

Fast Facts:

The Museum Disposition of Property Act enables museums, archives, and libraries to legally dispose of undocumented art and artifacts or objects loaned to them.

In order to be protected by the act, covered entities wishing to terminate loans or deaccess undocumented works must meticulously adhere to the mandates of the act.

If research identifies a potential ownership interest, the institution must notify that person.

Disposition of Art

Operating under the Museum Disposition of Property Act

Objects with a Past

By Mark L. Dobias and Elizabeth A. DuMouchelle

There have been a number of stories in recent times about valuable art objects coming to light after languishing for many years in private or public collections. Sometimes, there is an ownership dispute. The information age and our litigious society have generated increasing demands for return of “long lost” artworks and artifacts by persons claiming to be true owners.

This potential for art ownership claims presents a problem for Michigan institutions holding art and artifacts and for the attorneys representing them, especially when institutions want to remove objects from their collections because the objects no longer suit their purposes. During or even after this “deaccession” process, an institution may discover that the objects it wants to sell, or has already sold, have a “past.” This article will discuss deaccession under the Michigan Museum Disposition of Property Act (the act)¹ and the equitable arguments surrounding claims of true ownership that arise during or after the process.

THREE SCENARIOS

MUNICIPAL TUG OF WAR

While conducting the first comprehensive inventory of its collection, a village library finds two paintings gathering dust in a storeroom. None of the current members of the library board know exactly when or how the paintings were acquired. The identity of the donor is unknown because the library’s records were destroyed when the library secretary’s house burned in the early 1960s. The library board decides to send the paintings to auction to generate

funds for the purchase of computer technology for library patrons. A week before the sale, a board member, while reviewing county records, learns that the paintings were donated to the county nearly a century ago. The board member further discovers that the county “loaned” them to the local high school for display. The paintings remained at the high school until they were given, without documentation, to the library. The library board informs the county of its discovery. The county responds with a claim to all of the proceeds from the potential sale despite the library’s possession and preservation of the paintings over many years. The paintings sell for an amount several times over their appraised value.

FROM TRASH TO RICHES

During the summer remodeling of a college student union building, workers inadvertently place 1930s-era murals in the trash dumpster. A former art history student, visiting her alma mater, rescues the murals, because she recognizes them as valuable Works Progress Administration paintings. She sends the murals to a restorer after unsuccessfully contacting a Washington D.C. museum to determine if an institution would be interested in the murals. The college discovers the murals missing. And, after looking for several years, finds the murals in the possession of the restorer and makes a demand for their return. The murals are now worth over a million dollars.

ROCKING CHAIR REVERTER

In 1948, the scion of a Michigan pioneer family lends his great-grandfather’s rocking chair to a historic home in their county seat

with the condition that the chair is to be returned to the family “if and when the historic home no longer needs to display the chair.” In 1995, the time has come to change the display. After numerous attempts to find and notify heirs, the historic home curator decides to give the chair to another museum. Before delivering the chair to the museum, the curator posts a notice in the county newspaper stating that the chair will become the property of the historic home if not claimed in six months. After no one comes forward to claim the chair, the curator donates the chair. In 2002, an heir of the pioneer visits the historic home with her grandchildren and does not see the rocking chair. She sends a letter to the curator asking for the return of the chair.

LAW AND ANALYSIS

DEACCESSION REQUIREMENTS UNDER THE ACT

The Museum Disposition of Property Act enables museums, archives, and libraries to legally dispose of undocumented art and artifacts or objects loaned to them. Covered institutions include non-profit organizations, colleges, universities, or public agencies established primarily for artistic, educational, scientific, historic, or preservation purposes and which exhibit, care for, study, or catalogue property.²

In order to be protected by the act, covered entities wishing to terminate loans or deaccess undocumented works must meticulously adhere to the mandates of the act. Section 7 of the act³ provides a detailed protocol for terminating loans. The institution must notify the lender, and if the lender cannot be located, publish a notice of termination in the local newspaper of the county in which the institution is located and in the county of the last known address of the lender. The notice must conform to language detailed in section 7. If the lender does not claim the property within one year of the notice, the institution can take title in the object.

The act’s requirements for disposition of undocumented property are similar to those for loaned property. To gain title to undocumented objects, an institution must satisfy specific statutory requirements. First, the institution must have possessed the object for over 35 years.⁴ If research identifies a potential ownership interest, the institution must notify that person. Otherwise, the institution must prominently publish a black-bordered notice once each week, for two or more weeks, in a newspaper of general circulation in the county where the institution is located. The required wording for the notice is very specific, as outlined in section 11 of the act.⁵ There are also requirements for the type size in the notice, scaled according to the size of the institution’s budget. For example, institutions with a budget under \$50,000 may post a notice with a smaller type size.



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To redeem an object, the person claiming ownership must present documentation or other evidence of ownership within six months of the final publication of the notice.⁶ If a lender or owner comes forward with sufficient evidence of ownership within this deadline, the institution must turn over the object. The act insulates the institution from civil liability if it complies with these provisions of the act.⁷

APPLICATION

The Rocking Chair: The act will protect the historic home if it is a non-profit organization and it can prove that it kept up its lender records, tried to locate the lender’s descendants, posted notice of loan termination in conformance with the act, and waited a year before donating the rocking chair to the museum.

The Painting in the Storeroom: The library is also covered under the act. It could have and should have established title to the painting before sending it to auction. Since it did not adhere to the act, the library is left without the act’s protections and must rely on equitable arguments as discussed below.

The Murals: The restorer and former student are also left with only equitable defenses because individuals are not covered under the act.

DEFENDING CHALLENGES TO TITLE OUTSIDE OF THE ACT

There is a harsh reward for those unwitting safe keepers who lack legal title or who have not complied with the act to gain its protection. There are no Michigan cases discussing challenges to title in long held art objects. Consequently, Michigan courts are likely to look into the common law of other states when presented with disputes over art ownership.

A large body of law has emerged recently from successful claims pursued by the descendants of Holocaust victims to art stolen by Nazi Germany and others (including some Allied soldiers) during World War II. Numerous cases have adopted a Discovery Rule where a true owner’s claim does not arise until the whereabouts of the art object is discovered. This Discovery Rule has reduced the availability of state statute of limitations defenses, because the limitations period does not begin to run until the true owner demands return of the art object *and* the defendant refuses to return the work.⁸

In the absence of a statute of limitations defense, laches appears to be the best equitable defense to title challenges. Laches is a well developed equitable doctrine in Michigan jurisprudence. When presented with a laches defense in an ownership dispute over an art object, courts have considered whether the true owner or lender was negligent by failing to keep track of the property.⁹ Courts also have taken into account whether the art object

appreciated in value, resulting in a windfall to the negligent true owner. In order to overcome a laches argument, especially where the object in question has appreciated significantly in value, the true owner must demonstrate its diligence in trying to find the art object, at least to the extent of making inquiries and launching an investigation.¹⁰

Bailment is another equitable defense if a defendant argues that it exercised custodial care over the object and should be paid by the true owner for the bailment. Although courts consider bailments either express or implied contracts,¹¹ bailments do not necessarily depend on a contractual relationship. The issue with the bailment defense is whether the bailee properly cared for the property, or the true owner received a benefit from the bailment and the bailee should be remunerated; i.e., whether there should be restitution of bailment costs incurred, regardless of whether a contract was actually created.

APPLYING EQUITABLE DEFENSES

The Painting in the Storeroom: Notwithstanding the act, the library would have the best laches defense to prevent unjust enrichment of the county. Not only did the library make a good faith effort to find the true owner, the county also neglected to keep track of the painting and failed to launch an investigation until the library informed it of the painting's existence. As for a bailment/restitution defense, the library will have difficulty making the bailment argument because there was no special care of the painting. On the other hand, an argument could be made that the storage away from light may have protected the painting over the years and thus contributed to its value. At the least, the library can argue for storage costs.

The Murals: The finder and restorer of the WPA murals in the second scenario would not fare as well with a laches defense, because the college diligently pursued the whereabouts of the murals. However, the restorer has a good bailment and restitution defense if he can demonstrate that he carefully preserved the murals while they were under his care. At a minimum, if a court is inclined to order the return of the objects, the restorer can argue for his costs of bailment.

The Rocking Chair: In the rocking chair scenario, the equities in a laches defense are in closer balance between the parties because the historic home curator posted a termination of loan notice and the family attempted to find out what happened to the rocking chair once they discovered it was missing. The curator also has a good bailment defense and can argue for costs if he can demonstrate that he exercised curatorial stewardship over the chair while it was on loan. The decision reached in that case, however, probably would turn on whether the historic home complied with the requirements of the act.

ADVISING YOUR CLIENT

The Museum Disposition of Property Act was enacted to protect both institutions holding objects on loan and those persons do-

minating or loaning the objects. Institutions wishing to sell parts of their art collections to generate funds must adhere strictly to the act to protect themselves from lawsuits by persons claiming true ownership to the works. For their part, lenders and donors must make sure the institution accepting their object has their current address. Buyers of art works under deaccession should ask the seller for documented provenance. If there is no clear provenance, the institution should conduct further research, including the Internet, for lists of lost or stolen art objects.¹²

Since institutions, especially those with a tight budget, have the most to lose if the ownership of an object is challenged during deaccession, it is important for them to build at least eighteen months into deaccession planning. Two years is a better cushion. Institutions need time to make reasonable efforts to locate "true owners." Then public notices must run for several weeks, followed by a redemption period of six months to a year, depending on whether the property is undocumented or on loan. It is equally important for institutions to document their efforts to determine origins of property and to comply with the act. ♦



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Footnotes

1. MCLA 399.601 et seq.
2. MCLA 399.602.
3. MCLA 399.607.
4. MCLA 399.611.
5. Id.
6. Id.
7. MCLA 399.613.
8. See *Solomon R. Guggenheim Foundation v Lubell*, 77 NY2d 311 (1991); *Hoelzer v The City of Stamford Connecticut*, 933 F2d 1131 (1991); *Charash v Oberlin College*, 14 F3d 291 (CA 6, Ohio 1994); Note, *The Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule*, 50 Case W Res L Rev 87 (1998).
9. See C.J.S. Equity § 149.
10. Id.
11. C.J.S. Bailments § 4.
12. E.g., www.artloss.com; www.interpol.int/Public/WorksOfArt.