IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
12th Division

SUSAN TERRY BORNE, ELIZABETH TERRY FOTI, MARY CATHERINE DRENNAN, LEONARD JOHN DRENNAN III, MARGARET YATSEVITCH AND MICHAEL YATSEVITCH, as and on behalf of the Heirs of ADOLPHINE FLETCHER TERRY and MARY FLETCHER DRENNAN **PLAINTIFFS**

Vs. **Case No: 60CV-21-6690**

CITY OF LITTLE ROCK, ARKANSAS and the ARKANSAS MUSEUM OF FINE ARTS F/K/A THE ARKANSAS ARTS CENTER, and the ARKANSAS MUSEUM OF FINE ARTS FOUNDATION, A/K/A ARKANSAS ARTS CENTER FOUNDATION **DEFENDANTS**

PLAINTIFFS' RESPONSE TO DEFENDANT FOUNDATION'S MOTION TO DISMISS

In its Brief in Support of its Motion to Dismiss the Complaint, the Defendant Arkansas Arts Center Foundation claims it is not liable to account for funds that were donated to an endowment that it formed, solicited funds for, and administered for the use and benefit of the Pike-Fletcher-Terry Property because there was no "contract" between the Plaintiffs and the Foundation. This argument indicates a

misconception of the issues in this case on the part of the Foundation, and the remaining arguments in their Brief indicate a lack of knowledge of the basic facts.

1. *The "Contract" Contained In The Terry-Drennan Deed To The City Was Adopted And Ratified By The Arkansas Arts Center <u>And</u> The Foundation*

Defendant Foundation states in its Brief that "The 'contract' that allegedly creates liability is the deed from Mr. [sic] Terry and Ms. Drennan to the City of Little Rock." Based on this statement, the Foundation claims that "They [the Terry-Drennan Heirs] have no contract with the Foundation, and they cannot require an accounting and distribution of funds to themselves." (Foundation Brief, p. 4) It is true that the Deed dated the 19th day of August, 1964, from Adolphine Fletcher Terry and Mary Fletcher Drennan to the City of Little Rock "for the use and benefit of the Arkansas Art Center and its successors" (now the Museum), is a part of a contract alleged in the Complaint, and that the Deed is a contract between Terry-Drennan and the City "for the use and benefit of the Arkansas Arts Center and its successors."

However, the inquiry does not end there insofar as the liability of the Foundation is concerned. The "contract" goes far beyond the terms and conditions in the Deed, and includes other documents described and alleged in the Complaint (and in the First Amended Complaint), including the Resolution of the September

14, 1964, the Board of Trustees of the Arkansas Arts Center dated September 14, 1964, in which the Arts Center Board noted that the Property was "a unique and invaluable historic site" and "a dedication to the future cultural, artistic and educational progress of our community," and recommended to the Little Rock City Board of Directors "that it accept delivery of the Deed forthwith."

The inquiry also includes the actions of the Foundation after the Property was transferred to the City, "for the use and benefit of the Arkansas Arts Center and its successors." It is well-settled that a contract may be gathered from the actions and documents generated and exchanged between persons relating to the subject matter of the contract, and so connected with each other that they may constitute a contract. *Moore v. Exelby et al,* 170 Ark. 908, 281 S.W. 671 (1926)

Those actions show, and the Complaint and Amended Complaint allege, that the Arts Center and the Foundation used the Property as a vehicle for raising money from Federal and State agencies and private sources, and in so doing, accepted, adopted and affirmed the gift of the House, and assumed responsibility for the conditions and restrictions that are contained in the Deed. The First Amended Complaint recites the following examples of actions by the Foundation to assume the obligations of the Deed conditions.

Paragraph 35 of the First Amended Complaint states that in August 1984, the Museum Board decided to create an Endowment to provide permanent funding

for the Decorative Arts Museum. The Foundation and persons interested in the use of the Property in accordance with the conditions set forth in the Deed, commenced a fund-raising program to fund the endowment for the maintenance and operation of the House and Property.

On October 3, 1984, the Arkansas Arts Center issued a News Release announcing that:

> The *Arkansas Arts Center Foundation* has received a matching grant of up to $1,000,000 from the Winthrop Rockefeller Charitable Trust for endowment, which will provide operating revenue for the Arts Center's Decorative Arts Museum, which is due to open at the historic Pike-Fletcher-Terry House next spring. … The grant is a 2 for 1 matching grant, meaning the Rockefeller Charitable Trust will provide two dollars for every dollar the Arts Center *and Foundation* raises in Endowment for the Decorative Arts Museum. (Italics added)
> (Paragraph 38 of the First Amended Complaint)
> (***See News Release at Exhibit 6 to First Amended Complaint***)

Mr. Marion Burton, a Co-Trustee of the Winthrop Rockefeller Charitable Trust, wrote a letter dated October 1, 1984, to Mr. Robert Shults, an attorney of Little Rock, Arkansas, who was counsel for the Museum and its Foundation, stating in relevant part:

> On behalf of the Trustees, I am delighted to inform you that they have approved a matching grant *to the Arkansas Arts Center Foundation* on the following terms: the Trust will match on a two-for-one basis, and up to an aggregate Trust payment of $1 million, contributions made to the Foundation on or after July 1, 1984 and before January 1, 1986, *for the purpose of endowing the operation of the Pike-Fletcher-Terry House*. (Italics added)
> (Paragraph 39 of First Amended Complaint)

A form for donations and pledges to the Endowment was prepared by the Foundation and provided to prospective donors. The form contained a heading of

The Arkansas Arts Center – Decorative Arts Museum
(Pike-Fletcher-Terry House)

with the following text:

> I pledge my support to the *Arkansas Arts Center Foundation* in the amount of $_____ to provide a permanent endowment for the Decorative Arts Museum. (Italics added)
> (Paragraph 40 of First Amended Complaint)
> **See the Donation/Pledge Form at Exhibit No. 8 to First Amended Complaint.**

Mr. Charles C. Owen, an attorney of Little Rock, Arkansas, acting on behalf of and as *attorney for the Foundation*, submitted a letter dated February 18, 1985 to the Assistant Commissioner of the U.S. Internal Revenue Service regarding the treatment for tax purposes of the 2-for-1 matching grant of $1,000,000 by the Winthrop Rockefeller Charitable Trust *to the Foundation* for endowment of the Property, stating in relevant part:

> *The AACF [Arkansas Arts Center Foundation]* desires to create an endowment fund the income from which will be used for the *daily operations of the House, … and utilities and maintenance*. The Trustees of the Winthrop Rockefeller Charitable Trust have approved a two-for-one matching grant of endowment funds up to $1,000,000. Accordingly, a potential endowment fund of $1,500,000 may be raised. Paragraph 42 of the First Amended Complaint
> …
> Although *the AACF has accumulated an endowment fund for purposes of supporting the Arts Center, that endowment cannot support both the operations of the Arts Center and the House*. Thus, to be able to carry out the purposes of the House, an additional

endowment fund is necessary. (Italics added)
(First Amended Complaint, Paragraph 42. **The Owens-IRS letter is attached thereto as Exhibit 10**)

The First Amended Complaint also alleges in Paragraph No. 41 that other significant contributions were made by members of the public and organizations, and an endowment in the approximate total amount of One Million, Six Hundred Twenty-One Thousand, Five Hundred Forty-One and 55/100 Dollars ($1,621,541.55) ("the Endowment") was ultimately pledged and paid *to the Foundation* specifically for the use and benefit of the Property. See **Exhibit No. 9** (AAC Foundation – Decorative Arts Museum Fund Drive thru 1/27/86 summary).

Further allegations regarding the control of the Foundation over the Property are alleged in Paragraph 52 of the First Amended Complaint, in which it is alleged that on June 24, 2021, representatives of the Terry-Drennan Family met with representatives of the Museum and the Foundation regarding the future use of the Property by the Museum, at which the were told by Mr. Warren Stephens, *Chairman of the Foundation's Board of Directors*, that he, as Chairman of the Foundation, had, directed the Foundation's attorney to draft a letter to the City of Little Rock stating that *the Foundation no longer had an interest in the Property*, and would relinquish it. In that meeting, Mr. Stephens further confirmed to the representatives of the Terry-Drennan Family that the Foundation would not invest

any more money into the Property, other than payment of utilities at the house until June 30, 2022, the end of the Foundation's fiscal year.

The Foundation is the alter ego of the Arkansas Arts Center. While the City holds record title, the Arts Center and the Foundation acquired the right to use the Property through the Deed. Indeed, for over 40 years, the Foundation has been using it as a means of obtaining funding – not only for the Property, but for general revenues – since that time. The actions of the Arts Center and the Foundation subsequent to taking possession, as alleged in the Complaint and First Amended Complaint, are strong evidence that they accepted those conditions and restrictions, and wholeheartedly adopted and accepted those conditions and restrictions. Those allegations are sufficient to state a claim for breach of contract against the Defendants, and to overcome the Motion to Dismiss.

In addition, the Foundation should be estopped from denying liability for claims based on the contract between Terry-Drennan and the City, under which the Arts Center and Foundation derived benefits for many years. Under the doctrine of quasi-estoppel, a party that accepts the benefits of a transaction is not allowed to take an inconsistent position to avoid corresponding obligations or effects. Quasi-estoppel "stands for the proposition that "'one cannot blow both hot and cold.'" *KTVB, Inc. v. Boise City*, 486 P.2d 992, 994 (Idaho 1971) (quoting *Godoy v. Hawaii*, 354 P.2d 78 (Haw. 1960). The elements of Quasi-Estoppel are that "(1)

the offending party (e.g. the Foundation) is taking a different position than his or her original position, and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in." *Vawter v. United Parcel Serv., Inc*., 318 P.3d 893, 2014 WL 497437, at *7 (Idaho Feb. 7, 2014). See generally 28 Am. Jur. 2d Estoppel and Waiver § 173.

The Quasi-Estoppel Doctrine is similar to the rule, well-recognized in Arkansas, that a litigant who has voluntarily and with knowledge of all the material facts accepted the benefits of an order, decree, or judgment of a court, cannot afterwards question its validity on appeal. *Ahmad v. Horizon Pain, Inc.*, 2014 Ark. App. 531, 444 S.W.3d 412; *DeLaughter v. Britt*, 243 Ark. 40, 418 S.W.2d 638; *Ark. State Highway Comm'n v. Marlar*, 236 Ark. 385, 366 S.W.2d 191 (1953). To use another old saying, "one cannot have his cake and eat it too." The Foundation, having accepted the benefits of the donation of the Property for years, cannot now take an inconsistent position to avoid the corresponding obligations that came with the Property.

Further, the doctrine of Equitable Estoppel is also applicable to the Foundation's claim that it cannot be held liable for the Plaintiffs' claims. The

elements of equitable estoppel are: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting estoppel has a right to believe the other party so intended; (3) the party asserting estoppel must be ignorant of the facts; and (4) the party asserting estoppel must rely on the other's conduct to his detriment. A party who by his acts, declarations, or admissions, or by his failure to act or speak under circumstances where he should do so, either with design or willful disregard of others, induces or misleads another to conduct or dealings which he would not have entered upon, but for such misleading influence, will not be allowed, because of estoppel, afterward to assert his right to the detriment of the person so misled. *King v. Powell*, 85 Ark. App. 212, 148 S.W.3d 792 (2004) (overturned on other grounds by Ark. R. Crim. P. 50.

It is alleged in the Complaint and First Amended Complaint that The Arts Center and the Foundation were well-aware of the conditions on use of the Property and obligations to maintain it that were incorporated in the Deed when they first took possession of the property on June 8, 1977. The Arts Center assumed control of the Property, raised funds from private parties and various governmental and charitable entities to remodel the House to suit its purposes, created and raised money for an Endowment, and operated the Property for more than twenty years, proudly claiming it as a part of the Arts Center's/Foundation's

assets. The Arts Center and Foundation knew of the reverter clause in the Deed under which the Property would revert to the Terry-Drennan Heirs in the event that the conditions contained in the Deed were not met.

It is now too late for the Arts Center or the Foundation to disavow their responsibilities regarding the Property. Had the Arts Center or the Foundation not intended to claim any responsibility for the Property or to not be held responsible for fulfilling those conditions and obligations, it could have easily informed the City that it wanted nothing to do with the Property when it was offered, instead of waiting more than forty years after the gift of the Property was proposed and consummated, and before they allowed the Property to deteriorate.

Instead, the Arts Centers/Foundation's renunciation of its obligations at this point – with the Property in a seriously deteriorated condition, requiring over $1 million for repair – would be highly prejudicial to the Plaintiffs in a reversion of the Property, who, the First Amended Complaint alleges, were consistently assured by the Arts Center/Foundation that the Arts Center/Foundation would renovate and use the Property in the near future.

2. The Plaintiffs, As Heirs Of Mrs. Terry And Mrs. Drennan, Have Standing To Sue

The second basis for the Foundation's Motion to Dismiss is that the Plaintiffs have no interest in the Property or the Endowment, and therefore have no standing to bring the suit, stating specifically that:

> … the Heirs do not even allege that they contributed to the purported endowment for the Terry House. A party has no standing to raise an issue regarding property in which he or she has no interest.

In support of this position, the Foundation cites *Wisener v. Burns*, 345 Ark. 84, 89, 44 S.W. 3d 289, 292 (2001) holding that "Where a party does not possess an interest in real property, that party does not have standing to raise any issue concerning the real property."

This overlooks the fact that the Deed from Mrs. Terry and Mrs. Drennan contained a very clear, unambiguous provision stating:

> If the Grantee shall fail to comply with these conditions or uses, and in particular with the first condition above enumerated, … then *title to the said lands shall revert in an undivided one-half interest to the heirs of Adolphine Fletcher Terry and in an undivided one-half interest to the heirs of Mary Fletcher Drennan.* (Italics added)
> **See Deed at Exhibit No. 2 to First Amended Complaint.**

In other words, the Plaintiffs have a right of reverter to the Property upon the failure of the City or the Arts Center or its successor (the Museum) to comply with the conditions in the Deed requiring that the Property be maintained in good

condition and that it be used for a public purpose. That right of reverter is a recognized property interest.

The case of *Stone v. Washington Regional Medical Center*, 2016 Ark. App. 236, 490 S.W.3d 669, addresses this issue. In that case, Mr. and Mrs. Stone conveyed property in 1906 to the City of Fayetteville for use as a hospital, but retained a possibility of reverter to the Stones based upon two conditions. In 1909, the Stones executed a second deed to the same property to the City, but omitted the conditions. Years later, the Stone's heirs filed suit claiming a right of reverter to the property. In discussing the effect of the two deeds on that right, the Court of Appeals stated:

> It is clear from a plain reading of the 1906 Deed that the Stones originally conveyed the FCH property to the City retaining a possibility of reverter, which could be triggered by either of two events. It is equally clear that, three years later, the Stones eliminated the possibility of reverter created in the 1906 Deed and instead substituted a new condition on the conveyance that in the event the hospital is moved to a new location, the proceeds derived from the FCH property shall be retained in trust and said proceeds were to be used exclusively for the establishment and maintenance of the new City hospital at the new location.
>
> *The Stones retained a property interest in the FCH property by virtue of their retained possibility of reverter in the 1906 Deed*. While Arkansas courts have not addressed the precise issue of whether a grantor who retains a possibility of reverter releases and extinguishes that interest by making a subsequent conveyance of the property to the party in possession of the determinable fee, that is the uniformly held view of those American jurisdictions that have considered the question.

2016 Ark. App. 236 at page7-8

The Court of Appeals cited as authority for the above opinion the cases of *Atkins v. Gillespie*, 156 Tenn. 137, 299 S.W. 776 (1927) ("Possibility of reverter, *being a vested interest in real property*, is capable at all times of being released to the person holding the estate on condition, or his grantee, and if so released, vests an absolute and indefeasible title thereto."); *Smith v. Sch. Dist. No. 6,* 250 S.W.2d 795 (Mo.1952) ("[T]he authorities are well agreed that *a possibility of reverter after a determinable fee* is capable of being released to the tenant in fee simple determinable or a third party. Such a release has the effect of turning *the determinable or qualified fee into a fee simple absolute*."); *Long v. Long,* 45 Ohio St.2d 165, 343 N.E.2d 100 (1976); *Wash. State Grange v. Brandt,* 136 Wash.App. 138, 148 P.3d 1069 (2006); *W.A. Foote Mem'l Hosp. Inc. v. City of Jackson Hosp. Auth.,* 211 N.W.2d 649 (Mich.1973); *Copenhaver v. Pendleton,* 155 Va. 463, 155 S.E. 802 (1930); *O'Connor v. City of Saratoga Springs,* 146 Misc. 892, 262 N.Y.S. 809 (N.Y.Sup.Ct.1933); *El Dorado Land Co., L.P. v. City of McKinney,* 395 S.W.3d 798 (Tex.2013); *In re Application of Mareck,* 257 Minn. 222, 100 N.W.2d 758 (1960); *London v. Kingsley,* 368 Pa. 109, 81 A.2d 870 (1951); *Vaughn v. Langford,* 81 S.C. 282, 62 S.E. 316 (1908).

It is clear that a person holding a right of reverter of property upon violation of a condition subsequent has a recognized property interest. The provision in the

Terry-Drennan Deed is also clear in establishing that property interest: title to the said lands "shall revert in an undivided one-half interest to the heirs of Adolphine Fletcher Terry and in an undivided one-half interest to the heirs of Mary Fletcher Drennan."

The right of reverter was never rescinded or revoked by either Mrs. Terry or Mrs. Fletcher, or by any of the heirs of those persons.

Unlike many of the states in other parts of the country, where immense wealth has existed for many generations, numerous endowments have been established, and litigation over those endowments has occurred, there are few endowments in Arkansas, and very few cases involving endowments. One of the leading cases, nationally, on the question of who has the right to enforce the terms of a trust or endowment, is that of *Smithers v. St. Luke's-Roosevelt Hosp. Center,* 281 A.D.2d 127, 723 N.Y.S.2d 426 (2001). That case was brought by the widow of the endowment grantor, Smithers, who established the endowment for the defendant hospital to establish a facility for treatment of alcoholism, to avoid the hospital's use of the money for other purposes. In holding that the widow had standing to bring the suit, that Court stated:

> The general rule is "If the trustees of a charity abuse the trust, misemploy the charity fund, or commit a breach of the trust, the property does not revert to the heir or legal representative of the donor ***unless there is an express condition of the gift that it shall revert to the donor or his heirs***, in case the trust is abused, but the redress is by bill or information by the attorney-general ***or other person having the***

> ***right to sue.***" [2 Perry on Trusts, sec. 744; *Sanderson v. White,* 35 Mass. 328, 18 Pickering, 328; *Vidal v. Girard's Executors,* 2 Howard (U.S.), 191, 11 L.Ed. 205; *Mills v. Davison,* 54 N.J.Eq. 659, 35 A. 1072.] (Emphasis added)
> 281 A.D.2d at 136
> …
> The donor of a charitable gift is in a better position than the Attorney General to be vigilant and, if he or she is so inclined, to enforce his or her own intent. … To hold that, in her capacity as her late husband's representative, Mrs. Smithers has no standing to institute an action to enforce the terms of the Gift is to contravene the well settled principle that a donor's expressed intent is entitled to protection (*see St. Joseph's, supra; Lefkowitz v. Lebensfeld, supra; Alco Gravure, supra*) and the longstanding recognition under New York law of standing for a donor such as Smithers (*see Associate Alumni, supra*). We have seen no New York case in which a donor attempting to enforce the terms of his charitable gift was denied standing to do so. Neither the donor nor his estate was before the court in any of the cases urged on us in opposition to donor standing.

See also, *Rettek v. Ellis Hosp.,* U. S. District Court, N.D. New York, January 12, 2009, Not Reported in F.Supp.2d, 2009 WL 87592, holding:

> Where … a plaintiff is part of a "class of potential beneficiaries [that] is sharply defined and limited in number" standing exists, despite the general rule barring enforcement actions by beneficiaries of charitable bequests. *Id.* at 465. Further, courts have allowed donors of charitable gifts, or successors to their rights and interests, to enforce the terms of a bequest under limited circumstances. *See, e.g., Assoc. Alumni of Gen. Theological Seminary v. Gen. Theological Seminary,* 163 N.Y. 417, 422 (1900) (finding corporation which succeeded donor alumni association had standing to enforce terms of a charitable trust in which donor retained oversight rights).

Also, *Associate Alumni of the General Theological Seminary of the Protestant Episcopal Church in the United States of America v. General Theological Seminary of the Protestant Episcopal Church in the United States*

1 Bedell 417, 163 N.Y. 417 57 N.E. 626 (Ct. of Appeals, New York 1900), held that an association of alumni of a Seminary had the standing to sue the Seminary to enforce an endowment for a professorship in the school, stating:

> [A]s donor and possessor of the right to nominate to the professorship, it [Plaintiff] had sufficient standing to maintain an action to enforce the trust. *Mills v. Davision*, supra. It may be that a trust might entirely so fail, from the purpose for which it was created becoming impossible of accomplishment, that the fund ought to be returned to the donor.

The Plaintiffs in this case hold an interest in the Property conditionally conveyed to the City of Little Rock for this use and benefit of the Arkansas Arts Center and its successors, and the condition of the Property is of great concern to them. It is their desire to restore the Property to good condition and to dedicate it to an appropriate public use, but that will require a large sum of money. The Endowment that was raise, in part, to keep the property in good condition was a restricted endowment, and the Defendant Foundation was not entitled to spend the money for any purpose other than the Property. If the Foundation is holding money in an endowment for that purpose, it should go with the Property. If it has expended money from the Endowment for purposes other than those authorized by the documents used for funding the Endowment, the Foundation should restore it.

In any event, as the Foundation no longer has any interest in the Property, as it has said, it should not be allowed to keep any of the endowment funds.

Respectfully submitted,

RICHARD MAYS LAW FIRM PLLC

/s/ Richard H. Mays
Richard H. Mays
Ark. Bar No. 61043
2226 Cottondale Lane – Suite 210
Little Rock, AR 72202
Tele: 501-891-6116
Email: rmays@richmayslaw.com
njackson@richmayslaw.com

CERTIFICATE OF SERVICE

The undersigned certifies that on the date below he served a copy of the above and foregoing Plaintiffs' Response To Defendant Foundation's Motion To Dismiss on counsel for the parties through the Court's electronic filing system. The undersigned is unaware of any other attorney or party who requires service through any other means.

Dated: November 22, 2021.

/s/ Richard H. Mays
Richard H. Mays