

## The Failings of Donor Intent

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Alan L. Feld, [Who Are the Beneficiaries of Fisk University's Stieglitz Collection?](#) 91 **B.U. L. Rev.** 873 (2011).

In his May, 2011 article, *Who Are The Beneficiaries of Fisk University's Stieglitz Collection?*, [Alan L. Feld](#) presents an intriguing case study. Charitable giving is not new, nor are the issues of donor standing, beneficiary standing or the doctrine of *cy pres*. In fact, the issues arising from the obsolescence or dis-utility of charitable gifts recently have captured the attention both of the general public and the academy. Professor Susan N. Gary's article entitled, [The Problems With Donor Intent: Interpretation, Enforcement, and Doing the Right Thing](#), 85 Chi-Kent L. Rev. 977 (2010) presented a comprehensive analysis of the legal issues implicated in a variety of noteworthy failed charitable gifts.

By focusing on the [Stieglitz Collection](#), a multi-million dollar collection of artwork housed and maintained at [Fisk University](#) in Nashville, Professor Feld's article serves as an important complement to the somewhat longer piece by Professor Gary. Professor Feld raises important issues including the role of the state's attorney general in overseeing charitable trusts, fidelity to the all too often enigmatic intent of the donor, the tension between the doctrine of *cy pres* and literal interpretation of conditions on gifts, the importance of determining the charitable beneficiaries, and questions of who has standing to sue to enforce charitable purposes. Professor Feld presents compelling reasons for expanding the legal standing of the beneficiaries of a charitable trust.

Beginning in the late 1940's, [Georgia O'Keeffe](#) transferred photographs from the estate of her deceased husband, [Alfred Stieglitz](#), together with her own works of art to Fisk University with an express limitation that the artwork could not be sold. Fisk initially honored the donor's request; however, in the early 2000's the university experienced financial difficulties that threatened the operation of its programs. As the maintenance of an art collection was secondary to the primary charitable purposes of Fisk, the university proposed selling part of the Stieglitz Collection under the doctrine of *cy pres*.

Fisk sought court approval of a settlement agreement pursuant to which the [Crystal Bridges Museum of Bentonville](#), Arkansas, an art museum founded by members of the [Sam Walton](#) family, would pay Fisk \$30 million for an undivided one-half interest in the Collection. Pursuant to the proposed agreement, each of Crystal Bridges and Fisk would display the artwork for six months per year. The Georgia O'Keefe Foundation protested the proposed sale, claiming that the Foundation had an enforceable reversionary interest in the paintings.

While the Chancery Court [agreed](#) with the Foundation, the Court of Appeals [held](#) that there was no reversionary interest and that the application of *cy pres* was appropriate. Upon [remand](#), the Chancery Court allowed a modified sale to Crystal Bridges on several conditions including the segregation of part of the proceeds of sale as an endowment fund for the upkeep of the Stieglitz Collection.

After setting the stage for the drama, Professor Feld analyzes the interest of each actor. First, Fisk University desperately needs funds to continue operating, and even though selling the collection would violate the express restraint on alienation, the proposed sale to Crystal Bridges would permit Fisk to display the paintings for half of each year while at the same time receiving a sufficient infusion of cash to permit the university's remaining a viable charitable entity. Allowing Crystal Bridges to purchase an interest in the Stieglitz Collection benefits this developing museum by adding importantly to its collection of American art. In addition, the sale to Crystal Bridges furthers an important objective of The [Georgia O'Keefe Museum](#) (substituted in the litigation for the Foundation), namely, enhancing the public accessibility of Ms. O'Keefe's works. In contrast, the sale to Crystal Bridges at least partially

diminishes the expectations of the citizens of Nashville in keeping the unique and valuable collection in their city. Additionally, the court must attempt to follow the intent of Georgia O'Keefe, but determining such intent is often difficult, especially when the donor is deceased and unanticipated circumstances have arisen. The final actor is the Tennessee Attorney General whose role is to advocate for the diverse public interests that benefit from the enforcement of the charitable gift.

Absent a retained property right in the gifted property, donors generally lack the standing to sue a charity to enforce conditions attached to the gift. Retaining a right, however, may be an undesirable way to backstop donor intent as the retained interest may jeopardize the income tax benefits of the charitable gift. Like donors, beneficiaries generally lack standing to sue to enforce a gift. Professor Feld points out that under New York law, the law applied by the Tennessee court in the Fisk case, an applicable exception grants standing when there is a small and clearly defined subclass of beneficiaries possessing a special interest in the gift.

Courts typically rely on the doctrine of *cy pres* to permit a charity to modify an onerous condition on a gift; however, such doctrine is decidedly donor-focussed and, according to Professor Feld, often leaves the courts guessing at donor intent while failing to address the often determinable interests of intended beneficiaries. Professor Feld concludes that both donors and narrowly defined classes of beneficiaries should be allowed greater leeway to sue to enforce conditional charitable gifts.

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