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When It's OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses

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NOTES

When It's OK To Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art To Meet Museum Operating Expenses

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INTRODUCTION

Art museums present the paradox of being simultaneously very rich, because of the value of the assets they hold,[1] and very poor, due to the illiquidity of those assets and high operation costs.[2] Although a quick calculation of a museum's physical assets, composed primarily of its art collection, could yield a number reflecting large-scale wealth, the art museums of this country nevertheless are continually burdened by financial crises.[3]

As a result of this financial hardship, it is not difficult to imagine the following situation: A museum needs funds, not for the purpose of purchasing more art,[4] but for a variety of other purposes,

1. *See* STEPHEN E. WEIL, *On a New Foundation: The American Art Museum Reconceived, in* A CABINET OF CURIOSITIES: INQUIRIES INTO MUSEUMS AND THEIR PROSPECTS 81, 84 (1995) (estimating that, in 1989, museums held $65 billion worth of art in their collections).

2. *See* Peter Temin, *An Economic History of American Art Museums, in* THE ECONOMICS OF ART MUSEUMS 179, 179-80 (Martin Feldstein ed., 1991) (stating that, while art museums have "substantial collections of assets," their operating budgets run at a deficit); STEPHEN E. WEIL, *The Deaccession Cookie Jar, in* A CABINET OF CURIOSITIES, *supra* note 1, at 139, 140 ("[I]n the particular case of museums, there is a grotesque disproportion between the estimated market values of their collections and the funds that they generally have available to meet their ongoing operating needs.").

3. Many factors have contributed to this condition, for example, a decrease in patronage from various sources, including individuals, foundations, and corporations, and a decline in supportive governmental policy for the arts, manifested in part by the budget cuts suffered by the National Endowment for the Arts. *See, e.g.*, Robert Pear, *Alexander Makes Case For the Arts Endowment*, N.Y. TIMES, Jan. 27, 1995, at B1. These declines in funding are unfortunately accompanied by an increase in operating expenses, including the rising costs of purchasing and maintaining artwork. *See* STEPHEN E. WEIL, *The Multiple Crises in Our Museums, in* BEAUTY AND THE BEASTS: ON MUSEUMS, ART, THE LAW, AND THE MARKET 3, 5-7 (1983) (discussing the financial crisis of "broke" museums facing "soaring expenses"); *see also* Richard E. Oldenburg, *General Overview, in* THE ECONOMICS OF ART MUSEUMS, *supra* note 2, at 112, 113-15 (noting that the cost of art is rising while funding from various sources is disappearing); Richard N. Rosett, *Art Museums in the United States: A Financial Portrait, in* THE ECONOMICS OF ART MUSEUMS, *supra* note 2, at 129, 129-30 (noting that art museums are "plagued by rising costs of acquiring, caring for, and exhibiting fine art, shrinking support from some traditional sources of revenue, and decreasingly supportive public policy").

4. The storage rooms of many museums are already overflowing with excess works that are not exhibited. *See* Martin Feldstein, *Introduction* to THE ECONOMICS OF ART MUSEUMS, *supra* note 2, at 1, 8.

such as maintenance — including conservation of artwork as well as building repairs — personnel salaries, or repayment of loan debt. The museum director considers selling — or "deaccessioning"[5] — certain works not controlled by donor restrictions.[6] Neither the museum's trust instrument,[7] if established as a trust, nor the museum's charter or bylaws, if a corporate entity, contemplates how proceeds from any forthcoming sale may be used.[8] It is unclear whether the director can apply the proceeds from the sale of the works toward the museum's operations budget rather than the art-acquisitions budget.[9]

With reduced funding, some museums have turned to "deaccessioning," the removal of an object from a museum collection with the intent to sell it. The current public outcry over deaccessioning highlights the financial exigencies of art museums today, as reflected in the above hypothetical. In the past, many in the museum world, as well as the public, found deaccessioning to be an unpalatable concept, as it involves contemplating each work of art in a museum collection as a fungible asset. Museum officials are understandably uncomfortable with this characterization of art; works of art have an intrinsic value to them which is completely

5. Although "deaccessioning" literally refers just to the removal of the work from the collection, this Note uses it, as most commentators do, to stand for the entire process of liquidating artistic assets, with the sale of the work as the most important aspect of that process. *See* Linden Havemeyer Wise & Beverly M. Wolff, *Deaccessioning, Disposition, and the Pledge of Museum Collections: The Legal Parameters, in* LEGAL PROBLEMS OF MUSEUM ADMINISTRATION 107, 109 n.1 (A.L.I.-A.B.A. 1991).

6. This Note does not discuss the issue of how museums deal with donor restrictions on bequests made to the museums. When making gifts to museums, donors often stipulate that their gifts cannot be sold. *See* STEPHEN E. WEIL, *Deaccession Practices in American Museums, in* RETHINKING THE MUSEUM 105, 108 (1990). Donor restrictions on the disposition or use of objects presents the issue of the legality of the actual sale — as opposed to the use of the proceeds — and may call for the invocation of the *cy pres* doctrine by the courts in order to allow deviation from the terms of the donor's grant. *Cy pres* is a

> doctrine in the law of charities whereby when it becomes impossible, impracticable, or illegal to carry out the particular purpose of the donor a scheme will be framed by a court to carry out the general intention by applying the gift to charitable purposes that are closely related or similar to the original purposes.

Id. at 117 n.7. These deviations bring up sensitive issues of donors' intent that need not be contemplated for the topic at hand. When such restrictions are relevant to the discussion, they are specifically mentioned; otherwise, it may be assumed that no donor restrictions exist on any works of art earmarked for deaccessioning.

7. The trust instrument or indenture is "the document by which property interests are vested in the trustee and beneficiary and the rights and duties of the parties (called the trust terms) are set forth." GEORGE T. BOGERT, TRUSTS § 1 (6th ed. 1987).

8. The form of organization typically taken by museums is discussed *infra* in section I.A.

9. There are many cases similar to this scenario, but, for a typical situation, see Hammond Museum, Inc. v. Harshbarger, No. 92E-0067-G1 (P. & Fam. Ct. Essex County, Mass. Oct. 5, 1992). In *Hammond Museum,* the museum trustees sought court approval of a deaccessioning plan aimed at raising funds to pay off a bank loan and perform maintenance. The court approved the request but did not set forth any guidelines regarding the use of the deaccessioning proceeds.

distinct from their pecuniary value on the market.[10] According to the International Council of Museums, a museum is "a permanent establishment administered in the public interest with a view to conserve, study, exploit by various means and, basically, to exhibit, for the pleasure and education of the public, objects of *cultural* value."[11] Although cultural value often translates into high dollar value, the cultural value of a work of art is an important consideration independent of the price that work of art might bring on the market.[12]

Despite these justifications for avoiding any form of deaccessioning, the museum community generally recognizes the propriety of selling artwork in order to purchase other — presumably superior or more appropriate — art for the collection.[13] Some museum

10. *See* STEPHEN E. WEIL, *Testimony Prepared for the Financial Accounting Standards Board, Norwalk, Connecticut, in* A CABINET OF CURIOSITIES, *supra* note 1, at 145, 146-48 (discussing the difficulty of valuing art because "art is in no way like such other subjects of appraisal as real estate in which there may be genuine comparables to support a valuation"); *see also* Steven L. Katz, *Museum Trusteeship: The Fiduciary Ethic Applied,* J. ARTS MGMT. & L., Winter 1987, at 57, 73 ("Unlike corporations, which may recover quarterly losses through subsequent sales of essentially fungible commodities, objects in museum collections are unique."); Joshua C. Taylor, *The Art Museum in the United States, in* ON UNDERSTANDING ART MUSEUMS 34, 37 (Sherman E. Lee ed., 1975) ("[A]ccepted works of art are not simply collectible curiosities or cultural artifacts, but have a moral and aesthetic existence of their own.").

11. WILLIAM HENDON, ANALYZING AN ART MUSEUM 27-30 (1979), *reprinted in* 2 JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 640, 641 (2d ed. 1987) (emphasis added) (internal quotations omitted); *see also* MERRYMAN & ELSEN, *supra*, at 640-50; STEPHEN E. WEIL, *An Inventory of Art Museum Roles, in* BEAUTY AND THE BEASTS, *supra* note 3, at 30, 31 ("The museum — in its most fundamental role — is that place where objects are preserved for the public to see."). The museum's special obligation to the public complicates even further the characterization of art as a financial asset:

> Those who are responsible for museums rightly see themselves as the protectors of the treasures that our generation has inherited from the past, as the collectors of the creative activity of the current time, and as teachers who help the broad public to know and appreciate these works of art.

Feldstein, *supra* note 4, at 10.

12.

> Because the forces that drive the market are not the same as those that drive art, and because the goals of the two are not the same, the museum must keep its sights clear on what is important in art and not be overly influenced or driven by what may be important in the market.

Julia Brown Turrell, *The Museum's Collection, in* THE ECONOMICS OF ART MUSEUMS, *supra* note 2, at 15, 16.

13. *See, e.g.,* Feldstein, *supra* note 4, at 8 (noting the change of attitude toward deaccessioning despite a "natural reluctance" to endorse this practice); Elaine L. Johnston, *Deaccessioning to Raise Operating Funds: Recent Cases, in* LEGAL PROBLEMS OF MUSEUM ADMINISTRATION 165, 167 (A.L.I.-A.B.A. 1993) ("It is well-established that a museum may legally and ethically deaccession collection objects in appropriate circumstances, provided there are no specific restrictions against disposal."); Katz, *supra* note 10, at 62 ("[D]eaccessioning in and of itself is not wrongful."); WEIL, *supra* note 6, at 105-06 (describing the change in attitude toward deaccessioning as a process for "pruning and upgrading collections"); Wise & Wolff, *supra* note 5, at 110-15 (discussing cases demonstrating that "the courts have allowed museums wide latitude in disposing of works of art"). The codes of ethics aimed at museum professionals recognize the right of museums selectively to dispose of objects in order to improve the collection. *See infra* note 21.

directors[14] now seek to extend the practice so that they may use deaccessioning proceeds for purposes other than buying art for the collection.[15] These proposals have shifted the focus of the deaccessioning controversy from the overall propriety of selling objects to the permissible uses of the proceeds from these sales.

Deaccessioning controversies generally come to the attention of courts in one of two ways: through directors seeking court approval prior to deaccessioning[16] or through the state attorney general seeking to prevent such a transaction.[17] The attorney general also

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14. In a nonprofit corporation, the preferred term for a member of the board is a *trustee* rather than a *director*. *See* HOWARD L. OLECK & MARTHA E. STEWART, NONPROFIT CORPORATIONS, ORGANIZATIONS, & ASSOCIATIONS § 271 (6th ed. 1994). The *director* in the museum context usually refers to the professional who works directly with the curatorial staff and is accountable to the trustees. *See* Patty Gerstenblith, *The Fiduciary Duties of Museum Trustees*, 8 COLUM. J. ART & L. 175, 177 n.5 (1983). Contrary to common practice, this Note refers to nonprofit board members as *directors* in order to avoid confusion with *trustees* of actual trusts.

15. Recently, there have been some highly publicized cases of deaccessioning by museums or other nonprofit cultural institutions. *See* Michael Kimmelman, *Should Old Masters Be Fund-Raisers?*, N.Y. TIMES, Jan. 8, 1995, § 2, at 1 (describing a sale by the New York Historical Society of Old Master paintings for purposes of replenishing its endowment fund for operating expenses); Carol Vogel, *Met Blocks Sale So It Can Keep An Old Master*, N.Y. TIMES, Jan. 13, 1995, at B1 (same); *see also* Carol Vogel, *Leonardo Notebook Sells for $30.8 Million*, N.Y. TIMES, Nov. 12, 1994, at A1 (describing a sale by the Armand Hammer Museum of Art and Cultural Center of one of Leonardo da Vinci's notebooks for purposes of raising money to defend a lawsuit).

The more common — and less publicized — cases are much like the hypothetical described above. *See supra* text accompanying notes 4-9. In Trustees of Everhart Museum v. Commonwealth, No. 1043-92 (C.P. Orphans' Ct. Lackawanna County, Pa. Aug. 25, 1992), the support received by the museum from the city and state was reduced by nearly 40%, the region was suffering severe economic problems, and the possibility of renewed public funding was unlikely. The court found it in the best interest of the museum to sell a Matisse painting valued at over four million dollars but reserved its decision regarding the use of the proceeds for later. The painting failed to sell; as a result, the court never made this analysis.

In Holyoke Public Library Corp. v. Shawmut Bank, No. 93-002 (P. & Fam. Ct. Hampden County, Mass. Jan. 26, 1993), the court approved the sale of works to an educational institution and the use of funds for operating expenses. The museum historically had received the bulk of its funding from the city, so it suffered when the city cut back on funding.

Operating exigencies for small and large museums alike include the need to repay bank loans and perform maintenance, such as improving building conditions and climate-control mechanisms. *See* Hammond Museum, Inc. v. Harshbarger, No. 92E-0067-G1 (P. & Fam. Ct. Essex County, Mass. Oct. 5, 1992) (permitting a museum in default of its bank loan to sell works to raise money to pay off the loan and to use residual funds to perform maintenance).

16. *See, e.g., Trustees of the Everhart Museum*, No. 1043-92; *Hammond Museum*, No. 92E-0067-G1. These cases are discussed in Johnston, *supra* note 13, at 169-74.

17. *See, e.g.*, Commonwealth v. Reading Pub. Museum & Art Gallery, No. 72430 (C.P. Orphans' Ct. Berks County, Pa. Aug. 15, 1991). This case is discussed in Marie C. Malaro, *Deaccessioning in Hard Times*, *in* LEGAL PROBLEMS OF MUSEUM ADMINISTRATION 25, 29-32 (A.L.I.-A.B.A. 1992) [hereinafter *Deaccessioning in Hard Times*].

The attorney general is generally the only party with standing to sue a nonprofit organization for misuse of its assets. *See* MARIE C. MALARO, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS 19-22 (1985) [hereinafter A LEGAL PRIMER]. The attorney general of each state has the authority to institute or participate in court proceedings that challenge the propriety of a museum's proposed transaction. In most states, the attorney general's power and duty of enforcement is codified. Even when no statute exists, the power is generally recognized in common law. *See id.* at 19 n.2; Johnston, *supra* note 13, at 168.

may initiate litigation against the museum directors for mismanagement *after* a sale of assets.[18] Traditionally, the attorney general has been designated to protect the public's interest in the administration of charitable organizations, an interest that most likely would go unprotected if individual members of the public were expected to perform this role.[19] Members of the public may be responsible for bringing the matter to the attention of the attorney general, but, generally, the public does not have standing to bring an action directly.

Unfortunately for museum directors and attorneys general, courts have not decided when deaccessioning for the purpose of raising operating revenue is subject to legal challenge.[20] Although the codes of ethics promulgated by various museum professional associations forbid the application of proceeds from deaccessioning toward operating expenses,[21] at present courts have not indicated

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Attorneys general have an array of other responsibilities in addition to their authority over charitable organizations. As a result, their ability to supervise these organizations seems to be "greater in theory than in practice." STEPHEN E. WEIL, *Breaches of Trust, Remedies, and Standards in the American Private Art Museum, in* BEAUTY AND THE BEASTS, *supra* note 3, at 160, 166-67.

Attorneys general also encounter difficulty in monitoring the transactions of charitable organizations due to the lack of reporting requirements for these organizations. In 1951, the National Association of Attorneys General sought to create a uniform act to deal with this problem. The Uniform Supervision of Trustees for Charitable Purposes Act was drafted and approved by the American Bar Association in 1954. To date, the Act only has been adopted, with some modifications, in a handful of states. *See* A LEGAL PRIMER, *supra,* at 37-38. The Act proposes a register of charities and periodic reports by charitable organizations, both open to inspection by the public, and gives attorneys general more power to investigate transactions. *See* UNIF. SUPERVISION OF TRUSTEES FOR CHARITABLE PURPOSES ACT § 1, 7B U.L.A. 727 (1985). These reporting requirements would assist the courts in their evaluations of deaccessioning proposals and would reinforce directors' obligation to the public.

18. *See, e.g.,* People *ex rel.* Scott v. Silverstein, 418 N.E.2d 1087 (Ill. App. Ct. 1981); People *ex rel.* Scott v. George F. Harding Museum, 374 N.E.2d 756 (Ill. App. Ct. 1978).

The discussion *infra* in Part II regarding the standard of conduct for museum directors applies to these cases in which liability for mismanagement is sought. But this Note focuses more on the *potential* behavior of directors in the hopes that directors, attorneys general, and courts will work together to protect the public interest before it is harmed.

The role of the attorney general in deaccessioning controversies depends on the law of the state. In some states, the attorney general may require notice of any substantial sale of assets by a charitable organization. *See, e.g.,* N.Y. NOT-FOR-PROFIT CORP. LAW § 511 (McKinney 1970 & Supp. 1995). Even if neither notice to the attorney general nor court approval is mandated by law, a director should consider consulting the attorney general prior to a sale due to the inflammatory nature of deaccessioning. *See* A LEGAL PRIMER, *supra* note 17, at 145 & n.18 (recommending early consultation with the attorney general by directors about deaccessioning decisions). Directors would be wise to seek both attorney-general and court approval of a proposed transaction rather than risk liability suits by dissatisfied patrons.

19. *See* A LEGAL PRIMER, *supra* note 17, at 19-20.

20. This lack of guidance by courts only exacerbates the problems that attorneys general encounter with oversight of charitable organizations. Without some agreement regarding the requisite standard of conduct for trustees, that enforcement power is difficult to wield. *See* WEIL, *supra* note 17, at 167.

21. The following codes proscribe this practice: AMERICAN ASSN. FOR STATE AND LOCAL HISTORY, STATEMENT OF PROFESSIONAL ETHICS 1 (1992) ("Collections shall not be deacces-

whether and when this prohibition will be enforced.[22] The few courts rendering decisions have been silent as to their reasoning,[23]

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sioned or disposed of in order to provide financial support for institutional operations, facilities maintenance or any reason other than the preservation or acquisition of collections."); AMERICAN ASSN. OF MUSEUMS, CODE OF ETHICS FOR MUSEUMS 8-9 (1994) ("[D]isposal of collections through sale, trade, or research activities is solely for the advancement of the museum's mission. . . . [I]n no event shall [proceeds] be used for anything other than acquisition or direct care of collections."); ASSOCIATION OF ART MUSEUM DIRECTORS, PROFESSIONAL PRACTICES IN ART MUSEUMS app. A (1992) ("The members of the Association of Art Museum Directors . . . declare that it is unprofessional for museum Directors . . . to dispose of accessioned works of art in order to provide funds for purposes other than acquisitions of works of art for the collection."); COLLEGE ART ASSN., RESOLUTION CONCERNING THE SALE AND EXCHANGE OF WORKS OF ART BY MUSEUMS 2 (1973) ("[W]orks of art should be considered for sale or exchange only for the purpose of expanding or increasing the importance of the collection, not for operating expenses or building funds."); INTERNATIONAL COUNCIL OF MUSEUMS, CODE OF PROFESSIONAL ETHICS 22 (1987) ("Any moneys received by a governing body from the disposal of . . . works of art should be applied solely for the purchase of additions to the museum collections."). The American Association of Museums (AAM) and the American Association for State and Local History allow the use of sale proceeds for the preservation of works in a museum collection. These organizations should note that raising funds to preserve works is comparable to using these funds to preserve the museum building itself. *See* Feldstein, *supra* note 4, at 8-9.

22. Codes of ethics generally lack the force of law. The Model Rules of Professional Conduct that exist for the legal profession disclaim any force of law.

> Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.0 (1994). In fact, no court explicitly has recognized a private cause of action based on a violation of an ethical code. *See* Criton A. Constantinides, Note, *Professional Ethics Codes in Court: Redefining the Social Contract Between the Public and the Professions,* 25 GA. L. REV. 1327, 1355 n.142 (1991).

The most recent AAM Code of Ethics for Museums requires members of the Association to frame their own specific codes of ethics that must conform with the general AAM code. These ethical codes must be enacted no later than January 1, 1997. *See* Ellsworth H. Brown, *Code of Ethics for Museums, in* LEGAL PROBLEMS OF MUSEUM ADMINISTRATION, *supra* note 17, at 145, 149-50. Although these codes aim to ensure the ethical behavior of member institutions and their employees, they legally cannot bind the museum any more than the general code can, unless they become part of the corporate bylaws amounting to a binding contract.

This lack of legal enforceability does not prevent courts from using codes of ethics as the basis for establishing standards of care and duties that are legally enforceable. *Cf.* Post Office v. Portec, Inc., 913 F.2d 802, 807 (10th Cir. 1990) (noting in dictum that a code of conduct for licensed engineers was admissible as evidence of an industry standard of conduct), *vacated on other grounds,* 935 F.2d 1105 (10th Cir. 1991); Woodruff v. Tomlin, 616 F.2d 924, 936 (6th Cir. 1980) (recognizing that although the Code of Professional Responsibility is not law, it does constitute evidence of the standards required of attorneys); Lipton v. Boesky, 313 N.W.2d 163, 167 (Mich. Ct. App. 1981) (holding that a violation of the Code of Professional Responsibility is rebuttable evidence of attorney malpractice); Saur v. Probes, 476 N.W.2d 496, 498 (Mich. Ct. App. 1991) (applying the holding of *Lipton* to a psychiatrist's code of responsibility); *see also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 51-52 (1986). In addition, the threat of professional sanctions for association members who fail to abide by museum codes of ethics can serve as a meaningful form of self-regulation. For example, on or before January 1, 1997, the Ethics Commission of the AAM will begin reviewing allegations of violations of the 1991 Code of Ethics for Museums by any of its nonprofit museum members. The Ethics Commission may recommend to the AAM Executive Committee that membership be revoked for any museums violating the code. *See* Brown, *supra,* at 150.

23. There have been relatively few court cases dealing with deaccessioning. Judges tend to give one-time orders that do not provide insight into their decisionmaking processes and, as a result, offer no direction for future applicability. *See, e.g.,* Holyoke Pub. Library Corp. v.

and the bodies of law governing museum actions — corporate law and the law of trusts — offer no clear guidance on this matter. If museums intend to treat the items in their collections as fungible assets to solve their cash flow problems, courts should attempt more structured judicial scrutiny that takes into account the best interest of the public.[24] The development of an analytical framework is particularly important in this area because of the rebuttable presumption, created by the museum codes of ethics, that deaccessioning to cover operating expenses is unethical behavior.[25]

Shawmut Bank, No. 93-002 (P. & Fam. Ct. Hampden County, Mass. Jan. 26, 1993) (issuing no opinion, only an equity judgment authorizing the museum "to add the proceeds from the sale of a portion of its art collection to its endowment fund with the income to be used for operating purposes as well as the acquisition of library materials and objects of art"); Hammond Museum, Inc. v. Harshbarger, No. 92E-0067-G1 (P. & Fam. Ct. Essex County, Mass. Oct. 5, 1992) (issuing no opinion, only a judgment stating that the museum was authorized to make the sale, to use the proceeds to pay off a bank loan, and, "if residual funds are available, to preserve the remaining artifacts of the museum and purchase similar ones, and do repairs, maintenance, and to make necessary improvements on the museum's real estate insofar as any of these are necessary to keep the museum open and functioning"); Commonwealth v. Reading Pub. Museum & Art Gallery, No. 72430 (C.P. Orphans' Ct. Berks County, Pa. Aug. 15, 1991) (issuing no opinion, only an order granting the preliminary injunction sought by the attorney general, which prevented the auction of paintings).

The one case in which a court made impressive efforts to address the important issues never reached the question of the legality of using the sale proceeds for operating expenses. *See* Trustees of Everhart Museum v. Commonwealth, No. 1043-92 (C.P. Orphans' Ct. Lackawanna County, Pa. Aug. 25, 1992). The court had delayed its decision on this issue to allow more time to consider possible financial planning for the museum but issued a relatively lengthy opinion regarding the reasonableness of the proposed sale. The attempts to sell the painting were unsuccessful, and the plan was abandoned.

More illuminating arguments generally come from the attorneys' pleadings and particularly from attorneys' general briefs. These documents often raise the central issue of whether a trustee risks acting negligently in carrying out the proposed deaccessioning plan. Unfortunately, the court orders usually fail to comment on the arguments raised in these documents. *See* Attorney General's Brief, *Reading Pub. Museum* No. 72430; *see also* Complaint at 4, *Holyoke Pub. Library Corp.* No. 93-002.

24. *See* WEIL, *supra* note 17, at 167.

> The most fundamental characteristic of museums is their public purpose, a quality which translates into "charitable purposes" under the law and creates a legal relationship between museums and the public. . . .
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> . . . .
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> The urgency to develop a clearer sense of the law of museum trusteeship remains. Ideally, the law provides guidance and predictability in society . . . . Clarification of the fiduciary ethic as applied to museum trusteeship is a crucial element of this process.

Katz, *supra* note 10, at 57-58.

25. This Note argues that a policy as rigorous as the Museum Code of Ethics does not serve the best interests of the public. This Note encourages museum organizations to reconsider the present needs of museums and the public rather than stigmatizing museums that seek this option as a means to serve their beneficiaries and fulfill their fiduciary obligations.

> As codes of ethics now read . . . there is no acknowledgement that instances can arise where boards might prudently determine that their beneficiaries are better served if collection objects are sold and proceeds are used for other than collection purposes. This means that a board can be placed in a situation where it is scrupulously following its legal responsibilities and exercising in good faith an informed judgement and its actions can be labelled "unethical."

Deaccessioning in Hard Times, supra note 17, at 33.

Contrary to the view adopted by current codes of ethics, this Note argues that courts should approve a museum director's use of proceeds from the sale of deaccessioned art to meet operating expenses if the director's conduct comports with the duties of trustees under the law of trusts. Part I explores possible organizational structures for museums, including the charitable trust and the nonprofit corporation. Part I also compares the fiduciary duties of museum managers under trust and corporate law. Part II argues that courts should apply trust-law principles both to trustees of charitable trusts and directors of charitable corporations[26] because these managers perform the same role regardless of the organizational form of the museum entity and because the public's interest in the museum's assets necessitates a heightened fiduciary duty. Part III explains how courts can apply the duties of trust law — namely, loyalty and care — to the legality of a museum director's proposed deaccessioning plan.[27] This Note concludes that, by evaluating deaccessioning plans based on their consistency with the fiduciary duties of trustees, courts best can serve the interests of a museum's intended beneficiaries, the public.

I. The Law Governing Museum Activities

Museums traditionally have been formed as either nonprofit corporations or charitable trusts.[28] The directors of *for-profit* corporations, while fulfilling duties similar to those of trustees, generally are held to a lower standard of care.[29] Courts have experienced difficulty, however, developing criteria to evaluate deaccessioning proposals because the legal standard of care required of *nonprofit* directors remains unclear. Courts have not established whether the conduct of nonprofit directors will be controlled by the form of the organization, either corporate or trust, or whether all nonprofit directors will be treated similarly regardless of form. This situation has led to much confusion and little consistency.[30] Accordingly, section I.A briefly introduces the technical forms a museum may take — the charitable trust and the nonprofit corporation. Section I.B compares the standards of conduct required of fiduciaries under the law of trusts and corporate law.

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26. This Note uses the term "charitable corporation" interchangeably with "nonprofit corporation."

27. For the sake of simplicity, this Note refers to deaccessioning for the purpose of meeting operating expenses as merely "deaccessioning," except when necessary to distinguish the purposes of deaccessioning.

28. *See* Marilyn Phelan, Museums and the Law 1-7 (1982).

29. *See* Note, *The Fiduciary Duties of Loyalty and Care Associated with the Directors and Trustees of Charitable Organizations,* 64 Va. L. Rev. 449, 451-54 (1978).

30. *See* Katz, *supra* note 10, at 66-67 (noting that applying fiduciary standards to museums is difficult because museums are not organized uniformly).

A. *The Legal Form of the Museum*

Because of their common purposes, museums have similar problems regardless of their organizational structure. It is nevertheless important to note the structural possibilities and management dilemmas that stem from the existence of varying standards of conduct for the same type of enterprise.

1. *The Charitable Trust*

A trust originates from an arrangement, either inter vivos[31] or by will, that creates a "fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another."[32] A trust can be viewed as a property arrangement under which ownership of the property is divided between the parties involved. The creator of the trust designates a trustee[33] who obtains legal title to the trust property.[34] The beneficiary of the trust holds the equitable or beneficial title.[35]

A charitable trust is one of several special types of trust[36] — if a museum is established in the form of a trust, it will be a charitable trust.[37] A charitable trust differs from a private trust in that a charitable trust must "accomplish a substantial amount of social benefit to the public or some reasonably large class thereof."[38] As a result, it may enjoy tax privileges not bestowed upon the private trust.

2. *The Nonprofit Corporation*

Like the charitable trust, the nonprofit corporation serves the general purpose of providing a social benefit to the public and, as a

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31. An inter vivos trust is created by the settlor during his lifetime, as opposed to at his death. *See* RESTATEMENT (SECOND) OF TRUSTS § 17 (1957).

32. RESTATEMENT (SECOND) OF TRUSTS § 2 (1957).

33. In the case of an inter vivos trust, the settlor of the trust may name himself as trustee, or he may name a third party. *See* RESTATEMENT (SECOND) OF TRUSTS § 17(a)-(b) (1957).

34. *See* PHELAN, *supra* note 28, at 1-2. Legal title does not grant the trustee any beneficial property interest; the trustee holds title only as a "representative." For example, personal creditors of the trustee have no claim to the trust property. *See* BOGERT, *supra* note 7, § 32.

35. *See* PHELAN, *supra* note 28, at 1-2. Beneficial title empowers the beneficiaries to enforce the trust because the beneficiaries are "equitably entitled to its advantages." BOGERT, *supra* note 7, § 1. In the case of a charitable trust, the power of enforcement rests with the attorney general as "representative of the public." *Id.* § 156. For an example of a trust instrument that would create a museum as a charitable trust, see PHELAN, *supra* note 28, at 169-72.

36. *See* LORING, A TRUSTEE'S HANDBOOK 229 (Charles E. Rounds, Jr. & Eric P. Hayes eds., 7th ed. 1994).

37. *See* PHELAN, *supra* note 28, at 2.

38. BOGERT, *supra* note 7, § 54.

result, also may be entitled to tax benefits.[39] The two forms differ in that the founders of a nonprofit corporation achieve corporate status by filing articles of incorporation with the state.[40] A board of directors is elected to manage a nonprofit corporation in accordance with the charter and bylaws of the corporation,[41] as opposed to a charitable trust, which is administered by a trustee in accordance with the trust instrument.

Most states have statutes governing nonprofit corporations.[42] These statutes establish requirements pertaining to internal procedures of the organization[43] but generally do not impose a standard of conduct for directors.[44] Most art museums choose to incorporate under these nonprofit statutes.[45] By incorporating, museums enjoy the benefits that the corporate form offers, notably that the directors are free from personal liability for contracts entered into on behalf of the corporation, tort actions against the corporation, and actions involving corporate property, because the corporation is a legal entity separate from its members.[46] The corporate form also provides for a continuity of existence that allows a corporation to function perpetually, regardless of changes in membership.[47] These benefits are the same whether the organization functions as a for-profit or nonprofit corporation.

The nonprofit corporation does lack one distinguishing factor of the for-profit corporation: the profit motive.[48] As a result, the charitable corporation, like the charitable trust, does not have

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39. *See* OLECK & STEWART, *supra* note 14, at 16, 25, 276-87.

40. *See* PHELAN, *supra* note 28, at 4. For an example of articles of incorporation that would serve to establish a museum, see *id.* at 172-73.

41. *See id.* at 4.

42. *See* Thomas H. Boyd, Note, *A Call to Reform the Duties of Directors Under State Not-For-Profit Corporation Statutes,* 72 IOWA L. REV. 725, 735 (1987).

43. For example, the District of Columbia Nonprofit Corporation Act, D.C. CODE ANN. §§ 29-501 to -599.16 (1991 & Supp. 1995), includes provisions, among others, on meetings of members, the appointment and removal of officers, the filing of articles of incorporation, procedures for merger or consolidation, and liquidation proceedings.

44. *See* Boyd, *supra* note 42, at 736; *infra* section II.B.

45. *See* A LEGAL PRIMER, *supra* note 17, at 4 n.5; WEIL, *supra* note 17, at 164-65.

46. *See* PHELAN, *supra* note 28, at 3-4. This exemption from personal liability does not extend to violations based on the fiduciary relationship between the director and the organization. *See id.* at 4.

Trustees, on the other hand, may be personally liable in contract, tort, and property actions. "If a trustee makes a contract in the administration of the trust, he is personally liable unless the contract provides otherwise." BOGERT, *supra* note 7, § 125. The trustee is personally accountable for tort liability, with some exceptions for charitable organizations. *See id.* § 129. "The trustee's liabilities arising solely because of holding title to trust property are the same as if he owned the property absolutely." *Id.* § 132.

47. *See* OLECK & STEWART, *supra* note 14, at 33-34.

48. *See* Note, *supra* note 29, at 456. The charitable corporation does not exist for the purpose of making profits to be distributed to shareholders; in fact, the nonprofit corporation is forbidden from distributing any profits. *See id.* at 455 n.38.

shareholders or any specific beneficiaries who can assist in monitoring the administration of the corporation. In their voting powers, for-profit corporate shareholders have a tool for controlling managerial behavior; shareholders will not allow directors to avoid accountability for negligent or disloyal acts. Museums or nonprofit corporations, on the other hand, serve the broad public, which cannot exert effective managerial control or supervision.[49] The oversight of the attorney general is intended to compensate to some extent for the absence of shareholders.[50]

B. *Fiduciary Duties Under Trust and Corporate Law*

The legal structure of a museum — whether a charitable trust or nonprofit corporation — may determine the applicable standard of fiduciary duty. There are two standards of fiduciary duty courts currently can apply to directors: the trustee standard and the for-profit corporate standard. Which level of duty should be required of *nonprofit* corporate directors is unclear under current law; neither standard is consistently advanced by courts or commentators.

The fiduciary duties of both trustees and directors include the duty of loyalty and the duty of care. Furthermore, both trustees and directors fulfill these duties in light of a fiduciary relationship with the public; they must "act primarily for another's benefit in matters connected with [the management of the museum]."[51] The fiduciary duties of a trustee do not differ in kind from those of a for-profit corporate director, but the trustee is expected to satisfy a higher standard with respect to both duties.[52] This section describes

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49. *See* Boyd, *supra* note 42, at 742. In particular, a public-benefit corporation, which is formed for the benefit of a general segment of the public — as compared to a mutual-benefit corporation which typically is created and funded by the specific individuals who are the primary beneficiaries of the service provided, such as a trade association or social organization — lacks a defined body of members who may deter director misconduct. A museum is one example of a public benefit institution. *See id.* at 726-27, 729-31; *see also* James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 675, 677 (1985).

The difficulty of monitoring the behavior of public-benefit corporations or public trusts is a classic collective-action problem. The benefit of a properly run museum to any individual is minuscule in comparison to the cost required to monitor or correct director behavior. Proponents of the collective-action theory assert that even in a for-profit corporation, the profit motive does not assure that shareholders in a large corporation will take actions to protect their economic interest. The income of the corporation is a collective good in which each shareholder will benefit only minutely. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 55 (1971). The collective-action problem increases when the group involved is even less organized — the general public — and any individual incentive is based on intangible social benefits rather than economic reward.

50. *See supra* notes 17-19 and accompanying text.

51. BLACK'S LAW DICTIONARY 625 (6th ed. 1990); *see also* Gerstenblith, *supra* note 14, at 180 ("A trustee's fiduciary obligations are those duties which the trustee owes to both the beneficiaries and the trust.").

52. *See* Note, *supra* note 29, at 451-54.

the duties of loyalty and care and explains how these duties are more stringent for trustees than for directors of corporations.

1. *The Duty of Loyalty*

The trustee standard of loyalty requires the trustee to "administer the trust solely in the interest of the beneficiaries," which is the general public in the case of a charitable trust.[53] The trustee must display *complete* loyalty to the interests of the public. For example, trustees are barred from engaging in any "interested transaction" — any transaction between the trustee and the organization — because a trustee cannot avoid breaching the duty of loyalty in a case of "self dealing,"[54] regardless of whether the transaction was fair or any actual harm was done to the beneficiaries.[55]

In comparison, the corporate director can fulfill his fiduciary obligations of loyalty by dealing fairly with the corporation.[56] Corporate law does not demand that the corporate director be as completely loyal as trust law requires. For example, interested transactions are usually acceptable if the director can prove that the interested transaction was intrinsically fair to the corporation.[57]

2. *The Duty of Care*

The duty of care encompasses a trustee's or director's exercise of care and diligence in managing the trust or corporation.[58] In the museum context, the duty of care refers to management of the mu-

53. RESTATEMENT (THIRD) OF TRUSTS § 170 (1990); *see also* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 543, at 217 (repl. vol. 1993) ("Perhaps the most fundamental duty of a trustee is that he must display throughout the administration of the trust complete loyalty to the interests of the beneficiary . . . ."). The same duties are required of both trustees of charitable trusts and trustees of private trusts. *See* RESTATEMENT (THIRD) OF TRUSTS § 379 (1990).

54. "Self dealing" includes transactions between the organization and the trustee individually and transactions between the organization and any enterprise in which the trustee has a substantial pecuniary interest. *See* Note, *supra* note 29, at 451 n.13.

55. *See In re* Bond & Mortgage Guarantee Co., 103 N.E.2d 721, 725-26 (N.Y. 1952) (finding, in a case involving a trustee's alleged breach of the duty of loyalty, that "the question of bad faith or damage is irrelevant to [the] inquiry" because the rule of undivided loyalty is one of "uncompromising rigidity"); BOGERT & BOGERT, *supra* note 53, at 227-28 (discussing public policy reasons for the strict trustee duty-of-loyalty standard).

56. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 5.01, at 205-08 (1994).

57. *See* Murphy v. Washington Am. League Base Ball Club, Inc., 324 F.2d 394, 396 (D.C. Cir. 1963); Marciano v. Nakash, 535 A.2d 400, 403-05 (Del. 1987); Johnston v. Greene, 121 A.2d 919, 925 (Del. 1956); HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 238 (3d ed. 1983); *see also* AMERICAN LAW INSTITUTE, *supra* note 56, at 235. Most states have codified this standard in "safe-harbor" statutes. *See id.* at 235-41.

58. *See* Daniel L. Kurtz, *Safeguarding the Mission: The Duties and Liabilities of Officers and Directors, in* NOT-FOR-PROFIT ORGANIZATIONS 17, 25-26 (A.L.I.-A.B.A. 1992); *see also* Gerstenblith, *supra* note 14, at 193.

seum's assets, including not only proper management of trust funds but also due care for the museum's collection.[59]

The trustee standard of care requires trustees to exercise the care that an ordinarily prudent person would exercise in dealing with his own property.[60] For example, a trustee is expected to invest trust funds to produce a steady flow of income and to preserve the trust principal; a trustee may not endanger the corpus of the trust through speculative investments.[61] The trustee must act within a specified range of suitable investments, and the law will closely scrutinize the trustee for deviations from this range that might be considered negligent.[62]

The duty of care for a corporate director is phrased similarly,[63] yet the courts allow corporate directors a much wider range of discretion.[64] The corporate "business-judgment rule" permits directors to use their own judgment and excuses simple errors.[65] Under the business-judgment rule, courts will find liability only when directors commit "gross negligence" rather than "simple negligence."[66] Consequently, the corporate director need not be as risk-averse as the trustee in investments.[67] In the business world, risk often corresponds with profit potential. Corporate law does not aim to curb this risk taking unless directors are grossly negligent —

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59. *See* Gerstenblith, *supra* note 14, at 193-95. Several duties relevant to deaccessioning fall within this general category of duty of care, including the duty to protect and preserve trust property and the duty to make trust property productive. *See* RESTATEMENT (SECOND) OF TRUSTS § 176 (1959); *see also* RESTATEMENT (THIRD) OF TRUSTS § 181 (1990); BOGERT, *supra* note 7, §§ 99, 101.

60. *See* RESTATEMENT (SECOND) OF TRUSTS § 174 (1959).

61. *See* BOGERT, *supra* note 7, § 106.

62. *See id.* § 104.

63. Francis v. United Jersey Bank, 432 A.2d 814 (N.J. 1981), enunciates the basic corporate-law standard of the duty of care. According to *Francis,* directors and officers must "discharge their duties in good faith and with that degree of diligence, care and skill which ordinarily prudent [persons] would exercise under similar circumstances in like positions." 432 A.2d at 820.

64. *See* Note, *supra* note 29, at 453.

65. *See* HENN & ALEXANDER, *supra* note 57, at 661-63.

66. *See* Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

67. *See* Note, *supra* note 29, at 454; *see also* Dennis J. Block et al., *The Business Judgement Rule in Shareholder Derivative Litigation, in* 3 26TH ANNUAL INSTITUTE ON SECURITIES REGULATION 689, 697 (PLI Corp. L. & Practice Course Handbook Series No. B-868, 1994) ("[The business-judgment] rule recognizes that business decisions frequently entail risk, and thus provides directors the broad discretion they need to formulate dynamic and effective company policy without fear of judicial second-guessing."). On the other hand:

> In performing his investment duties a trustee should consider the purposes of the trust, which are normally the production of a constant flow of income consistent with maintenance of the safety of the principal of the fund, and the preservation of the principal of the trust. He has no duty to make investments for the purpose of increasing the value of the trust assets.

BOGERT, *supra* note 7, § 106.

for example, by failing to make reasonable investigation into the subject of their business decision or sacrificing the best interests of the corporation and the shareholders.[68]

II. The Fiduciary Standard That Controls the Conduct of Museum Directors

Courts have had difficulty in developing standards by which to evaluate deaccessioning decisions because museums can take either of two legal forms — a charitable trust or a nonprofit corporation. While trust managers are always held to the trustee standard, this formal distinction raises the question of which standard of conduct should be applied to directors of museums that take the nonprofit corporate form, the predominant form for museums.

This Part argues that courts should employ trust principles in evaluating deaccessioning decisions made by museums, whether these museums are structured as charitable trusts or nonprofit corporations. Section II.A argues that for purposes of determining the fiduciary obligations of museum directors, courts should apply charitable-trust principles to both trustees and directors because they perform similar roles, and their respective organizations have identical purposes. Section II.B contends that despite some of the organizational differences between trusts and nonprofit corporations, these differences should not affect the standard of fiduciary duty applied to museum directors.

A. *Nonprofit Directors and the Trustee Standard*

Because the law of nonprofit corporations has not developed to the point of establishing a standard of conduct applicable in all cases, courts are currently free to apply either the trust or corporate standard to director conduct.[69] Evaluating the conduct of museum directors in dissimilar ways based merely upon differences in organizational form improperly elevates form over function because the choice of organizational form has no affect on the service that museums provide to the public. Whether a museum is organized as a

68. *See Van Gorkom*, 488 A.2d at 874 (holding that a board of directors acted in a grossly negligent manner in granting uninformed approval of a merger proposal).

69. *See* A Legal Primer, *supra* note 17, at 13-16; *Developments in the Law — Nonprofit Corporations*, 105 Harv. L. Rev. 1579, 1593 (1992). In states where a standard is established by statute, courts do not have this freedom.

Even if the stricter trust standard were rejected in favor of the corporate standard, the test developed in Part III of this Note for analyzing proposed deaccessioning decisions still would be applicable. In all cases, a nonprofit director must manage the museum for the benefit of the public. Though a higher fiduciary standard would serve as a better guide for both directors and courts, in practice, both the trust and corporate standards are sufficiently vague to require courts to decide each fiduciary duty case on its particular facts. *See* Oleck & Stewart, *supra* note 14, at 899. The test advocated in this Note recognizes the importance of the individual factual circumstances in deaccessioning cases. *See infra* Part III.

trust or as a corporation, the public requires it to protect and preserve cultural assets.[70]

The societal interest in the beneficial administration of charitable organizations requires the application of a more demanding fiduciary standard. Museums preserve an institution and collection of assets so highly esteemed that they have been dedicated to public use and enjoyment. Yet the general public, as compared with the shareholders of a for-profit corporation, cannot monitor and control effectively the conduct of museum directors.[71] The problem of collective action prevents any concerted action; the costs of organizing the public as a whole are prohibitively high, and individual members generally will not assume this responsibility or expense while others enjoy the benefits of their efforts without participating. The presence of potential free riders generally will dissuade members of the public from attempting individual action. As a result, individuals will fail to take action that would serve the collective good — they will hold out in the hopes that other individuals will bear the burden.[72] For this reason, one commentator suggests that "[i]f a board of directors has no membership to police its actions, enforcement of a trustee standard would provide a necessary substitute."[73]

Moreover, the managers of a museum formed as a charitable corporation are just as much trustees as are managers who are formally named as the trustees of a charitable trust.[74] Because a museum formed as a nonprofit corporation usually is maintained by

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70. "Society has an interest in the proper administration of charities, and this interest is the same regardless of organizational form." Fishman, *supra* note 49, at 677. The *Second Restatement of Trusts* instructs that "the principles and rules applicable to charitable trusts are applicable to charitable corporations." RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. f (1959).

> Structure may seem to obfuscate the common law, and indeed it has in certain courts. But if an organization declares itself to be eleemosynary, or charitable (that is, operating with the sole purpose of serving the public good . . .), its organizational structure makes no fundamental difference in its legal accountability to use its resources, to manage property, and to exercise its stated purpose in its charter and bylaws for the interests of the public and no other.

JAMES C. BAUGHMAN, TRUSTEES, TRUSTEESHIP, AND THE PUBLIC GOOD: ISSUES OF ACCOUNTABILITY FOR HOSPITALS, MUSEUMS, UNIVERSITIES, AND LIBRARIES 19 (1987); *see also* Note, *supra* note 29, at 456-57 (collecting commentators who support the proposition that "[t]he standards of liability for the fiduciaries of charities should not differ for organizations with the same goals and purposes").

71. *See supra* note 49 and accompanying text.

72. *See supra* note 49.

73. Boyd, *supra* note 42, at 742; *see also* Katz, *supra* note 10, at 72-73 (explaining that the general public has "little or no voice in selecting the management" of museums and therefore the stricter trustee standard is necessary to protect the public interest).

74. *See* Gerstenblith, *supra* note 14, at 176-77; *see also* Katz, *supra* note 10, at 72-73 (concluding that because "museums are entrusted with assets for the benefit" of the public, they resemble trusts more closely than corporations).

public donations of artwork and funds,[75] courts have considered these assets to be held in trust and have required managers to administer these assets in accordance with the organization's mission.[76] Under this approach, the directors are subject to the fiduciary duties required of a trustee. The museum collection is essentially a trust asset, strongly supporting the application of a trustee standard of fiduciary duty to museum managers regardless of the museum's corporate form. Given that museum directors are trustees for the art in the museum collection, they should be held to the level of fiduciary duty required of trustees, even if the museum is organized as a nonprofit corporation.[77]

The trustee standard of fiduciary duty also has the virtue of providing explicit standards that address society's interest in the administration of both charitable trusts and charitable corporations. For example, trustees are given a clear mandate to protect and preserve trust property and to make trust property productive.[78] These specific duties provide extra guidance for directors who may not be professional managers. In addition, bright-line rules, such as the absolute prohibition against self dealing for trustees, offer discernible direction because they are not based on vague notions of fairness. The charitable corporation has proliferated in relatively recent years, presenting a conundrum for lawmakers due to its hybrid form.[79] A well-articulated standard provides much more guidance for directors than the general corporate-law obligations.

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75. *See* Gerstenblith, *supra* note 14, at 176.

76. *See* American Ctr. for Educ. v. Cavnar, 145 Cal. Rptr. 736, 742 (Cal. Ct. App. 1978). *Cavnar* states that

> gifts to charitable corporations are deemed given in trust to carry out the objects of the corporation, and the assets of charitable corporations are deemed to be impressed with a charitable trust by virtue of the declaration of corporate purposes. Accordingly, charitable corporations are generally governed by the same rules as those applicable to charitable trusts.

145 Cal. Rptr. at 742 (citations omitted); *see also* Lynch v. John M. Redfield Found., 88 Cal. Rptr. 86, 89 (Cal. Ct. App. 1970) ("Assets of a charitable corporation are impressed with a trust. Members of the board of directors of such corporation are essentially trustees." (citations omitted)); Boyd, *supra* note 42, at 734 ("Because not-for-profit corporations receive their funding on the condition that it will be used toward the efficient accomplishment of the corporations' missions, the donations effectively form trusts.").

77. *See* Katz, *supra* note 10, at 72-73. Even if courts were to determine that nonprofit directors generally are to be held to the lower standard of conduct, museum directors should be treated differently due to the special trust status of the assets for which they are responsible. Unlike most other nonprofit organizations, a museum's activity revolves around the holding of particular assets with exceptional value for the benefit of the public.

78. *See* Gerstenblith, *supra* note 14, at 193.

79. *See* MARILYN PHELAN, NONPROFIT ENTERPRISES: LAW AND TAXATION iii (1985) ("While the growth of nonprofit organizations has been phenomenal in recent years, the laws relating to these organizations have not always kept pace.").

B. *The Corporate Form and Substantive Duties*

Some commentators have argued that the charitable corporation resembles the business corporation in its structure and some aspects of governance and, therefore, that directors of nonprofit corporations *must* be governed by the corporate-director standard of fiduciary duty.[80] Nonprofit corporation statutes, which have developed in virtually all states, include some provisions modeled after preexisting for-profit statutes. For example, the 1987 Revised Model Nonprofit Corporation Act (RMNCA) borrows relevant language directly from the Model Business Corporation Act.[81] The RMNCA claims to "settle[ ] the dispute as to whether directors of nonprofit corporations should meet the general business standards or the trustee standards" by proposing that directors be governed exclusively by the lower corporate standards.[82]

The argument that directors' fiduciary duties from for-profit corporate law must be applied in nonprofit settings fails, however, because most nonprofit statutes do not include a provision establishing a standard of conduct for directors.[83] Instead, these statutes only address procedural issues that are related to the corporate structure.[84] Therefore, in the majority of cases, it is perfectly con-

80. These commentators have observed that both types of corporation are created by incorporating under state law, meaning that the law grants each the same corporate treatment, for example, status as a legal entity distinct from its constituent members and freedom from personal liability for individual directors. *See* Note, *supra* note 29, at 455. Other supporters of the more lax corporate standard suggest that the nonprofit director may face responsibilities that more closely resemble those faced by the corporate director than those of the common law trustee. The responsibilities of a museum director include deaccessioning decisions, as well as acquisitions, maintenance of the physical plant, storage, cataloguing, deficit spending, and hiring and supervising personnel. Historically, the common law trustee concentrated on managing investments. *See* Gordon H. Marsh, *Governance of Non-Profit Organizations: An Appropriate Standard of Conduct for Trustees and Directors of Museums and Other Cultural Institutions*, 85 DICK. L. REV. 607, 622 (1981). Perhaps this distinction is becoming more prehistoric than historic. The modern trustee is more than just a money manager in the sense of making prudent investments and distributing income to beneficiaries. The management of trust assets always will be central to the trustee's obligations, but "management" and "assets" can take on a very expansive meaning, as should be apparent from the context of deaccessioning by art museums.

81. *Compare* REVISED MODEL BUSINESS CORP. ACT § 8.30(a)-(d) (1984) *with* REVISED MODEL NONPROFIT CORP. ACT § 8.30(a)-(d) (1987). The Committee on Corporate Laws decided to revise the Model Business Corporation Act (MBCA) during the period that the Subcommittee on the Model Nonprofit Corporation Act was working on the revised Act. The Subcommittee decided to "track the MBCA in form and substance whenever appropriate, particularly in regard to filings with the secretary of state, formation of corporations, corporate powers, qualification of foreign corporations, requirements for a corporate office and agent and procedures for merger and dissolution." Michael C. Hone, *Introduction* to REVISED MODEL NONPROFIT CORP. ACT (1987). The Subcommittee appears to have been concerned primarily with mimicking sections relating to the organizational aspects of the corporation.

82. REVISED MODEL NONPROFIT CORP. ACT § 8.30 cmt. (1987).

83. *See* Boyd, *supra* note 42, at 736-38. In fact, the 1987 RMNCA was the first version of the MNCA to deal with standards of care and loyalty for nonprofit directors.

84. *See* Note, *supra* note 29, at 455; *supra* note 43 and accompanying text.

sistent for courts to enforce nonprofit corporation statutes that apply corporate principles to the internal procedures of museums, such as establishing procedures for filing with the Secretary of State or creating bylaws, but to apply trust law principles to the fiduciary responsibilities of the museum directors.[85]

Deaccessioning decisions, for example, would not come within the scope of merely procedural aspects of corporate governance, appropriately analyzed under corporate-law standards. The decision to sell works of art from a museum collection is a sensitive one that requires the utmost care and loyalty; this obligation is of a different nature than that of setting procedures for amending bylaws or other similar activities. Moreover, this decisionmaking process needs to be equally thorough and prudent regardless of the formal structure of the museum — the museum's obligation to the public is of paramount importance in such a decision.

III. The Framework for Evaluating a Proposed Deaccessioning Transaction

Because museums serve the same purpose regardless of their form of organization, courts should evaluate the proposed deaccessioning transactions of museum directors using the principles and interests enunciated by the trust-law fiduciary duties of care and loyalty. As discussed in Part I, the trustee standard of loyalty requires complete loyalty to the interests of the beneficiaries — the public.[86] In addition, that standard of care requires trustees to manage museum assets held for the public good diligently and under risk-averse policies.[87] In the context of deaccessioning, these duties lead to the same conclusion — courts can approve transactions that serve the public interest and need not differentiate between potential violations of the duties of loyalty and care. While self dealing is not the focus of concern in deaccessioning cases, the underlying requirement of unfailing loyalty to the beneficiaries re-

85. *See* A Legal Primer, *supra* note 17, at 17 & n.51; Fishman, *supra* note 49, at 676; *see also* City of Paterson v. Paterson Gen. Hosp., 235 A.2d 487, 489 (N.J. Super. Ct. Ch. Div. 1967) ("To some extent [the law applicable to charitable corporations] has its roots in the law of trusts, to some extent in the law of corporations; to some extent it may partake of both or indeed be *sui generis.*").

86. *See supra* notes 53-55 and accompanying text.

87. *See supra* notes 58-62 and accompanying text. A duty of primary importance for a trustee is the duty to make the trust property productive through suitable investments. *See* Restatement (Third) of Trusts §§ 181, 379 (1990). In evaluating a proposal for deaccessioning, the court should look over financial records provided by the directors regarding their investments and budget. If the court discovers a pattern of financial activities that violates the duty of care, the court has at its disposal a variety of remedies, such as removing the directors from their position. Directors cannot expect to neglect their duty to invest with care and then make up for losses by selling off the collection. By allowing this result, the courts would transform a temporary, emergency solution into a permanent crutch.

mains relevant. The duty of care requires the trustee to manage trust assets in the interest of the beneficiaries. For museums, the beneficiary of the art held in trust is the public. Thus, in applying the trustee standard of loyalty and care to deaccessioning, courts primarily must consider the public interest.

This Part argues that courts should evaluate any proposed transaction under a three-prong test. First, courts must look at whether the museum has a legitimate need for the proceeds from deaccessioning and whether the planned use for the deaccessioning proceeds is consistent with the public interest. If the court is not satisfied that this is the case, the court should reject the transaction. Next, the court must examine whether an actual sale is required to raise the necessary funds. If the court is not persuaded that the directors have considered less drastic alternatives, then the court should instruct the directors to consider other options and seek court approval at a later date. If the court is convinced that no alternatives to sale are viable, then the court would move on to the third prong of the test. In this part, the court should take into account the intended buyer. Sale of the work to another nonprofit organization that will make the work accessible to the public should lead to court approval of the sale as long as the directors are not obtaining a substantially lower price by selling to this organization. If the intended buyer is a private individual or entity, the court still may approve the sale if the price is significantly higher than that offered by a public institution.[88]

Section III.A examines the first prong of the test, the need for and intended use of the proceeds from deaccessioning. Section III.B illustrates the second prong, the consideration of nonsale alternatives. Finally, section III.C looks at the third prong of the test, the nature of the intended buyer.

A. *The Legitimate Need for the Deaccessioning Proceeds*

Under this prong of the test, the court must decide whether the use of deaccessioning proceeds for operating expenses is consistent with the museum's purpose of benefiting the public. The trustee has an obligation to demonstrate ultimate loyalty to the public beneficiaries — that he has their best interest in mind — by proving that the museum genuinely needs the funds and that the intended

88. If there is no potential public buyer involved, then the court must find that the private buyer's price is high enough to justify the removal of the work from the public domain.

If the proposed sale is to take place at public auction, where the ultimate buyer is unknown, the court can approve a sale at auction contingent on its conforming to the requirements of a public or private sale. Courts could assure this conformity by requiring judicial approval before any auction sale is finalized. In addition, courts could work with the attorney general and seller institutions to implement a "preemption agreement." *See infra* notes 111-13 and accompanying text.

use of the proceeds upholds the public purpose expressed in the charitable-trust indenture or corporate charter. This concept of public purpose is not translated easily into specific actions. Because no collection can be displayed publicly in a museum with inadequate maintenance, the public interest is served if public enjoyment of the museum is enhanced or if the remaining works receive greater protection as a result of renovation projects. In fact, failing to take care of maintenance and other operating expenses could threaten the very public purpose served by the establishment of a museum and collection in the first place and could be viewed as a violation of duty.[89] As long as revenue is directed back to a public good in some form, whether this good comes in the form of building restoration, extended hours for the museum, or another public benefit, the deaccessioning has served the requisite public purpose.[90]

B. *Consideration of Nonsale Alternatives*

After the court is satisfied that the use of the proceeds would benefit the public interest, the court still must consider whether this purpose could be served without selling the artwork.[91] The first consideration for courts is whether the museum has in place an adequate deaccessioning procedure. In establishing precedent on deaccessioning the courts have an interest in encouraging museum directors to develop internal policies for the deaccessioning process — including the consideration of nonsale alternatives — such as procedures for the selection of objects suitable for deaccessioning and principles regarding the use of proceeds from these sales.[92] Any procedure adopted by the directors as part of the museum's bylaws would have the force of law, as long as the policy did not

89. *See* Feldstein, *supra* note 4, at 9 (suggesting that the preservation of works may be "socially more productive" than using funds to acquire more art and that funds spent on improving the security or the internal climate of a museum are similar in this respect); *see also* BOGERT, *supra* note 7, § 99 (noting that a trustee has a duty to make such repairs to buildings located on trust realty as are necessary to prevent deterioration).

90. Courts will have to make a case-by-case analysis of whether an intended use is permissible. As a general class of uses, operating expenses may provide a social good and are therefore acceptable under this test. In a particular situation, a court still might find that the intended use cannot be approved.

91. While this Note does argue that deaccessioning is an acceptable option under certain conditions, the courts should seek to make the sale of museum assets a last resort. *See* A LEGAL PRIMER, *supra* note 17, at 139-40 ("Deaccessioning for routine operating expenses normally would be undertaken only as a last resort and only when it appears that the proceeds of the anticipated sales would enable the museum to regain financial stability."). This second prong of the test assures that deaccessioning will not be approved without due consideration of other options.

92. *See Deaccessioning in Hard Times*, *supra* note 17, at 34 ("[T]he public's interests are probably best served when boards are on notice that they are expected to be able to demonstrate that their decisions concerning the management of collections are the result of thoughtful and thorough evaluation of all circumstances.").

violate the museum's responsibility to the public.[93] Several museums have introduced resolutions on deaccessioning methods, although these procedures do not recognize the possibility of deaccessioning to raise operating funds.

Most memorably, the Metropolitan Museum of Art in New York modified its deaccessioning and disposal procedures after a much criticized transaction in 1972.[94] The museum's plan introduced specific steps, including an initial recommendation by a curator of the deaccessioning of a work of art; the determination, with the advice of counsel, as to any legal restrictions on disposal; consideration of the proposal by a committee made up of board members; and, after a final decision to deaccession an object, notification to the attorney general prior to sale or exchange.[95] Museum directors who alert the attorney general to their planned transaction and present proof to the court that they have followed a rigorous procedure, such as that of the Metropolitan, will gain credibility, if not a presumption in their favor that the transaction should be approved.

To analyze museum deaccessioning proposals, courts should look for alternatives preferable to sale. One commonly overlooked option is a museum's potential to meet operating expenses entirely or partially by fundraising.[96] Museum directors are often specially selected for their financial connections and ability to elicit donations from members of the public and corporate supporters. Directors are always encouraged to propose alternatives that have the support of the community in a way that deaccessioning may not, and imaginative fundraising methods have this potential.[97]

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93. Bylaws, unlike ethical codes, are binding on directors as long as they do not conflict with law or public policy — in effect, they are "internal laws." *See* OLECK & STEWART, *supra* note 14, at 693. The primary law of a nonprofit corporation is the charter or articles of incorporation. *See id.* at 701. Accordingly, it would behoove museums to state their deaccessioning policy in their charter or bylaws. *See* Denckla v. Independence Found., 181 A.2d 78, 83 (Del. Ch. 1962) ("If the power to make the contested grant is either expressly or by necessary implication given by its charter then it matters not whether trust law or corporate law is applicable."), *affd.*, 193 A.2d 538 (Del. 1963).

94. The Metropolitan Museum deaccessioned paintings that had been donated by Adelaide Milton de Groot through her will. Although de Groot had not explicitly restricted disposal of the works, she had requested that the Metropolitan give any works it did not want to other museums. Instead, many works were sold to private buyers. *See* 2 MERRYMAN & ELSEN, *supra* note 11, at 617-19; Wise & Wolff, *supra* note 5, at 113-14, 136-39.

95. *See* Wise & Wolff, *supra* note 5, at 136-39.

96. *See generally* ALAN D. ULLBERG & PATRICIA ULLBERG, MUSEUM TRUSTEESHIP 22-25 (1981) (discussing a trustee's responsibility for fundraising).

97. For example, in a case involving the Reading Public Museum and Art Gallery in Pennsylvania, Commonwealth v. Reading Public Museum & Art Gallery, No. 72430 (C.P. Orphans' Ct. Berks County, Pa. Aug. 15, 1991), the citizens of Reading urged the trustees to reconsider their decision to sell a substantial number of paintings from the collection. Negotiations followed, and the public eventually voted to use county funds to support the museum, provided that the museum matched this support through fundraising.

Courts also should ask directors to consider plans that involve the redistribution of works through a temporary lease rather than through a permanent sale — in other words, a sharing of artwork among institutions. Sharing may be the most economically sound means of allocating resources among museums.[98] Courts might suggest that directors attempt to retain a work for the benefit of the public by temporarily loaning or renting the work, rather than selling it outright. The rental of a work provides income to its owner while providing another museum with the opportunity to display a work it otherwise might not be able to afford.[99] This cooperation between museums should be supported, particularly during the present period of astronomical art prices.[100]

A traveling exhibit of an entire collection or selected works from the collection similarly serves the directors' obligations. Special exhibitions of works and tours "increase the availability of art to the viewing public"[101] — a goal clearly in line with a director's fiduciary duties. At the same time, these tours provide current and future income to all participants, including those museums whose works comprise the exhibit and those museums that enjoy increased attendance as a result of the exhibit.[102] A recent case concerning the Barnes Foundation involved the substitution of a traveling exhibit for a proposal to deaccession works from its collection as a means to raise extensive funds to repair the deteriorating Foundation building.[103] The tour of the Barnes collection raised more than

98. *See* James Heilbrun, *Managing a Museum's Collection,* 23 J. ARTS MGMT., L. & SOCY. 69, 71-72 (1993); *see also* Ralph Blumenthal, *Museums Share More Art to Survive Leaner Times,* N.Y. TIMES, Dec. 7, 1995, at B1 (discussing novel approaches to the sharing of art collections). As Blumenthal notes, "[a]lthough the approaches vary, the government aid and slower growth in foundation giving are sending a chill through many art organizations." *Id.*

99. *See* Heilbrun, *supra* note 98, at 71-72. A variation on the loan, one step closer to a full-scale sale, would involve the limited sale of an object. One commentator suggests that directors could preserve the assets of a museum and still earn funds by selling a limited present interest in the work and keeping for the museum a reversionary interest, thereby diminishing the net loss to the museum and to the public. *See* LEONARD D. DUBOFF, ART LAW IN A NUTSHELL 306 (2d ed. 1993).

100. *See* Heilbrun, *supra* note 98, at 72. As an example of trends in art prices, consider the 1989 sale of a work by Impressionist Mary Cassatt for $4,510,000. Five years earlier the same work had sold for $495,000. *See* Jay E. Cantor, *The Museum's Collection, in* THE ECONOMICS OF ART MUSEUMS, *supra* note 2, at 17, 20; Carol Vogel, *Bounding Art Prices Stir Echoes of the 80's,* N.Y. TIMES, Nov. 9, 1995, at B1.

101. Heilbrun, *supra* note 98, at 74.

102. *See id.* at 74-75.

103. The Barnes Foundation case is not a "pure" deaccessioning case because it involved a trust with restrictions regarding access and removal of works based on the will of the creator, Alfred C. Barnes. Both the deaccessioning plan and the traveling exhibit violated the terms of the trust. But the request to permit the traveling exhibit gained court approval and provides an example of an alternative more in line with a director's fiduciary duties. This Note does not aim to express an opinion on the court's decision to allow a violation of the terms of the trust but merely points out that, in the deaccessioning case where no donor restrictions exist, this alternative may be uncontroversial and both economically and socially beneficial. For greater detail regarding the Barnes Foundation and the scandal surrounding

seventeen million dollars in rental fees. The Foundation used twelve million dollars to modernize its facilities and applied the remainder to the Foundation's endowment and operating costs.[104]

C. *Nature of the Buyer*

If the court does not perceive an alternative to sale, the court still must consider the final factor — whether the intended buyer will defeat the public good of the sale. Public purpose would not be served by deaccessioning works in order to meet operating expenses without regard to the placement of those works, as each work lost to public viewing may jeopardize the museum's ability to cite public benefit as a legitimate goal. As a result, courts must differentiate between public and private buyers. Keeping the artwork in the hands of an organization that permits public viewing would adhere more closely to directors' duty to the beneficiaries and to the terms of the museum.[105]

In satisfying the public-purpose requirement, courts must balance the interest in finding a charitable buyer with another concern: obtaining the highest price for the deaccessioned assets. If courts require directors to sell objects to another museum, a tension develops between "maximizing dollar value and protecting the public's right of access to cultural artifacts."[106] Public nonprofit organizations often lack the financial resources to compete with private buyers for the purchase of works of art. As a result, directors often will be forced to forego the maximum sale price in order to keep the work accessible to the public.[107]

This balancing should be of utmost concern in any deaccessioning decision. Courts should encourage directors to use their best

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it, see Anne Higonnet, *Whither the Barnes?*, ART IN AMERICA, March 1994, at 62; Carol Vogel, *A Controversial Man in an Eccentric Place,* N.Y. TIMES, Apr. 4, 1993, § 2, at 1.

104. *See* Carol Vogel, *An Art Tour Comes Home, Its Fortune Made,* N.Y. TIMES, Nov. 19, 1995, § 2, at 47.

105. Not all public buyers are necessarily equally good. For example, although a sale from a museum in the United States to a foreign museum involves a sale to another public institution, the locality may be so inaccessible to the American public — even more so for the local public that previously had enjoyed the work — as to place it on the same level as a sale to a private buyer within the United States. Though a sale to a public buyer is generally preferable, there are certainly times when a public buyer is the practical equivalent of a private buyer. *See* WEIL, *supra* note 6, at 112 (discussing the dilemma of varying price thresholds for public institutions in the same locality as compared to a distant community or a foreign country); Suzanne Muchnic, *Don't Hate Him Because His Museum Is Filthy Rich,* L.A. TIMES, Apr. 30, 1995, at 20 (discussing an incident in which a group of British museums and donors collected funds sufficient to prevent the J. Paul Getty Museum in California from purchasing a Canova sculpture that originally belonged to a British estate); Judd Tully, *Who Owns N.Y. Museum's Old Masters?,* WASH. POST, Jan. 12, 1995, at C1 (equating a sale from a museum to private hands with a sale to a foreign museum).

106. David R. Gabor, Comment, *Deaccessioning Fine Art Works: A Proposal for Heightened Scrutiny,* 36 UCLA L. REV. 1005, 1037 (1989).

107. *See* WEIL, *supra* note 6, at 112.

efforts to facilitate a sale that is profitable and keeps the artwork available for public observation.[108] This type of transaction best serves the interest of the public. Accordingly, courts should require museums to sell to public buyers, unless the potential income of a private sale is significantly higher.

Museums may be able to engineer a purchase by a public buyer by finding several museums interested in the same work who would be willing to share the work on a rotating basis.[109] This kind of cooperative effort also may solve the problem of divergent publics[110] by allowing even broader access to the work — the same work now may be accessible to the "public" of several states or countries.

Courts also should support the implementation of "preemption agreements" that provide a guarantee of a fair balance between income and public access. A preemption agreement gives a qualified public institution the option to match a bid made by a private bidder within a specified number of days — in contract terms, a right of first refusal. If the public institution matches the private bid, the institution receives a graduated discount, depending on the amount of the sale.[111] This type of agreement was implemented recently by the New York Historical Society, Sotheby's, and the New York State Attorney General.[112] The agreement allowed institutions such as the Metropolitan Museum of Art, Vassar College, and the Corning Museum of Glass to purchase works that otherwise would have been sold to private buyers.[113] The protection to the public interest afforded by this agreement is worth duplicating in other jurisdictions.

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108. It would be unrealistic to make an absolute requirement that directors sell only to other museums. Even the codes of ethics do not adhere to this limitation:

> In disposing of an object, due consideration must be given the museum community in general as well as the wishes and financial needs of the institution. Sales to, or exchanges between, institutions should be considered as well as disposal through the trade. In addition to the financial return from disposals, the museum should consider the full range of factors affecting the public interest.

AMERICAN ASSN. OF MUSEUMS, MUSEUM ETHICS 13 (1978).

109. *See* STEPHEN E. WEIL, *Custody Without Title, in* BEAUTY AND THE BEASTS, *supra* note 3, at 151, 152-59 (discussing several cases involving joint-ownership arrangements).

110. *See supra* note 105.

111. The preemption agreement developed by the New York Historical Society, Sotheby's, and the New York State Attorney General stipulates that if the successful bid price (the price declared by the auctioneer) of the lot is $25,000 or less, the public institution receives a 10% discount. If the bid price is more than $25,000 but less than or equal to $100,000, the discount is 5%. Finally, if the bid price exceeds $100,000 *and* the bid price is greater than the high pre-sale estimate published in the catalogue for the sale, the discount is 3%. *See* Stephen E. Weil, *Miscellaneous Materials Relevant to Litigation Update, in* LEGAL PROBLEMS OF MUSEUM ADMINISTRATION 429, 431 (A.L.I.-A.B.A. 1995).

112. *See id.*

113. *See* Carol Vogel, *Inside Art*, N.Y. TIMES, Feb. 3, 1995, at B8; Carol Vogel, *Met Museum Pre-empts Sale of Old Master*, N.Y. TIMES, Jan. 20, 1995, at C3.

As part of the third prong of the test, a court may approve a sale to a private buyer if the sale would be substantially more lucrative than one to a public purchaser, and the court is convinced that the sale is in the best interest of the public — in other words, the increase in income outweighs the decrease in access. This situation, though perhaps least desirable, remains an option as long as the court is satisfied that the directors will fulfill their duties to the public through the use of the sale proceeds. In such a situation, the undesirable results of this public-to-private transfer may be minimized by a conveyance that requires the buyer periodically to display the work publicly.[114] By consistently suggesting these less absolute alternatives, courts will instill in directors an understanding of the preeminence of the public's interest as museum beneficiaries.

CONCLUSION

In February 1993, the New York Historical Society closed its doors after 188 years in existence — it no longer could afford to operate.[115] Museums will continue to desire new art for their collections, but — in cases like the Historical Society — their most pressing concern is survival. With the present reductions in government funding and no likelihood of increases in sight, museums must find innovative solutions to survive. Although drastic, museums must be able to consider the possibility of selling some of their assets in order to remain solvent. A lack of museums would make real the belief that art is only for the wealthy. Surely the public cannot be served best by a policy in which one interest — the art itself — is allowed to prevail *absolutely* over the very important interest of providing public access to the art through the maintenance of museums as healthy institutions. The only way museums can serve the interests of the public is if they are given the means to survive, which may require periodically allowing them to deaccession works from their collections. It is unrealistic to demand that museums hold on to works that do not serve their mission or those for which they cannot care properly, while forsaking the benefits of selling these works to others who might put them to better use.

Although not yet employed, the courts have an existing legal framework within which to evaluate deaccessioning proposals: the concept of trustee fiduciary duty, namely, the twin duties of loyalty and care. The courts can instruct museum directors that they may

114. *See* DUBOFF, *supra* note 99, at 306. Bargaining with private parties to display works may result in lowering the price. Again, balancing must be undertaken to determine whether this sacrifice in price is justified by the public display.

115. *See* David W. Dunlap, *Historical Society Shuts Its Doors but Still Hopes*, N.Y. TIMES, Feb. 20, 1993, § 1, at 9.

be able to fulfill their fiduciary obligations while pursuing a deaccessioning plan but only if directors can prove that they have arrived at this option with the public's best interest in mind and after careful consideration of less extreme alternatives. This proviso will prevent the use of deaccessioning as a crutch for poorly managed institutions. These demands represent the higher standard the law expects of trustees.

In May 1995, the Historical Society reopened and has since celebrated its rebirth with a series of exhibits, received a $7.5 million grant to create a study center for its collection of decorative and fine arts, and developed a program by which the building space may be rented out for parties — illustrating the benefits of permitting deaccessioning to meet operating expenses in appropriate circumstances.[116] Earlier in the year, a New York court allowed the institution to deaccession sixteen million dollars worth of Old Master paintings and then apply these funds toward operating expenses. The Director of the Historical Society summarized the controversy when she said that to consider deaccessioning only to buy more art when the Historical Society has been closed for over two years due to lack of working capital just "doesn't make any sense at this point."[117]

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116. *See* Bob Morris, *The Dress: Black Tie and Goggles,* N.Y. TIMES, Oct. 15, 1995, § 1, at 43.

117. Tully, *supra* note 105, at C1.