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Balancing Donor Intent with Museum Needs: Proposed Deaccession Planning Strategies for Art Bequeathed to Museums

Virginia D. Ryan

INTRODUCTION

Museums need money to maintain their large collections. Most museums can only display a small percentage of their holdings, but they are required to maintain, preserve, and store other donations, some of which are not of a displayable quality. Donors, on the other hand, often form an emotional attachment to their art collections in their lifetime and usually donate their collections to museums that have meaning to them, whether because of the museum's geographical location, university affiliation, or connection to the subject matter of the donor's collection. Therefore, when donors bequeath their art collections to museums, they often expect the collection to stay together and expect the museum that accepts the bequest to care indefinitely for the donated works. However, as the value of some pieces increases over others, the feasibility of caring for a large and varied collection can change. In order to maintain and care for their collection as well as to procure pieces consistent with the museum's acquisition policy, museums would occasionally like the ability to “deaccession”—meaning sell, trade, or otherwise remove—some artwork from their collection to preserve their more valuable pieces and make room for new acquisitions.

In this note, I explore the ways in which museums can encourage planning by donors for these types of situations. Museums should work with donors before accepting donations of artwork to plan ahead for potential deaccession circumstances. This will allow museums to protect

1 Virginia D. Ryan received her Juris Doctor from the University of Kentucky College of Law in 2013. She graduated cum laude from Dartmouth College in 2009, receiving high honors for her major in Art History.


3 See Alan F. Rothschild, Jr., How Donors May—and May Not—Exercise Control of Charitable Gifts, 16 Tax'n Exempts 110, 112 (2004).


5 Id.
and promote their most valuable pieces while remaining financially viable in difficult economic circumstances. Proposed legislation seeks to severely limit the circumstances under which a museum may deaccession its collection, which acts both to protect the donor and keep valuable artwork in the public trust. However, I explore several ways in which a museum can work with potential donors to plan for circumstances under which a museum must deaccession its work while remaining sensitive to the donor’s emotional ties to the artwork and their financial interests in donating.

Part I of this note addresses the need for deaccession and ways in which museums have addressed the deaccession problem. Part II describes the methods by which a donor can organize his or her donations, recognizes the boundaries to restrictions imposed on gifts of artwork, and discusses the limitations on charitable deductions that imposing conditions can invoke. Finally, Part III offers solutions to the previously mentioned deaccession issues through advanced planning between museums and donors.

I. THE NEED FOR DEACCESSION IN TODAY’S ECONOMY

Most museums are organized as either public trusts or nonprofit corporations. Public trust museums fall under the law of charitable trusts. “A charitable trust differs . . . from a private trust in that a charitable trust must ‘accomplish a substantial amount of social benefit to the public or some reasonably large class thereof.’”

Charitable trusts have several advantages over private trusts. First, a charitable trust can operate in perpetuity; in other words, a charitable trust is not subject to the Rule Against Perpetuities. Second, while private trusts are void where the beneficiaries are indefinite and unascertainable, a charitable trust can benefit unknown beneficiaries so long as it is “devoted to purposes beneficial to the community, such as a charity, education, the promotion of health, the advancement of religion and morality, the furtherance of governmental purposes, and so on, where an indefinite number of persons may be benefitted.” The third rule regarding charitable trusts, discussed in the Fisk University case cited below, arises from the first two features in that, “since a charity can have perpetual life with reference to stated charitable purposes, it might outlive such purposes. In that case the trust may be ‘reformed’ under the doctrine of *cy pres* if such can be accomplished within the general charitable intent of the settlor.”

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6 Cirigliana, supra note 2, at 380-81.
7 White, supra note 4, at 1049-51.
8 Id. at 1049 (quoting GEORGE T. BOGERT, TRUSTS § 54 (6th ed. 1987)).
10 Id.
11 Id. at 454-55.
Like a public trust, a nonprofit corporation also provides a cultural benefit to the public. Many modern museums prefer organization as a corporation where the board of directors may facilitate control, arrange for successors without court involvement, and adopt and alter bylaws for management functions and purposes. As a public trust or nonprofit corporation, museums owe a general duty to the public and not to a specific person. Trustees of a museum are charged with:

faithful administration in carrying out the trust's purpose and protecting the beneficiaries' interest in the trust. Although often afforded great latitude in their decision making, trustees must 'follow the intentions and directions of the creator of the foundation in serving the best interest of the beneficiaries.' Additionally, oversight over charitable trusts is typically provided for by statute or common law, and a state's attorney general may have a right to prevent the sale of a museum's holdings.

As a public trust, museums must protect the cultural property housed within the museum. Many people find the idea that a museum can sell their collection at-will distasteful because museums may shortsightedly sell historically important pieces to fund short-term and pet projects. Those against widespread deaccession fear museums will deaccession artwork as a short-term first resort to a budget pinch and will thereby lose valuable artwork that should be preserved for posterity. Their fear is compounded by the idea that struggling museums will use the proceeds of deaccession to fund operating costs, not just to bolster their collections.

Despite these concerns, one benefit of deaccession is that museums can reduce the financial burden of maintaining and storing their extensive collections by selling some of their artwork. Many museums keep ninety percent of their collections in storage. While an extensive collection in storage is useful for research and for temporary changing exhibitions, many stored pieces are dirty, damaged, or of lower quality than the works displayed in museum galleries. The museum must pay high costs to maintain stored artwork and may not have the funds to restore the less valuable pieces in their collection. If we hold museums to a strict standard

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12 White, supra note 4, at 1049.
13 Dodge et al., supra note 9, at 455.
14 Andrew L. Eklund, Note, Every Rose has its Thorn: A New Approach to Deaccession, 6 Hastings Bus. L.J. 467, 471 (2010).
15 Id.
17 See id.
18 Cirigliana, supra note 2, at 366.
19 See id.
of prohibition on deaccession, museums may use much of their operating budget on storing damaged pieces but may never have enough left over to restore these works. However, if museums are allowed to sell less valuable and duplicate artwork, they could alleviate some of the financial strain on operating costs and make room in their collection to house new acquisitions.

With the recent economic crisis, many museums have lost substantial portions of their endowment and are now struggling to cover basic operating costs. Since 2008,

Museums across the nation [have been forced to lay] off staff, [cancel] exhibits, [raise] admissions prices, and [close] extra days or even entire months. In the last year, about twenty museums closed permanently including Florida’s Gulf Coast Museum of Art, the Minnesota Museum of American Art, the Bead Museum, the Claremont Museum of Art, the Fresno Metropolitan Museum of Art, and the Las Vegas Museum of Art.

The closure of a museum has serious consequences including loss to the public of a cultural and recreational center, loss of a community education facility, and loss of investment to museum creditors. Some museums have deaccessioned artwork to pay operating costs and to prevent shutdown. However, the Code of Ethics promulgated by the regulating body for American museums, the American Alliance of Museums, stipulates that museums must use funds from the deaccession of artwork for future acquisitions and in limited cases also for the care of the current collection. Therefore, even if failing museums can manage to sell part of their collection, they cannot use the proceeds from these sales to pay for necessities like utility bills and staff salaries.

The irony of well-meaning restrictions on deaccession is that when debt finally forces a museum to shut its doors, the museum usually auctions its artwork to help repay creditors. In the case of the Fresno Metropolitan Museum of Art, “the global financial crash, a corresponding drop-off in key long-time donor contributions and a prolonged three-

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20 Id.
21 Id.
22 Id. at 371.
23 Id.
24 Id. at 371-72.
year building rehabilitation project that drained away patrons" forced the museum to close its doors. The Fresno Metropolitan Museum fought to stay afloat in the face of these concurrent crises, increasing programs aimed at children, marketing to the local Hispanic and Hmong ethnic communities, incorporating technology into galleries, and making the museum information available in languages other than English. In addition, the museum cut its 2009 operating budget by forty-five percent, underwent two rounds of layoffs, and received help from a limited liability company formed by local patrons to ease the museum into a "soft landing" to avoid bankruptcy and preserve goodwill in the community. Despite these efforts, the museum closed its doors in January of 2010 and sold its artwork to repay its debts. In the words of one blogger:

So let me get this straight. A struggling museum cannot sell art to keep from closing. That would be awful, a violation of the public trust, repulsive, Stalinesque, you know the rest. But if it closes, what happens to the art? It’s sold, to pay off creditors of the museum. Does that really make sense to anyone?

By requiring that deaccession funds be used for future acquisitions, the American Alliance of Museums intends to prevent the use of museum collections as liquid assets used at the discretion of a board of directors while promoting the image of museums as long-term collectors who protect artwork for posterity. However, in this volatile economy, when even drastic measures can fail to keep a struggling museum afloat, the absolute restrictions on deaccession require closer scrutiny in order to determine how a museum can plan for future gifts while keeping their hands free.

A. Regulation of Deaccession

The ethics codes of the American Alliance of Museums and the Association of Art Museum Directors help shape individual museums’ policies on deaccession in the United States. The American Alliance of Museums (formerly the “American Association of Museums” and hereinafter “AAM”), a museum association made up of museums in the United States, Mexico, and Canada, adopted the Code of Ethics for

27 Id.
28 Id.
29 Id.
31 Cirigliana, supra note 2, at 367.
32 Id. at 382.
33 Id.
Museums in 1991 and most recently amended the code in 2000. The Code states that a museum, its governing body, and any programs a museum may put on must ‘promote the public good rather than individual financial gain.’ The deaccession practices encouraged by the Code aim to promote the public good by ensuring that a museum’s board of directors do not deaccession artwork for quick financial relief where it can be achieved through alternative means.

The Code states that “disposal of collections through sale, trade, or research activities is solely for the advancement of the museum’s mission.” Further, the Code requires that “proceeds from the sale of nonliving collections are to be used consistent with the established standards of the museum’s discipline, but in no event shall they be used for anything other than acquisition or direct care of collections.” The policy behind this rule promotes the public good of the museum and prohibits the use of funds gained from selling artwork for potentially fleeting economic benefits. However, as discussed above, putting tight restrictions on deaccession and on the use of deaccessioned funds could inhibit a museum’s operating budget to the point of forced closure of the museum.

New York has been the only state thus far to develop a statewide deaccessioning policy that applies to all museums chartered under the Board of Regents. This rule, implemented in 2010, requires that an “institution may deaccession an item in its collection only in a manner consistent with its mission statement and collections management policy and where one or more of the following criteria have been met.” A museum can deaccession a work (1) if it is inconsistent with the mission statement of a museum; (2) when “the item has failed to retain its identity”; (3) when the work is redundant; (4) when the preservation needs are beyond the capacity of the museum to provide; (5) when deaccession will refine the collection; (6) when the work is inauthentic; (7) when the work is repatriated; (8) when the work is returned to the donor “to fulfill donor restrictions relating to the item which the institution is no longer able to meet”; (9) when the item is hazardous; or (10) when the item is stolen or lost. While the Board of Regents criteria for deaccession seems broad, the use of deaccession funds in New York may only be used for “the acquisition of collections,

34 Eklund, supra note 14, at 469.
35 Id.
36 Id. at 470.
37 Id.
38 Cirigliana, supra note 2, at 367.
39 Id. at 379.
40 N.Y. COMP. CODES R. & REGS. tit. 8, § 3.27(e)(7) (2010).
41 Id. at (e)(7)(ii).
42 Id. at (e)(7)(viii).
43 Id. at (e)(7)(i-x).
or the preservation, conservation or direct care of collections. In no event shall proceeds derived from the deaccessioning of any property from the collection be used for operating expenses or for any purposes other than the acquisition, preservation, conservation or direct care of collections.\(^{44}\)

In 2009-2010, the New York Assembly tried to pass a bill into law that would have applied similar standards to the New York Board of Regents rule on a state level, since the Board of Regents rule only applies to museums chartered by the Board.\(^{45}\) This proposed bill was met with widespread disapproval from New York museum directors. Notably

"[The director of the Albany Institute of History & Art argued that in the wake of legislative budgetary slashes for the arts, the legislature was 'seeking to choke off another avenue of income with this unfunded mandate.' The same director went on to ask if it '[made] sense to prevent the deaccessioning of works which then won't be enjoyed by the public because the institution that houses them can't afford to keep its doors open?"\(^{46}\)

The proposed Assembly Bill sponsors withdrew support following this backlash.\(^{47}\) While New York is the only state that has proposed regulation of deaccession on a statewide level, the AAM Code of Ethics binds many museums across the country. Museums that fail to follow the Code are subject to sanctions including loss of accreditation.\(^{48}\)

Many museums self-impose their own deaccession regulations. The Hood Museum of Art, Dartmouth College's art museum, has an extensive collections management policy, updated in 2004, and enforces its own restrictions on deaccession.\(^{49}\) The Hood Museum criteria for deaccession mirror the AAM Code of Ethics rules for deaccession and the New York Board of Regents guidelines outlined above, and the Hood also has a written "process" for works chosen for deaccession.\(^{50}\) The curator overseeing a particular work recommends deaccession to the museum director. In making this recommendation, the curator

should include complete catalogue information, donor history based on a thorough perusal of museum acquisition and donor records, reason(s) for deaccessioning or transfer, and proposed

\(^{44}\) Id. at (c)(6)(vii).

\(^{45}\) Cirigliana, supra note 2, at 380; see also S. Assemb. B. 6959, 2009-10 Leg., 232d Reg. Sess. (N.Y. 2009).

\(^{46}\) Cirigliana, supra note 2, at 381.

\(^{47}\) Id. at 380-82.

\(^{48}\) Id. at 383.

\(^{49}\) HOOD MUSEUM OF ART, COLLECTIONS MANAGEMENT POLICY: DEACCESSIONS 9 (2004)

("In drafting this document, the Curators relied heavily on policies produced by the Association of Art Museum Directors, Harvard University Art Museums, Williams College Museum of Art, and Yale University Art Gallery.").

\(^{50}\) Id.
method of disposal. The curator will give consideration not only to an object's intrinsic merits but to the integrity of cohesive collections and collections with historic significance . . . . In addition to public sale, the museum staff will consider as a possible means of disposal the transfer to another department at Dartmouth College or another museum or historical society, if appropriate.\footnote{Id.}

The curator then must consult with the museum registrar to ensure that the museum has clear title to the object and that deaccessioning will not conflict with donor restrictions or tax deductions taken by the donor.\footnote{Id.} Subsequently, the curator and director must get approval to deaccession from the other museum's curators, the relevant college professors who may use the material for teaching purposes, the college archivist, the college development office, the original donor (if living), and (in some cases) the heirs of the donor's estate, an appraiser, a conservation specialist, and the museum acquisition committee.\footnote{Id.}

When the museum finally approves a work for deaccession, the preferred methods of disposal include (1) sale through a public auction, (2) sale or exchange with another public institution or department at Dartmouth, or (3) sale through a dealer selected through three sealed bids.\footnote{Id.} The museum policy further states that “the disposal of an object, whether by sale or exchange, shall be conducted with a view toward maximizing the advantage and yield to the institution, without, however, compromising the highest standards of professional ethics, the institution’s standing in its community, or its responsibilities to its donors.”\footnote{Id.} The policy clearly states that “[t]he deaccessioned objects should never be sold to trustees, faculty, or staff of the college, or any third party acting in their interest. Members of the museum staff are expressly forbidden from ever acquiring an object that has passed through the Hood’s deaccessioning process.”\footnote{Id.}

Finally, the Hood Museum deaccessioning policy outlines safeguards and use of deaccession proceeds. The document states that (1) the relevant curator or museum director may halt the deaccession process at any time; (2) the museum must use the proceeds from deaccession for the acquisition of new art; (3) ideally, funds should be used to improve the collection in the same area; (4) “[w]orks acquired through the proceeds of sales or by exchange shall reflect recognition and proper credit to the donors of the
works sold or exchanged, to the extent reasonable and possible, and (5) the museum maintain complete records on works deaccessioned.

As evidenced by the AAM Code of Ethics rules, the New York Board of Regents policy, the proposed New York state legislation, and private museum policies, the deaccession of artwork, although practical in some circumstances, proves difficult and time consuming in many instances. To date, legal scholarship addressing deaccession proposes broader standards for the deaccession of artwork in an effort to allow museums to cull their collections and to manage their operating costs. Absent the changes proposed by existing scholarship, museums can prospectively manage deaccession by working with donors to develop a realistic plan for the future of donated art. By educating donors as to the financial needs of the museum, enforcing strict acquisition policies, and negotiating with donors who otherwise may be unwilling to split their collection, museums can avoid taking on more pieces than they can store and maintain and will better manage and preserve their smaller collections.

B. Case Study: The Fisk University Galleries Controversy

The current situation at Fisk University exemplifies donor intent gone wrong due to deaccession issues. To keep the University art galleries from closing, Fisk University proposed to sell a thirty million dollar one-half interest in its Stieglitz Collection to Wal-Mart heiress Alice Walton’s new Crystal Bridges Museum in Bentonville, Arkansas. In the late 1940s, Fisk University received a charitable gift from the artist Georgia O’Keeffe of 101 works of art. Four of the artworks in this collection belonged to O’Keeffe and the other ninety-seven were the former property of her late husband, the artist Alfred Stieglitz. O’Keeffe gave the 101 pieces to the Fisk University Art Galleries as conditional charitable gifts, subject to several restrictions. In 2009, Fisk University valued the Stieglitz Collection at sixty million dollars.

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57 Id.
58 Id.
59 See, e.g., Cirigliana, supra note 2, at 368; Eklund, supra note 14, at 372-74; White, supra note 4, at 1048.
62 Id.
63 Id.
64 Id.
On giving the artwork to Fisk, O’Keeffe imposed two major restrictions that have sparked litigation in the past several years. O’Keeffe stipulated that the university not sell the artwork and that Fisk display the works as one collection in their gallery. Fisk University agreed to O’Keeffe’s restrictions in 1949. In addition to agreeing not to sell or divide the work, Fisk University’s president also pledged not to change the matting or framing of any of the photographs in the collection, not to display other artwork in the same gallery as the Stieglitz Collection, and allowed O’Keeffe to choose the paint color of the gallery as a condition of the gift.

Fisk University maintains that it can no longer afford to maintain the collection as stipulated by O’Keeffe over fifty years ago. To remedy their financial burden, Fisk University filed an ex parte declaratory judgment action asking for permission to sell two valuable paintings from the Stieglitz Collection. The Georgia O’Keeffe Museum intervened in the action, asserting that the sale of any of the Stieglitz Collection would violate the intent of O’Keeffe’s gift. Soon after this proposed sale, Fisk University entered into a different deal with Wal-Mart heiress Alice Walton to share the Stieglitz Collection with her new Crystal Bridges Museum in Bentonville, Arkansas. Under this “settlement agreement,” the museum would sell a fifty-percent undivided interest in the Stieglitz Collection to Crystal Bridges Museum of American Art, Inc. (hereinafter “Crystal Bridges”) for thirty million dollars. Fisk would then display the Stieglitz Collection for six months out of every year, with Crystal Bridges displaying the collection for the remainder of each year.

The latest opinion given by the Tennessee Court of Appeals regards the legality of the proposed sharing arrangement with Crystal Bridges. Fisk sought to enter into the sharing arrangement with Crystal Bridges under a theory of cy pres. Cy pres is “[t]he equitable doctrine under which a court reforms a written instrument with a gift to charity as closely to the donor’s intention as possible, so that the gift does not fail.” Further, “[c]
ourts use *cy pres* especially in construing charitable gifts when the donor's original charitable purpose cannot be fulfilled.\(^7\)

Under the *cy pres* doctrine, the court had to determine whether *cy pres* relief was available and, if so, whether the "proposed modification closely approximate[d] the donor's charitable intent."\(^7\) Under the first part of this test, the court had to determine whether (1) the gift was charitable in nature; (2) the donor had a general, rather than specific, charitable purpose in donation; and (3) circumstances had changed to render compliance with the conditions impracticable.\(^7\) At trial, the court found that maintenance of the collection according to O'Keeffe's conditions was impracticable.\(^7\) Fisk University's president testified that the Stieglitz Collection cost $131,000.00 per year to maintain and display and that compliance with the requirements of the gift was not compatible with Fisk's financial situation.\(^7\) The court held that Fisk's financial situation rendered strict compliance with O'Keeffe's conditions impracticable and that *cy pres* relief was available.\(^6\)

The Attorney General of Tennessee and Fisk University then proposed several alternative plans for the Stieglitz Collection. The trial court approved Fisk's sharing plan with Crystal Bridges as most closely carrying out the wishes of O'Keeffe. The sharing arrangement between Fisk and Crystal Bridges furthers O'Keeffe's goals that the collection remains intact and available for study and education in Nashville and throughout the South.\(^6\) The sharing arrangement provides for the availability of the collection for two years out of a student's four-year matriculation and sets up a "Collection Committee" to preserve and maintain the collection according to O'Keeffe's wishes.\(^6\) In addition, no part of the collection may be sold, no additions may be made, and the collection is still titled the "Alfred Stieglitz Collection."\(^6\) On appeal, the court of appeals reversed the trial court's decision to set up an endowment for the preservation of the Stieglitz Collection and remanded the case for a reconsideration of measures to protect O'Keeffe's gift.\(^4\)

Under *cy pres*, because the trial court found that Fisk could not continue to operate if they followed O'Keeffe's donor intent, the court allowed deaccession and modification of O'Keeffe's conditions. Although the trial

\(75\) Id.  
\(76\) *Fisk II*, 2011 WL 5966893 at *3.  
\(77\) Id.  
\(78\) Id.  
\(79\) Id. (citing the court's holding in *Fisk I*).  
\(80\) Id.  
\(81\) Id. at *5, *7.  
\(82\) Id. at *7.  
\(83\) Id.  
\(84\) Id. at *12.
court attempted to preserve the majority of Crystal Bridges’ payment to fund the Fisk Galleries, the court of appeals held that since O’Keeffe did not require an endowment fund in her original gift, “[t]he court has no authority under the statute and the facts of this case to effectively decree the manner by which the Collection would be used by Fisk in furtherance of its educational mission.” The majority then allowed Fisk to use the proceeds from the sharing arrangement for the university’s operating costs and held that the Crystal Bridges sharing arrangement was the closest substitute for O’Keeffe’s original donative intent.

The Tennessee Attorney General has most recently filed for appeal to the Supreme Court of Tennessee. One of the arguments made by the Attorney General in his brief is that the ruling in the Fisk case will “chill” future charitable gifts of artwork to museums. The Attorney General quotes the testimony of Dr. William U. Eiland, Director of the Georgia Museum of Art at the University of Georgia, who states:

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... I have gotten quite a few phone calls... [from] even board members who are calling and saying, ‘Are you going to protect my donation when I make it?’

The Fisk controversy has sparked much debate about donor intent and the carrying out of conditions imposed on gifts of artwork to museums. However, by working with donors before gifts are made, the litigation in Fisk could have been avoided, saving the museum, the estate of the donor, and the public time and money while giving museums the freedom to deaccession or to make sharing deals in order to adequately fund their museum. A brief lesson on the structure of donations illustrates ways in which museums can work with donor intent.

85 Id. at *10-*11.
Art owners donate their collections to museums for a variety of reasons. Sometimes, donors want to bolster their alma mater’s collection or improve upon their local community art museum collection. Donors may want a safe place that will treasure their art, maintain and preserve their gift, and display their curatorial hobby in its completeness. Museums may reward those who make extensive donations by naming galleries after the donor, curating exhibitions in their honor, or displaying the donor’s name with the donated artwork. However, wealthy donors often choose to give their artwork to museums because of the substantial tax deductions available to the donor. Qualifying gifts and estate transfers to charity are deductible under both the gift and estate tax and in some cases under the federal income tax. For the income tax deduction, the IRS caps gifts to charity at a percentage of adjusted gross income, with a maximum allowed deduction of fifty-percent of adjusted gross income, depending on the nature of the donee organizations and the type of property contributed. Under the income tax scheme, gifts in excess of this limitation may be carried forward for up to five years. For gift and estate tax purposes, the IRS does not restrict charitable deductions to a dollar or percentage limit. The transferred amount must also be used exclusively for charitable purposes.

In general, donors are allowed to place restraints and conditions on their gifts of artwork to museums, lasting into perpetuity, “provided that the restriction does not prevent the charity from using the donated property in furtherance of its charitable purposes.” Examples of permitted restrictions include anything from a requirement of continuous display, directions on the type of frame used, the name of the collection, gallery wall color, or a requirement that the museum not sell, trade, or loan the paintings. Of course, a donee museum can always reject the conditions of a gift:

In theory, therefore, given its educational purposes and obligation to the public, the museum should not accept donor restrictions unless its board of trustees can determine, in good faith, that such restrictions will not ultimately be inconsistent with the

toddmayo.blogspot.com/2011/02/new-lawsuit-seeks-to-block-barnes.html (discussing a case involving the Barnes Foundation).
90 Dodge et al., supra note 9, at 454.
91 Id. at 456 n.87.
92 Id. See also I.R.C. § 170(b) (2010).
93 Dodge et al., supra note 9, at 456.
94 Id.
96 Rothschild, Jr., supra note 3, at 111.
97 Fox, supra note 95, at 452.
museum’s educational purposes or unduly burden the museum. As a practical matter, the greater the relative importance and magnitude of the collection to the particular potential donee museum, the more likely it is that the museum will accept the restrictions sought to be imposed by the donor.98

Donors traditionally have used several tools for giving tax-deductible gifts to museums in a way in which the donor can still retain some control over his or her gift. For instance, a donor could establish a private foundation instead of giving artwork to an exempt organization, such as an already established museum.99 Creation of a private foundation allows the donor to oversee the management and control of his or her gift.100 Also, a donor could create a split-interest trust, in which the donor retains the power to add and subtract charitable remainder beneficiaries without jeopardizing the income tax charitable deduction.101 The donor may place restrictions on the gift as long as the gift is still usable for the charitable purpose of the donee museum.102 However, if the gift is designated for a non-charitable purpose or for a purpose outside the mission of the donee museum, the gift may not be deductible by the donor.103 For example, if artwork is given to a church with the restriction that the work cannot be sold, the artwork is likely outside the scope of the donee organization and the gift may not be deductible to the donor.

Gifts of artwork subject to conditions donated to an art museum or university art gallery are usually within the scope of the organization’s mission, however, and are therefore deductible. Still, the donor should stipulate any conditions placed on the gift at the time the gift is made.104 If the donor retains the power to change the use of the gift, the donor retains the dominion and control over the property and has therefore not relinquished ownership for gift tax purposes.105 This could render the gift incomplete and includable in the donor’s estate and could void a potential charitable deduction.106

98 Id. at 452-53.
99 Rothschild, Jr., supra note 3, at 110.
100 Id.
101 Id. at 111 (“Such power was specifically authorized in Rev. Rul. 76-8, 1976-1 CB 179, which provided that the grantor of an inter vivos charitable remainder trust can retain the right to substitute charities ... without jeopardizing the income tax charitable deduction.”).
102 Id.
103 Id.
104 Id. at 112.
105 Id.
106 Id.
Relating specifically to artwork, a series of Letter Rulings in 2002\textsuperscript{107} addressed conditions placed on charitable gifts of art.\textsuperscript{108} The Letter Rulings held that reasonable restrictions on gifts of artwork would not decrease the charitable deduction of the donor.\textsuperscript{109} In Letter Ruling 200202032, the IRS held that even if the donor made restrictions on the charitable gift of art, the deduction available was still the full fair market value of the artwork.\textsuperscript{110} In this ruling, the restrictions included a requirement that the artworks be displayed on a continuous basis in the museum, a requirement that each work bear a placard with the donor's name, and a requirement that if the works were sold, works of similar style and quality should be bought with the proceeds.\textsuperscript{111} The IRS used three factors to support its ruling that these conditions did not affect the valuation of the gift: (1) the museum could never be divested of ownership of the gift; (2) there was no permanent restriction on the sale of the works, only a stipulation as to how the funds should be used; and (3) the museum could temporarily loan the works in the gift to other museums.\textsuperscript{112}

Although the Letter Ruling did not address changes in valuation brought about by a permanent restriction on deaccession, "the clear implication of the ruling is that a permanent restriction on the deaccessioning of artwork could result in a valuation issue under Section 2055."\textsuperscript{113} For example, if the donor places a three-year moratorium on the sale of the donated works, the value of the donor's charitable deduction may diminish accordingly.\textsuperscript{114} Arguably, however, "where a permanent restriction on the deaccessioning of artwork is, in fact, accepted by a museum, such a restriction should not, as a matter of law, affect the amount of the deduction otherwise available under Section 2055."\textsuperscript{115} When the museum accepts a gift with substantial restrictions, the acceptance of the conditions imposed by the donor show that the museum's director or board of trustees believed at the time of acceptance that the gift, even subject to restrictions on deaccession, is in the museum's best interest and furthers the educational purposes of the museum.\textsuperscript{116} Therefore, a rule reducing the deduction to the donor for gifts with restrictions would make the IRS, or the courts who enforce tax law,
the final arbiter of permissible restrictions on gifts of art, decisions that are better left to museums.\textsuperscript{117}

If museums are to be the arbiters of permissible restrictions on gifts of art, museums should follow carefully planned policies in working with donors before a gift is made. As noted in the Fisk controversy, after a restriction on alienation is made, museums may face years of litigation under the \textit{cy pres} doctrine when attempting to deaccession artwork. Planning with the donor ahead of time can eliminate the need for litigation and can create fulfilled relationships between the donor and the donee museum.

III. Solutions in the Planning Stage of Giving

I propose that museums institute a three-part policy when working with donors to obtain a charitable gift. Museums should educate donors regarding the financial needs of the museum, enforce strict acquisition policies that do not inhibit the freedom of the museum to deaccession in the future, and negotiate and work with donors in order to acquire gifts with mutually beneficial results for the museum and the donor.

A. Education

Education is perhaps the most useful tool museums can use to get condition-free gifts from donors. Many donors have spent a lifetime collecting, displaying, and living with their art and are sentimentally attached to their collections. Others are amateur curators and believe their works as a whole represent the passion and efforts of the donor. Some donors are attached to the institution, whether a university gallery or a public or private museum, and want their work to stay in that institution as a tribute to the donor or the donor's family. By making donors aware of the needs of the museum, museums can avoid future \textit{cy pres} litigation and can give the donor a realistic picture of what to expect for the life of their donation. Museums should be forthcoming with potential donors and illustrate for them the potential for litigation if the donor places restraints on deaccession of a donation.

Even if a museum wants the donation and does not expect the need to sell the works, as illustrated in the Fisk controversy, when a museum is faced with selling artwork or closing its doors, the need to deaccession may be necessary. If a donor understands from the start that the museum does not want to sell their contribution but that circumstances may change in fifty or more years, then a donor may be more willing to forego a restraint on deaccession of their donation. If donors are still worried that the museum will "flip" their donation for a profit, museums could encourage the donor

\textsuperscript{117} Id.
to put a temporary restraint on deaccession of five, ten, or twenty years to ensure that the museum's patrons get enjoyment out of the donor's artwork before making the choice to deaccession. When museums discuss these options with donors they should also make donors aware of the potential tax consequences for imposition of restrictions on alienation. As discussed above, restraints on deaccession of a donation could reduce the deduction allowable to the donor. Museums should work with donors to ensure the donor understands the tax consequences of his or her decision to prevent deaccession or to include reversionary clauses in the gift.  

B. Acquisition Policy

In addition, museums should enforce strict acquisition policies when accepting donations of artwork. If accepting a gift will impose an undue burden on the museum and the donor will not allow the gift to be sold or put to another use, the museum may need to reject the gift. Of course, museums may be more willing to accept substantial conditions on highly valuable gifts of art. If a museum has a strict policy for charitable gifts, however, this policy can be applied across the board. Many donors choose to give gifts of art based on their personal connection to the museum and not because of acquisition policies, so a strict, "no conditions," policy may simplify the donative process without chilling the rate of gift giving to museums. Currently, the Association of Art Museum Curators in their "Professional Practices for Art Museum Curators" impose cursory professional standards of acquisition on museums curators. The Practices suggest that

[The curator's primary responsibility is the care, presentation, interpretation and acquisition of works of art in the collection. This means that a work of art under the curator's care, and works under consideration for acquisition, must be thoroughly researched in order to ensure their authenticity, quality, and historical importance. Uncertainties about a work's authenticity, origins, condition, presentation, or provenance should immediately be brought to the attention of the museum administration.]

Further, "[a]cquisitions—whether through purchase, gift, or bequest—should be guided by the mission of the museum as well as by the curator's expertise. . . . [C]urators, having specialized knowledge, should be involved in the decision to acquire a work and . . . in presenting the object to their museum's acquisition committee." The American Association

118 See discussion supra Part II.
120 Id.
of Museums could expand the duty of curators in selecting works for acquisition. If an organization like the AAM would endorse a strict policy on charitable acquisitions, focusing more on the donation of the artwork than the consequences of selling it later, litigation like that in the case of Fisk University could be avoided.

If a strict ban on conditions on the gift of artwork is too harsh for a museum, then it may consider a ban on restraints on alienation while allowing conditions relating to the length of display, aesthetic presentation, and collection-naming of donations. Allowing donors to control a few aspects of their donation may be preferable to losing a major donation.

C. Negotiation

Finally, museums should negotiate with donors who are intent on restraining the deaccession of their artwork. Some donors have extensive collections that they want to give in their entirety to a museum. The museum may only want one or two choice pieces of this collection and may not have the resources to maintain the rest of the proposed donation. Donors who otherwise may be unwilling to break up their collection may be persuaded with a variety of negotiating tactics on the part of the museum. Museums may offer to curate a temporary exhibition of the donor's collection, in which a staff curator composes a catalogue and oversees a public showing of the entire collection. The museum may condition the exhibition on the donation of several choice works from the donor's collection, while refusing to accept the less desirable works that would be burdensome to maintain and house.

Museums could also bargain with a donor and allow a condition that the museum display one or several choice works permanently in a museum gallery with the donor's name prominently displayed in exchange for the sale of their less valuable gifts, or in exchange for breaking up the collection and only accepting the most coveted pieces in the donor's collection. Museums can think of many creative ways of honoring the donor while maintaining the right to deaccession, but as evidenced in the Fisk University case, museums should not accept a condition prohibiting deaccession because unforeseen financial changes in the museum could lead to costly and time consuming litigation.
In summary, museums must sometimes deaccession works of art. The public often views deaccession in a negative light because of the uncertain future of artwork sold away from the safe space of a museum and sometimes away from the public eye. Deaccession can reduce the financial burden in maintaining and storing artwork, alleviate financial strain imposed by the day-to-day operating costs of a museum, dispose of less valuable or duplicative artwork, and expand the budget for new acquisitions in accordance with a museum's growth plan.

Fisk University's attempts to share the Stieglitz Collection with Crystal Bridges exemplify the extreme measures museums must sometimes take in order to prevent closure of their galleries. Museums can avoid Fisk University-like litigation by working with donors to make them aware of the myriad consequences associated with restrictive giving and help them properly plan their donations for maximum tax benefits.

By working with donors to educate them on the real needs of a museum, enforcing strict acquisition policies, and negotiating to make the donor feel wanted without compromising the best path for the museum, museums can incorporate the potential for deaccession into their acquisition practices and alleviate some stress of the deaccession process.

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121 See Carol Vogel, *New York Public Library's Durand Painting Sold to Wal-Mart Heiress*, N.Y. Times (May 13, 2005), http://www.nytimes.com/2005/05/13/nyregion/13painting.html ("Paul LeClerc, the president of the New York Public Library, said he was 'delighted that it didn't leave the country and that it will be in an American museum,' and added, 'The fact that it will be on public display means a lot to me.'").