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## **The Attorney General's Role in Supervising Museums: The Current State of the Law and Proposals for Reform**

### **I. INTRODUCTION**

In New York and other states, museums as legal constructs consist of both private and public elements. In that government does not own their holdings or dictate their businesses transactions, museums represent private entities that employ professionals to care for their artifacts.<sup>1</sup> At the same time, however, museums are “public in the sense that [they are institutions] open to the public and dedicated to a public purpose.”<sup>2</sup> A museum keeps and maintains its treasures not to bring enjoyment solely to its staff or its benefactors, but rather to educate all citizens who visit. As a consequence, state law has established rules by which museums must abide to ensure their achievement of these public functions.

The responsibility to oversee the legality of museums' operations has vested primarily with each state's attorney general.<sup>3</sup> This authority traces its source to laws enacted by the English Parliament over five hundred years ago that sanctioned government enforcement of charitable trusts.<sup>4</sup> Over the last two decades, however, some commentators have doubted the normative propriety of the power of an attorney-politician to question the good-faith decisions of curators and art aficionados. As such, these skeptics have decried state laws that have established attorneys general as necessary parties to court actions that concern the construction

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<sup>1</sup> See MARIE C. MALARO, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS 3.

<sup>2</sup> *Id.*

<sup>3</sup> See Daniel L. Kurtz, *The Role of the Attorney General in Regulating Museums*, SJ049 ALI-ABA 33, 35 (2004).

<sup>4</sup> See Jennifer L. Komoroski, Note, *The Hershey Trust's Quest to Diversify: Redefining the State Attorney General's Role When Charitable Trusts Wish to Diversify*, 45 WM. & MARY L. REV. 1769, 1781-82 (2004) (discussing the English Statute of Charitable Uses of 1601).

of trust instruments through which museums receive many of their holdings. Meanwhile, other legal analysts have not only defended the state attorney general's role in monitoring museums' operations, but also have argued for its expansion. Lamenting how secret, ill-advised sales of priceless artworks or unique artifacts may easily dodge scrutiny, these scholars have campaigned for increases in funding for investigation of museums and charities, as well as for the recruitment of professional artists and academics to review transactions that involve valuable assets.

This paper shall detail the current scope of the supervision by state attorneys general over museums and discuss and evaluate proposals for reform. Part II outlines key statutes and case law that establish the attorney general's authority over museums in a single representative state, New York.<sup>5</sup> Recognizing that individuals or organizations may convey assets to a museum via a trust instrument, New York has created a system of financial reporting by which trustees must periodically inform the state Attorney General concerning relevant transactions. Upon reviewing these reports, the Office of the Attorney General may investigate particular conveyances by subpoenaing additional documents. Charitable trust law also has codified the attorney general's mandatory role to participate in any action that requests interpretation of a trust instrument or that seeks alteration of impracticable trust directions under the doctrine of *cy pres*. Moreover, New York law of nonprofit corporations authorizes the Attorney General to institute proceedings to remove unscrupulous directors who misappropriate a museum's assets.

Informed by the status of current law, Part III addresses two controversies that have arisen from the powers of state attorneys general to monitor museum management. The first pertains to an attorney general's intervention in the administration of charitable gifts in trust.

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<sup>5</sup> I have chosen to focus on New York law for two reasons. First, New York statutes clearly enumerate the powers of the attorney general to enforce charitable trusts and oversee nonprofit corporations. Second, New York law on this subject closely resembles the laws of other states, yet it simultaneously contrasts strikingly with other states' views concerning the *uniqueness* of the attorney general's authority.

While some scholars have advocated the streamlining or total elimination of this power, others have conversely demanded its reinforcement by raising new funds to subsidize frequent investigations. The second relates to deaccession, or the process by which a museum sells various holdings for appropriate consideration. Once again, *laissez-faire* commentators, wary of government intrusion on the prerogatives of museum directors, have criticized efforts by attorneys general to invoke the public interest in attempting to halt sales of valuable artifacts. Meanwhile, activist theorists, complaining that states deprive attorneys general of vital resources to oversee museums effectively, have recommended the creation of blue-ribbon style panels comprised of academics and curators whose approval would be required for any deaccession.

In light of these debates over charitable trusts and deaccession, Part IV overall argues against the adoption of proposals that needlessly weaken or strengthen the current power of the New York State Attorney General with regard to museum oversight. The implementation of most scholarly proposals for reform would create more problems for attorneys general and for state governments than they would actually solve. As it currently stands, New York law grants the Attorney General necessary power to enforce the responsibilities of trustees and museum directors, while simultaneously assuring him the flexibility in light of his limited investigative resources to pursue only the most egregious cases of abuse. On account of such limitation, however, New York should afford private citizens the opportunity to pursue judicial actions against museums and trustees whom the Attorney General declines to prosecute.

## **II. THE NEW YORK STATE ATTORNEY GENERAL'S ROLE IN REGULATING MUSEUMS**

At common law, the New York State Attorney General may act as *parens patriae* (translated from Latin as “parent of the fatherland”) on behalf of “any substantial segment of [the

state's] population" to "redress . . . wrongs done to [their interests] as a whole."<sup>6</sup> The Attorney General may broadly interpret this *parens patriae* authority to justify investigations and lawsuits that concern a wide range of issues that relate in any way to concerns of the citizenry. For this reason, former New York Attorney General Louis Lefkowitz applied *parens patriae* to substantiate his aggressive efforts to monitor the business dealings of museums in particular. As he once declared to a group of museum curators and directors during his tenure in the 1970's, "[M]y office has been given by law, long antedating the independence of our country, the high duty of representing the people for whose benefit you hold charitable and educational assets and to ensure that their interest in those assets is not adversely affected."<sup>7</sup> From Lefkowitz's perspective, museums specially cared for artifacts that demanded professional preservation on account of their age or value. Yet those museums kept such items on behalf of all New Yorkers who sought to enjoy and learn from them.

No reported cases have tested Lefkowitz's assumption that he could regulate museums on account of his *parens patriae* authority. Regardless, New York has enacted numerous statutes that uniquely empower the Attorney General to intervene in a museum's affairs in three notable respects: by obtaining pertinent data concerning financial transactions, by serving as a mandatory party in *cy pres* actions, and by instigating the removal of incompetent museum directors when necessary.

#### A. *Compulsory Financial Reporting and the Attorney General's Investigative Authority*

New York has established guidelines for a museum's "administration of assets within the

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<sup>6</sup> *Abrams v. New York City Conciliation & Appeals Bd.*, 472 N.Y.S.2d 839, 841 (N.Y. Sup. Ct. 1984). *See also* *People v. Albany & Susquehanna R.R. Co.*, 57 N.Y. 161, 167-68 (1874).

<sup>7</sup> JAMES C. BAUGHMAN, TRUSTEES, TRUSTEESHIP, AND THE PUBLIC GOOD 104 (1987). *See also* Jason R. Goldstein, Note, *Deaccession: Not Such a Dirty Word*, 15 CARDOZO ARTS & ENT. L.J. 213, 215 n.9 (1997).

corporation law rather than the trust law.”<sup>8</sup> Yet museums often receive gifts of money and artifacts via trust instruments that usually take effect upon the giver’s death. For example, the Buffalo and Erie County Historical Society, a Buffalo, New York, museum located on the grounds of the 1901 Pan-American Exposition, has gained its holdings over decades from a variety of bequests that have ranged from the commonplace (such as a monetary gift from one’s estate) to the peculiar (such as a trust of \$50,000 to be used for developing a stamp collection).<sup>9</sup> Article 8 of New York’s Estates, Powers, and Trusts Law, in addition to governing charitable corporations, regulates the activities of trustees charged with ensuring the rightful implementation of these many gifts to museums.<sup>10</sup>

Within six months of applying any property or income in New York pursuant to the terms of a charitable trust instrument, a trustee must file a copy of the instrument with the Attorney General, so long as he has not already registered as a trustee of a charitable organization.<sup>11</sup> Thereafter, a trustee must provide the Attorney General and any beneficiaries with “written annual financial reports” featuring a format approved by the Attorney General and describing the overall condition of the trust.<sup>12</sup> Upon reviewing a financial report, which must remain available for inspection by members of the public,<sup>13</sup> if the Attorney General or a member of his staff questions whether a trustee has “properly administered” proceeds “held for charitable purposes,”

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<sup>8</sup> Beverly M. Wolff, *Museums and the Attorney General: The Management and Spending of Endowment*, C896 ALI-ABA 333, 341 (1994).

<sup>9</sup> Interview with Hon. Carl L. Bucki, Member of the Board of Directors and Former President of the Buffalo and Erie County Historical Society (Dec. 23, 2004).

<sup>10</sup> See Kurtz, *supra* note 3, at 35.

<sup>11</sup> See N.Y. EST. POWERS & TRUSTS LAW § 8-1.4(d) (McKinney 2004). See also N.Y. EXEC. LAW § 172(1)(b) (McKinney 2004).

<sup>12</sup> N.Y. EST. POWERS & TRUSTS LAW § 8-1.4(f)(1) (McKinney 2004). See also N.Y. EST. POWERS & TRUSTS LAW § 8-1.4(h) (McKinney 2004). Although a trust instrument cannot waive the mandatory financial reporting requirement (see N.Y. EST. POWERS & TRUSTS LAW § 8-1.4(n) (McKinney 2004)), the Attorney General may do so in his discretion, such as with regard to trusts whose assets during the relevant reporting period never valued more than \$25,000 (see N.Y. EST. POWERS & TRUSTS LAW § 8-1.4(q) (McKinney 2004)), or when the absence of financial reports shall not prejudice the interests of beneficiaries or undermine proper supervision of the trust (see N.Y. EST. POWERS & TRUSTS LAW § 8-1.4(h) (McKinney 2004)).

<sup>13</sup> See N.Y. EST. POWERS & TRUSTS LAW § 8-1.4(l) (McKinney 2004).

his office may launch a broad investigation that may include interviewing the trustee or other witnesses under oath, demanding the production of relevant documents, and obtaining pertinent public records free of charge.<sup>14</sup> Upon completing his inquiry, the Attorney General in his discretion may institute proceedings in New York State Supreme Court to secure the trust's rightful administration in accordance with the donor's intent.<sup>15</sup>

Louis Lefkowitz's public opposition to the sale of prominent artwork by the Metropolitan Museum of Art in New York City illustrates the extent of the Attorney General's investigative authority. In 1971, the Metropolitan Museum, "through a series of private deals," sold paintings that Adelaide Milton de Groot, a noted wealthy philanthropist, had donated.<sup>16</sup> These transactions arguably contravened the terms of de Groot's gift, by which she had requested the museum, "*without limiting in any way the absolute nature of this bequest, . . . not to sell any of [the bequested] works of art, but to keep such of said works of art as it desires to retain for itself, and to give the balance to such one or more important Museums as said Metropolitan Museum of Art shall select*" (emphasis added).<sup>17</sup> Despite the apparent prohibition on any sales, the Museum interpreted the italicized phrase to mean that it "could do anything [it] liked with [de Groot's] pictures," notwithstanding her request.<sup>18</sup> Thus, concerned that the "sundry mediocrities by big names" in the de Groot collection would attract low values on the open market, Metropolitan Museum Director Thomas Hoving elected to sell them to "dealers who always can use some big-name, albeit lesser inventory" in order to build a "war chest" that could subsidize future costs of

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<sup>14</sup> See N.Y. EST. POWERS & TRUSTS LAW § 8-1.4(c), (i) (McKinney 2004). The Attorney General also may institute actions against any trustee or other party who refuses to comply with discovery requests. See N.Y. EST. POWERS & TRUSTS LAW § 8-1.4(k) (McKinney 2004)

<sup>15</sup> See N.Y. EST. POWERS & TRUSTS LAW § 8-1.4(m) (McKinney 2004). See also *Lefkowitz v. Lebensfeld*, 415 N.E.2d 919 (N.Y. 1980).

<sup>16</sup> See Goldstein, *supra* note 7, at 220. See also David R. Gabor, Comment, *Deaccessioning Fine Art Works: A Proposal for Heightened Scrutiny*, 36 UCLA L. REV. 1005, 1005-06 (1989).

<sup>17</sup> *Id.* at 239 n.138.

<sup>18</sup> THOMAS HOVING, *MAKING THE MUMMIES DANCE: INSIDE THE METROPOLITAN MUSEUM OF ART* 291 (1993).

maintenance and expansion.<sup>19</sup> After the New York Times uncovered and reported on the sales the following year, however, Attorney General Lefkowitz commenced a “full investigation with complete subpoena powers.”<sup>20</sup> After seven months of interviewing trustees, curators, and art dealers and reviewing numerous documents, Lefkowitz decided not to pursue any legal action against the Museum,<sup>21</sup> which reciprocally “agreed to a revised deaccession policy requiring greater public disclosure and public auctions” of masterpieces to be sold.<sup>22</sup> Although Lefkowitz did not take the Museum to court, his broad power to glean evidence in examining a trust’s administration resulted in the Museum’s adoption of new policy that would render its business practices more transparent to the citizens on whose behalf it maintained its precious treasures.

*B. The Attorney General’s Mandatory Involvement in Cy Pres Actions*

Whereas the Metropolitan Museum firmly believed that it had satisfied the wishes of Adelaide Milton de Groot in liquidating a portion of her collection, a trustee may also recognize that the language of a trust instrument has foreclosed the administration that he desires. However, such restrictive language does not pose an insuperable obstacle for the trustee, who may institute a *cy pres* (meaning “as near as may be”) action to alter the terms of the trust while still providing for a charitable purpose.<sup>23</sup> As the representative of the trust’s beneficiaries (who include the entire citizenry in the case of a gift in trust to establish a museum), the Attorney General must receive notice of every action for *cy pres*, and may opt to join the action to present his opinion of the propriety of a change in the trust instrument.<sup>24</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 305.

<sup>21</sup> *Id.* at 306.

<sup>22</sup> See Goldstein, *supra* note 7, at 221.

<sup>23</sup> Malaro, *supra* note 1, at 109.

<sup>24</sup> See N.Y. EST. POWERS & TRUSTS LAW § 8-1.1(f) (McKinney 2004). See also *In re Estate of O’Brien*, 649 N.Y.S.2d 220, 221 n.2 (App. Div., 3d Dep’t 1996). The Attorney General represents a mandatory party to *any* action that requests proper construction of the language of a trust instrument, regardless of any proposals for changes. See N.Y. EST. POWERS & TRUSTS LAW § 8-1.4(e)(1) (McKinney 2004).

Like many other states, New York has limited the control that a donor may exert via a private trust upon his property by the rule of perpetuities, which generally holds that such property must vest within twenty-years after lives in being at the creation of an estate.<sup>25</sup> However, a bequest of artifacts to a museum represents not a private trust, but rather a charitable trust over which the donor may “extend [his] control indefinitely, with state assurance as well as permission.”<sup>26</sup> Over time, however, there may arise circumstances that render a donor’s original intentions impossible to achieve. For this reason, the doctrine of *cy pres* developed at common law in England, and later in the United States, to free a charitable trust from the shackles of a grantor’s “dead-hand” control.<sup>27</sup> New York has codified *cy pres* in permitting a court to whom “it appears . . . that circumstances have so changed since the execution of an instrument making a disposition for religious, charitable, education or benevolent purposes as to render impracticable or impossible a literal compliance with the terms of such disposition” to administer the trust in a manner that shall “most effectively accomplish its general purposes, free from any specific restriction, limitation, or direction contained therein.”<sup>28</sup>

New York courts have interpreted this statute to permit application of the *cy pres* doctrine only for a trust or gift that is “charitable in nature,” whose language suggests general charitable intent, and whose purpose for creation “has failed, or has become impossible or impracticable to achieve.”<sup>29</sup> One may construe general charitable intent from a trust that presumes to profit many beneficiaries, or that grants trustees wide latitude in administration.<sup>30</sup> In contrast, a court may not amend by *cy pres* a trust that specifically mandates a gift to a certain beneficiary, even if that

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<sup>25</sup> See N.Y. EST. POWERS & TRUSTS LAW § 9-1.1(b) (McKinney 2004).

<sup>26</sup> Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111, 1114 (1993).

<sup>27</sup> For a brief discussion of the development of *cy pres* as a legal rule, see Wendy A. Lee, Note, *Charitable Foundations and the Argument for Efficiency: Balancing Donor Intent with Practicable Solutions Through Expanded Use of Cy Pres*, 34 SUFFOLK U. L. REV. 173, 181-84 (2000).

<sup>28</sup> N.Y. EST. POWERS & TRUSTS LAW § 8-1.1(c)(1) (McKinney 2004).

<sup>29</sup> *In re Estate of Othmer*, 710 N.Y.S.2d 848, 851 (Surr. Ct. 2000).

<sup>30</sup> *Id.*

beneficiary ceases to exist.<sup>31</sup>

New York courts have recognized a myriad of situations that satisfy the requirement of impracticability of the trust's original purpose. These have included trusts whose terms would violate the equal protection clause of the Fourteenth Amendment of the United States Constitution,<sup>32</sup> or whose income would prove inadequate<sup>33</sup> or more than sufficient<sup>34</sup> to achieve their grantors' charitable goals. However, a *cy pres* action in New York cannot stand if the trust's current purpose remains practicable, though inefficient or inconvenient for the trustees charged with administration. A notable illustration of this rule appears in the 1994 case of *Board of Trustees of the Museum of the American Indian, Heye Foundation v. Board of Trustees of Huntington Free Library and Reading Room*,<sup>35</sup> in which the Museum of the American Indian sought to recover a book collection from the Huntington Library that it had conveyed pursuant to an indenture created in 1930. In May 1989, the Museum, which had been located in New York City's Upper West Side, agreed to move to Washington, D.C., and become a part of the Smithsonian Institution.<sup>36</sup> However, this plan posed a logistical problem for the Museum's resident scholars, who often borrowed items from the book collection that the indenture had charged the Huntington Library to maintain. After talks between the Library and the Smithsonian to transport the collection to Washington broke down, the Museum brought its action for *cy pres* to negate the terms of the trust. Although the Court recognized that the Museum's trustees never could have anticipated the move to Washington in 1930, it also found that such a change in circumstances did not "[render] literal compliance with the dispositional

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<sup>31</sup> See *In re Syracuse Univ.*, 148 N.E.2d 671, 673 (N.Y. 1958) (declining application of *cy pres* to change a gift to Syracuse University's medical school after it became a part of the state university system).

<sup>32</sup> See *In re Estate of Wilson*, 452 N.E.2d 1228, 1235-37 (N.Y. 1983).

<sup>33</sup> See *In re Trs. of the Estate and Prop. Of the Diocesan Convention of N.Y.*, 484 N.Y.S.2d 406, 409 (Surr. Ct. 1984).

<sup>34</sup> See *In re Estate of Post*, 769 N.Y.S.2d 332, 334-35 (App. Div., 3d Dep't 2003).

<sup>35</sup> 610 N.Y.S.2d 488 (App. Div., 1st Dep't 1994).

<sup>36</sup> *Id.* at 492.

terms [of the indenture] impracticable.”<sup>37</sup> In the court’s view, the indenture’s requirement that the Museum’s staff retain access to the book collection did *not* automatically mandate the collection’s close geographic proximity to the Museum, so long as the staff could travel to New York whenever their scholarly pursuits demanded.<sup>38</sup> In order to avoid burdening future jurists constantly to “[redeploy] charitable assets . . . upon the merest showing that [they] might be more usefully situated,” the court concluded that *cy pres* did “not authorize judicial alteration of a charitable disposition simply because [of] some even more efficacious way of achieving the dispositional purposes.”<sup>39</sup>

Approximately two thirds of the states have adopted the standard of impracticability as a prerequisite for any successful *cy pres* action.<sup>40</sup> However, other state courts may permit alterations even to inconvenient or inefficient trust instruments described in *Heye Foundation*. Most notably, Pennsylvania courts have applied a watered-down version of *cy pres* in sanctioning numerous changes in the indenture for the Barnes Foundation, a collection of priceless artworks currently located outside Philadelphia. Dr. Albert Barnes, a prominent but reclusive entrepreneur, established his Foundation in 1922 to realize his dream to create “an education institute that would provide instruction in . . . philosophy of art.”<sup>41</sup> Before his death in 1951, he established in Merion, a Philadelphia suburb, a gallery in which he personally arranged his treasures (including dozens of works by Renoir, Cezanne, Van Gogh, and Picasso) in a serene garden that features “more than 200 varieties of lilacs and collections of magnolias, roses,

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<sup>37</sup> *Id.* at 497.

<sup>38</sup> *Id.* at 498.

<sup>39</sup> *Id.* at 499.

<sup>40</sup> Alex M. Johnson, Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Pres Doctrine*, 21 U. HAW. L. REV. 353, 370 (1999).

<sup>41</sup> Lee, *supra* note 27, at 189-90. See also Ilana H. Eisenstein, Comment, *Keeping Charity in Charitable Trust Law: The Barnes Foundation and the Case for Consideration of Public Interest in Administration of Charitable Trusts*, 151 U. PA. L. REV. 1747, 1749-54 (2003).

crabapples, and peonies.”<sup>42</sup> To prevent any disturbance to the composition or presentation of his collection, Dr. Barnes prepared detailed, extremely restrictive bylaws that provided for free public admission, limited use of the gallery solely for educational purposes, forbade the loan or sale of any of his holdings, and prohibited any amendments.<sup>43</sup> Despite the anti-amendment provision, by the 1980’s, the Barnes Foundation’s appointed trustees had begun to campaign for changes in the bylaws to ensure its future prosperity and financial viability.<sup>44</sup>

Unlike the New York court in *Heye Foundation*, Pennsylvania state courts have evaluated the Barnes Foundation amendment requests according to the common-law rule of “equitable deviation.” “Closely related to *cy pres*,” equitable deviation allows a court to alter only the “administrative or procedural provisions of a charitable trust,” rather than its “specific charitable purposes.”<sup>45</sup> To succeed in a deviation action, the petitioner need not prove the impracticability of the trust, but rather that the trust instrument merely hinders execution of the donor’s charitable intent.<sup>46</sup> Applying this less rigorous standard, a Pennsylvania court endorsed a limited tour of a portion of the collection in 1992.<sup>47</sup> More recently, in December 2004, the Pennsylvania Court of Common Pleas also approved the Foundation’s request to move its gallery permanently to downtown Philadelphia as a condition for obtaining \$150 million in new funds.<sup>48</sup>

Indeed, one may argue that such changes are not at all administrative, and thus should meet the ponderous *cy pres* burden of impracticability. The tour and the relocation do not relate merely to the museum’s management or operation, but rather to Dr. Barnes’ primary concern to maintain his masterpieces in a unique garden environment that the public could visit and enjoy

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<sup>42</sup> Patricia Horn, *On the Brink of Resolution*, PHILA. INQUIRER, Nov. 14, 2004, at E1.

<sup>43</sup> Lee, *supra* note 27, at 190.

<sup>44</sup> *Id.*

<sup>45</sup> John Sare, *A Primer on the Law of Cy Pres and Equitable Deviation*, 144 PLI/NY 168, 189 (2004).

<sup>46</sup> See Lee, *supra* note 27, at 186.

<sup>47</sup> See Sare, *supra* note 45, at 189.

<sup>48</sup> See *In re Barnes Found.*, 2004 WL 2903655, \*17-\*21 (Pa. C.P. Ct. Dec. 13, 2004). See also Horn, *supra* note 42.

for years to come. Nonetheless, Pennsylvania courts have boldly acted to “push the limits of the doctrine of equitable deviation in order to accomplish results that probably would not be permitted . . . under the doctrine of *cy pres*.”<sup>49</sup> For this reason, the Pennsylvania Superior Court has invited the Barnes Foundation to apply for amendments to the bylaws upon demonstrating not impracticability, but rather any “*necessity* for a further deviation” (emphasis added).<sup>50</sup> Therefore, unlike the appellate panel in *Heye Foundation*, courts in Pennsylvania have created an opportunity for the Barnes Foundation and other trusts to amend instruments that impose mere inconvenient or inefficient mandates upon their trustees.

New York has disagreed with other states not only regarding the standard of impracticability, but also concerning how closely a proper alteration to a trust instrument should conform to the donor’s original purpose. Pursuant to English common law and the current law of most states, any deviation from a trust’s original terms must achieve the donor’s initial charitable intent “as near[ly] as possible.”<sup>51</sup> New York’s *cy pres* statute does not adopt this rule, but rather requires any change in trust language “most effectively [to] accomplish [the donor’s] general purposes” in the court’s judgment.<sup>52</sup> Because the common-law doctrine does not survive the statute, a proposed amendment to a New York trust must strive not to *replicate* the donor’s charitable intent, but to achieve it *as effectively as possible*.<sup>53</sup> Within this framework, the attorney general may appear as a party in interest.

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<sup>49</sup> Sare, *supra* note 45, at 189.

<sup>50</sup> *In re Barnes Found.*, 683 A.2d 894, 901 (Pa. Super. 1996). A number of commentators have criticized the Pennsylvania courts for submissively bending the rules of *cy pres* to accommodate the requests of the Barnes Foundation’s trustees. See Lee, *supra* note 27, at 190-92. See also Chris Abbinante, Comment, *Protecting “Donor Intent” in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation*, 145 U. PA. L. REV. 665, 676 (1997).

<sup>51</sup> *In re Abrams*, 574 N.Y.S.2d 651, 654 (Sup. Ct. 1991) (hereinafter *Abrams*). See also Eisenstein, *supra* note 41, at 1756-57. See also GEORGE T. BOGERT, TRUSTS AND TRUSTEES § 431.

<sup>52</sup> N.Y. EST. POWERS & TRUSTS LAW § 8-1.1(c)(1) (McKinney 2004).

<sup>53</sup> See *Abrams*, 574 N.Y.S.2d at 654-55. See also *In re Multiple Sclerosis Serv. Org. of N.Y.*, 496 N.E.2d 861, 864-66 (N.Y. 1986).

### C. *The Attorney General's Regulation of Museums as Nonprofit Organizations*

Although New York's museums often receive their artifacts via gifts in trust, New York law provides for the organization of museums themselves as nonprofit corporations chartered by the Board of Regents.<sup>54</sup> As a consequence, a board of directors must preside over a museum's fiscal and operational affairs. Yet this privilege of governance for directors entails corresponding responsibilities that the New York State Attorney General may enforce.

Every director of a museum or other non-profit corporation in New York (and in other states) must satisfy the fiduciary duties of obedience, loyalty, and care.<sup>55</sup> The duty of obedience, which does not bind directors of for-profit corporations, requires the nonprofit director to ensure the successful implementation of the corporation's mission.<sup>56</sup> Thus, by its collective decisions, a museum's board of directors must carry out its goal of preserving and exhibiting its treasures for the enjoyment of the public at large. By virtue of their duty of loyalty, directors may not gain profit at the expense of their non-profit corporation's fiscal health.<sup>57</sup> Finally, the duty of care mandates non-profit directors to manage the corporation's assets "in good faith and with that degree of diligence, care and skill which ordinarily prudent [persons] would exercise under similar circumstances in like positions."<sup>58</sup> Under New York law, this duty (commonly known as the "prudent investor" rule) is far broader than the duty of care that binds a for-profit corporation's directors, who must act with "diligence" but not necessarily with "care" or

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<sup>54</sup> See Kurtz, *supra* note 3, at 35. See also Wolff, *supra* note 8, at 341.

<sup>55</sup> 64th Assocs. v. Manhattan Eye, Ear & Throat Hosp., 2 N.Y.3d 585, 590 n.7 (2004). Trustees must adhere to these duties in administering charitable trusts as well. See Komoroski, *supra* note 4, at 1775.

<sup>56</sup> See Mem'l Sloan Kettering Cancer Ctr. v. Spitzer (*In re* Manhattan Eye, Ear & Throat Hosp.), 715 N.Y.S.2d 575, 593 (Sup. Ct. 1999).

<sup>57</sup> See S.H. & Helen R. Scheuer Family Found. v. 61 Assocs., 582 N.Y.S.2d 662, 665 (App. Div., 1st Dep't 1992). See also Turner v. Am. Metal Co., 50 N.Y.S.2d 800, 831 (App. Div., 1st Dep't 1944).

<sup>58</sup> N.Y. NOT-FOR-PROFIT CORP. LAW § 717(a) (McKinney 2004). See also *Mem'l Sloan Kettering*, 715 N.Y.S.2d at 593. In selecting the corporation's investments, which may include stocks, bonds, mutual funds, or other investment property, non-profit directors may fulfill their duty of care by relying upon financial statements or data prepared by reliable and competent corporate officers, legal counsel, public accountants, or other qualified individuals. See N.Y. NOT-FOR-PROFIT CORP. LAW § 512 (McKinney 2004); N.Y. NOT-FOR-PROFIT CORP. LAW § 717(b) (McKinney 2004).

“skill.”<sup>59</sup> As such, the heightened duty of care for non-profit directors emphasizes the magnitude of their obligation to pursue wise investments that shall sustain the corporation’s fiscal health for years to come.

In his role as the guarantor and protector of the public interest, the Attorney General becomes a “necessary party to every fundamental corporate action,” including the amendment of a firm’s purpose, the sale or transfer of substantially all of a firm’s entire assets, and a firm’s merger or dissolution.<sup>60</sup> In addition, the Attorney General may enforce the duties of obedience, loyalty, and care against a non-profit corporation’s renegade directors by instituting court proceedings to remove them from their positions<sup>61</sup> or to recover damages “to the extent of any injury suffered by the corporation” as a result of their incompetence.<sup>62</sup> Therefore, New York has granted its Attorney General authority to ensure not only the proper administration of gifts to museums in trust, but also the good-faith management of museums’ fiscal operations by their appointed or elected corporate directors.

### **III. PROPOSALS FOR REFORMING THE ROLE OF THE STATE ATTORNEY GENERAL**

Although the particularities of their regulatory oversight may vary somewhat, most of the New York’s attorney general’s counterparts in other states share his rights to collect necessary financial data from charitable trusts, to participate in actions for *cy pres* and construction of trust

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<sup>59</sup> See *Mem’l Sloan Kettering*, 715 N.Y.S.2d at 593.

<sup>60</sup> Kurtz, *supra* note 3, at 36. See also N.Y. NOT-FOR-PROFIT CORP. LAW § 112 (McKinney 2004) (discussing actions and proceedings that the Attorney General may institute against a non-profit corporation in general); N.Y. NOT-FOR-PROFIT CORP. LAW § 511(b) (McKinney 2004) (mandating that museums and other non-profit corporations must provide the Attorney General advance notice of their intention to sell substantially all of their assets); N.Y. NOT-FOR-PROFIT CORP. LAW § 1101 et seq. (McKinney 2004) (describing the Attorney General’s authority to bring an action to dissolve a non-profit corporation).

<sup>61</sup> See N.Y. NOT-FOR-PROFIT CORP. LAW § 112(a)(4) (McKinney 2004); N.Y. NOT-FOR-PROFIT CORP. LAW § 706(d) (McKinney 2004).

<sup>62</sup> See N.Y. NOT-FOR-PROFIT CORP. LAW § 112(a)(7) (McKinney 2004); N.Y. NOT-FOR-PROFIT CORP. LAW § 719(a) (McKinney 2004). See also Kurtz, *supra* note 3, at 38.

instruments, and to enforce the duties of obedience, loyalty, and care that rest with a museum's directors. Yet these powers have suffered criticism both from commentators who wish to curtail interference by attorneys general in the decision-making of trustees and directors, as well as from others who alternatively favor an expanded role for attorneys general in controlling museums' business transactions. In advocating a *laissez-faire* approach to museum regulation, the former of these critics (to whom I shall refer as "libertarians") have often cited the numerous responsibilities of attorneys general, their limited resources with respect to funding and manpower, their potential to politicize investigations, and their lack of specialized knowledge concerning the ins and outs of running museums and cultural institutions. In response, supporters of increased involvement of attorneys general (to whom I shall refer as "interventionists") have argued for enhanced funding of charities bureaus and for government employment of museum professionals to review questionable expenditures. This overarching debate between libertarians and interventionists has developed amid the context of academic exchanges concerning the proper role of attorneys general in policing the administration of gifts in trust and in supervising the "deaccession" of museum assets and artifacts.

*A. Actions for Cy Pres and Revised Administration of Gifts in Trust for Museums*

Libertarian and interventionist critics alike have recognized the inevitability of disputes concerning the correct administration of certain gift instruments, as well as the need to amend other trusts that grow obsolete over time. Yet their opinions of the state attorney general's appropriate place in facilitating solutions to such problems differ starkly. Aiming to diminish the prevalence of governmental influence, libertarians have proposed to empower trustees to achieve greater charitable efficiency and to allow citizens to sue for the enforcement of charitable trusts without the attorney general's consent. Meanwhile, interventionists have presented an activist

solution to confer upon attorneys general an affirmative duty to seek out impracticable gift instruments whose terms should change pursuant to a *cy pres* action.

Controversy over the disposition of the Hershey Trust in Pennsylvania in 2002 perhaps constitutes the most compelling evidence in support of the libertarian recommendations for reform. Since its creation by Milton and Catherine Hershey, the Hershey Trust, the owner of a controlling interest in the well-known Hershey Foods Corporation, has subsidized not a museum, but rather the maintenance of the Milton Hershey School, which has educated orphan children for over one hundred years in a town outside Harrisburg, Pennsylvania.<sup>63</sup> Among numerous other provisions, the deed of trust enabled the trustee and managers to employ their discretion “in good faith” to invest principal funds and income “in any securities which [they] together [would] consider safe,” as well as “to sell any securities at any time held by [the Trust]” upon the managers’ majority approval.<sup>64</sup> Pursuant to this language, the Trust’s managers elected in 2002 to sell their controlling interest in Hershey Foods in an effort to diversify the Trust’s investment portfolio. However, this decision instigated a wave of public protest in the Harrisburg area, as employees of Hershey Foods worried that new owners would eliminate jobs or even more the company’s entire operations from its original home.<sup>65</sup> In response to this uproar, Pennsylvania Attorney General Mike Fisher filed a state-court petition for an order to show cause why the asset sale could move forward without judicial sanction.<sup>66</sup> Even though the specific language of the Hershey Trust instrument specifically granted managers the authority to make good-faith investment decisions, a Pennsylvania appellate court sided with Attorney General Fisher and

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<sup>63</sup> See Komoroski, *supra* note 4, at 1788-89.

<sup>64</sup> *Id.* at 1789.

<sup>65</sup> See Bill Sulon, *Hershey Foods Furor: Trustees Pledge Goal of Protecting Community*, PATRIOT-NEWS (Harrisburg, PA), Jul. 26, 2002, at A1. See also Mark Sidel, *The Struggle for Hershey: Community Accountability and the Law in Modern American Philanthropy*, 65 U. PITT. L. REV. 1, 1-2 (2003).

<sup>66</sup> See Komoroski, *supra* note 4, at 1790.

refused to lift a lower-court injunction to stay the Trust's proposed asset sale.<sup>67</sup> Citing the Attorney General's *parens patriae* power to supervise the activities of charitable trusts, the lower court had approved of his authority to question any exercise of a trustee's discretion, "even if authorized under the trust instrument," so long as it could prove "inimical to the public interest," as a potential loss of thousands of manufacturing jobs could.<sup>68</sup>

For libertarians, the Hershey Trust case epitomizes how an overzealous attorney general, by virtue of his unique standing to bring court action to compel a trust's enforcement, can usurp the rightful prerogatives of trustees who have committed no foul aside from simply doing their jobs. Consequently, libertarian commentators have first recommended a *legal bar on actions by an attorney general to enjoin an administration of a trust that conforms to the language of the corresponding deed*.<sup>69</sup> With respect to the example of the Hershey Trust, such a rule would have stonewalled Attorney General Fisher's action, so long as the Trust's managers had arrived at their investment decision in good faith, and had satisfied their duties of obedience, loyalty, and care.<sup>70</sup> This prohibition could moderate an attorney general's investigation of the administration of a museum trust as well. For instance, regardless of Attorney General Louis Lefkowitz's choice not to prosecute, the rule would have automatically prevented any legal action against the trustees who permitted the Metropolitan Museum of Art's 1972 partial sale of the de Groot collection. Despite the strenuous objections of art aficionados to the Museum's covert dispatch of numerous pieces, the Museum's literal, if hyper-technical adherence to the terms of the de Groot instrument would have strictly protected the sale from judicial disturbance. Adoption of this black-letter proposal would not only offer trustees necessary predictability in performing

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<sup>67</sup> See *In re Milton Hershey Sch. Trust*, 807 A.2d 324 (Pa. Commw. Ct. 2002).

<sup>68</sup> *Id.* at 330.

<sup>69</sup> See Komoroski, *supra* note 4, at 1794.

<sup>70</sup> See *id.* at 1798-99.

their duties, but also uphold the sanctity of a donor's charitable intent as evinced by the language present in the deed.

Yet their disdain for Fisher's preemption of the Hershey Trust's intended sale represents just the tip of the iceberg of the libertarians' concerns. More broadly, numerous academics have consistently raised two observations in questioning whether attorneys general should *ever* play a part in enforcing the terms of gifts to museums via trust. First, an attorney general's office often lacks the necessary financial and human resources to monitor the administration of charitable and donative trusts effectively. As libertarians have often argued, "[I]ack of money, coupled with the obligation to discharge the other important duties of the attorney general's office, contributes to inadequate staffing for the purpose of supervising charities."<sup>71</sup> For instance, the 500 attorneys and 1,800 support staff employed by the Office of the New York State Attorney General bear responsibility for a myriad of functions, such as prosecuting cases of organized crime and Medicaid fraud; defending the state against tort claims; representing the state in appellate litigation; and enforcing antitrust, civil rights, environmental, labor, and consumer protection laws.<sup>72</sup> Although the Attorney General might ideally desire to devote additional resources to monitoring the administration of charitable trusts, he must temper this wish by stretching his constricted budget in order to achieve the many duties incumbent upon his office. For this reason, libertarians fear that there exists "no reason to believe that the attorney general . . . will become an adequate instrument of enforcement in most states in the foreseeable

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<sup>71</sup> Geoffrey A. Manne, *Agency Costs and the Oversight of Charitable Organizations*, 1999 WIS. L. REV. 227, 251. See also Denise Ping Lee, Note, *The Business Judgment Rule: Should It Protect Nonprofit Directors?*, 103 COLUM. L. REV. 925, 933 (2003); Garry W. Jenkins, *The Powerful Possibilities of Nonprofit Mergers: Supporting Strategic Consolidation Through Law and Public Policy*, 74 SO. CAL. L. REV. 1089, 1121 (2001); Jaelyn A. Cherry, *Update: The Current State of Director Nonprofit Liability*, 37 DUQ. L. REV. 557, 568 (1999); Albert E. Elsen, *John Henry Merryman: Founding the Field of Art Law*, 39 STAN. L. REV. 1086, 1090 (1987).

<sup>72</sup> See Office of the New York State Attorney General, *Tour the Attorney General's Office*, available at <http://www.oag.state.ny.us/tour/tour.html#other>.

future.”<sup>73</sup>

Second, the state attorney general’s limited practical capacity to supervise charitable trusts requires his office to pick and choose the enforcement actions that it shall pursue. For libertarians, this discretion enables an attorney general to abuse his power by commencing only those investigations that will create a political and media splash.<sup>74</sup> Not surprisingly, they have cited Pennsylvania’s Mike Fisher as the prototypical state attorney general guided by political concern. Coincidentally, Attorney General Fisher instituted his suit against the Hershey Trust in 2002, a year in which he would run (unsuccessfully) for Governor as the Republican nominee.<sup>75</sup> Once the Trust recoiled from selling its interest in Hershey Foods, Attorney General Fisher released campaign advertisements in which he declared that he had personally saved 6,000 jobs.<sup>76</sup> For his critics, however, Fisher’s action against the Hershey Trust could not excuse his office’s previous inertia in scrutinizing museum trustees in Pennsylvania who had breached their duties far more egregiously. For example, in 1995, the Philadelphia Inquirer uncovered how the trustees of the city’s largest museums, including the Academy of the Natural Sciences, the Pennsylvania Academy of the Arts, and the Franklin Institute, had fallen for a fraudulent “pyramid investment” scheme peddled by a so-called “Foundation for New Era Philanthropy.”<sup>77</sup> Even though their decision to participate damaged their respective museums financially, Attorney General Fisher “never brought suit against [any of the] trustees . . . for breach of their duty of care” after he became Attorney General in 1997.<sup>78</sup> Also, never during his term did

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<sup>73</sup> Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 608 (1981).

<sup>74</sup> See Manne, *supra* note 71, at 251.

<sup>75</sup> See Komoroski, *supra* note 4, at 1786-87.

<sup>76</sup> See Peter L. DeCoursey, *Fisher Ad Seizes on Hershey Sale Halt: GOP Hopeful Claims He Saved 6,000 Jobs*, PATRIOT-NEWS (Harrisburg), Sept. 26, 2002, at B1.

<sup>77</sup> Stephen K. Urice, *External Constraints on Museum Authority*, SJ049 ALI-ABA 15, 20 (2004). See also Peter Dobrin & L. Stuart Ditzen, *A Bankruptcy Shakes World of Charities: The Radnor Foundation Promised Big Returns, Hundreds of Nonprofit Groups and Donors Could Lose Millions*, PHILA. INQUIRER, May 16, 1995, at A1.

<sup>78</sup> Urice, *supra* note 77, at 21.

Attorney General Fisher initiate legal action against the trustees of the Barnes Foundation, despite their failure throughout most of the 1990's to maintain an annual budget or develop a conflict-of-interest policy.<sup>79</sup> Certainly, attorneys general cannot investigate every complaint that their offices might receive concerning a trust's administration. Yet Fisher's spotty record validates the libertarian claim that an attorney general's enforcement decision may ensue from his political calculations, rather than from his professional judgment.

Having perceived a state attorney general's need to prosecute trustees selectively on account of his limited resources, various libertarian theorists have proposed three additional reforms. The first would drastically curtail the need for involvement of courts or attorneys general in the amendment of an impracticable trust. In particular, this libertarian *cy pres* reform would *permit trustees to alter their administration of an impracticable trust of their own accord, provided that they would still achieve some charitable purpose.*<sup>80</sup> The responsibility to determine the propriety of that new charitable purpose would lie not with a judge, or with an activist attorney general, but rather with the trustees themselves.<sup>81</sup> Notably, supporters of this overhaul of the *cy pres* doctrine do *not* recommend that attorneys general abandon the business of policing donative trusts altogether. The attorney general would still retain authority to press legal action against trustees who would exceed "broad bounds of charity," such as in conducting an asset sale and subsequently keeping the proceeds for their personal use.<sup>82</sup> Nonetheless, by virtually eliminating the need for *cy pres* litigation, this proposal would empower trustees to contravene a charitable donor's original intent without ever notifying the state attorney general.

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<sup>79</sup> *Id.*

<sup>80</sup> See Atkinson, *supra* note 26, at 1115-16.

<sup>81</sup> *Id.* at 1143.

<sup>82</sup> Eisenstein, *supra* note 41, at 1776.

Other libertarians, notably Professor Geoffrey Manne of Lewis and Clark Law School, have concluded that mere *cy pres* reform falls well short of alleviating the pressures on attorneys general to accomplish multiple assignments with so few resources. Consequently, he has proposed *entirely to privatize the enforcement of charitable trusts*. By his recommendation, new laws would require trusts and nonprofit corporations, including museums, to contract with for-profit monitoring companies that could bring suits for enforcement of their fiduciary duties.<sup>83</sup> For Manne, this plan not only would prevent attorneys general from figuring political motivations into their regulation of museums, but also subject them to the kind of accountability that multiple, well-funded private actors, rather than a single, fiscally-strained attorney general's office, can provide.<sup>84</sup>

Third, libertarian scholars and some judges have supported the *liberalization of standing rules that mandate the attorney general's participation in any action for trust enforcement*.<sup>85</sup> Because "Attorneys General have not been preoccupied with supervision of museums," these proponents have hailed standing for ordinary citizens to sue charitable trusts and nonprofit corporations as a necessary means to ensure museums' responsibilities to keep their treasures on behalf of the public.<sup>86</sup> Of course, detractors predict that such a reform proposal could subject museums and charitable trustees to endless, costly litigation from multiple parties concerning a trust's administration.<sup>87</sup> However, in Wisconsin and New Jersey, two states that have liberalized their standing rules, no such "flood of problem suits" has resulted.<sup>88</sup> Thus, granting standing to

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<sup>83</sup> Manne, *supra* note 71, at 229.

<sup>84</sup> *Id.* at 230.

<sup>85</sup> Today, New York retains this traditional rule of standing. See N.Y. EST. POWERS & TRUSTS LAW § 8-1.4(m) (McKinney 2004).

<sup>86</sup> Malero, *supra* note 1, at 22.

<sup>87</sup> See Mary Frances Budig et al., *Pledges to Nonprofit Organizations: Are They Enforceable and Must They Be Enforced?*, 27 U.S.F. L. REV. 47, 109 (1992).

<sup>88</sup> Hansmann, *supra* note 73, at 609. See also Ronald Chester, *Grantor Standing to Enforce Charitable Transfers Under Section 405(c) of the Uniform Trust Code and Related Law: How Important Is It and How Extensive Should*

citizens may not give rise to frivolous lawsuits, but rather encourage the most knowledgeable, committed, and resourceful denizens to take on investigations that an attorney general turns down.

Each of the libertarian ideas for reform shares a common purpose, namely to chip away at the longtime unique authority of state attorneys general to enforce the terms of gifts in trust to museums and other charitable organizations, in favor of supervision by trustees and private entities. In stark contrast, interventionists have offered two proposals to bolster the powers of attorneys general to enforce the proper administration of trusts. Like libertarians, interventionists have observed the inability of attorneys general, on account of limited funding, to monitor trusts aggressively. As Professor Alex Johnson of the University of Virginia Law School has lamented, this dearth of financial support renders a state attorney general unequipped “to determine if a doctrine like equitable deviation [or *cy pres*] should be deployed to create a more efficient use of [a trust’s] assets.”<sup>89</sup> Nevertheless, he still views attorneys general as the most sensible enforcers of charitable trusts, as they constitute “relational contracts” between donors who desire the implementation of their wishes, and the government charged with ensuring those wishes to benefit society at large.<sup>90</sup> Thus, whereas libertarians respond to the problem of inadequate funding by volunteering to strip attorneys general of their supervisory authority, interventionists like Professor Johnson first would prefer to raise new money to subsidize charitable enforcement. Indeed, so long as solely public tax dollars pay the salaries of an attorney general and his staff, “it stands to reason than an attorney general faced with enforcing criminal statutes, interpreting laws, assisting in drafting legislation, and providing legal opinions,

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*It Be?*, 37 REAL PROP. PROB. & TR. J. 611, 631 n.91 (2003); *City of Patterson v. Patterson Gen’l Hosp.*, 235 A.2d 487 (1967) (case in which a New Jersey court invalidated the Attorney General’s sole of right of standing to sue charitable trusts).

<sup>89</sup> Johnson, *supra* note 40, at 377.

<sup>90</sup> *Id.* at 387.

would place a very low priority on monitoring and bringing suits against charitable trusts.”<sup>91</sup>

Therefore, Professor Johnson has suggested imposing a “tax on trusts” that would be remitted “to the state’s office of the attorney general to fund a division within the office *whose sole purpose would be the monitoring and enforcement of charitable trusts,*” which by definition would include charitable gifts to museums (emphasis added).<sup>92</sup> Although interventionists have not yet articulated the logistics of imposing and executing such a tax, it still constitutes a proactive attempt to fix the funding problems faced by attorneys general, rather than to accept them with resignation.

Second, interventionists have posited that mere annual financial reporting, as New York requires from most charitable trusts, fails to provide attorneys general with timely information necessary to identify and troubleshoot questionable administrations as soon as they arise. Moreover, without additional legal provisions that describe proper supervision of a gift to a museum in trust, a compulsory reporting statute represents just a cosmetic measure that confers no onus of effective monitoring upon the attorney general, and but rather simply enables his staff to file away in a cabinet the financial data that he receives each year.<sup>93</sup> Therefore, a second possible interventionist reform would delegate to the attorney general an *affirmative duty to audit the finances of charitable trusts on a regular basis, even in the absence of evidence of impropriety by any trustees.*<sup>94</sup> Such an affirmative duty could entail mandatory review by assistant attorneys general of every financial report filed for charitable trusts, periodic accountings of their assets and transactions, and regular interviews with trustees who administer

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<sup>91</sup> *Id.* at 389.

<sup>92</sup> *Id.* at 390.

<sup>93</sup> See generally Michael C. Hone, *Aristotle and Lyndon Baines Johnson: Thirteen Ways of Looking at Blackbirds and Nonprofit Corporations --- The American Bar Association’s Revised Model Nonprofit Corporation Act*, 39 CASE W. RES. L. REV. 751, 773 (1988-89).

<sup>94</sup> See Budig, *supra* note 87, at 111.

even the most insignificant of estates. For interventionists who favor an expanded governmental role in regulating charitable gifts, such specific supervisory guidelines would empower attorneys general and their staff assistants to counsel trustees regarding their administrative duties, identify outmoded trusts whose terms should be amended by *cy pres*, and scrutinize suspicious investment and disbursement decisions soon after they take place.

### *B. Deaccession*

A term first coined by museum professionals, “deaccession” generally refers to the “process used to removed permanently an object from a museum’s collection.”<sup>95</sup> Inasmuch as one conceives of a museum as a collector, rather than a vendor, of artifacts, deaccession might seem anathema to a museum’s purpose for operation. Yet deaccession allows a museum flexibility to obtain funds to purchase high-profile masterpieces, to free space in its storage warehouse, or to survive in the face of financial difficulties.<sup>96</sup>

Under New York law, the Attorney General must receive notice of a sale of *substantially all* of the assets of a museum or other non-profit corporation.<sup>97</sup> Also, in 1996, New York enacted new laws to regulate deaccession by the New York State Museum, a historical and science museum located in Albany.<sup>98</sup> Besides requiring that any deaccession of items having “intrinsic historic, artistic, scientific, or cultural value” conform to the Museum’s overall “mission,” the law also mandated the proceeds of any deaccession to fund the acquisition and preservation of artifacts, rather than the Museum’s operating expenses.<sup>99</sup> Yet no New York statute or any reported cases specifically address the Attorney General’s authority to prevent or even undo the

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<sup>95</sup> Malara, *supra* note 1, at 138. More specifically, the New York State legislature has defined deaccession as the “permanent removal or disposal of an objection from the collection of [a] museum by virtue of its sale, exchange, donation or transfer by any means to any person.” N.Y. EDUC. LAW § 233-a(1)(b) (McKinney 2004).

<sup>96</sup> *Id.* at 139.

<sup>97</sup> See N.Y. NOT-FOR-PROFIT CORP. LAW § 511 (McKinney 2004).

<sup>98</sup> See N.Y. EDUC. LAW § 233-a (McKinney 2004).

<sup>99</sup> N.Y. EDUC. LAW § 233-a(1)(c), (2), (5)(a) (McKinney 2004).

decisions of museums other than the State Museum to sell their precious treasures.<sup>100</sup> To fill this void in substantive law, libertarians and interventionists once again have engaged in debate over the proper extent of the Attorney General's regulatory role. As compared with the volumes of scholarly commentaries on the enforcement of charitable gifts in trust, essays even mentioning deaccession remain few in number. Yet two visionary articles --- one libertarian and one interventionist --- offer vastly disparate opinions concerning governmental interference upon the prerogatives of non-profit corporate directors.

Viewing museum directors as business professionals whose decision-making authority should suffer minimal intrusion from public regulation, commentator Jason Goldstein has presented a libertarian argument in opposition to any deaccession restrictions that a state attorney general might enforce as a matter of right.<sup>101</sup> In defending "the supremacy of [a] museum board [of directors] when making deaccession decisions," Goldstein asks a compelling rhetorical question: "In what way could [a state] Attorney General's expertise exceed that of a museum professional when considering budgetary needs or the value of a particular painting to the museum's collection?"<sup>102</sup> Although an attorney general might possess a wealth of legal knowledge, he has not obtained nearly as much experience or training in operating a museum as its directors or curators have. Therefore, "[i]f a museum's board of trustees finds itself in the desperate position of having to sell a piece of artwork" for any reason, including on account of fiscal hardship, the attorney general and the state legislature "should yield to its judgment."<sup>103</sup> For this reason, Goldstein strenuously objects to New York's law requiring the deaccession of any item by the State Museum to accord with its mission. Such a vague rule, in the absence of

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<sup>100</sup> See Jennifer L. White, Note, *When It's OK to Sell the Monet: A Trustee-fiduciary-duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses*, 94 MICH. L. REV. 1041, 1045-46 (1996).

<sup>101</sup> See Goldstein, *supra* note 7.

<sup>102</sup> *Id.* at 244-45.

<sup>103</sup> *Id.* at 245.

any statutory definition of “mission,” enables the Attorney General to oppose a deaccession based upon his personal conception of the State Museum’s rightful mission. When this subjective interpretation clashes with that held by the trustees, the Attorney General may threaten to sue them for breach of their fiduciary duties, and thereby dictate the Museum’s transactions by threat of legal action.<sup>104</sup> For this reason, Goldstein and his libertarian supporters would regard any scrutiny of deaccession by the Attorney General, such as Louis Lefkowitz’s investigation of the Metropolitan Museum of Art, as inapposite with the American system of free enterprise that should permit corporations to make their own business decisions.

In contrast, conservative denunciations of deaccession regulations as “big government bureaucracy” do not sway interventionists like David Gabor, who perceive the state attorney general as a logical guarantor of the public’s “strong interest in [preserving and maintaining] any museum collection” as a fair price for the public cultural funding that they often receive each year.<sup>105</sup> Noting that ineffective deaccession laws offer unscrupulous curators and dealers an opportunity quietly to sell a museum’s pieces at prices far below market value in return for favors or perks from their buyers, Gabor suggests statutory guidelines that would impose upon a state attorney general and his staff a duty to review in advance a museum’s proposed sale of any artifact valued at over \$5,000.<sup>106</sup> Unlike the financial reporting mechanism currently enshrined in New York’s Estates, Powers, and Trusts Law, which merely informs the attorney general of a deaccession long after it has taken place, Gabor’s plan for reform empowers him to seek a judicial injunction to preempt a suspicious sale before it happens. Aware that investigations of relatively insignificant artifact transactions could overburden the attorney general’s limited staff support, Gabor would also support the creation of a council of artists, curators, dealers, and other

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<sup>104</sup> *See id.* at 244-45.

<sup>105</sup> Gabor, *supra* note 16, at 1007-08.

<sup>106</sup> *See id.* at 1021, 1044.

professionals to whom the attorney general could delegate authority to consider deaccessions for approval.<sup>107</sup> Via the Gabor plan, interventionists once again have responded to the attorney general's needs for extra funding and human resources not by relieving him of his duties, as libertarians have recommended, but rather by augmenting his practical capacity to monitor museums.

#### **IV. A BRIEF EVALUATION OF THE PROPOSED REFORMS**

“Libertarian” and “interventionist” scholars have presented numerous ideas for reforming the attorney general's authority to track and investigate both the administration of charitable gifts to museums and the deaccession of valuable artifacts. Whereas libertarian suggestions find their premise in distaste for public regulation of private decision-making, interventionist plans champion the unique power of government to root out wrongdoing efficiently as a great collective actor. However, neither vision of the proper role of the attorney general offers a utopia, as the implementation of suggestions from both ideological camps could create more problems than they would solve. On account of the drawbacks that plague many of these proposals, moderate revision of the attorney general's power and duties of oversight and enforcement could represent the most appropriate reform. With regard to charitable trusts, such moderation would retain the attorney general's current authority of supervision, while extending standing to sue for correct enforcement to truly interested citizens. Ideal deaccession reform would involve a collaborative effort among the attorney general, museum directors, and other experts to create a uniform policy to govern the sales of artifacts.

##### *A. The Administration of Charitable Gifts in Trust*

As discussed above, libertarian recommendations to reform the implementation of

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<sup>107</sup> See *id.* at 1027-28.

charitable gifts in trust certainly achieve their objectives of reducing the regulatory influence of the attorney general. Yet this result would likely arise at the expense of effective enforcement of trustees' responsibilities to carry out the desires of charitable grantors. The potential benefits of the libertarian plans do not adequately rationalize the costs that donors and the public would bear as the consequence of the attorney general's diminished oversight.

Three of the libertarian proposals raise particular concern. The first, namely a *legal bar on actions by an attorney general to enjoin an administration of a trust that obviously conforms to the language of the corresponding deed*, resounds of common sense at first blush. Indeed, why should an attorney general prevent a trustee from exercising the very prerogatives that the language of a trust instrument bestows upon him? The answer to this seemingly rhetorical inquiry lies in the attorney general's traditional role as *parens patriae*, the protector of the public welfare. In bringing action against trustees whose administrative decisions could cause great harm to a portion of his constituency, the attorney general successfully buys valuable time in which he can negotiate a compromise acceptable to the trustees and to the public. Of course, libertarians defend their position by arguing that common-law *parens patriae* power never intended the attorney general's interference to halt the rightful implementation of a deed in trust.<sup>108</sup> However, this view presumes that an attorney general files every lawsuit for the sole purpose of winning an eventual court judgment in his favor. On the contrary, an attorney general may strategically utilize his capacity to sue a trust in order to secure a more desirable administration by bargaining with trustees from a position of power. Thus, concerned for the maintenance of thousands of high-paying jobs, an attorney general in Mike Fisher's position could have brought action against the Hershey Trust not in the expectation that he would win in court, but rather in the hope that a lawsuit could stir up enough negative media attention to

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<sup>108</sup> See Komoroski, *supra* note 4, at 1794-95.

convince the Trustees to abandon their planned asset sale. Barring attorneys general from employing legal action as a tool to effectuate the settlement of all kinds of disputes, including those pertaining to the administration of charitable trusts, would deprive them of a tactic useful in negotiating resolutions to benefit the citizens whom they represent.

Second, libertarians would *permit trustees unilaterally to alter their administration of an impracticable trust, provided that they would still achieve some charitable purpose*. Though this proposal would release judges from the burden of deciding applications for *cy pres*, it would empower trustees to ignore a donor's original charitable intent. Presuming that the law prefers to honor a donor's original commitments as a matter of moral conviction, such a development would prove disturbing. Moreover, because the courts would no longer evaluate a trust's impracticability, a trustee could violate a donor's intent at any time, regardless of its prospects for implementation. Worried that trustees might not enforce their wishes, charitable donors could refuse to establish gifts via trust, and instead resort to granting their fortunes to museums, hospitals, and other agencies in lump sums.<sup>109</sup>

In dismissing these arguments, some commentators have posited that libertarian *cy pres* reform actually would encourage high-profile trustees, concerned with preserving their professional and personal reputations, to follow a donor's initial instructions.<sup>110</sup> Yet the latest chapter in the continuing saga of the administration of the Barnes Foundation has proven this prediction wrong. Dr. Barnes' crystal-clear intention that his masterpieces remain on public display as he arranged them, combined with the passionate entreaties of art critics who regard disturbing his gallery as "heresy," has not exerted nearly enough moral force to convince the Foundation's trustees to abandon their plans to move Dr. Barnes' collection to downtown

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<sup>109</sup> See Atkinson, *supra* note 26, at 1121-22.

<sup>110</sup> See *id.* at 1127-30.

Philadelphia.<sup>111</sup> Similarly, attention to reputation did not convince the trustees even to keep a budget or institute other “adequate financial controls” that could have maintained the Foundation’s fiscal health throughout most of the 1990’s.<sup>112</sup> Inasmuch as reputational concerns fail to influence trustees to carry out the true intentions of charitable donors, the courts, in consultation with state attorneys general must continue to enforce the traditional doctrine of *cy pres* on a case-by-case basis.

Third, *private monitoring of charitable trusts* could easily allow the decisions of trustees to escape any meaningful scrutiny, as compliance agencies could quickly fall prey to capture by allies of powerful trustees. Just as libertarians believed that reputation would convince trustees to follow donors’ instructions, they have also argued that it would stave off the phenomenon of capture by engaging monitoring contractors in a “race to the top” to institute the most stringent rules for enforcement.<sup>113</sup> However, privatization could result in a “race to the bottom” as well: anxious to earn as much business as possible, compliance agencies may compete for the informal title of softest monitor. Intense posturing among alternative contractors also could set off price wars that would save charitable trusts money, but deprive monitors of the financial resources necessary to investigate their clients thoroughly.

In contrast to these libertarian suggestions, both interventionist proposals represent laudable, yet utterly impractical proposals designed to compel state attorneys general to enhance their enforcement of charitable gifts in trust. First, Professor Alex Johnson’s “*tax on trusts*” would encounter virtually no hope of passage in most state legislatures. Facing aggressive lobbying from powerful trustees and grappling with wide budget deficits, lawmakers likely would prefer to impose new levies that would subsidize the costs of health care, police

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<sup>111</sup> Horn, *supra* note 42, at E1.

<sup>112</sup> Urice, *supra* note 77, at 21.

<sup>113</sup> Manne, *supra* note 71, at 229-30.

protection, highway maintenance, and similar vital services before earmarking funds to add attorneys to their state's charities bureau. Also, Professor Johnson's tax could impose undue financial hardships upon the smallest charitable trusts. Whereas doling out a percentage of its assets to state government would prove no trouble for a behemoth foundation, such an obligation could noticeably hinder the ability of far less wealthy endowments to achieve their charitable aims. Second, the establishment of an *affirmative duty to audit charitable trusts regularly in the absence of any evidence of wrongdoing by trustees* would create a bloated, unwieldy bureaucracy within the office of the Attorney General in a state as large as New York. Even if the size of New York's Charities Bureau tripled or quadrupled, it would still face a laborious task to investigate each of the state's thousands of registered charitable trusts. Moreover, a drastic boost in the Charities Bureau's funding and manpower would likely cause other departments of the Attorney General's office to clamor for proportional improvements in their resources as well. The staggering monetary costs of fulfilling such requests to maintain peace among departments would not justify the few revelations of impropriety that regular audits might uncover.

These myriad detriments of the libertarian and interventionist proposals for reform suggest that the *status quo* system by which the New York State Attorney General and his peers supervise charitable gifts and comment on requests for *cy pres* represents the worst possible mechanism, except for all the others. Critics have rightly noted the funding limitations that currently restrict an attorney general's capacity to investigate museums and charitable trusts, as well as the political incentives that can motivate his selective enforcement decisions. However, in exchange for addressing these problems, the libertarian recommendations respectively sacrifice an Attorney General's informal authority to negotiate with trustees on behalf of the public, empower trustees to disregard a grantor's charitable intentions, and establish monitoring

agencies intrinsically prone to capture and corruption. Meanwhile, the interventionist reforms overlook the reality of state budgetary constraints that prevent significant enhancements in funding for charities' bureaus. Despite the libertarian and interventionist critiques, the New York State Attorney General's present regulatory authority to collect annual financial reports from trustees, to bring legal actions for enforcement of their administrative duties, and to subpoena relevant evidence enables him to track down and prosecute trustees who most egregiously abuse their positions. His right to participate in *cy pres* actions allows him to defend all but the most impracticable wishes of charitable donors, and to articulate how altering the terms of a deed in trust would impact the citizens whom its proceeds benefit.

Concern for his lack of monetary and investigative resources should not rationalize the subtraction of any of these powers from an attorney general's arsenal. In deciding upon an optimally efficient allocation of limited funds and manpower at his disposal, an attorney general merely accepts a responsibility similar to that of the managing partner of a private law firm whose demand for its services exceeds its supply of labor and capital. Confronted with such a constraint, the managing partner (or a governing board of directors), after considering their merits and chances for success in light of the firm's capabilities, decides which cases and business to undertake, and which to refuse. As the managing partner would prefer to take on every matter that comes his firm's way, so too would most attorneys general desire to achieve the duties of their offices more thoroughly. If an attorney general could investigate every charity in his state every six months, or aggressively pursue every potential antitrust action, or participate in every multi-state class action that arises, he most likely would. Yet his office's limited resources, as they would for any private firm, must temper such enthusiasm. Rather, an attorney general, in consultation with his assistants, must wisely pick his enforcement battles

based upon multiple variables, such as the extent of their impacts on ordinary citizens, the attention that they have garnered in the media, and their likelihood for successful resolution. This necessity of selective prosecution should lead commentators not to deprive attorneys general of their duties, but rather to recognize their constant balancing of resources as a necessary aspect of the decision-making process.

On account of the inevitability of selectivity, states should adopt one libertarian reform proposal, namely *to allow private citizens standing to enforce charitable gifts in trust*. Even if attorneys general were seriously to consider the merits of every viable case in determining which actions to pursue, they may sometimes erroneously dispatch matters that actually deserve close investigation. For this reason, an attorney general's deaf ear to a complaint concerning the administration of a charitable trust should not automatically prohibit scrutiny by an impartial judiciary. Pursuant to the adoption of progressive standing rules, an attorney general's subjective decision regarding resource allocation would not prevent devoted, hard-working, well-funded citizens from pursuing legitimate action against an unscrupulous trustee. In answer to opponents of standing reform who warily envision a flood of new litigation against museum trustees and benevolent organizations, new rules could require a private individual to demonstrate reasonable, sufficient personal interest in a charitable trust's proper administration in order that his suit survive a motion for summary judgment. Such reform might also allow the imposition of costs, including legal fees, for any action found to be frivolous in nature.

#### *B. Deaccession*

Purely libertarian and interventionist recommendations for amending the role of state attorneys general in monitoring deaccession suffer from flaws similar to those that plagued both camps' proposals for enforcement of charitable gifts in trust. Like libertarian plans to delegate

responsibility for monitoring charities to private contractors, Jason Goldstein’s proposal to eliminate any role for the attorney general in regulating deaccession, if enacted, would severely compromise his capacity to uncover dishonest curators and museum directors who earn kickbacks from the sale of artifacts at well below market value. Though such impropriety by museum professionals sounds sensational, it has taken place in the past. For instance, upon concluding a thorough investigation, New York Attorney General Louis Lefkowitz in 1978 filed suit against several art dealers and the primitive art curator at the Brooklyn Museum, on the grounds that they “fraudulently [obtained] valuable works of art . . . in order to resell them to other dealers or collectors at sizeable profits.”<sup>114</sup> Because the museum’s directors had not questioned the dealers’ valuations of the items for sale, “no experts were called in, and no outside counsel was requested” to investigate them.<sup>115</sup> Therefore, had Attorney General Lefkowitz not intervened, the curator and the dealers never would have faced any responsibility for their treachery. Goldstein rightly notes that attorneys general should play no part in dictating the ordinary, day-to-day operations of a non-profit corporation. However, because deaccession can afford a museum professional particular opportunity to peddle for personal gain the very artifacts whose value the public has entrusted him to preserve on its behalf, an attorney general needs some extent of authority to review and nix suspicious sales prior to their completion.

While the unfortunate incentive for dishonesty among curators and dealers validates interventionist support for deaccession regulation, it does not justify David Gabor’s unrealistic proposal for museums to inform attorneys general of the deaccession of any artifact valued at greater than \$5,000. Given that the most famous works of master artists and the rarest of historical artifacts can sell for millions of dollars, Gabor’s plan would require museums to

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<sup>114</sup> Gabor, *supra* note 16, at 1021 n.79 (quoting the complaint filed by Attorney General Lefkowitz).

<sup>115</sup> *Id.* at 1021.

prepare deaccession reports upon selling even their most insignificant items. Inundated with paperwork accounting the sales of trivial vials, an attorney general's charities bureau could lose sight of the real purpose of its oversight of deaccession, namely to identify and examine the most questionable transactions involving high-ticket pieces. Moreover, any statute that would unconditionally mandate the employment of art experts and museum professionals to review and approve deaccessions would impose additional burdens upon an attorney general's already limited budget. Once again, any effort to raise money to subsidize these experts' salaries could engender range warfare among other departments within the attorney general's office that yearn for additional funding and resources to achieve their duties.

An effective compromise between Goldstein's libertarian and Gabor's interventionist conceptions of reform would enable an attorney general to recognize and preempt deaccessions that unload valuable pieces for insufficient consideration, yet would not distract investigators with meaningless information concerning minor transactions. To prepare model statutory guidelines for deaccession for legislative introduction, state attorneys general should consult extensively with curators and directors of museums of all sizes. Most museums already follow their own deaccession policies that they might prefer not to relinquish.<sup>116</sup> Therefore, collaboration with museum professionals would constitute an essential ingredient for earning their support for a uniform deaccession statute that incorporates the fruits of their input.

## **V. CONCLUSION**

Although usually created and endowed by private individuals and operated by qualified professionals, museums perform a vital public function in preserving and maintaining items that educate citizens about the wonders of art, history, and culture. Thus, state attorneys general have

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<sup>116</sup> See Goldstein, *supra* note 7, at 233.

willingly held accountable for their actions those museums that depart from this public mission. Pursuant to the laws of New York and other states, attorneys general may collect financial information for charitable trusts that grant artifacts to a museum or administer its holdings, subpoena documentary evidence from trustees concerning their business transactions, bring court action to enforce a trust instrument's literal directions, register official opinions concerning the impracticability of trusts whose terms may change by *cy pres*, and file suit against museum directors who betray their fiduciary duties of obedience, loyalty, and care. In employing these mechanisms, attorneys general wield tremendous authority to investigate trustees and directors on suspicion of fiscal wrongdoing, and also to represent the public's interest in a museum's proper management.

Yet staunch libertarian opponents of excessive government intervention in the affairs of private corporations, as well as interventionist supporters of increased regulation of museums by attorneys general, have criticized the powers available in their toolboxes and proposed their own recommendations for reform. Citing an attorney general's limited resources and political machinations, libertarians have proposed to curtail drastically his right to participate in *cy pres* actions, to enforce the instructions of charitable trusts, or to evaluate deaccessions of valuable artifacts. However, such reforms would sacrifice the effective, independent, centralized monitoring of charitable trustees and museum directors that only an attorney general can provide. In contrast, interventionists have concocted thoughtful, yet impractical plans to raise new tax revenue that would subsidize an attorney general's effort to audit regularly the finances of museums and associated charitable trusts. Given the numerous imperfections of these proposals for reform, state governments should revise an attorney general's authority to regulate and investigate museums only minimally. Aside from permitting private citizens to bring suit to

enforce charitable trusts and working with museum professionals to develop uniform deaccession guidelines, states should retain the flexibility of current laws that empower attorneys general to apply their resources to bring to justice the most egregious violators of the public's faith in the educative and the preservative functions that museums serve.