

AN ARM AND A VAN GOGH: SELLING ART COLLECTIONS FROM CHARITABLE CONTRIBUTIONS FOR CAPITAL GAIN IS A HIGH PRICE TO PAY

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I. INTRODUCTION

While selling an asset may be a simple balance sheet adjustment to the corporate world, selling a piece of a valuable art collection is like selling an organ on the black market to the art world. As institutions and universities struggle financially, they are forced to find creative solutions to increase their endowments. In many cases, institutions turn to selling off gifts or charitable trusts that have been donated.¹ The market for art collections is profitable because works of art perform well as long-term investments and hold their value.² This new strategy for financial wealth raises many issues. Some believe that the trustees of a university owe a fiduciary obligation to the welfare of the institution, while others believe that the obligation lies between the trustees and the community by preserving the collection.³

1. See Siobhan Morrissey, *Art of Sale*, A.B.A. J., Aug. 2008, available at http://www.abajournal.com/magazine/art_of_the_sale/.

2. See *id.* (providing examples of conflicts with charitable trusts); see also Aline Sullivan, *In a Plunging Market, Dealers Sell Art for Art’s Sake*, INT’L HERALD TRIB., Dec. 9, 1995.

3. See Morrissey, *supra* note 1.

Donors and donors' estates have struggled to enforce the charitable trusts in courts of equity.⁴

Across the country, institutions are seeking to capitalize on the sale of their donated art collections, regardless of the donor's intent.⁵ The trustees of an institution argue that the sale is a necessary part of their fiduciary duty to the furtherance of the institution's educational mission through capital projects.⁶ Opponents to these endeavors argue that the institutions have at least a moral obligation to the donor, even if there are no express restrictions on the donation.⁷ This Comment seeks to define the duties of the institutions and propose a solution that will be proactive in avoiding legal issues. Currently, there is no standard for the courts to apply. Therefore, donors may be reluctant to make charitable contributions to public institutions. Adversely, institutions may be reluctant to accept donations. This Comment proposes a national standard for such donations, in which both parties are well-informed about the necessary provisions for the creation of a charitable trust. This proposal is based on a recent history of legal disputes involving charitable trusts for art collections. Several recent conflicts demonstrate why this is a problem.

In 2007, at a small college in Virginia, trustees sought to sell off four paintings from its art collection in order to cure its financial ailment.⁸ The news from Randolph College stirred the emotions of the art world.⁹ The paintings were scheduled to be sold by Christie's for at least \$32 million.¹⁰ Students, alumni, and art donors were outraged, so they went to court to prevent the sale, arguing that the trustees had a moral obligation to maintain the collection.¹¹ The Virginia Supreme Court upheld a temporary injunction, and the plaintiffs subsequently dropped the lawsuit.¹² The first painting was sold in early 2008.¹³ During the proceedings, the college made it known that they wanted to sell off thirty-six of the pieces purchased from a trust.¹⁴ The first four pieces, however, were not a part of the trust;

4. See Reid Kress Weisbord, *Reservations About Donor Standing: Should the Law Allow Charitable Donors to Reserve the Right to Enforce a Gift Restriction?*, 42 REAL PROP. PROB. & TR. J. 245, 246-47 (2007) (discussing the donor's historical struggle with enforcing charitable gift restrictions).

5. See *id.*

6. *Id.*; see also Dodge v. Trs. of Randolph-Macon Woman's Coll., 661 S.E.2d 805, 805-10 (Va. 2008); Sue Lindsey, *Foes of Randolph College Art Sale Go to Court*, WASH. POST, Oct. 24, 2007, at C10, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/23/AR2007102302756.html>; Carl Vogel, *Eakins Masterwork Is to Be Sold to Museums*, N.Y. TIMES, Nov. 11, 2006, at B7, available at http://www.nytimes.com/2006/11/11/arts/design/11pain.html?_r=1&oref=slogin.

7. Lindsey, *supra* note 6, at C10.

8. *Id.*

9. *Id.*; see Dodge, 661 S.E.2d at 805-09.

10. Lindsay, *supra* note 6, at C10.

11. *Id.*

12. Dodge, 661 S.E.2d at 810.

13. Jori Finkel, *Whose Rules are These, Anyway?*, N.Y. TIMES, Dec. 12, 2008, § AR, at 28.

14. Lindsay, *supra* note 6, at C10.

therefore, the college argued that there should be no restrictions on the sale.¹⁵

Similarly, in Philadelphia, the board of Thomas Jefferson University voted to sell a painting for \$68 million to be shared between Crystal Bridges Museum and the National Gallery of Art.¹⁶ The University was aware that there would be resistance in the community and allowed local museums and institutions to match the \$68 million offer.¹⁷ In 1878, the alumni of the University donated \$200 so that the University could buy the painting for the medical school.¹⁸ The sale of this great American painting, Thomas Eakins' *The Gross Clinic*, would provide funding for a new campus building.¹⁹

At Fisk University in Tennessee, the board announced that it would sell two pieces from its Alfred Stieglitz collection, worth a total value of \$17 million.²⁰ This collection was donated by Stieglitz's wife, Georgia O'Keeffe.²¹ After the announcement of the sale, O'Keeffe's estate intervened, claiming that O'Keeffe intended for the collection to remain intact.²² In the end, the parties settled on an art-sharing arrangement worth \$30 million to the University.²³

Governor Chet Culver of Iowa weighed in on a similar matter.²⁴ The University of Iowa began to assess the monetary value of its Jackson Pollock painting *Mural*.²⁵ Governor Culver viewed the painting as a treasure belonging to the public and the state; therefore, he believed that it should be preserved for future generations.²⁶ Culver believed that the University should exhaust all options before selling off the "irreplaceable assets."²⁷

Courts have not made a straightforward declaration on the issue because there are so many aspects in each case. In the *Fisk* case, the collection was originally purchased with funds from a trust, bequeathed by a former professor.²⁸ In some cases, there are express restrictions from the

15. *Id.*

16. Vogel, *supra* note 6, at B7.

17. *Id.*

18. *Id.*

19. *Id.*

20. See Morrissey, *supra* note 1.

21. *Id.*

22. *Id.*

23. *Id.*

24. Tyler Green, Modern Art Notes, Aug. 13, 2008, http://www.artsjournal.com/man/2008/08/iowa_governor_the_pollock_shou.html.

25. *Id.*

26. *Id.*

27. *Id.*

28. See Morrissey, *supra* note 1.

donor, and in others, art lovers argue that there is an implied fiduciary obligation to the donor.²⁹

A solution to this situation rests on many issues. First of all, the art collection would have to fall under the category of a charitable trust, not a private trust. In a private trust, there is an “ascertainable beneficiary . . . with an economic incentive to enforce the trustee’s fiduciary duties.”³⁰ Enforcement of a private trust is more certain so less conflict arises.³¹ The boundaries are clear, and the only purpose is for the benefit of the beneficiary.³²

Two issues cause a charitable trust to be substantially more difficult to enforce. A charitable trust has no ascertainable beneficiary, even if some individuals benefit from the trust, for example through scholarships or grants.³³ “The human beings who are favorably affected by the execution of the trust are merely the media through whom the social advantages flow to the public.”³⁴ Enforcement of the charitable trust has traditionally fallen to the state’s attorney general.³⁵ The state attorney general serves as a surrogate, not a replacement, for those involved in the trust.³⁶

Also, “the case for disregarding the donor’s preference in the face of a contrary public policy is stronger in a charitable trust than in other donative contexts such as a private trust because a charitable trust is in effect subsidized by state and federal tax exemptions.”³⁷ Therefore, the charitable trusts are more difficult to enforce as circumstances change, as the donor’s intent has “undesirable social welfare consequences,” and when a legal conflict arises.³⁸

“In the case of an entity having no owners and established for the benefit of indefinite beneficiaries, who is the principal on whom the law can rely to monitor the agents and enforce the charitable purposes?”³⁹ This Comment is directed at that particular legal gray area where the donor’s intent conflicts with public policy. This Comment looks specifically at charitable trusts and gifts left for public institutions. This Comment will exhaust all options for both a donor and a public institution as it attempts to

29. See *Dodge v. Trs. of Randolph-Macon Woman’s Coll.*, 661 S.E.2d 805, 805-07 (Va. 2008); see also *Lindsey*, *supra* note 6, at C10; *Morrissey*, *supra* note 1; *Vogel*, *supra* note 6 at B7.

30. Jonathan Klick and Robert H. Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey’s Kiss-Off*, 108 COLUM. L. REV. 749, 780 (2008).

31. *Id.* at 780-81.

32. *Id.*

33. *Id.*

34. Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400, 1431 (1998) (quoting George Gleason Bogert, *Proposed Legislation Regarding State Supervision of Charities*, 52 MICH. L. REV. 633, 633 (1954)).

35. *In re Boston Reg’l Med. Ctr., Inc.*, 328 F. Supp. 2d 130, 147 (Mass. Dist. Ct. 2004).

36. *Id.*

37. Klick & Sitkoff, *supra* note 30, at 824.

38. *Id.* at 823.

39. Brody, *supra* note 34, at 1429.

determine when it is appropriate for an entity to sell an art asset for a non-art purpose and whether or not this is self-dealing. The main issues involve balancing the institution's interests with those of the community and the donor and determining when an institution may legally deviate or terminate a charitable trust. Part II begins with a basic discussion of gifts, charitable trusts, and donor's intent. The section will also discuss how these affect the later sale of the art asset.

Part III of this Comment examines the fiduciary obligations that a board of trustees owes to the institution and to the donor. Part III includes a discussion of (i) donor's intent with and without express restrictions; (ii) whether there must be a written no-sale provision; and (iii) whether or not a donor should be allowed to restrict a donation.

Part IV focuses on (i) the cy pres doctrine and deviation statutes; (ii) how these regulations can be applied to donations; and (iii) when the courts have the power to depart from the intentions of the donor. Part V creates a proposal for national clarity in dealing with charitable trusts. This section will include recommendations for potential donors and institutions. Ultimately, this Comment will demonstrate that the sale of an art asset for a financial gain requires an examination of obligations to both the institution and the donor, and this Comment will propose that donations of art collections should be preserved unless the institution's risk of failure rests upon the sale and all other options have been exhausted.

II. DONATIONS AND THE IMPACT OF THE DONOR'S INTENT

A. Gifts

The transfer of tangible property constitutes a gift when it stems from "detached and disinterested generosity out of affection, respect, admiration, charity, or like impulses."⁴⁰ In the issues at hand, the art collections either meet the criteria for a gift or a charitable trust. Under both, the obligations of the institution seem to fall upon donor's intent. A mere gift does not create a fiduciary duty, but in particular cases where a donor expresses "a suggestion or wish that the transferee should 'apply the property to charitable purposes,'" it is left up to the transferee to comply with the suggestion or wish if he desires to do so.⁴¹

[However, w]here property is given to a charitable corporation without restrictions as to the disposition of the property, the corporation is under a duty, enforceable at the suit of the Attorney General, not to divert the

40. *Comm'r v. Duberstein*, 363 U.S. 278, 285 (1960) (citing *Comm'r v. LoBue*, 351 U.S. 243, 246 (1956) and *Robertson v. United States*, 343 U.S. 711, 714 (1952)).

41. *In re Parkview Hosp.*, 211 B.R. 619, 631 (Bankr. N.D. Ohio 1997).

property to other purposes but to apply it to one or more of the charitable purposes for which it is organized.⁴²

B. Charitable Trusts

Charitable trusts are difficult to enforce in courts of equity because they do not have ascertainable beneficiaries, unlike the private trusts.⁴³ Traditionally, no party other than the state's attorney general may bring suit to enforce the terms of the trust.⁴⁴ This power given to state attorneys general across the nation is based on the idea that only they can properly represent the public interest.⁴⁵ However, this theory, has fallen short in recent legal battles over charitable trusts because "state attorneys general almost universally lack sufficient resources to effectively oversee and enforce charitable gifts."⁴⁶ Across the United States, enforcement of these charitable trusts is in disarray. Each state handles the enforcement and the state attorney general's role differently.⁴⁷ This subsection will examine those differences that create conflict in the settling of charitable trusts.

The definition of a charitable trust differs from state to state, although many states use statutory language similar to the Restatement of Trusts, defining a charitable trust as "a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose."⁴⁸ In *Dodge*, the court determined that the college was not subject to the Uniform Trust Code and did not confer any fiduciary duties upon the institution.⁴⁹ Therefore, the state attorney general did not have control over the matter.⁵⁰ However, the court did not consider other doctrines, such as *cy pres*, because the plaintiffs failed to raise any further arguments.⁵¹ The *cy pres* doctrine is defined as follows:

42. *Id.* at 634-35.

43. *See* Klick & Sitkoff, *supra* note 30, at 780-81.

44. Weisbord, *supra* note 4, at 247.

45. *Id.*

46. *Id.*

47. *See* Klick & Sitkoff, *supra* note 30, at 780-81.

48. *In re Parkview Hosp.*, 211 B.R. 619, 619 (Bankr. N.D. Ohio 1997); *see also In re Kiernat*, 671 N.W.2d 887, 887 (Minn. 2006). The court found that Kiernat, an attorney, committed professional misconduct for failing in his fiduciary capacity and misappropriating trust funds. *See id.*; *see also Brown v. Concerned Citizens for Sickle Cell Anemia, Inc.*, 382 N.E.2d 1155, 1156 (Ohio 1978). The state attorney general in Ohio brought an action for the enforcement of a charitable trust because the defendant had a fiduciary duty to "employ the net proceeds solely for the benefit of the appropriately designated charities." *Id.*; *see* RESTATEMENT (SECOND) OF TRUSTS § 348 (1959) (defining a charitable trust).

49. *See* Lindsey, *supra* note 6, at C10.

50. *Dodge v. Trs. of Randolph-Macon Woman's Coll.*, 661 S.E.2d 805, 805-10 (Va. 2008).

51. *See id.*

If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out that particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.⁵²

Courts will typically begin an investigation of a charitable trust by first looking for a no-sale provision within the trust agreement.⁵³ The more difficult issue comes when there are no written terms, and it is up to the donor or the donor's estate to argue an implied agreement not to sell the collections.⁵⁴ Although court decisions have not generally fallen in favor of the donor, donors do have a few grounds to stand upon. Some states have the cy pres doctrine, defined above, and deviation statutes, which are discussed in a later section.⁵⁵

An express creation of a trust requires five elements: (1) intent to create a trust; (2) trust property; (3) a beneficiary; (4) a trustee; and (5) implied or express duties imposed upon the trustee.⁵⁶ Without these elements, the state attorney general lacks standing to enforce a charitable trust. In the *Cronic* case, the Georgia Supreme Court held that the testatrix's gifts to private cemeteries were "outright bequests of specific funds to private organizations, not gifts in trust for an over-arching charitable purpose" because a trustee was not evident and no active duties were imposed upon a trustee.⁵⁷

However, a trust may be implied, however, without the express usage of the words trust or trustee.⁵⁸ This makes the determination of an institution's ability to deviate from the trust vague and subjective. While some argue that trustees of an institution owe a fiduciary duty to the donor, legal reinforcement is currently lacking—except to look at the donor's intent when a written charitable trust does not exist.⁵⁹ Therefore, the type of gift will therefore affect the institution's ability to deviate from the donor's intent.

52. *First Nat'l Bank of Chicago v. Elliot*, 92 N.E.2d 66, 73 (Ill. 1950) (adopting the definition given in the Second Restatement of the Law of Trusts); *see also* *Cnty. Unit Sch. Dist. No. 4. v. Booth*, 116 N.E.2d 161, 168 (Ill. 1953); RESTATEMENT (SECOND) OF TRUSTS § 348 (1959).

53. *See In re Parkview Hosp.*, 211 B.R. 619, 629-33 (Bankr. N.D. Ohio 1997).

54. *Id.*

55. *See* discussion *infra* Part IV.A-B.

56. *Cronic v. Baker*, 667 S.E.2d 363, 365-66 (Ga. 2008).

57. *Id.*

58. *Id.*

59. *See supra* text accompanying note 2.

While many states have slightly different definitions of a charitable trust, the generally accepted definition comes from the Restatement of Trusts.⁶⁰ For example, in Ohio, a charitable trust is defined as follows:

[A]ny fiduciary relationship with respect to property arising under the law of this state or of another jurisdiction as a result of a manifestation of intention to create it, and subjecting the person by whom the property is held to fiduciary duties to deal with property within this state for any charitable, religious or educational purpose.⁶¹

Other states maintain a similar standard. In Minnesota, a charitable trust is defined as “a fiduciary relationship with respect to property that arises as a result of a manifestation of an intention to create it and that subjects the holder of the property to an equitable responsibility to manage the property for a charitable purpose.”⁶²

In New York, the intent to establish a charitable trust must be “clear and unequivocal.”⁶³ A lack of express provisions in a trust agreement will definitely hurt the donor and the donor’s estate in bringing a claim. The estate will need to somehow establish that the intent of the donor was to create a trust through the donation of the art collection, intending for the collection to remain intact within the institution.⁶⁴

In Massachusetts, the determination of a charitable trust is based on whether the class of beneficiaries is “sufficiently large and indefinite to make the gift of common and public benefit.”⁶⁵ This suggests that some trusts will appear to be charitable but are not because some sort of restriction has been placed on the beneficiaries.⁶⁶ One example of a trust that will not be established as a charitable trust in most states is a scholarship trust that is restricted to the donor’s descendants.⁶⁷ The beneficiaries are not indefinite and unnamed.⁶⁸

Iowa’s statute provides that a charitable trust may be created for any purpose “beneficial to the community,” adhering to the definition in the First Restatement of Trusts, which defines “charitable purposes [to] include

60. See *supra* text accompanying note 48. The Restatement defines a charitable trust as “a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose.” RESTATEMENT (SECOND) OF TRUSTS § 348 (1959).

61. *Brown v. Concerned Citizens for Sickle Cell Anemia, Inc.*, 382 N.E.2d 1155, 1158 (Ohio 1978).

62. *State by Humphrey v. Delano Cmty. Dev. Corp.*, 571 N.W.2d 233, 241 (Minn. 1997).

63. *United States v. Sun Myung Moon*, 718 F.2d 1210, 1224 (N.Y. 1983).

64. See *id.*

65. *Holly C. Meyer & Hon. Spender M. Kagan, Fiduciary Litigation in the Probate Court: Cy Pres and Deviation*, MASS. CONTINUING LEGAL EDUC., INC. § 14.2.2 (2006) (citing *Worcester County Trust Co. v. Grant Knight of the Knights of Columbus*, 325 Mass. 748, 753 (1950)).

66. See *id.*

67. See *id.*

68. *Id.*

... governmental or municipal purposes [and] other purposes [that are] beneficial to the community.”⁶⁹ The *Kolb* case uses the example of a trust established to support a city flower garden, suggesting that this would qualify as a charitable trust.⁷⁰

All of the preceding examples share the common thread that each state’s standard for a charitable trust is highly subjective, with the different holdings hinging on a loose definition of charitable purpose.

The creation of a trust establishes a fiduciary duty between the donor and the trustee as a matter of law.⁷¹ In determining whether or not there is a breach of this fiduciary duty, courts will first look to see if there are express terms in the trust agreement—perhaps a no-sale provision.⁷² To create a charitable trust, however, the words trust or trustee do not have to necessarily be used.⁷³ No particular words or conduct are required for manifestation of an intention to create a charitable trust.⁷⁴

In *Carver*, the court held that, although the express language fulfilled the necessary elements to create a charitable trust, the attempt failed because the terms were too vague and made the trust impossible to carry out.⁷⁵ The elements the court in *Carver* considered included (1) sufficient words to prove intent; (2) a definite subject; and (3) an ascertained subject.⁷⁶

In *In re Parkview Hospital*, the bankruptcy court of Ohio held that the state attorney general presented clear and convincing evidence that the trust held by the hospital was a charitable trust.⁷⁷

On the other hand, in *Gordon v. City of Baltimore*, the court declined to acknowledge that a library collection, given by philanthropist George Peabody with the purpose of “the improvement of the moral and intellectual culture of the inhabitants of Baltimore, and collaterally to those of the State; and, also, towards the enlargement and diffusion of a taste for the Fine Arts,” constituted a charitable trust.⁷⁸ The city of Baltimore sought to enjoin the Peabody Library from transferring its collection.⁷⁹ The court refused to recognize that this case involved a charitable trust because

69. IOWA CODE ANN. § 633A.5101(1) (West 2007); RESTATEMENT (FIRST) OF TRUSTS § 368 (1935).

70. *Kolb v. City of Storm Lake*, 736 N.W.2d 546, 552 (Iowa 2007).

71. *See In re Charles M. Bair Family Trust*, 183 P.3d 61, 72-73 (Mont. 2008).

72. *See id.*

73. *See In re Parkview Hosp.*, 211 B.R. 619, 630 (Bankr. N.D. Ohio 1997).

74. *See id.*

75. *See Carver v. Carver*, No. COA07-263, 2008 WL 132007, at *2 (N.C. App. Jan. 15, 2008);.

76. *See id.*

77. *In re Parkview Hosp.*, 211 B.R. at 630.

78. *Gordon v. City of Baltimore*, 267 A.2d 98, 100 (Md. 1970) (quoting a letter from Peabody to his trustees).

79. *See id.*

preceding cases generally held that such bequests were invalid for lack of definite beneficiaries.⁸⁰ Furthermore, the court held the following:

[W]hen a gift is made to a charitable corporation, even though it be made for a particular purpose, no condition subsequent will be implied should it prove impossible or impractical for the donee to perform the donor's condition, unless there is a clear expression of the grantor's intention that there will be a gift over on default.⁸¹

Unless the language of the instrument indicates that the property is to revert to the estate of the owner, "the instrument does not operate as a restraint on alienation of the property but merely expresses the grantor's confidence that the grantee will use the property so far as may be reasonable and practicable to effect the purpose of the grant."⁸² The intent must prove to be stronger than an expression of intent to create a moral obligation in order for the charitable trust to stand in court.⁸³ Language must be construed as an imperative direction, not simply an expression of desire, hope, or recommendation.⁸⁴

Courts use multiple considerations in determining the settlor's intent such as the following:

- (1) The imperative or precatory character of the words used;
- (2) [T]he definiteness or indefiniteness of property;
- (3) [T]he definiteness or indefiniteness of the beneficiaries or of the extent of their interest;
- (4) [T]he relations between the parties;
- (5) [T]he financial situations of the parties;
- (6) [T]he motives which may reasonably be supposed to have influenced the settlor in making the disposition; [and]
- (7) [W]hether the result reached by construing the transaction as a trust or not a trust would be such as a person in the situation of the settlor would naturally desire to produce.⁸⁵

Based on the previous examples, courts across the nation are inconsistent with determinations of charitable trusts. In *In re Small's Estate*, there was an issue with regard to construction of trust provisions in

80. See *id.*

81. *Id.* at 109-10.

82. *Id.* at 110.

83. See *Walton v. City of Red Bluff*, 3 Cal. Rptr. 2d 275, 280 (Cal. Ct. App. 1991); see also *In re Faber's Will*, 141 N.W.2d 554, 558 (Iowa 1966).

84. See *Walton*, 3 Cal. Rptr. 2d at 280.

85. See *First Nat'l Bank of Mansfield v. Galion Cmty. Hosp.*, No. 3-77-8, 1978 WL 215794, at *3 (Ohio Ct. App. May 11, 1978) (citing RESTATEMENT (SECOND) OF TRUSTS § 25 cmt. b (1959)); see also *In re Faber's Will*, 141 N.W.2d 554, 558 (Iowa 1966).

a will that directed trustees to distribute the funds from the trust “to such persons and for such purposes as they might feel was directed by God the Father, Jesus Christ the Son and Holy Spirit, and as they believed would be acceptable to the testator and meet his approval if he were able to give it”⁸⁶

The Iowa Supreme Court held that this constituted a public charitable trust.⁸⁷ This was a broad interpretation, ignoring the petitioners who argued that the decision would require an “excursion into a metaphysical field” that should be beyond the boundaries of the courtroom.⁸⁸ This broad spectrum of interpretation, from New York to Iowa, has only caused more confusion in the enforcement of charitable trusts and the ability of an institution to sell an art asset for capital gain. Evelyn Brody’s question still stands as follows: “In the case of an entity having no owners and established for the benefit of indefinite beneficiaries, who is the principal on whom the law can rely to monitor the agents and enforce the charitable purposes?”⁸⁹ Also, where do the fiduciary obligations come into play?

III. FIDUCIARY OBLIGATIONS

A. *Fiduciary Obligations Generally*

After the institutions’ recent attempts to sell art assets, members of the community felt that the trustees owed an obligation to honor the donor’s intent. However, only a solid charitable trust will create this fiduciary duty. A solution to the issue of discretion in selling these donations may rest in the establishment of this fiduciary duty. Do these donations create a fiduciary duty on the part of the institution to keep the art collection intact? As an analogy, this Comment will refer to other contexts for an examination of the fiduciary duties.

In regard to a fiduciary duty in the religious context, “[w]here a religious society raises a fund by subscription for a particular purpose, it cannot divert the funds to another purpose, and if it abandons such purpose, the donors may reclaim their contributions.”⁹⁰ Furthermore, the court in *Avery v. Baker* held that a church could not sell a building built from donations and retain the monetary benefits.⁹¹ This would be an abuse of a

86. *In re Small’s Estate*, 58 N.W.2d 477, 477 (Iowa 1953).

87. *See Id.*

88. *Id.* at 482.

89. Brody, *supra* note 34, at 1429.

90. *Columbus Cmty. Hosp., Inc. v. Califano*, 614 F.2d 181, 187 (8th Cir. 1980) (quoting *Barker v. Wardens & Vestrymen of St. Barnabas Church*, 126 N.W.2d 170, 177 (1964)); *see also Avery v. Baker*, 43 N.W. 174, 176-77 (Neb. 1889). After donors contributed money for a church to be built, the church could not be converted into a building for another purpose without the consent of the donors. *See Columbus Cmty. Hosp.*, 614 F.2d at 187.

91. *See Avery*, 43 N.W. at 176-77.

donation and it is not allowed.⁹² Should a public institution, such as a university and its academic society, be held to the same standard as the church and its religious society?

There should be an overarching standard to avoid subjective determinations of charitable trusts from state to state. Michigan has a statute that imposes a fiduciary duty upon a trustee in which a trustee must meet the standard of a reasonably prudent person when caring for the property held in trust.⁹³ Specifically, the statute states that “[i]f the trustee has special skills or is named trustee on the basis of representation of special skills or expertise, the trustee is under a duty to use those skills.”⁹⁴ Michigan courts further adhere to the “prudent investor rule,” which implies that a fiduciary trustee is not liable “to the extent that the fiduciary acted in reasonable reliance on the provisions of the governing instrument.”⁹⁵ The true challenge comes when there is no governing instrument.

B. Fiduciary Relationships in Implied Charitable Trust

Courts are reluctant to create a fiduciary obligation for the trustee when there is no clear directive or obligation.⁹⁶ When there is no guidance as to the trustor’s intent, the court may infer that the trustee has complete discretion as to the property’s use.⁹⁷ If examination by the court finds only that the language surrounding a trust is precatory, meaning that the language expresses merely a wish or a recommendation, then the language creates, at most, an ethical obligation—not a legal obligation.⁹⁸

As previously mentioned, a charitable trust may sometimes be implied, which is often referred to as a constructive trust. For example, in South Dakota, the state attorney general argued that a donation from the community to a local health care system created a constructive trust “over that donation that inured to the exclusive benefit of the local community . . . even for uses that are consistent with [the hospital’s] overall charitable mission.”⁹⁹ The state attorney general further argued that this donation created a fiduciary relationship between the hospital and the community.¹⁰⁰

92. *See id.*

93. *See* MICH. COMP. LAWS ANN. § 700.7302 (West 2000); MICH. COMP. LAWS ANN. § 700.1502 (West 2000); *In re Wege Trust*, No. 271244, 2008 WL 2439904, at *4-5 (Mich. Ct. App. June 17, 2008).

94. § 700.7302.

95. *Id.*; § 700.1502.

96. *In re Charles M. Bair Family Trust*, 183 P.3d 61, 70 (Mont. 2008) (quoting *In re Bolinger*, 943 P.2d 981, 986 (Mont. 1997)).

97. *See id.*

98. *See id.*

99. Harold L. Kaplan et al., *The “Charitable Trust” Doctrine: Lessons and Aftermath of Banner Health*, 23 AM. BANKR. INST. J. 28, 28 (2004); *see* *Banner Health Sys. v. Long*, 663 N.W.2d 242, 242 (S.D. 2003).

100. Kaplan et al., *supra* note 99, at 29.

The court, however, saw it differently.¹⁰¹ Because the court found no relationship between the hospital and the community, the court denied the existence of a charitable trust.¹⁰² “The decision is significant because it squarely addresses and rejects the notion that gifts and donations to a nonprofit corporation somehow impose fiduciary—or trustee-like—obligations on the non-profit corporation that receives them.”¹⁰³

In South Dakota, the only way for a charitable trust to be implied is to satisfy the following basic elements of a trust: “property, a charitable purpose, indefinite beneficiaries, a trustee and a distinction between the equitable estate, which inures to the benefit of the beneficiaries and the legal estate, which is held by the trustee.”¹⁰⁴ The court refused to accept the “position that an automatic implied charitable trust arises whenever the purpose of the donation is narrower than the purpose of the receiving corporation,” although the Supreme Court of South Dakota did acknowledge that certain legal theories would subject a nonprofit corporation to an implied charitable trust.¹⁰⁵ In the cases of the donated art collections, the existence of an implied trust is questionable with the patchwork of standards from state to state.¹⁰⁶ The cy pres doctrine and deviation statutes further complicate the issue.

IV. CY PRES DOCTRINE AND DEVIATION

A. *Cy Pres Doctrine*

Even when an express charitable trust does exist, a court may still change the purpose of the trust if a state statute allows. The same rules would apply to an implied or constructive trust. The cy pres doctrine is derived from the French expression “cy pres comme possible,” which translates roughly into “as close as possible.”¹⁰⁷ In Iowa, the doctrine is defined as follows:

Unless the terms of the trust provide to the contrary the following apply:

1. A charitable trust does not fail, in whole or in part, if a particular purpose for which the trust was created becomes impracticable, unlawful, or impossible to fulfill.
2. If a particular charitable purpose for which a trust was created becomes impracticable, unlawful, or impossible to fulfill, the court

101. *See id.*

102. *See id.*

103. *Id.*

104. *Banner Health Sys. v. Long*, 663 N.W.2d 242, 247 (S.D. 2003).

105. *See id.* at 249.

106. *See discussion supra* Part II.B.

107. *Kolb v. City of Storm Lake*, 736 N.W.2d 546, 552 (Iowa 2007).

may modify the terms of the trust or direct that the property of the trust be distributed in whole or in part in a manner best meeting the settlor's general charitable purposes. If an administrative provision of a charitable trust becomes impracticable, unlawful, impossible to fulfill, or otherwise impairs the effective administration of the trust, the court may modify the provision.¹⁰⁸

The policy behind the doctrine is to prevent a charitable contribution from failing against the intent of the settlor, and the determination by the court should be as close to the donor's intent as possible.¹⁰⁹ Courts favor charitable trusts because of the general charitable intent manifested by the donor.¹¹⁰ The application of cy pres requires that the donor manifested general charitable intent that extends beyond the original intended purpose of the trust that has failed.¹¹¹ In Massachusetts, manifested general charitable intent is not hard to find.¹¹² As public policy, the courts in Massachusetts will find general charitable intent even without an express statement, so long as nothing in the instrument negates the general intent.¹¹³

Also, a court has a greater propensity to apply the cy pres doctrine if the trust has existed for a long time prior to its failure as opposed to a trust that failed at creation.¹¹⁴ The reason for this is that a trust that has existed for years and years has stronger proof of the settlor's intent and there is less reason to believe that the settlor would not want to continue under the necessary modification.¹¹⁵

As previously discussed, the cy pres doctrine allows courts to find that the purpose of a trust has become impossible, impracticable, or illegal if the trust meets a three part test.¹¹⁶ First, the issue must involve a charitable trust—not a private trust.¹¹⁷ Second, the purpose of the trust must be illegal, impracticable, or impossible.¹¹⁸ Finally, there must be evidence of a general charitable intention by the donor.¹¹⁹ The trust will be terminated or altered because its purpose can no longer be served if these three

108. *Id.* at 554. Part II of this statutory provision refers to the doctrine of deviation, which deals specifically with the administration of the trust and is discussed in the next section. See discussion *infra* Part IV.B.

109. See *Kolb*, 736 N.W.2d at 552.

110. See *id.* at 559; see also Meyer, *supra* note 65.

111. See Meyer, *supra* note 65.

112. See *id.*

113. See Meyer & Kagan, *supra* note 65, at § 14.2.2.

114. See *Kolb*, 736 N.W.2d at 559.

115. See *id.*

116. See *id.* at 555.

117. See *id.*

118. See *id.*

119. See *id.*

requirements are satisfied.¹²⁰ North Carolina adds wastefulness to the list of conditions for determining when the cy pres doctrine may be applied to a charitable trust.¹²¹ Cy pres statutes differ among states, but the doctrine may be used to terminate or deviate from the donor's intentions concerning the charitable contribution.¹²²

Delaware and New Jersey further modify the basic definition of cy pres by specifically stating that courts may apply the doctrine if the trust would no longer serve any religious, charitable, scientific, literary, educational, or non-charitable purpose.¹²³ The court may direct the property in "a manner consistent with the trustor's charitable or non-charitable purposes, whether or not such purposes be specific or general."¹²⁴

North Carolina's statute provides that when a charitable trust fails for the reason of an inability to carry it out, the cy pres doctrine may only be applied to terminate or alter the trust when the settlor has not provided for an alternative plan that does, in fact, establish a charitable trust on its own.¹²⁵ If the alternative plan fails in its attempt to establish a charitable trust, then the intention shown in the original plan will prevail.¹²⁶ If there is no alternative plan, then the court has the power to terminate or alter the provisions of the trust.¹²⁷ This doctrine is put into effect when the original intent of the trust becomes impracticable or impossible, but some states, such as California, extend the definition to include that the property should be put to the "next best use," in accord with the dominant charitable purposes of the donor."¹²⁸

A donor or a donor's estate must not assume that the court will take this doctrine into consideration.¹²⁹ The plaintiff must make a claim under the cy pres doctrine as part of their brief.¹³⁰ "In charitable trusts, 'there is

120. See *First Nat'l Bank of Chicago v. Elliot*, 92 N.E.2d 66, 73 (Ill. 1950) (adopting the definition given in the Restatement of the Law of Trusts); see also *Cnty. Unit Sch. Dist. No. 4. v. Booth*, 116 N.E.2d 161, 168 (Ill. 1953); RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

121. *Turner v. Hammocks Beach Corp.*, 664 S.E.2d 634, 648 (N.C. Ct. App. 2008) (Tyson, J., dissenting).

122. See *Carver v. Carver*, No. COA07-263, 2008 WL 132007, at *2 (N.C. App. Jan. 15, 2008); see generally *Haupt v. Canton Museum of Art*, No. 2007CA00013, 2007 WL 3171218, at *6 (Ohio Ct. App. Oct. 29, 2007).

123. DEL. CODE ANN. tit. 12, § 3541 (2008); *PNC Bank v. N.J. State Soc'y for Prevention of Cruelty to Animals*, No. TUW: FRAFBADDEOS, 2008 WL 2891150, at *7 (Del. Ch. July 14, 2008) (explaining that an application of the law would result in the same conclusion under Delaware or New Jersey law).

124. *PNC Bank*, 2008 WL 2891150, at *7.

125. See N.C. GEN. STAT. § 36C-4-413(d) (2007); *Carver*, 2008 WL 132007, at *2.

126. See *Carver*, 2008 WL 132007, at *2.

127. See *id.*

128. *Cundiff v. Verizon Cal., Inc.*, 167 Cal. App. 4th 718, 729 (Cal. Ct. App. 2008).

129. See *Dodge v. Trs. of Randolph-Macon Woman's Coll.*, 661 S.E.2d 805, 807 (Va. 2008).

130. See *id.*

greater occasion for the exercise of the power of the court to permit or direct a deviation from the terms of the trust” due to the cy pres doctrine.¹³¹

B. Doctrine of Deviation

The doctrine of deviation allows for a departure from terms of the trust if the administration is impossible or illegal.¹³² The doctrine of deviation is different from the doctrine of cy pres.¹³³ Deviation statutes may be applied to both charitable and private trusts.¹³⁴ Deviation statutes are concerned solely with the administration of the trust.¹³⁵ “In applying the doctrine of deviation, a court cannot change the original charitable objective of the settlor or divert the bequest to an entity with a charitable purpose different from the purpose set forth in the trust instrument.”¹³⁶

For this doctrine to apply, the document creating the trust must explicitly state the terms of administration.¹³⁷ A further use of this doctrine is allowed “if owing to circumstances not known to the testator and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust.”¹³⁸ In *PNC Bank*, the will provided for an alternate beneficiary under certain circumstances; therefore, the intent of the charitable trust had not been frustrated.¹³⁹

Texas has a deviation statute that allows trustees either to deviate from the terms of the trust or to terminate the trust upon showing of the following:

- (1) [T]he purposes of the trust have been fulfilled or have become illegal or impossible to fulfill;
- (2) [B]ecause of circumstances not known to or anticipated by the settlor, the order will further the purposes of the trust; [and]

131. *Alpert v. Riley*, 274 S.W.3d 277, 289 (Tex. App.—Houston [1st Dist.] 2008, pet. filed) (quoting *Coffee v. William Marsh Univ.*, 408 S.W.2d 269, 284 (Tex. Civ. App.—Houston 1966, writ ref’d n.r.e.)).

132. *See PNC Bank v. N.J. State Soc’y for Prevention of Cruelty to Animals*, No. TUW: FRAFBAD EOS, 2008 WL 2891150, at *7 (Del. Ch. July 14, 2008).

133. *See Haupt v. Canton Museum of Art*, No. 2007CA00013, 2007 WL 3171218, at *6 (Ohio Ct. App. Oct. 29, 2007).

134. *See id.*

135. *See id.*

136. *Id.* (citing *Daloia v. Franciscan Health Sys. of Cent. Ohio, Inc.*, 679 N.E.2d 1084, 1091 (Ohio 1997)).

137. *See PNC Bank*, 2008 WL 2891150, at *7.

138. *Id.* (quoting *Univ. of Del. v. Warrington*, No. 12440, slip op. at 6 (Del. Ch. June 9, 1993)).

139. *See id.*

- (3) [M]odification of administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or avoid impairment of the trust's administration¹⁴⁰

A court may only order modification of trust terms on the petition of a trustee or beneficiary.¹⁴¹ However, the trial court has broad discretion to act under the statutory provision allowing for judicial modification of provisions in a trust.¹⁴²

Whether it is the donor's intent or the administration of the trust that is challenged by either the doctrine of cy pres or deviation, there is a need for proactive negotiations at the outset of the donation so that courts and state attorneys general are not left to defend and speculate on the donor's intent.¹⁴³ The donor should anticipate that the institution may sell off the collection at a distant point in the future, and the donor should also understand the consequences in any given state when the trust becomes impracticable or impossible to fulfill.¹⁴⁴

V. PROPOSAL FOR CLARITY

Substantial donations are complex contractual matters—or at least they should be. A donation with no conditions or reservations, failing to take into account future changes in either the trust itself or in the institution's financial situation, will undoubtedly lead to conflict, litigation, or both.¹⁴⁵ It seems that many generous donors give substantial gifts or donations to institutions of their choice while unaware of impending future litigation.¹⁴⁶ Of course, the determination of charitable trusts and the donor's ability to show standing in courts of equity will depend on each individual situation. The situations vary because of differing state laws regarding the state attorney general's powers and the patchwork of the cy pres and the deviation doctrines.¹⁴⁷

140. *Alpert v. Riley*, 274 S.W.3d 277, 290 (Tex. App.—Houston [1st Dist.] 2008, pet. filed) (quoting TEX. PROP. CODE ANN. § 112.054 (Vernon 2007)).

141. *See* TEX. PROP. CODE ANN. § 112.054.

142. *See* *Conte v. Ditta*, No. 01-05-00603-CV, 2007 WL 2519466, at *7 (Tex. App.—Houston [1st Dist.] 2007, pet. filed).

143. *See* *Weisbord*, *supra* note 4, at 247.

144. *See id.* at 292.

145. *See* *Dodge v. Trs. of Randolph-Macon Woman's Coll.*, 661 S.E.2d 805, 807-09 (Va. 2008); *see also* *Vogel*, *supra* note 29.

146. *See* *Dodge*, 661 S.E.2d at 807-09; *see also* *Vogel*, *supra* note 29.

147. *See, e.g.,* *Kolb v. City of Storm Lake*, 736 N.W.2d 546, 554 (Iowa 2007) (citing IOWA CODE § 633A.5102 (2007)); *see also* discussion *supra* Part IV.B (citing *Haupt v. Canton Museum of Art*, No. 2007CA00013, 2007 WL 3171218, at *6 (Ohio Ct. App. Oct. 29, 2007) (referencing *Daloia v. Franciscan Health Sys. of Cent. Ohio, Inc.*, 679 N.E.2d 1084, 1091 (Ohio 1997))).

147. *See* *PNC Bank v. N.J. State Soc'y for Prevention of Cruelty to Animals*, No. TUW: FRAFBAD EOS, 2008 WL 2891150, at *7 (Del. Ch. July 14, 2008).

Also, the courts' ability to find an implied charitable trust adds to the mixture. Courts, thus far, have not set a sound precedent for how to deal with a public institution's attempt to sell off an art collection or other assets.¹⁴⁸ The preceding cases, of course, are open to the courts' interpretation, applying the appropriate doctrines of cy pres and deviation when necessary and required by state law.¹⁴⁹

Randolph College settled before the court could make a decision because the donor's intent was vague. After reviewing several states' statutes defining a charitable trust, it appears that courts prefer a broad level of discretion in the interpretation.¹⁵⁰ For example, if an Iowa court finds a charitable purpose, then it may find an implied charitable trust, so long as the property is "beneficial to the community."¹⁵¹ Then, if the court finds a charitable trust, the trustee's fiduciary obligations to the welfare of the institution come into play. At some point, the trustee's fiduciary duties to the institution will clash with the public as a beneficiary to the charitable trust.¹⁵² In order to avoid this conflict, strict ground rules should be in place. These ground rules should be proactive in preventing any confusion about the donor's intent and the institution's ability to sell the donated assets for capital gain.

A. Thoughts for the Donor

Currently, donors are unaware of the legal issues that may come with a substantial donation to a public institution.¹⁵³ The formalities to create a charitable trust are minimal.¹⁵⁴ A donor should understand exactly what he or she is signing onto with a donation or a creation of a trust.¹⁵⁵ All donors should be well-informed prior to the transaction in order to prevent legal battles down the road. When making a donation to a public institution, it is important for the donor to understand the implications of the transaction.¹⁵⁶ A donor should be aware of the sort of relationship he or she is creating.¹⁵⁷

148. See *Morrissey*, *supra* note 1.

149. See discussion *supra* Part IV.A-B.

150. See *Kolb*, 736 N.W.2d at 552.

151. *Id.* at 556. This case is a good analogy to the art collections because the beauty of the gardens is intended for aesthetic enjoyment, as are the collections; therefore, the purposes of the two donations are the same. *Id.*

152. See Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 674 (2000).

153. See sources *supra* note 29.

154. See Rob Atkinson, *Obedience as the Foundation of Fiduciary Duty*, 34 J. CORP. L. 34, 79 (2008).

155. See generally *Comm'r v. Duberstein*, 363 U.S. 278, 285 (1960) (citing *Comm'r v. LoBue*, 351 U.S. 243, 246 (1956) and *Robertson v. United States*, 343 U.S. 711, 714 (1952)).

156. See generally *Walton v. City of Red Bluff*, 3 Cal. Rptr. 2d 275, 280 (Cal. Ct. App. 1991); see also *In re Faber's Will*, 141 N.W.2d 554, 558 (Iowa 1966).

157. See *In re Charles M. Bair Family Trust*, 183 P.3d 61, 70 (Mont. 2008).

Precatory language is not enough to create a legal obligation; the language must be stronger than a mere recommendation for the purpose of a trust.¹⁵⁸

There should be a national standard or requirement that when a significant donation is given to a public institution, the institution must inform the donor to designate the donation as either a gift or a charitable trust, similar to that of museums. A museum is held to a national code of ethics, and it is only allowed to sell art in order to buy more art to add to its collection.¹⁵⁹ The Detroit Institute of Arts is clinging to its Van Goghs, even with a debt of tens of millions of dollars.¹⁶⁰ There should be a legal requirement for the terms to be written out with detailed allowances for what the trustee may do if a charitable trust is created because implied charitable trusts lend the donor's intent to too much speculation.¹⁶¹ A charitable trust should only be valid if it is in writing in order to alleviate uncertainty and misappropriated assets.

If the donor wishes to create a charitable trust and ensure that the property, specifically an art collection, be kept intact and in possession of the institution, then those intentions should be expressed in the governing instrument and signed by both the donor and trustee. The donor's intent should be expressed and unequivocal in order to avoid confusion.¹⁶²

This proposed governing instrument should impose a fiduciary duty upon the institution that will disallow it from selling or dividing the property according to the donor's wish. On the other hand, if the donor wishes to allow the institution, at its discretion, to sell the property for financial gain, then this should also be expressly mentioned in the agreement. If the donor wishes to avoid misappropriation of his assets, then the written instrument should expressly negate general charitable intent beyond the original purpose of the trust.¹⁶³ This will prevent courts from finding a manifested general charitable intent when the original purpose has been exhausted, and this will disallow the courts from reallocating the trust.¹⁶⁴ An institution should be required to make reservations for the later sale of the asset at the initial creation of the trust so that there will not be confusion in the future when the institution wants to increase its endowment or build a new building.¹⁶⁵

158. *See id.*

159. *See* Posting of Jen Graves to http://slog.thestranger.com/slog/archives/2009/01/12/when_museums_sell_their_art_t (Jan. 12, 2009, 4:57 PM); *see also* Finkel, *supra* note 13, at 28.

160. *See* Finkel, *supra* note 13, at 28.

161. *See* Kaplan, *supra* note 99.

162. *See* Morrissey, *supra* note 1; *see also* Vogel, *supra* note 6.

163. *See* Meyer & Kagan, *supra* note 65.

164. *Id.*

165. *See* Morrissey, *supra* note 1; *see also* Sullivan, *supra* note 2.

B. Thoughts for the Trustee and the Institution

Adopting a national standard of ethics would prevent further disputes regarding charitable trusts. Courts should construe donor's intent more broadly when it seems that the donor intended for the collection to remain with the institution.¹⁶⁶ If a court will construe a charitable trust out of a provision to distribute income to those with whom the trustee has been directed by God to do so, then contributions given in furtherance of educational purposes should be viewed liberally, giving courts broader discretion in finding a charitable trust.¹⁶⁷

Until there is a national standard for such donations, courts should give greater consideration to the donor's intent, examining all facets and contexts of the creation of the charitable trust. In reviewing the recommendations from the Restatement on Trusts instructing a court to look at the context surrounding the donation, courts should look closely at the financial situation of the institute.¹⁶⁸ For example, if the donation was given when the institution was in obvious financial trouble, then there may be stronger evidence that the donor's intent was to assist with the institution's financial situation by contributing an asset.¹⁶⁹ On the other hand, if the institution has a healthy endowment at the time of the donation and seeks to sell off the collection years down the road, then perhaps the donation was intended to be a charitable trust, in furtherance of an educational purpose under the model definition of a charitable trust.¹⁷⁰

If "[a] flower garden [which] enhances the beauty of its surroundings for the benefit of others who take the time to enjoy it" is determined to be held by the trustee for a charitable purpose and is therefore a charitable trust, then so should an art collection given to a university.¹⁷¹

A public institution, such as a university, should be held to the same regulations and ethical standards as museums when it comes to donations of art collections.¹⁷² Museums are required to go beyond the minimum local, state, and federal regulations because museums are held to an ethical code.¹⁷³ When conflicts of interest arise, the trustees of the museum have a

166. See *In re Small's Estate* 58 N.W.2d 477, 483 (Iowa 1953).

167. *Id.*

168. See *First Nat'l Bank of Mansfield v. Galion Cmty.*, No. 3-77-8, 1978 WL 215794, at *2-3 (Ohio Ct. App. May 11, 1978) (citing RESTATEMENT (SECOND) OF TRUSTS, § 25 cmt b (1959)); see also *In re Faber's Will*, 141 N.W.2d 554, 558 (Iowa 1966). Many states adopt the definition of a charitable trust and its elements from the Restatement of Trusts. See *id.* at *3.

169. *In re Faber's Will*, 141 N.W.2d 554, 558 (Iowa 1966).

170. See *Brown v. Concerned Citizens for Sickie Cell Anemia, Inc.*, 382 N.E.2d 1155, 1156-57 (Ohio 1978).

171. *Kolb v. City of Storm Lake*, 736 N.W.2d 546, 556 (Iowa 2007).

172. See generally Phelan, *supra* note 152, at 674 (explaining that The Code of Ethics for Museums imposes a duty of public service on the museum as a public trust).

173. See Edward J. Beckwith, *Donor Centered Philanthropy Study Materials*, A.L.I.—A.B.A. CONTINUING LEGAL EDUC.: SOPHISTICATED EST. PLANNING TECHNIQUES 73, 120 (2008).

duty of loyalty to the museum and its assets.¹⁷⁴ The staff of a museum “must ensure that no individual benefits at the expense of the museum’s mission, reputation, or the community it serves.”¹⁷⁵ A public institution should also have to “take affirmative steps to maintain their integrity so as to warrant public confidence.”¹⁷⁶ With the numerous disagreements about where these duties lie, there must be ethical standards—beyond the legal basics—that the trustees of an institution should adhere to.¹⁷⁷

Congress has declared that “the arts and the humanities belong to all the people of the United States.”¹⁷⁸ Further, “to fulfill its educational mission, achieve an orderly continuation of free society, and to provide models of excellence to the American people, the Federal Government must transmit the achievement and values of civilization from the past via the present to the future.”¹⁷⁹ An art collection is more than a business transaction, and an art collection is intended for one purpose—to be viewed by the public. Donors of art collections should consider this before they donate to an institution, and the institution should treat the art collection as more than a funding source for its future projects.

With a national standard and strict contractual regulation, the courts will have a black letter code to follow regarding charitable trusts and the enforcement of the donor’s intent. There should be an ethical code, comparable to that for museums, which holds other public institutions to a higher standard. Currently, institutions risk losing substantial donations because hesitant donors worry that their irreplaceable assets may be misappropriated in the future.¹⁸⁰

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174. *See id.*

175. *Id.*

176. Phelan, *supra* note 152, at 674 (quoting CODE OF ETHICS FOR MUSEUMS (2000)).

177. *See id.*

178. 20 U.S.C. § 951 (2007).

179. *Id.*

180. *See Morrissey, supra* note 1; *see also* Weisbord, *supra* note 4, at 246-47.