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2017 WL 6940932 (Mass. Sup. Ct. Nov. 7, 2017)**

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ROCKWELL V. TRUSTEES OF THE BERKSHIRE MUSEUM

**No. 1776CV00253, 2017 WL 6940932 (Mass. Sup. Ct.
Nov. 7, 2017)**

*Kahlia Halpern**

I. INTRODUCTION

This controversy arose from the Trustees of the Berkshire Museum's plan to deaccession forty pieces of art through a contracted sale with Sotheby's, as well as a refocusing of the museum's purpose.¹ The decision brought two separate actions against the Trustees of the Berkshire Museum seeking to prevent the Sotheby's sale.²

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¹*Rockwell v. Trustees of the Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932 (Mass. Sup. Ct. Nov. 7, 2017).

² *Id.* at *1.

The two cases were consolidated before the court. The Plaintiffs include the Rockwell heirs, museum members, donors, and an impacted artist.³ The Defendants include the Trustees of the Berkshire Museum.⁴ The Attorney General of the Commonwealth of Massachusetts possess plaintiff-status if the Plaintiffs cannot establish standing to sue.⁵

As of September 2018, the Attorney General and the Trustees of the Berkshire Museum have reached an agreement and thirty-eight pieces from the Sotheby's auction have been sold.⁶

II. BACKGROUND

A. *Factual Background*

In 1903, Philanthropist Zenas Crane donated a building intending to create the Berkshire Museum, which was to be managed by the Berkshire Athenaeum under the title "Berkshire Museum and Athenaeum."⁷ The two entities were considered

³ *Id.*

⁴ *Id.*; (discussing the Plaintiff's theory of jurisdiction that parties entered into a binding contract or employed precatory language); *Rockwell*, 2017 WL 6940932 at 1 n. 5 (discussing that Hatt plaintiffs based standing on an alternative theory that their membership entitles them to bring derivative claims on behalf of the Museum against the Board of Trustees).

⁵ *Id.*

⁶ Larry Parnass, *All but two works sold, Berkshire Museum Reports*, BERKSHIRE EAGLE (Sept. 12 at 9:00 PM, 2018), <https://www.berkshireeagle.com/stories/hammer-prices-on-berkshire-museums-chinese-works-total-170000,550156>.

⁷ *Rockwell*, 2017 WL 6940932 at *1. (The Trustees of the Berkshire Athenaeum were incorporated by Chapter 129 of the Acts and Resolves of 1871. The Act established that no real or personal property of the Athenaeum, including gifts or bequests, shall be removed from the town of Pittsfield)

distinct collections with a united Board of Trustees.⁸ In 1932, Berkshire Museum acquired independent legal existence and formally incorporated the Trustees of the Berkshire Museum through documents referred to as the “1932 Act.”⁹ Through the enumerated purposes, the museum amassed a collection comprised of thousands of items, least of which were art pieces, and enjoyed sufficient charitable donations until the 1970s.¹⁰

In the 1970s, the Berkshire County population began to change, causing a significant economic loss, from which the Berkshire Museum failed to recover.¹¹ Suffering continual financial peril, the Trustees of the Berkshire Museum began deliberations in 2015 by forming a Master Planning Process (the “MPP”).¹² The MPP sought to address the Museum’s need for economic stability within operation expenses and the Museum’s endowment.¹³ The MPP review process was undertaken by the Trustees over a two-

⁸*Id.*

⁹*Id.* : The 1932 Act officially created the corporation a specific purpose of:

“...establishing and maintaining in the city of Pittsfield an institution to aid in promoting for the people of the Berkshire county and the general public the study of art, natural science, the cultural history of mankind and kindred subjects by means of museums and collection....”

¹⁰ *Id.* at *2. (the collection contained 40,000 items with a majority of items concentrating on natural sciences)

¹¹ *Id.*

¹² *Rockwell v. Trustees of the Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932, *2 (Mass. Sup. Ct. Nov. 7, 2017).

¹³ *Id.* at *10 (discussing the Trustee’s adopted plan costing \$60 million; \$20 million for maintenance and \$40 million to be added to the endowment)

year period, after which the Trustees determined that the deaccession sale and the museum's "new vision" was necessary.¹⁴

An agreement with Sotheby's was signed in June 2017, which contracted the sale of the forty pieces, including two paintings by Norman Rockwell (b. 1894-d. 1978), a local and renowned artist.¹⁵ As the pieces for auction all hail from prominent artists and sculptors, the expected value ranges between \$46 million to \$68 million.¹⁶

B. Procedural Posture

Following announcement of the deaccession plan, two parties initiated separate actions against the Trustees of the Berkshire Museum seeking to halt the sale at Sotheby's Auction House.¹⁷ One action was brought by Norman Rockwell's children, as principal beneficiaries of the estate against the Trustees of the Berkshire Museum, and Maura Healey as Attorney General to the Commonwealth of Massachusetts.¹⁸ The complaint contains two

¹⁴ *Id.* at *2. (The MPP initially considered merging with another museum. After the initial plan was rejected the MPP also considered and adopted more aggressive fundraising, changes in programming, increasing ticket sales, grant writing and reduced operational costs through hiring freezes, reduced hours and reduced programming)

¹⁵ *Rockwell, 2017 WL 6940932, *2* (the two of Norman Rockwell's paintings for auction are "Shuffleton's Barbershop" and "Shaftsbury Blacksmith Shop," both personally donated to the Museum by Norman Rockwell)

¹⁶ *Id.*

¹⁷ *Id.* at *3.

¹⁸ *Id.* at *2-3). (plaintiffs in "Rockwell Case" are Thomas, Jarvis, and Peter Rockwell as beneficiaries, James Lamme, Donald MacGillis, Jonas Dovydenas, and Jean Rousseuo as Museum donors, and Tom Patti as individual with contracted work for the Museum).

counts of injury, with Count I pertaining to the Sotheby's sale under breach of fiduciary duty, breach of trust, and absence of authority and with Count II pertaining to glass work by Tom Patti under contract with the Museum.¹⁹ The requested relief involved rendering the Sotheby's contract void and the prevention of the Museum from deaccessioning the pieces.²⁰

Another action was brought by three Berkshire County residents and members of the museum in Suffolk Superior Court against the Board of Trustees for the Berkshire Museum and twenty-two individual Trustees.²¹ Plaintiffs claimed breach of contract between the Trustees and the museum members as well as breach of fiduciary duty against individual Trustees.²²

By court ordered consolidation and transfer from Suffolk Superior Court, the two actions were bound and brought in the Superior Court of Massachusetts at Berkshire.²³ In a hearing following consolidation, the Attorney General of the Commonwealth of Massachusetts was granted conversion from Defendant to Plaintiff-status to seek the preliminary injunction should Plaintiffs fail to establish standing.²⁴ The court considered whether the Plaintiffs are entitled to a preliminary injunction

¹⁹ *Id.* at *3. (count II is breach of contract regarding the contracted works of Tom Patti).

²⁰ *Id.*

²¹ *Rockwell*, 2017 WL 6940932, (plaintiffs in "Hatt Case" are James Hatt, Kristin Hatt, and Elizabeth Weinberg. James and Kristin Hatt are former members of the Museum and Elizabeth Weinberg is a current member of the Museum. All are residents of Berkshire County)

²² *Id.*

²³ *Id.* at *1.

²⁴ *Rockwell v. Trustees of the Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932, *1 (Mass. Sup. Ct. Nov. 7, 2017).

prohibiting the Museum from selling or disposing of the forty works of art under contract with Sotheby's.²⁵

II. LEGAL ANALYSIS

The court immediately acknowledged that the core concern of the case was that of deaccessioned art.²⁶ Although the practice of deaccessioning pieces from a museum's collection was recognized as both necessary and tolerated, such a perception was exclusively reserved for when museums acquire greater pieces of art.²⁷ When used for the purpose of raising operation funds, however, the practice is typically condemned despite being "neither illegal nor unethical per se...."²⁸ Because of conflicting beliefs regarding the practice, the court stated that "every proposed deaccession must be examined on its own merits."²⁹ The issues concerning this particular case were thus, (1) whether the non-governmental plaintiffs possess standing, and if not, (2) whether the Attorney General satisfied the requirements for a preliminary

²⁵ *Id.* at *3.

²⁶ *Id.* at *4.

²⁷ *Id.*

²⁸ *Id.* (Discussing the Association of Art Museum Directors' policy on deaccession items for a museum's collection).

²⁹ *Id.* (The art world relies upon two tools to control deaccession including self-regulation and peer regulation. Self-regulation involves the policies and procedures that a museum enacts to influence its operations. Here, the Berkshire Museum allowed for deaccession and had specific policies for such an occurrence. Peer-regulation relies on accreditation and professional ethical codes with his undertaken by both the American Association of Museums and the American Association of Museum Directors. There is little legal authority in both statutory and case law regarding these types of conflicts).

injunction.³⁰

A. Standing

The first issue was whether the non-governmental plaintiffs had standing to request the preliminary injunction.³¹ As expressed by the court, there exists a well-established law that authorizes only the Attorney General to “enforce public rights in a public charity,” reasoning that the law presumes the Attorney General to be more capable of protecting public charitable trusts than the general public.³² Thus it was maintained that in order to assert standing “it [fell] on would-be plaintiffs to demonstrate that they [sought] to enforce some kind of private right....”³³

The Court held that none of the non-governmental Plaintiffs successfully demonstrated that a private right confers onto them standing to bring claims against the Trustees in place of the Attorney General.³⁴ As neither the Rockwell or the Hatt

³⁰ *Rockwell v. Trustees of the Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932, *4 (Mass. Sup. Ct. Nov. 7, 2017).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at *5; *Id.* at *6 (The Rockwell heirs and beneficiaries of his trust did not have standing because the private right to enforce their father’s contracts belonged to his estate or trust which was not a party to the litigation. Patti did not have standing because although he possessed the private right to enforce his own contracts against the Museum, his works were not designated for deaccession and his injuries were speculative. The members of the Museum who have made substantial donations to the Museum did not have standing because they were not suing to enforce a right only available to them as members. The residents of Berkshire County did not have standing because their interest was indistinguishable from that of the general public. The residents of Pittsfield did

Plaintiffs possessed a private right distinguishable from that of the public right, which was enforceable only by the Attorney General, the requests for a preliminary injunction were denied and their complaints were dismissed.³⁵ The Attorney General then assumed Plaintiff-status and established standing to request that the Museum be enjoined from conducting the Sotheby's auction.³⁶

B. *The Merits*

Following the Attorney General's establishment of standing, the second issue was whether the Attorney General satisfied the requirements for acquiring a preliminary injunction to prohibit the sale of forty works through the Sotheby's auction.³⁷ To prevail on such a motion, the Attorney General had to show "(1) a strong likelihood of success on the merits of the claim, (2) that they suffer irreparable harm without the requested injunctive relief, and ... (3) [that] the harm, without the injunction outweighs any harm to the defendant from being enjoined."³⁸

Although the Attorney General admitted to failing to complete its investigation into the matter prior to assuming Plaintiff-

not have standing because the 1871 Act did not expressly give citizens of Pittsfield any right to enforce the Act's restriction prohibiting the removal of property from Pittsfield.)

³⁵ *Id.* at 6.

³⁶ *Rockwell v. Trustees of the Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932, *6 - *9 (Mass. Sup. Ct. Nov. 7, 2017). (The court also expressed concerns regarding the AGO's initial investigation which was incomplete despite extensive opportunity to formulate a more comprehensive understanding of the matter. It was expressly stated that "it is obvious that the AGO's lack of aggressiveness speaks volumes to this court.").

³⁷ *Id.* at *4.

³⁸ *Id.* at *3.

status, the Attorney General asserted that the Trustee's plan raised concerns and that allowing the sale to proceed before the close of the investigation would "interfere irreparably with the AGO's duty to protect charitable assets and the public interest."³⁹ The Attorney General's concerns regarded whether the Trustees "[had] breached or [would have breached] their fiduciary duties by selling the objects as planned."⁴⁰ The three specific grounds in support of the motion for a preliminary injunction included: (1) the Sotheby's sale could be a breach of fiduciary duty; (2) the sale could be a breach of three alleged trusts; and (3) if the sale occurs before the Attorney General finishes its investigation, "the public will have been deprived of the Attorney General's oversight."⁴¹ Accordingly, the Court was required to enjoin the sale if it concluded that "it was more likely than not that the Attorney General [would] prevail on any of [the] three grounds and that, as a result, the sale would adversely affect the public interest."⁴²

i. Breach of Fiduciary Duty

For a preliminary injunction to be issued on the basis of a breach of fiduciary duty, the Attorney General had to demonstrate that it was more likely than not that "(1) the Trustees had a fiduciary duty to the public; (2) that the Trustees breached or [would] have breached that duty; (3) that the public [had] been or [would have been] damaged; and (4) that the Trustees' fiduciary breach has caused or [would have] caused the public injury."⁴³

³⁹ *Id.* at *9.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Rockwell v. Trustees of the Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932, *9 (Mass. Sup. Ct. Nov. 7, 2017).

⁴³ *Id.*

The AGO's threshold argument contended that the Trustees breached or would have breached their statutory duty of care as a charitable corporation.⁴⁴ To evaluate whether a breach occurred or would occur, the Attorney General suggested that the Trustees should have been held to a heightened standard of scrutiny as opposed to the standard business judgment rule.⁴⁵ The Court concluded that the statutory duty of care for nonprofit organizations are essentially identical to that of private businesses, thus applying the standard business judgment rule.⁴⁶ Therefore, the Trustees' actions were scrutinized to "confirm that their decisions measure up not only to the standard business judgement rule, but also that their choices reflect their "high degree of accountability to the individual donors as well as the community.""⁴⁷

First, the Attorney General argued that the Trustees unreasonably chose an excessive recovery plan.⁴⁸ However, the Court determined that the Trustees undertook reasonable efforts to consider multiple plans over a two-year period. Furthermore, the Court reasoned that the Trustees' plan was a non-aggressive choice and demonstrated a "commitment to the community to keep the Museum operational," as the decision allowed for the improvement

⁴⁴ *Id.*

⁴⁵ *Id.* at *9-10. (Under the business judgment rule, a board must perform its duties "in good faith, with the care that a person in a like position would reasonably believe appropriate in similar circumstances and in a manner...reasonably believed to be in the best interest of the corporation." During oral arguments, the Attorney General contended that the Trustees' decision was made in good faith).

⁴⁶ *Id.* at *10.

⁴⁷ *Rockwell v. Trustees of the Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932, at *10 (Mass. Sup. Ct. Nov. 7, 2017).

⁴⁸ *Id.* (Discussing the fact that the Trustees' consultant found that the Museum needed \$25.6 Million for operations yet opted for a plan consisting of \$60 Million—\$20 Million for upgrades and \$40 Million for the endowment.).

of the facilities and the maximization of the Museum's endowment.⁴⁹ Thus, it was held that the Trustees did not fail to consider the individual donors and the community.⁵⁰

Second, the Attorney General argued that the Trustees' decision to deaccession the works was unreasonable because it "violated general museum ethics and would result in sanctions."⁵¹ However, the Attorney General failed to cite to any case, statute, or AGO policy in support of the proposal that to be reasonable, the board's decisions must follow the field's professional ethics.⁵² It was thereby determined that the Trustees considered the ethical implications and weighed the potential ramifications before making their decision.⁵³ The Court stated that although the Trustees' decision would subject the Museum to significant sanctions and exclusion from the industry per the professional ethics oversight of the Association of Art Museum Directors, it was not without cause.⁵⁴ Thus reasoning that, while the Museum will be excluded from the ability to be loaned items from most accredited museums for a period of time, the significant assets gained in the Sotheby's sale would allow the Museum to thrive during such time.⁵⁵ Moreover, public and professional dissatisfaction was not enough to render the Trustees' actions unreasonable given the Museum's peril.⁵⁶ Thus, the Court again held that the Trustees' difficult

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Rockwell v. Trustees of the Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932, at *10 (Mass. Sup. Ct. Nov. 7, 2017).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

decision indicated a careful consideration of the individual donors and community.⁵⁷

Third, the Attorney General argued that the Trustees “unreasonably decided to violate the Museum’s collections management policy by choosing to deaccession the Museum’s most valuable artwork to pay for operational costs.”⁵⁸ However, it was found that the Trustees demonstrated that they were not bound by a policy, such policy was not referenced in the Museum’s charter, articles of incorporation, or bylaws.⁵⁹ The Court thus determined that the Trustees’ decision to supersede its policy was reasonable “in [the] circumstance in light of the extreme financial concerns before them...”⁶⁰ It was therefore held that the two-year period during which the Trustees’ undertook deliberations regarding their plan, demonstrated that they were “mindful of the donors and the community in that they did not disregard the collections management policy in haste.”⁶¹

Fourth, and finally, the Attorney General argued that the Trustees failed to discover the pre-1932 restrictions on some of the deaccessioned pieces as well as to notify the AGO of the restrictions.⁶² The AGO believed that such failures rendered the deaccession plan unreasonable.⁶³ However, it was found that whether or not there was a restriction on items donated before 1932, it would not have rendered the deaccession of the older objects

⁵⁷ *Id.*

⁵⁸ *Id.* at *11.

⁵⁹ *Rockwell v. Trustees of the Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932, at *11 (Mass. Sup. Ct. Nov. 7, 2017).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

unreasonable.⁶⁴ The Court reasoned that the Museum's accession "slips" did not contain any restriction on pre-1932 objects.⁶⁵ It was further suggested that it fairly assumed that even if a restriction applied, the chance of enforcement was slim.⁶⁶ Moreover, the Court theorized that all provenance of the Museum's earliest objects could reasonably be traced to Zenas Crane, the founder of the Museum in 1903, and who in 1932 was a significant donor in establishing the Museum as an independent entity. As such, when evaluating the provenance and the Museum's 1932 charter which contained no geographical restriction, the Trustees could have concluded that Zane Crane had no intention that the earlier pieces be kept in Pittsfield.⁶⁷

On the claim involving failure to notify the AGO of restrictions, the Court held that the risk associated with the deaccession of older pieces was minimal and thus not unreasonable.⁶⁸ The risk was minimal as the AGO, in its own investigation, took two months to discover the possibility of restrictions, which was only illuminated after a member of the community provided the relevant information.⁶⁹ Accordingly, the AGO's own failure to discover theories of restrictions for certain objects allows the Museum's failure to seem reasonable.⁷⁰

Overall, on the issue of breach of fiduciary duty grounded in reasonableness, the Court held that the Trustees' decision was not unreasonable under any concerns raised by the AGO and that the

⁶⁴ *Id.*

⁶⁵ *Rockwell v. Trustees of the Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932, *11 (Mass. Sup. Ct. Nov. 7, 2017).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

Trustees did not fail to consider public interests in making their decision.⁷¹ The Trustees were held to the standard of reasonable care under the circumstance, which was determined to have been met in the Trustees' undertaking of extensive deliberations in reviewing all options available to them, and in selecting the option they believed to be the most appropriate.⁷²

ii. Breach of Fiduciary Duty by Breach of Trust

The Attorney General additionally complained that the sale would breach one of three trusts including: (1) the alleged trust containing the pre-1932 restrictions; (2) Norman Rockwell's supposed inter vivos trust; and (3) the trust central to the Museum's charter.⁷³ To support the preliminary injunction, the Court stated that the Attorney General must have demonstrated by the preponderance of the evidence that "(1) a trust exists; (2) the Trustees breached or [would] have breach[ed] the trust; (3) the public was or [would] be injured; and (4) that the Trustees' fiduciary breach caused or [would] cause the injury to the public."⁷⁴

The Attorney General first suggested that the trusts were "constructive" rather than based on an express declaration.⁷⁵

⁷¹ *Rockwell v. Trustees of the Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932, *12 (Mass. Sup. Ct. Nov. 7, 2017).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* ("a constructive trust is an equitable remedy used to avoid the unjust enrichment of one party at the expense of another, where legal title to the property in issue was obtained either by fraud, in violation of a fiduciary relationship, or where information confidentially given or acquired was used to the advantage of the recipient at the expense of the one who disclosed the information" Newhall, *Settlement of Estates* (5th ed.) § 36:2, p. 13.)

However, the Attorney General made no allegation that any of the trusts arose from “fraud, a violation of a fiduciary relationship, or unfair use of secret information....”⁷⁶ Because no such allegation existed, the doctrine of constructive trusts did not apply.⁷⁷ Furthermore, the trust similarly could not be categorized as “implied” trusts.⁷⁸

Instead, the Court specified that the proposed trusts were best categorized as “voluntary inter vivos,” or life time, trusts where, according to the Attorney General, it was the terms of the trust that were implied, not the trusts themselves.⁷⁹ The Court recognized that a gift to a charity typically creates a charitable trust with terms that are either express or implied based on the circumstances of the gift.⁸⁰ It was further established that with the proposed trusts, the donor could have chosen to donate with or without restrictions.⁸¹ If no restrictions existed, then the public charity’s use of the gift was limited to those uses that were deemed best for the accomplishment of the charity’s purpose.⁸² Comparatively, if restrictions existed, then the use would be limited to “the particular purpose for which the property was given.”⁸³

⁷⁶ *Id.*

⁷⁷ *Rockwell v. Trustees of the Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932, *12 (Mass. Sup. Ct. Nov. 7, 2017).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at *13.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Rockwell v. Trustees of the Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932, *13 (Mass. Sup. Ct. Nov. 7, 2017). (If the charitable trust is alleged to be unrestricted the court must determine the scope of the corporate purposes to decide whether the Sotheby’s sale would be in breach of trust. If the charitable trust was allegedly restricted by the donor, then the court must determine the

a. Pre-1932 Restrictions

The Court first examined the trust including the pre-1932 restrictions, which was alleged to govern all donations to the Museum before being separately incorporated from the Berkshire Athenaeum in 1932.⁸⁴ The trust prohibited “real and personal property, or such gifts, devises or bequests” held by the Berkshire Athenaeum to be removed from Pittsfield.⁸⁵ The issue was thus whether it was more likely than not that the “corporate purpose of the Berkshire Athenaeum [encompassed] the Pittsfield geographical restriction.”⁸⁶ The Court held that because the geographical restriction did not appear within or closely to the “purposes” provision, the corporate purpose did not encompass the restrictive bar.⁸⁷

The Court reasoned that even if not listed within the purposes of the statutory charter, the Legislative intent demonstrated that the restriction was grounded in the limitation of possession and not of use.⁸⁸ It was also noted that the clause directly before the geographical location restriction provided “that donor-

breadth of those restrictions to see if the Sotheby’s auction would violate them, breaching the trust)

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* (§ 1 of the Berkshire Athenaeum’s corporate charter provides that it was to be incorporated “for the purpose of establishing and maintaining in the town of Pittsfield an institution to aid in promoting education, culture and refinement, and diffusing knowledge by means of a library, reading-rooms, lectures, museums, and cabinets of art and historical and natural curiosities.” § 2 contains the geographical restriction)

⁸⁷ *Id.*

⁸⁸ *Id.* at *14.

imposed restrictions should not conflict with the corporate purposes,” indicating that if the restriction was meant to modify corporate purposes, it should have been listed before the clause referring to the corporate purposes.⁸⁹ Thus, the court concluded that the Museum was not restricted in using the pieces received prior to 1932 in a way that removes those pieces from Pittsfield.⁹⁰

b. The Rockwell Charitable Trust

The court then examined the Rockwell trust, which the Attorney General argued were gifts subject to a separate trust than that of the charter.⁹¹ It was noted that if the separate trust contained donor restrictions that were accepted by the charity, the charity would be barred from using the gift in violation of those restrictions.⁹² To determine whether Norman Rockwell intended to restrict the use of his paintings in gifting them to the Museum, the court considered the circumstances surrounding the gift.⁹³ In both instances of gifting to the Museum, however, Rockwell failed to declare any trust.⁹⁴ After donating the first painting, however, Rockwell received a letter from the Museum’s director accepting the paintings and stating that the paintings were to part of the

⁸⁹ *Rockwell v. Trustees of the Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932, *14 (Mass. Sup. Ct. Nov. 7, 2017).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* (Whether a trust is created depends primarily on the manifestation by the parties of an intention to create a trust and that is ordinarily a question of fact. The donor’s intent “is to be ascertained from a study of the instrument as a whole in light of the circumstance attending its execution.)

⁹³ *Id.*

⁹⁴ *Id.* at *15.

Museums “permanent collection.”⁹⁵ As also contended by the Attorney General, “permanent collection” is a phrase regularly used by museums when accessioning objects and does not imply actual permanency.⁹⁶

On this matter, it was therefore concluded that the meaning of the phrase “permanent collection” was well-known to both parties at the time of the gift and that the practice of deaccessioning artwork was not yet commonplace.⁹⁷ Thus the court was led to believe that either Rockwell did not know to restrict the use or purposefully intended to not restrict the use of his gifts.⁹⁸ Consequently, the Rockwell gifts were governed by the corporate purposes established within the Museum’s charter at the time of the gifts.⁹⁹

c. Charitable Trust Based on the Museum’s Charter

The last trust examined by the court was that of the Museum’s charter, which the Attorney General argued would be violated by the Museum’s “New Vision” plan.¹⁰⁰ The Museum’s statutory charter provides that all unrestricted gifts donated to the Museum can only be used for the “advancement of maintaining the facilities, and promoting art, science, history, and “kindred

⁹⁵ *Rockwell v. Trustees of the Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932, *15 (Mass. Sup. Ct. Nov. 7, 2017).

⁹⁶ *Id.*

⁹⁷ *Id.* at *15-16.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Rockwell v. Trustees of the Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932, *16 (Mass. Sup. Ct. Nov. 7, 2017). (The Museum’s New Vision includes a refocusing of the Museum’s collection to primarily that of natural science exhibits).

subjects”.”¹⁰¹ The issue was whether it was more likely than not that the “sale of a substantial portion of the Museum’s art would violate its corporate purposes.”¹⁰² The court found that there was no evidence that a sale of art would violate the Museum’s charter, that deaccessioning was not itself a violation of professional ethical standards, and that there was no prohibition against selling unrestricted donation in Massachusetts without permission by court of the AGO.¹⁰³ It was thereby held that the sale did not violate the Museum’s corporate purpose.¹⁰⁴

The Attorney General also argued that rather than the sale itself being problematic, the addition of the Museum’s New Vision to the sale would violate the Museum’s charter in changing the nature of the Museum.¹⁰⁵ However, there was little authority for the court to “enjoin a party, let alone a corporate board charged with a duty of reasonable care, from doing a lawful act for the sole reason that it anticipates the party will use that lawful act to springboard into an unlawful one.”¹⁰⁶ Therefore, the court concluded that it was unlikely that the “Sotheby’s sale [would] breach the Museum’s charter and the court [had] no cause to grant injunctive relief on this ground.”¹⁰⁷

¹⁰¹ *Id.*

¹⁰² *Id.* at *17.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Rockwell*, 2017 WL 6940932, at *17.

¹⁰⁷ *Id.*

iii. *The Attorney General's Incomplete Investigation*

The final argument examined was that of the Attorney General's request for injunctive relief based in the fact that the AGO had not finished investigating its concerns.¹⁰⁸ However, while the Trustees' proposed sale would be significant, the sale alone would not materially alter the use of the assets or any donor restrictions, and the sale would not fall below the fair market value of the pieces.¹⁰⁹ Furthermore, the Attorney General had not moved for a continuance or communicated the reasons for which the AGO required additional time to complete its investigation.¹¹⁰ Moreover, the AGO's investigation lacked any evidence of "bad faith, conflict of interest, breach of loyalty, express gift restrictions, or...implied gift restrictions or a breach of reasonable care...."¹¹¹ Thus the court held that in weighing the public interests of allowing the AGO to conduct thorough investigations on behalf of the public and preventing a significant loss to a public charity, an injunction extending the investigation under those circumstances "would adversely affect the public and be inconsistent with the requirements of such request."¹¹²

IV. FUTURE IMPLICATIONS

Although it is unclear how the *Rockwell v. Trustees of the Berkshire Museum* decision will impact future litigation regarding

¹⁰⁸ *Id.* at *18. (The AGO's policy is that charities only need to give official notice when they seek to sell substantially all of their assets).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Rockwell*, 2017 WL 6940932, at *19.

the deaccession of museum collections, the outcome poses important issues for future consideration.

First, the *Rockwell* decision bolsters the well-established principle regarding standing in the protection of public charitable trusts.¹¹³ The rule establishes that only the Attorney General has standing to “protect public charitable trusts and to enforce proper application of their funds and assets.”¹¹⁴ Accordingly, to overcome the general prohibition against public standing, a plaintiff must establish that she possess a private right distinct from that of the public’s, or Attorney General’s, rights.¹¹⁵ In finding as such, the court engaged in a thorough explanation dispelling the potential conference of standing for future plaintiffs identified as heirs, donors, members, local residents, or contracting artists not at risk of sale.¹¹⁶

Second, the *Rockwell* decision recognizes that violations of professional and ethical standards do not automatically render a museum’s practices unreasonable or unlawful.¹¹⁷ According to the Association of Art Museum Directors’ Policy on Deaccessioning and Code of Ethics, the use of proceeds generated from deaccessioned pieces in operational costs is not tolerated.¹¹⁸ As such, when engaging in such practices, Museums in violation are exposed to a “freeze-out from the industry during which time the Museum will not be loaned exhibits from most, if not all, accredited museums.”¹¹⁹ Here, a decision favoring deaccession voluntarily

¹¹³ *Id.* at *4.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at *5.

¹¹⁶ *Id.* at *6.

¹¹⁷ *Id.* at 10.

¹¹⁸ *Rockwell*, 2017 WL 6940932, at *4.

¹¹⁹ *Id.* at *10.

subjects the Museum non-court mandated sanctions.¹²⁰ However, the court recognizes that there is a difference between the law and professional guidelines. When guidelines are broken that do not appear with binding documents or within state law, a court can consider whether the actions of the museum were reasonable under the circumstances.¹²¹ Here, the Museum's financial difficulties were so severe as to threaten closure of the museum to the public, necessitating extreme efforts.¹²² Therefore, in carefully determining a course of action which allows the public to maintain access to the museum, subjecting one's own organization to potentially harmful sanctions may be reasonable.¹²³

Third, and finally, the *Rockwell* decision represents a polarizing determination, which may facilitate further discussion amongst the art and museum community. The court noted that the decision meant that "timeless works by an iconic, local artist [would] be lost to the public..." and that many would be disappointed with the ruling.¹²⁴ Comparatively, however, the decision also meant that the rights of a charitable board to "make thoughtful decisions" in an effort to overcome financial peril had been justified.¹²⁵ In balancing the two opposing perspectives of deaccessioning pieces of art as well as the potential consequences there are many considerations both parties must make. For museums, there must be a consideration as to whether the proposed

¹²⁰ *Id.*

¹²¹ *Id.* at *11.

¹²² *Id.* at *2 (Court stated that "...it is beyond cavil that the Museum's financial outlook is bleak.); *Rockwell*, No. 1776CV00253, 2017 WL 6940932 at 10 (Court noted that deaccessioning had become a "necessary evil in the museum industry due...to loss of funding and economic upheaval).

¹²³ *Id.* at *10-11.

¹²⁴ *Rockwell*, 2017 WL 6940932, at *19.

¹²⁵ *Id.*

plan is reasonable and the most beneficial to all those affected by such determinations. Furthermore, museums must consider whether an institution could withstand potential ramifications of violating professional standards. Similarly, the public must consider whether the protection of some collection pieces warrants the potential loss of an entire entity.

V. CONCLUSION

After analyzing each of the Attorney General's arguments, the court found that the Attorney General failed to satisfy the requirements in order to prevail on a request for a preliminary injunction.¹²⁶ Thus, the court denied the Attorney General's request for a preliminary injunction enjoining the sale of significant pieces within the Museum's collection based on the legal merits of the claims presented despite an awareness of the disappointment in such an outcome.¹²⁷

¹²⁶ *Id.*

¹²⁷ *Id.*

