

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 06-0586

IN RE:

THE CHARLES M. BAIR FAMILY TRUST

Petitioner.

BRIEF OF APPELLANT STATE OF MONTANA

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable G. Todd Baugh, Presiding

APPEARANCES:

MIKE McGRATH
Montana Attorney General
ANTHONY JOHNSTONE
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

ATTORNEYS FOR APPELLANT
STATE OF MONTANA

JOHN G. CRIST
Crist Law Firm, LLC
201 North Broadway, Suite 300
Billings, MT 59101

ATTORNEYS FOR RESPONDENTS
AND CROSS-APPELLANTS,
TRUSTEE

CAREY E. MATOVICH
BROOKE MURPHY
Attorneys at Law
2812 First Avenue North, Suite 225
Billings, MT 59101-2312

ATTORNEYS FOR RESPONDENTS,
BOARD OF ADVISORS

A. CLIFFORD EDWARDS
ROBERTA ANNER-HUGHES
Edwards, Frickle, Halverson
& Anner-Hughes
P.O. Box 20039
Billings, MT 59104-0039

ATTORNEYS FOR APPELLANTS
AND CROSS-RESPONDENTS,
FRIENDS OF THE BAIR

MICHAEL A. COX
Michigan Attorney General
THOMAS L. CASEY
Solicitor General
TRACY A. SONNEBORN
Assistant Attorney General
Consumer Protection Division
Charitable Trust Section
Michigan Attorney General's Office
P.O. Box 30213
Lansing, MI 48909-0213

EDWARD P. NOLDE
Special Assistant Attorney General
Michigan Attorney General's Office
Snyder Law Office, P.C.
P.O. Box 717
Bigfork, MT 59911-0717

ATTORNEYS FOR *AMICI CURIAE*
MICHIGAN ATTORNEY GENERAL
ET AL.

TABLE OF CONTENTS

TABLE OF AUTHORITIESIII

ISSUE PRESENTED..... 1

STATEMENT OF THE CASE 1

I. THE TRUST 1

 A. The Trust Agreement2

 B. The Trust’s Finances3

II. THE MUSEUM.....4

 A. The Establishment of the Museum.....5

 B. The Operations of the Museum.....6

 C. The Board’s Closure of the Museum9

 D. The Board’s Assessment of the Museum.....11

 1. The CTA Assessment12

 2. The Hassrick Report13

 3. The Kolstad Study16

 4. The Yellowstone Art Museum “Market Test”17

 E. The Board’s Decision.....18

 F. The Board’s Other Spending Priorities.....20

III. THE TRUSTEE’S PETITION23

ARGUMENT.....24

TABLE OF CONTENTS

(Cont.)

I. THE BOARD DID NOT USE “WHATEVER PRINCIPAL AND INCOME OF THE TRUST THAT IS NECESSARY TO ESTABLISH, IMPROVE, AND MAINTAIN THE MUSEUM.”28

II. THE BOARD DID NOT GIVE THE MUSEUM “FIRST PRIORITY ON INCOME TO BE DISTRIBUTED FROM THE TRUST.”32

III. THE BOARD DID NOT AND COULD NOT FIND THAT THE MUSEUM “CEASED TO SERVE THE PURPOSES THEREOF.”34

CONCLUSION.....41

CERTIFICATE OF SERVICE.....42

CERTIFICATE OF COMPLIANCE.....43

TABLE OF AUTHORITIES

CASES

Board of Trustees of the Museum of the Am. Indian, Heye Found. v. Board of Trustees of the Huntington Free Library & Reading Room, 610 N.Y.S.2d 488 (N.Y. App. Div. 1994).....	35
Boyd v. Frost Nat'l Bank, 196 S.W.2d 497 (Tex. 1946)	40
Conway v. Emeny, 18 Conn. Supp. 22 (Conn. Super. Ct. 1952).....	37
Conway v. Emeny, 96 A.2d 221 (Conn. 1953).....	37
Decker Coal Co. v. Dept. of Revenue, 2000 MT 125, 299 Mont. 477, 2 P.3d 245	27
Estate of Getty, 149 Cal. Rptr. 656 (Cal. Ct. App. 1978).....	34
Harris v. Attorney Gen., 324 A.2d 279 (Conn. Super. Ct. 1974).....	39
In re Estate of Clark, 237 Mont. 179, 772 P.2d 299 (1989).....	26
In re Estate of Hermann, 312 A.2d 16 (Pa. 1973).....	40
In re Estate of Hill, 281 Mont. 142, 931 P.2d 1320 (1997).....	27
In re Estate of Lindgren, 268 Mont. 96, 885 P.2d 1280 (1994).....	40
In re George Trust, 253 Mont. 341, 834 P.2d 1378 (1992).....	41

TABLE OF AUTHORITIES

(Cont.)

In re Guardianship & Conservatorship of Elizabeth Saylor, 2005 MT 236, 328 Mont. 415, 121 P.3d 532	27
In re Los Angeles County Pioneer Soc., 257 P.2d 1 (Cal. 1953).....	28
Jackson v. Phillips, 96 Mass. 539 (1867)	41
Manhattan Eye, Ear & Throat Hosp. v. Spitzer, 715 N.Y.S.2d 575 (N.Y. Misc. 1999).....	36
Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928)	25
Murphy v. Redland, 178 Mont. 296, 583 P.2d 1049 (1978).....	26
Queen of Angels Hospital v. Younger, 136 Cal. Rptr. 36, 41 (Cal. Ct. App. 1977).....	33
Palmer v. Evans, 124 N.W.2d 856 (Iowa 1963).....	29
Stop Over Spending Mont. v. State, 2006 MT 178, 333 Mont. 42, 139 P.3d 788	27
Trust Estate of Molinari v. Probate Appeal, 2001 Conn. Super. LEXIS 3125 (Conn. Super. Ct. 2001)	38
Wild W. Motors v. Lingle, 224 Mont. 76 (1986).....	25

TABLE OF AUTHORITIES

(Cont.)

OTHER AUTHORITIES

Montana Code Annotated

§ 1-1-107.....	27
§ 72-33-103.....	27
§ 72-34-101, -108	25
§ 72-34-130.....	40
§ 72-34-501, -506	27
§ 72-34-504(2)(c).....	25
§ 72-34-506.....	28
§ 72-34-103(1), -105(1).....	26
§ 72-34-114(1), -113(2).....	26

PUBLICATIONS

S.J. Res. 27, 58th Leg., Reg. Sess., 2003 Mont. Laws 2780-81.....	11
--	----

ISSUE PRESENTED

Did the Charles M. Bair Family Trust Trustee and Board of Advisors breach their fiduciary duties to the Trust's primary charitable purpose?

STATEMENT OF THE CASE

This case involves the fate of “the cherished aim and foremost desire” of Alberta Bair: the Charles M. Bair Family Museum in Martinsdale, Montana. The relevant facts in the record, taken almost entirely from the Trustee's financial records, the Board of Advisors' minutes, and its members' testimony, were undisputed at trial. (Trial Exhibits were admitted in batches at the pages indicated on Tr. 3-4, 281, 534, and 808-09.)

I. THE TRUST

On January 3, 1990, Alberta M. Bair of Martinsdale, Montana, executed a Trust Agreement with First Trust Company of Montana (succeeded in interest by U.S. Bank, N.A. (Trustee)). (Trial Ex. 1 (Trust Agmt.), State's App. C.) The Trust is administered by the Trustee on the advice of a Board of Advisors (Board) consisting of five nominees identified in the Trust Agreement: Glen Hough (U.S. Bank Trust nominee), Wayne Hirsch (U.S. Bank nominee), Gerald Murphy (Moulton Firm nominee), James Roscoe (Yellowstone County nominee), and Louise Galt (Meagher/Wheatland County nominee). (Trial Ex. 98 at 3.) The Trust Agreement limits the Board members to staggered terms of one, two, or three

years, ensuring diverse representation of opinions and interests on the Board. (Trust Agmt. ¶ 6.2(d)(i).) Still, the Board members have “frozen” their own terms; consequently, four of the members who closed the Museum were appointed simultaneously and have occupied their positions for six years, twice as long as the maximum term allowed by the Trust, while the fifth member (Glen Hough) has occupied his position for nearly four years. (Trial Ex. 3, (Board Minutes), State’s App. D at 476; Tr. (Hough) at 709:16-17.)

A. The Trust Agreement

Section 6.2(e) of the Trust Agreement provides for the establishment of the Charles M. Bair Family Museum (Museum):

In carrying out the charitable purposes of the Trust as aforesaid and without intending to limit the generality thereof, it has long been the cherished aim and foremost desire of Grantor’s sister and Grantor to establish a museum which would perpetuate the historic and artistic significance of the Charles M. Bair Ranch and the people associated with it. *It is therefore Grantor’s will that the Board of Advisors devote Grantor’s entire residence, together with all personal property of lasting historical and artistic value located therein, and together with surrounding grounds and outbuildings necessary for such purpose, to the establishment of a museum to be named the Charles M. Bair Family Museum* which shall be open for the educational benefit of the general public. . . .

(Trust Agmt. ¶ 6.2(e) (emphasis added).)

The same section prioritizes the use of all trust assets for the Museum:

The Board of Advisors is directed to use *whatever principal and income of the Charles M. Bair Family Trust that is necessary* to establish, improve,

and maintain the museum, and shall have full discretion and authority to administer and manage the same.

The Charles M. Bair Family Museum created herein *shall have first priority on income to be distributed* from the Trust by the Board of Advisors

(Trust Agmt. ¶ 6.2(e) (emphasis added).)

Section 6.2(e) of the Trust Agreement also provides for the disposition of the Museum and its collection in case of the Museum's failure:

If, at any time following the fifth anniversary of Grantor's death, the Board of Advisors, acting in its sole judgment and discretion, shall determine that the said Charles M. Bair Family Museum has *ceased to serve the purposes thereof so as to make it inadvisable to continue the museum for public and educational purposes* . . . then and in any such event the Board of Advisors is thereupon authorized and empowered to sell, transfer, relocate the museum, or otherwise dispose of all of the property then held as a part of the Charles M. Bair Family Museum . . .

(Trust Agmt. ¶ 6.2(e) (emphasis added).)

B. The Trust's Finances

Following Alberta Bair's death in 1993, her estate transferred \$23,487,639 worth of assets into the Trust. (Trial Ex. 74 (Trustee Tax Returns), State's App. L at 17.) Those assets included a \$14,486,188 majority interest in The Bair Co., the owner and operator of the Bair Ranch (since converted to the nonprofit Bair Ranch Foundation), in addition to various securities. (Trial Ex. 74 at 34.) On average, the Trust has earned nearly \$2 million of income each year, including the Foundation's distributions. (Trustee Tax Returns at 1, 40, 90, 137, 178, 219, 261,

305, 346, 392, and 443, line 12.) In its last five reported tax years (1999-2003), the Trust's average annual income has risen to \$3 million.

At the end of its first fiscal year, April 30, 1994, the Trust included \$23,496,722.75, including \$8,992,927.75 of readily available "investment assets." (Tr. Ex. 81 (Trust Value), State's App. M at 2.) At its most recently reported fiscal year end, April 30, 2005, the Trust included \$55,273,189 of assets, including: \$11,074,128.65 of investment assets (stocks, bonds, and money market investments); the \$37,501,057.50 majority membership in the Foundation; the Bair Family collection of Western art, Native American artifacts, and European furnishings appraised at \$6,690,532, and \$7,470.85 of various mineral interests. (Trust Value at 3; Tr. (Doak) at 20:13-21:4.)

II. THE MUSEUM

Over decades, Alberta Bair and her sister, Marguerite, repeatedly expanded the Bair residence in Martinsdale to display their growing collection of art, artifacts, and furnishings. (Tr. (Hassrick) 361:22-362:2; Tr. (Rostad) 840:3-13; Trial Ex. 5 at 42.) The Collection includes twenty-two paintings and watercolors by Western artists and Bair family friends C.M. Russell, Joseph Sharp and J.K. Ralston, as well as photographs from Bair associate Edward Curtis. (Trial Ex. 61 at 4, 13, 77-78, 83.) The Collection also holds over 80 Native American artifacts, primarily from Plains tribes, including a vest and miniature tipi given to

Alberta Bair by Crow Chief Plenty Coups. (Trial Ex. 30 (Hassrick Report) State’s App. J at 43-58.) Another 350 items include furnishings such as 18th-century European furniture and silver collected by the Bair sisters on their various trips to Europe. (Hassrick Report at 61-63.)

A. The Establishment of the Museum

On October 3, 1994, the Trustee leased the Bair residence and its grounds from the Bair Co. in order to house the Museum. (Trial Ex. 14.) The initial lease term was five years with an option for a three-year renewal, rent free, but the lease provided that “[a]ll improvements or additions made by the [Trust] to the leased premises . . . shall become the property of the [Bair Co.] without any compensation whatsoever to the [Trust].” (Trial Ex. 14 ¶ 7.) Although the Board had nearly \$9 million of investment assets available to purchase the residence and grounds at the time, and a majority share in the Bair Co., the Board did not obtain the residence and grounds because “we didn’t want to use the money.” (Tr. (Murphy) at 497:8-13.)

The Board’s first museum consultant, Leavengood Architects, informed it that “the Bair Ranch has the potential of being a world-class institution” and that “the museum’s future is bright and needs only careful guidance.” (Trial Ex. 5 at 2.) Leavengood concluded that “[t]he transition of the Ranch House from a private residence to a museum will unavoidably require some changes to the

building and its systems.” (Id. at 97.) Total estimated conversion costs ranged between \$1,935,375 and \$2,517,320. (Id. at 101-03.) Instead of adopting the Leavengood proposal, the Board asked CTA Architects to propose another plan for the Museum, which was presented to the Board on March 30, 1994. (Trial Ex. 11.) CTA made similar recommendations and estimated that the preliminary total cost for the Master Plan would amount to \$1,023,200. (Id. at 3.)

Despite its architects’ recommendations, the Board refused the Leavengood proposals, the \$1,023,200 “Preliminary Project Cost Analysis” proposed by CTA, and a later \$521,000 “Minimum Operation Solution” also proposed by CTA, before it finally accepted a \$328,000 “Revised Minimum Operation” proposal. (Trial Ex. 16; Board Minutes at 156.) Due to cost increases, the final renovation budget increased to \$507,240, and the total amount spent on initial construction was \$673,559.29. (Trial Ex. 3 at 182; Trial Ex. 86 at 2.) When the Board made these decisions, nearly \$9 million of investment assets were available from the Trust. (Tr. (Doak) 66:4-14; Trust Value 81.)

B. The Operations of the Museum

On May 2, 1996, the Museum opened to the public. (Trial Ex. 70 (Board Decision), State’s App. D at 8.) The Museum hosted 14,890 visitors in its first season of operation, May through September of 1996. (Board Decision at 7.) In 2002, its last year of operation, the Museum attracted 25 percent of its visitors

from outside of Montana, and 3 percent from outside of the United States. (Trial Ex. 36 (Russell Report), State's App. F at 2.) The Museum kept a staff of five, including a caretaker and manager. (Id. at 9.) The Trustee had entered an agreement with the C.M. Russell Museum in Great Falls to operate the Museum. (Trial Ex. 3 at 174.) The Agreement had no defined term, and could be terminated any time after the Museum's summer season ended each year. (Id. at 179.)

In the four years following the Museum's first season, attendance averaged over 7,600 visitors each season. (Board Decision at 7-9.) However, after 1999, the Board ended all expenditures of Trust income on the Museum, except for operating payments to the Russell and insurance. (Trial Ex. 85 (Museum Expenses), State's App. N at 14-18.) Then, in 2001, advertising spending by the Russell Museum dropped from an average of nearly \$40,000 to \$25,911 (Trial Ex. 50 at 2), and attendance slid to 5,220. (Board Decision at 9.) Tourism generally suffered after the recession and the terrorist attacks of September 11, 2001; one peer Museum, the Bradford Brinton Memorial Museum in Bighorn, Wyoming (Brinton Memorial), saw visits drop more than 25 percent and sales decrease by up to 70 percent in 2002. (Tr. (Schuster) 732:25-733:19, 741:18 to 742:3.) In 2002, advertising spending rose again, but attendance hit a low of 4,357. (Board Decision at 9.)

The Board's Chairman called the Museum's attendance by thousands of visitors each summer "a terrible legacy." (Tr. (Roscoe) 170:21-171:15.) However, the Board's initial attendance estimates were between 2,500 and 3,000 annual visitors. (Tr. (Rostad) 867:14-21; Trial Ex. 3 at 267.) By that measure, the prior Board noted the Museum had "exceeded the Board's expectations." (Trial Ex. 3 at 440.) No one from the current Board has attempted to set an attendance target. (Tr. (Roscoe) 234:25-235:4; Tr. (Hirsch) 683:19-684:1; Tr. (Murphy) 590:18-24; Tr. (Galt) 662:17-22; Tr. (Hough) 712:5-8.) Still, the Museum exceeded the attendance figures of every other museum in the region. In 2001, the Museum brought in 5,220 visitors, more than the Upper Musselshell Historical Society in Harlowton (2,500), the Central Montana Historical Association in Lewistown (3,000), the Musselshell Valley Historical Museum in Roundup (3,867), the Meagher County Historical Association at the Castle in White Sulphur Springs (4,100), and the Crazy Mountain Museum in Big Timber (5,000). (Tr. Ex. 112 (Museum Directory), State's App. E at 762, 763, 766, 767, 755.) The current Board never considered attendance at other rural museums, but instead complained that they did not understand "how you get people to go" to "a very remote location." (Tr. (Roscoe) 176:25-177:4.)

C. The Board's Closure of the Museum

After the close of the Museum's season in October 2002, the Russell Museum reported to the Board that "[t]he Trust and C.M. Russell Museum need a shared understanding of our levels of commitment to operating and managing the Bair Family Museum" because "[t]here is great uncertainty about its future from one season to the next" under the year-to-year arrangement with the Board. (Russell Report at 9.) The Report also recommended the establishment of a separate Board of Trustees "to ensure that short term needs are addressed, while working to ensure long-term financial health" and a professional museum administrator "to give year-round attention to fund raising, management, collections, education and interpretation and marketing." (*Id.*) U.S. Bank Trust administrator Penny Doak agreed that "both the C.M. Russell Museum and the Trustee agree the management agreement currently in place is inadequate." (Board Minutes) at 484.)

Instead of addressing these issues, on November 20, 2002, U.S. Bank President Wayne Hirsch "moved that the Bair Museum not be reopened for the year 2003 and beyond," and the motion passed unanimously. (Board Minutes at 485.) Neither Mr. Hirsch, nor the Board's Chairman James Roscoe, had ever visited the Museum before deciding to close it. (Tr. (Hirsch) 675:9-11; Tr. (Roscoe) 194:2-7.) Mr. Roscoe was not even aware of the Museum's existence

during his first one-and-a-half years on the Board. (Tr. (Roscoe) 141:17-21, 314:18-21.) However, the Board did not announce their decision to the public until February 3, 2003, after Mr. Hirsch and Chairman Roscoe could visit the closed Museum. (Board Decision at 12.)

The Board closed the Museum without a plan to exhibit the collection or provide any other public benefit from the Museum's assets. (Tr. (Hirsch) 703:17-20.) Yet the Trustee continued to treat the value of the collection as "charitable use assets" for tax exemption purposes. (Trustee Tax Returns at 449.) The Board never published a catalog of the Bair Family collection until an exhibition outside of the Museum, at the Yellowstone Art Museum. (Tr. (Hassrick) 350:12-351:5.) The Board never publicized or made available the extensive Bair Co. historic archives kept at the Bair residence. (Tr. (Rostad) 863:19-864:9.) The Board never sought National Historic Register status for the Museum, even though it was encouraged to do so because registration can increase awareness of and funding for a site. (Tr. (Hassrick) 358:17-359:13; Tr. (Jiusto) 758:3-760:16.) The Board never attempted formal outreach efforts to increase Museum attendance by traveling selected art and artifacts to schools and other institutions, a method that can reach thousands of additional people each year. (Tr. (Schuster) 719:21-720:8.)

Meanwhile, the 2003 Montana Legislature responded to the Board's decision by overwhelmingly passing Senate Joint Resolution 27, which expressed statewide interest in the Museum and urged the Board to keep "the Charles M. Bair Family Museum open and operational at its current location at the Bair family home in the city of Martinsdale in Meagher County for the historical benefit and enjoyment of all citizens of the State of Montana, the nation, and the world." S.J. Res. 27, 58th Leg., Reg. Sess., 2003 Mont. Laws 2780-81. Also, in response to an inquiry from the Attorney General's office about the Museum's closing, Chairman Roscoe wrote that the Board had decided at its February meeting "to temporarily suspend the operation of the Museum for the 2003 summer season." Chairman Roscoe did not enclose the November meeting minutes, or explain that the closure was not temporary but indefinite, "for the year 2003 and beyond." In his letter, Mr. Roscoe cited three concerns motivating the closure: the Museum's "rural location," the necessity of "substantial repairs and upgrades" to the Museum, and "the Museum does not operate[] profitably." (Trial Ex. 48 (Letter to Attorney General), State's App. H at 1.)

D. The Board's Assessment of the Museum

In planning the Museum's next steps, Chairman Roscoe identified several issues, including:

Given - *The museum was never really made 'museum ready' in 1995 [sic] when it opened. A lot of work was done but many issues linger*

in terms of compliance with government regs, good curatorship, etc. The house is not disability friendly. It does not have climate control for good preservation of artifacts. It is not user friendly in terms of taking large groups through. It has inadequate bathrooms.

Given - *The museum has band-aided itself along through its 8 years of operations* as it dealt with all these inconsistencies. These inconsistencies contribute to cost, efficiency and other factors key to successful operation.

(Trial Ex. 46 at 1 (Chairman’s E-mail), State’s App. G (emphasis added).) In response to these concerns, the Board commissioned several studies from firms and individuals with expertise that the Board lacked. Each study offered a way forward for the Museum in Martinsdale.

1. The CTA Assessment

The Board first commissioned an assessment by CTA Architects. (Trial Ex. 58 (CTA Assessment), State’s App. I.) The Assessment confirmed many of the flaws discussed by Chairman Roscoe, and “the upgrades needed to operate the home as a true museum facility.” (Id. at 4.) The Museum’s visitor center did not serve its multiple functions “simultaneously, or well” and, in particular, the visitor center was ill-suited to host the average tour bus group of 46 visitors. (Id. at 9-12.) The interior presentations needed an overall upgrade, including rotating exhibitions displaying some of the Indian artifacts and photographs to target visitors with an interest in the Lewis & Clark Bicentennial. (Id. at 9, 11.) The 2003 CTA

Assessment estimated the cost of finally making the residence “museum ready” to be \$1,706,445. (Id. at 24.)

2. The Hassrick Report

The Board also commissioned a study by noted western art historian and curator Peter Hassrick to consider options for the Museum’s future. (Hassrick Report.) Mr. Hassrick found that “the Bair Museum received less than full attention” during its seven years of operation. (Id.) “The Bair collection . . . is relatively unknown and thus, lamentably, unheralded.” (Id. at 79.) According to Mr. Hassrick, “the Bair Museum was given what I would call ‘step child’ treatment and not afforded a fair chance to survive on its true merits.” (Id. at 6.) However, Mr. Hassrick testified that even as it fell short of its potential, the Museum served its purposes. (Tr. (Hassrick) 368:9-369:2.)

After many discussions with people associated with the Museum, Mr. Hassrick concluded that keeping it in Martinsdale “seems to have been Alberta’s preference” and “[t]here is certainly nothing like the Bair Museum in Montana.” (Hassrick Report at 5, 6.) He referred to notes from a trip Alberta Bair took to the Bradford Brinton Memorial in Bighorn, Wyoming, another historic house museum that Ms. Bair saw as a model for the eventual establishment of a similar museum in her residence. (Id. at 5.) The notes from that trip “show the sincerity of Alberta’s desire to do a proper job of preserving her home and

collections in a professional museum environment, a situation that was sadly not evident through much of the seven year management stewardship by the C.M. Russell Museum.” (Id.) The Brinton Memorial, like the Bair Museum, is an endowed rural museum with a collection of art and historical artifacts similar to but of a greater value than the Bair Collection. (Tr. (Schuster) 722:6-14.) It has a longer season and receives approximately 10,000 visitors annually, with 3,000 to 4,000 visiting during the summer. (Tr. (Schuster) 732:15-19, 753:15-18.)

Mr. Hassrick recommended that the Board reopen the Museum in 2004 “as a corrective to that unfortunate saga” of past years. (Hassrick Report at 6.) He recommended facility and marketing improvements, the establishment of a separate charitable organization to oversee the Museum, and the hiring of a full-time director with art expertise to oversee staff and budgets. (Id. at 2-3.) The estimated costs of Mr. Hassrick’s recommendation amounted to \$127,500, with an additional \$100,000 for a fire sprinkler system. (Hassrick Report at 7-8.) Annual operating expenses would run at \$227,000, offset by an estimated \$46,000 of income based on annual attendance of 4,000. (Id. at 8-10). Those operating expenses, excluding any income generated, are roughly the average amount spent each year on the Museum since the Trust’s reception, and less than ten percent of the Trust’s average annual income. (Museum Expenses at 2.)

Other art experts concurred in Mr. Hassrick's support for the Museum. Philip Hewat-Jaboor, an independent London antiques expert, observed that "to have the collection presented in its original domestic setting gives the opportunity for visitors to considerabl[y] widen their understanding of the use [of] these objects." (Hassrick Report at 64-65.) Mr. Hewat-Jaboor concluded: "This collection is of undoubted importance to the region. To be able to see such a complete collection, although not all authentic, in its original setting and collected by the important local family is a rare opportunity not to be missed." (Id. at 65.)

Barbara Loeb, a Plains Indian ethnographic specialist from Oregon State University, praised "[t]he uniqueness and scholarly value of the collection," calling it "aesthetically, one of the finest private collections of Plains art that I have seen." (Id. at 41.) But she noted the relative lack of academic notice given the Museum's collection and hoped "the museum will introduce the collection to scholars soon, as they will want to know about it and, as they begin to incorporate Bair pieces in their studies, will help to increase the museum's fame." (Id. at 41.) Beyond her focus on the Indian artifacts, she expressed her concern about the Museum's fate: "I understand that the museum is in danger of being disassembled. I did not address this directly, as you did not ask me to. However, I think that would be a great loss to Montana, as the museum is a work of art in itself." (Id. at 37.)

Mr. Hassrick also considered a second option: selling the Bair ranch house and 30 to 40 percent of the collection, and moving the collection to the Yellowstone Art Museum in Billings at a cost of \$2.2 million to the Trust, if “the officers of the Trust deem[ed] it unfeasible to continue the operations of the historic house museum.” (Id. at 12-13.) In suggesting this second option, he described Montana’s “sad history of losing treasures such as this to other states,” including the loss of Bair family friend Joseph Sharp’s house and studio from its original location in Crow Agency to the Whitney Gallery of Western Art in Cody, Wyoming. (Id. at 12.) “In each case there were seemingly justifiable reasons for not working hard enough to retain these objects,” Mr. Hassrick continued, “but the ultimate loss proved to be a profound cultural and psychological debit for the state and an erosion of its charm, beauty and history.” (Id.)

3. The Kolstad Study

Instead of adopting Mr. Hassrick’s proposal for reopening the Museum, the Board kept it closed and hired yet another consultant, its fourth since the 2002 Russell Report. On May 6, 2004, Gene Kolstad of CTA Architects presented a dozen different options for the Museum. (Trial Ex. 66.) Kolstad’s final detailed option was to keep the museum open. (Trial Ex. 66 at 14.) He observed that “Maybe 4,000 visitors/year is enough, and perhaps Alberta would have subsidized,” adding “[i]t’s the purest form of preservation.” (Id.) One concern he

raised was the “[s]afety of [the] collection,” but he suggested some of the collection could go to another museum with prints remaining at the site. (Id.) A final concern with keeping the Museum open was what he called a “[c]ontinuing money drain,” but he acknowledged that such a “drain” was less likely at the existing Museum “than some of the other options.” (Id.)

4. The Yellowstone Art Museum “Market Test”

Meanwhile, the Board conducted what Chairman Roscoe called a “market test” of the Billings area by negotiating an exhibition of some of the Collection at the Yellowstone Art Museum from June, 2004 through January, 2005. (Tr. (Roscoe) 168:21-24; Trial Ex. 65 at 11; Tr. (Knight) at 441:13-442:13, 479:3-8.) The Yellowstone Art Museum’s exhibition drew approximately 10,000 visitors in its debut 29-week run, or approximately 344 visitors per week. (Tr. (Roscoe) 208:5-8.) Unlike the Board’s limited summer season for Martinsdale, the Board scheduled the exhibition in Billings to overlap the school year, and school tours alone drew 3,000 children and adults. (Tr. (Knight) 451:22-452-9.) Still, the Museum in Martinsdale drew one-and-a-half times the attendance in its four-month opening season than the exhibition at the Yellowstone Art Museum drew in a seven-month opening season. (Tr. (Knight) 208:13-22.) The Museum’s average attendance over seven years was approximately 356 per week in Martinsdale,

slightly more than the weekly draw for the grand opening of the Yellowstone Art Museum's exhibition in Billings. (Board Decision at 7-9.)

Visitor comments in the exhibition guest book (excluding comments by parties to this case) ran approximately five-to-one for of keeping the Museum in Martinsdale, mostly from Yellowstone County residents but also from Central Montana, Bozeman, Helena, and Stevensville, as well as from Wisconsin and Florida. (Trial Ex. 69 at 3-5, 8, 18-19, 25-27, 29-30, 39, 66-67, 87, 94, 108, 112, 124, 126 (for); 59, 112, 116, 118, 122 (against).) In addition, the Board also received hundreds of letters that unanimously opposed the Museum's closing. (Tr. (Roscoe) 220:16-221:8.) Many of those Peter Hassrick spoke with also "exhorted that the Bair Museum should remain open to the public as a historic house museum near Martinsdale." (Hassrick Report at 2.) The Board received no letters supporting the Museum's closing. (Tr. (Roscoe) 221:5-8.)

E. The Board's Decision

Shortly after the close of the Yellowstone Art Museum exhibition in January 2005, the Board finalized its decision. With millions of dollars available to renovate the Museum, the Board based its decision on financial grounds. Despite overwhelming evidence of continued public interest, the Board concluded that "every dollar spent on maintaining, renovating, and improving the Museum is a dollar *without any return* in the form of educating more people about the

amazing story of Charlie Bair and his family or the artistic significance of the artifacts the Bair Family collected and left behind for generations to enjoy.” (Board Decision at 19 (emphasis added).) “In short,” the Board argued, “the costs associated with continuing the exhibition of the Bair Family Collection in Martinsdale, just in the next five years, were staggering to the Board in light of the lack of return in increased visitorship and/or educational opportunities.” (Id. at 18.) At the end of its analysis, the Board did not claim that the Museum and “*ceased to serve*” its purposes, but instead “determined that the educational, scholarly, and artistic purposes of the Museum can be *better served* by its exhibition in an area more accessible and more populated,” such as “the Yellowstone Art Museum in . . . Billings, Montana.” (Id. at 18, 19 (emphasis added).)

As the Museum approaches its fifth year of closure, and its third in litigation, the Board still refuses to share the original Collection with the public in Martinsdale. (Tr. (Roscoe) 179:15-17.) Instead, the Board has divided the Collection, emptied the Museum of many of its most significant art and artifacts, and converted the Museum into a “Home” run on a minimal budget without an endowment. (Doc. 130 at 1-2.) The Home’s successful season last summer helped to disprove the Board’s unfounded pessimism that it could never “get people to go” to “a very remote location.” (Tr. (Roscoe) 176:25-177:40). However, the Home

itself fell far short of Alberta Bair's vision, without "*all* personal property of lasting historical and artistic value." (Trust Agmt. ¶ 6.2(e) (emphasis added).)

F. The Board's Other Spending Priorities

Each year, the Board budgeted its expenditures on the Museum and reported its charitable grants on an annual basis. (Tr. (Doak) at 59:17-20, 63:6-9.) In the Trust's first full year, while the Board was negotiating the bare minimum for renovations of the Museum, the Board committed \$1 million to renovate a student center at Rocky Mountain College, and \$550,000 to capital improvements at the Yellowstone Art Museum. (Trial Ex. 97 (Grants Funded), State's App. O at 7.) Later in 2001 and 2002, years after major restoration work on the Museum had ceased, the Board granted \$300,000 to restore the Billings Depot. (Grants Funded at 2-3.) For the fiscal years ending 1995, 1997, 1998, 2000, 2002, 2004 and 2005, the Board spent more Trust income on a single grant recipient than it did on the Museum. (Tr. (Doak) at 60:19-24, 60:25-11.) When the Museum was open, the Board spent more Trust income to support other museums through grants (\$1,044,126) than it paid the Russell to run the Museum in Martinsdale (\$727,780.44). (Grants Funded; Museum Expenses at 9-19.)

After closing the Museum, in the fiscal years ending in 2004 and 2005 the Board made a total of \$4,325,402 in grants, or over \$1 million more than the total funding the Board had given to support the Museum since the Trust's creation.

(Grants Funded at 9; Museum Expenses at 2.) These grants included \$1,100,000 to the Boys & Girls Club of Billings and Yellowstone County (where Board member and U.S. Bank President Wayne Hirsch, who voted for the grant, also serves as Foundation President) and \$1,050,000 to the Alberta Bair Theater, more than the Board had ever spent to support the Museum in a single year. (Grants Funded at 3; Tr. (Hirsch) 676:2-8.) The grants also included two gifts to the Yellowstone Art Museum totaling \$510,000, including a gift of \$395,000, which is more than the Bair Family Museum had received in a single year since its opening. (Grants Funded at 9; Museum Expenses at 2.) The Board gave all three of these organizations more money in a single year than Alberta Bair had given them in the last six years of her life. (Board Minutes at 239.) In total, the Board has spent more than \$14 million for charitable purposes, and the Museum has received less than a quarter of that amount. (Grants Funded at 7-9; Museum Expenses at 2.) Other than the initial value of the contribution of the Museum collection, the Board never spent more than the Trust's annual income to support the Museum. (Trustee Tax Returns at 1, 40, 90, 137, 178, 219, 261, 305, 346, 392, 443 (line 12).)

Most recently, the Board committed another \$2.15 million to endow the Yellowstone Art Museum after trial, despite the Trustee's complaints that any commitment of such size would leave the Trust unable to fund its annual grants at normal levels. (Doc. 129, Matovich Aff. at Ex. A (YAM Gift), State's App. P

at 1(c); Tr. (Doak) 29:4-30:10.) Without notice to the other parties or prior court approval, the Board also agreed to split up the Collection and moved part of it to the Yellowstone Art Museum. While the gift of the partial Collection is premised on the Board prevailing in this case, there is no such restriction on the multi-million dollar endowment. (Compare YAM Gift at 2(a) with id. at 3.) The Board never offered such an endowment to support Alberta Bair's Museum. Instead, the Yellowstone Art Museum, located in the hometown of the Trustee U.S. Bank and four of the five Board members, is now the single largest beneficiary of her trust, with a total of \$3.47 million of trust assets including this most recent pledge. (Grants Funded at 7-9.)

Notwithstanding the Trustee's ambivalent view of its grantmaking capacity--generous when supporting hometown organizations, frugal when supporting the Museum--the Board would have been able to be equally generous with Trust funds had the Museum remained open. As the Trustee reported in its 2003 tax return: "While the museum was not open for the season, the charitable distributions for this foundation were not significantly financially impacted." (Trustee Tax Returns at 488.) The Board confirmed at trial that the Trust's financial assets were sufficient to support the Museum. (Tr. (Murphy) 633:1-11; 637:17-23.) Since the Trust's inception, its principal has more than doubled from

\$23,496,722.75 to \$55,273,189 (including \$11,074,128.65 in investment assets).

(Trust Value at 2-3; Tr. (Doak) 76:8-11.)

III. THE TRUSTEE'S PETITION

The Trustee filed its petition on March 8, 2004, seeking a determination of whether the Board has power “to suspend operations of the Museum” and “to sell, transfer, relocate the museum, or otherwise dispose of the Trust property,” steps it already had taken at the time. Pet. (Doc. 1). At a hearing on May 14, 2004, the district court granted leave to intervene to the Friends of the Bair Museum. (Doc. 10.) One month later, the State of Montana intervened on behalf of the public as a matter of right. (Doc. 17.) Several months later, the Board of Advisors, represented by their own counsel separate from the Trustee’s counsel, moved for and was granted leave to intervene. (Doc. 50.)

Following discovery and the district court’s postponement of the trial date, the State moved for summary judgment. (Doc. 84.) Despite the absence of a genuine issue of material fact, however, the district court denied the State’s motion because of what it called “mixed questions of law and fact that dictate a decision on the law and facts at trial and not by summary judgment.” (Doc. 99 (Summary Judgment Order), State’s App. A at 2.) The district court also reached the legal conclusion that “[t]he museum was authorized by the Trust Agreement in a precatory clause [meaning] the museum did not ever have to be established.” (Id.)

Indeed, the Court suggested the case was moot because the Board “determined for themselves that they could close the Museum and did so.” (Id. at 1.)

After a three-day bench trial, the district court issued a final decision in which it expanded upon its construction of the Trust Agreement. (Doc. 138 (Decision), State’s App. B.) The court held that “[t]he museum itself is not directly created or brought into existence by the trust agreement” and that the Board “had the power to decide to create or establish the museum” but did not have to do so. (Id. at 2-3.) Without addressing any of the fiduciary duties of the Trustee and Board, the court reviewed their entire twelve-year course of conduct for arbitrariness, caprice, and abuse of discretion. (Id. at 4.) Therefore, while acknowledging that “[d]epending on one’s viewpoint, the decisions of the Board of Advisors may be seen as deficient or not,” the court confirmed the Trustee’s and the Board’s conduct in its entirety. (Id.) The court did not cite a single legal authority in support of its decision.

ARGUMENT

Section 6.2(e) of the Trust Agreement provides three primary requirements with respect to the establishment, operation, and assessment of the Bair Family Museum. The Board must spend whatever money is necessary (including principal) to establish and maintain the Museum; it must make the Museum the first priority for all trust income; and it cannot close the Museum unless the

Museum has ceased to serve its purposes. The district court misconstrued these controlling terms of the Trust Agreement and ignored the Trustee's and Board's fiduciary duties. As a result, the court wrongly countenanced a series of gross breaches of trust to approve the unraveling of Alberta Bair's cherished Museum.

As this Court has recognized, the bedrock of trust law is a trustee's fiduciary duties to its beneficiary:

When a party undertakes the obligation of a trustee to receive money or property for transfer to another, he takes with it the duty of undivided loyalty to the beneficiary of the trust. The undivided loyalty of a trustee is jealously insisted on by the courts which require a standard with a "punctilio of an honor the most sensitive."

Wild W. Motors v. Lingle, 224 Mont. 76, 82 (1986) (citations omitted), quoting Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928) (Cardozo, C.J.). A trustee is liable not only for its conduct, but "for breach of trust involving acts or omissions of a predecessor." Mont. Code Ann. § 72-34-504(2)(c).

The law recognizes three primary fiduciary duties: obedience, loyalty, and care. Foremost, the duty of obedience requires a trustee "to administer the trust according to the trust instrument" and trust law, and "to make the trust property productive under the circumstances and in furtherance of the purposes of the trust." Mont. Code Ann. §§ 72-34-101, -108. The duty of loyalty requires a trustee "to administer the trust solely in the interest of the beneficiaries" and "not to use or deal with trust property for the trustee's own profit or for any other purpose

unconnected with the trust.” Mont. Code Ann. §§ 72-34-103(1), -105(1). The duty of care requires a trustee to “administer the trust with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would use to accomplish the purposes of the trust as determined from the trust instrument,” and “to exercise general supervision” over any delegated functions. Mont. Code Ann. §§ 72-34-114(1), -113(2).

As Chief Judge Cardozo recognized, his famed formulation of a trustee’s duties arose from “a tradition that is unbending and inveterate,” in which courts show an attitude of “[u]ncompromising rigidity” toward fiduciary duties. Murphy v. Redland, 178 Mont. 296, 309, 583 P.2d 1049, 1056 (1978), quoting Meinhard, 164 N.E. at 546. “Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.” Id. Therefore, courts “must carefully scrutinize” the conduct of a trustee, “who bears the burden of proving the proper disposition of the property under his control.” In re Estate of Clark, 237 Mont. 179, 183, 772 P.2d 299, 302 (1989). Like others entrusted with fiduciary duties, the Board was “required to observe the stringent standards applicable to trustees,” and the court was required to hold them to those standards. Id. at 184. The district court failed to do so.

This Court conducts plenary review of a district court’s legal conclusions, including its construction and interpretation of a written agreement. In re Estate of

Hill, 281 Mont. 142, 145, 931 P.2d 1320, 1323 (1997). This Court also conducts plenary review of mixed questions of law and fact, including a district court’s determination that the facts established in the record satisfy a legal standard. Stop Over Spending Mont. v. State, 2006 MT 178, ¶ 10, 333 Mont. 42, 139 P.3d 788; Decker Coal Co. v. Dept. of Revenue, 2000 MT 125, ¶ 15, 299 Mont. 477, 2 P.3d 245. This Court reviews a district court’s findings of fact to determine “if substantial evidence does not support [the decision], if the district court misapprehended the effect of the evidence, or if, after reviewing the record, this Court is left with a firm conviction that a mistake has been made.” In re Guardianship & Conservatorship of Elizabeth Saylor, 2005 MT 236, ¶ 10, 328 Mont. 415, 121 P.3d 532.

The common law of charitable trusts governs the Trust, except to the extent that the common law rules governing trusts are modified by statute. See Mont. Code Ann. § 72-33-103; Saylor, ¶ 16. Where common law governs, its source is Montana case law when available, and also where it is “observed and administered in the courts of the country.” See Mont. Code Ann. § 1-1-107. This Court, when presiding in equity over a breach of trust, is “empowered to determine all the questions involved in the case and to do complete justice,” and “may render final judgment in relation to all matters involved and growing out of that controversy.” Saylor, ¶ 33 (citations omitted); Mont. Code Ann. §§ 72-34-501, -506. A trustee

who breaches any of the duties owed to the beneficiary “provides good cause for a court to remove him.” Saylor, ¶ 16; Mont. Code Ann. § 72-34-506; In re Los Angeles County Pioneer Soc., 257 P.2d 1, 10 (Cal. 1953) (rejecting return of charitable trust assets to entity that breached trust, and requiring transfer of assets to different charitable organization subject to its compliance with purpose of original trust and supervision of attorney general).

I. THE BOARD DID NOT USE “WHATEVER PRINCIPAL AND INCOME OF THE TRUST THAT IS NECESSARY TO ESTABLISH, IMPROVE, AND MAINTAIN THE MUSEUM.”

The Trust Agreement requires the Board to “use whatever principal and income of the Charles M. Bair Family Trust that is necessary to establish, improve, and maintain the museum.” (Trust Agmt. ¶ 6.2(e).) Contrary to this clear mandate, the Board believed that the Museum was optional “if the board so chooses to create it” (Tr. (Roscoe) 140:3-11) rather than Alberta Bair’s “primary wish” under the Trust Agreement (Tr. (Murphy) 492:2-9). The Board saw its own grant-making to be the “paramount” purpose of the Trust (Tr. (Hirsch) 679:13-19), and therefore acted to preserve its power to make grants “forever” regardless of the Museum (Tr. (Roscoe) 170:21-25), thinking it was “a little out of line” to require “whatever principal” it took to establish the Museum (Tr. (Galt) 668:3-13). The district court adopted the Board’s perverse reading in its preliminary conclusion that “[t]he museum was authorized by the Trust Agreement in a precatory clause

[meaning] the museum did not ever have to be established.” (Summary Judgment Order at 2.) Later the court confirmed its mistake by holding that the Board “had the power to decide to create or establish the museum” but did not have to do so. (Decision at 2-3.)

The Board’s and the district court’s derogation of the Museum as merely “precatory” is contradicted by the terms of the Trust Agreement, which not only express Alberta Bair’s “cherished aim and foremost desire” but also her “*will* that the Board of Advisors devote” her residence, its contents, and its grounds to “the Charles M. Bair Family Museum which *shall be open* for the educational benefit of the general public.” (Trust Agmt. ¶ 6.2(e).) Even without such directly mandatory words as “will” and “shall,” the law is clear that a Grantor’s expression of her “cherished aim and foremost desire,” is not precatory and expresses the primary purpose of the Trust. Palmer v. Evans, 124 N.W.2d 856, 858, 860 (Iowa 1963) (will stating testator’s “long and cherished aim and purpose to establish a museum” and “direct[ing] the Trustees” to do so expressed “[t]he primary purpose” of the charitable trust). This initial failure to give Alberta Bair’s words their plain meaning set the stage for the Board’s and the court’s subsequent neglect of the Museum and the public interest.

The Board, having no museum expertise of its own, repeatedly requested the opinions of professionals in the establishment and maintenance of the Museum.

Then the Board rejected the ensuing recommendations, always to the Museum's disadvantage. Those rejections, and the resulting neglect of the Museum, did not follow from any reasonable disagreement among professionals; to the contrary, the expert reports commissioned by the Board show broad consensus in such matters as the need for certain house renovations and the importance of aggressively and creatively marketing the Museum. Instead, the Board consistently rejected the advice it received whenever it would require a substantial commitment of Trust funds to the Museum. The Board members feared that obeying the command to spend "whatever *principal* and income . . . that is necessary" for the Museum would compromise their ability to hand out grants in their community. So with at least \$9 million available to support the Museum, the Board chose the cheapest options possible. As the Board's Chairman acknowledged, "[t]he museum was never really made 'museum ready.'" This is a stark admission of the Board's breach of trust.

Similarly, Section 6.2(e) of the Trust Agreement directs the Board to "devote Grantor's entire residence . . . together with surrounding grounds and outbuildings necessary for such purpose, to the establishment of a museum to be named the Charles M. Bair Family Museum," and further authorizes the Board "to acquire additional land [and] erect and/or maintain existing structures suitable to the operation of a museum." While the Bair Co. owned the residence and grounds,

the Trust had nearly \$9 million available to purchase the residence and grounds, it owned a majority share of the company, and the Trustee's employees directed the company. The Trust Agreement clearly contemplated the purchase of the house and grounds, but instead of pursuing its fiduciary duty to the Museum, the Board leased the house and grounds from a bank-controlled entity on terms that would not allow the Trust to recoup any investments in improvements.

Lastly, rather than exercising its authority under the Trust Agreement "to establish a charitable entity legally separate from the Charles M. Bair Family Trust" with directors and staff qualified to operate a Museum (Trust Agmt. ¶ 6.2(e)), the Board delegated its duty to "administer and manage" to the C.M. Russell Museum, an organization whose primary focus would never be the Bair Museum. Because the Board chose this short-sighted delegation over the more stable and independent arrangement contemplated by the Trust Agreement, the Museum suffered under a year-to-year operating contract that the Trustee admitted was inadequate to the task. As a result, the Board's expert Peter Hassrick observed, "the Bair Museum was given what I would call 'step-child' treatment and not afforded a fair chance to survive on its true merits." Again, as the Board's Chairman later admitted, the Museum "band-aided itself along through its 8 years of operations as it dealt with all these inconsistencies [which] contribute to cost, efficiency and other factors key to successful operation."

II. THE BOARD DID NOT GIVE THE MUSEUM “FIRST PRIORITY ON INCOME TO BE DISTRIBUTED FROM THE TRUST.”

The Trust Agreement provides that the Museum “shall have first priority on income to be distributed from the Trust by the Board of Advisors.” Contrary to this clear mandate, the Board believed that “Alberta gave us the discretion to determine . . . how much money we would put into the Museum” (Tr. (Murphy) 553:24-554:4), that “first priority on income” means something other than the “amount of money” due the Museum (Tr. (Roscoe) 178:21-179:8), and that the Museum should not receive more money than grant recipients (Tr. (Murphy) 555:18-19).

As a result of the Board’s prioritization of its own grantmaking over Alberta Bair’s Museum, the Board usually gave the Museum second or third priority on trust income. In the very first year of the Trust, the Board granted more money to other museums than it did to the Bair Family Museum, the only museum it was obligated to support. The next year, while the Board repeatedly rejected comprehensive proposals to make the residence and grounds “museum ready,” it committed to a total of \$1.5 million in grants to Rocky Mountain College and the Yellowstone Art Museum for renovations, nearly three times the amount it budgeted to renovate the Museum. In four of the seven years the Museum operated, and seven of the twelve years of the Trust’s existence (not including the

most recent \$2.15 million pledge to the Yellowstone Art Museum), the Board made its largest annual expenditure for purposes other than the Museum. Over the six years the Museum was open, the Board spent more in grants to other museums than it paid the Russell to operate the Museum.

Other than the initial value of the contribution of the Museum collection, the Board never spent more than the Trust's annual income to support the Museum, and the Museum received a majority of Trust income only once. The Board has spent more than \$14 million for charitable purposes, but has given just a quarter of that amount to support the Museum. No doubt the other beneficiaries of the Board's changed priorities are worthy, but "the issue is not whether the new and different purpose is equal to or better than the original purpose, but whether that purpose is authorized by the [Trust Agreement]." Queen of Angels Hospital v. Younger, 136 Cal. Rptr. 36, 41 (Cal. Ct. App. 1977).

The Board's failure to prioritize the Museum is related to its lack of any formal conflict of interest policy. (Tr. (Roscoe) 222:14 to 223:1, 311:7-17; Tr. (Murphy) 593:25-594:3.) Several times Board members participated in decisions to make large grants to organizations with which they had financial, business, or personal affiliations, without even considering abstention. (Tr. (Murphy) 595:20-596:17, 569:11-570:5; Tr. (Hirsch) 676:9-19.) In weighing financial support for the Trust's sole named beneficiary against the "frozen" Board's grants

to hometown charities, “[t]he composition of the museum’s board of trustees makes it doubtful that the board could impartially consider this question, let alone take vigorous action, by reason of the conflicts of interest present between the trustees’ duties as guardians of a charitable trust and their personal welfare as executors of the estate, affiliates of attorneys for the estate, and officers and employees of [the Bair Foundation].” Estate of Getty, 149 Cal. Rptr. 656, 660 (Cal. Ct. App. 1978).

III. THE BOARD DID NOT AND COULD NOT FIND THAT THE MUSEUM “CEASED TO SERVE THE PURPOSES THEREOF.”

The Trust Agreement allows the Board to close the Museum in Martinsdale only “[i]f, at any time following the fifth anniversary of Grantor’s death, the Board of Advisors, acting in its sole judgment and discretion, shall determine that the said Charles M. Bair Family Museum has ceased to serve the purposes thereof so as to make it inadvisable to continue the museum for public and educational purposes.” (Trust Agmt. ¶ 6.2(e).) Despite the clear standard of “ceased to serve the purposes thereof,” the Board never determined that the Museum had ceased to serve its purposes. Instead, the Board simply disagreed with those purposes, calling the Museum “almost a flawed concept” (Tr. (Roscoe) 171:19-172:8), explaining that the Board could “do a better job” (Tr. (Murphy) 642:8-12) or “might be able to do it better” than in the way Alberta Bair intended (Tr. (Murphy) 487:25-488:6), and

“that maybe this should be a house destination and not a museum destination”

(Tr. (Roscoe) 170:21-171:15).

The only two criteria for closing the Museum, however, are either that it has ceased to serve its purposes or that it has been destroyed by fire or other causes. (Trust Agmt. ¶ 6.2(e).) So long as the Museum serves its purposes by publicly displaying the Collection in the location and manner dictated by Alberta Bair, it is irrelevant that the Board might think of “better” things to do with the residence and the Collection. Neither the Trust Agreement nor the Board’s fiduciary duties allow the Board to substitute its judgment, aesthetic or otherwise, for that of Alberta Bair. In a similar case, a court rejected museum trustees’ attempt to transfer its collection to what they considered a more desirable location:

While there may exist perfectly sound reasons of a curatorial, scholarly, aesthetic or other sort, why it would be desirable for the Indian book collection to find a home in an institution as eminent as the Smithsonian, *we are not free to move charitable assets from one institution to the next simply to maximize the utility of those assets in some broad sense.*

Board of Trustees of the Museum of the Am. Indian, Heye Found. v. Board of Trustees of the Huntington Free Library & Reading Room, 610 N.Y.S.2d 488, 501 (N.Y. App. Div. 1994) (emphasis added). As that court observed, “the consequence of so easily dispensing with a grantor’s directions would be to discourage charitable giving.” Id.

Here, the Board closed the Museum without any determination that it had ceased to serve its purposes, absent any study of alternatives, and before the two Board members leading the closure effort had ever visited the Museum. The Trust Agreement, however, required the Board to make its final determination first and “then and in any such event” close the Museum, subject to judicial review. “It is a fundamental principle that trustees dare not risk any attempt to deviate from the clear purposes of a trust without formal, nor merely the informal, approval of [a] court.” Bennet Estate, 18 Pa. D. & C.2d 595, 608 (Pa. D. & C. 1959). This hasty decision to close the Museum while the Board considered its options, and its subsequent and repeated rejections of every one of its consultants’ proposals to reopen the Museum, suggest that the Board’s desire to justify its initial decision to close the Museum drove its prolonged consideration of the collection’s fate, when the Board’s fiduciary duties required the converse. Manhattan Eye, Ear & Throat Hosp. v. Spitzer, 715 N.Y.S.2d 575, 596-597 (N.Y. Misc. 1999) (charity’s board breached its fiduciary duty when its sale of a hospital drove the board’s consideration of a change in charitable purpose, and not vice versa). In other words, “[i]t appears that the Board confused preservation of the [Museum] with preservation of the Board, when the appropriate calculus should be what is good for the [Museum] is good for the Board.” Id. at 596.

The Board's decision to close the Museum was motivated by many factors other than whether the Museum "ceased to serve the purposes thereof," and that constitutes a breach of trust regardless of the Board's discretion:

Some of those voting to discontinue the museum took into consideration their personal ideas of what [Grantor] would wish if she were living; erroneous personal interpretations of the will; future financial difficulties which they feared the museum would have; the financial needs of [other charities]; that the [Grantor's] Museum should be discontinued in order that [other charities] might continue to exist.

Conway v. Emeny, 18 Conn. Supp. 22, 30 (Conn. Super. Ct. 1952). In affirming that court's holding, the Connecticut Supreme Court made an equally fitting observation:

To be sure, the trustees did not act for personal advantage. Indeed, they appear to have been motivated by a desire to assist a worthy project. They were, nevertheless, trustees of the museum. This was an institution in which the testatrix had faith and which she had handsomely endowed to ensure its perpetuation. As long as it commanded what the trustees, acting in good faith, should believe to be sufficient public interest, it was to remain open. However commendable their purpose on behalf of [other charities], the trustees were unwarranted in ignoring the sole standard which the testatrix had provided, and they cannot justify their failure to measure up to this standard of loyalty to their cestui.

Conway v. Emeny, 96 A.2d 221, 225 (Conn. 1953) (trustees breached fiduciary duty in closing a museum so the trust could fund a school instead).

The primary extraneous factor the Board relied upon in closing the Museum was what it called the Museum's "staggering" costs, despite its authority to "use

whatever principal and income” of the Trust’s substantial wealth “is necessary to establish, improve and maintain the museum.” The Board balked at the \$1.7 million estimated costs of finally improving the residence to be “museum ready” while the Trust enjoyed approximately \$50 million in financial assets, including more than \$11 million of investment assets. With the Museum in need, the Board gave millions more to other organizations than it had ever given the Museum. The Board considered the \$181,000 estimated operating costs to be a “cost drain,” but that figure amounted to little more than five percent of the Trust’s annual income, and was no higher than the budgets of similar museums. The Museum did not drain the Trust; to the contrary the Trust’s funds had increased by two-and-one-half times. Trust Estate of Molinari v. Probate Appeal, 2001 Conn. Super. LEXIS 3125 (Conn. Super. Ct. 2001) (rejecting trustee’s assertion that charitable purpose was “uneconomic” or “not in the best interests” of the beneficiaries when the trust’s funds had increased in value).

The Board’s final consideration in closing the Museum was its attendance. Again, none of the Board’s consultants concluded that the Museum’s attendance meant it had “ceased to serve” its scholarly, educational, and historical purposes. The Board did not consider that the Museum had outpaced all other rural museums in the region, or that its summer attendance was comparable to its model the Brinton Memorial as well as the Yellowstone Art Museum, or that the Museum’s

relatively low final year attendance came amid a sharp downturn in tourism following the 2001 terrorist attacks and recession. The Museum's final year attendance of 4,357 still exceeded the Board's original expectations, although the current Board has repeatedly refused to say that any amount of attendance would be enough to keep the Museum open. The Board's dismissal of thousands of visitors a year is a breach of trust:

[T]he quoted clause requires that the trustees, in their absolute discretion, determine that there is not sufficient public interest to warrant the continuance of the museum. The evidence produced by the defendants falls quite short of establishing that there was a lack of public interest. On the contrary, evidence has been produced to demonstrate a real and vital public interest. It is one which is not restricted to [Martinsdale] and surrounding towns but is nationwide and worldwide. Attendance figures at the museum support this conclusion.

Harris v. Attorney Gen., 324 A.2d 279, 286 (Conn. Super. Ct. 1974).

Finally, the Trust Agreement authorizes closure and dismantling of the collection only if it has "ceased to serve" its purposes in its original intended location, not, as the Board determined, that its purposes "can be better served by its exhibition in an area more accessible and more populated." While the trust at issue in Harris allowed the trustees to close that museum if "there is not sufficient public interest," the Trust Agreement requires a stricter "ceased to serve" standard that does not depend on attendance. The purposes of the Museum, and all museums, are broader:

We have doubts that the frequency of visitation by the general public is any proper part of the definition of ‘museum’ . . . Certainly there are valuable museum collections which, owing to their obscure location or to the obscure nature of the subject matter displayed, are only rarely visited by the general public. It is doubtful that such a fact bears on whether they are or are not ‘museums.’

In re Estate of Hermann, 312 A.2d 16, 20 n.10 (Pa. 1973). As the Board’s consultants emphasized, the Museum not only served its purposes, but was “a work of art in itself” of “undoubted importance to the region.” There was “nothing like [it] in Montana.” While the Board and the Trustee have offered their own worthwhile visions for the Trust, “[t]he courts should be most unwilling to disappoint the expense and magnificence of [Grantor’s] vision by frustrating the wishes she has thus plainly expressed.” Boyd v. Frost Nat’l Bank, 196 S.W.2d 497, 501 (Tex. 1946).

Given the Board’s basic failure to consider the Museum’s purposes and to determine that it had ceased to serve those purposes, the Trust Agreement’s grant of “sole judgment and discretion” cannot immunize its conduct from judicial scrutiny. “[I]f a trust instrument confers ‘absolute,’ ‘sole,’ or ‘uncontrolled’ discretion on a trustee, the trustee shall act in accordance with fiduciary principles and may not act in disregard of the purposes of the trust.” Montana Code Annotated § 72-34-130; see In re Estate of Lindgren, 268 Mont. 96, 99-101, 885 P.2d 1280 (1994) (holding that trust’s grant of “sound discretion” to pay as much income and principal as the Trustee deems necessary to support Trustor’s

wife, combined with Trust's direction that the discretion be "exercised liberally in favor of my said wife" did not permit the Trustee to deny support payments to Trustor's wife); In re George Trust, 253 Mont. 341, 344, 834 P.2d 1378 (1992) (describing as "words of limitation" a trust's grant of "sole and absolute discretion" to "pay so much thereof as may be necessary, to or for the benefit of my wife"). This is particularly true for charitable trusts, which must submit to public and judicial oversight in exchange for the public benefits they receive:

No testator can obtain for his bequests that support and permanence which the law gives to public charities only, and at the same time deprive the beneficiaries and the public of the safeguards which the law provides for their due and lawful administration.

Jackson v. Phillips, 96 Mass. 539, 570-571 (1867).

CONCLUSION

Montanans are entitled to enjoy the Museum Alberta Bair intended for them. Therefore, the State respectfully requests the Court to reverse the district court, hold that the Trustee and Board breached the trust and their fiduciary duties, and remand for removal of the Trustee and the Board from the Museum, its Collection, and trust assets sufficient to endow the permanent support of both by an independent charitable entity.

Respectfully submitted this 22nd day of December, 2006.

MIKE McGRATH
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: _____
ANTHONY JOHNSTONE
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief
of Appellant to be mailed to:

Ms. Tracy A. Sonneborn
Assistant Attorney General
Michigan Attorney General's Office
P.O. Box 30213
Lansing, MI 48909-0213

Mr. John G. Crist
Crist Law Firm, LLC
The Securities Building
2708 First Avenue North, Suite 300
Billings, MT 59101

Mr. Edward P. Nolde
Special Assistant Attorney General
Michigan Attorney General's Office
Snyder Law Office, P.C.
P.O. Box 717
Bigfork, MT 59911-0717

Mr. A. Clifford Edwards
Ms. Roberta Anner-Hughes
Edwards, Frickle, Halverson
& Anner-Hughes
P.O. Box 20039
Billings, MT 59104-0039

Ms. Carey E. Matovich
Ms. Brooke B. Murphy
Attorneys at Law
2818 1st Avenue North, Suite 225
Billings, MT 59101-2312

DATED: _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

ANTHONY JOHNSTONE