

August 15, 2018

Mark C. Fleming

**BY ELECTRONIC FILING**

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Mr. Joseph Stanton  
Clerk, Massachusetts Appeals Court  
John Adams Courthouse  
One Pemberton Square, Room 1200  
Boston, MA 02108

Re: *Hatt v. Trustees of the Berkshire Museum*, No. 2017-P-1556 (to be argued Sept. 4, 2018)

Dear Clerk Stanton:

Pursuant to Mass. R. App. P. 16(l), Appellee Trustees of the Berkshire Museum respectfully informs the Court of pertinent authority issued after the close of briefing. I would be very grateful if you would convey this letter to Justices Maldonado, Massing, and Neyman.

On April 5, 2018, the Supreme Judicial Court for Suffolk County (“SJC”) issued a Memorandum of Decision (“Mem.”) and Judgment (“Judgment”) expressly authorizing the Berkshire Museum to sell up to 40 objects under specific terms and conditions. *See Trustees of the Berkshire Museum v. Healey*, No. SJ-2018-065 (Mass. Apr. 5, 2018) (attached). Appellants James Hatt, Kristen Hatt, and Elizabeth Weinberg sought and obtained leave to file an *amicus* brief and present oral argument in that proceeding.

The SJC’s decision makes plain that this appeal is wholly insubstantial and frivolous. The SJC confirmed the Attorney General’s “exclusive province to ensure that a charitable trust established for the benefit of the public is properly administered.” Mem. 2; *see also id.* 2 n.2 (noting that “[t]he individuals opposing the sale of the artwork,” including Appellants, “do not have standing to challenge the sale”); *compare* Museum Br. 16-35 (showing that Appellants lack standing).

Moreover, the SJC expressly authorized the Museum to sell up to 40 objects from its collection and use the proceeds subject to the Judgment’s terms. *See* Judgment ¶¶ 3-5. That forecloses and moots Appellants’ claim that the sale of objects violates the Museum’s governing statute or other obligations. *See* Museum Br. 36-40. The Museum has sold one tranche of works pursuant to the Judgment and is in the process of completing the sale of a second tranche.

On August 6, 2018, we asked counsel for Appellants to dismiss this appeal as it has no valid basis. On August 14, Appellants refused. The Superior Court was right to dismiss this case, and this Court should do likewise.

Respectfully submitted,

/s/ Mark C. Fleming

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
No. SJ-2018-065

TRUSTEES OF THE BERKSHIRE MUSEUM

v.

MAURA HEALEY, ATTORNEY GENERAL OF THE  
COMMONWEALTH OF MASSACHUSETTS

MEMORANDUM OF DECISION

The plaintiff, the Trustees of the Berkshire Museum (Museum), brought a complaint in equity pursuant to G. L. c. 214, §§ 1 and 10B, seeking an order of equitable deviation or *cy pres*, authorizing a limited sale of up to forty works of art from the Museum's collection.<sup>1</sup> The requested equitable relief is premised on the Museum's contention that without a limited sale of its collection, the Museum cannot sustain its operations and will be forced to close in the near future. Following an investigation into the proposed sale and the Museum's financial outlook, the Attorney General of Massachusetts assented to the Museum's motion for entry of judgment granting the equitable relief sought.

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<sup>1</sup> The parties have stipulated that, to the extent there are restrictions on the artwork at issue, the limited sale of the artwork is permissible under the doctrine of equitable deviation or *cy pres*.

This court allowed certain non-party individuals ("the Amici") to submit briefs in opposition to the proposed sale and to appear at a non-evidentiary hearing before the Single Justice for the purpose of voicing their concerns about the proposed sale.<sup>2</sup> The Amici voiced serious concerns regarding, among other aspects of the sale, the effect on the Museum's collection, oversight of the sale, and the broader cultural impact on the residents of the Commonwealth, particularly in Berkshire county. This court acknowledges those legitimate concerns. Based on the Attorney General's investigation into the sale and her assent to the requested relief, the Museum has satisfied its burden of establishing that it has become impossible or impracticable to administer the Museum strictly in accordance with its charitable purpose, thus entitling the Museum to relief under the doctrine of equitable deviation. Accordingly, the court allows the Museum's request for equitable relief to sell the designated artwork.

It is ordinarily the Attorney General's exclusive province to ensure that a charitable trust established for the benefit of the public is properly administered. Trustees of Dartmouth

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<sup>2</sup> The individuals opposing the sale of the artwork are not parties to the litigation and do not have standing to challenge the sale. The Amici include a group of "Berkshire County Citizens" and James Hatt, Kristin Hatt, and Elizabeth Weinberg. The court also received an additional amicus brief from Martin Gammon.

College v. Quincy, 331 Mass. 219, 225 (1954), citing Dillaway v. Burton, 256 Mass. 568, 573 (1926) ("It is [her] duty to see that the public interests are protected and to proceed in the prosecution or to decline so to proceed as those interests may require"). See also G. L. c. 12, § 8. "[T]he Attorney General serves as the guardian of the public interest with respect to charitable trusts, and when a trustee seeks direction or approval of the court, we expect the Attorney General's recommendation to be furnished after due diligence and careful consideration." DeGiacomo v. Quincy, 476 Mass. 38, 46 (2016).

In short, the Museum contends that without the equitable relief sought, it will soon be unable to operate, completely frustrating its charitable purpose of "aid[ing] in promoting for the people of Berkshire county and the general public the study of art, natural science, and the cultural history of mankind and kindred subjects by means of museums and collections." This court has long held that under the *cy pres* doctrine, "a liberal construction is to be given to charitable donations, with a view to promote and accomplish the general charitable intent of the donor, and that such intent ought to be observed, and when this cannot be strictly and literally done, this court will cause it to be fulfilled, as nearly in conformity with the intent of the donor as practicable." New England Hosp. v. Attorney Gen., 362 Mass. 401, 404 (1972), citing Rogers v. Attorney Gen., 347 Mass.

126, 131 (1964). See Worcester v. Directors of Worcester Free Pub. Library, 349 Mass. 601 (1965) ("It is only when it becomes impossible or impracticable to administer a charitable trust according to its terms that a court of equity will apply the doctrine of *cy pres*"). Otherwise stated, "[t]he application of the *cy pres* doctrine should 'carry out the essential purpose of the donor and at the same time . . . preserve as far as reasonably practicable the details of . . . [her] original scheme.'" New England Hospital, supra, quoting Briggs v. Merchants Natl. Bank, 323 Mass. 261, 275 (1948). Similarly, under the doctrine of equitable deviation, "the court will direct or permit the trustee of a charitable trust to deviate from a term of the trust if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust." Museum of Fine Arts v. Beland, 432 Mass. 540, 544 n. 7 (2000), quoting Restatement (Second) of Trusts § 381 (1959). See Trustees of Dartmouth College v. Quincy, 357 Mass. 521, 531 (1970).

There is no question that the Amici care deeply about the Museum and the future of art and culture in the Berkshires. Indeed, the art displayed in the Berkshire Museum enriches the lives of the entire community, and the Museum is a reservoir of

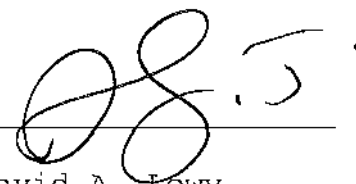
cultural nourishment for all who visit. The Museum's charitable purpose of aiding in the study of art, natural science and cultural history must be protected. The Attorney General is that protector. She is the attorney for the people, including those who now oppose the sale. Following a comprehensive seven-month investigation into the Museum's financial state and its plan to sell a portion of its collection to avoid insolvency, the Attorney General concluded that "the Museum cannot practicably survive without lifting or amending the restrictions on at least some of the works of art to permit their sale."<sup>3</sup> Not only has the Attorney General determined that a limited sale of artwork is necessary, the Attorney General will maintain an active role in overseeing the deaccession of the artwork to ensure that the public's interests are protected.<sup>4</sup> Although the Amici disagree with the Attorney General's ultimate conclusion, the Attorney General has fulfilled her role of investigating the administration of the Museum, particularly the proposed sale.

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<sup>3</sup> According to the Attorney General, the investigation revealed that notwithstanding the Museum's dire financial situation, the Museum considered alternatives to selling a portion of its collection. Ultimately, however, the Museum concluded -- and the Attorney General agreed -- that the Museum's survival would be impossible without the proposed sale.

<sup>4</sup> Pursuant to paragraph forty-eight of the Trustees of the Berkshire Museum's Verified Complaint, the Museum will provide reports to the Attorney General throughout the deaccession process.

See G. L. c. 12, § 8. Based on that investigation, she has determined that an application of *cy pres* or equitable deviation is necessary to allow the Museum to continue its charitable purpose into the future. This is precisely the Attorney General's role in this domain.<sup>5</sup> Accordingly, the assented-to motion for entry of judgment is ALLOWED, and the proposed judgment shall be entered forthwith.

A handwritten signature in black ink, appearing to read "D.A. Lowy", written over a horizontal line.

David A. Lowy

Associate Justice

April 5, 2018

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<sup>5</sup> Given the important concerns presented by the amici, this court encourages that, to the extent possible and with the Museum's best efforts, it shall endeavor to sell the identified works of art as it plans to do with *Shuffleton's Barbershop*, with restrictions for public access to the art. As the Amici have argued, art is best preserved for the benefit of the many, not the few highest bidders.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
No. SJ-2018-065

TRUSTEES OF THE BERKSHIRE MUSEUM

v.

MAURA HEALEY, ATTORNEY GENERAL OF THE  
COMMONWEALTH OF MASSACHUSETTS

JUDGMENT

This matter came before the Court, Lowy, J., presiding, and in accordance with the Memorandum of Decision of this date and the parties' assented-to Motion for Entry of Judgment:

NOW, THEREFORE, it is adjudged and ordered:

1. To the extent notice is required under G.L. c. 214, § 10B, such requirements are met and no further notice is required.
2. The 40 objects listed in Exhibit A are a proper subject for the Court's application of its equitable powers, including deviation and/or *cy pres*.
3. The Museum may sell, via Sotheby's Inc., *Shuffleton's Barbershop*, on the following terms, which will be incorporated into the legal sale document:



- a. The Museum will sell *Shuffleton's Barbershop* to a museum buyer registered as a 501(c)(3) institution.
  - b. Within 120 days of finalizing the acquisition of *Shuffleton's Barbershop*, the buyer will initiate a loan of *Shuffleton's Barbershop* to the Norman Rockwell Museum for a period of 18-24 months.
  - c. Following the loan to the Norman Rockwell Museum, the buyer will explore the possibility of loaning *Shuffleton's Barbershop* to other museums in the Commonwealth of Massachusetts, such as the Museum of Fine Arts in Boston or the Worcester Art Museum.
  - d. The buyer will ultimately display *Shuffleton's Barbershop* in a place of prominence within its museum. The buyer will consider periodically loaning the work to museums in Berkshire County and to public-facing museums in the United States and around the world.
4. The Museum may sell, via Sotheby's, the remaining 39 works free of any restriction, in the event that the sale price net of any fees, commissions, or costs retained by Sotheby's ("net proceeds") received by the Museum from the sale of *Shuffleton's Barbershop* does not exceed \$55 million.
- a. The Museum may sell 39 of the remaining items on Exhibit A in at least three tranches of works, with no more works in any tranche than the Museum deems necessary to be reasonably calculated by the Museum to further its interpretive goals and to arrive at the difference between \$55 million and the net proceeds received by the Museum from the sale of *Shuffleton's Barbershop* and from the sale of any previous tranche(s). For each tranche of works, once the Museum commences sales of the items in a tranche, the Museum may proceed to sell all items included in that tranche. If

the net proceeds received by the Museum from the sale of the first tranche of works, plus the net proceeds received by the Museum of the sale of *Shuffleton's Barbershop*, meet or exceed \$55 million, the Museum will not proceed with the sale of the other works on Exhibit A in connection with subsequent tranches in the New Vision. Otherwise, the Museum may proceed with sale of the second tranche. If the net proceeds received by the Museum of the sale of *Shuffleton's Barbershop* and the first and second tranches meet or exceed \$55 million, the Museum will not proceed with the sale of the other works on Exhibit A in connection with the New Vision. Otherwise, the Museum may proceed with the sale of any subsequent tranche until reaching \$55 million of net proceeds received by the Museum.

- b. The number and identity of the works to be included in each tranche will be determined by the Museum in its sole discretion. The Museum shall utilize the following principles in identifying the works to be included in each tranche:
  - i. The Museum will consider whether to include works in any given tranche for sale based on both the interpretive and financial value of the works to the Museum.
  - ii. The tranches shall be structured and implemented sequentially to accommodate the Museum's desire to sell only those works on Exhibit A that will allow the Museum to best further its interpretive mission as well as the Museum's desire to achieve, as reasonably close as possible, net proceeds received by the Museum from the sales that will reach but not substantially exceed \$55 million.
  - iii. The number and identity of the works in the first tranche shall be at the Museum's sole discretion and shall be reasonably calculated to arrive at the difference between \$55 million and the net proceeds received by the Museum from the sale of

*Shuffleton's Barbershop* such that the Museum may not need to proceed with any further tranches. In selecting the number and identity of the works to be included in the first tranche, in addition to considering the interpretive mission of the Museum, the Museum shall use the median of contemporaneous auction estimates received by the Museum from Sotheby's to estimate the financial value of the works to be included in that tranche.

iv. The number and identity of the works to be included in any subsequent tranches shall be at the Museum's sole discretion, but the number of works in any subsequent tranche shall not exceed 15 items, and shall be reasonably calculated to arrive at the difference between \$55 million and the net proceeds received by the Museum from the sale of *Shuffleton's Barbershop* and net proceeds received by the Museum from the sale of previous tranches. In selecting the number and identity of the works to be included in any subsequent tranche, in addition to considering the interpretive mission of the Museum, the Museum shall use the median of contemporaneous auction estimates received by the Museum from Sotheby's to estimate the financial value of the works to be included in that tranche, and to minimize the further sale of artwork.

c. Although the Museum is under no obligation to do so, the Museum may consider sale terms for any of the 39 works with restrictions for public access to the work and/or to a Museum.

5. The Museum may use the proceeds from the sales of

these works subject to the following conditions:

a. \$50 million of the net proceeds received by the Museum from the sale of these works may be used by the Museum without restriction in furtherance of its charitable purpose.

- b. Net proceeds to the Museum between \$50 and \$55 million will be held by the Museum in a separate fund for the benefit of the Museum's collection and to be used for acquisitions and to support the Museum's collection, including in connection with the New Vision.
- c. Any net proceeds received by the Museum that exceed \$55 million will be further restricted and held by the Museum in a separate fund for the benefit of the Museum's art collection and to be used for acquisitions and to support the Museum's art collection, including in connection with the New Vision.
- d. "Support" in this context (whether of the Museum's collection generally or its art collection) includes but is not limited to capital and operating expenditures for curation, exhibition, collections storage and facilities, related salaries, and conservation efforts.

By the Court, (Lowy, J.)

DAL



Assistant Clerk

Entered: April 5, 2018

EXHIBIT A

Artist	Title/Object
Bierstadt, Albert	Connecticut River Valley, Claremont, New Hampshire
Bierstadt, Albert	Giant Redwood Trees of California
Blakelock, Ralph Albert	Rocky Mountains
Bouguereau, William-Adolphe	La Bourrique (The Horseback Ride)
Bouguereau, William-Adolphe	L'Agneau Nouveau-Ne (The Shepherdess)
Burrini, Giovanni Antonio / Troppa, Girolamo	Apollo and Marsyas/Apollo and Satyr
Calder, Alexander	Dancing Torpedo Shape
Calder, Alexander	The Arc and The Quadrant/Double Arc and Sphere
Church, Frederic Edwin	Valley of the Santa Ysabel
Daubigny, Charles Francois	Early Morning/Payans allant aux champs le matin
Dewing, Thomas Wilmer	Two Ladies in a Drawing Room/The White Dress
Dufy, Raoul	The Party/Card Game
Durrie, George Henry	Hunter in Winter Wood
Hooch, Pieter de	The Music Party
Inness, George	Leeds in the Catskills
Isenbrandt, Adriaen	Adam and Eve/The Temptation
Isenbrandt, Adriaen	Flight into Egypt
Knight, Daniel Ridgway	Reverie/Girl with a Dog
LaFarge, John	Magnolia
Moore, Henry	Three Seated Figures
Moran, Thomas	The Last Arrow
Pasini, Alberto	Market Day in Constantinople
Peale, Charles Wilson	Portrait of General David Forman
Peale, Rembrandt	George Washington
Picabia, Francis	Force Comique
Reynolds, Sir Joshua	Portrait of Mr. W. Cave
Rockwell, Norman	Shaftsbury Blacksmith Shop
Rockwell, Norman	Shuffleton's Barbershop
Saint-Gaudens, Augustus	Diana of the Tower
Simmons, Franklin W.	Penelope
Tadolini, Giulio	Judith
Unknown, China	Archaic Bronze Food Vessel, Gui
Unknown, China	Chinese porcelain vase. Blue on white. Decorated with dragons
Unknown, China	Daoist Screen
Unknown, China	Guanyin figure on lotus on lion – bronze
Unknown, Japan	Japanese screen with tale of Genji
Victors, Jan	Benjamin and His Brethren
Vuillard, Edouard	Deux femmes dans un interieur
Weeks, Edwin Lord	Indian Prince, Palace of Agra
West, Benjamin	Daniel Interpreting to Belshazzar the Handwriting on the Wall

