

SHATTERED PROMISES: THE ETHICS OF  
BREAKING DONOR RESTRICTIONS

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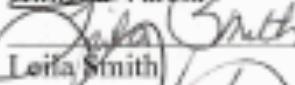
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ABSTRACT

This paper explores the existing issues surrounding acceptance of restricted gifts and discusses the ethics and ramifications for breaking donor stipulations. Starting with the historical context of why museums need donors, it follows the history of gifts to art museums in America. It then studies the implications that breaking agreements can have on the organizations. Using case studies and examples from twentieth and twenty-first centuries, the ethics are approached from situations such as the safety and accessibility of the art, the mission of the organization and the survival of the museum.

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## CHAPTER ONE

### INTRODUCTION

*Disposal of collections through sale, trade, or research activities is solely for the advancement of the museum's mission. Proceeds from the sale of nonliving collections are to be used consistent with the established standards other than acquisition or direct care of collections.*  
-American Associations of Museums, Code of Ethics for Museums

In the late 2000's the financial situation left arts organizations struggling to make ends meet. Stories about museums made breaking international news, but these stories were not about brilliant shows or spectacular thefts. These stories focused on the ethics of museums. The ethics of the art world were being openly debated in the public domain. Accessioning, deaccessioning, donor wishes vs. artistic control have all had their fifteen minutes of fame. But where is the discussion about the ethics of breaking donor stipulations? While the ethics surrounding the practice of deaccessioning are well established, the ethics of breaking a contract with a donor who put stipulations on the donation, as well as the consequences for an organization that does so, need to be defined.

During the last decade the news reports seem to be showing that museums are not self sustainable. In recent high-profile cases such as the Barnes Foundation, then Fisk University, then the Rose Museum at Brandeis, art museums have resorted

to breaking the very conditions on which they were founded in order to survive. The Barnes Museum wanted to move to downtown Philadelphia. Fisk University wanted to sell two paintings. Brandeis University wanted to sell its entire collection and shutter the gallery.

These museums had all been impacted economically. In the case of Fisk University and the Rose Museum at Brandeis, the parent university was in dire financial straights and saw the art collection as a lucrative asset. The Barnes Foundation felt attendance was not high enough in the suburban setting it was founded in, and saw a move to the city as a means to higher income. But these desired moves broke with the agreements made at the time of the donation of the art.

This trend in collections/financial management appeared to be a result of the recent financial crises. But research finds similar cases that date back over 100 years. During the late 1980's and early 1990's—right around the recession culture wars of that decade—several organizations sought to sell off pieces of their collections for capital improvements. According to the American Association of Museums, selling parts of a collection for anything except new acquisitions is highly unethical (American Association of Museums 2000). But what happens when a museum's attempts at stability directly violate the very terms under which they received their collections?

The stipulations donors put on their gifts can vary greatly in the ways they bind the recipients. For collections that have been left with the building they were

originally housed in to form a museum, such as the Barnes Foundation and the Isabella Stewart Gardner Museum, the donors have mandated that the collections stay as they left them. Charles Freer left his Asian art collection to the Smithsonian, but said that it could never be added to or broken up. When Georgia O’Keeffe donated her late husband’s collection to Fisk University—and five other organizations—she clearly stated that the works were not to be sold off and must always be on display as a whole at each location. The University of Indiana accepted a gift of priceless art from an alumnus under the agreement that the college would also accept and display sculptures he created. Clyfford Still left an extensive collection of his abstract expressionist paintings to the city that would build a museum in his name to house them. MoMA accepted paintings from a generous donor, who stipulated that they could have the works for 50 years, then must give them to the Met and Art Institute of Chicago, as at that time the works would no longer be considered “modern.” The Whitney agreed to never sell its Madison Avenue building in exchange for a \$125 million donation. All of these donors left their works and their money in good faith that the organizations that accepted them would keep their end of the agreement.

There are several reasons why museums have felt they couldn’t maintain the original agreements. For several, such as the Rose Museum, Fisk University, the University of Iowa, Thomas Jefferson University and Randolph College, the museums are a small part of a larger entity of a university. In recent years as endowments have shrunk from the economic crisis, donations have dwindled, and

operating costs have risen, the universities have viewed the art collections as assets—assets that could be sold for profit. Likewise several museums had need for capital improvements and saw deaccessioning as a solution for financial problems. For the Barnes Foundation, their location was deemed too remote to receive the number of visitors needed to maintain the museum—and the original mission Albert Barnes had established<sup>1</sup>.

While some of the museums mentioned have not broken agreements with donors, they have accepted gifts with strict, well-established, stipulations. Is it just a matter of time until they find themselves in a situation like the Barnes Foundation or Fisk University? Study of these particular cases at this time could set a precedent for the considerations museums need to take when accepting gifts with restrictions, as well as for the ethics they must follow when they are no longer able to maintain their end of the agreement.

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<sup>1</sup> Albert Barnes established the Barnes Foundation “for its corporate purpose the promotion of the advancement of education and the appreciation of the fine arts.” He intended to promote his particular study of art, for in the bylaws he also stipulated that at “the death of Donor the collection shall be closed, and thereafter no change therein shall be made by the purchase, bequest or otherwise obtaining of additional pictures, or other works of art, or other objects of whatsoever description. Furthermore, after the death of Donor and his wife, no buildings, for any purpose whatsoever, shall be built or erected on any part of the property.” (Cantor, 1963)

## CHAPTER TWO

### BRIEF OVERVIEW OF THE HISTORY OF MUSEUMS AND DONORS

*When you look at the big gestures in the history of art, it is a story of individuals, whether it's the Medicis or J. Paul Getty...many of the great creative projects in the world began with a single patron.*  
(Garber 2008)

Museums need donors. More than just financially, more than to keep the lights on or provide diverse programming, museums need donors to have art on the walls. American museums would not have collections were it not for the donations of individuals. To look at the implications that breaking donor agreements could have, one has to first understand the history of the relationship between patron and museum.

The National Gallery was a gift of Andrew Mellon. The Smithsonian Institution began with a gift from Englishman James Smithson. The Metropolitan Museum of Art grew with the support of J.P. Morgan and his extensive collection. Museums such as the Whitney, the Guggenheim, the Getty and the Gardner were private collections that were turned into public museums. Abby Aldrich Rockefeller, Lillie P. Bliss and Mary Quinn Sullivan founded the MoMA, with pieces from their private collections, to “challenge the conservative policies of traditional museums and to establish an institution devoted exclusively to modern art” (MoMA Museum History 2011).



The reasons why people commission and collect art are as varied as the patrons themselves and come from a sense of piety and prestige, as well as power and pleasure (Einreinhofer 1997). During the Middle Ages the wealthy would commission artists to create pieces that would then be given to a church. These pieces of “public art” would teach biblical stories, capture historic moments and serve as a means for the viewer to become closer to God. They were also a way for patrons to display their wealth and secure prayers from the living after they had died—thereby advancing their path through purgatory.

In the Renaissance the patron took on a more important role in the creation of art. Families such as the Medicis, perhaps the greatest family to ever support the arts, not only commissioned works for religious use, they also began to request pieces for public spaces and their own private collections. The Medicis had an eye for beautiful things, a sense of civic responsibility to support the city-state of Florence they loved, and a desire to display their wealth and power.

In the United States, the traditions of patronage were started by “the barons of industry in the 19<sup>th</sup> century and continued by their descendants” (Garber 2008). Great American families such as the Rockefeller’s, Vanderbilt’s and Carnegie’s searched history to find models for how to leave a legacy. They saw the Italian Renaissance as the epitome of high culture and wanted be modern Medicis (Einreinhofer 1997). Individuals who donated their personal collections thereby founded American museums.

During the Renaissance, and later during the boom of the Industrial Age, art came to be seen as a crowning achievement. Once a culture mastered agriculture, they could advance to industry and education. After education came culture. Industrial barons strove to prove their worth and power by conquering the arts. As President John F. Kennedy said in a letter to the editor of *Musical America*, "There is a connection, hard to explain logically but easy to feel, between achievement in public life and progress in the arts. The age of Pericles was also the ages of Phidias. The age of Lorenzo de Medici was also the age of Leonardo da Vinci. The age of Elizabeth was also the age of Shakespeare." Each baron wanted to be the art patron of his era.

Piety, or national pride, prestige and pleasure were amassed along with the works. As collection became more of a competition between the rich, men were striving to collect not only what visually appealed to their own tastes, but also to collect the great masterpieces. Patrons of the arts began to look for guidance from experts on art. Together, "the enlightened collector and the expert in art worked together to build a collection that met a standard beyond personal taste. These men and the collections they build were the foundations of the major art museums in America" (Taylor 1975).

Unlike European states, the United States did not have any sort of royal collection. The young country had no prince to bestow art on the people. The Revolution had not opened up the collections of a dethroned monarchy. In the late 1800's America had no real public museum or national collection. The enlightened

collectors, the social elite who had the time and collections, banded together and created the first American museums.

In 1869 a group of men met at the New York Union League Club. Over three hundred people—businessmen, lawyers, bankers, city leaders—heard a speech by William Cullen Bryant that expressed the need for a museum in New York:

*Our city is the third greatest city in the civilized world, our republic has already taken its place among the great powers of the earth; it is great in extent, great in population, great in the activity and enterprise of its people. It is the richest nation in the world.*

But his speech continued to declare America a poor nation due to its lack of a museum of art. The implication was that the great European cities publicly displayed cultural treasures, and so should the United States. The other speakers at this meeting reiterated the need for an American museum. Two months later the first board of trustees of the Metropolitan Museum of Art was elected (Einreinhofer 1997).

This group of 27 men donated their own money and art to the museum. They solicited friends to raise \$250,000 towards the purchase of the Met's initial collection. They personally petitioned the City of New York for space, a building and equipment. When the depression of the 1870's hit, the trustees paid the museum's debts with their own money (Einreinhofer 1997). J.P. Morgan left his extensive Hyde Park collection of art to the Met "for the instruction of the American people" and to strengthen the organization's holdings.

At the same time in Boston individuals were raising money to start the Museum of Fine Arts. One thousand citizens raised the initial \$260,000 needed for the first building (Gilman 1907). As the MFA built its permanent collection, “few individual personalities predominate in Boston....there have been a host of good collectors and donors whose special insights and singular taste” formed the collection. Martin Brimmer, Thomas Gold Appleton, Dr. Denman Waldo Ross, John Taylor Spaulding, and Maxim Karolik were among the many whose donated works created a permanent display of art for the people of Boston.

The Smithsonian Institution originated in the will of Englishman James Smithson. He bequeathed his entire estate to the United States, “to found at Washington, under the name of the Smithsonian Institution, an establishment for the increase and diffusion of knowledge among men.” Today the Smithsonian is one of the largest museums in the world.

Nearly a century after the Smithsonian was founded, Andrew Mellon followed suit and gifted his world-class collection to the American people by founding the National Gallery of Art. Mellon envisioned a museum in America that rivaled the Louvre and the National Gallery in London (Einreinhofer 1997). Since there was no royalty to bestow an expansive collection on the people, Mellon—himself a self-made member of the American elite—began collecting masterpieces and later offered them to the United States. In a 1936 letter to Franklin Roosevelt he wrote:

*Over a period of many years I have been acquiring important and rare paintings and sculpture with the idea that ultimately they would become the property of the people of the United States and be made available to them in a national art gallery to be maintained in the city of Washington for the purpose of encouraging and developing a study of the fine arts.*

Beyond providing his collection, Mellon also employed the architect for the building and provided an endowment to pay salaries and purchase future pieces.

Two other private collections, those of Samuel H. Kress and Chester Dale rounded out the initial collection at the National Gallery. Pieces included were master works by Botticelli, Jan Van Eyke, Titian, Rembrandt, Giotto, Raphael, El Greco, Monet, Renoir and Cassatt. Without these collections, the National Gallery would not have been established as a museum fit to rival those in Europe.

In the late 1920's three female patrons of the arts left a lasting impression on the history of the American museum. Lillie Bliss, Mary Quinn Sullivan and Abby Aldrich Rockefeller founded the Museum of Modern Art in New York. The three women, to the dismay of their families, collected Modern art, a genre that had yet to gain mainstream legitimacy. Bliss tried several times to donate pieces of her collection to the Met, but with no avail. The three women, tired of trying to force their cause into other museums, decided to start their own. With that, MoMA was born. Upon her death, Bliss left her collection to the museum, providing it with a permanent collection to build upon (Burt 1977).

Other American museums of the time were established solely from individual collections that were turned into museums. Many, such as the Phillips Collection in

Washington, the Isabella Stewart Gardner in Boston, and the Barnes Foundation in Philadelphia remained housed in the original homes of the collectors.

Beyond establishing permanent collections for museums, donations from private collectors also allow museums to expand and diversify their collections. The Freer Gallery of Art at the Smithsonian was born from the Asian and American art collections of Charles Freer. But his collection lacked depth, and in the 1980's Charles M. Sackler rounded out the Smithsonian's collection of Asian art by donating his entire collection to the museum. This donation filled in gaps in Chinese and Islamic art to create a robust museum of Asian art.

As the prices on pieces continue to rise, museums, which are accountable to the public, have less freedom to purchase landmark pieces or take as many risks in collecting contemporary art. Private collectors, on the other hand, have the freedom to purchase at will. Arts organizations rely on private collectors to amass quantities of contemporary art, and then donate pieces when they have obtained solid historical context. (American Association of Museum Directors 2007). In an interview with ARTINFO in August of 2010 Gary Tinterow, chief curator of modern and contemporary art at the Met said it simply, "In terms of acquisitions, we rely primarily on donations" (Kaufman 2010).

Historically over 90 percent of museum collections were donated by private collectors and individuals account for approximately 80 percent of new acquisitions (Follas 2008). In looking at recent annual reports of museums, annual acquisitions are weighted by either donations of pieces from individuals or purchases made from

funds provided by donor endowments. In the Met's 2009-2010 annual report 1033 pieces of art were acquired by the museum in that year. Of those acquisitions, 59 percent were donated items, 39 percent were purchased through donor endowments, 1.8 percent were exchanges with other organizations and only 0.2 percent were purchased by the museum outright. Similar patterns appear in annual reports from museums around the country. The Smithsonian's Arthur M. Sackler Gallery was given 75 percent of its acquisitions in 2008/2009, 19 percent were purchased through donated funds and 6 percent were outright purchases. At MoMA in 2009/2010 acquisitions were broken down to 57 percent gifts, 40 percent purchases through funds and 3 percent museum purchases. In 2008/2009 the Dallas Museum did not purchase a single piece without donated funds, 79 percent of acquisitions were gifts of art. The following year the Phillips Collection similarly relied on donations, as 97 percent of acquisitions were gifts of art and 3 percent were purchased through funds donated for purchases for the collection.

In Nashville the Frist family saw the community's need for a space to publicly display meaningful art exhibitions and venue to provide arts education. With an initial pledge of at least \$25 million in the late 1990's, and continuing annual support of \$5 million, the Frist's gave residents of middle Tennessee a place to "present and originate high quality exhibitions with related educational programs and community outreach activities."

Currently construction is underway in Denver for the Clyfford Still Museum. Were it not for the bequest of the artist for which it is named, the museum would

never have existed. But because Still stated in his will that his works were to go to “an American city that will agree to build or assign and maintain permanent quarters exclusively for these works of art,” Denver will soon be home to one of the country’s newest museums.

American museums were founded by the people, for the people. Museum collections were built and continue to expand based on the generosity of donors. Either by donations of entire collections or funds for acquisition endowments, museums are building and expanding collections thanks to the support of donations from individuals. With growing financial restraints and demands for transparency, this trend is certain to continue, ever increasing museums’ dependency on donors. By the nature of their mission and government status as non-profit entities, museums are required to operate in the public’s trust. Boards are legally and ethically required to ensure that the organization is operating in a manner that is consistent with its mission.



## CHAPTER THREE

### ETHICS IN ACCEPTING RESTRICTED GIFTS

*Gifts and bequests should be unrestricted whenever possible.  
The museum should resist accepting special restrictions concerning exhibition or  
installation. No work should be accepted with a guarantee as to attribution.  
While circumstances may justify some deviation from policy, variances  
should be carefully considered and recorded.*

Professional Practices in Art Museums,  
guidelines from the Association of Art Museum Directors

The ethics around deaccessioning works of art in a museum's collection are well established and widely accepted. If a museum wishes to sell a piece from its collection, the profits may only be used to advance the collection. If one piece is sold, one—or more—must be purchased with the money. Deaccessioning is not to be a means for raising funds for capital projects, general endowments or programming. If a museum breaks the code of ethics as laid out by the American Association of Museums (AAM) and the American Association of Museum Directors (AAMD), then they are essentially blackballed from the museum world. As a result they are not allowed to loan or borrow pieces from other AAMD or AAM member organizations.

The ethics around accepting works with restrictions are not so clearly defined. Policies and best practices for accessioning are well established. There are clearly stated laws and codes of ethics for acquiring antiquities or items that may have been plundered. Proof of provenance is required for museums to add pieces to

their collections. Yet there is little detailing the ethics of accepting restricted gifts, other than that it should be avoided when possible.

The basic rule is that museums should not accept gifts that come with strings attached. But working with donors is an art, not a science. Not every situation can be expected to go by the book: personalities, egos, and politics may all play a role. Museums try to take the stance that they will not accept donations that come with restrictions, but frequently see a gift with restrictions as a means towards more donations. Historically they have let donors “rule the roost” and presently may find stipulations an acceptable price to pay for the donation.

When a patron puts stipulations on a donation of works, the museum needs to be very cautious before accepting. Short term and long term repercussions from the donation must be considered. If it is a piece that does not enhance the collection, should the museum accept it? This could be particularly complicated if a patron is donating more than one piece, some of which fit their mission and others of which do not.

By accepting a gift with restrictions, a museum is also opening itself to the control of a “dead hand.” The organization is agreeing to let a donor’s demands dictate some aspect of how the museum is run. While the next chapter explores this topic in detail, it is very important to note that donor restrictions allow a decision that is made at one point in time to bind the organization in an unforeseeable future.

As previously discussed, museums are dependent on donations of gifts of art to deepen and expand their permanent collections. When accepting a gift, museums,

and the trustees, as their representatives, have many factors that need to be considered before accessioning a piece. The mission of the organization should be the primary deciding factor. Does the piece/collection/donation support the mission of the organization? Does it further the goals the organization set out to achieve? How does it complete or enhance the collection? Does the organization have the resources necessary to maintain the works? When presented with a potential gift of art, museums, and their trustees, are expected to make decisions that support the mission of the organization.<sup>2</sup> In a perfect world, museums would be offered amazing pieces that perfectly complement their collection and mission. But, as was discussed in the previous chapter, museums are dependent on donors to expand and deepen their collections. At the same time, donors sometimes come with complex demands and eclectic collections. Stipulations may be as diverse as the donors who are making them, and could be logical or bizarre in nature. Below are a few examples that demonstrate the range of donor restrictions:

- The University of Indiana accepted a donation of a private collection with the stipulation that the donor's own sculptures always be on display.
- MoMA received four drawings from Abby Aldrich Rockefeller in 1948, two van Gogh and two by Seurat, with the restriction that after 50 years the pieces were to be given to the Art Institute of Chicago, as they would no longer be "new" (Vogel 1998).
- The Whitney accepted a \$125 million cash gift by agreeing to not to sell its Marcel Breuer building on Madison Avenue at 75th Street (Vogel, Whitney Museum to Receive \$131 Million Gift 2008).
- The Charles Freer Gallery of Asian Art at the Smithsonian Institution was a gift that came with the explicit instruction that the collection was not to be added to, subtracted from or loaned out.

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<sup>2</sup> Trustees are mentioned here because they are ultimately responsible for decisions that are made by the museum.

- The Smithsonian's Sackler Gallery was given an endowment to always have arrangements of fresh flowers in the lobby.
- Another donor gave the Sackler Gallery \$100,000 for a very specific type of Southeast Asian sculpture, a type that rarely comes to market, and when it does it carries heavy provenance issues and a hefty price tag.

Museums do not, and should not, accept every piece that is offered to them.

Sometimes works are not at an adequate level of quality for the collections. Perhaps they are damaged or of questionable origin. Pieces of art may not fit the needs and/or mission of the organization. And sometimes donations, though well intended, come with strings attached that are ill suited for the long-term mission of the museum.

It is wise for museums to have collections policies—written and agreed-upon policies that determine parameters for accepting gifts—before a questionable donation appears. This public document can prevent problems when an organization is confronted with restricted gifts (Simmons 2006). Museum officials can refer back to this document throughout discussions with potential donors to reinforce their stance that they are making decisions with the museum's best interests in mind.

The long-term, as well as short-term, ramifications of accepting a gift must also be reviewed. Trustees must determine if the museum has the resources to be able to manage new pieces. As Malaro states, "No gift of an object is free" (Malaro 1994). Any piece that is added to a collection has to be documented, registered, and maintained. Regular inventories have to be taken, and objects must be made accessible to scholars upon request. Conservation and general storage space also

demand resources—resources that are typically limited for most museums (Malaro 1994). Another important consideration is whether the donor placed any restrictions on the donation. If so, is the museum willing, and able, to uphold the agreement? Long-term, does accepting a restricted gift limit future growth and support of the mission?

If demands are made about how the works are to be displayed, again the museum must consider the long-term effects of accepting the piece. In 2007 the AAMD laid out these questions for an organization to ask before accepting any work of art (American Association of Museum Directors 2007):

- Is the work, in terms of content and quality, consistent with the mission of the museum and the context provided by its permanent collections and programs?
- Does the work enhance the educational opportunities provided by the museum to the public?
- Does the work reflect the interests of museum constituencies?
- Does the work enhance the museum's leadership position as a cultural and educational resource to the community?
- Does the work bring new art, new knowledge and/or new cultural perspectives that enhance the community's quality of life?
- Is the collector an individual with a reputation of integrity whose involvement enhances the museum's program?
- Are the collector's motives transparent and acceptable to the museum?
- Are there restrictive conditions on the loan or gift that place an undue burden on the museum?
- Are the provenance and ownership of the work known and acceptable to the museum?
- Are there legal or ethical issues associated with the gift or loan that can be anticipated by the museum?
- Are there security and/or conservation considerations related to the loan or gift?
- Does financial support provided by collectors primarily enhance the museum's fulfillment of its public and scholarly mission?
- Does the collector have an established history of philanthropy and sustained commitment to the museum?

- Does the work appear to have the potential to deliver a substantial public benefit that justifies the time and resources invested in its cultivation and development?
- When the collector has special knowledge of his/her work and can provide meaningful technical or interpretive support to the museum in exhibiting, publishing or otherwise making the work publicly accessible, is the museum making appropriate use of this knowledge?

Following these guidelines can limit the acquisition of pieces that a museum may later want to remove from their collection, either for the quality of the piece itself or the stipulations included in the donation.

There are many reasons why donors place restrictions on gifts of art, as outlined by Malero (Malero 1994). They want to be remembered. They want to leave a lasting legacy. Probably, for large collections, they have spent a great amount of time, energy and money on perfecting their personal collection and they want to maintain it as a whole for prosperity. Donors may just feel they have the right to make whatever demands they wish, as they are the ones “in charge.” Legal rulings have perhaps stated it best (*In re Girard’s Estate* 1956):

*One of the most reassured rights of a free man in a free civilization is the right to dispose of his property at death as he sees fit. No right is more solemnly assured to him by law. This right is so sacred that a testator’s directions will be enforced even though repugnant to the general views of society.*

Generally speaking, the tradition of giving in the United States has allowed for donors to have a voice in the use of their donations, allowing individuals to feel they have an innate right to place stipulations on gifts.

Just as there are many reasons why donors request restrictions with their donations, there are many reasons why museums should not accept any restricted

gift. The most important reason is because it may be impossible for trustees to see the long-term ramifications of the stipulations. While it may seem feasible in the short-term to honor a donor's requests, it is quite possible that in the future the restrictions could hold an organization back in attempts to fulfill its mission.

Accepting gifts with restrictions may also test the integrity of an organization. Outsiders may feel large donors whose gifts are received with complex stipulations are in a sense "buying" a museum. Restrictions that dictate exhibitions or items on display mitigate the value of a curator by giving the impression that it is the donors, not the trained curators, who are determining what is shown in galleries. Once a museum has started down the slippery slope of accepting restricted gifts, what grounds do they have for refusing other gifts with stipulations? Lines between museum executive and donor can become extremely blurred. The organization risks developing a reputation for "selling out" to the highest bidder.

Malaro describes many of the outside pressures on trustees for allowing their organizations to accept restricted gifts:

- Public opinion normally favors the right of the individual to control his/her property
- Legal precedent favors individual property rights; there is a history of museums accepting restricted gifts
- An analysis of legal cases involving charitable trustee responsibilities indicates that museum trustees are obligated to set collecting policy, and they are obliged to act 'in the highest good faith toward their public'
- Current codes of ethics relating to museum operations caution against the acceptance of restricted gifts
- Museums are more conscious of their public mission, yet restricted gifts by their very nature require museums over the years to give preference to donors' wishes rather than perceived public benefit

- If a trouble trustee looks to his or her peers for support, recent situations can be cited where museums have bowed to donor restrictions despite internal policies cautioning against such action.

There have been several cases recently of museums that were perceived to have “sold out” to appease a potential donor. In 2009 the New Museum of Contemporary Art made headlines when it announced plans for an exhibition of Dakis Joannou’s private collection—an exhibition that would take over three floors of the museum. As “one of the most important contemporary art collectors in the world,” as the New York Times described him, an exhibition of his collection may have seemed pertinent. But when it was revealed that Joannou was not only a trustee of the museum, but also the chief patron of the curator of the show, Jeff Koons, questions were raised: Was this exhibition curated in pure, unbiased terms, or did the curator have ulterior motives in showcasing the work of his most loyal patron? Would exhibition increase the value of Joannou’s collection, or the value of Koons’s own pieces that happened to constitute a large percentage of the show? Did the patron, and the recipient of the patron’s purchases, have too much input in artistic decisions? Was it the museum’s exhibition or the donor’s public display? Can one assume there was a large donation made by Joannou around the time of the exhibition? Is it too irrational to think the exhibition may have been the result of a stipulation on a large donation? (Sontag and Pogrebin 2009).

Dia: Beacon, a contemporary art museum in the Hudson River Valley near West Point, was founded and stocked as a result of the close relationship between trustee (and patron) Leonard Riggio and director Michael Govan. In an expose in the



October 14, 2007, *New York Times* reporter Joe Nocera describes the rise—and fall—of the questionably close relationship that blurred the boundaries of donor intent and organization integrity. Riggio, the founder of Barnes and Noble bookstores, gave at least \$35 million to build the \$50 million museum. He also purchased and donated many of the pieces in the collection. Whenever Govan had a project that needed funding, Riggio would write the check. While there are no public references to restricted gifts, interviews with Riggio, Govan and other Dia board members make it very clear that Riggio expected to exercise control of Dia because he was the museum's primary source of income. He told the *New York Times* reporter, "I am the patron and I will make the decision." That was met with Govan's attitude, "No patron, no project." The result: a museum that should be acting in the interest of the public that in reality became a pet project of its largest donor. Decisions were not made without the patron's input and when his voice stopped being heard, he—and his checkbook—left the organization (Nocera 2007).

In 1999 the Brooklyn Museum put together the exhibition "Sensation," a showcase of young British contemporary artists (Barstow 1999). To finance the show, the museum solicited dealers who represented the artists, as well as individuals who collected works by names represented in the exhibition. On top of questionable fundraising strategies, the museum was not forthcoming about its sources of income in the early stages of planning for the exhibition. Did dealers and collectors agree to support the organization because they could influence artistic

decisions for personal gain? Was the exhibition centered on fundraising potential instead of artistic excellence?

There may be situations when trustees find the restrictions acceptable. The stipulations may be fairly minor, or contracts may be written in a manner that gives the organization the final judgment. The restricted gift may be a small step towards a much larger gift from the donor. When weighing the pros and cons, the positive benefits of accepting the gift with restrictions may simply outweigh the negatives.

If a museum is considering making exceptions to their collecting policies, trustees and executives need to make sure to carefully document the reasons behind their decisions, as well as museum and donor understandings of future implications. They need to make it very clear that the gift fits their mission and the organization has the finances, manpower and desire to keep the agreement.

The Dallas Museum of Art's acceptance of the Reves collection is a perfect illustration of a situation where the proposed donation was too tempting for trustees to turn down, despite a long list of stipulations. In 1982 Wendy Reves offered her extensive art collection to the Dallas Museum of Art. Along with the works, she included numerous restrictions on the gift, including:

- Requirement of the museum to build a new facility that copied the Reves' French villa
- Permanent display of the collection in the villa, complete with furniture, drapery and ashtrays of Reves' choosing
- Guidance from Reves during installation
- Cohesiveness of the collection, to the extent that pieces could not be hung in other parts of the museum
- Permission from Reves before selling or loaning any of the objects.

Reves was quoted in the *New York Times* as having felt so strongly about her restrictions that "[she] was prepared to ask, and if [she] could not get it [she] would not give." The museum had to raise \$5 million to pay for the building, but felt the donation of the collection—containing works by Monet, Degas, Rodin, Manet, Gauguin, Pissarro, Courbet, Cezanne, Rodin and van Gogh and valued at \$30-35 million in the mid-80's—was worth the fundraising efforts and adherence to donor demands. Vincent Carrozza, chairman of the board at the time of the donation, told the *Times* that they accepted the gift with the belief that it would "transform the museum" (Malaro, Museum Governance : mission, ethics, policy 1994).

The city of Denver, Colorado, willingly entered into a dead hand control agreement with the deceased artist Clyfford Still in 2004. Still left 95 percent of his body of work, some 2,400 pieces, to the American city that would establish a museum in his name. For over 30 years the art sat in storage, for no city was willing to accept the many terms of his conditions, which included building a museum, designating a city agency to oversee its operations, staff the museum, provide funding for upkeep and an endowment, and agree to never sell any of the works. Denver agreed to these terms, and was forced to raise \$33 million to uphold the contract.

Still also maintains posthumous control of his works at the San Francisco Museum of Art. In one of the very few donations he made of his work, he put the following restrictions on his gift (Woods 2009)

- I. Mr. Still will give the Museum a grouping of his works which will be selected by Mr. Still and approved by Henry Hopkins, Director of the Museum.
- II. The Museum will accept these works into the permanent collection with the understanding that the works will not be sold or exchanged or loaned without the Still's permission.
- III. The display and storage of these works will be in what is now referred to as the "Vault" Gallery according to a plan approved by Mr. Still and Mr. Hopkins and will not be hung with the work of other artists.
  - i. Works on display will be open during regular museum hours, and upon request, arrangements will be made for art scholars to view and study the works in storage.
  - ii. In order to take advantage of Mr. Still's splendid gift, it is the expectation of the Museum that for many years to come some of the paintings will always be on display, and the Vault gallery installation will be designed and constructed with that in mind.
  - iii. If the Museum should expand its space or develop new spaces where it would be advisable to re-install the Still collection in another Museum location (for the purpose of continuity), the new space will be at least comparable to the existing "Vault" gallery.
- IV. The museum will publish a catalog that will reproduce each of the works in the Still collection in color. The catalog, copy and color reproductions will be developed in consultation with Mr. Still.

Both the City of Denver and the San Francisco Museum of Modern Art found the price of these agreements to be worthy of the privilege to show Still's art.

In a much simpler case, the Whitney Museum in New York accepted a \$131 million gift from Leonard Lauder in 2008 with the stipulation that it would not sell its Marcel Breuer building on Madison Avenue. His restriction was based on speculation that with the expansion to a new location in Manhattan, the Whitney would seek to sell its original building to raise money. In this case, the donor intent was to maintain the historic home of the museum, while allowing for growth, an agreement that the Whitney was willing and able to commit to upholding.

Donations are made between the organization and the patron; there are no requirements for public reporting other than to the IRS. Therefore, museums do not have to disclose terms of contracts for donations. Agreements are kept behind the scenes and typically the only times restrictions are made public are when they aren't kept. Given the copious gifts that are made to museums each year and the history of donor attitudes towards gifts, the assumption that organizations frequently find the restrictions to be acceptable given the parameters of the donation could be made.

## CHAPTER FOUR

### WHAT MAKES THE AGREEMENTS BINDING?

In the United States today, few, if any, museums would accept a major gift, including gifts of art, without a signed contract that outlines the terms of the donation. Lawyers on both sides will review, suggest changes, and approve the documents before a signature hits the dotted line. It should never be assumed that the two parties have reached an agreement; all decisions, restrictions, and benefits must be clearly articulated in a signed gift agreement. These documents are considered legal and binding documents, and originals should be kept on file by all parties involved. But what about donations that were given in the past? What happens when the donor is no longer living so consultation is impossible?

Wherever possible, written records need to be consulted. Correspondence between the donor and the museum is frequently referred to in order to determine donor intent. Legally, there is no “statue of limitations” on restrictions put on gifts. Agreements are held valid until proven otherwise.

Very recently the University of Iowa had to navigate this exact situation. In the 1940's Peggy Guggenheim donated a large Jackson Pollock painting to the university. Several times in the last decade the university, and the State Legislature of Iowa, have proposed selling the painting to raise funds for the university. The intentions of the donation have been questioned and researched to great extent.

While there was no signed gift agreement, there are several letters between Guggenheim and the administration of the University. In these letters Guggenheim clearly states that she is donating the piece “if you are able to show it” and “if you have big enough place for it.” A few years later she wrote to the university to address rumors that the painting may be sold. In this correspondence she says:

*If this is true it is extremely unpleasant for me that you should sell my gift, when there are so many museums in the world, who would be delighted to own this wonderful painting. If you no longer wish to have this mural in your University I must ask you to return it to me, so that I can [have it] in my museum here in Venice or give it to some other museum in the states.*

In this case, the correspondence between the donor and the recipient are very clear that Guggenheim made the donation with the expectation that the piece would be on display at the university, and that if the donation was to be used for anything besides study, it should be returned to her.

A museum that has accepted restricted gifts may find it is being controlled by a “dead hand.” Dead hand is a legal term that is used to describe the continuation of control by a donor who is no longer living. When donors place restrictions on gifts, it is allowing them to continue to control the property indefinitely, even upon death. A stipulation that was made at one point in time, which may have been deemed in the best interest of the organization at that moment, can hinder an organization as it evolves over time.

In a dead hand situation, an organization may find itself severely limited and unable to serve its public efficiently, or, in extreme cases, even unable to continue to

exist. But how to you balance the innate right of a donor to distribute their capital as they wish with the changing needs of an organization?

Examples of dead hand control are varied. At the Barnes Foundation, Albert Barnes dictated—what he thought was indefinitely—the content of objects in his collection, as well as their display. He also limited the hours the galleries could be open, forbid drawing and painting in the galleries and refused the right for anyone to copy any of the pieces (Cantor 1963)<sup>3</sup>. Isabella Stewart Gardner’s will said that if anything in the museum was changed or moved that the entire contents would be given to Harvard University to sell (Tharp 1965). At the Phillips Collection Duncan Phillip’s maintains control by his request that pieces be rearranged on the walls periodically. The Charles L. Freer Gallery’s collection hasn’t changed in the 91 years since Freer’s death due to the terms of his bequest. Georgia O’Keeffe strove for perpetual cohesiveness of her personal collection when she donated pieces to six organizations with the expressed agreement that pieces could not be sold or the gift had to be returned. Clyfford Still donated three of his works to the San Francisco Museum of Modern Art only after they agreed to not show the pieces next to paintings by other artists.

In cases where an organization has accepted restricted gifts, the museum cannot, without court approval, put its mission first because it has committed itself to demands of the donor (Malaro 1994). It is be controlled by the restrictions of the

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<sup>3</sup> Cantor included a transcript of the Indenture of Trust and By-laws of the Barnes Foundation in his 1963 book, Gilbert M. Cantor, *The Barnes Foundation, Reality vs. Myth*



donor—living or dead. These demands that may have been logical at the time but over time may prove to be more restrictive than helpful. As Scott said in his much referenced article *Education and the Dead Hand* (Scott 1920):

*It must not be over-looked that a too meticulous adherence to the words of the donor often means the defeat and not the accomplishment of his ultimate purpose. He intended to make his property useful to mankind. To render it useless is to defeat his intention.*

When an organization is accused of breaking a donor agreement, decisions move to the courtroom. In most of these incidents, it is the heirs of the estate who present the case. In others, the Attorney General of the state files the lawsuit. This is because the museum, as a non-profit, is seen as an organization that is required to act on behalf of the public. When a museum is suspected of acting against the better good of its public, the state, represented by the Attorney General investigates and presses charges.

To change or repurpose the donation, the burden lies on the organization to prove *cy pres*, or what the donor's intent would be, if the donor were available for consultation. This process is described in more detail in the following chapter.

## CHAPTER FIVE

### ETHICS IN BREAKING DONOR AGREEMENTS

*No disposal should ever occur unless there are extraordinary mitigating circumstances and only if careful judicial review finds no legal or moral objections. (Perrot 1997)*

If the ethics around accepting restricted gifts are grey, the ethics around breaking a donor's requests are outright confusing. They wind up in a legal maze of *cy pres*, donor intent, the effects of dead hand control, and wishes of heirs. This section outlines the ethics behind breaking donor stipulations, based on standards established by the American Association of Museums, with the following assumptions:

- The organization has extremely valid reasons for why it is looking to break an agreement, reasons that run parallel to its mission
- If an item is to be deaccessioned, the funds will be used exclusively for furthering the collection.

Ideally, every gift an organization has accepted will have included a signed gift agreement that clearly outlines the terms of the donation, but historically museums have not been so prudent. As described in previous chapters, in situations where no signed gift agreement is available, trustees must refer to correspondence between the donor and the organization's representatives from the time of the donation (which the museum has hopefully kept on file.) From these documents, the museum may be able to determine possible repercussions for breaking the agreement.

Typically the consequences for breaking the agreement equal the return of the donation to the estate of the original donor, meaning donated objects should be returned to the heirs if for any reason the organization changes its mind about the relevance of the object. Another fairly standard situation would require the museum to give the objects to another organization, either one named in the agreement or one with a similar mission.

But in the majority of cases, the organization is choosing to deaccession for reasons in which they would not want to return the gift. It is more likely that they are looking to use the pieces as capital for purposes such as expanding a collection, or strengthening weaker areas of the collection. In these cases, it is necessary for the organization to prove *cy pres*, which would enable them to break the agreement.

*Cy pres* is a legal doctrine that translated means “as near as possible,” according to Black’s Law Dictionary. Random House Dictionary defines *cy pres* as

*the doctrine, applied especially to cases of charitable trusts or donations that, in place of an impossible or illegal condition, limitation, or object, allows the nearest practicable one to be substituted.*

In other words, when a situation changes and the donor’s stipulations are seen to no longer be at the best interest of the organization—and the public it serves—it must be determined what the donor would have wanted under the current circumstances. Malero describes *cy pres* in simple terms, “If the restriction eventually inhibits the best use of the material, the museum is faced with the task of proving impossibility or impracticability of performance.” As stated in a previous section, it cannot,

without court approval, put the public interest first because it has committed itself to defending the donor (Malaro 1994).

Suppose for example, a donor left a billion dollars to an organization to end world hunger, with the stipulation that the money was only to be used to feed starving children or it had to be returned to the estate. Suppose then that the organization was actually able to accomplish this mission after the death of the donor, and with money left over. Due to unforeseen circumstances—actually ending world hunger—the organization now decides to change its mission and focus on world peace. Before it can use the remainder of the billion dollars to find a solution to world peace, it would have to prove that if the donor were still alive, they would approve of the way the organization used their money to end hunger and would support world peace. They would have to prove through correspondence or general knowledge of other interests of the donor that the repurposing of the funds was for a cause the donor would have supported. Trying to read the mind or understand the wishes of someone no longer living is, needless to say, highly challenging and can be an expensive legal pursuit. It is a judgment call that may not be able to be made.

Ultimately it is a judgment call that the state's Attorney General or a judge must make. However, it is up to the organization to prove *cy pres*, that the original charitable *intent*, not just specific demands, of the donation would still be upheld with the proposed changes to the way the donation was used.

If an organization is granted *cy pres* then they can move ahead, legally and ethically, with the steps they wish to take that differ from the original stipulations

on the donation. If *cy pres* is not established, then the organization is bound to the original requests of the donor. Even if *cy pres* is determined in favor of the museum's new direction, it should not be seen as encouragement to accept restricted gifts. The process for granting *cy pres* is time consuming and the organization incurs substantial legal fees. To again quote Malaro, "when a museum accepts a restricted gift it is, in all probability, 'buying' itself a lawsuit if relief is ever needed" (Malaro 1994).

## CHAPTER SIX

### ETHICS IN BREAKING DONOR STIPULATIONS

*Sooner or later this view must prevail, unless progress is to be stayed by a view which surrenders the welfare of the living to the fancied wishes of the dead.*

Austin Wackeman Scott

If a museum has decided to break a donor's restrictions, and has been granted legal ability to do so, should they? While the ethics around deaccessioning and the legal rights have been clearly defined by courts and accreditation associations, the ethics around actually breaking stipulations, and the ramifications of doing so, have not been so clearly explored.

There are many issues to consider, and this section maintains the following assumptions:

- Any income from deaccessioning would go to further the collection, as laid out in the AAMD's code of ethics
- The organization has the authority to break the agreements, either from the donor, their estate, or the courts have granted *cy pres*
- The organization as an extremely valid reason for why it is looking to break the agreement with the donor, reasons that run parallel with its mission.

#### What about the art?

Donor stipulations may put the integrity of the art at stake. While presumably all restrictions were made with good intentions, unforeseeable changes happen as time progresses and it is possible that donor intent could have negative impacts on the works themselves.

At the onset of the long battle between the O’Keeffe estate and Fisk University, there was a valid concern for the safety of the works of art. The university could not afford to maintain the building where the pieces were stored, and damage occurred. At the first mention of sale, the future of the art was at risk. In such a situation, is it more important to sacrifice part of the collection to the betterment of the whole, or should, as the donor requested, the collection be maintained as a whole—either in deteriorating conditions or by selling the entire lot?

What about situations where pieces are not able to be viewed, or can’t be seen in settings that bring out the best of them, such as the Barnes Foundation? Are ethics different when the survival of the museum as a whole is at stake? This section will discuss the ethics of several cases where the integrity of the art and the survival of the organization are at risk.

### Safety of the art

If an organization is not able to maintain its collection, it is not performing its legal duty of care. Part of the responsibility of a museum is to preserve works in its collection. By insisting on keeping works that it does not have the resources to care for (manpower, conservation techniques, adequate storage facilities, advanced technology, to name a few), it runs the risk of losing pieces forever. Damage to pieces limits future abilities for proper scholarship and enjoyment. There is no way

to accurately predict what future technologies and study could tell scholars (and the public) about the techniques, historical context, artist intent, or even environmental factors. If pieces are damaged, parts of history are lost.

In cases, such as at Fisk University, where the organization cannot maintain its collection, the museum has the responsibility to put the safety and preservation of the art first. But should an organization be allowed to pick and choose which pieces would be sold for the capital funds to ensure proper storage and display, or should it loose its entire collection for not proving to be a proper steward? Are past mistakes indicative of future behaviors? If so, should an organization get the chance to prove it has learned from the past? How much can the art be at risk for the sake of the museum?

When Fisk University initially announced its intent to sell two pieces from its collection, the December 2005 press release read that the funds were to be used to renovate the building where the collection was displayed. Extensive damage to the building threatened the safety of the artwork, and the University was no long able to keep the collection on display. To secure the safety of the entire collection, Fisk sought to sell just two of the 101 pieces to cover the cost of renovations.

Fisk University's situation is different from many museums in that the bulk of the current collection was given in a single donation (from Georgia O'Keeffe) with the stipulation that the collection had to be kept together (and always on display). Public outcry was quick and loud. The museum was seen as a hidden jewel of the community, and people did not want to see any part of the collection leave the city.



Fisk University used the story to raise the funds needed to restore the museum, and three years later the renovated building was reopened. Once the safety of the pieces was ensured, the University should have had no reason to look to sell the pieces.

Clyfford Still's dead hand control that kept 2,400 objects out of the public eye for over 30 years was also threatening to the safety of the pieces. Because he left the bulk of body of work to a city that would "build or assign and maintain permanent quarters exclusively for these works of art ...to be retained in the place described above exclusively assigned to them in perpetuity for exhibition and study" his artwork set in a house and then a storage facility for three decades. Instead of allowing the works to be properly stored and preserved in museums, his insistence on a single artist museum could have cost him his life's work.

When conservators finally gained access to the collection in 2008, they were amazed at the state of the pieces. All of the canvases were rolled up; in some case as many as 11 canvases were stored on the same roll. Typically this is a process that is used only for very brief periods of time for transporting a piece. Bits of debris, including wood, dust, straw and even a fingernail clipping dirtied the objects. Masking tape held many of the rolls tight (Hochfield 2009). While the art was better preserved than was expected given the conditions, the potential for losing the majority of Still's work was high because he insisted on controlling access to his work from the grave.

### Visibility of the art

Museums are, by virtue of their 501c(3) status, public entities. They have a responsibility to the public that is defined by their mission statement. For art museums, that mission includes access to collections. Donor stipulations should not impede a museum's ability to fulfill its mission to its public.

While Albert C. Barnes intended his collection be used for study, he was not a trained art historian or visual artist himself. His eclectic purchases and particular display of his collection are studies of his very specific views on art. But for art historians and artists, the arrangements, placement and lighting in his house are limiting to the study of the individual pieces, as well as their impact on the field. As advancements in lighting technology, temperature and humidity control, and digital imaging have been made, the Barnes has not been able to utilize them because of his strict restrictions on changes. His dead hand control has forced his pieces to always be viewed exactly as they were viewed at the time of his death in 1928.

In a case such as these, the reasons for breaking the donor's restrictions actually offer opportunities to enhance the art, the study of the collection, and the experience of the viewer. By allowing the collection to move to a space with modern technology for lighting and environmental controls, the art can be seen at its best, not just as it was seen in the mind of the last person who happened to purchase it.

Charles Lang Freer's restrictions are also limiting the visibility of important pieces. The Freer Gallery does not have the physical space to publically display the entire collection. If the museum could loan pieces to other exhibitions, even to its adjoining sister museum, the Arthur M. Sackler Gallery, more of the collection could

be accessible to scholars and audiences at any given time. But because Freer included strict stipulations with his donation, the Smithsonian Institution has been unable to maximize display of the full collection.

Again, Clyfford Still's refusal to give or loan his work to museums other than one built in his name greatly limited access to the works an important painter. Still was seen as one of the leading figures of Abstract Expressionism. But upon his death, only five percent of his work was accessible to anyone other than his wife. Students, curators, and the general public were restricted in what they could learn about his impact on modern art because he refused to let his work be seen.

### Limiting scholarship

Further study of the Barnes Foundation will address the ethics of breaking donor restrictions in cases where scholarship is limited by donor intent. Barnes clearly stated that the pieces in the collection were to be studied, but that they had to stay on location, in place on the walls, and could not be photographed. His restrictions severely limited opportunities for scholarship and seem contradictory to his mission. Study of the work is limited to Barnes's very particular point of view.

Photographing the collection allows images of the pieces to be viewed in classrooms around the world. Many of the pieces in the collection create important links in the progression of the artists' techniques and styles. When the Foundation agreed to create a catalogue of the collection in 1993, they were blatantly going against his states wishes; the Indenture of the Barnes foundation directly states

prohibits the “copying of any of the works of art in the Barnes Foundation by any person whatsoever.” But they were, without compromising the collection, allowing access to the works for countless students, researchers, art lovers and generations.

By agreeing to travel the exhibition in the early 1990’s, while the building was undergoing renovation, the trustees were recognizing the limitations of the interested parties who happened to live outside the immediate Philadelphia vicinity. Because the cost of travel to Barnes’s house in Merion, Pennsylvania, and limited hours of accessibility prevented many audiences from seeing the collection, taking the pieces on tour allowed hundreds of thousands of viewers to see the art and learn about the art collection of Albert Barnes. And since the tour was conducted while the museum was under construction, the timing was right to allow the collection to continue to serve as an educational tool.

Returning to the Freer Gallery, we find another case where restrictions prevent scholarship. When Charles Freer donated his extensive collection to the Smithsonian, he added the stipulation that the collection could not be deaccessioned, accessioned or loaned. While this collection contains numerous pieces that are considered key pieces for the study of Asian art, it does have holes. Yet pieces cannot be seen next to objects from other collections, much less allowed to travel to locations that may have a more complete contextual history to exhibit or better technology for research. This has earned the Freer the reputation of being the “selfish Asian art museum.” By trying so hard to maintain integrity within the collection, Freer has severely limited opportunities for research, study and

exhibitions. Similar to the Barnes Foundation, the only history of Asian art to be learned at the Freer is the one the collector chose to tell through his purchases.

### Sustainability of Museums

In cases where the survival of the museum as a whole is at stake, is it ethical to sell a few pieces to secure funding to keep the doors open? The National Academy Museum and School of Fine Arts encountered what its director Carmine Branagan called a “monumental crisis” when it decided to sell two paintings from its collection in 2008. “There wasn’t money to pay the guards,” she explains. “There wasn’t money to buy ink cartridges. I actually worked gratis for many months — they had absolutely no cash flow. All the budgets were frozen.” The options were to sell off pieces or close its doors (Zaroli 2009). James Augustus Suydam donated the pieces to the school in 1865, and any stipulations on the donation are not public.

Brandeis University made international news in 2009 when it announced that it had voted to sell its entire collection to fund the school’s shrinking endowment. Fearing extensive cuts to budgets, University trustees decided to sell the entire collection, to raise an estimated \$350-\$400 million. While AAM ethics would forbid such a sell, Brandeis is functioning as a school, not a museum. If the Rose is not seen as a viable part of the university community by the administration, but does somehow remain open, then funding is certain to be cut gradually, and one could assume the safety of the art would one day be jeopardized. In such a case, the

art would be better served at an institution that had the proper resources to maintain the collection.

However, Brandeis's administration was being extremely shortsighted in announcing plans to sell the collection, as it had extremely negative repercussions for their reputation. From a public relations standpoint, Brandeis made a poor decision at an unfortunate time. With the economic crisis of 2008, prices for art dropped drastically. There couldn't have been a worse time to try to sell art for maximum profit. Instead of dealing with dropping endowments fairly quietly, by announcing the plan to sell Brandeis's financial woes were splashed all over the world. Who would want to fund a failing organization that wasn't being prudent with their assets by choosing to sell at the lowest point in the market? According to financial records posted on the university's website, giving dropped 44 percent from 2008 to 2010, the period during which the scandal was born. Perhaps long-term it is better for the preservation of the art that the collection be sold, but detrimental to the financial stability of the organization as a whole.

The Detroit Institute of Arts and Museum of Contemporary Art Detroit could face similar issues for survival. In the last decade the city of Detroit has seen a major decline in industry and population. At around 800,000, Detroit's current population is less than half what it was in 1950. How will the museums keep their doors open in a declining city? Local funds are presumable scarce, and tourism is dropping. It is not outlandish to think these organizations could quickly face budgetary deficits and no way to alleviate them without selling pieces of their collections. If this does

happen, would the museums be wrong to sell pieces, even pieces that were given with restrictions? Is it better for a museum to fall into an irreversible decline, or remain solvent to fulfill a mission? Is it better for donors see their art on the walls of a skeleton of a museum or allow the work to be seen elsewhere so that said museum could remain functional?

## CHAPTER SEVEN

### IMPLICATIONS FOR MUSEUMS

*Apparently the fear lurking in the hearts of those who would compel the observance of the directions of donors in their minutest details is that a failure to observe these directions might lead to the overthrow of charitable trusts, and ultimately perhaps of the institution of private property; that no clear line can be drawn between a departure from the letter of the donor's directions, and confiscation. (Scott 1920)*

These cases bring up several interesting questions for museums, particularly those in academic settings. Which is a higher priority, the requests of the donor or the needs of the organization? What impact does deaccessioning have on the museum's reputation? What impact does it have on the willingness of donors to donate, either money or works?

As discussed earlier, the American Association of Museum Directors has made strong statements about deaccessioning. They believe that ethically pieces of art should only be sold if a) the pieces no longer fit the collection's mission and b) the proceeds are used exclusively for expanding the collection. The American Association of Museums also states in their code of ethics "disposal of collections through sale, trade, or research activities is solely for the advancement of the museum's mission. Proceeds from the sale of nonliving collections are to be used consistent with the established standards of the museum's discipline, but in no



event shall they be used for anything other than acquisition or direct care of collections.”

The practice of selling works can also have long lasting negative effects on a museum’s ability to cultivate donors. From a public relations standpoint, selling works, particularly if the money is to be used for capital improvements, can cause donors to be skeptical of the organization’s stability. People are less likely to donate to an organization they see as unstable (the exception to this would be a large donor who is cultivated to “rescue” the organization.) Particularly a private collector would be hesitant to donate new works to an organization if they have seen a museum selling off pieces that others have donated. This brings up questions of how their donation will be viewed and maintained by the museum. If a donor feels their work will not be appreciated, they will either keep it in their private collection or find an organization they believe would honor the donation.

So what is a museum to do? First, it must be very careful in accepting works, particularly when they come with strings attached. Staff should be well versed in the ethics of the field. Second, the mission of the organization must shape all decisions, particularly with acquiring and deaccessioning. Third, fundraising, particularly for an endowment, must be a primary focus for the organization. Museums must have specific budgets for maintaining the security and safety of pieces, to insure the funding is always in place to preserve the collection. When it becomes absolutely necessary to break an agreement made with a donor, administration and trustees must be well prepared to address donor questions and concerns. The organization

should be forthcoming in their reasons for breaking the agreement and the impact the decision has on its mission and future.

The question becomes, do museums always need to be governed by decisions made in the past or can they live in the present and function in the future?

## CHAPTER EIGHT

### CASE STUDIES

#### Case Study: Fisk University

Fisk University is a small, liberal arts, traditionally black university in Nashville, Tennessee. In recent years the university has experienced financial strains and has dipped deeply into its endowment. In trying to find solutions to their financial crisis, Fisk sought to sell two paintings from their private collection.

The paintings in question were Georgia O’Keeffe’s *Radiator Building—Night, New York* and Marsden Hartley’s *Painting No. 3*. When the University announced the intended sell of the pieces, they stated that the money made from the sale of the paintings was intended to be used for “new buildings, the university's endowment, faculty positions and security for the remaining 99 works in the 101-piece Stieglitz collection, which had remained intact for 56 years.”

How did Fisk even acquire such an extensive collection? In 1949, Georgia O’Keeffe split up over 1,000 pieces that her late husband, Alfred Stieglitz, had collected. She split the works between the National Gallery of Art, the Metropolitan Museum of Art, Fisk University, and three other institutions (Emery 2007). O’Keeffe made the donation as a statement against segregation, and to provide fine art to blacks who were otherwise denied access to other museums. At a time when racial

tensions were extremely high, she made a bold move of acceptance by dividing her collection between the historically black college and some of the most esteemed museums in the country, including the National Gallery and the Metropolitan Museum of Art (Emery 2007).

As a stipulation of the donation, O'Keeffe laid out how the works were to be displayed and insisted that the collection always remain intact. She even wrote, in a letter to Charles Johnson, president of Fisk at the time of the donation, "it is my understanding that Fisk University will not at any time sell or exchange any of the objects in the Stieglitz collection." These terms were agreed upon and the donation was made (Emery 2007).

Fisk University proudly displayed the works for over 50 years. Considered a "hidden jewel" of Nashville, the galleries at the university displayed the works in accordance to the donor's requests. But as the university faced increasingly difficult financial times, they could no longer afford to maintain the gallery at a level that was safe for the works, and some pieces were damaged. In November of 2005 they put the collection in storage.

Facing a financial crisis, Fisk searched for quick solutions. The university made a bold decision to deaccession two pieces of their collection. Valued at over 15 million dollars, selling just two paintings of the 101 was a quick way to gain financial stability.

It seems logical: these works are in the university's possession, they are highly valued pieces, and selling two paintings is a quick and easy fix to an

immediate financial crisis. But Fisk has found itself to be in the midst of an ongoing legal battle over not only their ability to sell these two paintings, but also their claim to the entire collection.

In December 2005 Fisk made a public announcement of their intent to sell the two pieces. In their announcement, they clearly stated that funds from the sale would go to building maintenance, faculty salaries, deepening the endowment and security for the remaining pieces. There was no allowance for expanding the collection.

When the Georgia O'Keeffe estate (the Georgia O'Keeffe Museum in Santa Fe, New Mexico) heard of the plans, they protested in court. In the spring of 2006 they filed a lawsuit, stating that Fisk had violated the donor's terms of giving by not displaying the works and by attempting to break up the collection. In such a case, the entire collection, not just the two paintings up for sell, would be returned to the estate. (Ironically, they would then be free of any terms of donation and would legally be able to sell any portion of the collection at will.)

In the years since the original lawsuit, the verdicts have waived in favor of one organization and then the other. To complicate the case, in 2007 Alice Walton proposed a compromise. She had originally sought to purchase the O'Keeffe painting from Fisk, but in a settlement, she agreed to have partial ownership of the entire collection for the price of 30 million dollars. In exchange, the collection would share exhibition time equally between Fisk University and Walton's Crystal City Bridges'

Museum. This agreement was acceptable to all parties involved, and was approved by the courts.

But when Fisk continued to seek permission to sell the two individual pieces, the O'Keeffe Museum returned to court. In March of 2008 a judge ruled that the university had violated the requests of the donor, but Fisk could retain the collection if they could have it on display by October 2008. The university, after a major fundraising drive, was able to renovate the gallery and opened it to the public by the deadline.

In 2010 Dr. Carol Creswell-Betsch, a Fisk University alumna, established a fund to keep the collection at Fisk University. The Fund would provide for the care and upkeep of the artwork. Unsatisfied, the university is still seeking permission to sell the two paintings to boost endowments. The case is still in the courts at this date.

#### Discussion of the Fisk Case

Should Fisk be allowed to sell the two paintings?

This is a collection of highly recognizable artists donated by a widely known and renowned artist. Georgia O'Keeffe chose specific pieces to go to specific museums for a reason. The individual pieces contribute to the collection as a whole. Fisk agreed to O'Keeffe's written stipulations for the donation, and should maintain their portion of the agreement.

Selling any of the works, particularly two that are viewed as the foundation, would change the dynamics of the entire collection. Without those two pieces, O'Keeffe may have completely reorganized which pieces went to go to each museum. By breaking up the collection, the university is disrupting the educational and visual integrity of the works as a whole. Since O'Keeffe—someone with an intimate knowledge of art—specifically asked that the collection remain intact, this request should be respected.

More importantly, Fisk University has a disregard for the importance of their museum. People who are familiar with the field see how lucky this small university is to have such an extensive collection. It is a rare gift, and an incredible opportunity to serve their students and community. By choosing to try to sell pieces of the collection for capital improvements, Fisk is disregarding the integrity of their museum and the works. In the case of Randolph College, the staff at the museum quit when they learned of the board's decision to sell works to increase the endowment. These people believed so strongly in the integrity of the museum, the quantitative value of the collection and the mission of the museum that they chose to make a statement in putting their ethics before their personal gain. This was an incredibly bold move that Fisk University should learn from and see as a standard in the field.

Fisk University is only seeing the collection for the monetary value it holds. They are being extremely short sighted by disregarding the opportunities they are taking away from their students, the community and their reputation. In the spring

of 2008 they were able to rally an extensive fundraising effort that more than tripled their donations from the year before.

This effort was the result of many factors, including the impending deadline for renovations on the gallery to be able to keep the collection. While Fisk recognized the important public relations and development role of the collection, they still do not view it as important as the money that the sell of two of the most important pieces in the collection would bring. Until they hold themselves to the same ethical standards as the staff of the museum at Randolph College, the negative effect this case will have on their public relations and fundraising is likely to return to haunt them in the long term.

#### Case Study: Barnes Foundation

*The main function of the museum has been to serve as a pedestal upon which a clique of socialites serve as patrons of the arts.*

Albert C. Barnes

Albert Barnes was born to a blue-collar family in Philadelphia. He earned an MD and studied chemistry and pharmacology in Berlin and built a career—and a fortune—in pharmaceuticals. As Barnes's fortune grew, so did his interest in art. He began collecting around 1910 when he commissioned a former classmate, William Glackens, to buy several modern French paintings. With the original 20 paintings Glackens brought back from Paris, the cornerstone for the Barnes Foundation was laid (Feigen 2000).



Barnes developed unique theories on art and education that he shared with friends, academics and employees of his pharmaceutical factory. His growing interest in art and the development of new education theories lead him to found the Barnes Foundation in 1922 to "promote the advancement of education and the appreciation of the fine arts." Particularly, he had unique opinions on how art should be displayed. Barnes felt objects should be exhibited based on their relationship with other objects, and should not be accompanied with plaques or wall text that would distract from the visual experience. It was the study of the art, not art history, that he tried to convey to visitors to his collection.

Because he felt so strongly about his theories on art and education, and believed so little in the established institutions that he otherwise saw art existing in, Barnes placed very strict regulations on the foundation that would carry his name and become caretaker of his estate. Instructions for operations of the Foundation include (Cantor 1963):

- The collection shall be closed, and thereafter no change therein shall be made by the purchase, bequest or otherwise obtaining of additional pictures, or other works of art, or other objects of whatsoever description.
- No picture belonging to the collection shall ever be loaned, sold or otherwise disposed of
- Should the said collection ever be destroyed, or should it for any other reason become impossible to administer the trust hereby created concerning said collection of pictures, then the property and funds contributed by [Barnes] to [the Foundation] shall be applied to an object as nearly within the scope herein indicated and laid down as shall be possible, such application to be in connection with an existing and organized institution then in being and functioning in Philadelphia, Pennsylvania, or its suburbs.

- All the paintings shall remain in exactly the places they are at the time of the death of Donor and his said wife
- [The Foundation] shall employ an art director at a salary not to exceed \$5,000 per annum
- [The Foundation] may employ a suitable person as a Curator of the Arboretum, at an annual salary not exceeding six thousand (\$6,000) dollars.
- On Saturday of each week, except during the months of July and August of every year, the gallery and the arboretum shall be open to the public between the hours of ten o'clock in the morning and four o'clock in the afternoon
- On Sunday of each week during the entire year the gallery and the arboretum shall be closed to students and public alike.
- At no time after the death of [Barnes], shall there be held in any building or buildings any society functions commonly designated receptions, tea parties, dinners, banquets, dances, musicales or similar affairs, whether such functions be given by officials, Trustees or employees of the Barnes Foundation or any other person or persons whatsoever, or whether such functions be private or public.
- At no times after the death of [Barnes] shall the art gallery be used for exhibitions of paintings or other works of art, or of any work whatsoever, that are not the property of the Barnes Foundation.
- At no time after the death of [Barnes] shall the art gallery be used for painting, drawing or sculpturing by any person or persons, whether said persons be students or instructors of The Barnes Foundation or from any other institution where students are instructed how to paint, draw or sculpture.
- The Barnes Foundation is to be maintained perpetually for education in the appreciation of the fine arts and not as a school for instruction in painting, drawing, sculpturing or any other branch of art or craftsmanship. This restriction also prohibits the copying of any of the works of art of The Barnes Foundation by any person whatsoever.

But the future of the Barnes Foundation was not as secure as Albert Barnes had planned. In 2004 a Pennsylvania judge authorized the move of the collection from its location in Merion to Philadelphia. The request for the move was a response to trustee concern that the current location was not accessible enough to the crowds it needed to sustain the collection.

In the following years the battle was fought in the courts. Supporters of Barnes's original intent opposed a move, citing the bylaws as clear citation that the donor had intended for the collection to always stay in the Merion building he had carefully crafted for its existence. Supporters of the move claimed sustainability—and eventual failure of the organization—as necessary means to allow the move. While legal battles are still pending at the time of writing, ground has been broken on Philadelphia's Benjamin Franklin Parkway—home to the Philadelphia Museum of Art and six other major arts organizations—and the new facility is slated to open in 2012.

This move blatantly breaks many of the intentions of the donor. Specifically, it allows more access to the collection than he had outlined, it not only removes the objects from the specific locations where he placed them—it puts them in a totally different context, objects will be situated in new arrangements in rooms with different proportions, and the art is physically removed from the arboretum—a connection that was important to Barnes.

But ethically, was the move warranted? The Foundation was failing. Barnes did not leave a strong enough endowment to insure the perpetual operation of his organization. He in fact limited fundraising capabilities by refusing to allow any “social” events on the premises. While he saw artistic merit to the way he exhibited his collection and the building it was housed in, he did not allow for advancements in technology and increased interest in the Foundation's inception papers. In fact, if his desires were followed precisely, the Foundation would not be able to hire a

curator for more than \$6,000 a year or an executive director for more than a \$5,000 annual salary. While those numbers may have been reasonable in the 1920's, a decade later they fall well below the poverty line. Adherence to these demands would ensure lack of trained leadership, almost guaranteeing failure of the Foundation.

Barnes's dead hand control of the foundation was limiting rather than enhancing his legacy. Trustees broke some of his stipulations without public outcry. For example, according to the organization's 990 forms, the executive director made \$374,702 in 2009. Hours of operation were extended to allow greater access. Board numbers tripled. While the building was undergoing renovation in the early 1990's the collection went on tour, making stops in six locations nationally and abroad, with an accompanying full-color catalogue. (This decision had some opposition, but was generally seen as beneficial to the organization—financially and in raising awareness of the collection—at a time when the art needed to be removed from the facility to ensure its safety during construction.)

If these stipulations could be broken for the benefit of the collection, then why is there now a battle over breaking others? Are some restrictions considered more sacred than others? Does the mission of the organization factor into the decisions? Where does this leave donor intent? The Barnes Foundation sought, and was granted, legal permission to move its facilities from Merion to Philadelphia's Museum Mile. According the organization's boilerplate, "the collection will be displayed in 12,000 square feet of exhibition space that replicates the scale,

proportion and configuration of the original galleries in Merion. The new building also will house a 5,000-square-foot space devoted to special exhibitions, as well as classrooms, a 150-seat auditorium, and much-needed facilities for painting conservation and research.” This clearly breaks the terms of indenture as laid out by Albert Barnes, yet they are not the only terms to have been broken.

The website of the Foundation addresses concerns about the move. It justifies the move in the following paragraph (Unknown n.d.):

*The root causes that eventually precipitated the need for the move of the Collection were endemic and longstanding, including Dr. Barnes's insistence that the Foundation rely on fixed-income investments that failed to provide the Foundation with sufficient revenue, and the Indenture's restrictions of fund-raising events. By the time then-director Kimberly Camp arrived in 1998, the Foundation's finances were in shambles and there was no simple solution to achieve fiscal stability. There had been expensive legal costs from a series of acrimonious lawsuits resulting from some Merion residents' opposition to the Foundation's efforts to increase attendance at the Merion galleries. The Foundation's ability to prosper, or indeed survive, in Merion was severely handicapped by local regulations restricting visitation to the galleries. In particular, the Foundation's expensive and distracting litigation in Merion had a chilling effect on donors' willingness to provide desperately needed general operating support.*

At the time of this writing, the courts were still involved in the case. In March 2011 a group of citizens petitioned the court to reopen the case. The hearing was postponed and another date will be set. The Merion galleries are scheduled to close in June 2011 and the new facility will open in 2012.

#### Discussion of the Barnes Foundation Case

Should the Barnes Foundation be allowed to move from its original location in Merion to a new facility in Philadelphia?

The Barnes Foundation is home to one of the most expansive collections of nineteenth and twentieth century French paintings in the world. While Barnes was rumored to have gone on spending frenzies, blindly buying up works by artists at the suggestion of an artist friend, he was extremely particular in how he chose to arrange them on his walls. He meticulously placed paintings, sculptures, furniture and ironworks so that visual relationships between the objects enhanced the overall display. As much as it was a collection of masterpieces, it was a study on the experience.

By moving the collection to a new facility, those experiences are lost. The original intent of the donor, the reason why he created the museum, is morphed into a completely different organization. Trustees are saying they are keeping to the mission of the organization to “promote the advancement of education and the appreciation of fine arts” and are opening the collection to a broader public, all as Barnes desired. But the execution of the mission is turning the Foundation into the type of organization he clearly disliked. Museum access will be easily obtained; Barnes liked to limit who he allowed to enter. The spaces will not be the intimate setting amongst an arboretum. Special exhibition space will presumably allow outside pieces to be displayed within the museum, and will certainly show collection pieces in different arrangements than he intended. If Barnes were alive today, he

would probably feel his collection was being turned into another massive, elitist museum.

But is this all problematic? Obviously the Foundation couldn't maintain his requirements for director and curator salaries. Nor was his endowment adequate for modern needs. Merion was too far off the beaten path for visitors. His method of art education did not become mainstream, and the absence of labels in the galleries was disorienting to viewers. The depth of the collection for certain artists is unparalleled, yet individual pieces cannot be part of exhibitions that could explore their creator's development of style and technique. Works that could fill holes in exhibitions exploring topics such as the history of a period or the progression of a style are sequestered away from the rest of the art world. For the integrity of the art, Barnes's restrictions are dated and too limiting. Taking the view of a museum having the responsibility to allowing access to its collection for the public and the advancement of the field, the move to Philadelphia is ethically the right thing to do.

## CHAPTER NINE

### SUMMARY

Should museums be allowed to break donor stipulations? Is there a process that could be developed beyond *cy pres* to address the ethical dilemmas museums face when breaking gift agreements? Would a peer review protect the organization in question from a public relations firestorm?

The answer: It depends. There is no one-size fits all solution to the ethics of breaking an agreement with a donor. First and foremost, the reasons for breaking the donor's restrictions must be reviewed in respect to the museum's mission. If the stipulations are impeding the ability of the organization to fulfill its stated purposes, or going against the public's trust, then breaking the agreement may be the ethical decision. But in cases where the restrictions are not adversely affecting the mission, the museum should have little reason to revise the contract. Doing so negatively impacts public trust, and can lead to a weakened reputation and reduced fundraising.

If survival of the museum is at stake, and breaking the donor's restrictions could ensure perpetuity, then perhaps the organization could make decisions contrary to the gift agreement. Again, the mission of the museum would be the deciding factor to determine the ethics of the decision.



Trustees and administration of non-profit museums must always remember that they are expected, ethically and legally, to act for the good of the public. Any decision that threatens the community's trust must be reviewed carefully internally and, on occasion, externally by peer institutions.

The organization's leaders also need to factor the impact on public relations into their decision. It is quite possible that negative attention surrounding breaking a donor's restriction could cost the museum more in the long-term than they are prepared to pay. Once trust is lost—be that the trust of the general public, other museums, associated alumni or donors—the institution could find itself in a long upward struggle to repair its reputation and fundraising. If donors do not feel their wishes will be maintained once they are not around to ensure restrictions are being followed, they may feel the need to seek out other organizations to which they choose to donate.

Each incident has to be evaluated on a case-by-case basis. There is no one-size-fits-all solution. Breaking donor agreements should only occur when it is absolutely necessary for the organization to continue to further its mission, and only then with proper legal and board approvals.

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