

IN ART WE TRUST: THE INTERSECTION OF TRUST AND BANKRUPTCY LAW IN *DETROIT*

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I. INTRODUCTION

On July 18, 2013, the City of Detroit, Michigan filed for bankruptcy protection under Chapter 9 of the United States Bankruptcy Code (the Code), marking the largest municipal bankruptcy in American history.¹ Slightly over one year later, on November 12, 2014, Judge Steven Rhodes confirmed the Eighth Amended Plan for the Adjustment of Debts of the City of Detroit.² In those sixteen months, much debate circled around the art collection of the Detroit Institute of Arts (DIA), one of the largest publicly owned art institutions in the world. The DIA has one of the nation's most prolific

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1. Michael A. Fletcher, *Detroit Files Largest Municipal Bankruptcy in U.S. History*, WASH. POST (July 18, 2013), https://www.washingtonpost.com/business/economy/2013/07/18/a8db3f0e-efe6-11e2-bed3-b9b6fe264871_story.html.

2. Order Confirming Eighth Amended Plan for the Adjustment of Debts of the City of Detroit at 217, *In re City of Detroit*, No. 13-53846 (Bankr. E.D. Mich. Nov. 12, 2014), ECF No. 8272.

collections of art, with works by such artists as Rembrandt, Degas, Cézanne, Picasso, Van Gogh, Gauguin, and a famed mural by Diego Rivera.³

At issue was Detroit's contention that the works contained in the DIA could be liquidated to satisfy the debts of the City of Detroit, a sentiment echoed by creditors, including the Financial Guarantee Insurance Company, Syncora Holdings Ltd., and numerous hedge funds (the Objecting Creditors).⁴ While deaccessioning, "the process of permanently removing an object from a museum's collection," might have appeared at first to be a viable solution to Detroit's fiscal problems, it never truly was.⁵ This Article argues that the works contained in the DIA were held in charitable trust before and during the Detroit bankruptcy, and therefore could not have been sold to satisfy the debts of Detroit under its Chapter 9 plan of adjustment.⁶

To come to this conclusion, this Article first seeks to define the nature of a municipal debtor's property, and subsequently apply that definitional framework to assets held in a trust. Part II addresses established principles of law related to a debtor's property, particularly when such property is held in trust. Specifically, this Part shows that when a bankruptcy debtor serves as the trustee of a charitable trust, the trust assets do not constitute property of the debtor's estate such that they may be monetized for distribution under a confirmed plan. Part III then provides a history of the DIA, the institution at the center of the legal dispute. Part IV explains the elements of a charitable trust under Michigan law, applies those elements to the history and organization of the DIA, and comes to the conclusion that the artwork contained in the DIA must be held in charitable trust, thereby foreclosing the possibility of a sale to fund Detroit's Chapter 9 plan. Part V briefly discusses sociocultural arguments against liquidating any works of art contained in the DIA. Finally, Part VI discusses the "Grand Bargain," which ultimately saved the DIA from being liquidated, and explains how the debate surrounding the DIA is still relevant, even as Detroit continues to emerge from bankruptcy.

II. PROPERTY OF THE DEBTOR AS A CHARITABLE TRUSTEE

Courts afford municipalities going through Chapter 9 bankruptcy substantial leeway in their decisions pertaining to the retention of assets. In

3. *Art at the DIA: Search the Collection*, DETROIT INST. ARTS, <http://www.dia.org/art/search-collection.aspx> (last visited Nov. 18, 2015).

4. See Joint Pretrial Brief in Support of Objection to DIA Settlement at 12–13, *In re City of Detroit*, No. 13-53846 (Bankr. E.D. Mich. Aug. 27, 2014), ECF No. 7103 [hereinafter Objector's Brief].

5. Sara Tam, Note, *In Museums We Trust: Analyzing the Mission of Museums, Deaccessioning Policies, and the Public Trust*, 39 FORDHAM URB. L.J. 849, 859 (2012); see also NEW OXFORD AMERICAN DICTIONARY 436 (1st ed. 2001) (defining *deaccession* to mean "officially remove (an item) from the listed holdings of a library, museum, or art gallery, typically in order to sell it to raise funds").

6. While this Article primarily discusses the proposed sale or liquidation of the artwork of the DIA, this discussion includes, by implication, any other method of monetizing the DIA, for example, through the granting of a security interest, which could have the effect of a sale under certain circumstances.

fact, as provided in § 904 of the Code, the bankruptcy court may not interfere with most operations of a municipal debtor, as it is permitted to do with respect to those of an individual or corporate debtor.⁷ The Code, moreover, imposes an important requirement for confirmation of the eventual plan for the adjustment of the Chapter 9 municipal debtor's debts; namely, it must comply with state law, at least in the sense that, as provided by § 943(b)(4), the court shall confirm a Chapter 9 plan if, among other requirements, the debtor "is not prohibited by law from taking any action necessary to carry out the plan."⁸ Thus, because trust law is found in individual state codes and case law, compliance with that body of law is important to crafting a confirmable plan.

Generally, trust and bankruptcy law collide when a court must make a determination about what to include as property of the debtor. Before examining that conflict, however, note that in a Chapter 9 bankruptcy, unlike a case under any other chapter of the Code, there is no such thing as an "estate," and accordingly, there is no "property of the estate."⁹ Perhaps because debtors file under Chapter 9 less frequently than under other chapters of the Code, or perhaps because large-scale Chapter 9 cases are rarer still, issues of charitable trust law raised questions of first impression in Detroit's Chapter 9 case.¹⁰ Cases dealing with trust law in Chapter 11 bankruptcies, in which there is a bankruptcy estate, may be instructive on how a court should address such questions in Chapter 9, given that Detroit could not sell anything in which it does not hold a property interest.¹¹

The concept of "property" vis-à-vis bankruptcy merits a brief discussion. The "estate" in bankruptcy consists of "all legal or equitable interests of the debtor in property as of the commencement of the case."¹² It is clear, however, that in crafting the Code, Congress intended to exclude from the bankruptcy estate property to which the debtor held only bare legal

7. 11 U.S.C. § 904 (2012).

Notwithstanding any power of the court, unless the debtor consents or the plan so provides, the court may not, by any stay, order, or decree, in the case or otherwise, interfere with—

- (1) any of the political or governmental powers of the debtor;
- (2) any of the property or revenues of the debtor; or
- (3) the debtor's use or enjoyment of any income-producing property.

Id.

8. *Id.* § 943; *In re N.Y.C. Off-Track Betting Corp.*, 434 B.R. 131, 144 (Bankr. S.D.N.Y. 2010) ("As nothing in chapter 9 may be interpreted to interfere with the power of a State to control its municipalities, it necessarily follows that debtors under chapter 9 must follow state laws, at least those that are not preempted by federal law.").

9. 11 U.S.C. § 901(a); Eric S. Pommer & Marc M. Friedman, *Municipal Bankruptcy and Its Effect on Government Contractors*, 25 PUB. CONT. L.J. 249, 255, 262 (1996) ("[T]here is no 'estate' under section 541.").

10. *Table F-2—Bankruptcy Filings (December 31, 2013)*, U.S. COURTS, <http://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2013/12/31> (last visited Nov. 18, 2015). In 2013, for instance, only nine Chapter 9 bankruptcies were filed, compared to 8,980 business Chapter 11 filings. *Id.*

11. *See infra* Section IV.B.

12. 11 U.S.C. § 541(a)(1); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983).

title.¹³ The Supreme Court has long held “that the basic federal rule in bankruptcy is that state law governs the substance of claims, Congress having generally left the determination of property rights in the assets of a bankrupt’s estate to state law.”¹⁴

Superimposed upon this discussion is the nature of trusts in general. At heart, a trust is a unique sort of fiduciary relationship wherein there is a “holding of title to property by one person [or entity] for the benefit of another.”¹⁵ There is thus a bifurcation of interest upon the creation of a trust into legal ownership (held by a trustee) and equitable ownership (held by a beneficiary).¹⁶ As such, courts must determine what property interest a debtor holds in the trust’s property when that debtor serves as its trustee.

Courts agree that when a debtor serves as a trustee of a trust, charitable or otherwise, the property contained within that trust is not property of the debtor.¹⁷ Thus, when the debtor holds or possesses property validly held in trust for another, that property is beyond the reach of the debtor’s creditors.¹⁸ Furthermore, even if the debtor did retain an interest such that the trust would be property of the debtor, the property would still be subject to all limitations imposed upon it by the trust, such as a purpose restriction.¹⁹

13. *Whiting Pools, Inc.*, 462 U.S. at 204 n.8 (“The legislative history indicates that Congress intended to exclude from the estate property of others in which the debtor had some minor interest such as a lien or bare legal title.”).

14. *Raleigh v. Ill. Dep’t of Revenue*, 530 U.S. 15, 20 (2000); *see also* *Butner v. United States*, 440 U.S. 48, 55 (1979) (“Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.”).

15. *Nash v. Duncan Park Comm’n*, 848 N.W.2d 435, 447 (Mich. Ct. App. 2014) (citing RESTATEMENT (SECOND) OF TRUSTS § 2 (AM. LAW INST. 1959)), *vacated in part, appeal denied in part*, 862 N.W.2d 417 (Mich. 2015).

16. *Equitable Tr. Co. v. Milton Realty Co.*, 246 N.W. 500, 502 (Mich. 1933) (“To create a trust, there must be an assignment of designated property to a trustee with the intention of passing title thereto, to hold for the benefit of others. There must be a separation of the legal estate from the beneficial enjoyment.”).

17. *Begier v. IRS*, 496 U.S. 53, 59 (1990) (“Because the debtor does not own an equitable interest in property he holds in trust for another, that interest is not ‘property of the estate.’”); *Megafoods Stores, Inc. v. Tex. Comptroller of Pub. Accounts (In re Megafoods Stores, Inc.)*, 210 B.R. 351, 354 (B.A.P. 9th Cir. 1997) (“It is well-settled that a debtor does ‘not own an equitable interest in property he holds in trust for another,’ and that funds held in trust are not ‘property of the estate.’”), *aff’d in part, vacated in part*, 163 F.3d 1063 (9th Cir. 1998); *Mitsui Mfrs. Bank v. Unicom Comput. Corp. (In re Unicom Comput. Corp.)*, 13 F.3d 321, 324 (9th Cir. 1994) (“[S]omething held in trust by a debtor for another is neither property of the bankruptcy estate under section 541(d), nor property of the debtor for purposes of section 547(b).”).

18. 5 COLLIER ON BANKRUPTCY ¶ 541.28[6] (16th ed. 2015).

19. *Tort Claimants Comm. v. Roman Catholic Archbishop of Portland (In re Roman Catholic Archbishop of Portland)*, 345 B.R. 686, 705 (Bankr. D. Or. 2006) (“The bankruptcy estate takes whatever interests a debtor has in property as of the petition date, subject to the same limitations and restrictions on the use of the property that existed prepetition.” (citing *Salisbury v. Ameritrust Tex. (In re Bishop College)*, 151 B.R. 394, 398 (Bankr. N.D. Tex. 1993))).

III. HISTORY OF THE DETROIT INSTITUTE OF ARTS

To fully understand the conundrum the DIA faced, it is important to place the museum in a historical context. In 1885, the Michigan Legislature passed Act No. 3 of the Public Acts of 1885, an act “for the formation of corporations for the cultivation of art”²⁰ to allow for the creation of a public art gallery in Detroit.²¹ That same year, the DIA was founded as a private, nonprofit corporation pursuant to the then-recently passed legislation.²²

Soon after its founding, the DIA conveyed its real estate to the City of Detroit, while maintaining ownership of the art collection.²³ The Michigan Legislature promulgated legislation that allowed the City of Detroit both to appropriate money to the museum and to issue bonds for building construction.²⁴ Unsurprisingly, appropriation of public funds to a private institution had its detractors, some of whom argued that the appropriation violated the Michigan constitution.²⁵ This dispute came to a head in 1915, when the Supreme Court of Michigan, despite arguments that the Detroit Museum of Art had a public object, ruled that the appropriation of public funds to the Detroit Museum of Art was, in fact, unconstitutional because of the constitutional prohibition against government subsidizing private corporations.²⁶

Due in large part to the fact that the City of Detroit was no longer able to subsidize the activities of the Detroit Museum of Art, in 1919 the Michigan Legislature passed a law allowing the museum to convey its assets to the

20. 1885 Mich. Pub. Acts 2–3. The legislation provided that such corporations shall have power . . . to receive, acquire, collect, and own paintings, sculpture, engravings, drawings, pictures, coins, and other works of art, and to institute, maintain, or assist schools for the teaching of art.

The public exhibition of its collection of works of art shall be the duty of every such corporation, and . . . it shall . . . open its buildings and art collection to the general public.

Id.

21. Pretrial Brief of the Detroit Institute of Arts in Support of Confirmation of the Sixth Amended Plan for the Adjustment of Debts of the City of Detroit at 6, *In re* City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Aug. 27, 2014), ECF No. 7141 [hereinafter DIA Brief].

22. DETROIT MUSEUM OF ART, ANNUAL REPORT FOR THE YEAR 1918 11 (1918), http://www.dalnet.lib.mi.us/dia/collections/dma_annual_reports/1918.pdf. The Detroit Museum of Art was incorporated for the founding of a public art institute in the city of Detroit, which may acquire and hold such real estate as may be suitable for the site of such art buildings as it may erect or maintain thereon; receive and use such gifts, contributions, devises and bequests as may be made for art purposes; receive, acquire, collect and own, paintings, sculpture, engravings, drawings, pictures, coins, and other works of art

Id.

23. *Detroit Museum of Art v. Engel*, 153 N.W. 700, 700 (Mich. 1915).

24. *See, e.g.*, 1903 Mich. Pub. Acts 583; 1899 Mich. Pub. Acts 1442.

25. JEFFREY ABT, *A MUSEUM ON THE VERGE: A SOCIOECONOMIC HISTORY OF THE DETROIT INSTITUTE OF ARTS, 1882–2000* 94–95 (2001).

26. *Engel*, 153 N.W. at 700. “The fact that a private corporation has divested itself of its property does not change its character as a private corporation.” *Id.* at 702 (Brooke, C.J., dissenting).

city.²⁷ Additionally, the year before, Detroit amended its city charter to allow itself to operate and acquire art for an art institute.²⁸ Under the authority of these laws, and because of the Detroit Museum of Art's financial difficulties resulting from a lack of public funding, the private Detroit Museum of Art Corporation transferred all of its assets to the City of Detroit in July 1919, which began operating the assets of the former Detroit Museum of Art as the Detroit Institute of Arts.²⁹ Rather than winding up its affairs, the private corporation "continued to exist to assist the museum with gifts of art and with support of museum operations and their costs."³⁰

Over the next decades, the DIA experienced extraordinary growth. In 1921, the institute hired German-born William R. Valentiner, who redirected the museum's focus exclusively to fine art.³¹ Under Valentiner's leadership, the DIA acquired many significant works of art, such as Van Gogh's *Self Portrait*, with municipally provided funds.³² Notably, it is—and was—extremely rare in the United States for any public funds to be used to purchase works of art.³³ At present, however, the DIA purchased only 5% of its collection using public funds; over 95% of the artwork came from the donations of private individuals and entities.³⁴

On October 7, 1927, the DIA opened its new home on Woodward Avenue to much pomp and circumstance.³⁵ Over the ensuing years, the DIA experienced a degree of turmoil, unsurprisingly coinciding with the Great Depression, as it saw municipal appropriations decrease and growth stunted.³⁶ In 1933, though, the DIA unveiled the famous commission by

27. 1919 Mich. Pub. Acts 125 ("Any corporation organized under [1885 PA 3] situated in a city empowered to maintain a public art institute . . . may convey all or any of its property to said city . . . and said property so conveyed shall . . . be faithfully used for the purposes for which such corporation was organized . . ."); Mich. Att'y Gen. Op. No. 7272 (2013) (citing 1919 Mich. Pub. Acts 125).

28. Charter of the City of Detroit, Michigan, tit. IV, chapter XIX, §§ 1, 7 (1918), <http://elibrary.wayne.edu/articles/1374459.5143/1.PDF>.

29. See ABT, *supra* note 25, at 110. Some have focused on the fact that Detroit began acquiring works of art between 1918, when the city formed the Arts Commission, and 1919, when the city took title to the assets of the former Detroit Museum of Art. See, e.g., Objector's Brief, *supra* note 4, at 20–21. This argument is unpersuasive because history clearly shows that the creation of the City Arts Commission was predicated on the anticipated acquisition of the Detroit Museum of Arts. See, e.g., DETROIT MUSEUM OF ART, *supra* note 22, at 7 ("[T]he city in its new charter has provided for an arts commission, contemplating that [we] will convey the property and trusts [we] hold to the city, as the basis for the Detroit Institute of Arts.").

30. Mich. Att'y Gen. Op. No. 7272. Today, the City Arts Commission is known as the Founders Society. *Id.*

31. ABT, *supra* note 25, at 117.

32. *Museum Info: About the DIA*, DETROIT INST. ARTS, <http://www.dia.org/about/history.aspx> (last visited Nov. 18, 2015).

33. ABT, *supra* note 25, at 118.

34. DIA Brief, *supra* note 21, at 15.

35. ABT, *supra* note 25, at 121. During the ceremony, both Valentiner and Ralph H. Booth, the President of the Detroit Arts Commission, gave lengthy speeches; the former about "the spiritual benefits of art" and the latter "on the museum as a civic monument and public resource." *Id.* at 122.

36. *Id.* at 130–40.

Diego Rivera, the mural cycle *Detroit Industry*, and a slight uptick of attendance occurred, even in the midst of economic turmoil.³⁷ For various reasons, Detroit ceased using public money to acquire artwork for the museum in 1955, though the Founders Society continued to solicit private funds for that purpose.³⁸

With a combination of public and private funding, the DIA added two new wings, one opening in 1966 and the next in 1971.³⁹ Simultaneously, however, the museum experienced severe funding shortages, and the Founders Society saw decreased membership, causing staffing shortages and reduced schedules.⁴⁰ In 1975, a citywide fiscal crisis necessitated a temporary closing of the museum.⁴¹ Shortly thereafter, the DIA began receiving direct appropriations from the State of Michigan through legislative action.⁴² After substantial internal discontent and mismanagement, museum employees became employees of the City of Detroit in 1983.⁴³ Despite this, Michigan continued to provide funding to the DIA; in fact, between 1977 and 2011, the Michigan Legislature appropriated approximately \$300 million to the museum.⁴⁴

The most recent pre-bankruptcy reorganization of the DIA occurred in 1997, when Detroit entered into a twenty-year contract with the Founders Society, under which the City of Detroit maintained title to the art collection but the Founders Society handled operations of the museum.⁴⁵ Even so, the museum continues to face financial hardship.⁴⁶

In 2010, the Michigan Legislature passed the Art Institute Authorities Act, which permitted the establishment of an “art institute authority” that, through popular ballot, could levy property taxes to support an art institute.⁴⁷ On Election Day in 2012, voters of three Detroit-area counties agreed to the property tax, providing a new funding mechanism for the DIA and giving residents of the three counties free admission to the museum.⁴⁸

37. *Id.* at 142.

38. Mich. Att’y Gen. Op. No. 7272 (2013).

39. ABT, *supra* note 25, at 158.

40. *Id.* at 177–78.

41. *Id.* at 189.

42. *Id.* at 191.

43. *Id.* at 213.

44. Mich. Att’y Gen. Op. No. 7272 (2013).

45. *Id.*; ABT, *supra* note 25, at 246.

46. Mich. Att’y Gen. Op. No. 7272.

47. MICH. COMP. LAWS ANN. §§ 123.1201–.1217 (West, Westlaw though Public Act No. 172, 2015 Reg. Sess.).

48. Mark Stryker, *Voters in 3 Counties Approve DIA Millage, Get Free Admission*, DETROIT FREE PRESS (Aug. 8, 2012, 1:38 AM), <http://www.freep.com/article/20120807/ENT05/120807090/>.

IV. TRUST LAW STANDS FOR THE PROPOSITION THAT THE ART OF THE DIA COULD NOT BE SOLD

Even though individual state codes contain trust law, the majority of states, including Michigan, have trust laws derived from the Uniform Trust Code (UTC).⁴⁹ Under Michigan law, and by extension under the law of those states that have adopted the UTC, it is evident that the DIA held the assets in trust, and thus it could not have sold the assets as a part of the city's bankruptcy.⁵⁰ While the agreements the City of Detroit entered into under Michigan contract law could have been avoided in bankruptcy, they do evidence the existence of an express charitable trust.⁵¹ As explained below, because the assets of the DIA were held in charitable trust, they could not have been sold in conjunction with Detroit's bankruptcy.

A. Creation of an Express Charitable Trust Under State Law

Michigan law, like the common law, allows for the creation of express charitable trusts.⁵² While some have argued that Michigan did not recognize charitable trusts at the time it formed the Detroit Museum of Art, this assertion is misplaced.⁵³ Charitable trusts are not a new legal construct; they have been in existence for centuries and are well-integrated into American common law.⁵⁴ Further, the Michigan Supreme Court recognized municipal entities' ability to hold property in trust for the general public well before the founding of the Detroit Museum of Arts.⁵⁵

To effectuate any trust, including a charitable trust, a number of elements must be met. All trusts must have a valid, legal purpose; a trustee; beneficiaries; an intent to create a trust; and trust property, also referred to as a corpus.⁵⁶ Notably, a written trust instrument is not among these

49. *Enactment Status Map*, UNIFORM L. COMMISSION, <http://uniformlaws.org/Act.aspx?title=Trust%20Code> (last visited Nov. 18, 2015). As of the time of this writing, thirty jurisdictions apply a form of the UTC, namely Alabama, Arizona, Arkansas, the District of Columbia, Florida, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. *Id.*

50. *See infra* Part IV.B–C.

51. *See* 11 U.S.C. § 365 (2012).

52. *See* MICH. COMP. LAWS ANN. § 700.7405. The Michigan Estates and Protected Individuals Code (EPIC), defines a charitable trust as one “created for a charitable purpose described in section 7405(1).” *Id.* at § 700.7103(c).

53. *See, e.g.*, Objector's Brief, *supra* note 4, at 99.

54. *See* RESTATEMENT (THIRD) OF TRUSTS § 28 general cmt. a (AM. LAW INST. 2003) (“The general scope of charitable purposes in England was indicated over four centuries ago in the preamble to the Statute of Charitable Uses, 43 Eliz. I, c. 4 (1601).”).

55. *Maynard v. Woodard*, 36 Mich. 423, 425–26 (1877); *Hatheway v. Sackett*, 32 Mich. 97, 101 (1875).

56. *See, e.g.*, MICH. COMP. LAWS ANN. § 700.7402(1).

requirements.⁵⁷ Under Michigan law, “a trust need not be evidenced by a trust instrument” and may even be created orally.⁵⁸ Because all of the necessary elements are present with regard to the art of the DIA, as discussed at length below, those items are held in trust, and the City of Detroit could not sell them in conjunction with Detroit’s bankruptcy.⁵⁹

1. Valid, Legal Purpose

Generally, a trust must be created for lawful purposes that are not contrary to public policy and are for the benefit of the trust’s beneficiaries.⁶⁰ Michigan trust law, which parallels the Restatement (Third) of Trusts, provides that a “trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, scientific, literary, benevolent, governmental, or municipal purposes . . . or other purposes the achievement of which is beneficial to the community.”⁶¹ The commentary to the Restatement explicitly provides that the establishment or maintenance of museums fits squarely into such a purpose.⁶² Case law bolsters this proposition.⁶³ Furthermore, museums commonly use charitable trusts as a tool to create organizational and legal structures.⁶⁴

Moreover, Michigan law favors the creation of charitable trusts. “Charitable gifts and trusts are favorites of the law and of the courts, and the courts will declare valid, and give effect to, such gifts and trusts where it is possible to do so consistently with established principles or rules of law.”⁶⁵ Michigan courts have thus construed charitable trusts liberally, even before

57. *Gold v. Marquette Univ. (In re Leonard)*, 454 B.R. 444, 451 (Bankr. E.D. Mich. 2011). “To constitute an express trust there must be an explicit declaration of trust, or circumstances which show beyond reasonable doubt that a trust was intended to be created.” *Id.* (quoting *Scarney v. Clarke*, 275 N.W. 765, 767 (Mich. 1937)).

58. MICH. COMP. LAWS ANN. § 700.7407.

59. *See* 11 U.S.C. § 541(d) (2012); *Hunter v. St. Vincent Med. Ctr. (In re Parkview Hosp.)*, 211 B.R. 619, 629 (Bankr. N.D. Ohio 1997).

60. MICH. COMP. LAWS ANN. § 700.7404; UNIF. TRUST CODE § 404 (UNIF. LAW COMM’N 2010), www.uniformlaws.org/shared/docs/trust_code/utc_final_rev2010.pdf.

61. MICH. COMP. LAWS ANN. § 700.7405(1). This provision parallels the Restatement (Third) of Trusts § 28. *See* RESTATEMENT (THIRD) OF TRUSTS § 28 (AM. LAW INST. (2003)).

62. *See* RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. h.

A trust for the advancement of knowledge or education is charitable. Trusts for the promotion of education include trusts: . . . *to establish or maintain public libraries, museums, or other facilities*. Also supportive of education or enhancement of knowledge are trusts to promote or support research, or to promote the dissemination of knowledge or beliefs by the publication of books and pamphlets or through conferences or the delivery of lectures or media presentations.

Id. (emphasis added).

63. *See, e.g., Hardman v. Feinstein*, 195 Cal. App. 3d 157, 161 (Cal. Ct. App. 1987) (“Art museums advance education and therefore serve a charitable purpose.”).

64. Tam, *supra* note 5, at 855.

65. *Hannah v. Kelley (In re Estate of Rood)*, 200 N.W.2d 728, 738 (Mich. Ct. App. 1972) (quoting 14 C.J.S. *Charities* § 6, at 427).

the adoption of the modern Trust Code.⁶⁶ As a matter of public policy, “the people of the state are interested in the administration, operation and disposition of the assets of all charitable trusts in the state.”⁶⁷

Furthermore, Michigan law liberally construes any gift with a charitable purpose, such as those made to the DIA:

No gift, grant, bequest or devise, whether in trust or otherwise to religious, educational, charitable or benevolent uses . . . which shall in other respects be valid under the laws of this state, shall be invalid by reason of the indefiniteness or uncertainty of the object of such trust or of the persons designated as the beneficiaries thereunder in the instrument creating the same⁶⁸

Since its formation, the DIA has had one consistent purpose—to provide for educational enrichment through the exhibition of works of art. Upon its incorporation in 1885, the museum had a specific purpose: “The public exhibition of its collection of works of art.”⁶⁹ “All gifts, devises, or bequests” made to the DIA had to serve that purpose.⁷⁰ The Michigan Legislature could not change this purpose, nor could it effectuate a general sale of art without express authorization.⁷¹ The original Articles of Incorporation for the Detroit Museum of Art also emphasized this purpose.⁷² The original purpose of the institution did not change when the corporate entity transferred all of its property to the City of Detroit; in fact, the agreement between the city and the Detroit Museum of Art specifically provided that the conveyance and continued use of the property was predicated upon the city carrying out the purpose originally articulated in the Articles of Incorporation.⁷³ When Detroit took legal possession of the artwork, it did so “under a charter provision establishing a department that gave promise of permanent care and maintenance of the collections.”⁷⁴

Through the operating years of the DIA, not only did this charitable purpose not change, it continued to be emphasized. Private support for the

66. See, e.g., *John Robinson Hosp. v. Cross*, 272 N.W. 724, 726 (Mich. 1937); *Wanstead v. Fisher*, 270 N.W. 218, 221 (Mich. 1936); see also *Hunter v. St. Vincent Med. Ctr. (In re Parkview Hosp.)*, 211 B.R. 619, 631–32 (Bankr. N.D. Ohio 1997) (noting that courts often treat charitable trusts favorably).

67. MICH. COMP. LAWS ANN. § 14.251 (West, Westlaw through Public Act No. 173, 2015 Reg. Sess.).

68. *Id.* § 554.351.

69. 1885 Mich. Pub. Acts. 2–3.

70. *Id.*; 1915 Mich. Pub. Acts 3851.

71. 1915 Mich. Pub. Acts 3851.

72. DETROIT MUSEUM OF ART, *supra* note 22 (“Said corporation is formed for the objects and purposes contemplated by [1885 PA 3], to wit, for the founding of a public art institute in the city of Detroit . . . receive and use such gifts, contributions, devises and bequests as may be made for art purposes . . .”).

73. ABT, *supra* note 25, at 273.

74. Dexter M. Ferry, Jr. & Clyde H. Burroughs, *The Arts Commission Annual Report for the Year 1939*, 19 BULL. DETROIT INST. ARTS CITY DETROIT 46, 46 (1940), <http://www.jstor.org/stable/41500305>.

DIA was based largely on statements and conduct that affirmed the public's beneficial ownership of the museum's artwork.⁷⁵ In fact, in correspondence with Detroit Mayor Frank Murphy in 1955, E.P. Richardson, the Director of the DIA, stated that the artwork would be secure even if "the City of Detroit should go out of business," because legal title would revert back to the Founders Society.⁷⁶ When the original corporation restated its Articles of Incorporation in 1998, the purpose remained the same—"[t]o promote the people's interest in and knowledge of art matters by classes, lectures, exhibits and such other methods as may be thought to be appropriate to that end."⁷⁷ The current Collections Management Policy of the DIA further underscores this purpose: "The Mission of the Museum: To serve the public through collection, conservation, exhibition and interpretation of the art."⁷⁸ It is abundantly clear, by nearly every governing document of the DIA and its predecessor, that there exists a timeless purpose of the entity—to promote education, enrichment, and entertainment through the exhibition of works of art.⁷⁹

a. The Cy Près Doctrine

Once it is established that a trust exists for a specific purpose, the corpus of the trust may only be used in a manner consistent with that purpose.⁸⁰ There are situations, however, wherein the stated purpose of a charitable trust becomes frustrated for various reasons.⁸¹ Michigan, like many other jurisdictions, applies the doctrine of *cy près* in such a circumstance.⁸² Under the doctrine of *cy près*, which comes from the French meaning "as near as," a court may use its powers of equity to reform a donor's express charitable gift so that the gift will not fail.⁸³ In Michigan, courts may apply *cy près* to a charitable trust only when "a particular charitable purpose becomes unlawful, impracticable, or impossible to achieve, no alternative taker is named or provided for, and the court finds the settlor had a general, rather

75. See DIA Brief, *supra* note 21, at 36–40.

76. *Id.* at 14 (internal quotations omitted).

77. ABT, *supra* note 25, at 278.

78. DETROIT INST. OF ARTS, COLLECTIONS MANAGEMENT POLICY § II.A. (2005), <http://usmuseum.survey.claimscon.org/PDF/1326-58.pdf>.

79. See *id.* at §§ I–XIV.

80. See *Ourlian v. Major*, 53 N.W.2d 346, 348 (Mich. 1952) ("The law requires that the trustees conform strictly to the directions of the trust. They may not rewrite their express trust powers in frustration of the unambiguous intention of the grantor of the trust."); 24 MICH. CIV. JURIS. TRUSTS § 96, Westlaw (database updated Nov. 2015).

81. 88 AM. JUR. 3D *Proof of Facts* 469 (2006 & Supp. 2010).

82. MICH. COMP. LAWS ANN. § 700.7413(1)(c) (West, Westlaw through Public Act No. 172, 2015 Reg. Sess.); 88 AM. JUR. 3D *Proof of Facts*, *supra* note 81, at § 4; BOGERT'S TRUSTS & TRUSTEES § 433, Westlaw (database updated Sept. 2015);

83. RESTATEMENT (THIRD) OF TRUSTS § 67 (AM. LAW INST. 2003); *Cy pres*, BLACK'S LAW DICTIONARY (9th ed. 2009).

than a specific, charitable intent.”⁸⁴ This provides a court the opportunity to exercise its equitable powers only in a narrow set of circumstances. Other states generally limit the doctrine in much the same way as Michigan.⁸⁵

b. Application of Cy Près to the DIA

Given that the assets of the DIA are held in charitable trust, applying the doctrine of *cy près* may be appropriate. Before and during the bankruptcy, Detroit was in a state of disrepair.⁸⁶ It “no longer ha[d] the resources to provide its residents with the basic police, fire and emergency medical services that its residents need for their basic health and safety.”⁸⁷ Crime increased, infrastructure decreased, and the overall quality of life for Detroit residents was poor.⁸⁸ Selling the assets of the DIA could have allowed for the alleviation of many of these problems—the building of more roads or the hiring of more police officers, for example; these purposes would certainly benefit the public in general.

This argument, however, is misplaced. For a court to apply *cy près* in the first place, the original purpose of the charitable trust must be “unlawful, impracticable, or impossible.”⁸⁹ It was certainly not illegal for the DIA to continue operating, or to create a trust for the purpose of educational and artistic enrichment.⁹⁰ Furthermore, it is not impractical for the DIA to operate, providing educational enrichment to the masses.⁹¹ “A purpose becomes impracticable when the application of property to such purpose would not accomplish the general charitable intention of the settlor.”⁹² Certainly, it is not impossible to provide educational enrichment to a municipality, as the DIA’s continued operation, even through bankruptcy, evidences. Thus, the doctrine of *cy près* may not be applied to amend the trust purpose to allow the DIA to sell its assets for a purpose other than that of educational and artistic enrichment, no matter how important or even necessary the other purpose may be.

84. MICH. COMP. LAWS ANN. § 700.7413(1).

85. See, e.g., MD. CODE ANN., EST. & TRUSTS § 14-302 (West, Westlaw through 2015 Reg. Sess.).

86. See *In re City of Detroit*, 504 B.R. 97, 112 (Bankr. E.D. Mich. 2013).

87. *Id.*

88. *Id.*

89. MICH. COMP. LAWS ANN. § 700.7413(1).

90. See *id.*

91. See 88 AM. JUR. 3D *Proof of Facts*, *supra* note 81, at § 469 (“Mere unfairness does not constitute impracticability.”).

92. *Id.*

2. Trustee

In trust law, legal and equitable titles are bifurcated, with the former held by a trustee and the latter held by a beneficiary or beneficiaries.⁹³ Under Michigan charitable trust law, codified in the Supervision of Trustees for Charitable Purposes Act,⁹⁴ a trustee is “any individual, group of individuals, association, foundation, trustee corporation, corporation, or other legal entity holding property for any charitable purpose.”⁹⁵ As a legal entity, therefore, a municipality is a permissible trustee. Similarly, under the Restatement, municipalities and municipal corporations may serve as trustees.⁹⁶ As early as 1877, Michigan courts recognized that a municipal corporation could serve as a trustee of a charitable trust.⁹⁷

With regard to the works of the DIA, the City of Detroit served as trustee before the “Grand Bargain.”⁹⁸ The DIA’s status was not only obvious from traditional constructs of public museum management, but the Collections Management Policy of the DIA referred to the Museum, which the City of Detroit possessed, as trustee of the artwork.⁹⁹ As trustee, the City of Detroit held legal, but not equitable, ownership of the artwork in the DIA.¹⁰⁰ “The trust creates a fiduciary relationship, in which the trustee is the holder of legal title to the property subject to the beneficial interest of the beneficiary; the essential characteristics include separation of legal title from the beneficial interest and the existence of fiduciary duties.”¹⁰¹ Thus, the City of Detroit did not possess complete and unencumbered title to the artwork of the DIA.¹⁰²

Even if the City of Detroit was not the trustee of the artwork in the DIA, such a finding would still not defeat the charitable trust or the intent behind its creation under Michigan law. “If no such trustee shall be named in said instrument . . . then the trust shall vest in the court of chancery for the proper county, and shall be executed by some trustee appointed *for that purpose* by

93. *Pierowich v. Metro. Life Ins. Co.*, 275 N.W. 789, 790 (Mich. 1937) (“[T]here must be an assignment of designated property to a trustee with the intention of passing title thereto, to hold for the benefit of others. There must be a separation of the legal estate from the beneficial enjoyment.” (quoting *Equitable Tr. Co. v. Milton Realty Co.*, 246 N.W. 500, 502 (Mich. 1933))).

94. MICH. COMP. LAWS ANN. §§ 14.251–.266.

95. *Id.* § 14.252(a).

96. RESTATEMENT (THIRD) OF TRUSTS § 33 cmt. d (AM. LAW INST. 2003); *In re Acchione*, 227 A.2d 816, 820 (Pa. 1967) (explaining that “a municipality can act as trustee for a trust of a public nature provided that such trust is germane to the objects of the municipal corporation” (citations omitted)).

97. *Maynard v. Woodard*, 36 Mich. 423, 426–27 (1877).

98. *See infra* Part VI.

99. DETROIT INST. OF ARTS, *supra* note 78, at § V.A.

100. 90 C.J.S. *Trusts* § 249, Westlaw (database updated June 2015) (“Where a trust is valid . . . the trustee is the holder of the legal title and the beneficiary takes the equitable estate or beneficial interest.” (footnotes omitted)).

101. *Id.*

102. *See id.*

or under the direction of the court”¹⁰³ In that event, the City of Detroit would hold neither legal nor equitable title to the artwork, and, therefore, it still could not initiate a sale to fund a plan of reorganization.

3. Beneficiaries

At common law, a trust must have a beneficiary that is either a specific and identifiable person or class of persons. Both Michigan law and the Uniform Trust Code except charitable trusts from this requirement.¹⁰⁴ “A charitable trust can be created although it has no definite or definitely ascertainable beneficiary.”¹⁰⁵ In essence, the public at large may, and often does, serve as the beneficiary of a charitable trust.¹⁰⁶

Under trust law, a trustee must manage the trust for the benefit of the beneficiaries, keeping in mind the established purpose of the trust.¹⁰⁷ Here, as with any charitable trust, the beneficiary is the public at large.¹⁰⁸ Because the instant beneficiaries are the people of Detroit and the purpose of the trust is to provide, *inter alia*, educational advancement, the management of the trust property must coincide with those terms.¹⁰⁹ Therefore, to deaccession any artwork from the DIA for a purpose inconsistent with that of the DIA (namely educational and cultural enrichment) would constitute mismanagement of the trust.¹¹⁰

Certainly, the purposes for which individuals propose to deaccession pieces of art from the DIA are noble, for example, providing police and fire protection or rebuilding crumbling infrastructure.¹¹¹ But, as explained in Part IV.B, *infra*, simply because a purpose for selling trust property would be beneficial to a trust’s beneficiaries does not therefore mean that doing so is permissible.¹¹² The operative question is necessarily whether the proposed liquidation is consistent with the stated purpose of the trust, not whether it would prove beneficial in some way to a trust’s beneficiaries.¹¹³

103. MICH. COMP. LAWS ANN. § 554.351 (West, Westlaw through Public Act No. 173, 2015 Reg. Sess.) (emphasis added).

104. *Id.* § 700.7402(1)(c)(i); UNIF. TRUST CODE § 402(a)(3)(A) (UNIF. LAW COMM’N 2010).

105. RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. c (AM. LAW INST. 2003).

106. *See id.*

107. UNIF. TRUST CODE § 105(b)(2)–(3).

108. 14 C.J.S. *Charities* § 29, Westlaw (database updated June 2015).

109. MICH. COMP. LAWS ANN. § 700.7801 (“[T]he trustee shall administer the trust in good faith, expeditiously, in accordance with its terms and purposes, for the benefit of the trust beneficiaries, and in accordance with this article.”).

110. *See id.*

111. *See supra* notes 87–88 and accompanying text.

112. *See infra* notes 138–40 and accompanying text.

113. *See infra* notes 138–40 and accompanying text.

4. Intent to Create a Trust and Trust Property

The settlor of a trust must intend for a trust to be created.¹¹⁴ The settlor, however, need not use any specific language to create a trust, charitable or otherwise.¹¹⁵ What is required, generally, is that the settlor “manifest[s] an intention to create a [trust] relationship.”¹¹⁶ As defined by the Restatement, a trust is “a fiduciary relationship with respect to property . . . subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons.”¹¹⁷ With reference to charitable trusts specifically, Michigan law requires only an intent “that the property should be held subject to a legal obligation to devote it to purposes which are charitable.”¹¹⁸ Taken together, therefore, a manifestation of intent to create a trust is simply a manifestation of a relationship upon which one individual or entity (the trustee) is to deal with certain property (the corpus) in a certain way (the trust purpose) for the benefit of certain individuals (the beneficiaries).

Because Michigan law does not provide any specific mechanism for creating a trust, one can deduce intent from the many documents available, even if the title is not “Trust Document.”¹¹⁹ It has already been shown that there is a trustee, a class of beneficiaries, and a purpose with respect to certain property, namely those works of art contained in the DIA.¹²⁰ The numerous documents available, particularly the Articles of Incorporation, evidence an intent for the corpus to be managed in a certain manner, which, even without the label of the word *trust* operates exactly as any written trust would.¹²¹

In *In re Americana Foundation*, the Michigan Court of Appeals concluded that, in spite of the fact that the Articles of Incorporation of Americana Foundation contained no explicit trust declaration, they clearly evidenced an intent to create a charitable trust.¹²² In reaching this conclusion, the court cited six factors as evidencing such intent: (1) “[t]here was an assignment of designated property”; (2) the assignment was made to a trustee; (3) there was an intention to pass legal title; (4) the intent was for the

114. MICH. COMP. LAWS ANN. § 700.7402(1)(b); RESTATEMENT (THIRD) OF TRUSTS § 13 (AM. LAW INST. 2003); UNIF. TRUST CODE § 402(a)(2) (UNIF. LAW COMM’N 2010).

115. RESTATEMENT (THIRD) OF TRUSTS § 13 cmt. b (“No particular manner of expression is necessary to manifest the trust intention. Thus, a trust may be created without the settlor’s use of words such as ‘trust’ or ‘trustee’ . . .”).

116. *Id.* at § 13.

117. *Id.* at § 2.

118. *Knights of Equity Mem’l Scholarships Comm. v. Univ. of Detroit*, 102 N.W.2d 463, 466 (Mich. 1960); *Hannah v. Kelley (In re Estate of Rood)*, 200 N.W.2d 728, 733 (Mich. Ct. App. 1972) (“A determination that a charitable trust is created needs only a finding that ‘some charitable purpose’ exists.”).

119. *See* MICH. COMP. LAWS ANN. § 700.7402(1)(b); *Knights*, 102 N.W.2d at 466–67.

120. *See supra* Part IV.A.1–3.

121. *See supra* note 72 and accompanying text.

122. *Attorney Gen. of Mich. v. Livy (In re Americana Found.)*, 378 N.W.2d 586, 588–89 (Mich. Ct. App. 1985).

assets to be used for “charitable, religious, scientific, literary or educational purposes”; (5) “the legal estate was separated from the beneficial enjoyment”; and (6) the Articles of Incorporation clearly establish a charitable purpose.¹²³ All six factors were present with regard to the DIA. As explained above, there have been assignments of property to a trustee since 1885, with an intention to pass legal title thereto.¹²⁴ Through the Articles of Incorporation and subsequent documents, statements, and policies, it is evident that the intention was charitable in nature, such that Detroit held legal title while the benefits of the artwork flowed to the population at large.¹²⁵

Numerous provisions in then-applicable agreements and policies, in addition to those already discussed, underlie the proposition that the works of art possessed by the DIA were held in the public trust, some of which even refer to the concept of a trust. The Collections Management Policy of the DIA contained multiple such provisions:

In considering objects or groups of objects, the Museum must be ever aware of its role as trustee of the collection for the benefit of the public.

.
The manner of disposition should be in the best interest of the Museum, the public it serves, the public trust it represents, and the scholarly and cultural communities it serves.¹²⁶

The 1997 Operating Agreement between the City of Detroit and the Founders Society of the Detroit Institute of Arts specifically references the Collections Management Policy, and the 1997 Operating Agreement was to remain in effect through 2018.¹²⁷ While the City of Detroit remained in possession of legal title to the works of art contained in the Institute, the Founders Society was responsible for the management of the art collection in accordance with the Collections Management Policy.¹²⁸ Therefore, the City of Detroit and the Founders Society incorporated the terms of the Collections Management Policy, including the numerous references to the works of art held in the public trust, into the contract.¹²⁹

123. *Id.*

124. *See supra* notes 20–26 and accompanying text.

125. *See supra* Part IV.A.1–3.

126. DETROIT INST. OF ARTS, *supra* note 78, at §§ V.A, V.E.

127. Operating Agreement for the Detroit Institute of Arts, Between the City of Detroit and Founders Society, Detroit Society of Arts (1997), <http://www.scribd.com/doc/144896834/Detroit-Institute-s-Operating-Agreement-with-City> [hereinafter Operating Agreement for the Detroit Institute of Arts].

128. *Id.*

129. *See id.*

Furthermore, the legal construct of a trust is the widely available mechanism through which museums are organized and protected.¹³⁰ As a general precept, professional codes of ethics prevent museums from deaccessioning works of art for any purpose other than to purchase more works of art for the reason that those works of art are held in the public trust for a charitable purpose.¹³¹ The DIA, in its governing documents, clearly adopted this policy.¹³² Two organizations, the American Alliance for Museums (AAM) and the International Council of Museums (ICOM), promulgated codes of ethics with which member museums should comply.

In its Code of Ethics, the AAM provides the following:

Museums in the United States are grounded in the tradition of public service. They are organized as public trusts, holding their collections and information as a benefit for those they were established to serve.

. . . [D]isposal of collections through sale, trade or research activities is solely for the advancement of the museum's mission. Proceeds from the sale of nonliving collections are to be used consistent with the established standards of the museum's discipline, but in no event shall they be used for anything other than acquisition or direct care of collections.¹³³

For its part, the ICOM, in its Code of Ethics, states:

Museums that maintain collections hold them in trust for the benefit of society and its development.

. . . Museum collections are held in public trust and may not be treated as a realizable asset. Money or compensation received from the deaccessioning and disposal of objects and specimens from a museum collection should be used solely for the benefit of the collection and usually for acquisitions to that same collection.¹³⁴

The President and Chief Executive of the J. Paul Getty Trust, the world's wealthiest art institution, agreed that the DIA held its art in the public trust.¹³⁵ Numerous courts throughout the country agree that devises,

130. Jennifer L. White, Note, *When It's OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses*, 94 MICH. L. REV. 1041, 1048 (1996).

131. See, e.g., INT'L COUNCIL OF MUSEUMS, ICOM CODE OF ETHICS § 2.16 (2013), http://icom.museum/fileadmin/user_upload/pdf/Codes/code_ethics2013_eng.pdf.

132. See Jennifer Swan, *The Ethics of Selling Artworks: An Example from Michigan*, NPQ (Jan. 13, 2015), <http://nonprofitquarterly.org/2015/01/13/the-ethics-of-selling-artworks-an-example-from-michigan/>.

133. *Code of Ethics for Museums*, AM. ALLIANCE MUSEUMS, <http://www.aam-us.org/resources/ethics-standards-and-best-practices/code-of-ethics> (last visited Nov. 19, 2015).

134. INT'L COUNCIL OF MUSEUMS, *supra* note 131.

135. James Cuno, *The Immorality of Using Detroit's Art to Bail Out Bankrupt City*, INST. MUSEUM ETHICS (Sept. 10, 2013), <http://museumethics.org/2013/09/the-immorality-of-using-detroits-art-to-bail-out-bankrupt-city/> ("[The DIA] accepted gifts of works of art from donors who believed that they were going to serve a lasting, public purpose, and it bought others with funds provided by donors who thought

bequests, and gifts made to an institution, such as a charitable corporation, with a charitable purpose impresses the existence of a charitable trust upon such devises, bequests, and gifts.¹³⁶ Between the many written documents controlling the DIA and its predecessors, as well as the common practice of holding museum assets in charitable trust, the evidence is sufficient to show the intent to create a trust for the art of the DIA.¹³⁷

B. Because the DIA's Art Was Held in Trust, It Could Not Be Sold

Because the City of Detroit only held legal title to the works of the DIA, by virtue of the charitable trust created under state law, the artwork could not have been considered property of the debtor.¹³⁸ Thus, the artwork could not be sold to satisfy the debts owed to the city's creditors.¹³⁹ The only purpose for which the artwork could plausibly be sold is reflected in the universally accepted principle that art held in the public trust should not be sold for any purpose other than to acquire additional art or to provide for the care of existing art, which itself is codified in the DIA's governing documents.¹⁴⁰

The 1997 Operating Agreement provided that "[a]ny funds received from disposition of works of art in the *City art collection* shall be used solely to purchase other works of art for the *City art collection*."¹⁴¹ Similarly, the Collections Management Policy stated that "[n]et proceeds derived from the sale of a deaccessioned object . . . shall not be used as operating funds. Such net proceeds shall be placed in the selling curatorial department's Art Acquisition Fund"¹⁴² It is therefore strikingly clear that both the governing documents of the DIA and widely accepted industry practice would disallow the use of funds from deaccessioned objects for any purpose other than acquisition of additional art, and would unquestionably preclude the use of such funds to pay the debts of the City of Detroit wholly unrelated to the DIA itself.

Though a nonprofit corporation did not hold title to the art, state nonprofit law further bolsters this proposition. Michigan's Nonprofit Corporation Act states that the Act shall not be deemed to permit "assets held by a corporation for charitable purposes to be used, conveyed, or distributed

similarly. . . . [T]hey all must have thought that their gifts were going to be used to enhance public access to works of art.").

136. See, e.g., *Pac. Home v. Los Angeles County*, 264 P.2d 539, 543 (Cal. 1953) (en banc); *Swenson v. Bd. of Christian Serv. (In re Peterson's Estate)*, 277 N.W. 529, 532 (Minn. 1938); *Presbyterian Theological Seminary v. Harrington (In re Harrington's Estate)*, 36 N.W.2d 577, 582 (Neb. 1949).

137. See *White*, *supra* note 130, at 1049.

138. 11 U.S.C. § 541(d) (2012).

139. *Hunter v. St. Vincent Med. Ctr. (In re Parkview Hosp.)*, 211 B.R. 619, 630 (Bankr. N.D. Ohio 1997).

140. See *supra* Part IV.A.1.

141. Operating Agreement for the Detroit Institute of Arts, *supra* note 127, § F.2(b).

142. DETROIT INST. OF ARTS, *supra* note 78, at § V.F.

for noncharitable purposes.”¹⁴³ Combined with Michigan trust law, this enactment makes clear that assets held for charitable purposes, whether in the form of a trust or nonprofit corporation, may not be used, much less sold, for a purpose inconsistent with that of the trust or corporation.¹⁴⁴ In summary, as succinctly stated by Michigan Attorney General Bill Schuette:

Thus, as a legal entity holding assets for a charitable purpose, the museum was founded as a charitable trust. The museum’s charitable purpose was the exhibition of art for the public; the art collection thereafter acquired by the museum became the res or assets of the trust. And as a charitable trustee, the Founders Society was limited to using its assets—the art collection—for its dedicated charitable purpose.¹⁴⁵

C. Works of Art in the DIA May Not Be Sold in Bankruptcy

From the foregoing, it is clear that the works of art contained within the DIA are held in charitable trust for the purpose of educational and artistic enrichment, with the City of Detroit as trustee, and the public at large as beneficiary.¹⁴⁶ As trustee of a properly formed charitable trust, the City of Detroit holds bare legal title without an equitable interest.¹⁴⁷ Because the artwork of the DIA constitutes the corpus of that trust, the City of Detroit may not sell it to satisfy its own creditors.¹⁴⁸

V. SOCIOCULTURAL ARGUMENTS AGAINST DEACCESSIONING

The overriding purpose of Chapter 9 is to allow a municipality to restructure its debt, coming out of bankruptcy as a viable entity. Thus, the city must be able to continue providing services both during and after the bankruptcy, and the Code reflects this truism.¹⁴⁹ Unlike in a corporate

143. MICH. COMP. LAWS ANN. § 450.2301(6) (West, Westlaw through Public Act No. 173, 2015 Reg. Sess.).

144. RESTATEMENT (SECOND) OF TRUSTS § 348, cmt. f (AM. LAW INST. 1959) (“Where property is given to a charitable corporation without restrictions as to the disposition of the property, the corporation is under a duty, enforceable at the suit of the Attorney General, not to divert the property to other purposes but to apply it to one or more of the charitable purposes for which it is organized.”).

145. Mich. Att’y Gen. Op. No. 7272 (2013).

146. See *supra* Part IV.A–B. Michigan Attorney General Bill Schuette came to the same conclusion in an opinion responding to an inquiry by State Senator Randy Richardville. Mich. Att’y Gen. Op. No. 7272. It should be noted that referring to items being held “in charitable trust for the public” is functionally equivalent to those items being held “in the public trust.” See *id.*

147. RESTATEMENT (THIRD) OF TRUSTS § 42 (AM. LAW INST. 2003).

148. See *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 135–36 (1962) (“Bankruptcy [law] simply does not authorize a trustee to distribute other people’s property among a bankrupt’s creditors.”); *Universal Bonding Ins. Co. v. Gittens & Sprinkle Enters., Inc.*, 960 F.2d 366, 372 (3d Cir. 1992).

149. See *In re Addison Cmty. Hosp. Auth.*, 175 B.R. 646, 648 (Bankr. E.D. Mich. 1994). Judge Stephen Rhodes, the judge hearing the Detroit bankruptcy case, recognized this fact in an earlier case:

Chapter 9 of the Bankruptcy Code was drafted solely for municipalities. The provision allows debt adjustment which fosters the continuance of municipalities rather than their dissolution.

bankruptcy, a municipality cannot simply liquidate and cease to exist. It cannot fire its citizens, and basic functions of the city cannot permanently abate.¹⁵⁰

The DIA is beloved by the City of Detroit and the State of Michigan. Its existence provides entertainment, education, and enrichment for millions of people and serves a crucial cultural purpose that could not be easily replaced. Many think that deaccessioning at the DIA would have sounded a death knell for the venerable institution. “Museum officials say the sale of even a part of an institution’s core collection in effect renders a museum defunct: donors stop giving money and art, attendance declines and other support dries up.”¹⁵¹ Two Directors of the DIA agree. The current Director, Graham W. J. Beal, believes that “selling any art would be tantamount to closing the museum.”¹⁵² Furthermore, Samuel Sachs II, the DIA’s Director from 1985 to 1997, believes that a sale of the DIA’s artwork would “be the end of one of the most venerable cultural institutions in the country, not just in Detroit.”¹⁵³

But even if these experts are incorrect, and deaccessioning would not lead the DIA down a path to closure, even considering a sale of assets frames the issue incorrectly. In 2012, residents of three metro Detroit counties voted to increase *their own taxes* to pay for improvements to the DIA.¹⁵⁴ A late September 2013 poll found that 78% of Detroit area respondents opposed selling art to pay off creditors.¹⁵⁵ Besides being cherished locally, the DIA is a beloved institution nationally. For example, in a show of solidarity, the American Association of Museum Curators moved its 2014 conference to Detroit to support the DIA.¹⁵⁶

Because the purpose of municipalities (i.e. police protection, fire protection, sewage, garbage removal, schools, hospitals) is to provide essential services to residents, it is crucial that chapter 9 relief allow these entities enough flexibility to remain viable.

Id.

150. James S. Russell, *Detroit’s Venal Art Sale No Fix for Urban Nightmare*, BLOOMBERG (Aug. 6, 2013, 11:01 PM), <http://www.bloomberg.com/news/2013-08-07/detroit-s-venal-art-sale-no-fix-for-urban-nightmare.html> (“When companies go bankrupt, the medicine can be harsh for staff members and the local tax base, yet the effects are temporary. A bankrupt city can’t fire citizens who pay taxes but already receive worse than subsistence services like one-hour police response times.”).

151. Randy Kennedy & Monica Davey, *Detroit’s Creditors Eye Its Art Collection*, N.Y. TIMES (July 19, 2013), <http://www.nytimes.com/2013/07/20/arts/design/detroits-creditors-eye-its-art-collection.html>.

152. Graham W. J. Beal, *Director’s Letter*, DETROIT INST. ARTS (Sept. 2013), <http://archive.constantcontact.com/fs100/1102135368424/archive/1114686318864.html>.

153. Kennedy & Davey, *supra* note 151.

154. *DIA Millage Passes: Detroit Institute of Arts Expects \$23 Million Annually After Tight Race in Macomb*, HUFFINGTON POST (Aug. 8, 2012, 8:08 AM), http://www.huffingtonpost.com/2012/08/08/dia-millage-detroit-institute-of-arts-_n_1753989.html.

155. Randy Kennedy, *The Agony of Suspense in Detroit: Detroit Institute of Arts Copes With Threat of Art Selloff*, N.Y. TIMES (Oct. 2, 2013), <http://www.nytimes.com/2013/10/03/arts/design/detroit-institute-of-arts-cope-with-threat-of-art-selloff.html>.

156. B.J. Hammerstein, *Museum Curators Move 2014 Event to Detroit to Show Support for DIA*, DETROIT FREE PRESS (Sept. 19, 2013, 5:52 PM), <http://archive.freep.com/article/20130919/NEWS/01/309190173/DIA-bankruptcy-museum-curators>.

From this, it is obvious that the DIA is an august institution, beloved not only by the people of Detroit, but the community at large. Neither experts nationally nor Detroiters locally wanted to see any portion of the museum sold off to satisfy the city's creditors. To do so would further depress the morale of a municipality that is already experiencing its share of desolation.¹⁵⁷ Looking at potentially ending a cultural institution because of its perceived economic worth obfuscates the fact that things can have value outside of dollars and cents. "Detroit's assets need to be understood in terms of what they can do to revive the city, not on what cash they will produce at auction."¹⁵⁸ Every year hundreds of thousands of Michiganders, including tens of thousands of school children, visit the DIA.¹⁵⁹ For those people, the DIA has a certain educational value, which can neither be easily replaced nor quantified in terms of dollars. It is a generally accepted principle that museums, and the art contained within them, have sociocultural value that society cannot—and should not—quantify fiscally. Eviscerating a cultural institution like the DIA would assuredly have a profound negative effect on those important values and would fly in the face of the purpose of Chapter 9 bankruptcy itself.

VI. THE "GRAND BARGAIN"—ISSUE RESOLVED?

Through the course of Detroit's bankruptcy, the DIA was the epicenter of the dispute. On one side were Detroit's creditors and the city itself, led by Emergency Manager Kevyn Orr, who argued that the city can and must monetize the DIA.¹⁶⁰ On the other was the DIA itself and Michigan's Attorney General, who steadfastly averred that the art must stay on the walls of the venerable Motor City institution.

Thanks, perhaps, to acute judicial interest in a resolution, the parties brokered a "Grand Bargain."¹⁶¹ In it, private foundations, the State of Michigan, and the DIA itself contributed \$816 million to the City of Detroit's bankruptcy plan.¹⁶² In return, Detroit "agreed to transfer all of its right, title

157. See Kurt Badenhausen, *Detroit Tops 2013 List of America's Most Miserable Cities*, FORBES (Feb. 21, 2013, 2:20 PM), <http://www.forbes.com/sites/kurtbadenhausen/2013/02/21/detroit-tops-2013-list-of-americas-most-miserable-cities/>.

158. Russell, *supra* note 150.

159. Editorial, *A Civic Treasure in Detroit*, N.Y. TIMES (July 26, 2013), <http://www.nytimes.com/2013/07/27/opinion/a-civic-treasure-in-detroit.html> ("But selling the city's art could be incredibly shortsighted; the long-term value of maintaining this valuable institution and its collection could easily outweigh any immediate gains. Quite apart from the damage it would do to morale, selling this trove would also be a violation of the public trust for the nearly 600,000 annual visitors, including 50,000 schoolchildren.").

160. See *supra* note 4 and accompanying text.

161. Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 YALE J. ON REG. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2635767.

162. Randy Kennedy, 'Grand Bargain' Saves the Detroit Institute of Arts, N.Y. TIMES (Nov. 7, 2014), <http://www.nytimes.com/2014/11/08/arts/design/grand-bargain-saves-the-detroit-institute-of-arts.html>.

and interest in the art to the DIA to be held in a perpetual charitable trust for the benefit of the people of the City and the State.”¹⁶³ Noting that he believed that if the issue over the sale of the DIA’s collections was ever litigated, “the position of the Attorney General and the DIA would almost certainly prevail,” and further finding that “any such litigation would take years to conclude and would be costly to pursue,” Judge Rhodes approved the Grand Bargain.¹⁶⁴

Even though Chapter 9 has been codified in the Bankruptcy Code for decades, until 2013, we had never seen a major United States city utilize the Code’s protections. With the City of Detroit’s bankruptcy filing, issues were raised for the first time in conjunction with a municipal bankruptcy, principally because of the size and history of Detroit itself.¹⁶⁵ Because of its perceived value, the DIA became a main exhibit in the Detroit bankruptcy. While the issues presented above may seem narrowly tailored to a specific set of facts only occurring in Detroit, experts believe that Detroit is only the first—and not the last—major municipal bankruptcy.¹⁶⁶

Issues of charitable trust law saw their first impression in Chapter 9 bankruptcy in the discussions surrounding the DIA simultaneous with serious debates over preservation of culture at the expense of forsaking fiscal obligations. If even one more major municipality were to file bankruptcy, questions like those raised by the debate over the DIA will be litigated anew.

163. *In re City of Detroit*, 524 B.R. 147, 176 (Bankr. E.D. Mich. 2014).

164. *Id.* at 179.

165. *See supra* note 1 and accompanying text.

166. William C. Dudley, President, Fed. Reserve Bank of N.Y., Opening Remarks for the Chapter 9 and Alternatives for Distressed Municipalities and States Workshop (Apr. 14, 2015) (transcript available at <http://www.newyorkfed.org/newsevents/speeches/2015/dud150414.html>).