisk needs to be replaced," the Attorney General proposed two different alternatives: the use of the Pearl Creswell Fund to pay the costs of displaying the Collection on the Fisk campus, or moving the Collection to the Frist Center or the Tennessee State Museum

The trial court rejected both of these proposals because "they provide no money for Fisk, the institution." (TR Vol. XIII at p. 1771). Moreover, the trial court rejected the Attorney General's proposals despite specifically finding that "there was no general charitable intent by Georgia O'Keeffe to perpetuate the existence of Fisk" and that in terms of financial gain or value, Fisk was simply "to be enriched by the presence of the Collection at the University." (*Id.*).<sup>74</sup>

As discussed in the previous sections, there simply is no support either in the evidence or the law for the trial court's conclusion that by placing the Collection at Fisk, Georgia O'Keeffe intended to promote the institution's continued existence and that Fisk can, therefore, convert the

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<sup>74</sup>The trial court also rejected the Attorney General's proposal for displaying the Collection either at the Frist Center for the Visual Arts or the State Museum as only being a "temporary fix." (TR Vol. XIII at p. 1583). However, the only aspect of that proposal that is temporary is the provision that Fisk be allowed to resume custody of the Collection when it has the financial ability to do so. The Attorney General considered such a provision to be appropriate, as it recognized not only Fisk's historical connection to the Collection but also the trial court's finding that Ms. O'Keeffe's placement of the Collection as Fisk was deliberate. Moreover, the Attorney General recognized that the trial court had the authority to modify this provision if it found it to be too temporal. (TR Vol. XIII at p. 1732).

Stieglitz Collection into a financial asset to be used in whole or in part for its own benefit. Accordingly, the trial court abused its discretion when it rejected the Attorney General's proposals on the basis that they did not provide for an infusion of cash for Fisk to use at its discretion.

Moreover, the Attorney General submitted a proposal to the trial court that would ensure that Ms. O'Keeffe's charitable intent was fully and faithfully carried out, *i.e.*, to make the Collection available to Nashville and the South to promote the study of art. Under the Pearl Creswell Fund proposal, the Stieglitz Collection would remain on display full-time at the Van Vechten Gallery at Fisk University in compliance with all of the conditions imposed by Ms. O'Keeffe, and it would be available not only for the students and faculty at Fisk but also for the public in Nashville and the South to view and to study.<sup>75</sup>

The Pearl Creswell Fund proposal would also relieve Fisk of the very financial burdens that prompted the university to file this case.<sup>76</sup> Indeed, Fisk initially commenced this proceeding seeking permission to sell two valuable pieces of the Collection because it alleged it could no longer afford to maintain the Collection pursuant to the conditions imposed by Ms. O'Keeffe.<sup>77</sup> After the remand, Fisk alleged in its Second Amended Complaint for *Cy Pres* Relief that it could no longer justify the expenditure of money on the Stieglitz Collection when the money was

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<sup>75</sup>In other words, the Pearl Creswell Fund proposal not only most closely approximates Ms. O'Keeffe's charitable intent, it in fact preserves the manner in which Ms. O'Keeffe chose to implement that intent. In comparison, the *cy pres* relief ordered by the trial court, among other defects, preserves neither Ms. O'Keeffe's charitable intent nor her method of implementing that intent. It will remove the Collection from Nashville and the South at least fifty percent of the time. It will remove the Collection to a location in northwest Arkansas, largely inaccessible to much of the population for which the Collection was intended and far removed from the cultural and historical context that makes this Collection unique. It will require the Collection to be transferred regularly, which will speed the deterioration of the individual pieces of art.

<sup>76</sup>See *Georgia O'Keeffe Foundation v. Fisk University*, 3122 S.W.3d at 20 (Dinkins, J., concurring) ("Fisk's dilemma – and the reason it seeks *cy pres* relief – is based on an inability, due to expense, to maintain and display the collection as originally contemplated by Ms. O'Keeffe and President Johnson.").

<sup>77</sup>See n. 6, *supra*.

needed for its educational mission and overall survival. (TR Vol. I at p. 197). The Pearl Creswell Fund is a designated fund that has already been established at The Community Foundation with financial commitments sufficient to generate a grant of at least \$131,000 each year to Fisk for the sole purpose of caring for and displaying the Stieglitz Collection in the Van Vechten Gallery. (TR Vol. XIII at pp. 1728-1749). The payment of this annual grant would relieve Fisk of having to spend any money on the Stieglitz Collection and allow the University to utilize those funds instead for its educational mission and overall survival.<sup>78</sup>

Adopting the Pearl Creswell Fund proposal would not require voiding the no-sale restriction – a restriction that Ms. O’Keeffe clearly considered to be paramount. She never lifted that restriction on Fisk despite having knowledge of Fisk’s financial difficulties and despite setting an expiration date on the no-sale restriction imposed on other recipients of Alfred Stieglitz’s art collection. (TE 17, Vol. I at p. 21). Moreover, by leaving the no-sale restriction intact, adoption of the Pearl Creswell Fund proposal would ensure that the fundamental nature of the Collection as a restricted charitable gift would remain unchanged and fully protected from Fisk’s creditors. For the same reasons, the Attorney General’s proposal to relocate the Collection for display at either the Frist Center for the Visual Arts or the State Museum, even though it would move the Collection off campus until Fisk regained its financial stability, also more closely approximates Ms. O’Keeffe’s general charitable intent than does the solution adopted by the trial court.

Clearly, both of these proposals are faithful to Ms. O’Keeffe’s general charitable intent and comply with New York *cy pres* law, unlike the solution adopted by the trial court. In fact, the Pearl Creswell Fund proposal, by leaving the Collection on display in the Van Vechten

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<sup>78</sup>Since this annual grant would essentially “free up” approximately \$131,000 annually for Fisk to use at its discretion, the Pearl Creswell Fund actually does “provide money for Fisk, the institution” – just not in the amount the trial court apparently considered to be sufficient.

Gallery at Fisk University and relieving the University of the annual costs of the Collection, could not more closely approximate Ms. O’Keeffe’s charitable purpose. Accordingly, the trial court abused its discretion in not adopting this proposal.

**B. The *cy pres* relief ordered by the trial court does not most closely approximate Ms. O’Keeffe’s general charitable intent.**

In its orders declaring granting *cy pres* relief, the trial court specifically and properly recognized that this Court had “made no finding of a dual intention by Ms. O’Keeffe that includes perpetuating the existence of Fisk” and that in other cases of financially unstable or bankrupt institutions, no New York court had allowed the institution to sell a restricted charitable gift to generate money for the institution. (TR Vol. X at p. 1318; Vol XIII at p. 1771). The trial court further acknowledged that *cy pres* would not allow the court “to simply convert charitable gifts into an expendable ‘asset’ in order to maximize its utility to the donor” and that monetizing the Collection under the guise of *cy pres* relief would ultimately frustrate the whole purpose of the *cy pres* doctrine. (TR Vol. XIII at p. 1773) Finally, the trial court recognized that under New York law, “[c]y pres may not be employed simply to promote what the court views as a worthy charitable agenda” and that a court can “change a condition/restriction of a gift only if in doing so the result closely approximates the donor’s intent, and *if the change does not create a result that overrides the general charitable purpose for which the donor gave the gift.*” (TR Vol. X at pp. 1317-18) (emphasis added).

Despite recognizing these limitations under applicable New York *cy pres* law, the trial court concluded that the “best way to achieve Ms. O’Keeffe’s purposes” was to void the no-sale restriction on the Collection and allow the sale to Crystal Bridges “conditioned on the bulk of the proceeds, \$20 million, being removed from Fisk and used to endow a Nashville connection to the Collection, and the remaining \$10 million being paid to Fisk for its viability.” (TR Vol. XIII at

p. 1784) By limiting Fisk to only \$10 million of the proceeds for its unrestricted use, the trial court reasoned that it had not converted the Collection into an expendable asset.

Such reasoning is simply not logical. The trial court cannot have it both ways. Either the entire Collection was intended to promote the study of art or it was not; Ms. O’Keeffe could not have donated only part of the Collection for such a purpose. The evidence in the record and the law lead to only one conclusion – that by displaying the Collection at Fisk, Georgia O’Keeffe did not intend to support the university’s continued viability as an institution.<sup>79</sup> Rather, by imposing the no-sale restriction and never removing it, Ms. O’Keeffe intended that the Alfred Stieglitz Collection in its entirety be made available to the public in Nashville and the South to promote the study of art. Accordingly, to void the no-sale restriction and allow the sale to the Crystal Bridges Museum to proceed, regardless of the share of the proceeds that Fisk would receive to support its financial viability as an institution, does not most closely approximate Ms. O’Keeffe’s intent but rather clearly breaches it.

Moreover, New York courts have uniformly held that the intention of a donor in making a general charitable gift to a nonprofit corporation should be presumed to be in furtherance of the charitable purpose, rather than for the gift to be used by a financially struggling nonprofit to satisfy its creditors’ claims.<sup>80</sup> This legal presumption protecting a charitable gift is even stronger when that charitable gift is restricted, as here. Indeed, in the recent case, *In the Matter of Friends*

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<sup>79</sup>There is also no evidence to support a finding that Ms. O’Keeffe intended that the Stieglitz Collection or any part could be sold and the proceeds used to enable Fisk to “fulfill its mission of providing the Nashville public access to the Collection and promoting the study of art.” (TR Vol. XIII at p. 1779). Rather, the clear evidence in the record is that Ms. O’Keeffe intended for the artwork itself and repeated viewings of it to promote the study of art and to “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.” (TE 72, Vol. II at p. 171 ).

<sup>80</sup>*See Matter of Kraetzer’s Will*, 462 N.Y.S.2d 1009, 1013-1014 (N.Y. Sur. Ct. 1982) (Based on this presumption, court rejected the bankruptcy trustee’s argument that charitable gift to bankruptcy hospital should be available to satisfy the bankrupt hospital’s obligations to its creditors and instead directed, under the *cy pres* power, that the gift be applied to a similar charitable use.).

*For Long Island's Heritage*, a New York court reaffirmed “New York’s long-standing policy honoring donors’ restrictions on the use of the property they donate [as having] greater weight than the claims of creditors” and held that “where the donee has imposed a limitation on the use of the asset, that limitation must be honored in the operation and dissolution of the NFP [not-for-profit].”<sup>81</sup> In that case, the court refused to allow a charitable fund held by a not-for-profit educational institution for a specific purpose to be liquidated to pay the institution’s creditors because “[t]o do so would be to extinguish the purpose behind the gift.” Similarly, to remove the no-sale restriction on the Stieglitz Collection and allow Fisk to sell a half interest in the Collection in order to keep Fisk afloat would extinguish Ms. O’Keeffe’s charitable intent behind this gift.

Furthermore, the trial court’s finding that Ms. O’Keeffe intended the Stieglitz Collection to be a financial asset available to help keep Fisk in operation, if allowed to stand, would establish a legal basis on which the university’s creditors could seek to satisfy their claims not just from the \$10 million in proceeds from the sale to Crystal Bridges but also from Fisk’s remaining half interest in the Collection. And it is reasonably foreseeable that, in the event of bankruptcy, Fisk or some other party-in-interest will argue that since applicable state law has already determined that the Collection is intended to benefit Fisk financially, Fisk’s remaining half interest in the Collection should be included within the bankruptcy estate and sold so that the proceeds can be used to support of Fisk’s continued operation, not to promote the study of art. In contrast, so long as Ms. O’Keeffe’s no-sale restriction on the Collection is preserved, the Collection will be protected from any forced sale in bankruptcy.<sup>82</sup>

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<sup>81</sup>1911 N.Y.S.2d, 412, 420 (N.Y.Sup.Ct.App.Div. 2010).

<sup>82</sup> Courts have found that donor-restricted gifts are held in actual or constructive trust by the donee and consequently concluded that such restricted charitable gifts are not property of the estate if the donee files

By ordering *cy pres* relief that removes Ms. O’Keeffe’s no-sale restriction on the Collection and allows the sale to Crystal Bridges to proceed, however, the trial court has changed the fundamental nature of the Stieglitz Collection, converting it from a restricted charitable gift into an unrestricted asset for the benefit of Fisk University. More importantly, the trial court has simply dispensed with Ms. O’Keeffe’s clear directive that Fisk University never sell the Stieglitz Collection, all in an effort to maximize the financial utility of the asset to Fisk. However, as noted by the court in *Museum of the American Indian*, to “so easily dispens[e] with a grantor’s directions” in order to “maximize the utility of the assets” would undermine future charitable giving:

[W]e are not free to move charitable assets from one institution to the next simply to maximize the utility of those assets in some broad sense. *What the law recognizes in its imposition of far more stringent, dispositionally based conditions on the use of the cy pres power, is that the consequences of so easily dispensing with a grantor’s directions would be to discourage charitable giving and to rob charitable institutions of the stability necessary to the discharge of their purposes.* Doubtless it is better in the end for society to reap the benefit of charitable giving even in the form of dispositions imperfectly suited to the achievement of their purposes, than to forgo the benefits of charity altogether in the course of pursuing by judicial means some almost certainly elusive reallocation of charitable resources.<sup>83</sup>

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bankruptcy. See, e.g., *In re Joliet-Will County Community Action Agency*, 847 F.2d 430 (7th Cir. 1988) (holding that federal and state agency grants to nonprofit community organizations that impose restrictions on the grants’ use were made to the organization as a trustee, such that the debtor lacked beneficial title to the funds and hence they were not property of the estate); *Parkview Hospital v. St. Vincent Medical Center*, 211 B.R. 619 (N.D. Ohio 1997) (debtor hospital’s contributors manifested an intent that the hospital’s development fund would be used for specific charitable purposes, supporting a finding of an express charitable trust that removed the funds from the chapter 11 estate); *Hobbs v. Board of Educ. of Northern Baptist Convention*, 253 N.W. 627 (Neb. 1934) (finding that donations made directly to college with conditions attached or for particular object or purpose constituted a charitable trust and not subject to claims of creditors). Thus, any such donor-restricted charitable gifts may not be used or administered for the benefit of creditors of the bankruptcy donee. See, e.g., *In re Bishop College*, 151 B.R. 394 (N.D. Tex. 1993); *Hobbs v. Board of Educ. of Northern Baptist Convention*, 253 N.W. 627 (Neb. 1934). Once those restrictions are lifted, the rule enunciated in these cases no longer applies and the gift becomes part of the donee’s estate like any other asset.

<sup>83</sup>610 N.Y.S.2d 488, 501 (N.Y. App. Div. 1994) (emphasis added).

The *cy pres* relief ordered by trial court would convert the Stieglitz Collection into a source of revenue for the university, a transformation which is inimical to Ms. O'Keeffe's intent and the charitable purpose of the Collection and is not permitted under New York *cy pres* law. Accordingly, the trial court abused its discretion in ordering such relief and should be reversed.

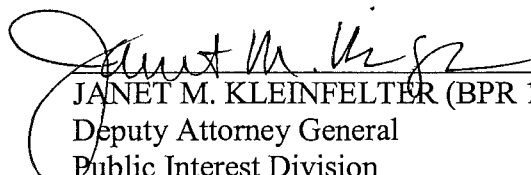
## CONCLUSION

For these reasons, the judgment of the trial court should be reversed and the case remanded to the trial court with instructions to adopt the Attorney General's "Pearl Creswell Fund" proposal as the *cy pres* relief that most closely approximates the donor's charitable intent.

Respectfully submitted,

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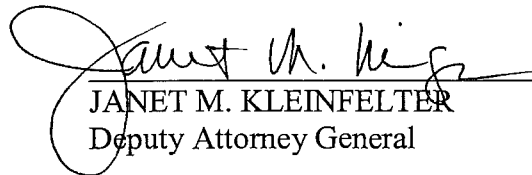
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**CERTIFICATE OF SERVICE**

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

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