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Preserving the Artistic Afterlife: The Challenges in Fulfilling Testator Wishes in Art-Rich, Cash-Poor Estates

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Cover Page Footnote

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Preserving the Artistic Afterlife: The Challenges in Fulfilling Testator Wishes in Art-Rich, Cash-Poor Estates

Hanna K. Feldman*

Artists' estates present unique legal issues distinct from the estates of art collectors-cum-investors, as these estates tend to be much more art-rich and cash-poor, leading to difficulties in funding legacies when there is no cash readily available and all of the value of the estate is tied up in the artworks themselves. Robert Indiana, an American sculptor who was frequently exploited throughout his life and now appears to be subject to posthumous exploitation, will be examined as a textbook example of such an artist's estate. The issues surrounding Indiana's estate exemplify the challenges in following a testator's intent to leave a lasting artistic reputation when the artist has not also left behind the cash necessary to fund their dreams. This Note looks at the judicial doctrines of cy pres and equitable deviation and various legal scholars' proposed solutions to modifying such impracticable dreams, particularly in the case of artists' and art collectors' estates. Specifically, the Note argues that Indiana's collection should not be housed in his ramshackle mansion on a rural island in Maine, but rather should be bequeathed to the Farnsworth Museum in Rockland, Maine. Substantively, this Note concludes that public benefit should prevail over dead hand control in the case of artists' estates.

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INTRODUCTION

Robert Indiana, an American sculptor who died in May 2018, expressed his testamentary intent to create a museum out of his sprawling mansion in which all the artworks in his collection, including his own creations, would be housed.[1] This noble and worthy wish, however, was doomed from the start. Indiana's estate, like many other artists',[2] is art-rich and cash-poor, which means it is

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1 *See infra* text accompanying notes 10–29.

2 Much like trends in other industries, there is an increasing income disparity between the wealthiest artists, such as Christopher Wool, Peter Doig, and Richard Prince, and the rest of artists, with 89% of the Contemporary Art market turnover being generated by its 500 most successful artists, in a pool of over 20,000 artists. Deceased artist Jean-Michel Basquiat, Doig, and Rudolf Stingel together accounted for 22% of the market's sales. *The*

filled with artworks considered illiquid assets as they are hard to sell, and low on cash to pay for after-death expenses such as taxes, probate, and administration.[3] Most famous instances of disputes in the art world generally involve wealthy collectors, galleries and auction houses,[4] rather than artists, as in the Barnes Foundation litigation.[5] Thus, the controversy around Indiana's estate represents a departure from these circumstances, as his estate is art-rich but cash-poor, unlike collectors' estates like Barnes's which are usually both art-rich and cash-rich.

Therefore, Indiana represents the unusual case where an artist entrusts his works to a museum to be created in his honor, but his estate lacks the liquidity necessary to fulfill his wishes. Indiana's wish to benefit the general public with the display of his artwork is an honorable one, and the difficulties surrounding his estate administration can serve as an exemplar for other art-rich, cash-poor estates on how to maximize public benefit without unduly burdening estate resources.

Robert Indiana's will and estate have many corresponding legal issues that may be implicated, including estate taxes,[6] the validity of the will (since it is unclear if Indiana had the mental capacity to

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Contemporary Art Market Report 2018, ARTPRICE, https://www.artprice.com/artprice-reports/the-contemporary-art-market-report-2018/artists-prices [https://perma.cc/3MZ7-ARJL] (the report focused on auction sales in the Contemporary Art Market, hence targeting primarily living artists—with the exception of Basquiat's untimely demise).

3 *See* JOHN HENRY MERRYMAN, ALBERT E. ELSEN & STEPHEN K. URICE, LAW, ETHICS AND THE VISUAL ARTS 925 (5th ed. 2007).

4 *See* Harriet Fitch Little, *How an Artist's Legacy Became Big Business*, FIN. TIMES (Aug. 26, 2016, 9:19 AM), https://www.ft.com/content/d77d5e74-69e5-11e6-ae5b-a7cc5dd5a28c.

5 *See* Daniel Grant, *The Art of Art Lawsuits*, HYPERALLERGIC (Feb. 4, 2014), https://hyperallergic.com/107150/the-art-of-lawsuits/ [http://perma.cc/ZQH3-MDSS].

6 *See generally* Erik J. Stapper, *Trusts and Estates*, *in* ART L. HANDBOOK 1033, 1035 (Roy S. Kaufman ed., 2000) (explaining that there is an estate tax threshold over which an artist's assets must be valued in order for tax to be assessed). Thanks to the 2017 Tax Act, the current threshold for estate taxation is $10 million, which Indiana's estate easily surpasses with a valuation of $50 million. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11061, 131 Stat. 2054 (2017) (amending I.R.C. § 2010) (increasing the exemption cap for estate and gift tax exemptions for estates or gifts made after December 31, 2017 from $5 million to $10 million).

make the new will in 2016),[7] the valuation of the estate,[8] and the copyright infringement claims alleged by Morgan Art Foundation in the federal litigation filed a day before Indiana died.[9] However, this Note will focus more narrowly on the feasibility of creating a

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[7] *See* Stapper, *supra* note 6, at 1037–39. The will appears to have followed the local law's (i.e., Maine's) formalities, with the presence of adult disinterested witnesses (one was a CPA and the other a nurse practitioner, neither of whom resided in Vinalhaven, Maine) and executed by an attorney that was not James Brannan. *See* Last Will and Testament of Robert Indiana, at 3–4 (May 7, 2016) (on file with the Fordham Intellectual Property, Media & Entertainment Law Journal) [hereinafter Indiana Will]; *see also infra* Section I.A. Stapper notes that artists "working outside the mainstream of art or leading an alternative lifestyle may leave a will that could be considered an easy target for a contest on the ground of lack of mental capacity to make a will"; however, "eccentricity, delusions short of insanity, or bad living habits are not sufficient to invalidate a will. The test for the capacity to make a will is not general mental capacity; it is, rather, the ability to make a will at the time it is made." Stapper, *supra* note 6, at 1038. Indiana fits this description well, having been isolated from the mainstream art world since the 1970s, leading an eccentric lifestyle and living in a rundown house on a rural island in Maine. *See infra* Section I.A. But, per Stapper, it does not appear that Indiana lacked the mental capacity to make the will since the standard is so high. All that is needed is a "lucid moment, in an otherwise disoriented life" to make a will valid. *Id.* at 1039.

[8] *See* Stapper, *supra* note 6, at 1063–71. The value of an artist's estate is important in determining the amount of estate taxes, but complications arise with art, as personal property must be measured by the fair market value of the work at time of death, which can be hard to measure for previously unsold artworks by an artist and when the artist's reputation could skyrocket after his death. Additionally, valuation of an artist's estate must go beyond the price of unsold art and measure the stream of income that was earned in the artist's business. Several cases have been litigated disputing the worth of artists' estates. *See, e.g.*, David Smith Estate v. Comm'r, 57 T.C. 650 (1972), *acq*. 1974–2 C.B. 4, *aff'd*, 510 F.2d 479 (2d Cir. 1975); Georgia O'Keeffe Estate v. Comm'r, 63 T.C.M. (CCH) 2699 (1992); Louisa J. Calder v. Commissioner, 85 T.C. 713 (1985); *In re* Estate of Warhol, 165 Misc. 2d. 72, 629 N.Y.S.2d 621 (1st Dep't 1995), *aff'd as modified*, 224 A.D.2d 235, 637 N.Y.S.2d 708 (1st Dep't 1996). The latter case involved a dispute over the amounts to be paid as executor's commission and in attorney fees, as most states set these fees as a percentage of the estate. The lawyer who was executor of Andy Warhol's estate was eventually paid $3.5 million. Indiana may not have to worry about paying estate taxes since he bequeathed all of his property to a nonprofit organization which is tax-exempt. *See* I.R.C. § 642(c).

[9] Complaint at 1, Morgan Art Found. Ltd. v. McKenzie, No. 1:18–cv–04438–AT–BCM (S.D.N.Y. filed May 18, 2018); *see also* MERRYMAN ET AL., *supra* note 3, at 959–60 (referencing a similar authenticity dispute that arose after sculptor Jacques Lipchitz died and his wife Yulla, also a sculptor, completed his unfinished, commissioned project, albeit changing its dimensions in the process from a planned 30-foot bronze to a 20-foot-tall one; Yulla claimed that she had been directed to do so by her husband's mandate and was vouched by sculptor Henry Moore who "proclaim[ed] her as the one to do the job").

museum out of Indiana's house, Star of Hope, and the legal mechanisms for modifying Indiana's will if Indiana's wish cannot be executed, as this Note argues is the case. In doing so, this Note will examine the many interests involved in the resolution of the disputed will and propose a solution that will heighten public benefit and public access to the artist's works while also maintaining respect for the artist's wishes, a delicate balance over which many legal scholars have debated. This Note will rely on the legal doctrines of cy pres and equitable deviation, which are implicated when changed circumstances render execution of the testator's original estate plan impossible and modification becomes necessary, using the Indiana case as a touchstone.

Part I outlines a brief survey of past legal controversies surrounding artists' estates, with a close look at Robert Indiana's estate and ongoing litigation. Part II discusses the legal doctrines governing the administration of estates and nonprofit corporations, including fiduciary duties, and explains options for modifying a will that still strive to effectuate donor intent. Previous examples of courts applying these legal principles to art estates and foundations will be examined and compared to the Indiana case. Part II also discusses legal scholarship on whether the testator's intent should be priorit ized over the public benefit of the gift. This Note will then argue why public benefit should prevail over dead hand control in the case of art estates. Finally, Part III proposes solutions for artists' estates to consider both pre- and postmortem when artists have an honorable charitable purpose of displaying their artwork for the public benefit, but their plans for doing so are impracticable to execute.

I. BACKGROUND OF ARTISTS' ESTATES: NO AMOUNT OF PLANNING CAN PREPARE FOR CHANGED CIRCUMSTANCES

A. Robert Indiana

Robert Indiana—born Robert Clark in 1928 in New Castle, Indiana—was an artist and sculptor known for his assemblage, hard-edge painting, and Pop art, who gained notoriety in the New York art scene in the 1960s and 1970s and ran in the same artists' community as Ellsworth Kelly, Agnes Martin, James Rosenquist,

and Jack Youngerman.[10] Indiana reached the pinnacle of his fame with the success of his *LOVE* image in the mid-1960s, which the Museum of Modern Art used as the image on its Christmas card in 1965.[11] However, with his success came widespread unauthorized reproduction of his work and incorrect assumptions that he was a "sell-out."[12] By 1978,[13] after he had become embittered by the New York art world, with its rampant unauthorized copying and lack of appreciation for his other art besides *LOVE*, Indiana retreated to the remote island of Vinalhaven, an hour's ferry ride off the coast of mainland Maine.[14] However, Indiana's retreat wasn't exactly inconspicuous, as he took up residence in the island's "most remarkable building" known as the Star of Hope, a sprawling Victorian mansion that formerly served as an Odd Fellows Lodge.[15] Indiana continued to create art while living on this remote island, and eventually passed away in the Star of Hope on May 19, 2018.[16]

A day before Indiana died,[17] Morgan Art Foundation (MAF), "Indiana's representative since the 1990s and the owner of the artist's famous Love trademark," sued the artist's "long-time assistant, Jamie Thomas, and an art publisher, Michael McKenzie" in the Southern District of New York federal court.[18] MAF alleged that

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10 *See Biography*, ROBERTINDIANA.COM, http://robertindiana.com/biography/ [https://perma.cc/7AYQ-KRJM].

11 *See id.*

12 *Id.*

13 *See id.*

14 Murray Carpenter & Graham Bowley, *The Artist Vanished*, N.Y. TIMES (May 23, 2018), https://www.nytimes.com/2018/05/21/arts/design/robert-indiana-vanished-artist.html [https://perma.cc/M8M9-HRKD] [hereinafter Carpenter & Bowley, *Artist Vanished*]. (Vinalhaven's 1,200 year-round residents rely primarily on granite quarries and lobster fishing for income.).

15 *Id.*; *see also* Murray Carpenter, *Robert Indiana's Estate: Generosity, Acrimony, and Questions*, N.Y. TIMES (Sept. 12, 2018), https://www.nytimes.com/2018/09/12/arts/design/robert-indianas-estate-generosity-acrimony-and-questions.html [https://perma.cc/2VUT-GL34]. The Odd Fellows is a fraternal organization founded in England in the eighteenth century. *See Odd Fellow*, DICTIONARY.COM, https://www.dictionary.com/browse/odd-fellow?s=ts [https://perma.cc/2SLQ-EVL9].

16 Jori Finkel, *Robert Indiana, Whose 'Love' Is an Art Icon of the 20th Century, Dies at 89*, N.Y. TIMES (May 21, 2018), https://www.nytimes.com/2018/05/21/obituaries/robert-indiana-love-pop-art-dies.html [https://perma.cc/D82X-6AFT].

17 *See* Carpenter & Bowley, *Artist Vanished*, *supra* note 14.

18 Anny Shaw & Jillian Steinhauer, *Will Robert Indiana's Legacy Get Stuck in a Legal Battle?*, ART NEWSPAPER (July 19, 2018, 9:00 AM), https://www.theartnewspaper.com/

Thomas and McKenzie exploited Indiana towards the end of his life by "producing dubious works in his name and isolating him from friends";[19] these allegations appear to be supported by an investigative piece timely published by the New York Times hours before Indiana's death had been announced.[20] The lawsuit also challenges the validity of Indiana's will, signed and dated May 7, 2016, "which gives Thomas power of attorney and names him as the executive director of a museum the artist intended to be established at his home and studio" on Vinalhaven.[21]

Indiana's will expressly states his testamentary intent regarding nearly all of his property: "[A]ll works of art created by me . . . located at Star of Hope, Vinalhaven, Maine, or elsewhere, together with my residence known as Star of Hope at 46 Main Street, Vinalhaven, Maine" shall be "give[n], devise[d] and bequeath[ed] to a 501(C)(3) not for profit organization under the Internal Revenue Code, to be formed by my Personal Representative," James Brannan.[22] Further, Indiana stated that it is his "intent that my Star of Hope Real Estate be restored to museum quality for use as an art environment open to the public for visits, classes and lectures and for the continued preservation, promotion, exhibition and use of my Collection and Real Estate."[23] The Will then specifies that Jamie L. Thomas of Vinalhaven, Maine, "shall serve as the Executive Director of [the Star of Hope Foundation], for so long as he wishes, as I know he is willing to carry out my intent and to provide for the continued preservation, promotion and exhibition of my Collection and use of Real Estate."[24]

The Will also directs that all royalty payments received under the "Morgan Rights Agreement dated April 9, 1999 and the 'Morgan Sculpture Agreement' dated December 22, 1999 and any other . . . rights to income and royalties" will go to the non-profit organization

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news/will-robert-indiana-s-legacy-get-stuck-in-a-legal-battle [https://perma.cc/3L34-4NUE]; *see also* Complaint at 1, Morgan Art Found. Ltd. v. McKenzie, No. 1:18-cv-04438-AT-BCM (S.D.N.Y. filed May 18, 2018).

19 Shaw & Steinhauer, *supra* note 18.

20 *See* Carpenter & Bowley, *Artist Vanished*, *supra* note 14.

21 Shaw & Steinhauer, *supra* note 18; *see also* Indiana Will, *supra* note 7, at 2.

22 Indiana Will, *supra* note 7, at 1–2.

23 *Id.* at 2.

24 *Id.*

to help transform Indiana's house into a museum.[25] The Will further appoints James W. Brannan as executor of Indiana's estate, unless he is unable to do so, in which case Jamie L. Thomas will fill the role instead.[26] Brannan appears to have worked closely with Indiana at least since 2016, as he created the Star of Hope Foundation shortly after the will was executed, on June 22, 2016.[27] The Star of Hope Foundation is a nonprofit corporation registered in Maine[28] and is registered with the Internal Revenue Service as a private operating foundation rather than a public charity, which still renders it tax-exempt and eligible for donations that are deductible as charitable contributions under Internal Revenue Code Section § 170.[29]

As is the case with many estates of large value, there are numerous players with vested interests in how the $50 million worth of assets in Indiana's estate will be utilized.[30] Morgan Art Foundation Ltd. ("MAF") is a Bahamas limited liability company[31] formed in 1993 by Mossack Fonseca,[32] the now-dissolved Panamanian law firm at the center of the Panama Papers scandal.[33] In the

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25 *Id.*

26 *Id.* at 2–3.

27 *Corporate Name Search*, ME. DEP'T SECRETARY ST. BUREAU CORPS., ELECTIONS & COMMISSIONS, https://icrs.informe.org/nei-sos-icrs/ICRS?CorpSumm=20160532ND [https://perma.cc/M3LF-4LE7].

28 *Id.*

29 *See Details About Star of Hope, Inc.*, IRS, https://apps.irs.gov/app/eos/ (select "Organization Name" from the "Search By" drop-down menu, "ME" from the "State" drop-down menu, and search "Star of Hope" for the search term). Although the entity is technically registered as Star of Hope, Inc., I refer to it as the Star of Hope Foundation to clarify its status as a nonprofit organization.

30 *See* Carpenter, *supra* note 15 ("Over the summer, an appraiser hired by Mr. Brannan estimated the value of art contained in Mr. Indiana's home at approximately $50 million.").

31 Complaint at 9, Morgan Art Found. Ltd. v. McKenzie, No. 1:18–cv–04438–AT–BCM (S.D.N.Y. filed May 18, 2018).

32 Declaration of Hardin P. Rowley in Support of Defendant American Image Art's Motion to Stay at Exhibit 1 (Report Concerning Morgan Art Foundation Limited from the Offshore Leaks Database of the International Consortium of Investigative Journalists, *available at* https://offshoreleaks.icij.org/nodes/10214036 [https://perma.cc/8GQM-VG8N]), No. 1:18-cv-04438-AT-BCM (No. 102) (Nov. 6, 2018).

33 Nicola Slawson, *Mossack Fonseca Law Firm to Shut Down After Panama Papers Tax Scandal*, GUARDIAN, (Mar. 14, 2018, 5:35 PM), https://www.theguardian.com/world/2018/mar/14/mossack-fonseca-shut-down-panama-papers [https://perma.cc/Z5VQ-M8KR]. The Panama Papers was a large-scale scandal in 2016 in which 11.5 million files were leaked from the Mossack Fonseca law firm in Panama, the fourth biggest offshore law firm

1990s, MAF and its advisor, Simon Salama-Caro, sought out Indiana; during a meeting with MAF and Indiana, an agreement was reached wherein the artist would receive 50% net-income royalties from reproductions, promotions, and sales, in exchange for MAF owning all the intellectual property rights to many of Indiana's most iconic creations, including "LOVE."[34] MAF and Salama-Caro have been credited with "effectuating Indiana's 'comeback,' which culminated in a 2013 exhibition at the Whitney Museum, 'Robert Indiana: Beyond Love,' the first major retrospective of the artist's works."[35] Salama-Caro received commissions on sales, and he and his family have spearheaded the effort to compile a *catalogue raisonné* of Indiana's works.[36]

The defendants in MAF's suit are Michael McKenzie, his art publishing business, American Image Art (AIA), Jamie Thomas, and Indiana's Estate.[37] AIA, unlike MAF, appears to have a number of other artists besides Indiana as clients, and published two books with Indiana imagery in the 1990s.[38] McKenzie claims that his relationship with Indiana goes back to the 1970s, and he, like

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in the world. The files showed the numerous ways in which the world's richest were exploiting offshore tax havens. *See* Luke Harding, *What Are the Panama Papers? A Guide to History's Biggest Data Leak*, GUARDIAN (Apr. 5, 2016, 5:42 AM), https://www.theguardian.com/news/2016/apr/03/what-you-need-to-know-about-the-panama-papers [https://perma.cc/8HW6-ZDQW].

34 *See* Matthew A. Marcucci, *In Pair of Lawsuits, Robert Indiana's Former Associates Are Vying for Control of the Late Artist's Legacy*, GROSSMAN LLP: ART L. BLOG (Aug. 30, 2018), https://www.grossmanllp.com/in-pair-of-lawsuits-robert-indianarsquos-former-a [https://perma.cc/3DSC-PDNL]; *see also* Carpenter & Bowley, *Artist Vanished*, *supra* note 14.

35 Marcucci, *supra* note 34.

36 Carpenter & Bowley, *Artist Vanished*, *supra* note 14; *see also Catalogues Raisonnés Users' Guide*, INT'L FOUND. ART RES., https://www.ifar.org/users_guide.php [https://perma.cc/J7L6-ZTN8]. A *catalogue raisonné* is a definitive guide containing all of the works known to be made by the artist, and the author of the catalogue frequently must make assessments as to a piece's authenticity, thus giving these catalogues enormous power and clout in the art world. *See, e.g.*, Eileen Kinsella, *The Warhol Market Gets Even Wilder as Richard Polsky Releases an Unauthorized Addendum to the Catalogue Raisonné*, ARTNET (July 19, 2017), https://news.artnet.com/art-world/exclusive-richard-polsky-announces-warhol-catalogue-raisonne-addition-1026629 [https://perma.cc/96YU-B9L8].

37 Complaint at 8, Morgan Art Found. Ltd. v. McKenzie, No. 1:18–cv–04438–AT–BCM (S.D.N.Y. filed May 18, 2018).

38 *See* Carpenter & Bowley, *Artist Vanished*, *supra* note 14.

MAF and Salama-Caro, takes credit for rebuilding Indiana's reputation, including through his promotion of "Indiana's 'HOPE' image, which the artist created to support the Obama campaign," and organizing a 2016 show at the Bates College museum.[39] Unsurprisingly, asserting counterclaims against MAF that the works McKenzie and AIA produced were "not forgeries at all but the direct result of a successful partnership initiated by Indiana himself," McKenzie and AIA present a vastly different picture of the events underlying the dispute.[40] "Moreover, AIA purports to have . . . paid the artist nearly $10 million in royalties under an agreement between AIA and Indiana" and alleges that MAF is using the lawsuit as a "tactic to distract from MAF's failure to pay the artist what it owed him."[41] The aforementioned agreement between AIA and Indiana was undertaken in 2008 and contained an arbitration provision which Judge Analisa Torres declared was binding, thus forcing a stay on the S.D.N.Y. action while the parties go to arbitration.[42]

Jamie Thomas, over thirty years younger than Indiana, formerly operated a seafood business on Vinalhaven before becoming

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[39] *Id.* (McKenzie co-organized the Bates College museum show alongside Landau Traveling Exhibitions. Professor Wilmerding, a close friend of Indiana's, traveled to the Bates exhibition and felt that the newer pieces were in Indiana's "vocabulary" but not necessarily "his voice.") Carpenter and Bowley suggest that MAF and Salama-Caro were more well-known as the representatives of Indiana than McKenzie, especially within New York art circles. *Id.*

[40] Marcucci, *supra* note 34; *see also* Verified Amended Answer, Counter-Claims & Cross-Claims of Michael McKenzie & American Image Art at 36, ¶ 282, Morgan Art Foundation Ltd. v. McKenzie, No. 1:18–cv–04438–AT–BCM (S.D.N.Y. filed Aug. 3, 2018).

[41] Marcucci, *supra* note 34. However, McKenzie and AIA likely have some culpability, as McKenzie testified in a probate court hearing in Maine in early September that he "returned more than 60 works to the estate since Mr. Indiana's death." Carpenter, *supra* note 15. However, McKenzie seems prone to hyperbole, as he stated that he "had five people on this [recovering the art works], 40 hours a week, for a month." *Id.*

[42] *See* Order to Arbitrate, Morgan Art Foundation Ltd. v. McKenzie, No. 1:18–cv–04438–AT–BCM (S.D.N.Y. filed Oct. 9, 2018); *see also* Tiffany Hu, *Artist Robert Indiana's Estate Can Arbitrate Dealer's Claims*, LAW360 (Oct. 10, 2018, 8:24 PM), https://www.law360.com/articles/1090769/artist-robert-indiana-s-estate-can-arbitrate-dealer-s-claims [https://perma.cc/ZAU8-4XQJ]. This Note will not be discussing the ongoing litigation concerning MAF and AIA, except to note that these entities will be interested in how the Star of Hope Foundation is run, as both parties stand to gain reputation-wise and monetarily depending on their future role in the museum and ongoing relationship with the Star of Hope Foundation.

Indiana's studio assistant in the 1990s and eventually graduating to Indiana's full-time caretaker in 2013. In 2016, Thomas was granted power of attorney for Indiana, the same year Indiana's will was revised to remove Ronald D. Spencer as executive director of the future museum and naming Thomas in his stead.[43] During a probate court hearing in Maine in early September 2018, Thomas testified that he was paid approximately $250,000 per year to tend to Indiana, an astounding increase from the initial $1,000 per week that he was earning in 2013 when he started taking care of the aging artist.[44]

Thomas further testified that he was gifted "at least 118 pieces [from Indiana] since 2010" and had withdrawn $615,000 from Indiana's accounts in the last two years of Indiana's life, purportedly by the artist's request.[45] Such suspicious financial activity is alarming when combined with Thomas's simultaneous control of access to Indiana. There were numerous people who reported that Thomas isolated Indiana from the outside world, with Thomas

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[43] *See* Carpenter & Bowley, *Artist Vanished*, *supra* note 14 (noting that in a will executed prior to 2016, Indiana had stipulated that "his works and house . . . be transferred to a foundation to be overseen by a New York lawyer, Ronald D. Spencer," but Spencer was "let go in 2016" and that same year Indiana's power of attorney was given to Thomas, granting him the authority to make decisions on Indiana's behalf). Ronald D. Spencer, counsel at Carter, Ledyard & Milburn LLP, is a prominent lawyer in the art world, specializing in art authentication and helping art investors with attribution and provenance of works of art. *See Ronald D. Spencer*, CARTER, LEDYARD & MILBURN LLP, https://www.clm.com/attorney/spencer_ronald [https://perma.cc/M945-7XZC]. Spencer is currently embroiled in litigation himself, after the widower of the deceased former chairman and chief executive of the Pollock-Krasner Foundation, Charles C. Bergman, challenged the appointment of Spencer as successor to run the Pollack-Krasner Foundation. The widower accused Spencer of strong-arming his way into the position after representing the Foundation for decades. The widower also challenges Spencer's appointment as executor of Bergman's will. *See* Jillian Steinhauer, *Widower Takes Aim at Chairman of Pollock-Krasner Foundation*, ART NEWSPAPER (Dec. 8, 2016, 12:58 AM), https://www.theartnewspaper.com/news/lawsuit-faults-head-of-pollock-krasner-foundation [https://perma.cc/DV3S-7Z5E].

[44] *See* Carpenter, *supra* note 15. The probate hearing in Knox County Probate Court was requested by James Brannan, executor of the estate, to "clear up multiple questions that have swirled about Mr. Indiana's finances in recent months," including clarifying "whether any money was owed to the estate . . . , get[ting] a solid inventory of the whereabouts of all the art works Mr. Indiana left behind and address[ing] accusations, contained in a separate lawsuit, that Mr. Thomas and a New York art publisher [McKenzie] had made unauthorized works under Mr. Indiana's name in recent years." *Id.*

[45] *Id.*

rebuffing any and all attempts by Indiana's friends and colleagues to reach the artist by phone or email.[46] Thomas's appointment as executive director of the Star of Hope museum has also been a cause of concern, as Thomas has no background in the art world and several parties have questioned his qualifications "to establish or run a museum of the kind Indiana stipulated in his will."[47]

Meanwhile, James Brannan, a lawyer based in Rockland, Maine, is a somewhat questionable appointee for the executor of Indiana's estate.[48] Brannan appears to have begun representing Indiana at least as early as 2016, as he was the registered agent responsible for creating the Star of Hope Foundation as a non-profit corporation in Maine on June 22, 2016.[49] Brannan has quite a host of issues to contend with as executor of the estate, including Thomas's suspicious conduct, including possible undue influence over Indiana[50] and breach of fiduciary duty while holding Indiana's power of attorney,[51] recovery of possible money owed to the estate by MAF and

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46 *See* Carpenter & Bowley, *Artist Vanished*, *supra* note 14.

47 *See Robert Indiana and the Importance of a Will*, FREEMAN'S (Sept. 19, 2018), https://www.freemansauction.com/news/robert-indiana-and-importance-will [https://perma.cc/5J3F-6QPE]; *see also* Shaw & Steinhauer, *supra* note 18. Both these publications reference remarks by Luke Nikas, MAF's lawyer and esteemed art law partner at Quinn Emanuel Urquhart & Sullivan, LLP, stating that Thomas is not qualified to run a museum of this kind and instead, "a 'diverse board' of specialists should manage [the museum] and protect Indiana's legacy and market." Nikas recommended "collector and curator John Wilmerding, the New York gallerist Paul Kasmin and representatives at the Whitney Museum of American Art in New York, which staged Indiana's retrospective in 2013, as well as the Farnsworth Art Museum in Rockland, Maine." Shaw & Steinhauer, *supra* note 18. Thomas is not entirely without a background in art, as he did help Indiana as a studio assistant for several years, but his experience seems to have been limited to stretching canvases. *See* Marcucci, *supra* note 34.

48 Carpenter & Bowley, *Artist Vanished*, *supra* note 14.

49 *See supra* note 27 and accompanying text.

50 *See* Stapper, *supra* note 6, at 1039. Undue influence could be argued in Indiana's case because of the appointment of power of attorney to Jaime Thomas in 2016 and his subsequent enlarged role in Indiana's 2016 will—i.e., as the Executive Director of the future museum to house Indiana's works. *See supra* note 24 and accompanying text. Stapper cites Georgia O'Keeffe's will as an example of a will attacked for undue influence "because it favored a much younger longtime assistant over the family." *See* Stapper, *supra* note 6, at 1039. Indiana similarly favored Thomas over any remaining family he has, although a party trying to make this argument will likely be unsuccessful, just as O'Keeffe's family was. *Id.*

51 *See, e.g.*, Carpenter, *supra* note 15 (citing an incident during a visit by Brannan to Vinalhaven shortly after Indiana's death in which Thomas's wife, Yvonne, handed

AIA,[52] accusations that Thomas and AIA "made unauthorized works under Mr. Indiana's name in recent years,"[53] restoration of the Star of Hope into a museum-quality building, and management of the museum as one of its two board members.[54]

Brannan has already faced a dearth of cash in light of all these issues and in November 2018, just six months after Indiana's death, sold off two major artworks from Indiana's collection.[55] Brannan stated that the money was needed to pay mounting legal fees in connection with contesting the S.D.N.Y. lawsuit, repairs needed to fix the Star of Hope's leaking roof, and costs for moving Indiana's art out of the house and into safe storage.[56] Brannan is legally entitled to sell assets of Indiana's estate because Maine probate law grants executors this power without any prior judicial review needed.[57]

Brannan "a gym bag filled with $189,000 in cash," telling him it "belonged to the estate"); *see also* Andrew H. Hook, *Durable Powers of Attorney*, *in* 859 TAX MGMT.: EST., GIFTS, & TR. A-3–A-5 (2000) (outlining the fiduciary duties an agent with durable powers of attorney owes to the principal). In August 2019, Brannan filed a lawsuit against Thomas in Knox County Superior Court in Maine, alleging that Thomas breached his fiduciary duties by pocketing $1.1 million from the artist while subsequently allowing Indiana to live in "squalor and filth," despite Indiana having $13 million in the bank. *See* Answer for Defendant at 12, Brannan v. Thomas, No. CV–19–19 (Me. Super. Ct. filed Aug. 13, 2019). *See also* Naomi Rea, *Robert Indiana's Estate Accuses His Caretaker of Allowing the 89-Year-Old Artist to Live in 'Squalor' Before He Died*, ARTNET (Aug. 16, 2019), https://news.artnet.com/art-world/robert-indiana-lawsuit-claims-squalor-1627561 [https://perma.cc/FK7G-BMF3]. It is unclear why Brannan needed to sell artworks in Indiana's collection if the requisite funds were already available in Indiana's bank account upon his death. *See infra* text accompanying notes 55–56.

52 Shaw & Steinhauer, *supra* note 18.

53 Carpenter, *supra* note 15; *see also* Complaint at 6, Morgan Art Found. Ltd. v. McKenzie, No. 1:18–cv–04438–AT–BCM (S.D.N.Y. filed May 18, 2018).

54 *See* Carpenter, *supra* note 15. Thomas is the other board member of the Star of Hope Foundation. For further discussion on potential conflicts of interest in holding dual positions of executor and board member of the foundation, see *infra* Section I.D. (examining the Rothko case).

55 *See* Graham Bowley & Murray Carpenter, *Robert Indiana Estate to Sell Art Valued at Up to $4 Million*, N.Y. TIMES (Nov. 8, 2018), https://www.nytimes.com/2018/11/06/arts/design/robert-indiana-estate-to-sell-art-valued-at-up-to-4-million.html [https://perma.cc/A3P3-XRLR] [hereinafter Bowley & Carpenter, *Estate to Sell Art*].

56 *See id.*

57 *See id.*; *see also* ME. REV. STAT. ANN. tit. 18–A, § 3–715 (1979) (listing building repairs and sale of assets as transactions authorized for an executor to make without judicial approval beforehand). Maine is also one of three states in the United States that allows

Brannan's decision to sell the artworks—one by Ellsworth Kelly entitled "Orange Blue" and gifted specifically to Indiana with a special inscription on the back, the other by Ed Ruscha titled "Ruby"—was not without controversy, as friends close to the artist including Kathleen Rogers, his former publicist, and John Wilmerding, emeritus professor of American art at Princeton University, objected to the sale. For instance, Wilmerding suggested that "the Indiana legacy was being diminished by off-loading works that were crucial to the artist's identity."[58] Wilmerding further stated that no sale should occur until the members of the Star of Hope Foundation had assessed the "artistic importance of any works to be sold."[59] Brannan reported that he had consulted a curator to determine which pieces to sell, but declined to provide the curator's name.[60] While the sale of these two works is lamentable and seems to demonstrate Brannan's willingness to deaccession Indiana's own works as a board member of the museum, he should be able to abstain from further sales for the foreseeable future, as the two pieces raked in over $6 million at the November 16, 2018 auction at Christie's.[61]

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estate taxes to be paid directly with works of art. *See* ME. REV. STAT. ANN. tit. 27, §§ 92–93 (1979); *see also* LEONARD D. DUBOFF, CHRISTY A. KING & MICHAEL D. MURRAY, ART LAW IN A NUTSHELL 160 (4th ed. 2006) (noting that Connecticut and New Mexico, as well as France and the United Kingdom also allow this practice of paying estate taxes directly with works of art).

58 Bowley & Carpenter, *Estate to Sell Art*, *supra* note 55. The article cited Indiana's former romantic relationship with Ellsworth Kelly as the reason "Orange Blue" is so crucial to Indiana's collection, while the argument for keeping Ruscha's "Ruby" is less persuasive, as both artists working in the "verbal tradition" seems a bit tenuous of a connection. *Id.* However, the article also mentions that Indiana might have bought the work because a woman named Ruby "was accused of the murder of his stepgrandmother [sic]—an emotional ordeal that may have been a catalyst for his parents' divorce." *Id.*

59 *Id.*

60 *Id.*

61 *See* Bob Keyes, *Indiana-Owned Art Sells for Millions at Auction*, PORTLAND PRESS HERALD, Nov. 17, 2018, at B2, *available at* https://www.pressherald.com/2018/11/16/two-paintings-owned-by-robert-indiana-sell-for-5-million-at-auction/ [https://perma.cc/NBV2-HEBT]. Although the paintings sold for $5 million, it is unclear how much of the money the estate will ultimately net after commission. For exact sales prices, visit the Christie's Post-War and Contemporary Art Auction page, accessible here: https://www.christies.com/SaleLanding/index.aspx?intsaleid=27589&lid=1&saletitle= [https://perma.cc/A29N-FZ9B].

As Indiana never married and had few close relatives,[62] it appears unlikely that any of his assets would be reverted from the Star of Hope Foundation to anyone in his family in the event the foundation's purpose to establish a museum should fail *ab initio*.[63] The Maine Attorney General's Office has been monitoring the case[64] because Indiana "left the assets of his estate to a charitable organization, a nonprofit corporation known as the Star of Hope Foundation."[65] Because there are no shareholders besides the general public benefitting from a nonprofit corporation's assets, the Attorney General retains a residual supervisory duty to ensure the assets are being properly managed.[66]

The Farnsworth Museum in Rockland, Maine has also been following the case, even sending its chief curator, Michael Komanecky, to the probate hearing proceedings in September 2018 in Knox County to learn more about the artist's estate.[67] The Farnsworth has long been a supporter of Indiana, organizing a "major survey [of the artist's work] in 2009—the same year [Indiana's] illuminated sculpture EAT was first installed on the museum's roof. In 2012, Indiana told The Art Newspaper that the Farnsworth would probably inherit his collection."[68] Christopher Brownawell, the director of the Farnsworth, says the museum is "uniquely equipped to preserve and promote [Indiana's] legacy and his important contributions to American art . . . . If the time arises, we will certainly be ready, willing and able to assist."[69] Komanecky indicated that such assistance might take the form of a Robert Indiana Center to be developed at the Farnsworth, in conjunction with helping the museum to be established on Vinalhaven, stating, "[t]he Farnsworth

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62 Carpenter & Bowley, *Artist Vanished*, *supra* note 14.

63 *See generally* Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183 (2007) (discussing reversionary interests in charitable gifts in the context of issues with donor standing).

64 Shaw & Steinhauer, *supra* note 18.

65 Carpenter, *supra* note 15. See *infra* notes 125–127 and accompanying text for further discussion of the Attorney General's role in monitoring nonprofit charitable organizations.

66 *See* Brody, *supra* note 63, at 1187–88.

67 Carpenter, *supra* note 15.

68 Shaw & Steinhauer, *supra* note 18.

69 *Id.*

remains committed to supporting Robert Indiana's wishes for the Star of Hope and the collection he has there."[70]

B. Barnes Foundation

The most analogous case to Indiana's is that of the Barnes Foundation.[71] Dr. Albert Barnes was a chemist who made his fortune in pharmaceuticals during the turn of the twentieth century.[72] Dr. Barnes established the Barnes Foundation in 1922 "as an educational institution that would train students in Dr. Barnes's theories of art aesthetics."[73] Dr. Barnes erected a building in Merion, Pennsylvania, a then-rural suburb outside Philadelphia, to house the collection, and donated his priceless collection to the Foundati on.[74] Dr. Barnes imposed many stringent restrictions in the trust indenture, charter and bylaws creating the Foundation, including specifications that the artworks remain exactly as he hung it in the building that he had custom-designed to house his collection, bans on lending, selling, or otherwise moving the art outside the Barnes facility, and limited hours for allowing the public to view the collection.[75]

The Foundation operated relatively undisturbed by litigation until the 1990s, when little professional or private support remained and the Foundation became strapped for cash, as investment restrictions Barnes had put in place "hinder[ed] the facility's maintenance and quality."[76] In 1993, the trustees proposed selling some of

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[70] Carpenter, *supra* note 15.

[71] *See Robert Indiana and the Importance of a Will*, *supra* note 47.

[72] Chris Abbinante, Comment, *Protecting "Donor Intent" in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation*, 145 U. PA. L. REV. 665, 666 (1997).

[73] Susan N. Gary, *The Problems with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing*, 85 CHI.-KENT L. REV. 977, 985 (2010) [hereinafter Gary, *Problems with Donor Intent*].

[74] *See* Abbinante, *supra* note 72, at 666–67.

[75] *See* Gary, *Problems with Donor Intent*, *supra* note 73, at 985.

[76] Abbinante, *supra* note 72, 672 n.43, 673 n.55 (1997) (citing Barnes Indenture and Agreement, art. IX, ¶ 27 (Dec. 6, 1922), which mandated that the Foundation's funds be invested only in low-yielding government securities). There were two lawsuits in the 1950s and 1960s, with the former requiring that the Foundation open its doors to the public or lose its tax-exempt status and the latter allowing the trustees to charge $1 for admission to the gallery. All told there have been "twenty-nine decisions discussing the Foundation and its operations." PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW 280 (3d ed. 2012).

the Foundation's "lesser" paintings to raise cash, even though any sale was strictly verboten by the Barnes's Indenture.[77] After public outcry, the trustees rescinded their proposal; instead, they petitioned the local Pennsylvania court for approval to exhibit part of the collection on a worldwide tour to raise funds, which the court ultimately approved, finding "that the deviation was administrative in nature and necessary to uphold the greater purpose of the Foundation—art education."[78]

Such administrative deviation commenced a long string of lawsuits that besieged the Barnes Foundation throughout the 1990s and 2000s.[79] The most significant change approved by the Pennsylvania courts was allowing the Foundation and its collection to be moved from Merion to downtown Philadelphia,[80] a decision that was explicitly against Barnes's wishes. The court justified this drastic change by grounding its decision in the doctrine of equitable deviation rather than cy pres.[81] However, it will forever remain a mystery "[w]hether Dr. Barnes considered the directions concerning the location of the art part of his purpose restrictions or only administrative restrictions."[82]

C. Stieglitz Collection at Fisk University

Georgia O'Keeffe's gift of the Alfred Stieglitz collection to Fisk University in Tennessee provides another example of a donee institution being strapped for cash and no longer able to fulfill the donor's wish as originally prescribed.[83] Like Indiana, O'Keeffe does not appear to have accounted for changed circumstances:

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77 Abbinante, *supra* note 72, at 673 (citing Robert Hughes, *Opening the Barnes Doors*, TIME, May 10, 1993, at 61, 62).

78 *Id.* at 674 (citing *In re* Barnes Found., No. 58–788, slip op. at 3, 7, 13, 16 (C.P. Ct. Montgomery County, Pa., Orphans' Ct. Div. July 21, 1992)).

79 *See* GERSTENBLITH, *supra* note 76, at 281.

80 *See In re* Barnes Found., 2004 WL 2903655, at *19–20 (C.P. Ct. Montgomery County, Pa., Orphans' Ct. Div. Dec. 13, 2004).

81 *Id.* at *19, *19 n.13.

82 Gary, *Problems with Donor Intent*, *supra* note 73, at 987.

83 *See* Georgia O'Keeffe Found. v. Fisk Univ., 312 S.W.3d 1, 4 (Tenn. Ct. App. 2009). *See also* Melanie B. Leslie, *Time to Sever the Dead Hand: Fisk University and the Cost of the Cy Pres Doctrine*, 31 CARDOZO ARTS & ENT. L.J. 1 (2012); Alan L. Feld, *The Nature of Fiduciary Law and Its Relationship to Other Legal Doctrines and Categories: Who Are the Beneficiaries of Fisk University's Stieglitz Collection?*, 91 B.U.L. REV. 873 (2011).

> She gave no guidance on how Fisk should respond to changed circumstances or as to which of her objectives—benefitting Fisk, creating a perpetual memorial in honor of Stieglitz, keeping the Collection together, prohibiting sale of the Collection, and ensuring that the Collection remained in the South—should be given priority in the event that changed circumstances should cause them to come into conflict.[84]

Ultimately the court used the cy pres doctrine to grant Fisk "permission to sell a fifty percent interest in the Collection to the Crystal Bridges Museum in Arkansas."[85] The court reached this conclusion after focusing on the donor's intent of keeping the Collection in the South,[86] although there is little to no indication that O'Keeffe had this intent in mind when she donated the collection.[87]

D. Mark Rothko Estate and Foundation

Finally, the overlapping administration of Mark Rothko's estate and foundation portend the future of Indiana's estate. Mark Rothko seemed to make all the right choices in his will by appointing three close friends—one an accountant, another a painter, and the last an anthropology professor—as executors of his estate and directors of the Foundation that he formed before his tragic death by suicide.[88] At the time, New York law limited charitable gifts to a maximum of fifty percent of the estate and mandated a statutory minimum go to Rothko's widow and his minor children.[89] While the house, its contents, and $250,000 went to Rothko's family, the remainder of

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The Rose Art Museum controversy in the late 2000s is another example of a university strapped for cash that attempted to deaccession its collection. *See* Gary, *Problems with Donor Intent*, *supra* note 73, at 993–95.

84 Leslie, *supra* note 83, at 1, 2–3.

85 *Id.* at 3 (citing *In re* Fisk Univ., 392 S.W.3d 582 (Tenn. Ct. App. Nov. 29, 2011)).

86 *See In re Fisk Univ.*, 392 S.W.3d at 593.

87 *See* Leslie, *supra* note 83, at 1, 2–3.*Id.*

88 MERRYMAN ET AL., *supra* note 3, at 941.

89 *Id.*

his estate, including approximately eight hundred paintings, were left to the Foundation, run by the executors of his estate.[90]

Unfortunately for Rothko's children (his widow died shortly after Rothko's suicide), the executors of the estate breached their fiduciary duties by entering into a highly disadvantageous, conflicted transaction[91] with Marlborough Gallery, by agreeing to sell paintings to the gallery "with a 50 percent commission, unless the paintings were sold to or through other dealers, in which case the commission was to be 40 percent."[92] Several terms in these agreements between the executors of Rothko's estate and Marlborough Gallery were highly questionable, particularly the inflated commission, as "paintings sold during Rothko's lifetime through Marlborough had earned only a 10 percent commission."[93] As a result of the ensuing litigation jointly filed by Rothko's children and the New York State Attorney General,[94] all three executors were found to have violated their fiduciary duties, were removed as executors, and were fined between $6.4 and $9.3 million in damages.[95]

II. THE LAW OF WILLS, CHARITABLE FOUNDATIONS, FIDUCIARY DUTIES, AND DEVIATIONS FROM TESTATORS' WISHES

Artists' estates can have many corresponding legal issues, as outlined in the introduction,[96] but this Note focuses on some of the most important problems that frequently spark legal controversy in relation to wills and charitable foundations and the corresponding legal remedies available for when testators' wishes regarding their bequests are impracticable to execute due to changed circumstances.

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90 *Id.*; *see also In re* Estate of Rothko, 84 Misc. 2d 830, 834–35, 379 N.Y.S.2d 923, 932 (Sur. Ct. 1975).

91 One of the executors Rothko appointed was a director of Marlborough Gallery, while another was an artist represented by the gallery. *See In re* Estate of Rothko, 84 Misc. 2d at 842–844.

92 Stapper, *supra* note 6, at 1042. *See also In re* Estate of Rothko, 84 Misc. 2d at 852.

93 Stapper, *supra* note 6, at 1042. Other questionable provisions included "interest-free installment payments over a twelve-year period" and the "sale of so many paintings within a short period of time." *Id.*

94 MERRYMAN ET AL., *supra* note 3, at 941.

95 *In re* Estate of Rothko, 84 Misc. 2d at 887, 379 N.Y.S.2d at 978.

96 *See supra* notes 5–8 and accompanying text.

A. The Will and the Importance of Choosing Appropriate Executors

Nearly every person dies with some property left behind, and those who are prudent (and perhaps wealthy enough) execute a will explaining to survivors what should be done with this leftover property. Every state in the United States has a Probate Code prescribing the rules to make such a will enforceable.[97] Generally, such rules define a will as a written document outlining the deceased's wishes and also require strictly observed formalities, such as attestation by disinterested witnesses and a signature by the deceased (i.e., the testator).[98] In the will, the testator specifies how she wishes to dispose of her property that remains upon her death.[99] For instance, artworks are typically distributed under a will by bequest to specific individuals or to a class.[100] Indiana deviated from these norms by bequeathing his artwork to neither of these categories, but rather to a 501(c)(3) foundation.[101] Barnes did something similar when he gifted all of his artwork to his foundation, although his foundation was set up while he was still alive.[102]

One of the designations that a testator can make in a will is who the executor (or executors) of the estate should be,[103] an appointment that is crucial for artists, as executors often control the disposition of the artist's artworks from the estate.[104] With this power, the executor can control the reputation of an artist and the value of an artist's works by decreeing how often, where, and to whom such artworks are sold.[105] The choice of executors and their powers is

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97 ROBERT SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 141 (10th ed. 2017).

98 RESTATEMENT (THIRD) PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 (AM. LAW INST. 2003).

99 TAD CRAWFORD, LEGAL GUIDE FOR THE VISUAL ARTIST 225 (5th ed. 2010).

100 *Id.* ("A bequest means a transfer of property under a will, while a gift is used to mean a transfer of property during the life of the person who gives the property.")

101 *See supra* text accompanying note 22.

102 *See supra* text accompanying note 74.

103 *See* Crawford, *supra* note 99, at 226.

104 Henry Lydiate, *Death of an Artist*, ARTQUEST (2014), https://www.artquest.org.uk/artlaw-article/death-of-an-artist/ [https://perma.cc/B9DL-6HRT] (discussing the powers of an executor under British law, although the findings are equally applicable to American estates).

105 *See id.*; *see also* MERRYMAN ET AL., *supra* note 3, at 924; Little, *supra* note 4.

unique to each estate and should be based on the artist's own situation.[106] However, the executor must be "capable of making the necessary artistic and financial decisions for the estate."[107] On the artistic front, a well-qualified executor for an artist's estate would exhibit various virtues and attributes, including "know[ing] and car[ing] deeply about the deceased," being "sufficiently well organized and energetic to deal with the technicalities of inventories, valuation, [and] returns," and knowing the applicable surrounding law.[108] Financially, the executors also must maximize the assets in order to fulfill their fiduciary duty to the beneficiaries.[109]

Such attributes are difficult to find in one person alone; thus, artists frequently appoint joint executors, with one being an art expert and the other a financial expert, so that all of an artist's interests are represented adequately and the estate is well run.[110] Unfortunately, such precautions still may not adequately protect an artist's interests, as demonstrated by the Rothko controversy, in which the artist was seemingly prudent in appointing three close friends with varied backgrounds as executors; yet, his estate was still exploited and subjected to a breach of fiduciary duty.[111]

Indiana's choice of attorney James Brannan as executor of his estate does not seem to follow the usual guidelines of an artist's executor outlined above and appears particularly imprudent, as Brannan lacks knowledge about Indiana's *oeuvre* and may be too heavily concerned with financials at the cost of preserving Indiana's collection.[112] A primary tenet of trusts and estate law is effectuating testator intent, which appears easy for Brannan to fulfill, as Indiana clearly demonstrated his intent in his will to convert his house into

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106 *See* Crawford, *supra* note 99, at 226.

107 *Id.*

108 MERRYMAN ET AL., *supra* note 3, at 924–925 ("As pointed out by Surrogate Midonick in the *Rothko* case, . . . executors must have undivided loyalty or integrity, and good judgment, firmness, independence, and active involvement.") (citing *In re* Estate of Rothko, 84 Misc. 2d 830, 847, 379 N.Y.S.2d 923, 943 (Sur. Ct. 1975)). *See also* Stapper, *supra* note 6, at 1041–45; CRAWFORD, *supra* note 99, at 226–27.

109 *See* MERRYMAN ET AL., *supra* note 3, at 925.

110 *See* MERRYMAN ET AL., *supra* note 3, at 924 (5th ed. 2007); *see also* CRAWFORD, *supra* note 99, at 226–27.

111 *See supra* Section I.D.

112 *See supra* text accompanying notes 48–61.

a museum comprised of his artworks.[113] However, Brannan's actions as executor have demonstrated the inherent challenge in effectuating such intent, as Indiana's house is crumbling and all of his liquid assets appear to have been spent on securing counsel to represent the estate in the federal litigation in New York.[114] Thus, as mentioned previously, Brannan had to resort to selling two works in Indiana's collection to pay for litigation expenses and emergency repairs on the Star of Hope building.[115]

In selling off these works, Brannan has shown that he thinks more practically rather than aesthetically when it comes to managing Indiana's collection and may not exhibit the appropriate sensitivity toward and concern for the artist's reputation. Brannan's readiness to sell off estate artworks is worrying. Although Brannan did consult a curator before selling the two paintings in November 2018, his secretiveness about the decision and his unwillingness to disclose the curator's identity could be a distressing sign of how he will operate the museum as a director and potentially deaccession more of Indiana's works until the estate dwindles to nothing.[116] There may also be ethical concerns to consider in having the same attorney who drafted Indiana's will serve as executor of Indiana's estate and co-director of Indiana's foundation, particularly since Brannan receives payments for serving in all of these roles.[117]

B. Charitable Trusts/Foundations

Many artists have made the wise choice to create a nonprofit, private foundation while alive, or upon their death via their will, to avoid tax liability and ensure that their artworks are managed by trustees or directors in an organization operating with funds of its own and servicing the public benefit.[118] Because they serve the

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113 *See supra* text accompanying notes 22–23.

114 *See supra* text accompanying notes 47–49.

115 *See* Bowley & Carpenter, *Estate to Sell Art*, *supra* note 55. As mentioned previously, such a move is not illegal, as Maine law grants "an executor the power to sell assets as he administers the estate and there is no required judicial review." *Id.*; *see also supra* note 57.

116 *See supra* text accompanying note 47.

117 *See* Stapper, *supra* note 6, at 1043–44; *see also* N.Y. SUR. CT. PROC. Act § 2307–a.

118 *See, e.g.*, Little, *supra* note 4 (discussing foundations set up by Rothko, Salvador Dalí, Warhol, and Moore, among others); Christa Blatchford, *Are Artists' Estates Too Protective of Artists' Reputations?*, APOLLO MAG. (Jan. 30, 2017), https://www.apollo-magazine.com

general public, such foundations, like the one Indiana created in 2016, are classified as charitable, in contrast to private trusts, where the beneficiaries are a small number of named beneficiaries, who are generally listed in the documents establishing the foundation.[119] "This attribute—that charities operate for the benefit of the general public rather than a restricted and identified class of beneficiaries—shapes the legal accountability of charities. Donors transfer property to a charity so that it can provide a public benefit."[120] Like the Barnes Foundation,[121] Indiana's Star of Hope Foundation is a "privately created and operated institution that serves the public in some manner."[122] Another advantage of private, charitable foundations is that they are exempt from the Rule Against Perpetuities, meaning they can be "potentially infinite in duration."[123]

However, donors to charities, including even testators' representatives when deceased parties bequeath gifts in their will (e.g., Indiana's estate once Indiana bequeathed his collection to the Star of Hope Foundation), generally lack the standing to sue should the charities fail to fulfill conditions on a gift or violate fiduciary duties.[124] Because the general public is considered the "recipient" of a charity's benefits, no individual other than the state Attorney General in which the charity is registered has the standing to sue, thus leaving the job of protecting the public's interest in the charity's conduct to the state Attorney General.[125] This legal issue of who has standing to sue can create problems, particularly when the interest

/artists-estates-manage-reputations/ [https://perma.cc/EK2E-BC3K] (Blatchford is the CEO of the Joan Mitchell Foundation and discussed her work carrying out artist Joan Mitchell's vision in directly supporting visual artists).

119 Abbinante, *supra* note 72, at 679.

120 Feld, *supra* note 83, at 874.

121 *See supra* Section I.B.

122 Abbinante, *supra* note 72, at 679.

123 *Id.* (quoting Roger G. Sisson, *Comment: Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres*, 74 VA. L. REV. 635, 635 (1988)). *See also* RESTATEMENT (THIRD) PROP.: WILLS AND OTHER DONATIVE TRANSFERS, § 27.3(2) (AM. LAW INST. 2003).

124 Feld, *supra* note 83, at 874.

125 *Id.*; *see also supra* note 66 and accompanying text. For further reading on the controversial topic of standing in the charity context, see Brody, *supra* note 63. *See also* Kelly McNabb, *What "Being a Watchdog" Really Means: Removing the Attorney General from the Supervision of Charitable Trusts*, 96 MINN. L. REV. 1795, 1800 (2012).

in protecting the public interest diverges from the responsibility of protecting the donor's intent.[126] Compounding problems further is the Attorney General's status as a politician, since "political considerations may become part of the decision in connection with monitoring a charitable trust, at least in high-profile cases."[127] Thus, if Jamie Thomas or James Brannan commit fiduciary duty breaches by mishandling Indiana's collection in the course of their conduct as directors of the Star of Hope Foundation, the only person legally entitled to sue is Maine's Attorney General.[128] Indeed, the Maine Attorney General has said that it is monitoring the Indiana litigation proceedings, although it is unclear what legal remedies, if any, the Attorney General could take if all of the estate assets (i.e., the art collection) are depleted in funding the litigation and repairing the house before the museum has a chance to be established.[129]

On a managerial level, the officers and directors of a charitable enterprise, much like a for-profit corporation, "operate subject to the twin [fiduciary] duties of care and loyalty in acting for the institution," with great deference given by courts to the institution's actions that are based on "honest judgment."[130] Thus, appointing trustworthy directors to run the charitable corporation is crucial, as the directors are given broad discretion in their management.[131] While "[a]ll charitable not-for-profits operate subject to a non-

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126 *See* Susan N. Gary, *Restricted Charitable Gifts: Public Benefit, Public Voice*, 81 ALB. L. REV. 565, 597 (2018) [hereinafter Gary, *Restricted Charitable Gifts*].

127 *Id.* at 598. Gary cites the Hershey Trust in Pennsylvania as an example, and earlier references the potentially political reasons the Pennsylvania Attorney General advocated for the Barnes Foundation museum to be moved to downtown Philadelphia. *See id.* at 595, 598.

128 *See supra* text accompanying notes 63–65.

129 *See id.*

130 Feld, *supra* note 83, at 875.

131 *See* DUBOFF ET AL., *supra* note 57, at 162–63. For further reading on the vital role trustees/directors play in nonprofit governance, see Jennifer L. White, *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 (1996); Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400 (1998); Charles Bryan Baron, *Self-Dealing Trustees and the Exoneration Clause: Can Trustees Ever Profit from Transactions Involving Trust Property?*, 72 ST. JOHN'S L. REV. 43 (1998); Nina J. Crimm, *A Case Study of a Private Foundation's Governance and Self-Interested Fiduciaries Calls for Further Regulation*, 50 EMORY L.J. 1093 (2001); Karen E. Boxx, *Of Punctilios and Paybacks: The Duty of Loyalty Under the Uniform Trust Code*, 67 MO. L. REV. 279 (2002).

distribution rule," meaning that the charity cannot "distribute any part of its income to the charity's insiders," the charity can still enrich its managers in other ways, including the payment of high salaries and "elaborate fringe benefits."[132] The only constraint on salaries imposed by tax law is a reasonableness test, wherein the IRS must overcome the rebuttable presumption that the salary is reasonable with sufficient evidence to the contrary, thus giving charities considerable latitude to pay their directors handsomely.[133]

Such creative manipulation of director duty for unjust enrichment was seen in the *Rothko* case, as two of the three executors/directors of the Rothko Foundation had direct economic ties to the Marlborough Gallery, with whom they had contracted to consign Rothko's artworks.[134] In a similar vein, Jamie Thomas, as attorney-in-fact for Indiana, has already made questionable ethical and financial decisions, such as withdrawing large sums of cash, increasing his salary, and cutting off communication to Indiana from the outside world. These actions suggest that Thomas could be held liable for breaches of the fiduciary duties of care and loyalty; regardless of his ultimate culpability, these actions do not instill trust in Thomas as a director of the Star of Hope Foundation.[135]

Besides issues of adherence to fiduciary duties, complications can arise when an institution has a mission beyond being a conservator of valuable artworks, such as when it also maintains the historic preservation of a famous building housing the artworks. In such cases, institutions "may seek to realize the monetary appreciation in its art, by way of sale or otherwise, in order to support its other purposes."[136] These competing missions can create controversy, particularly within the museum community, where there is a strong undercurrent of antipathy towards deaccessioning for any purposes other than to "reinvest[] the proceeds in other artwork."[137]

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132 Feld, *supra* note 83, at 876.

133 *Id.*; *see also* 26 C.F.R. § 53.4958–6 (2010).

134 *See supra* text accompanying notes 87–94.

135 *See supra* text accompanying notes 42–46.

136 Feld, *supra* note 83, at 878.

137 *Id.* (citing ASS'N ART MUSEUM DIRECTORS, AAMD POLICY ON DEACCESSIONING 4 (June 9, 2010) https://aamd.org/sites/default/files/document/AAMD%20Policy%20on%20Deaccessioning%20website_0.pdf [https://perma.cc/LD2W-WUHG] ("Funds received from the disposal of a deaccessioned work . . . may be used only for the acquisition of

The Association of Museum Directors can even impose sanctions if a museum sells artwork and plans to use the money for an operating budget and general maintenance.[138] This tension between preserving the museum's structure and taking proper care of the artworks was seen in the Barnes Foundation's move to downtown Philadelphia[139] and could be implicated in Indiana's case, as the repairs to the house are estimated to cost $10 million.[140]

As appears to be evidenced in Indiana's case, problems, particularly liquidity issues, can emerge in carrying out the testator's wishes when his estate is "art-rich and cash-poor."[141] The estate's valuation in such a case all comes from the works of art which have traditionally been illiquid assets, and a high valuation of the estate results in a higher bill for taxes and probate administration.[142] If the estate does not have sufficient cash to pay the bills, "works may have to be sold to meet sudden, large cash requirements. Such 'distress' sales depress the market for the artist's work and result in disorderly disposition of his *oeuvre*."[143] Indiana's estate administration has unfortunately already fit this description, as Brannan sold two artworks from Indiana's estate to abate the immediate, dire need for large sums of cash.[144]

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works in a manner consistent with the museum's policy on the use of restricted acquisition funds."). The Policy was amended in 2015 and further limited the actions that may be taken with the funds from deaccessioned art: "[Such] [f]unds . . . shall not be used for operations or capital expenses. Such funds, including any earnings and appreciation thereon, may be used only for the acquisition of works in a manner consistent with the museum's policy on the use of restricted acquisition funds." *Id.*

138 Feld, *supra* note 83, at 878. Feld's article cites an instance from 2009 wherein the National Academy Museum in New York was penalized by the AAMD for selling two Hudson River paintings in 2008. The penalty included a ban on loaning artworks to or borrowing artworks from other Association members as well as any other program collaborations. *See* Donn Zaretsky, *AAMD Rules Need to Be Deaccessioned*, ART AM. (Mar. 31, 2009), https://www.artinamericamagazine.com/news-opinion/the-market/2009-03-31/aamd-rules-need-to-be-deaccessioned/ [https://perma.cc/U4RN-E3WD].

139 *See supra* text accompanying note 82.

140 *See* Willy Blackmore, *The Fight Over Robert Indiana's Estate*, INDIANAPOLIS MONTHLY (Feb. 8, 2019), https://www.indianapolismonthly.com/arts-and-culture/the-fight-over-robert-indianas-estate [https://perma.cc/C5NH-X6BK].

141 MERRYMAN ET AL., *supra* note 3, at 925.

142 *Id.*

143 *Id.*

144 *See supra* text accompanying note 55.

However, in this case, the cash was not for taxes or probate administration, but instead for exorbitant litigation costs and emergency repairs required to fix Indiana's Star of Hope house, which had a leaking roof.[145] While the two works sold by Brannan in November 2018 were not created by Indiana himself, many people close to Indiana protested the works chosen as being central to Indiana's *oeuvre* and detracting from the cohesiveness of his collection.[146] Additionally, the immediacy of Brannan's action (six months after Indiana's death) is a worrying sign about which side will win out in the war between paying the cost of repairs to turn the Star of Hope into a museum-worthy building and keeping Indiana's collection intact.[147]

C. Cy Pres and Equitable Deviation Doctrines: Balancing Public Benefit and Donor Intent

While the law is unclear on whether the restricted gift that Indiana bequeathed to the Star of Hope Foundation creates a charitable trust,[148] the modification rules of cy pres and equitable deviation are equally applicable regardless of whether a charitable trust was formed or Indiana's bequest is simply a restricted gift held by the Star of Hope Foundation, a nonprofit corporation.[149] Because charitable gifts are exempt from the common law Rule Against Perpetuities, "the restrictions placed on a charitable gift by the donor may last for a very long period of time."[150] While circumstances may change over time, rendering modification of the original gift

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145 *See supra* text accompanying notes 47–49.

146 *See supra* text accompanying notes 57–60.

147 *See supra* text accompany note 112.

148 Gary, *Problems with Donor Intent, supra* note 73, at 998 (citing the differing opinions between RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (AM. LAW INST. 2003) and Section 400(a) and (b) of PRINCIPLES OF THE LAW OF NONPROFIT ORGS. (The American Law Institute Preliminary Draft No. 5 2009)).

149 *Id.* at 1000–01 ("Courts have applied the rules of cy pres and deviation to restricted gifts held by nonprofit corporations, but no direct statutory authority existed for the application of those rules . . . . [T]he modification rules of cy pres and deviation apply to charitable trusts through trust law, to restrictions on funds held by nonprofit corporations through [Uniform Prudent Management of Institutional Funds Act (UPMIFA)], and to restrictions on other assets held by nonprofit corporations through case law.").

150 *See* GERSTENBLITH, *supra* note 76, at 261; *see also supra* text accompanying note 123.

terms necessary,[151] such a change cannot be done unilaterally by the recipient of the gift without "run[ning] the risk of suffering a forfeiture" if such modification is found to be a violation of the gift's terms.[152]

In response to this dilemma, the equitable doctrines of cy pres and equitable deviation have developed over the centuries to permit charitable trusts to be saved by allowing the *purpose* of the gift to be modified in the case of cy pres (i.e., a substantive modification) or the *methods* by which the purpose is to be carried out to be altered in the case of equitable deviation (i.e., a procedural modification).[153] The term cy pres is taken from the French *cy pres comme possible*, meaning "as near as possible,"[154] and the doctrine "ties the modification to the donor's intent," as the "modification should be 'as near as possible' to the original purpose" of the donor.[155] Under this doctrine, when it becomes impossible, impracticable, or illegal to carry out the settlor's particular purpose set out in the trust instrument due to changed circumstances, a court will not allow the trust to fail but will redirect the trust assets to some other charitable purpose "that reasonably approximates the designated purpose."[156] There is generally a preference by courts to keep the trust intact, with modification, rather than let it fail and go through reversion.[157]

A determination of a general charitable intent used to be evaluated in courts,[158] but over time courts rarely allowed a gift to fail and revert to the donor's heirs; instead, the majority of states, including Maine, have adopted the Uniform Trust Code, which

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151 Gary, *Problems with Donor Intent*, *supra* note 73, at 1022.

152 GERSTENBLITH, *supra* note 76, at 261.

153 *Id.*

154 Gary, *Problems with Donor Intent*, *supra* note 73, at 1023 n.288 (noting that per RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. d (AM. LAW INST. 2003), cy pres does not literally require the "substitute or supplementary purpose to be the *nearest possible* but one reasonably similar or close to the settlor's designated purpose, or 'falling within the general charitable purpose' of the settler").

155 *Id.* at 1023.

156 RESTATEMENT (THIRD) OF TRUSTS § 67 (AM. LAW INST. 2012).

157 *See id.* at § 67 cmt. b.

158 15 AM. JUR. 2D *Charities* § 147 (2011).

"creates a presumption of general charitable intent."[159] The courts are required to make a judicial finding of the donor's intention as applied to new conditions, although cy pres is a liberal rule of construction to *carry out*, not defeat, the settlor's intent.[160] While changed circumstances generally occur many years after the gift has first been put to use by the charity, "[c]y pres can also be applied to new gifts, most commonly in the case of bequests."[161] The most important issue in a cy pres case is the intent of the testator, and this intent "depends on documentation at the time of the gift and not thoughts about what a donor might have intended under changed circumstances, but the discussion of donor intent includes thoughts about later intent as well as intent at the time of the gift."[162]

Equitable deviation (or deviation), by contrast, does not "modify a restriction on the purpose of a gift," but instead modifies "a restriction on *how* the charity carries out the purpose."[163] Cy pres focuses on shifting the intent of the donor, while deviation permits an administrative change that will help the charity carry out the donor's intent.[164] The distinction between the two doctrines is often tenuous and can be manipulated based on how a party wants to characterize the situation to achieve their desired outcome.[165] For example, the parties in the Barnes Foundation litigation reclassified changes as cy pres or equitable deviation depending on which side

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159 Gary, *Restricted Charitable Gifts*, *supra* note 126, at 585. See ME. REV. STAT. ANN. tit. 18–B, § 413 (2003) for the Maine statute implementing the Uniform Trust Code. I have included mention of Maine as that is the state where Indiana's will was probated.

160 15 AM. JUR. 2D *Charities* § 144 (2011). For more on the issues involved in determining settlor's intent, see Heinrich Schweizer, *Settlor's Intent vs. Trustee's Will: The Barnes Foundation Case*, 29 COLUM. J.L. & ARTS 63 (2005).

161 Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111, 1115 n.10 (1993) ("Here, typically owing to the lapse of time between death and the execution of the will, the donor would have been unaware when the gift became effective of circumstances that would preclude precise execution of his or her wishes within the confines of legally defined charitable purposes").

162 Gary, *Problems with Donor Intent*, *supra* note 73, at 978 n.2.

163 *Id.* at 978–79 (emphasis added).

164 *Id.* at 979.

165 Abbinante, *supra* note 72, at 685. Abbinante cites the Barnes Foundation dispute as a perfect example of such manipulation. *Id.* at 686.

they were advocating for, and the court ultimately relied on administrative deviation to make changes that completely altered the purpose of Barnes's trust and went against his wishes as the donor.[166]

In Indiana's case, the changed circumstances occurred much earlier than for the Barnes Foundation, as Indiana's wish appeared to be impracticable to carry out even at Indiana's death, as he left his house in too run-down of a condition; moreover, the prohibitive cost of restoring the house to museum quality will far outweigh any potential benefits that the museum could bring.[167] This is especially true since the renovation seems likely to deplete all of the estate's assets—i.e., the artworks in Indiana's collection—since there are no other funds available to pay for the restoration. Thus, the trustees of Indiana's foundation will probably have to petition the court in short order to alter the terms of the trust, and it remains to be seen whether such modification will be advocated as a cy pres or equitable deviation change. If the trustees and the court adopt my suggested solution put forth below, then the cy pres doctrine could be utilized to allow Indiana's charitable purpose to be adhered to closely, yet the result will be a drastic shift of location for Indiana's art collection.

D. Is It Time to Relinquish Dead-Hand Control? Legal Scholars' Response to Cy Pres and Equitable Deviation

Various legal scholars have argued in the wake of costly lawsuits due to changed circumstances such as the Barnes Foundation and O'Keeffe's gift to Fisk University that the application of the doctrines of cy pres and equitable deviation should be amended or that the doctrines should be eliminated altogether.[168] However, these scholars have disagreed as to whether such amendments should involve following more closely the settlor/testator's intent in making the gift or abandoning such dead-hand control and focusing solely on maximizing the public benefit of the charitable gift.[169]

Chris Abbinante is perhaps one of the staunchest advocates for adhering to donor intent. He argued in his influential Comment that

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166 *See id.* at 686–87; *see also supra* text accompanying note 82.

167 *See* Blackmore, *supra* note 140.

168 For an excellent overview of various scholars' proposals for amending the cy pres/deviation doctrines, see Gary, *Restricted Charitable Gifts*, *supra* note 159, at 600–07.

169 *See id.* at 600; *see also* Abbinante, *supra* note 72, at 705.

the Barnes case demonstrated "the legal system's failure to uphold donor intent in the face of charitable-foundation trustees who wish to deviate from that intent."[170] Abbinante proposed adopting an additional legal hurdle for litigants to overcome when asking courts to rule on cy pres or administrative deviation petitions.[171] This additional step would require courts to focus their initial inquiry on the necessity of the deviation, with a "rebuttable presumption against permitting any type of deviation from the intent of the donor, which can be overcome only when a trustee makes a showing of indisputable need."[172] Abbinante stated that the threshold test should be framed as a two-part inquiry to the parties seeking to deviate from the donor's wishes: "(1) Have all reasonable efforts to comply with the terms of the [trust agreement] been exhausted? and (2) Will the foundation fail in its purpose if the desired deviation is not allowed?"[173] Abbinante argued that failure of purpose only refers to impossibility or illegality and thus would eliminate petitions for cy pres and/or administrative deviation that only seek to modify based on impracticality.[174] Abbinante acknowledged that this added legal threshold might cause more trusts to fail, but posited that this outcome could be avoided if donors exercise more foresight and implement contingency plans and plan ahead for alternative uses of their trust assets in anticipation of changed circumstances.[175]

On the other end of the spectrum, several scholars have advocated for greater consideration of the public's interest in a charitable gift, although these scholars have differed on how much deference should be given to the public interest.[176] Ilana Eisenstein and John

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170 Abbinante, *supra* note 72, at 705.

171 *See id.*

172 *Id.*

173 *See id.* at 705–06.

174 *Id.* at 706. Abbinante averred that impracticality is too nebulous of a standard and allows courts and trustees to deviate from donor intent when such deviation is convenient or "suitable to their ulterior motives, such as efficiency." Thus, he argued that impracticality should be rejected as grounds for modifying a donor's intent. *Id.* at 706 n.240.

175 *Id.* at 707.

176 *See* Gary, *Restricted Charitable Gifts*, *supra* note 126, at 605 (citing Katie Magallanes, Ilana H. Eisenstein, and John Nivala as scholars who have advocated for courts to direct their consideration to public interest when determining whether to modify a charitable gift).

Nivala agreed that the public has a strong interest in gifts that represent "the droit patrimoine," i.e., "our collective cultural inheritance."[177] Both Eisenstein and Nivala argued that public interest should be protected even if the donor intent clearly contradicts such interest, as was demonstrated in the Barnes Foundation case.[178]

Melanie Leslie advocated for a sort of middle ground between dead-hand control and public benefit by arguing that a legal rule should be adopted "limiting the duration of restrictions on charitable donations."[179] She proposes putting in a time constraint of forty years to enable donors to restrict the use of their gift for a "reasonable period" but argues that such a restriction would "greatly reduce litigation over changed circumstances and the accompanying waste of charitable and public dollars."[180] Leslie argued that cy pres should still apply within the first forty years and that the law should grant standing to the donor or the donor's heirs to enforce the terms of the charitable gift within that time frame.[181] However, after the forty-year period has lapsed, and in the event that a charity can no longer comply with the donor's restrictions on the gift, Leslie states that the charity should be free to use the gift as they see fit, subject to its fiduciary duties of "care, loyalty and obedience to mission."[182] Leslie avers that the Attorney General would still have the power to

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177 *Id.* (citing Ilana H. Eisenstein, *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, 1783–86 (2003)). Gary also notes that Nivala used the Barnes Foundation as an example of such cultural heritage, as the collection, when displayed, represents "an intellectual, emotional and cultural experience." *Id.* at 605 n.341 (quoting John Nivala, *Droit Patrimoine: The Barnes Collection, The Public Interest, and Protecting Our Cultural Inheritance*, 55 RUTGERS L. REV. 477, 480 (2003)).

178 *See* Eisenstein, *supra* note 177, at 1785–86; Nivala, *supra* note 177, at 481.

179 Leslie, *supra* note 83, at 16.

180 *Id.* It is unclear why Leslie chose forty years as the appropriate time period, and other scholars have written similar proposals with differing durations, including Alex Johnson, who argued that the duration should be the same as that governed by the Rule Against Perpetuities since this time frame represents the law's balancing of the rights of the present generation against the rights of future generations. *See* 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, 354, 355, 391 (1999); *see also* Gary, *Restricted Charitable Gifts*, *supra* note 126, at 600–04 (citing a number of different legal scholars' proposals for loosening the rules around modifying a charitable gift after a set number of years).

181 See Leslie, *supra* note 83, at 16.

182 *Id.* at 16–17.

enforce the donor restrictions should the charity violate these fiduciary duties, but only after the initial forty-year period has lapsed.[183]

Rob Atkinson has endorsed another alternative to court modification of the charitable gift: giving the power to make key decisions in changed circumstances to the trustees or directors of the charity, subject to their fiduciary duty.[184] The trustees would be legally empowered to use the assets as they see fit, but would be constrained by "what the state defines as charitable through common law, legislation, or administrative regulation," and by "extralegal mechanisms to enforce donor intent."[185] The Attorney General would still intervene should the trustees breach their fiduciary duties of care and loyalty, but the donor's restrictions placed on the gift would henceforth only carry moral weight.[186] Atkinson argued that the donor's threat of cutting off future support to the charity would be serious enough to act as a safeguard for the charity trustees to adhere to their fiduciary duties.[187]

Many of the solutions just described are inapt to solve the dilemma that arises when an artist only leaves behind their artworks and has no liquid assets to carry out their wishes, as is the case with Indiana's estate. An artist's estate requires special care in maintaining the collection which can easily be mishandled by inexperienced or self-serving trustees, as was seen in the Mark Rothko controversy and appears likely to occur with Brannan and Thomas serving as trustees, neither of whom have art-world experience. Thus, Atkinson's proposal to delegate important decisions to fiduciaries when changed circumstances arise would likely lead to more fiduciary breaches, particularly if artists appoint trustees who are self-interested in carrying out transactions or have no experience in the art world and therefore likely do not know the best way to preserve an artist's *oeuvre*.

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183 *Id.* at 17.
184 *See* Rob Atkinson, *supra* note 161, at 1143.
185 *Id.*
186 *See id.* at 1144.
187 *See id.*

Additionally, Abbinante's proposal of eliminating impracticality as a justification for modifying a charitable gift would unnecessarily constrain trustees and courts, since the heightened standards of impossibility and illegality seem exceedingly difficult to prove and would cause more trusts to fail, as Abbinante admitted. Further, Abbinante was too optimistic in hoping that donors would exercise more foresight and develop contingency plans, as demonstrated by the previous cases as well as the ongoing litigation shrouding Indiana's estate. Artists seem especially prone to lacking the foresight to develop backup plans should their initial wishes be impracticable to fulfill. But under Abbinante's proposal, Indiana's wish to create a museum out of his rundown house on an isolated island in Maine is not necessarily impossible to fulfill, but it is highly impracticable, as the estate has no liquid assets and would need to sell off one-fifth of Indiana's art collection just to restore the Star of Hope house to museum quality.[188] Thus, under Abbinante's proposal, because Indiana failed to implement a contingency plan, his trust would likely fail, as all the artworks in the collection would be sold off in order to pay for the creation of the museum to house them.

III. SOLUTION

While no two cases are alike, each prior instance of complications related to an artist's estate provides helpful precedent for artists creating their estate plans now. The Barnes Foundation, like Indiana's future museum, was in a geographically isolated area, which hindered the museum's generation of profits and ultimately led the Foundation to fall into dire straits. Indiana's estate should thus exercise caution in opening a museum on Vinalhaven, as it is significantly harder to reach than Merion was for the Barnes Foundation and it is unclear how the museum would attract a sufficient number of visitors to a remote island in order to offset the substantial overhead costs of running a museum. Additionally, like the Barnes Foundation, Indiana's estate runs the risk of becoming

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[188] *See supra* text accompanying note 140.

bankrupt if the litigation carries on for a long time, further draining what little liquid assets the estate has.

In contrast to Barnes's indenture, however, Indiana's will is much less detailed and gives Brannan and Thomas as directors of the Foundation considerably more flexibility in running the museum. This flexibility should allow them to seek out more creative solutions and potential fundraising avenues that Barnes's indenture strictly forbade.[189] However, even with such a detailed indenture, the court in the Barnes case still applied equitable deviation to blatantly go against the donor's intent, a move that should sound alarm bells for future donors wishing to make restricted gifts.

The court in the Fisk University case faced a similar dilemma with the Stieglitz Collection, yet employed cy pres in that case to apply its own definition of O'Keeffe's donative intent. A comparison of the Fisk University and Barnes Foundation cases demonstrates the inherent subjectivity of cy pres/administrative deviation analysis, and the arbitrariness of courts in applying these doctrines. Thus, Indiana's estate should exercise caution in seeking judicial approval of any modifications that it may make, and try to frame such changes as administrative deviation, since that seems to grant greater flexibility to directors of nonprofit corporations than cy pres.

Finally, the breaches of fiduciary duty in Mark Rothko's case should serve as a cautionary tale for the fiduciaries involved in managing Indiana's estate, since Rothko exercised care in who he chose as executors of his estate and these "close friends" still blatantly breached their duties of care and loyalty. Unfortunately, Thomas already appears to demonstrate the sort of erratic behavior indicative of a breach of fiduciary duty by abusing his power of attorney and exerting undue influence over Indiana. Time will tell if Thomas and Brannan can avoid the kind of conflicted transaction in which Rothko's executors engaged, although Thomas appears to have already completed such a transaction with McKenzie and AIA, if MAF's allegations prove to be founded.

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[189] Indiana's will also doesn't contain any reversionary language should the purpose fail to be carried out, in contrast to Barnes's Indenture which contained such language but was ignored by the Pennsylvania courts. *See* Abbinante, *supra* note 72, at 686. Compare the discussion of Indiana Will, *supra* text accompanying notes 22–26.

Generally, cy pres applies after a sufficient period of time has passed, and it has been demonstrated that the intent of the donor can no longer be carried out based on the current condition of the foundation. However, it appears from the outset that the Star of Hope Foundation faces an uphill battle, as it is tethered to a rundown and remote house that needs emergency funds for extensive repairs.[190] The Star of Hope's disrepair was so bad it necessitated the emergency transport of Indiana's works to a storage facility, as the house was too unfit for proper artwork storage.[191] With Indiana's estate being art-rich and cash-poor, there is no hefty endowment like the Barnes Foundation had, and it seems that deaccessioning will be necessary perhaps from the outset (as has already been seen with Brannan selling off two valuable works in Indiana's collection simply to pay for the roof repairs and litigation fees).[192] Thus, the circumstances seem to have changed sufficiently from when Indiana drafted his will to justify modification—the real question is whether such a modification would require the use of cy pres or if equitable deviation would suffice.

Unfortunately, Indiana did not plan for any changed circumstances aside from the possibility that either Brannan or Thomas would decline their duties as executor or director, respectively. Thus, the question of donor intent is left to the court to make a subjective judgment call. Additionally, the only parties who can request such a modification of Indiana's will are the Attorney General of Maine and Thomas and Brannan as directors of the Star of Hope Foundation.[193] Moving the collection to the Farnsworth Museum seems like the best solution because the intended beneficiaries of Indiana's estate are arguably Maine's citizens, expanding the public benefit beyond the tiny town of Vinalhaven, with its 1,200 residents. This solution appropriately balances the donor's intent and the public benefit, a balance over which many scholars have debated.[194] Indiana's remarks to The Art Newspaper in 2012 that the

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190 *See supra* text accompanying notes 55–56.

191 *Id.*

192 *Id.*

193 *See supra* note 125 and accompanying text for a discussion of standing.

194 For an overview of various scholars' arguments, see generally Atkinson, *supra* note 161.

Farnsworth would probably inherit his collection point to his predilection for the museum and indicate that he would perhaps not object to his collection being housed there if the Star of Hope cannot feasibly be converted into a museum.[195] Additionally, the public benefit still remains with Maine and would be sufficiently isolated from the mainstream that Indiana so despised as to likely satisfy the reclusive and embittered artist. While Indiana had an honorable primary purpose of converting his formerly grand house into a museum, prudence will hopefully prevail here and the maximum public benefit for the art collection will be prioritized over the costly renovation of Star of Hope. This focus on the public benefit has the added bonus of allowing many more visitors to see the collection (and the collection to remain much larger) than would likely be the case if it remained on Vinalhaven.

CONCLUSION

This Note examined how changed circumstances can apply to a testator's wishes soon after his or her death—as demonstrated by Robert Indiana's request to turn his house into a museum to display his collection, which wish is impracticable from the outset. Based on prior cases such as the Barnes, Rothko, and Fisk, it is unclear whether either the cy pres or deviation doctrines would remedy this impracticability in a satisfactory manner. Thus, artists should be particularly careful to draft their wills to provide for alternative plans in the event of changed circumstances. By doing so, they will exercise the necessary foresight that Indiana lacked, as he provided no alternatives should the museum be impracticable to establish. Time will tell how much money gets swallowed up in the ongoing litigation and the cost of repairing the Star of Hope. However, Indiana's case will hopefully serve as a cautionary tale to artists to consider the liquidity of their estates and the feasibility of creating museums when they have no cash flow to accompany their collections, and to consider other alternatives that still keep their collections in the public eye and provide long-lasting public benefit.

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[195] *See supra* text accompanying note 67.