



By Thomas and Charles Danziger

Catalina had been a trustee of a respected New York museum for many years, and as it turned out, she was allergic to oysters.

Very, very allergic.

Her funeral service was short and sweet, and we soon found ourselves back at Catalina's Fifth Avenue town house for the reception, watching her grieving sisters calculate their inheritance. Given the size of her estate, this took quite some time.

Bruce, the museum's director, was in the midst of telling us what a loyal trustee Catalina had been when her 8-year-old nephew interrupted, asking if he could speak with him "about something superimportant."

"When do I get my Picasso?" little Nathan asked excitedly, waving a photograph of the painting that Catalina had donated to the museum decades earlier. "Mom says it's mine under Aunt Catalina's will."

Bruce thought the boy was joking, but he wasn't—and that's where we, as attorneys for the museum, came in.

At a trustee's meeting we attended the next afternoon, the news got worse. The museum had received a hand-delivered letter from Nathan's lawyer, formally demanding the immediate return of the work or he would sue. The letter said that the Picasso had simply been "a temporary loan" to the museum, and in his words, "time's up."

In our letter of response, we took the position that, far from being a loan, the painting had been irrevocably donated, and we reaffirmed the museum's ownership of it. We enclosed a copy of a "deed of gift," executed years before by Catalina, under which she transferred to the museum all her "right, title and interest" with regard to the Picasso. We also sent copies of letters that the museum had written in reply, thanking her for the donation of the Picasso as a "leadership gift" and stating that the museum hoped that this would induce other donors to be equally generous.

In closing, we reminded Nathan's attorney of a principle known to most first-year law students: Once a gift has been voluntarily made, delivered and accepted, it cannot be revoked. "Indian givers" lack legal standing.

Nathan's lawyer responded with another pithy demand for the painting, together with a copy of Catalina's last will and testament. The will did seem to bequeath the Picasso to the boy, but significantly the document was executed after the date the painting had been given to the museum.

When we met with Nathan's attorney, he first insisted that the deed of gift was not binding because Catalina had not received any benefit, known as "consideration," in exchange for the painting. Under U.S. law, both parties must receive adequate consideration for a contract to be considered binding—with the exception of charitable gifts. We pointed this out to Nathan's attorney.

Undeterred, he claimed that Catalina may have made a pledge of the picture, but not an irrevocable gift. He contended that Catalina would not have bequeathed the painting to Nathan if she had believed she no longer owned it, and what's more, the pledge was nullified by the terms of her will.

We thought the lawyer was wrong on both the facts and the law.

Legally a pledge is a promise to make a gift in the future, which may or may not be enforceable, depending on its terms. By contrast, a deed of gift is a "present conveyance," meaning it is effective when made, and no further action need be taken to transfer property. We told Nathan's lawyer that Catalina had made an irrevocable gift, despite the terms of her will.

The meeting ended acrimoniously, and the lawyer stormed out of our office. Perhaps not coincidentally, the museum director soon received a nasty letter written by Nathan in red magic marker.

At least the kid could spell.

We did more legal research in this area and turned up a 1991 U.S. federal court case, *Mac'Avoy v. The Smithsonian Institution*, which squarely supported our position. In 1966 the American painter Romaine Brooks allegedly executed an agreement conveying certain works of art to Edouard Mac'Avoy, who claimed to be her curator in France. Then, in 1968–69, Brooks gave the works to the Smithsonian and received various letters accepting the gift and thanking her. After 1968 the works were publicly exhibited at the Smithsonian and published in catalogues describing them as gifts from Brooks. The artist died in 1970, and in 1989 Mac'Avoy filed suit in Washington, D.C., demanding that the works be returned to him.

The court rejected Mac'Avoy's contention that Brooks intended to make a loan rather than a gift, observing: "After each shipment of paintings or drawings, the Smithsonian acknowledged the shipments as 'gifts.' Ms. Brooks never responded to the contrary. Instead, she continued to ship her artwork to the Smithsonian."

The court also dismissed Mac'Avoy's claim that the Smithsonian took his private property with "neither due process nor just compensation, as required by the Fifth Amendment of the U.S. Constitution." The court reasoned, in part: "Given the Museum's understanding that it was receiving the paintings and drawings as gifts, there is no basis for the conclusion that the alleged interference with the plaintiff's property rights was the natural and logical consequence of the Museum's acquisition of these works."

Nathan's lawyer was not through with us, and next turned to what we viewed as a cheap threat: He would notify publications

ranging from Newsweek to Boy's Life that the museum was stealing artwork from "a poor child"—albeit one with a handsome trust fund. Apparently the lawyer figured that even if he could not win in a court of law, he might triumph in the court of public opinion.

This threat hit a nerve. The museum's trustees were terrified of bad press (and the impact it would have on potential donors), and were mindful of the legal controversy in which the Museum of Modern Art in New York found itself years ago.

That fracas involved the family of photographer Edward Steichen, who had been the head of MoMA's photography department for 15 years and was a great benefactor to the museum. The dispute centered on a 1905 painting by Henri Matisse, *Vue de Collioure à l'Eglise*, which Steichen had bequeathed to his daughter Charlotte in 1973. She lent the painting to the museum, and upon her death in 1988, the work was willed to Charlotte's young great-niece.

MoMA contended that the painting had been donated as a gift and initially refused to return it. In 1990, the estate of Charlotte Steichen brought suit in federal court in Bridgeport, Connecticut, demanding the painting and \$1 million in damages. The case was ultimately settled and MoMA returned the painting.

In our case, the trustees worried that by holding on to the Picasso, they might be violating guidelines of the American Association of Museums, which state: "A museum should recognize that instances may arise when donors cannot or do not honor a pledge. In determining the enforceability of a pledge that is not honored, a museum may consider: (a) the

legal and accounting implications; (b) the overall impact of the gift on the museum; (c) the museum's history and previous relationship with the donor; and (d) the attitude of the community toward the situation."

We reminded the trustees that the Picasso was an outright gift, not a pledge, and pointed out that they had a legal obligation to safeguard the museum's assets, including this legitimate gift.

The museum ultimately decided not to knuckle under to Nathan's demands, and his attorney never filed suit. A small celebratory dinner was given sometime later. Oysters were not on the menu.