

Berkshire Museum Drama Heats Up

11.15.17 | Linda J. Rosenthal, JD



Recently, in [Controversial Decision for Berkshire Museum](#) (October 11, 2017), we reported on [an uproar last summer](#) in the art world. The trustees of this 100-year-old institution in Pittsfield, Massachusetts, had announced a decision to sell some 40 valuable and cherished works of art at a Sotheby's auction set for November 2017.

The board explained this plan was based on the Museum's perilous financial situation: an "existential threat" requiring the organization to "adapt, migrate or go extinct." Many in the Pittsfield community were surprised and shocked at the news; they questioned the board's claim that the matter had been carefully studied for some two years before the drastic recommendation was proposed and approved. Opposition in the local community erupted immediately and has strengthened over several months.

There has been criticism as well from outside the Pittsfield area; around the nation, the art world had a collective apoplectic fit at the news of the proposed sell-off. Well-known art journalist and lecturer [Lee Rosenbaum](#), aka @CultureGrrl, has helpfully provided a blow-by-blow account of each and every twist and turn in this saga – albeit from her standpoint as an ardent opponent of this deaccessioning plan. "Deaccessioning" an art collection violates "a cardinal rule of museums: Don't sell stuff to pay the bills." Generally, "works of art are sold only to fund further acquisitions." The announced objective for the Berkshire sale is different; the trustees intend to create an endowment and to generate funds to chart a new path forward.

In the conclusion to our October 11th Berkshire post, we posed the question: "Who gets a say in a decision like this? Are there any other possible stakeholders? Are there overriding considerations that can be raised by colleagues and community members....?"

Lawsuits Filed in Museum Dispute

A week or so after our post, @CultureGrrl wrote in her column that “[the only realistic hope](#) to stop Berkshire Museum’s misguided course would be legal action, either by the Massachusetts Attorney General’s Office (which is reviewing the case but has not yet announced whether it will act) or by opponents to the sale.” With the auction set for the week of November 13th, opponents and government regulators had no time to lose.

Events moved quickly. Several plaintiffs, including the sons of the late artist Norman Rockwell, filed a lawsuit in [Massachusetts Superior Court](#) on October 20, 2017, seeking injunctive relief. The board’s proposed sell-off plan includes two multi-million-dollar Rockwell paintings donated to the Museum by the artist himself who was an honored member of Berkshire for many years.

In the [Complaint](#), Plaintiffs allege that the board and its members: (1) breached their fiduciary duties; (2) made a decision violating the Massachusetts statute that created the Museum and imposed a requirement that it maintain any gifts “for the people of Berkshire County and the general public”; and (3) made overblown claims of financial necessity to support the board vote to sell off many works of art.

Several days later, a separate group of plaintiffs filed another – distinct – lawsuit. At that time, the Massachusetts Attorney General’s office finally took steps to join the litigation proceedings.

Plaintiffs Lose First Round

Among certain law and accounting professors who regularly tweet about developments in the exempt-organizations world, there were discussions about the possible outcome of at least the first phases of these lawsuits. On October 21, 2017, (in response to @CultureGrrl’s tweet referencing the just-filed lawsuits) University of Kentucky law professor Brian Frye [tweeted](#): “The plaintiffs lack standing & the complaint fails to state a viable cause of action. No written gift condition & ‘public trust’ is pure BS.”

On Tuesday, November 7, 2017, Judge John A. Agostini issued a [25-page decision](#), declining plaintiffs’ request to halt the imminent Sotheby’s auction. It’s an interesting read because of the detailed discussion of the facts and background of this case along with an exhaustive, thoughtful legal analysis. Later in the day, Brian Frye [sent out another tweet](#): “Called this one. No standing for plaintiffs, no violation of the duty of care.”

The museum trustees were happy. The folks at Sotheby’s were, too. Art Law Blogger Donn Zaretsky reacted in [an entertaining rant](#) approving the win against what he terms “the Deaccession Police.”

But not everyone was pleased; the plaintiffs certainly were not. And the officials at the Attorney General’s office were not; Judge Agostini slammed them hard for dithering around about getting involved. The state agency – unlike the plaintiffs – generally has standing in such matters, and should have acted faster. Also miffed about this development was the [aforementioned @CultureGrrl](#) who quickly blogged and tweeted her displeasure.

Plaintiffs Get Temporary Reprieve

Time was running out; the Sotheby's auction was set to go on Monday, November 13th. At the eleventh hour, on Friday, November 10th, the only party with standing took action. The Massachusetts Attorney General's office filed an appeal of Judge Agostini's ruling.

It was late Friday night when a Massachusetts Appeals Court judge granted a preliminary injunction to block the Museum from selling the art in question on Monday November 13th at Sotheby's. He ruled that the "risk of irreparable harm" weighed in favor of the petitioners seeking the stay; that is, Rockwell's sons, Berkshire Museum members, and the Attorney General's Office. He set the injunction to run until December 11th, but gave the Attorney General the "option to extend the injunction until its investigation into the deaccessioning can be completed."

The Art Law Blogger reacted to the temporary stay: "I guess the appellate court wasn't as impressed with Judge Agostini's decision as I was."

Conclusion

This drama in the Massachusetts hills showcases an emerging trend in 501(c)(3) governance: A wide variety of "stakeholders" are challenging the decisions of the boards of their important community institutions. Philanthropy experts are homing in on this facet of the case: see, for instance, *Proposed Pittsfield Museum Art Sale Raises Core Questions Regarding Nonprofit Stewardship and Boards Should Heed This Multi-Stakeholder Revolt in Western Mass.* both by editor Ruth McCambridge of The Nonprofit Quarterly.

Similarly, in 2015, we wrote about two important – successful – stakeholder revolts; one at the San Diego Opera, the other at Virginia's Sweet Briar College.

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