

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

FISK UNIVERSITY,)	
)	
Petitioner/Appellant,)	
)	
v.)	Appeal No. M2008-00723-COA-R3-CV
)	
GEORGIA O'KEEFE FOUNDATION)	On Appeal from Davidson County
(MUSEUM),)	Chancery Court No. 05-2994-III
)	
Defendant/Appellee,)	
)	
And)	
)	
ROBERT E. COOPER, JR., Attorney)	
General and Reporter for the State of)	
Tennessee,)	
)	
Intervening Defendant/Appellee.)	

BRIEF OF ATTORNEY GENERAL AND REPORTER

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

JANET M. KLEINFELTER
Senior Counsel

WILLIAM H. HELOU
Assistant Attorney General
Special Litigation Division
Office of Attorney General
P.O. Box 20207
Nashville, TN 37243

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF THE FACTS	3
STATEMENT OF THE CASE	10
ISSUES PRESENTED ON APPEAL	16
ARGUMENT	17
I. The Trial Court Erroneously Held That The Museum Has A Right Of Reversion In The Stieglitz Collection.....	17
A. Georgia O’Keeffe had no authority to create or retain any right of reversion under the power granted to her in Stieglitz’s Will.....	17
B. Georgia O’Keeffe had no authority to create a right of reversion or reacquisition in the Stieglitz Collection as such right was not recognized under New York law at the time the gift of the Collection was made. . .	23
C. New York law does not recognize an implied right of reversion or reacquisition.....	28
II. The Trial Court Erred In Ruling That The Museum Has Standing.	31
III. The Trial Court Erred In Ruling That Georgia O’Keeffe Lacked a General Charitable Intent When She Gave The Alfred Stieglitz Collection To Fisk University.....	38
IV. The Trial Court Erred In Ruling That The Crystal Bridges Proposal Did Not Effectuate O’Keeffe’s Intent As Nearly As Possible.....	38
CONCLUSION	46
CERTIFICATE OF SERVICE	47

TABLE OF AUTHORITIES

CASES

<i>Application of Abrams</i> , 574 N.Y.S.2d 651 (N.Y.Surr.Ct. 1991)	42
<i>Allen v. Trustees of Great Neck Free Church</i> , 269 N.Y.S. 341 (N.Y.App.Div. 1934)	28
<i>American Civil Liberties Union of Tennessee v. Darnell</i> , 195 S.W.3d 612 (Tenn. 2006)	32
<i>Carson v. Nashville Bank & Trust Company</i> , 321 S.W.2d 798 (Tenn. 1959)	33
<i>Cathedral of the Incarnation in the Diocese of Long Island, Inc.</i> , 697 N.Y.S.2d 56 (N.Y.App.Div. 1999)	25
<i>Cook v. City Bank Farmers Trust Co.</i> , 158 N.Y.S.2d 315 (N.Y.Sup. 1956).....	29, 30
<i>Gorton v. Wager</i> , 149 N.Y.S.2d 887 (Sup. Ct. 1956).....	24
<i>Graves v. Deterling</i> , 120 N.Y. 447	29
<i>In re Bennett's Estate</i> , 297 N.Y.S. 396 (Sup.Ct.App.Div. N.Y. 1937).....	22
<i>In re Carper's Estate</i> , 415 N.Y.S.2d 550 (N.Y.Surr.Ct. 1979).....	42
<i>In re Colley's Will</i> , 134 N.Y.S.2d 99 (Sur. Ct. 1954)	22
<i>In re Corey</i> , 672 N.Y.S.2d 131 (Sup.Ct.App.Div. N.Y. 1998).....	18
<i>In re Davis</i> , 59 N.Y.S.2d 607 (N.Y. Sup.Ct. 1946).....	19
<i>In re Ender's Estate</i> , 13 N.Y.S.2d 766 (Sur.Ct. 1939).....	24, 27
<i>In re Estate of Notkin</i> , 358 N.Y.S.2d 491 (N.Y.App.Div. 1974).....	34
<i>In re Estate of Othmer</i> , 815 N.Y.S.2d 444 (N.Y.Surr.Ct. 2006)	39
<i>In re Gaffers' Estate</i> , 5 N.Y.S.2d 671 (N.Y.App.Div. 1938).....	27, 28
<i>In re Goehringer's Will</i> , 329 N.Y.S.2d 516 (N.Y.Surr.Ct. 1972).....	42
<i>In re Hummel</i> , 805 N.Y.S.2d 236 (N.Y.Surr.Ct. 2005)	42

<i>In re James' Estate</i> , 123 N.Y.S.2d 520 (Surr.Ct. 1953).....	27, 33
<i>In re Johnston's Estate</i> , 99 N.Y.S.2d 219 (Sup.Ct. App.Div. 1950)	24, 27
<i>In re Lachat's Estate</i> , 52 N.Y.S.2d 445 (N.Y.Sup. 1944).....	33
<i>In re Long</i> , 565 N.Y.S.2d 569 (N.Y.App.Div. 1991)	33, 34
<i>In re Moeller's Estate</i> , 39 N.Y.S.2d 180 (Sur. Ct. 1942).....	18
<i>In re Polytechnic University</i> , 812 N.Y.S.2d 304 (N.Y.Surr.Ct. 2006)	42
<i>In re Roger's Will</i> , 293 N.Y.S.626 (Sup.Ct.App.Div. N.Y. 1937).....	22
<i>In re Stuart's Estate</i> , 183 Misc. 20 (N.Y.Surr.Ct. 1944).....	38
<i>Matter of Johnson</i> , 460 N.Y.S.2d 932 (N.Y.Surr.Ct. 1983)	42
<i>Matter of Kraetzer's Will</i> , 462 N.Y.S.2d 1009 (N.Y.Surr.Ct. 1983)	42
<i>Matter of McCarthy</i> , 347 N.Y.S.2d 490 (N.Y.Surr.Ct. 1973)	25
<i>Merrill v. Lynch</i> , 13 N.Y.S.2d 514 (1939).....	21
<i>National City Bank of N.Y. v. Beebe</i> , 131 N.Y.S.2d 67, (N.Y.Sup.Ct. 1954).....	33
<i>National Soc. of Daughters of American Revolution v. Goodman</i> , 128 Md. App. 232 (Md. Ct. of Special App. 1999).....	39
<i>Richmond Hose Case Co. No. 2</i> , 130 N.E.613, 230 N.Y. 462 (N.Y. 1921)	25
<i>Smithers v. St. Luke's Roosevelt Hospital Center</i> , 723 N.Y.S.2d 426 (N.Y.App.Div. 2001) 33, 34, 36, 37	
<i>Stratis v. Doyle</i> , 575 N.Y.S.2d 400 (N.Y.App.Div. 1991)	29
<i>Syracuse University</i> , 3 N.Y.2d 665 (1958).....	29, 30
<i>Van De Bogert v. Reformed Dutch Church of Poughkeepsie</i> , 220 N.Y.S. 58	29
<i>Vanderbilt University v. Mitchell</i> , 36 S.W.2d 83 (Tenn. 1931)	33
<i>West Sand Lake v. Kunz</i> , 357 N.Y.S.2d 637 (Sup.Ct. 1974)	24
<i>Yale University v. Fisk University</i> , 660 F.Supp. 16 (M.D.Tenn. 1985)	17

STATUTES

E.P.T.L. § 6-3.1..... 23

E.P.T.L. § 6-3.4..... 26

E.P.T.L. § 6-4.4..... 24, 30

E.P.T.L. § 6-4.5..... 24

E.P.T.L. § 6-4.6..... 24

E.P.T.L. § 8-1.1(c)(1)..... 38

E.P.T.L. § 8-1.1(f)..... 33

E.P.T.L. § 10-3.1(a)..... 19

E.P.T.L. § 10-3.2..... 19

E.P.T.L. § 10-6.1(a)..... 19

E.P.T.L. § 10-9.2..... 21

Tenn. Code Ann. § 35-13-110 10

Tenn. Code Ann. § 35-13-113 11, 12, 13, 15

Tenn. Code Ann. § 35-15-110 10

INTRODUCTION

This case involves one of the most significant and valuable art collections in Tennessee, the Alfred Stieglitz Collection. Fisk University was given this irreplaceable collection of early twentieth century American and European art not as an asset which Fisk could dispose of at will, but as a charitable gift, subject to specific conditions, which Fisk holds in a fiduciary capacity for the benefit of its students, the Nashville community and the people of the state of Tennessee. Because the Stieglitz Collection is a charitable gift subject to conditions, the Attorney General and Reporter appears in this case pursuant to its responsibilities under state law to ensure that the charitable purposes of this gift are carried out and to represent the citizens of Tennessee, the ultimate beneficiaries of this charitable gift.

The trial court below granted the motion for summary judgment filed by the defendant Georgia O’Keeffe Museum, dismissing Fisk’s amended complaint asking for *cy pres* relief that would allow it to sell a half interest in the Collection to the proposed Crystal Bridges Museum in Bentonville, Arkansas, and would give the Crystal Bridges Museum a priority claim on the other half. *Cy pres* law correctly requires that the donee of a charitable gift subject to conditions satisfy a rigorous standard before the conditions of that charitable gift can be modified, lest donors be discouraged from making such gifts in the future. Accordingly, Fisk carries a heavy burden in attempting to accomplish such a radical change to the conditions on Miss O’Keeffe’s gift.

Notwithstanding this burden, the State argued below and asserts here that the gift from Miss O’Keeffe was motivated by a general rather than specific intent, which would permit in theory the application of the doctrine of *cy pres*, and that disputed issues of fact should have precluded the grant of summary judgment.

But where the State and the trial court truly disagree is over the role of the Georgia O’Keeffe Museum in this case. New York law, which governs this dispute, clearly provides that the O’Keeffe Museum, the successor in interest to Miss O’Keeffe’s estate, has no right of reversion or reacquisition in the Stieglitz Collection, even if the conditions that Miss O’Keeffe placed on the Collection have been violated by Fisk. In addition, the O’Keeffe Museum lacks standing under New York law to seek to enforce those conditions. The only party with the authority to seek to enforce those conditions is the Attorney General, who represents the interests of all beneficiaries of this charitable gift.

Accordingly, this Office asks that the holdings below granting standing to the O’Keeffe Museum and finding that the Museum has a right of reacquisition in the Stieglitz Collection be reversed. This Office also asks that the grant of summary judgment on Fisk University’s amended petition for *cy pres* relief be vacated and this matter remanded for further appropriate proceedings.

STATEMENT OF THE FACTS

The issues in this case arise from the gift of 101 pieces of art from Alfred Stieglitz's art collection to Fisk University in 1949. Mr. Stieglitz died on July 13, 1946, leaving an estate containing a vast collection of photographs and other works of art. Mr. Stieglitz's Last Will and Testament was admitted to probate in the Surrogate's Court of New York County, New York on September 13, 1946. (R. Vol. IV, p. 480-485; Ex. 52, 67). The Will was divided into seven articles and amended by one codicil. Article II of the Will is the provision most relevant to this action, as it defined the powers and duties of Stieglitz's surviving wife, Georgia O'Keeffe. Under Article II, Miss O'Keeffe was granted a life estate in all of Mr. Stieglitz's property, both real and personal. As the life tenant, Miss O'Keeffe was granted three separate and distinct powers: (1) the power to use all income from such property for the payment of debts, taxes and administration expenses; (2) the power to sell any property and hold the proceeds of such sale for the express purposes set forth in the Will (implicitly creating a trust with Miss O'Keeffe as a trustee); and (3) the power to transfer, without any consideration, any of the property to a nonprofit corporation as described in Article III of the Will. Miss O'Keeffe was also named Executrix of her husband's estate. (*Id.*).

Article III of the Will provided that, upon Miss O'Keeffe's death, Mr. Stieglitz's art collection was to be given to nonprofit corporations, chosen by his executors, for public viewing and to promote the study of art. To facilitate the transfer of art, the Will authorized his executors to transfer cash and securities from his estate to the chosen nonprofit corporations to be used to defray the expenses of managing and preserving the artworks. Any cash and securities remaining after such transfer were to be given to Mr. Stieglitz's grandson. (*Id.*).

Mr. Stieglitz later added a codicil to the Will which provided Miss O’Keeffe with the power to expend money from the estate to suitably maintain herself in as much comfort as she enjoyed at the time of his death. (*Id.*).

At the time of his death, Mr. Stieglitz also had a surviving daughter, Katherine S. Stearns, who was disabled. A special Guardian was appointed for Ms. Stearns, who subsequently raised two issues during the probate of the Will on Ms. Stearns’ behalf: (1) that Article III of the Will violated the Rule against Perpetuities; and (2) that the Will, depending upon the actions of the Executrix, could violate Section 17 of the Decedent’s Estate Law. (R. Vol. IV, p. 493-500; Ex. 52). The Surrogate Court eventually found the first objection invalid; the second objection, however, proved problematic. Section 17 of the Decedent’s Estate Law of New York, which was in effect at that time, but later repealed, prohibited charitable gifts with a value greater than 50% of the value of the entire estate if the deceased has a surviving spouse or child. Article II of the Will allowed Miss O’Keeffe to gift any or all of Mr. Stieglitz’s estate to a nonprofit corporation. Without capping this power at less than 50% of the value of the estate, Article II gave Miss O’Keeffe the power to violate Section 17. Additionally, Article III of the Will required that, upon Miss O’Keeffe’s death, any remaining artworks be gifted to one or more nonprofit corporations. It also empowered the executors of his estate to transfer as much cash or securities as necessary to the donee nonprofit corporations as would be required to maintain the art collection. Thus, Article III, depending upon the value of the art collection and the amount of money transferred to the nonprofit corporations, could also result in a violation of Section 17. (*Id.*).

In response to these concerns, Miss O’Keeffe filed a petition with the Surrogate Court, in which she proposed to transfer all of Mr. Stieglitz’s collection of photographs and other works of

art to six (6) named institutions: the Metropolitan Museum of Art in New York, the Philadelphia Museum of Art, the National Gallery of Art in Washington, the Art Institute of Chicago, the Library of Congress and Fisk University. According to the accounting done of the estate, the total value of the estate was approximately \$148,000, while the photographs and artworks had an estimated value of \$62,396.00 – less than fifty percent of the value of the entire estate. By proposing to immediately give the art to charity, and assuring the court that she would neither gift any additional money to the charities for the maintenance of the art nor spend any money herself on its maintenance, Miss O’Keeffe sought to assure that Section 17 would not be violated. (R. Vol. IV, p. 503-521; Ex. 52, 68).

The Surrogate Court found that Miss O’Keeffe’s proposal’s sufficiently addressed the concerns related to Section 17 raised by the Special Guardian, and accordingly, granted O’Keeffe’s petition ordering that “all of the photographs and other works of art be entirely transferred and delivered to the six charitable and educational institutions within thirty (30) days.” The remainder of Stieglitz’s estate, valued at \$75,941.70, was ordered transferred to O’Keeffe, as life tenant, pursuant to the terms of the Will. (R. Vol. IV, p. 559-569; Ex. 52, 68).

Prior to entry of this order and transfer of the artworks, Miss O’Keeffe had necessarily been in contact with the six institutions she was proposing to be the recipients of Stieglitz’s vast art collection. In the case of Fisk University, Miss O’Keeffe exchanged a series of letters with Fisk President Charles S. Johnson, beginning in January 1949 through the transfer of the artworks in June 1949. In this correspondence, Miss O’Keeffe attempted to impose a number of conditions upon the display of the artworks. Specifically, on January 31, 1949, Miss O’Keeffe sent a letter to President Johnson in which she outlined the following conditions to be imposed upon the works of art other than the photographic prints and photogravures of Alfred Stieglitz:

1. The paintings and other works from the Alfred Stieglitz Estate shall be known and individually designated as the Alfred Stieglitz Collection.
2. No object from the Collection will be loaned, except in the event of a large retrospective one-man exhibition in a major institution, and then only at the discretion of the Fisk Art Committee.
3. No reproductions will be made of the works of living artists without permission from the artist, with the reservation that Fisk University may occasionally make photographic reproductions for use in its bulletin or for trade publications for promotion of the artists.
4. The artist shall have the right to authorize anyone of their choice to reproduce their paintings and make whatever royalty arrangements they wish.
5. Fisk University will defray the cost of packing, shipping and insuring the art works from the Estate.
6. The Fisk University Art Committee shall presently consist of Carl Van Vechten, Tom Mabry, Aaron Douglas, Jacob Lawrence, Lincoln Kerstein, Georgia O'Keeffe, and Charles S. Johnson, ex officio, or succeeding presidents in their capacity as President of Fisk University. The Committee will be consulted on questions pertaining to Fisk University's art collections, and any additions to those collections will have the approval of the Committee. The Art Committee will be self-perpetuating.
7. The Alfred Stieglitz Collection will be exhibited intact and no other objects will be shown in the same room except with the expressed consent of the donor, or the Art Committee if so empowered by the donor.
8. The Collection will be under surveillance at all times when the rooms are not locked.
9. The walls will be painted white or a very light color as designated by the donor, Miss O'Keeffe.
10. The collection will be housed in as safe a building as possible. (R. Vol. V, p. 574-582; Ex. 2).

These conditions were accepted by President Johnson in a letter to Miss O'Keeffe dated February 14, 1949. (R. Vol. V, p. 584-585; Ex. 3).

In a letter dated March 31, 1949, Miss O'Keeffe placed similar types of conditions upon the photographic prints and photogravures:

1. The photographs and photogravures by Alfred Stieglitz received from the Alfred Stieglitz Estate are to be known with the paintings

and other works of art from the Estate as the Alfred Stieglitz Collection.

2. Since the Stieglitz prints are selected from those which Stieglitz had made and kept from his negatives, it is requested that should you be given original Stieglitz prints other than those from the Stieglitz Collection at An American Place, these prints should be clearly designated as coming from a source other than the Stieglitz Collection.
3. All the Stieglitz prints are given as they were mounted and matted by Stieglitz. They are to be left mounted and matted as received, except for the removal of glass and frames, which is optional. If they are taken out of the frames they are to be placed with the original mount and mat in rag board handling mats, according to the samples submitted.
4. Should the prints be removed from their frames it is understood that:
 - a. All persons from outside the staff immediately in charge of the prints will be watched at all time while handling the prints.
 - b. No pen or ink may be used on the table while prints are on it.
 - c. The prints are to be kept in boxes of not more than two and one-half inches depth, inside measurement.
 - d. No one is to touch the print itself, or the paper on which it is mounted. This means that the prints may only be handled and examined by picking up the handling mat.
5. Prints may not be loaned at any time for any reason to any person or institution.
6. No photographic copy prints or reproductions may be made from the Stieglitz prints, except for the forthcoming catalogue of the Fisk University Art Collection, or for the purposes of institutional publicity in current publications or future publications of Fisk University. (R. Vol. V, p. 587-588; Ex. 4).

These conditions were also accepted by President Johnson in a letter to Miss O'Keeffe dated April 12, 1949. (R. Vol. V, p. 589-590; Ex. 5).

Finally, at the time Miss O'Keeffe formally assigned and transferred the photographs and works of art to Fisk University in June 1949, she imposed two additional conditions: (1) that Fisk lend the Gaboon Figure to the Museum of Modern Art every three years for a period of three months, if requested, and (2) that Fisk not sell or exchange any of the objects in the

Stieglitz Collection. (R. Vol. V, p. 593; Ex. 8). These conditions were accepted by President Johnson in a letter to Miss O’Keeffe dated June 13, 1949. (R. Vol. V, p. 594; Ex. 9).

The Stieglitz Collection given to Fisk University consisted of nineteen (19) Stieglitz photographs and seventy-eight (78) works of art including sculptural pieces, oil paintings, water colors, lithographs and others works on paper, for a total of ninety-seven (97) pieces of art. (R. Vol. V, 596-620; Ex. 37). In addition to these artworks from the estate of Alfred Stieglitz, O’Keeffe also gave Fisk four paintings which she owned personally with the direction that they be hung and exhibited with the other ninety-seven artworks as part of the “Stieglitz Collection.” While these four paintings were originally given to Fisk in 1949 to be held “on permanent loan,” O’Keeffe later transferred title to the paintings to Fisk. (Ex. 2).

Georgia O’Keeffe died in 1986, almost forty years after transferring the Stieglitz Collection to Fisk University. (Ex. 53). Although there is evidence in the record that Miss O’Keeffe was at times dissatisfied with the way in which Fisk handled and/or displayed the Collection, at no time prior to her death did O’Keeffe demand that Fisk return the Collection for failure to comply with any of the conditions outlined in her 1949 correspondence, although she was clearly aware that one or more of these conditions had been breached. (Ex. 59, 63). Nor did Miss O’Keeffe make any reference in her Will to any rights in the Stieglitz Collection. (Ex. 53).

Instead, O’Keeffe left most of her estate to her assistant and companion, John (“Juan”) Hamilton. This action led to a will contest by O’Keeffe’s relatives and eventually resulted in a Settlement Agreement. Under the terms of that Agreement, the parties agreed to form the Georgia O’Keeffe Foundation (“Foundation”) and to transfer to it a large portion of O’Keeffe’s estate (primarily in the form of artworks). The purpose of the Foundation was to “perpetuate the artistic legacy of Georgia O’Keeffe for the public benefit.” The Agreement required that the

Foundation distribute all of the works of art received from the Estate to charitable institutions by March 6, 2006. (Ex. 53).

On March 6, 2006, the Foundation and the Georgia O’Keeffe Museum (“Museum”) entered into an agreement whereby the Foundation assigned all of its assets, including its interest in this lawsuit, to the Museum. (Ex. 54). The Museum was founded in 1997, approximately eleven years after Miss O’Keeffe’s death.

STATEMENT OF THE CASE

This case began on December 6, 2005, when Fisk University filed a petition for declaratory judgment seeking a ruling permitting it to sell two paintings from the Alfred Stieglitz Collection. (R.Vol. I, p. 1-10). Shortly thereafter, the Georgia O'Keeffe Foundation sought to intervene: (1) to oppose the sale of the paintings; (2) to seek enforcement of the conditions imposed by O'Keeffe on the Stieglitz Collection, and alternatively, (3) to seek return of the Collection to the Foundation, as O'Keeffe's beneficiary, for breach of the conditions. (R.Vol. 1, p 51-60). The trial court granted the Foundation's motion to intervene in an order entered January 12, 2006. (R. Vol. 1, p. 99-101).

The Attorney General and Reporter for the State of Tennessee also sought to intervene pursuant to the provisions of the Charitable Beneficiaries Act of 1997, Tenn. Code Ann. § 35-13-110 and the Uniform Trust Code, Tenn. Code Ann. § 35-15-110 to represent the interests of the charitable beneficiaries, the potential charitable beneficiaries and the people of the State of Tennessee in the charitable gift at issue. The trial court denied the motion, accepting the Foundation's argument that because the Attorney General had failed to fully identify himself as either a plaintiff or defendant in the matter, intervention was inappropriate. (R. Vol. 1, 102-105, 106-108 and 117-119).

Thereafter, the Foundation filed a motion seeking to have the Georgia O'Keeffe Museum substituted as a result of the execution of the agreement between the parties assigning all of the Foundation's assets, including its interest in the litigation, to the Museum. (R. Vol. 1, under seal). This motion was subsequently granted on May 9, 2006. (R. Vol. I, 141-142, 145-147).

Thereafter, Fisk filed a motion for summary judgment seeking to dismiss the Foundation and its counter-claims on the grounds that Georgia O'Keeffe had made the gift of the Stieglitz

Collection to Fisk in her capacity as the Executrix of Stieglitz's estate and, therefore, the Foundation lacked standing. (R. Vol. II, 285-287). The trial court denied this motion in a memorandum and order entered October 3, 2006, finding that O'Keeffe had acted in her capacity as a life tenant and not as the Executrix of Stieglitz's estate. (R. Vol. VI, 761-769).

In April 2007, Fisk sought to amend its complaint to add, among other things, a claim under Section 34 of Public Chapter 24, Acts of 2007 (now codified at Tenn. Code Ann. § 35-13-113). At the same time, the Attorney General once again sought to intervene to represent the interests of the people of the state, as the ultimate beneficiaries of the charitable gift. The Attorney General also sought to intervene to defend the constitutionality of Tenn. Code Ann. § 35-13-113, which the Museum had challenged. (R. Vol. VII, p. 904-906). The Museum once again opposed the Attorney General's intervention; however, this time the trial court allowed the Attorney General to intervene. (R. Vol. X, p. 1313-1315).

On May 4, 2007, the Museum filed a motion for summary judgment only on Fisk's complaint for declaratory judgment. (R. Vol. VII, p. 989-992). The Museum asserted that the conditions outlined by O'Keeffe in her 1949 correspondence were conditions placed on the Stieglitz Collection that were accepted by Fisk and, therefore, binding on Fisk. Accordingly, the Museum argued that these conditions prevented the sale of any of the works from the Collection. It further argued that violation of these conditions would result in a "reversion" of the Collection to the Museum, as the successor in interest to the O'Keeffe estate. (Id.).

The Attorney General filed a response to this motion disputing the Museum's position that as Miss O'Keeffe's successor in interest, the Museum had standing under New York law. The Attorney General argued that whatever interest and rights Miss O'Keeffe possessed in her husband's art collection under his Will clearly expired upon her death. The Attorney General

further argued that the conditions O’Keeffe had sought to impose upon the Stieglitz Collection did not constitute a bilateral contract with reversion as a remedy for breach thereof; rather, the Attorney General submitted that the conditions constituted a charitable gift subject to conditions or covenants that could be subject to modification in an appropriate action under the *cy pres* doctrine. (R. Vol. XI, p. 1518-1546).

On June 12, 2007, the trial court issued a memorandum and order granting the Museum’s motion for summary judgment, finding that the conditions otherwise prevented the sale of any art from the Collection and that the facts presented by Fisk in its complaint were insufficient to justify modification of those conditions under the *cy pres* doctrine. (R. Vol. XIII, p. 1712-1729). Specifically, the trial court found “that the law does not permit the University to sell works from the Collection and that the Court should by summary judgment dismiss the University’s lawsuit and enjoin the University from selling the Collection.” (*Id.*)

Trial on the Museum’s counterclaim for breach of the conditions was set for September 18, 2007; however, prior to that time, the Museum and Fisk entered into a “settlement agreement” and sought court approval of that agreement. (R. Vol. XIII, p. 1740-1756). The agreement provided that the Museum would pay seven and a half million dollars (\$7,500,000) to Fisk in three installments for Georgia O’Keeffe’s painting, *Radiator Building-Night, New York*, and upon confirmation by Fisk of receipt of initial payment of one million (\$1,000,000), Fisk would execute a bill of sale and deliver title and possession of the painting to the Museum. (R. Vol. XIII, p. 1744-1752).

The settlement agreement further provided that the Museum would make the painting available for loan to Fisk for four months every four years, subject to Fisk’s timely request for such loan. In addition, the Museum agreed to have a reproduction of the painting made for

display at Fisk when the original was not on loan. (*Id.*). The agreement did not require the Museum to assume any of the conditions originally imposed by O’Keeffe; however, the Museum did agree to make the painting “reasonably available to the public for the study of art in accordance with its usual practice relative to works by Georgia O’Keeffe” and if it sold the painting within twenty (20) years of the date of the agreement, it would pay to Fisk one-half of the amount by which the sale price exceeded the original \$7.5 million purchase price. The Museum also agreed under the terms of the settlement agreement that it would not oppose Fisk’s request to sell another painting from the Collection, Marsden Hartley’s *Painting No. 3*. (*Id.*).¹

The Attorney General strongly opposed court approval of this settlement agreement on the basis that it was not in the best interests of the people of this state as the ultimate beneficiaries of the Stieglitz Collection. (R. Vol. XIII, p. 1763-1781). The trial court agreed with the Attorney General’s objections and issued a memorandum and order denying approval of the settlement agreement on September 10, 2007. (R. Vol. XIII, p. 1841-1846). In denying approval, the trial court noted that the settlement agreement between Fisk and the Museum was not consistent with the conditions imposed by O’Keeffe and that there were other potential offers, including a potential offer from the Crystal Bridges Museum, that should be reviewed. (*Id.*). The court further indicated that the possibility of consummation of an agreement with the Crystal Bridges Museum and subsequent court approval outweighed the risk of any adverse outcome at trial, *i.e.*, reversion of the Collection to the Museum. (*Id.*).

¹ This “settlement agreement” was actually the second such agreement entered into by Fisk and the Museum. The parties had entered into a prior agreement in early February 2007, which provided that the Museum would purchase the Radiator Building painting for seven million (\$7,000,000) and would not oppose Fisk’s sale of Hartley’s *Painting No. 3*. In exchange, Fisk agreed to expend up to five hundred and sixty thousand (\$560,000) from the proceeds of the sale of the two paintings to stabilize and restore the Van Vechten Gallery. This agreement was specifically conditioned upon the approval of the Attorney General, who declined to approve the agreement as not being in the best interests of the people of the state of Tennessee. (R. Vol. IX, 1283; Vol. X, 1284; Vol. XIV, 1809-1813, 1816-1819, 1825-29, 1832-35).

In light of this ruling, the Museum filed a notice of voluntary nonsuit of its counterclaims and an order of voluntary dismissal was entered by the court on September 17, 2007. (R. Vol. XIII, p. 1847-1848, 1851-53.) In the meantime, Fisk reached an agreement with the Crystal Bridges Museum and on September 28, 2007, filed a motion with the court seeking to file an amended petition for approval of that agreement under the *cy pres* doctrine. (R. Vol. XIV, p. 1858-1861, 1862-81). This motion was granted by the Court on October 22, 2007. (R. Vol. XVI, p. 2156-2159). On November 9, 2007, the Museum filed an answer to Fisk's amended petition in which it reasserted its counterclaim for reversion for breach of the conditions. (R. Vol. XVI, p. 2166-2201).

Shortly thereafter, Fisk filed a motion for partial summary judgment on the issue of the Museum's standing and the availability of reversion to the Museum as a remedy. (R. Vol. XVI, p. 2226-2227). The Attorney General filed a response in which it agreed that the Museum lacked standing and that reversion was not available, because, among other things, there was no express provision for reverter in any of the documents executed by O'Keeffe. (R. Vol. XVI, p. 2291-2296). The trial court disagreed and held that the Museum had standing as the successor in interest to O'Keeffe's estate. The court further held that, while there was no express reverter provision, the Museum had an implied reversionary interest. (R. Vol. XVIII, p. 2481-2486).

On January 17, 2008, the Museum moved for summary judgment in its favor on Fisk's *cy pres* petition. (R. Vol. XVIII, 2489-2491). The Attorney General opposed this motion primarily on the grounds that it was premature because there were disputed issues of fact on the three elements of a *cy pres* action. (R. Vol. 2600 – 2609). On February 8, 2008, the trial court entered an order granting the Museum's motion for summary judgment, finding that two out of the three elements for a *cy pres* action could not be demonstrated by Fisk: (1) that Georgia O'Keeffe had

a general charitable intent when she donated the Stieglitz Collection to Fisk and (2) that Fisk's agreement with the Crystal Bridges Museum as nearly as possible effectuated O'Keeffe's intent in giving the Collection to Fisk. (R. Vol. XXII, p. 3266-3289). The court further reinforced its previous ruling that the Museum had an implied reversion in the Collection which could be ordered by the court in the event the Museum demonstrated breach of the conditions at trial. (*Id.*).

A trial solely on the Museum's counterclaim for breach of the conditions was held on February 19-21, 2008. On March 6, 2008, the trial court entered a memorandum and order finding that the Museum had failed to prove that Fisk had violated the conditions, with the exception that "Fisk has breached the conditions of the gift by declaring that it could not care for and display the Collection." However, the court found that under the circumstances, this breach was not sufficient to justify reversion of the Collection to the Museum, and accordingly, dismissed the Museum's counterclaims. (R. Vol. XXIV, p. 3438-3458). The trial court did, however, impose a permanent injunction upon Fisk requiring compliance with all of the conditions, noting that "[n]oncompliance with the injunction carries a threat of a finding of contempt punishable by fines, payment of damages and attorneys fees, and forfeiture of the Collection." (*Id.*).

Fisk timely filed its notice of appeal on April 3, 2008. (R. Vol. XXIV, p. 3459-3461).

ISSUES PRESENTED ON APPEAL

I. Whether the trial court erred in ruling that the Georgia O’Keeffe Museum has a right of reversion in the Stieglitz Collection. (Appellant’s Issue No. III)

II. Whether the trial court erred in ruling that the Georgia O’Keeffe Museum has standing. (Appellant’s Issue No. IV)

III. Whether the trial court erred in ruling that Georgia O’Keeffe lacked a general charitable intent when she made the gift of the Alfred Stieglitz Collection to Fisk University. (Appellant’s Issue No. I)

IV. Whether the trial court erred in ruling that the Crystal Bridges proposal did not effectuate Georgia O’Keeffe’s intent as nearly as possible. (Appellant’s Issue No. II)

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY HELD THAT THE MUSEUM HAS A RIGHT OF REVERSION IN THE STIEGLITZ COLLECTION.

The trial court erred in finding that the Museum has a “right of reversion,” either express or implied, in the Stieglitz Collection. Without this right, the Museum otherwise has no interest in the Collection and, consequently, has no standing to be a party to this lawsuit. The Museum cannot have any “right of reversion” because under New York law², Miss O’Keeffe did not have a sufficient interest in Stieglitz’s personal property under the terms of his Will to create or retain a right of reversion in that property. Moreover, even if New York allowed Miss O’Keeffe to retain such a right of reversion, she still could not have created that right, as New York law did not recognize such a right at the time O’Keeffe transferred the Stieglitz Collection to Fisk. Finally, a right of reversion must be established by express provisions and there simply is no evidence of such an express provision in the record. Instead, the trial court found that such right of reversion existed by implication; however, no New York court has ever recognized that a right of reversion of a vested charitable gift can exist by implication.

A. Georgia O’Keeffe Had No Authority To Create Or Retain Any Right Of Reversion Under the Powers Granted To Her In The Stieglitz Will.

There is no dispute among the parties as to the basis of the Museum’s claim to a right of reversion. Specifically, the Museum asserts that, as the assignee of the Georgia O’Keeffe Foundation, the residuary beneficiary of Miss O’Keeffe’s estate pursuant to a settlement agreement among her beneficiaries, it is the successor to the right Miss O’Keeffe created or retained in the Stieglitz Collection when she transferred the Collection to Fisk subject to certain conditions. However, this argument is premised upon the faulty assumption that O’Keeffe had

² The trial court found that New York law governed the issues in this case and none of the parties dispute this finding. See also *Yale University v. Fisk University*, 660 F.Supp. 16 (M.D.Tenn. 1985).

the ability to create or retain such a right under the terms of the Stieglitz Will and applicable New York law.

In Article SECOND of his Will, Alfred Stieglitz gave to his wife “all my real and personal property, *for the duration of her life.*” (Emphasis added).³ There is no dispute among the parties that with these words, Stieglitz gave his wife a life estate in all of his real and personal property. However, a life estate, and necessarily any rights in a life estate, terminate upon the death of the donee.⁴ Thus, any rights that Miss O’Keeffe had in her capacity as a life tenant in the real and personal property of her husband terminated upon her death, and O’Keeffe’s life estate cannot constitute the basis upon which she created or retained a right of reversion in the Stieglitz Collection to which the Museum succeeded, as her estate never had any right in or to the real and personal property of Stieglitz, including the Stieglitz Collection.⁵

Rather, the basis of such a right can only be found, if at all, in the additional right given to O’Keeffe in Article SECOND: the “right, during her lifetime, to transfer said property, or any part thereof, without receiving any consideration, to one or more corporations, such as are described in Article THIRD of this Will, and as she may select or cause to be incorporated.”⁶ This power contained in the third paragraph of Article SECOND of the Will is the power given to O’Keeffe, during her lifetime, to appoint or designate the beneficiaries of her husband’s

³ Ex. 67.

⁴ See *In re Corey*, 672 N.Y.S.2d 131, 133 (Sup.Ct.App.Div. N.Y. 1998) (“The real substance of a life estate consists in the life tenant’s right to exclude all others from the possession of the subject property for the duration of his or her own life. In general terms, such an estate, but its very nature, terminates upon the death of the life tenant, although it may terminate earlier by forfeiture or by voluntary surrender.”)(internal citations omitted).

⁵ See *In re Moeller’s Estate*, 39 N.Y.S.2d 180, 185 (Sur. Ct. 1942).

⁶ Ex. 67. Article THIRD of the Will provides that upon the death of Miss O’Keeffe, “I give and bequeath so much of my entire collection of photographs (including those produced by me) and other works of art as shall not have been disposed of by my said wife to one or more corporations . . . such property to be received and held by such corporation or corporations under such arrangements as will assure to the public, under reasonable regulations, access thereto to promote the study of art.” *Id.*

collection of photographs and other works of art.⁷ Under New York law, a power of appointment is either general or special. A power of appointment is general to the extent that it is exercisable wholly in favor of the donee, his estate, his creditors or the creditors of his estate. All other powers of appointment are special.⁸ Here, O’Keeffe was only given the power to transfer property to “one or more of the corporations, such as are described in Article Third” and thus, her power of appointment was a special power of appointment.⁹

New York law provides that in order to effectively exercise a power of appointment, it is sufficient if the donee manifests his or her intention to exercise the power in writing. Such a manifestation exists when the donee:

- 1) Declares in substance that he is exercising all the powers he has;
- 2) Sufficiently identifying the appointive property or any part thereof, executes an instrument purporting to dispose of such property or part;
- 3) Makes a disposition which, when read with reference to the property he owned and the circumstances existing at the time of its making, manifests his understanding that he was disposing of the appointive property; or
- 4) Leaves a will disposing of all of his property or all of his property of the kind covered by the power, unless the intention that the will is not to operate as an execution of the power appears expressly or by necessary implication.¹⁰

The evidence in the record clearly establishes that Miss O’Keeffe fully and completely exercised her special exclusive power of appointment when she transferred all of Stieglitz’s photographs and works of art to six different non-profit institutions in response to a challenge to the charitable dispositions under Article THIRD of the Stieglitz Will as being in violation of

⁷A “power of appointment” is defined under New York law as “an authority created or reserved by a person having property subject to his disposition, enabling the donee to designate, within such limits as may be prescribed by the donor, the appointees of the property or the shares or the manner in which such property shall be received.” EPTL § 10-3.1(a).

⁸ See EPTL § 10-3.2.

⁹ See *In re Davis*, 59 N.Y.S.2d 607, 609 (N.Y. Sup.Ct. 1946) (“The power of appointment conferred upon Mrs. Davis was limited to a class. It was, therefore, a special power.”).

¹⁰ EPTL § 10-6.1(a).

Section 17 of the New York Decedent Estate Law. On April 13, 1948, O’Keeffe filed a petition in which she stated:

That petitioner, as the life tenant of all of the testator’s property, real and personal, under Article “SECOND” of decedent’s last will and testament, *is desirous of exercising the right given to her in the third paragraph of said Article “SECOND” to transfer*, to the following corporations, without consideration therefor, all of decedent’s photographs and works of art, referred to in Schedules A and H of the executrix’s account of proceedings filed herewith and more particularly enumerated and identified in the ‘Schedule of Proposed Transfers and Distribution of Article Comprising the Stieglitz Collection”, marked Exhibit II, annexed hereto and made a part hereof:

The Metropolitan Museum of Art
The Art Institute of Chicago
Fisk University
National Gallery of Art
Philadelphia Museum of Art
Library of Congress¹¹

Subsequently, in June 1949, the Surrogate court entered an order granting Miss O’Keeffe’s petition and ordering that

the transfer and delivery of the testator’s entire collection of photographs and other works of art, without compensation therefor, to charitable and educational institutions pursuant to Article SECOND of his Last Will and Testament, as proposed by the petitioner herein, will not be in violation of Section 17 of the Decedent Estate Law and that the said petitioner be, and she hereby is, authorized and directed, as prayed for in the petition, to transfer and deliver the said collection of photographs and other works of art to and among (1) The Metropolitan Museum of Art, (2) The Art Institution of Chicago, (3) Fisk University, Nashville, Tennessee, (4) National Gallery of Art, Washington, District of Columbia, (5) Philadelphia Museum of Art, Philadelphia, Pennsylvania, and (6) Library of Congress, Washington, District of Columbia, . . . *SUBJECT HOWEVER to the stipulation of the said petitioner with the Special Guardian herein that all of such photographs and other works of art be entirely transferred and delivered to the said charitable and educational institutions within thirty (30) days from the date of this decree.*

¹¹ Ex. 68.

And it appearing to the satisfaction of the Surrogate, as set forth in the decision rendered herein on the 19th day of May, 1949, as aforesaid, that the delivery of the decedent's complete collection of art works pursuant hereto, will render inoperative the provisions of the Last Will and Testament of Alfred Stieglitz, deceased, for the delivery of such works of art, cash and securities by the executors subsequent to the death of the widow of said testator, the petitioner herein, and it further appearing that the *petitioner, by written instrument executed and acknowledged by her on the 18th day of November, 1948, and filed herein, having irrevocably and forever renounced, relinquished, released and surrendered absolutely the right or power, given her by Article SECOND of the said Last Will and Testament, to transfer any moneys or property of the estate without consideration therefor, other than as authorized and directed by this decree.*¹²

Thus, in her petition O'Keeffe affirmatively declared that she was exercising the power of appointment granted to her in Stieglitz's will to dispose of all the appointive property, and this exercise of her power of appointment was subsequently recognized by the Surrogate Court in its order granting her petition. In addition, O'Keeffe "irrevocably and forever renounced, relinquished, released and surrendered absolutely the right of power . . . to transfer any money or property" of Stieglitz's estate, other than as authorized and directed by the decree of the Surrogate Court directing that all of the photographs and other works of art be entirely transferred and delivered to the six identified charitable and education institutions.¹³

Consequently, in order for O'Keeffe to have created or retained a right of reversion in the Stieglitz Collection, she must have done so when she exercised her special power of appointment in her petition, because she otherwise fully renounced and released that power.¹⁴ Of course, neither the petition nor the court's order granting the petition make any reference to any right of

¹² Ex. 69 (emphasis added).

¹³ *Id.*

¹⁴ New York law specifically recognizes that a power of appointment can be renounced or released and thereby extinguished by written instrument signed by the donee of such power and delivered to the clerk of the surrogate's court having jurisdiction of the estate of the donor if the power was created by will. *See* EPTL § 10-9.2. *See also* *Merrill v. Lynch*, 13 N.Y.S.2d 514 (1939) (special power not coupled with a trust may be surrendered, renounced or released and thereby extinguished).

reversion created or retained by O’Keeffe. Moreover, no such right could be implied from O’Keeffe’s actions (*i.e.*, O’Keeffe’s correspondence with Fisk University President Charles Johnson) in exercising her power of appointment, because under New York law, a power of appointment does not constitute an interest or estate of the donee of the power.

The power of appointment does not constitute an estate possessed by the donee of the power within the provisions of the Decedent Estate Law. The exercise of such a power by a donee does not relate to an estate vesting in the donee. The donor merely utilizes the donee as an instrument for the devolution of the title of his (the donor’s property).¹⁵

As the donee of a special power of appointment, O’Keeffe was simply the instrument utilized by Stieglitz to transfer his collection of photographs and other works of art to non-profit corporations. When O’Keeffe exercised her power of appointment, these items of personalty merely “passed through her” and she fully divested herself of any other interest or estate in this property. Since no interest or estate in the property ever vested in O’Keeffe once she exercised her powers under the Will and subsequently renounced any further rights, any attempt by O’Keeffe to create or retain a right of reversion in the Stieglitz Collection for herself and/or her estate was void and invalid under New York law.

Additionally, any attempt by O’Keeffe to create or retain such a right which she could then dispose of by will (*e.g.* specific disposition or residuary clause) would also have been void as the power of appointment given to O’Keeffe did not include a power to dispose by will.¹⁶ Rather, Stieglitz’s Will specifically directs that O’Keeffe has the power to transfer all or part of his photographs and art works *during her lifetime*, and upon her death, any such property not

¹⁵ *In re Roger’s Will*, 293 N.Y.S.626, 632 (Sup.Ct.App.Div. N.Y. 1937) (citations omitted). *See also In re Colley’s Will*, 134 N.Y.S.2d 99, 102 (Sur. Ct. 1954).

¹⁶ *See In re Bennett’s Estate*, 297 N.Y.S. 396, 400-01 (Sup.Ct.App.Div. N.Y. 1937).

disposed of by O’Keeffe shall then be given to one or more corporations chosen by his executors.¹⁷

Under the specific provisions of Stieglitz’s Will, O’Keeffe had only a life estate in Stieglitz’s real and personal property with a special power of appointment giving her the power, during her lifetime, to transfer all or part of Stieglitz’s collection of photographs and works of art to non-profit institutions of her choosing. Under the applicable New York law, neither the life estate nor the special power of appointment was legally sufficient to allow O’Keeffe to create or retain a right of reversion in herself or her estate that could then be disposed of by her will. Accordingly, the trial court erred in finding that the Museum, as the successor to Miss O’Keeffe, had a right of reversion in the Stieglitz Collection.

B. Georgia O’Keeffe Had No Authority To Create A Right Of Reversion Or Reacquisition In The Stieglitz Collection As Such Right Was Not Recognized Under New York Law At The Time The Gift Of The Collection Was Made.

Even if this Court finds that O’Keeffe had a sufficient interest under the terms of the Stieglitz Will and the applicable New York law to create or retain some sort of reversionary right, the Museum still does not possess such a right in the Stieglitz Collection, because at the time O’Keeffe transferred the Collection to Fisk, New York law did not recognize the type of right or future estate O’Keeffe allegedly created in herself and her estate.

In 1966, the New York Legislature adopted the New York Estate, Probate and Trust Law (E.P.T.L.), which became effective September 1, 1967. That law classifies estates in property as either estates in possession or future estates based upon the time of their enjoyment.¹⁸ The E.P.T.L. further classifies future estates that are left in the creator as either reversions, possibilities of reverter or rights of reacquisition. A “reversion” is defined as “the future estate,

¹⁷ See Ex. 67.

¹⁸ E.P.T.L. § 6-3.1.

other than a possibility of reverter and a right of reacquisition, left in the creator or in his successors in interest upon the simultaneous creation of one or more lesser estates than the creator originally owned.”¹⁹

A “possibility of reverter” is defined as the “future estate left in the creator or in his successors in interest upon the simultaneous creation of an estate that will terminate automatically within a period of time defined by the occurrence of a specified event.”²⁰ For example, if a grantor transfers property “for so long as it is used for school purposes,” he retains a possibility of reverter.²¹ Words denoting the running of time usually characterize the creation of a “possibility of reverter,” such as “until,” “while,” “so long as,” and “during.”²² Thus, from this definition, it can be seen that a “possibility of reverter” has as its touchstone the passage of time that must ultimately terminate the fee conveyed.

Conversely, a “right of reacquisition” is defined as the “future estate left in the creator or in his successors in interest upon the simultaneous creation of an estate on a condition subsequent.”²³ Under this definition, a “right of reacquisition” has as its genesis a “condition subsequent,” the breach of which brings into being the future estate that was simultaneously created when the fee was conveyed.²⁴ Under New York Law, a condition subsequent arises when it is found from the nature of the act to be performed and the time required for its performance, that the estate is intended to vest and the grantee to perform after taking possession.²⁵

¹⁹ E.P.T.L. § 6-4.4.

²⁰ E.P.T.L. § 6-4.5.

²¹ See *Gorton v. Wager*, 149 N.Y.S.2d 887 (Sup. Ct. 1956).

²² *United Methodist Church in West Sand Lake v. Kunz*, 357 N.Y.S.2d 637, 640 (Sup.Ct. 1974).

²³ E.P.T.L. § 6-4.6.

²⁴ *United Methodist Church*, 357 N.Y.S.2d at 640 (citing *Fausett v. Guisewhite*, 225 N.Y.S.2d 616).

²⁵ *In re Ender's Estate*, 13 N.Y.S.2d 766, 770 (Sur.Ct. 1939). See also *In re Johnston's Estate*, 99 N.Y.S.2d 219, 243 (Sup.Ct. App.Div. 1950).

The conditions sought to be imposed by Miss O’Keeffe clearly could not be complied with prior to the vesting of the Collection and, therefore, are conditions subsequent. Accordingly, to the extent O’Keeffe attempted to create a future estate in herself in the Collection, it was a right of reacquisition, and not a reversion or possibility or reverter.²⁶ However, O’Keeffe could not have created such a right of reacquisition, because at the time of the transfer of the Stieglitz Collection to Fisk pursuant to the New York Surrogate Court’s order, the applicable New York law did not recognize such a right with respect to personal property.

As to personal property before September 1, 1967, the rule, generally, was clearly to the effect that estates upon condition subsequent did not give rise to a right of reentry upon the happening or non-happening of the condition as would be the case with real property.²⁷

The trial court found, however, that the current provisions of the EPTL, which do recognize a right of reacquisition in a grantor and his heirs, were applicable to O’Keeffe’s transfer of the Stieglitz Collection, relying upon the language contained in Section 1-1.5 of the EPTL. In that section, the New York legislature expressly declared its intent that the EPTL not affect the rights of parties that had accrued prior to the effective date of the Act.

Unless otherwise stated herein, the provisions of this chapter apply to the estates, and to instruments making dispositions or appointments thereof, of persons living on its effective date or born subsequent thereto, without regard to the date of execution of any such instrument; except that the provisions of this chapter shall not impair or defeat any rights which have accrued under dispositions or appointments in effect prior to its effective date.

²⁶ See fn. 18, *supra*.

²⁷ *In the Matter of McCarthy*, 347 N.Y.S.2d 490, 494 (N.Y.Surr.Ct. 1973); see also *Richmond Hose Case Co. No. 2*, 130 N.E.613, 230 N.Y. 462, 469-70 (N.Y. 1921). New York courts did recognize a right of reentry or reacquisition to real property upon the happening or non-happening of a condition subsequent; however, the exercise of this right was limited to the grantor or his heirs. Any attempt at assignment extinguished both the right and the condition. See *Cathedral of the Incarnation in the Diocese of Long Island, Inc.*, 697 N.Y.S.2d 56, 59 (N.Y.App.Div. 1999) (“The Court observed that although a right of reentry (now known as a right of reacquisition; see *Turano Practice Commentaries*, McKinney’s Consolidated Laws of N.Y., Book 17B, EPTL 6-4.6, at 81-82), arose from the Cathedral’s deed, the Company, as an assignee, could not enforce it since, when the deeds were made, the right of reacquisition was not assignable, devisable or descendible.”)

Because O’Keeffe was still living at the time the EPTL became effective September 1, 1967, the trial court held the O’Keeffe could have created or retained a right of reacquisition in the Stieglitz Collection when she transferred it to Fisk University in 1949. However, the EPTL specifically provides that a future estate, whether in real or personal property, is created when the disposition creating it becomes legally effective.²⁸ Thus, when a testator creates an interest by will, it becomes effective upon her death; when she creates an interest by gift, it is effective upon execution of the gift instrument and transfer of the assets. Accordingly, whatever interests O’Keeffe could have created in the Stieglitz Collection would have to have been created when she exercised her special power of appointment and transferred all of Stieglitz’s collection of photographs and other works of art to the six non-profit institutions.²⁹ As previously discussed, though, O’Keeffe could not have created or retained a right to herself or her estate in exercising the power of appointment, because the grant of such power did not vest any interest or estate in her from which she could have retained or created a future interest. Accordingly, the trial court erred in finding that the EPTL was applicable to O’Keeffe’s disposition of the Stieglitz Collection.

Additionally, application of the EPTL would impair the rights of Fisk in the Stieglitz Collection. At the time that O’Keeffe transferred the Stieglitz Collection, New York law had consistently held that conditional limitations on absolute gifts were not favored and that such gifts would not be restricted or cut down by subsequent language unless it be clear, decisive and

²⁸ E.P.T.L. § 6-3.4.

²⁹ There is no evidence in the record that O’Keeffe executed any gift instruments disposing of any portion of Stieglitz’s collection of photographs and other art works other than the documents discussed herein reflecting the transfer of works to Fisk and the other five non-profit institutions, and there is certainly no evidence of such a gift instrument being executed by O’Keeffe prior to the adoption of the EPTL in 1967.

mandatory.³⁰ Rather, in the absence of such language, the New York courts have construed such conditions not to be conditions subsequent, but to be covenants binding upon the donee and “enforceable in behalf of any interest entitled to invoke its protection.”³¹

As discussed further herein, no such clear and decisive language exists in any document or instrument executed by O’Keeffe with respect to the transfer of the Stieglitz Collection to Fisk. In addition, there is a complete absence of a clause of reverter or re-entry in these documents. Accordingly, under the authorities discussed above, Fisk’s interest in the Stieglitz Collection was not a fee simple subject to conditions subsequent the breach of which would work a forfeiture of the estate, but rather, was a fee simple estate in the collection subject to certain covenants enforceable at the instance of the Attorney General, the statutory and common law representative of the beneficiaries of a charitable gift.³²

Clearly, applying the provisions of the EPTL to find that O’Keeffe created, or rather could have created, in herself and her estate a right of reacquisition in the Stieglitz Collection -- a right that was otherwise not recognized by New York law at the time she made her disposition of the Collection -- would impair the rights of Fisk which had already accrued long before the effective date of the EPTL. Accordingly, the trial court erred in finding that the EPTL applied to allow O’Keeffe to create or retain a right of reacquisition.

³⁰ See *In re Johnston’s Estate*, 99 N.Y.S.2d at 222, 224 (“Such a condition [subsequent] annexed to a legacy of personal property will not operate upon breach to divest the title of the legatee unless there is an express gift over on breach of the condition.” (internal citations omitted). See also *In re Ender’s Estate*, 13 N.Y.S.2d at 770 (“as there is no provision for a gift over on breach of the condition, the breach, if any, will not operate to divest the title of the legatee.”) (internal citations omitted).

³¹ *In re Gaffer’s Estate*, 5 N.Y.S.2d at 679.

³² See *In re James’ Estate*, 123 N.Y.S.2d 520 525-26 (Surr.Ct. 1953).

C. New York Law Does Not Recognize An Implied Right Of Reversion Or Reacquisition.

Finally, even if this Court were to find that, O’Keeffe had a sufficient interest in the Stieglitz Collection under the provisions of the Will to create or retain a right and that New York allowed for the creation of such future estate in O’Keeffe and her estate, the trial court still erred in finding that the Museum had a right of reacquisition in the Collection, albeit an implied right of reacquisition.

The New York courts have consistently held that “[n]o right of re-entry [now known as reacquisition] can be implied for such right exists only when clearly and definitely expressed in the instrument which creates the estate.”³³ This requirement that such right be clearly and definitely expressed is based upon a recognition, as previously noted, that “[c]onditions subsequent working a forfeiture of the estate conveyed should be strictly construed as such conditions are not favored in law and are to be taken most strongly against the grantor to prevent such forfeiture.”³⁴ Neither the petition filed by O’Keeffe seeking to transfer the Stieglitz Collection, the court order granting that petition, or the correspondence between O’Keeffe and Fisk President Charles Johnson contains any of the words recognized by New York courts as usually indicating a condition subsequent, such as “upon express condition that,” or “provided that” or “while,” “prior,” “as long as,” and “during the continuance of.”³⁵ While these particular words are not indispensable, *language meaning the same thing must be found in the instrument* in order to create the right of reacquisition or re-entry.

³³ *In re Gaffers' Estate*, 5 N.Y.S.2d 671, 679 (N.Y.App.Div. 1938).

³⁴ *Id.* at 678.

³⁵ *See Allen v. Trustees of Great Neck Free Church*, 269 N.Y.S. 341, 348 (N.Y.App.Div. 1934).

But there must be some words, which, *ex vi termini*, import that the vesting or continuance of the estate is to depend upon the supposed condition.³⁶

Despite this clear authority, the trial court held that an express provision for reversion was not required under New York, relying upon two cases, *Application of Syracuse University*, 3 N.Y.2d 665 (1958) and *Cook v. City Bank Farmers Trust Co.*, 158 N.Y.S.2d 315 (N.Y.Sup. 1956). However, neither of these cases supports that determination. *Application of Syracuse* was a *cy pres* action initiated after the dissolution of the charitable corporation receiving the gift under the will of the decedent. The court, quoting Scott on Trusts, first noted that

Where it clearly appears that the testator intended that the property should be applied only to the particular purpose which failed, or for the benefit of a particular association or corporation which was dissolved, it has been held that the doctrine of *cy pres* action is not applicable and that the property reverts to the heirs or the next of kin of the settler.³⁷

Applying this rule of law to the language contained in the testator's will, the court found that

we have significant language indicating that if this money could not go to Syracuse University for the benefit of its medical college the testator did not intend to make the gift. ... He could not have made it clearer that unless a Syracuse University were in a position to use this money for the promotion of the study of medicine or for research in its medical college he had no intention to give the money at all.³⁸

The court refused to grant the *cy pres* petition which sought to engraft upon the will a provision which "it might be supposed the testator would have harbored if he had known what

³⁶ *Id.* See also *Van De Bogert v. Reformed Dutch Church of Poughkeepsie*, 220 N.Y.S. 58 ()(Instrument contained no forfeiture clause nor a provision for re-entry upon breach; no words declare that the continuance of the estate is dependent upon maintaining the property to the desire use.); *Graves v. Deterling*, 120 N.Y. 447 () ("[T]he absence of such provisions [for forfeiture or re-entry] makes clear that the continuance of an estate does not depend upon a supposed condition, because the presence of such provisions is essential to create a condition."); *Stratis v. Doyle*, 575 N.Y.S.2d 400, 401 (N.Y.App.Div. 1991) (Court found that, since nothing in deed expressing an intent to create a condition subsequent and failure of grantor to retain any reversionary interest or right or reentry, deed only contained a covenant and not a condition subsequent.).

³⁷ 3 N.Y.2d at 669.

³⁸ *Id.* at 670-71.

was to happen, *but which the language [of the will] indicates is contrary thereto.*³⁹ Thus, while the will did not contain express reverter language, the court found that *language meaning the same thing* was contained in the will.

The *Cook* case is similarly distinguishable in that *Cook* involved a reversion⁴⁰ and not a right of reacquisition and the New York courts have recognized that a reversion may exist as a result of operation of law.⁴¹ In *Cook* case, a mother had established an inter vivos trust by which she was to receive trust income during her lifetime and her daughter was then to receive the income during her lifetime. Upon the daughter's death, the principal was to be paid over to the daughter's issue, if any then surviving, and in the absence of such issue, to such persons as the daughter might appoint by her will.⁴² After the death of the mother, the daughter sought to have the trust declared void as against the rule of perpetuities because she had no issue and there was no possibility of her having any issue. Specifically, the daughter's theory was that because the will did not contain any express provision for a disposition of the corpus of the trust in the event of the non-exercise of the power of appointment left the title to the corpus in suspension.⁴³

The trial court rejected this theory stating that “[t]here was an implied reversion to the donor, in default of exercise of the power of appointment.”⁴⁴ Thus, what the court referred to as an “implied reversion,” in reality was a reversion that arose as a result of the operation of law and thus no express provision was required. Conversely, because the right of reacquisition is the

³⁹ *Id.* at 672 (“The favor shown to charities should not be carried to the point of overriding the plainly expressed limits of a gift, whether the duration is limited in so many words or not.”) (citation omitted).

⁴⁰ A reversion “is the future estate, *other than a possibility of reverter and a right of acquisition*, left in the creator or in his successors in interest upon the simultaneous creation of one or more lesser estates than the creator originally owned.” E.P.T.L. § 6-4.4.

⁴¹ See Turano Practice Commentaries, McKinney’s Consolidated Laws of NY, Book 17-B, EPTL 6-4.4 (“A reversion may arise by operation of law. For example, a grantor . . . has a reversion if he creates a power of appointment over the remainder but does not name a beneficiary to take in default of appointment.”).

⁴² 158 N.Y.S.2d 315, 316.

⁴³ *Id.*

⁴⁴ *Id.* at 317.

future estate left in the creator when he simultaneously creates the present fee on condition subsequent, which is a vested interest but subject to a condition whose occurrence can cause divestiture, the courts have consistently required that such right must be clearly and definitely expressed in the instrument creating such estate.⁴⁵ Accordingly, both the *Application of Syracuse* and *Cook* cases are clearly distinguishable on both the facts and the law and, therefore, the trial court's reliance upon these two cases to find that the Museum had an implied right of reversion was in error.

In sum, the Museum does not have a right of reacquisition in the Stieglitz Collection, because under the terms of the Will of Alfred Stieglitz and the applicable New York law Miss O'Keeffe did not have a sufficient interest in the personal property of Stieglitz to create or retain a right of reacquisition in that property. Moreover, even if Miss O'Keeffe did have a sufficient interest, she still could not have created that right, as New York law did not recognize a right of reacquisition in personal property at the time O'Keeffe transferred the Stieglitz Collection to Fisk. Finally, a right of reacquisition must be established by clear and express provisions in the instrument creating the right and there simply is no evidence of such an express provision in any of the documents reflecting the disposition of the Stieglitz Collection. Accordingly, the trial court's finding that the Museum had an implied right of reversion was in error and should be reversed by this Court.

II. THE TRIAL COURT ERRED IN RULING THAT THE MUSEUM HAS STANDING.

The trial court erred in finding that the Museum had standing in this case based upon its concurrent finding that the Museum has an implied right of reversion in the Stieglitz Collection.

⁴⁵ See fn. 27, *supra*.

The Attorney General that this is error on the part of the trial court because the Museum simply has no interest in the Stieglitz Collection sufficient to establish the requisite standing.

The doctrine of standing prevents courts from “adjudicating ‘an action at the instance of one whose rights have not been invaded or infringed.’”⁴⁶ “To establish standing, a plaintiff must show three ‘indispensable’ elements ‘by the same degree of evidence’ as other matters on which the plaintiffs have the burden of proof.”⁴⁷ First, a plaintiff must show a distinct and palpable injury: conjectural or hypothetical injuries are not sufficient.”⁴⁸ “Standing also may not be predicated upon an injury to an interest that the plaintiff shares in common with all other citizens.”⁴⁹ “The second essential element of standing is a causal connection between the claimed injury and the challenged conduct.”⁵⁰ “The third and final element necessary to establish standing is a showing that the alleged injury is capable of being redressed by a favorable decision of the court.”⁵¹

The Museum’s status as successor in interest to the estate of Georgia O’Keeffe does not confer the requisite standing. As discussed in the previous section, O’Keeffe’s life estate in and special power of attorney over Stieglitz’s collection of photographs and works of art were not sufficient interests to allow O’Keeffe to create or retain a right of reacquisition in the Collection. Furthermore, New York law did not otherwise recognize a right of reacquisition in personal property at the time the Collection was transferred to Fisk and has never recognized an implied right of reacquisition or re-entry. Consequently, upon O’Keeffe’s death there was no right or interest in the Stieglitz Collection remaining in her estate that could subsequently be devised or

⁴⁶ *American Civil Liberties Union of Tennessee v. Darnell*, 195 S.W.3d 612, 619 (Tenn. 2006) (internal citations omitted).

⁴⁷ *Id.* at 620 (internal citations omitted).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

assigned to the Museum. With no interest or estate in the Stieglitz Collection, the Museum cannot demonstrate the first element necessary to establish standing.

In a somewhat tacit recognition that the Museum does not have any interest in the Stieglitz Collection, the trial court and the Museum both rely upon the case of *Smithers v. St. Luke's Roosevelt Hospital Center*, 723 N.Y.S.2d 426 (N.Y.App.Div. 2001), to find that the Museum has standing to enforce the conditions placed upon a charitable gift, rather than the attorney general.⁵² *Smithers* is, however, entirely distinguishable from the facts of *this case* and, therefore, is simply inapplicable.

Under New York law, the statutory duty to enforce the carrying out of charitable gifts is placed upon the Attorney General.⁵³ This statutory duty exists under Section 8-1.1(f) of the EPTL⁵⁴, the current law, as well as its predecessor, Section 12 of the Personal Property Law.⁵⁵

The duty of the Attorney General has been defined by the New York courts as follows:

The question here presented is whether the clearly expressed direction of the testator must be obeyed. The answer to that question does not depend upon whether the gift was absolute or created a trust, or whether the testator annexed a direction or a technical condition to the gift. The authorities sustain the validity of the direction of the testator, and equity will afford protection to

⁵² As discussed in the previous section, when O’Keeffe transferred the Stieglitz Collection to Fisk and attempted to imposed conditions upon that charitable gift, she did not create a fee simple subject to conditions subsequent the breach of which would work a forfeiture of the estate, but rather, a fee simple estate in the collection subject to certain covenants enforceable at the instance of the Attorney General, the statutory and common law representative of the beneficiaries of a charitable gift. *See* fn. 26, *supra*.

⁵³ *See In re Lachat's Estate*, 52 N.Y.S.2d 445, 449 (N.Y.Sup. 1944); *see also In re Long*, 565 N.Y.S.2d 569, 570 (N.Y.App.Div. 1991) (“general rule is that in cases involving the ongoing administration of a charitable corporation, standing is restricted to the Attorney General); *National City Bank of N.Y. v. Beebe*, 131 N.Y.S.2d 67, , 75 (N.Y.Sup.Ct. 1954) (“Under the law of this State the attorney-general is the sole representative of indefinite charitable beneficiaries.”); *In re James' Estate*, 123 N.Y.S.2d at 525-26 (“The general rule is that charitable trusts or gifts to charitable corporations for stated purposes are enforceable at the instance of the Attorney General.”). These rulings are consistent with Tennessee law. *See Carson v. Nashville Bank & Trust Company*, 321 S.W.2d 798, 802 (Tenn. 1959); *Vanderbilt University v. Mitchell*, 36 S.W.2d 83, 84 (Tenn. 1931).

⁵⁴ E.P.T.L. § 8-1.1(f) provides: “The attorney general shall represent the beneficiaries of such dispositions for religious, charitable, education or benevolent purposes and it shall be his duty to enforce the rights of such beneficiaries by appropriate proceedings in the courts.”

⁵⁵ Section 12 of the Personal Property Law provided, in part: “The attorney-general shall represent the beneficiaries in all such cases, and it shall be his duty to enforce such trusts by proper proceedings in this courts.”

a donor to a charitable corporation in that the Attorney General may maintain a suit to compel the property to be held for the charitable purpose for which it was given to the corporation.⁵⁶

Thus, the Attorney General's authority to represent the beneficiaries of a charitable gift and to maintain an action to enforce its charitable purposes is not derivative, but rather, primary, in accordance with the clear legislative directive that it is the Attorney General's duty to enforce the rights of charitable beneficiaries, even if it results in his being at cross purposes with such beneficiaries.⁵⁷ Moreover, the purpose and policy behind restricting standing to the attorney general is to "prevent vexatious litigation and suits by irresponsible parties who do not have a tangible stake in the matter and have not conducted appropriate investigations."⁵⁸

In the *Smithers* case, the New York appellate court carved out a very narrow exception to this rule that in cases involving the ongoing administration of a charitable corporation, standing is restricted to the Attorney General. That case involved a ten million dollar donation to a hospital for the specific purposes of building and maintaining a free standing alcoholics' rehabilitation center.⁵⁹ This gift, which was made over a number of years, was restricted and required the approval of the donor of "detailed project plans and staff appointments."⁶⁰ Disagreements between the donor and the hospital arose, and at one point, in order to ensure that the donor completed the gift, the hospital president persuaded the donor to execute a written gift instrument including restrictions and directions to use the funds "exclusively for [specified] purposes." This written gift instrument also included a signed statement by the hospital

⁵⁶ *In re Lachat's Estate*, 52 N.Y.Sl.2d at 449 (internal citations omitted).

⁵⁷ *In re Estate of Notkin*, 358 N.Y.S.2d 491, 492 (N.Y.App.Div. 1974).

⁵⁸ *In re Long*, 565 N.Y.S.2d at 570 (citing *Alco Gravure, Inc. v. Knapp Found*, 64 N.Y.2d 458, 466 (1985)).

⁵⁹ 723 N.Y.S.2d at 427.

⁶⁰ *Id.*

president stating that the gift “is gratefully accepted subject to the restrictions set forth in the letter”⁶¹

After the death of the donor, the hospital expressed its intention to sell the free standing building and move the alcohol treatment center into the hospital ward. The wife of the deceased donor alerted the New York Attorney General to this violation of the conditions in the hopes of stopping it.⁶² The Attorney General, while finding and remedying some other violations, found that the proposed sale did not violate the conditions and did not oppose such a sale.⁶³ Ms. Smithers then petitioned the court for and was granted letters of administration of her deceased husband’s estate for the specific purpose of bringing an action to stop the sale.⁶⁴

The Attorney General and the hospital both brought motions to dismiss this suit for lack of standing. The appellate court found, however, that Ms. Smithers had standing to bring the action.⁶⁵ In reaching that conclusion, the court found that her standing was not predicated on her position as a beneficiary of her husband, the deceased donor’s estate, nor in her own status as the wife of the deceased donor; rather, the court found that her standing was predicated on her unique status as “the court-appointed special administratrix of the estate of her late husband to enforce his rights under his agreement with the Hospital through specific performance of that agreement.”⁶⁶

The *Smithers* court also advanced three primary reasons for granting standing to Ms. Smithers, none of which are present in this case. First, the court found that Ms. Smithers had no pecuniary interest in the outcome of the litigation “because she [had] no position or property to

⁶¹ *Id.* at 428.

⁶² *Id.* at 429-30.

⁶³ *Id.*

⁶⁴ *Id.* at 430.

⁶⁵ *Id.*

⁶⁶ *Id.*

lose if the Hospital alter[ed] its administration of the Gift,” making it clear that she was not bringing suit as a beneficiary of the charitable gift.⁶⁷ Here, the Museum, through its President Saul Cohen, has admitted that it has an interest in the outcome of this litigation, separate and distinct from that of Georgia O’Keeffe.⁶⁸

Second the court found that “[t]he donor of a charitable gift is in a better position than the Attorney General to be vigilant and, if he or she is so inclined, to enforce his or her own intent.”⁶⁹ The Museum, however, is not the donor of the Stieglitz Collection. The Museum is the assignee of the Georgia O’Keeffe Foundation, the residual beneficiary of O’Keeffe’s estate, pursuant to a settlement agreement and not pursuant to the actual terms of O’Keeffe’s will.⁷⁰ In addition, the Museum has candidly admitted that it has pursued this action not just on behalf of the interest of Georgia O’Keeffe, but on behalf of its own interests.⁷¹ Given these circumstances, this second reason simply is not applicable.

Third, the court found that a donor’s desire to perpetuate the good name of a donor may constitute a “profound concern” in the administration of an estate, reasoning that a state attorney general might not pursue this interest on behalf of the public at large.⁷² Here, the original donor of the gift was Alfred Stieglitz. The Museum does not purport to represent Alfred Stieglitz and to perpetuate his good name; rather, the Museum purports to represent the name of Georgia O’Keeffe, as her successor in interest.

The *Smithers* court applied all three principles to the facts of that case and found that “the circumstances of this case demonstrate the need for co-existent standing for the Attorney General

⁶⁷ *Id.* \at 434.

⁶⁸ Deposition of Saul Cohen at pp. 229-232 (Tr. Transcript).

⁶⁹ 723 N.Y.S.2d at 434.

⁷⁰ In fact, neither the Georgia O’Keeffe Foundation nor the Georgia O’Keeffe Museum were in existence prior to the death of Miss O’Keeffe; nor were either of these entities established pursuant to any directives of Miss O’Keeffe, including any provisions of her actual will.

⁷¹ *See* fn. 68, *supra*.

⁷² 723 N.Y.S.2d at 435.

and the donor.”⁷³ Thus, the *Smithers* court did not find that Ms. Smithers had established standing by asserting a special interest as a beneficiary of her husband’s estate or as a beneficiary of the charitable gift itself. Rather, the court relied on Ms. Smithers’ rights as a private attorney general in granting her standing.

In this case no letters of administration have been granted and the Museum has admitted that it has not intervened in this case as a representative of the estates of either Alfred Stieglitz or Georgia O’Keeffe, but rather, as a successor in interest to whatever interests Miss O’Keeffe had in the Stieglitz Collection. Thus, the Museum is at best a beneficiary of O’Keeffe’s estate and, therefore, the *Smithers*’ exception is not applicable. Moreover, as previously discussed, Miss O’Keeffe had no rights or interest in the Collection other than her life estate which terminated upon her death. Accordingly, there are no separate and distinct rights of Miss O’Keeffe for the Museum to enforce; instead, the Museum is attempting to be “the champion and representative of the possible beneficiaries of the Gift.”⁷⁴ Such status is not sufficient to confer standing on the Museum.

In summary, the Museum simply does not have a sufficient interest here to establish standing. The only possible interest the Museum could have in the Stieglitz Collection is the interest shared by the general public, *i.e.*, the inability to view the collection as a whole if a piece of the Collection is sold. This shared injury is simply not enough to confer standing. Accordingly, the trial court erred in finding that the Museum had standing.

⁷³ *Id.*

⁷⁴ 723 N.Y.S.2d at 434.

III.&IV. THE TRIAL COURT ERRED IN RULING THAT GEORGIA O'KEEFFE LACKED A GENERAL CHARITABLE INTENT WHEN SHE GAVE THE ALFRED STIGELITZ COLLECTION TO FISK UNIVERSITY AND IN MAKING A FINDING ON THE CRYSTAL BRIDGES AGREEMENT.

New York courts have explained the *cypres* doctrine as follows:

Upon a failure or refusal of the legatee to comply with the conditions and restrictions imposed upon the bequest, or if the legatee commits a breach of trust or mismanages the gift in any way the courts have the power to see to it that the interests of the public in the trust or gift are properly safeguarded. However, whenever it is shown to the court that the circumstances have so changed since the execution of an instrument containing a charitable gift, grant or use as to render impracticable or impossible a literal compliance with the terms of such instrument, the court may, upon the application of the trustee or the person or corporation having the custody of the property, make an order directing that such gift shall be administered or expended in such manner as in the judgment of the court will most effectually accomplish the general purpose of the testator, without regard to and free from any specific restriction, limitation or direction contained in the instrument.⁷⁵

This ability of the court to allow legatees to deviate from the conditions attached to a charitable gift was first codified in New York law in 1893 ("Tilden Act of 1893") and is currently codified in E.P.T.L. § 8-1.1(c)(1), which states in pertinent part,

whenever it appears to such court that circumstances have so changed since the execution of an instrument making a disposition for religious, charitable, educational or benevolent purposes as to render impracticable or impossible a literal compliance with the terms of such disposition, the court may, on application of the trustee or of the person having custody of the property subject to the disposition and on such notice as the court may direct, make an order or decree directing that such disposition be administered and applied in such manner as in the judgment of the court will most effectively accomplish its general purposes, free from any specific restriction, limitation or direction contained therein[.]

In applying this statute, New York courts have developed a three pronged test for determining whether the doctrine should be applied: "(1) that the gift or trust be charitable in

⁷⁵ *In re Stuart's Estate*, 183 Misc. 20, 25 (N.Y.Surr.Ct. 1944) (internal citations omitted).

nature; (2) that the donor must have demonstrated a general, rather than a specific, charitable intent; and (3) that circumstances have changed subsequent to the gift that render literal compliance with the restriction impossible or impracticable."⁷⁶

A. Miss O’Keeffe Had a General Charitable Intent.

The court below erred when it found that Miss O’Keeffe had specific rather than general charitable intent.

The primary inquiry in determining whether the donor had general charitable intent is, if the donor had known that it would be impracticable or impossible to follow the express terms of the gift, would that donor prefer the gift be made to a similar charity or prefer that the gift be returned to the estate and distributed to the donor's heirs and devisees.⁷⁷ Here, it is apparent from the Will, the Petition Miss O’Keeffe filed in support of the gift to Fisk University, and the gift itself that the intent of the gift was to promote the study of art, in Nashville and in the southeast, for the benefit of African American youth and others without access to comparable collections, in honor of Alfred Stieglitz.

The first indicator of the purpose of the gift is the Will of Alfred Stieglitz, as it is the document that authorized Miss O’Keeffe to make the gifts of art. The Will provided Miss O’Keeffe with a special power of appointment – the power to give the art to nonprofit institutions for the promotion of the study of art. This provision of the will indicates that all of the art given by Miss O’Keeffe, at the very least, served the one central purpose of promoting the study of art (as opposed to residing in an individual’s private collection).

The second indicator of the purpose of the gift is the uniqueness of Fisk as a donee entity when compared to the other entities that received parts of the Stieglitz Collection. Of the six

⁷⁶ *In re Estate of Othmer*, 815 N.Y.S.2d 444, 447 (N.Y.Surr.Ct. 2006).

⁷⁷ *See National Soc. of Daughters of American Revolution v. Goodman*, 128 Md. App. 232, 240 (Md. Ct. of Special App. 1999).

institutions, Fisk University is the only institution whose primary purpose was not the display of art – each of the other institutions was considered a major museum at the time of the gift. Fisk, on the other hand, is primarily an educational institution. In addition, of the six institutions, Fisk University is the only institution that serves a primarily African-American population – each of the other institutions does not focus its efforts on serving that demographic. Third, of the six institutions, Fisk University is the only one that is located in a city in the southeast portion of the United States – each of the other institutions is located in a major metropolitan area in the northeast or west.

Charles S. Johnson, the President of Fisk who accepted the gift from Miss O’Keeffe, elaborated on Miss O’Keeffe’s intent in the catalogue that Fisk published upon receipt of the Collection in 1949. President Johnson’s message noted Miss O’Keeffe’s desire to expose students at Fisk and other Nashville colleges to a quality of art that would otherwise be beyond their reach:

In presenting the collection to Fisk, Miss Georgia O’Keeffe acted on the generous belief that some of the finest examples of modern art should be in the possession of institutions which would under ordinary circumstances have great difficulty in acquiring such treasures. She felt also that these works should be available to people who would not usually be able to visit the fine galleries of New York City. For this practical, public-spirited point of view and for Miss O’Keeffe’s specific interest in Fisk, the Trustees, the Faculty, the Alumni and Students of the University are deeply grateful.

The new collection will be a continuing source of inspiration for creative artists among Fisk students and, we hope and believe, among the students of the whole group of nine Nashville colleges. At the same time it will prove an effective means of stimulating wider appreciation of the arts among students and the general public in Nashville and throughout this area.⁷⁸

⁷⁸ Ex. 37 at 7 (Fisk Catalogue of Alfred Stieglitz Collection).

The uniqueness of Fisk University as a donee was not accidental. Miss O’Keeffe was an artist and collector and was very aware of Fisk University’s uniqueness as compared with the other institutions. Her awareness is reflected in the type of art given to Fisk. A great deal of African American art from the Stieglitz Collection, including African masks and works of art by African American artists, was given to Fisk. In summary, Fisk University’s uniqueness is further evidence of Miss O’Keeffe’s intent in giving a portion of the Stieglitz Collection to Fisk University – the intent to promote the study of art, by African Americans, in a city located in the southeast.

A third indicator of Miss O’Keeffe’s intent in giving Fisk University the gift is the conditions she attached to the gift. Miss O’Keeffe required Fisk University to display the entire collection of art together, as a whole, in a room without any other pieces of art. Related to that, Fisk University was not to loan any piece of the Collection without first attaining approval from a specially formed art committee. From these conditions, it is apparent that Miss O’Keeffe felt that there was an added value to the collection displayed as a whole that was greater than just the value of displaying each item alone. In addition, Miss O’Keeffe wanted the collection displayed under the name “The Alfred Stieglitz Collection.” This condition evidences Miss O’Keeffe’s intent to honor the memory of her late husband.

It defies reason to conclude that in the face of Miss O’Keeffe’s intent to give the art to an institution dedicated to the education of African American students in a city in the southeast United States, for the promotion of the study of art throughout the community, and in honor of her late husband Alfred Stieglitz, Miss O’Keeffe would prefer that the art revert to her private collection (and heirs) if Fisk University failed to comply with the conditions placed on the gift. That reversion would defeat the original motivation for giving the art to Fisk University. It

appears much more reasonable that Miss O’Keeffe would have preferred to modify the conditions in order to achieve most effectively the intent behind the original gift.

In addition to the primary inquiry above, New York courts have held that the fact that a donor made similar charitable gifts to several different charities demonstrates a general charitable intent.⁷⁹ While not expressly stated in the cases, the policy and reasoning behind this is easily discernible and logical. When a donor gives multiple, similar charitable gifts to several institutions, it is only logical that those multiple gifts are indicative of a general charitable intent to benefit the public, as opposed to a narrower intent to specifically benefit one institution. Here, every piece of art that Alfred Stieglitz owned at his death was given to six different nonprofit institutions. From that, it is clear that Ms. O’Keeffe’s intention was to make a charitable gift of the entire collection to benefit the public.

Third, New York courts have consistently held that the absence of a divesting clause upon breach of a condition is proof that the donor had general charitable intent.⁸⁰ The cases in support of this proposition are numerous and span several decades. Here, it is undisputed that there is no divesting clause.⁸¹

Finally, New York courts generally favor a finding of general charitable intent.⁸² As a policy, New York courts have adopted a liberal interpretation of the general charitable intent

⁷⁹ See *In re Polytechnic University*, 812 N.Y.S.2d at 301-11; *In re Hummel*, 805 N.Y.S.2d at 249.

⁸⁰ See *In re Polytechnic University*, 812 N.Y.S.2d 304, 301-11 (N.Y.Surr.Ct. 2006); *In re Hummel*, 805 N.Y.S.2d 236, 249 (N.Y.Surr.Ct. 2005); *Application of Abrams*, 574 N.Y.S.2d 651 (N.Y.Surr.Ct. 1991); *Matter of Johnson*, 460 N.Y.S.2d 932, 937 (N.Y.Surr.Ct. 1983) (reversed on other grounds); *Matter of Kraetzer’s Will*, 462 N.Y.S.2d 1009, 1013 (N.Y.Surr.Ct. 1983); *In re Carper’s Estate*, 415 N.Y.S.2d 550, 554 (N.Y.Surr.Ct. 1979); *In re Goehring’s Will*, 329 N.Y.S.2d 516, 522 (N.Y.Surr.Ct. 1972).

⁸¹ To the extent that the O’Keeffe Museum makes the argument that there is a divesting clause implied by the conditions, the Attorney General asserts that the argument is meritless. Every *cy pres* action seeks relief from conditions imposed on a gift. The argument that the existence of conditions implicitly creates a divesting clause would fly in the face of the numerous New York cases that have clearly stated that the absence of a divesting clause demonstrates a general charitable intent. In addition, a number of the New York cases cited above state that the divesting clause must be **explicitly stated** and present in the gift document.

⁸² See *Matter of Kraetzer’s Will*, 462 N.Y.S.2d at 1013; *In re Goehring’s Will*, 329 N.Y.S.2d 516, 521 (N.Y.Surr.Ct. 1972).

requirement of the *cy pres* doctrine. The policy behind this is to promote charitable giving and to effectuate the charitable purpose of original gifts. Here, to allow the portion of the Stieglitz Collection given to Fisk to revert for lack of general charitable intent deprives the general public of the benefit of the significant gift made by Miss O’Keeffe and defeats Miss O’Keeffe’s original intention.

B. The Present Record Is Insufficient To Permit Any Conclusions Concerning Whether It Is Impracticable or Impossible for Fisk to Comply with the Conditions.

In granting summary judgment, the Chancery Court never reached the merits of Fisk’s claim that compliance with the conditions would be impossible or impracticable. As a result, that issue is premature for consideration by this Court and should be remanded to the trial court for further proceedings.⁸³

C. The Trial Court Erred in Making Any Finding as to A *Cy Pres* Remedy.

The Chancery Court found that the Crystal Bridges Agreement “fails as a *cy pres* remedy because the proposal does not nearly as possible effectuate the intent of the donor.” In its brief, Fisk University argues that this Court should find that the proposed Crystal Bridges Agreement “most effectively accomplishes O’Keeffe’s intent *insofar as is practicable under the circumstances.*”⁸⁴ The Attorney General asserts that any finding as to any *cy pres* remedy by the

⁸³ The Court did order Fisk to comply with the conditions and did so based on Fisk’s proof at the trial on the O’Keeffe Museum’s allegations of breach of conditions and proposed remedy of reversion. That finding, however, is not relevant to a separate *cy pres* proceeding in which each party would be able to make offers of proof specifically as to Fisk’s financial condition (presently and going into the future) with the aid of expert witnesses. With the benefit of this much more detailed and thorough inquiry, the Chancery Court could then make a fact based conclusion as to whether or not compliance with the conditions is impracticable or impossible presently and going forward.

It is important to note that the Chancery Court, perhaps recognizing the distinction between Fisk’s present ability to comply with the conditions and Fisk’s ability in the future to comply with the conditions, issued a permanent injunction and explicitly stated it was leaving the door open to future contempt proceedings should Fisk become unable or unwilling to comply with the conditions. This ruling demonstrates the Chancery Court’s recognition that the ruling at trial only applied to Fisk’s present ability to comply with the conditions.

⁸⁴ Appellant’s Brief at page 42 (emphasis added).

court below or this Court is premature, and the issue should be remanded to the trial court for determination if the court finds that the requirements for *cy pres* relief have been satisfied.

The *cy pres* analysis of the New York courts cited above consisted of a two step process: first, the court makes a finding as to each of the three prongs of the *cy pres* analysis; second, if, and only if, the court finds that the petitioning entity is entitled to *cy pres* relief, then the court engages in an analysis of whether the proposed *cy pres* relief effects “as nearly as possible” the original intent of the donor.

If this court performs the two-step analysis in the order required by New York law, Fisk’s arguments concerning the Crystal Bridges Agreement must fail. In *cy pres* cases in which the court addresses whether or not the proposed relief is appropriate, the Court has already made a finding of impracticability or impossibility. A necessary component of that conclusion would be findings by the court as to why compliance with conditions was impracticable or impossible. These findings as to why compliance is impracticable or impossible are paramount to making any findings as to any appropriate *cy pres* remedy. Court findings as to the appropriateness of a certain remedy cannot be made in a vacuum; they must be made in light of the impracticability or impossibility of performance of the conditions. Depending on those findings the appropriate relief could range from being relieved of a minor condition to transferring the gift to another institution.

For example, many of the items in the collection are photographs or watercolor drawings, which are highly sensitive to light. According to modern curatorial practice, such items should be stored away from light for extended periods of time to avoid irreparable damage or fading. A court could find upon appropriate proof that it is impracticable or impossible to carry out Miss O’Keeffe’s intent to display the entire Collection at all times, if such display would ultimately

result in the degradation or destruction of part of the Collection. In addition, Miss O’Keeffe was aware of good curatorial practices at the time she made the gifts, as some of the conditions imposed on Fisk dealt with the manner in which items would be handled and stored. It would be reasonable for a court to assume that Miss O’Keeffe, if present today, would concur with modifying the restrictions on the gift to allow additional measures intended to preserve the physical condition of the Collection.

In contrast, Fisk’s aggressive claim seeking permission to sell a half interest in the collection is much more problematic. Even if the court found that Fisk satisfied the three elements required by *cy pres* relief, based on the assertion that Fisk’s financial condition rendered compliance with the gift’s restrictions impracticable or impossible, the court would still have great discretion over which conditions should be amended to address such findings. Such relief would not necessarily include, and would likely fall short of, a sale of the Collection.

For this reason, this Court should remand the entire *cy pres* analysis (remedy included) to the lower court for findings as to the first step in the *cy pres* analysis. If, and only if, the trial court finds that Fisk University is entitled to *cy pres* relief should the trial court then decide what kind of relief would be appropriate in light of the significance of the need for relief.

Fisk University attempts to argue in its brief that the Crystal Bridges Agreement most effectively achieves Miss O’Keeffe’s intent. As no court has even found that *cy pres* relief is warranted in this case, this argument is inherently flawed and should be rejected. It is entirely possible that a much less drastic *cy pres* remedy than selling the collection would satisfy Fisk’s needs if Fisk is entitled to any *cy pres* relief at all.⁸⁵

⁸⁵ In its final argument, Fisk asserts that the trial court erred in imposing a permanent injunction enjoining Fisk from selling the Stieglitz Collection or any part thereof and requiring Fisk to display the Collection, among other things. The Attorney General does not take a position with respect to this issue.

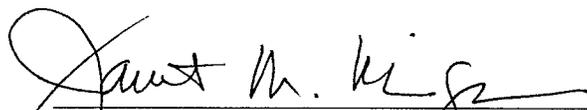
CONCLUSION

The trial court erred in finding that the Georgia O’Keeffe Museum, as the successor in interest to Georgia O’Keeffe’s estate, has a right of reacquisition in the Stieglitz Collection, express or implied, and in finding that the Museum has standing. The trial court further erred in finding that Georgia O’Keeffe lacked a general donative intent when she transferred the Stieglitz Collection to Fisk University. Accordingly, the trial court’s grant of summary judgment on these issues should be reversed and the case should be remanded for the appropriate proceedings.

Respectfully submitted,

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General


JANET M. KLEINFELTER (BPR 13889)
Senior Counsel
(615) 741-7403


WILLIAM N. HELOU (BPR 22839)
Assistant Attorney General
Special Litigation Division
Office of Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 253-3327

CERTIFICATE OF SERVICE

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

William L. Harbison
Andree S. Blumstein
L. Webb Campbell III
Sherrard & Roe, PLC
424 Church Street, Suite 2000
Nashville, TN 37219

Counsel for Georgia O'Keeffe Museum

John P. Branham
Stacey A. Garrett
C. Michael Norton
Bone McAllester Norton, PLLC
511 Union Street, Suite 1600
Nashville, TN 37219

this 8th day of September, 2008.


JANET M. KLEINFELTER
Senior Counsel