

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

In the Matter of)
)
FISK UNIVERSITY,) NO. 05-2994-III
)
Petitioner.)

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CLARENCE S. HASTLEY
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05-2994

MEMORANDUM AND ORDER

This lawsuit was filed by Fisk University, Nashville's oldest college. The University has been and is struggling financially. The lawsuit seeks to address Fisk's financial problems by petitioning the Court to approve a sale of the Alfred Stieglitz Collection of art, valued at \$74 million. The Collection was given to the University by the modernist painter, Georgia O'Keeffe, in the late 1940's and early '50's. The stated purpose of the gift is to provide Nashvillians and Southerners access to the Collection to promote the study of art.

Fisk seeks approval of a sale to the Crystal Bridges Museum in Bentonville, Arkansas. Founded and supported by Wal-Mart heir Alice Walton, Crystal Bridges has offered Fisk \$30 million. The sale provides for the Crystal Bridges Museum to receive an undivided 50% joint ownership interest in the Collection and for removing the Collection from Nashville half of the time for it to be displayed in the Crystal Bridges Museum in Arkansas.

Court approval of the sale is necessary because Georgia O'Keeffe (deceased) made it a condition of the gift that it be displayed at all times in a Fisk gallery and that the

Collection not be sold. Fisk asserts that in its precarious financial condition it cannot literally comply with Ms. O'Keeffe's disposition that Fisk display and maintain the Collection.

Before and at the time of the Crystal Bridges' offer, this Court ruled in June 12, 2007 and March 6, 2008 decisions, that Fisk could not sell the Collection because Ms. O'Keeffe had forbidden such a sale. This Court also ruled that should Fisk's financial condition make it impractical or impossible for it to support and maintain the Collection, it would revert to the Georgia O'Keeffe Museum, the successor to the deceased Ms. O'Keeffe, to decide what should be done with the Collection.

This Court's decisions were appealed by Fisk, and the higher Court reversed this Court's rulings. In *Georgia O'Keeffe Foundation (Museum) v. Fisk University*, 312 S.W.3d 1 (Tenn. Ct. App. 2009), the Tennessee Court of Appeals, on July 14, 2009, held that the Tennessee courts, and not the representative and successor to Ms. O'Keeffe, should decide the fate of the Collection if Fisk failed to be able to maintain the Collection. This decision was based on the Court of Appeals' determination as a matter of law that the O'Keeffe Museum had no reversionary interest in the Collection. *Id.* at 15. The higher Court also held that the conditions imposed by Ms. O'Keeffe on the gift, including the no sale condition, could be removed if Fisk demonstrates that: (1) "the circumstances have changed subsequent to the gift that render literal compliance with the restrictions impracticable" and (2) "the proposed modification most closely approximates the donor's charitable intent." *Id.* at 16-17. In terms of Ms. O'Keeffe's intentions in giving the Collection to Fisk, the Court of Appeals

instructed this Court, “Considering the facts in the record, we have concluded that the clear intent for giving the Collection to the University was to enable the public—in Nashville and the South—to have the opportunity to study the Collection in order to promote the general study of art.” *Id.* at 18. As to the constituent parts of the Collection, the Court of Appeals explained that it came from two sources over a time span of 1949 to 1956: (1) the ninety-seven pieces from the Alfred Stieglitz estate and (2) four paintings from Ms. O’Keeffe’s personal collection. *Id.* at 7, 17-18. At the conclusion of its decision, the Court of Appeals sent the case back to this Court with instructions to decide the two issues of “impracticability” and a modification that closely approximates the donor’s intent.

Beginning August 11, 2010, this Court conducted a trial on the issues specified by the Court of Appeals. The proof included testimony offered by Fisk from the following witnesses: deposition of Walter J. Leonard, former President of Fisk; the President of Fisk, Hazel O’Leary; the deposition of Donna Barrett, a representative of SACs, the college accrediting body for Fisk; and the deposition of Robert Workman, the Director of the Crystal Bridges Museum. The Attorney General presented the testimony of two members of the Board of the Frist Center for the Visual Arts, Attorney Lee Barfield and Dr. Thomas F. Frist, Jr.; Dr. William U. Eiland, the Director of the Museum at the University of Georgia; Dr. Foster Amey, a sociologist at MTSU; and deposition testimony of former Fisk employees and a SACs employee. The trial concluded on Friday, August 13, 2010, and this Court took the matter under advisement.

The Court's Decision

After reviewing the proof, studying the law and considering argument of counsel, the Court finds that Fisk has established the first requirement set by the Tennessee Court of Appeals. It is impracticable for a struggling university on the brink of closing to literally comply with Ms. O'Keeffe's plan that Fisk maintain and display the Collection.

As to the second requirement specified by the Court of Appeals, Fisk has not demonstrated that its solution of a joint ownership/location sale agreement with the Crystal Bridges Museum, as that Agreement is presently written, closely approximates Ms. O'Keeffe's intent. There are 8 provisions of the Agreement which override, thwart and dilute the purpose for which Ms. O'Keeffe made the gift. The Court can not approve the Agreement as written.

Lastly, where, as in this case, there are deficiencies with the proposed solution, the law provides that the Court take the time to solicit a second round of proposals to see if a better solution emerges. One possibility is that on the second round Fisk will submit an altered Crystal Bridges Agreement that addresses the objectionable provisions identified herein. Another possibility on a second round of proposals is that the Attorney General may submit one. The proof at trial suggested that there may be museum sharing arrangements and assistance in Nashville, but the Attorney General presented no Nashville-based proposal to counter the Crystal Bridges Agreement. If there is a Nashville-based solution, now is the time for it to be submitted for consideration to bring closure to this matter and provide a

complete record to review on appeal. Yet another solution, found in the case law, is that Fisk can be replaced with a Nashville entity to carry out the purposes of the Collection. Below, the Court has entered an order giving the parties additional time, until October 8, 2010, to submit any other proposals. Following completion of this second round of proposals, the Court shall adopt a plan for the display and maintenance of the art.

Contained below are the findings of fact and conclusions of law on which the Court's decision is based.

Impracticability

The proof established that Fisk is a historic, small liberal arts college. Founded after the Civil War to educate freed slaves, Fisk's present enrollment is about 700 students. Fifty percent of its students are low income, on Pell Grants, and are first generation college attendees. Updating its original mission, Fisk focuses on social mobility and providing its graduates the tools and skills to succeed. Among its accolades are the following:

- Fisk ranked fourth among the 81 schools listed in U.S. News and World Report's "Historically Black Colleges and Universities: Top Schools."
- A recent National Science Foundation study revealed that Fisk alumni earned more doctorate degrees in the natural sciences than African-American graduates from any other college or university in the nation.
- Fisk ranks in the top 77th percentile of all institutions in the United States receiving federal science and engineering research funds.
- Fisk ranks among the top-fifty baccalaureate institutions in producing African-American science and engineering doctoral degree recipients.

- For the past eleven years, Money Magazine has included Fisk on its “100 Best College Buys” list.
- For the seventeenth-consecutive year, Fisk has been selected for inclusion to the “Best 361 Colleges” by the Princeton Review.
- Fisk is ranked first of moderately selective colleges when it comes to graduating low-income students.

The proof established that over the years Fisk has struggled financially, particularly after the 1954 landmark U.S. Supreme Court desegregation decision in *Brown v. Board of Education*. The Court accredits President O’Leary’s testimony that during her six years at Fisk, noticeable improvements have been made in financial practices. The \$11 million debt she inherited has been significantly reduced. She is the best fundraiser in Fisk’s recent history. Accounting notes and findings on audits have been reduced in number and substance to only one in the last year. But just as Fisk was making inroads, the 2008 economic downturn hit.

The Court accredits President O’Leary’s testimony that recently Fisk has had to reduce expenses every year to the point that two degree programs: dramatic speech and dance, and philosophy and religion have been eliminated. In the last two years, every faculty member has taken a 5% salary reduction, and Administration salary cuts range from 7 to 15%. Fisk has suspended its contributions to pension plans and vacation accrual. All of the buildings are mortgaged. Unrestricted endowment is zero dollars. Endowment has declined from \$4.27 million to \$3.7 million. Accounts payable total \$2 million. Fisk is running a deficit

for the fiscal year ending June 30, 2010, and regularly runs a two million dollar deficit annually. The Court accredits Dr. O'Leary's assessment that Fisk has not cut just to the bone "but to the marrow," and that with the economic downturn, cuts can not sustain Fisk. An infusion of capital is needed.

Additionally relevant to this case is that by virtue of the O'Keeffe gift, Fisk has the cost and responsibility for maintaining and displaying the 101 piece, valuable Collection. Fisk currently spends on average about \$131,000 on the Collection per year. Yet Fisk estimates that there have been fewer than 10,000 visitors to all of its art collections in a typical year. Also, the conditions placed on the gift by Ms. O'Keeffe constrain Fisk. Except for a very narrow exception, the Collection can not be loaned, and it can not be separated or sold.

These foregoing facts proven at trial of eliminating degree programs, cutting salaries, mortgaging buildings, challenging economic times and the annual maintenance costs of the Collection, the Court concludes, establish the legal requirement of "impracticability." It is impracticable for a struggling university on the brink of closing to literally comply with Ms. O'Keeffe's plan that Fisk maintain and display the Collection.

Under these circumstances, a new plan for the Collection is necessary. Fisk either needs assistance with the Collection or Fisk needs to be replaced.

Cy Pres Relief

Fisk's Proposal

The second issue the Court of Appeals instructed this Court to examine is Fisk's proposed solution of the Crystal Bridges Museum Agreement, providing for \$30 million to be paid to Fisk in exchange for Crystal Bridges receiving an undivided 50% ownership interest in the Collection and the right to display the Collection. To proceed with this solution, the Court must use its authority under the cy pres doctrine to remove the no sale condition imposed by Ms. O'Keeffe on the gift.

Through the deposition of Robert Workman, the Director of Crystal Bridges in 2008, Fisk proved that the Museum has excellent resources to display and maintain the Collection in accordance with best museum practices. Mr. Workman testified that the Museum is designed with 120,000 square feet and 7 pavilions. The Museum owns some of the art to be housed there and has some art on loan. Alice Walton is the founder and major benefactor of the Museum along with her family. The Museum's financial condition at the end of 2006 was a liquid asset balance of \$138 million, with another \$350 million in non-liquid assets, such as real property and artwork. Mr. Workman testified that the Museum is dedicated to presenting and preserving artworks of the highest quality produced in the United States by American artists from colonial times to the present. The Stieglitz Collection is desirable to Crystal Bridges because the Collection relates to in many ways and demonstrates Alfred Stieglitz' key contribution to the evolution of 20th Century American Art.

Fisk asserts that the Crystal Bridges sale is a practical and sensible solution. By keeping the Collection in Nashville half of the time, the sale accomplishes, in part, Ms. O’Keeffe’s purpose of providing Nashvillians and the South access to the Collection to promote the study of art, and the sale gives Fisk the financial boost it needs. The sale also allows for more viewers to study the Collection and for it to be maintained by a top of the line art museum. This solution, Fisk asserts, is a win-win for all involved. Accordingly, Fisk asserts that this Court should exercise its cy pres power to remove and disregard Ms. O’Keeffe’s no sale restriction.

The Court’s research reveals that although the cy pres doctrine provides this Court flexibility in fashioning a solution, the Court’s powers are not unchecked. “Cy pres may not be employed simply to promote what the court views as a worthy charitable agenda.” *Bd. of Trs. of Museum of Am. Indian, Heye Found. v. Bd. of Trs. of the Huntington Free Library and Reading Room*, 197 A.D.2d 64, 82 (1994). Courts are not “free to move charitable assets from one institution to the next to maximize the utility of those assets in some broad sense.” *Id.* at 85.

The reason the law limits the power of courts in changing the conditions and disposition of gifts is for the greater good. The law has made the value judgment that it is better in the end for society as a whole that charitable giving be encouraged and rewarded

by sticking to the plan and intent of the donor. The theory is that if donors see that the law does not honor their plans and intentions, donors will quit giving:

What the law recognizes in its imposition of far more stringent, dispositionally based conditions on the use of the cy pres power, is that the consequence of so easily dispensing with a grantor's directions would be to discourage charitable giving and to rob charitable institutions of the stability necessary to the discharge of their purposes. Doubtless it is better in the end for society to reap the benefit of charitable giving even in the form of dispositions imperfectly suited to the achievement of their purposes, than to forego the benefits of charity altogether in the course of pursuing by judicial means some almost certainly elusive ideal reallocation of charitable resources.

Id.

To prevent a chilling effect on giving, the law limits the power of courts. A court may change a condition/restriction of a gift only if in doing so the result closely approximates the donor's intent, and if the change does not create a result that overrides the general charitable purpose for which the donor gave the gift. *Id.* at 83. Even "dilution" of the general charitable purpose, in some instances, is prohibited. *Id.*

Additionally, the Court has conducted legal research to see if in other cases of financially unstable or bankrupt institutions courts have allowed the institution to sell a charitable gift to generate money for the institution. The Court located none. Instead, what the Court found is that in the case of a bankrupt institution, the charitable gift was given to another institution to carry out the charity. In the case of *In Matter of Will of Coffey*, 187 A.D.2d 929, 590 N.Y.S.2d 357 (1992), an appellate court affirmed the trial court's decision

to redirect a charitable gift from a hospital in bankruptcy to another hospital in the same county.

As to cases cited by counsel: *In re Board of Huntington Free Library and Reading Room*, 5 A.D.3d 15, 771 N.Y.S.2d 69 (2004) and *In re Polytechnic University*, 812 N.Y.S.2d 304 (N.Y. Sur. 2006), those are distinguishable. *Huntington* involved a \$2.5 million sale of a gifted book collection to sustain a Library. The court was clear that the \$2.5 million sale was approved because one of the donor's explicit intentions was not only to gift the book collection to the Library but also to perpetuate and assure the future existence of the Library. 5 A.D.3d at 18. In contrast, the Tennessee Court of Appeals in this case made no finding of a dual intention by Ms. O'Keeffe that includes perpetuating the existence of Fisk.

As to *Polytechnic*, it is distinguishable because the requested change was a "bookkeeping transaction designed to increase unrestricted funds" in order for a University to meet its federal and loan mandates. 812 N.Y.S.2d at 311. In other words, the modification of the gift condition was only changing the name of a particular asset. *Id.* It did not authorize expenditure of any cash against the donee's general intent to keep the education mission of the University alive. *Id.* Here, Fisk seeks relief from the no sale condition in order to "monetize," as President O'Leary testified, the Stieglitz Collection for the purpose of infusing much needed capital. Unlike *Polytechnic*, Fisk seeks to change the form of the gift—converting the artwork into money.

Applying the foregoing law to the solution proposed by Fisk, first, the Court has been instructed by the Court of Appeals that the purpose for the gift is clear. That purpose is to “enable the public—in Nashville and the South—to have the opportunity to study the Collection in order to promote the general study of art.” *Georgia O’Keeffe Found. (Museum)*, 312 S.W.3d at 16. Using this purpose as the benchmark, the Court must next compare the Crystal Bridges solution to see if it closely approximates Ms. O’Keeffe’s purpose.

Through the testimony of sociologist Dr. Amey the Attorney General established that Bentonville, Arkansas, is 555 miles driving distance from Nashville. That is the same distance as it is from Nashville to Milwaukee, Detroit, Cleveland and Pittsburgh. The population of Bentonville is 32,000; Nashville’s population is 590,000. Nashville is more racially diverse and has a lower average household income. Using the U.S. Census Bureau’s definition of the “Southern” states, Nashville is closer to more Southern states than Bentonville.

These statistics establish that displaying the Collection in Bentonville, Arkansas, 50% of the time dilutes Ms. O’Keeffe’s purpose of access to the Collection by Nashvillians and Southerners. The statistics also establish that selling a 50% interest to the Crystal Bridges Museum dilutes the Nashville and Southern connection to the Collection intended by Ms. O’Keeffe.

Similarly, in the details of the Agreement, there are terms that dilute Ms. O’Keeffe’s purpose, or have that potential, or that override and/or dispense with Ms. O’Keeffe’s purpose of providing Nashvillians and Southerners access to the Collection.

More specifically, some of the provisions appear to or have the potential to divest Fisk of more than a 50% ownership in the Collection. Such an occurrence does not “closely approximate” Ms. O’Keeffe’s intent of a Nashville connection to the Collection.

- **Paragraph 12 of the Joint Ownership Agreement: Secured Loans**—This section allows either party—but, considering the financial situations of both parties, most likely Crystal Bridges—to loan money to the other party and thereby obtain a security interest in the debtor’s undivided 50% interest of the artwork. Over time, especially considering Fisk’s financial circumstances, Crystal Bridges could obtain much more or full title to all of the Stieglitz Collection, thus divesting Fisk of any interest in the artwork. This section would then completely thwart Ms. O’Keeffe’s intention by eliminating any Nashville connection to the Collection. This result must be removed from any modified Joint Ownership Agreement.
- **Paragraph 14 of the Joint Ownership Agreement: Transfer of Interest; Right of First Refusal**—This section appears to contemplate the ability of either party to sell its undivided interest in the Stieglitz Collection to another non-profit organization, and either party retains a “Right of First Refusal” if there is a pending sale by one of the parties of its undivided 50% interest. These provisions have the potential of moving the Stieglitz Collection outside the geographical boundaries of “Nashville and the South” contrary to Ms. O’Keeffe’s general charitable intent. Section (a) of this paragraph could possibly be saved by requiring that any sale by Crystal Bridges, as well as by Fisk, to a non-profit organization requires prior approval by the Davidson County Chancery Court.
- **Paragraph 4 of the Joint Ownership Agreement: Collection Committee; Establishment and Paragraph 7 of the Joint Ownership Agreement: Care of the Collection; Costs**—In both of

these sections, the parties agree to use “the highest standards and best art museum industry practices, and with the general adherence to the American Association of Museums guidelines or other appropriate guidelines” in preserving the Stieglitz Collection. In Paragraph 7, it appears as if each party will adhere to these “highest standards and best industry practices” on an equal basis in line with their 50% undivided interest in possession of the Collection. These “highest standards and best industry practices” would arguably increase the cost of preservation and maintenance of the Stieglitz Collection beyond what Fisk University already spends on the Collection. Based on the evidence at trial, these expenses could be quite high, not affordable by Fisk, and result in a breach by Fisk of the Agreement and divestiture. A possible modification is to provide that Fisk’s annual contribution to these expenses shall not exceed the current \$131,000 it spends.

Other provisions further dilute Ms. O’Keeffe’s intention of a Nashville connection to the Collection.

- **Paragraph 12 of the Purchase and Sale Agreement and Paragraph 20 of the Joint Ownership Agreement: Arbitration; Mediation**—Both of these provisions provide the standard language in regard to the imposition of an arbitration clause in which any dispute arising between the parties over the agreement will be subject to arbitration. The provisions have the potential of divesting Nashville and Tennessee courts of jurisdiction regarding any future issues with the Purchase and Sale Agreement as well as the Joint Ownership Agreement.
- **Paragraph 2 of the Joint Ownership Agreement: Right to Possession**—This section of the Joint Ownership Agreement involves the discussion of the contemplated sharing of the Stieglitz Collection on a (50/50) basis. However, this provision fails to set out a specific schedule for when and where the collection will be at any given date. In line with Ms. O’Keeffe’s general intent of promoting art in “Nashville and the South,” the parties must provide with more specificity a schedule which delineates where the Stieglitz Collection will be at all times, so the Court will know that Ms. O’Keeffe’s general intent of promoting art in “Nashville and the South” is being upheld.

Finally, some of the provisions are contrary to other conditions imposed by Ms. O’Keeffe and require an order from the Court to modify or disregard them.

- **Paragraph 5 of the Joint Ownership Agreement: Section (c)**—This section appears to give the Collection Committee the sole discretion when determining whether the Stieglitz Collection may be exhibited as a whole or in part. This could be construed as a right “to break up the collection” as the Attorney General argued. However, this section could also be interpreted to allow the Collection Committee to make decisions regarding the necessary “rest” that some of the pieces of art need in order to maintain and preserve the Collection as a whole.
- **Paragraph 5 of the Joint Ownership Agreement: Section (g)**—This section provides, “Only with the express consent of the Collection Committee and in accordance with the best interests of the Collection, and the highest standards and best industry practices, may the Collection (or any work included therein) be loaned for exhibition at another museum, institution or other location.” This clause disregards Ms. O’Keeffe’s condition against loaning the Collection.
- **Paragraph 5 of the Joint Ownership Agreement: Section (k)**—This section provides for any digital reproductions of the Stieglitz Collection at either Crystal Bridges or Fisk when the actual originals are at the other location. This section disregards Ms. O’Keeffe’s requirement that only the originals be displayed.

The foregoing examination of the concept and detailed terms of the Crystal Bridges Agreement reveals that, as presently written, the Agreement contains provisions which dilute, override and in some cases thwart Ms. O’Keeffe’s intention. The Tennessee Court of Appeals instructed this Court that cy pres relief in this case must “most closely approximate[] Ms. O’Keeffe’s charitable intent.” *Id.* The Crystal Bridges Agreement, as

presently written, does not satisfy that requirement. Accordingly, the Court is not authorized by law to approve the Crystal Bridges Agreement, as written.

Solicitation of Other Proposals

If, as in this case, the Court is not presented with a proposal that it can approve, the law provides that this Court may solicit a “second round” of proposals. In the New York case of *Application of Abrams*, upon the dissatisfaction of the proposed modifications to a charitable gift, the Court ordered that it would “entertain proposals” from the parties in order to formulate an appropriate scheme to modify the gift in line with the donor’s charitable intent. 574 N.Y.S.2d 651, 656 (N.Y. Sup. 1991); *see also* RONALD CHESTER, GEORGE GLEASON BOGERT, & GEORGE TAYLOR BOGERT, *BOGERT’S TRUSTS AND TRUSTEES* § 442 (2010) (“The suggestions of the trustee, the Attorney General, and other persons and institutions hoping to benefit from the exercise of the cy pres power should be received and considered by the court.”)

On this second round, a possibility is that Fisk will submit a modified Crystal Bridges Agreement responsive to the areas described *supra* at 13-15.

Another possibility is for the Attorney General to submit a proposal. Perhaps because he did not know how the Court would rule on the impracticability issue or because of previous court rulings or because of the “no shop” provision in the Crystal Bridges Agreement, the Attorney General has not provided this Court with proof or any plan that in

the face of the impracticability of Fisk displaying and maintaining the Collection there is a sharing arrangement in Nashville or there is an institution in Nashville capable and willing to permanently house and maintain the Collection to replace Fisk. Or, it could be that the Attorney General has been unable to locate an alternative to the Crystal Bridges Agreement.

As to a Nashville-based solution, the proof at trial established that there have been attempts, discussions and hypotheticals but that no concrete proposal has yet been formulated. The testimony of Attorney Lee Barfield, a member of the board of the Frist Center for the Visual Arts, revealed that Nashville's experienced, dedicated and talented problem solvers have worked on the issue. In 2007 Attorney Barfield, at the behest of the Attorney General, made a concerted but unsuccessful effort, contacting a long list of art patrons and Nashville philanthropists and fundraisers. Mr. Barfield testified that no passion for the Collection surfaced.

Former Vice-Mayor Howard Gentry and a member of Fisk's Board, who has initiated and engineered many solutions for Nashville, also made attempts. It was Mr. Gentry who contacted the Frist Center's Board for a "brainstorming session." The Court finds that in May of 2008 a meeting was held between Frist Center Director Edwards and Board members Attorney Lee Barfield and Dr. Thomas Frist, Jr., and, from Fisk, Chairman of the Board Robert Norton, President O'Leary and Fisk Board Member Howard Gentry. The Court accredits the testimony of Attorney Barfield and Dr. Frist that the purpose of the meeting was

to see if the Frist Center could help Fisk with the art issues and financial stress it was experiencing at that time.

The proof established that unlike Crystal Bridges, the Frist Center is not a collecting museum. That is, the Frist Center does not own and acquire artworks; it only displays them. Art is so expensive that a collecting museum, Mr. Barfield testified, requires more assets. Based on the assets available to the Frist Center, it has gone the non-collecting route.

At the May 2008 meeting, Dr. Frist's approach, at first, was to inquire if the Frist Center could display the art to assist Fisk while it was renovating its gallery. As to a more permanent plan, Dr. Frist made the suggestion that Fisk could be provided "condominium" space at the Frist Center for the Alfred Stieglitz Collection, a practice that is in use at a Museum in Louisville, Kentucky, that Dr. Frist had seen when researching the creation of the Frist Center. The Louisville Museum has a permanent exhibit on loan from the UK with ownership covenants similar to the no sale condition of the Collection in this case. Applying the "condominium" practice to Nashville, Dr. Frist explained that MDMHA owns the property where the Frist Center is located. The Center has a 99 year lease. Within this arrangement, Fisk could be deeded condominium space that would be titled to Fisk as a satellite Fisk campus. Within that space, Fisk could set up the gallery and Collection in adherence to the conditions established by Ms. O'Keeffe. Fisk would retain title to the Alfred Stieglitz Collection thereby honoring the no sale condition and preserving Fisk's authority to display the Collection as required by Ms. O'Keeffe. The numerous viewers who

visit the Frist Center would have access to the Collection. In terms of financial support of the Collection, locating it in a satellite Fisk campus at the Frist Center would defer some of the cost Fisk incurs such as security. Dr. Frist testified, and the Court accredits his testimony, that the Frist Center does not need this arrangement and, that at the May 2008 meeting, the Frist Center did not solicit such an arrangement but mentioned the possibility to help Fisk and the Nashville community.

The condominium alternative is an innovative and resourceful idea, but it is merely hypothetical at this point. A proposal was not developed by the Attorney General. For example, there was no proof about whether the Frist Center had room for the Collection, or if there would be expansion or redesign costs, and if Fisk would have to bear those.

That the condominium hypothetical was never pursued by the Attorney General in conjunction with the proof the Court heard about the unsuccessful efforts of Nashville's experienced and skillful problem solvers such as Howard Gentry and Lee Barfield in attempting to locate assistance for Fisk in its curator role indicate that the Crystal Bridges Agreement may be the only alternative. Thus, the process being ordered by the Court of a second round of proposals provides the Attorney General, on behalf of the citizens of Nashville and the State of Tennessee, a final opportunity to propose a solution. If, however, this Court does not receive such a proposal from the Attorney General, the only available alternative is for this Court to attempt to rework the Crystal Bridges Agreement to more

closely approximate Ms. O'Keeffe's intent. Certainty and closure must be brought to this matter.


Lastly, whatever remedy is fashioned by the Court, that remedy shall include an update of Ms. O'Keeffe's conditions in light of advancements over the last 50 years in the care of artwork. These advancements, the proof established, include a normal schedule for "resting" art on paper and rematting photographs to prevent harm to the artworks.

It is therefore ORDERED that this Court finds that due to Fisk's unstable financial condition it is unable to literally comply with displaying and maintaining the Alfred Stieglitz Collection in accordance with Ms. O'Keeffe's disposition.

It is additionally ORDERED, for the reasons stated herein, that the Crystal Bridges Agreement, as presently written, does not closely approximate Ms. O'Keeffe's intent, and, therefore, the Agreement is not approved as the cy pres remedy in this case.

It is further ORDERED that the Attorney General shall have 20 days (until September 10, 2010) to file a proposal with the Court for the display and maintenance of the Alfred Stieglitz Collection. Following that, Fisk shall file, by October 8, 2010, any responses to the other side's proposal, and/or any additional proposals Fisk has. Thereafter, the Court shall notify counsel whether an evidentiary hearing is required on the proposals; or the Court shall order a solution for the display and maintenance of the Collection based upon the

record, proof already adduced at trial and the papers filed subsequent to this Memorandum and Order.



ELLEN HOBBS LYLE
CHANCELLOR

cc: Stacey Garrett
John Branham
C. Michael Norton
C. David Briley
Janet Kleinfelter
William Helou