

ORIGINAL

IN THE SUPREME COURT OF OHIO

THOMAS REVIS, et al.,

10-1169

Appellants,

On Appeal from the Summit County
Court of Appeals, Ninth Appellate
District

v.

Court of Appeals
Case No. 24696

OHIO CHAMBER BALLET, INC.,

Appellees.

NOTICE OF APPEAL OF APPELLANTS THOMAS REVIS, JAMES M. REHMUS, and
RICHARD W. WARFIELD

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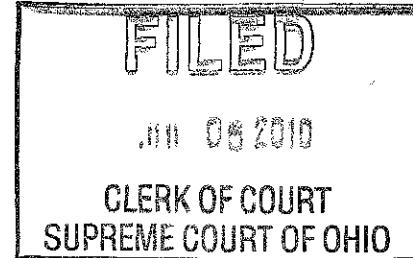
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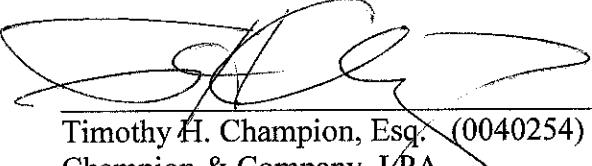


Notice of Appeal of Appellants Thomas Revis, James M. Rehmus, and Richard W. Warfield

Appellants, Thomas Revis, James M. Rehmus, and Richard W. Warfield hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Summit County Court of Appeals, Ninth Appellate District, entered in Court of Appeals case No. 24696 on 19 May 2010, on the grounds that the said judgment violates the due process clause of the Ohio Constitution, Article 1, Section 16 and the Equal Protection Clause under the Ohio Constitution Article 1, Section 2.

In addition to a substantial constitutional questions, this case is one of public or great general interest.

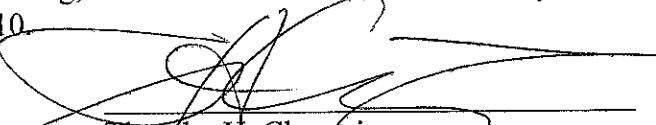
Respectfully Submitted,



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Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U. S. mail to counsel for Appellees, Vivian P. Tate, Ohio Attorney General's Office, 150 E. Gay Street, 23rd Floor, Columbus, Ohio 43215 and William D. Dowling, Counsel of Record, 3800 Embassy Parkway, Suite 300, Akron, Ohio 44333 on July 6, 2010.



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STATE OF OHIO) COURT OF APPEALS
COUNTY OF SUMMIT) DANIEL M. HORRIGAN
) IN THE COURT OF APPEALS
) ss: 2010 MAY 19 AM 7:59 NINTH JUDICIAL DISTRICT

THOMAS REVIS, et al.) SUMMIT COUNTY
) CLERK OF COURTS CASE No. 24696

Appellants

v.

OHIO CHAMBER BALLET, et al.

Appellees

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2007-11-8265

DECISION AND JOURNAL ENTRY

Dated: May 19, 2010

WHITMORE, Judge.

{¶1} Plaintiff-Appellant, Thomas Revis, appeals from the judgment of the Summit County Court of Common Pleas, denying his motion to release certain endowment funds and issuing a declaratory judgment in favor of Akron Community Foundation (“Akron Community”), John S. and John L. Knight Foundation (“Knight”), and GAR Foundation (“GAR”) (collectively “Intervenors”). This Court affirms.

I

{¶2} On November 28, 2007, Revis and several other plaintiffs filed a declaratory judgment action against the Ohio Chamber Ballet (“OCB”) and Marc Dann, the Ohio Attorney General at the time of the suit. Revis and his fellow plaintiffs (collectively “Revis”) all acted in some capacity as trustees for OCB, which ceased its operations at some point before Revis filed this suit. The complaint requested the court take multiple measures, including, but not limited to: (1) declaring that Revis had the authority to dissolve and wind up OCB’s affairs pursuant to R.C.

1702.01, et seq.; (2) staying all existing claims against OCB; (3) determining all of OCB's claims and assets; and (4) ordering final distribution of OCB's assets. Revis amended his complaint on March 26, 2008 to remove one of the named plaintiffs, but the content of the complaint otherwise remained the same.

{¶3} On May 7, 2008, Intervenors filed a motion to intervene based on their assertion that OCB's assets consisted of restricted endowment funds that Knight and GAR had donated and Akron Community administered. Intervenors sought to protect the funds from being used as payment for OCB's debts. The trial court granted the motion to intervene on May 12, 2008. On June 6, 2008, Revis answered Intervenors' complaint and counterclaimed Intervenors, seeking a declaration that the funds constituted assets of OCB because Knight's and GAR's donations were gifts made for OCB's benefit. OCB filed a cross-claim against Intervenors on the same grounds.

{¶4} On June 5, 2008, the trial court issued an order setting a status conference and ordering the parties to submit a combined brief comprised of their individual positions "regarding disputed and undisputed gifts; the disposition of income and principle; and any other issues by July 19, 2008." Subsequently, the trial court moved the deadline for the parties' position statements to September 2, 2008. On July 16, 2008, Intervenors filed their own position statement, outlining their argument and asking the court to prohibit any distributions to OCB. Revis never filed a position statement. Instead, Revis filed a motion to release the restrictions on OCB's endowment funds and to allow distribution of those funds to OCB for purposes of paying its debts, as well as the attorney fees and costs arising from this litigation. Intervenors and the Attorney General filed memorandums in opposition to the motion. On September 16, 2008, the trial court issued a judgment entry, denying Revis' motion, finding that the endowment funds

were not assets of OCB, and ordering that all the endowment funds remain in Akron Community's possession "for use in accordance with [Knight's] and GAR's charitable purposes."

{¶5} Revis now appeals from the trial court's judgment and raises two assignments of error for our review.

II

Assignment of Error Number One

"THE TRIAL COURT ERRED IN ENTERING JUDGMENT AGAINST THE PLAINTIFF-APPELLANTS' (sic) FOR FAILURE TO ESTABLISH A REAL CONTROVERSY BETWEEN THE PARTIES WITHOUT HAVING PROVIDED AN OPPORTUNITY FOR PLAINTIFFS TO PRESENT EVIDENCE SUPPORTING THEIR CLAIMS."

{¶6} In his first assignment of error, Revis argues that the trial court erred in entering judgment against him without notice or a hearing. Specifically, Revis argues that he was never given an opportunity to present evidence and that the trial court "essentially dismisse[d]" his claim on the basis of the unauthenticated documents affixed to Intervenors' position statement.

{¶7} Before we address the merits of Revis' argument, we first must consider whether Revis has appealed from a final judgment. The Ohio Constitution limits an appellate court's jurisdiction to the review of final judgments of lower courts. Section 3(B)(2), Article IV.

Accordingly, this Court has jurisdiction to review only final and appealable orders. See *Harkai v. Scherba Industries, Inc.* (2000), 136 Ohio App.3d 211, 219. "For a judgment to be final and appealable, the requirements of R.C. 2505.02 and Civ.R. 54(B), if applicable, must be satisfied."

Konstand v. Barberton, 9th Dist. No. 21651, 2003-Ohio-7187, at ¶4. As to R.C. 2505.02, "a declaratory judgment action constitutes a special proceeding and rulings affecting substantial rights in such proceedings are generally final orders." *National City Bank v. Depew* (Nov. 1,

1996), 9th Dist. No. 18116, at *1. Nothing in the record contradicts the conclusion that the court's determination regarding the endowment funds affected the parties' substantial rights. Therefore, we conclude that the court's judgment satisfies R.C. 2505.02's finality requirements. See *id.* The only remaining issue is whether the court's judgment also satisfies Civ.R. 54(B)'s finality requirements. Civ.R. 54(B) permits a court to enter a final judgment on fewer than all the claims or parties involved in an action upon an express determination that there is no just reason for delay.

{¶8} It is clear from the judgment entry in this case that the court did not enter a final judgment as to the claims involved in this matter. Civ.R. 54(B) only provides for the separate disposition of multiple claims, not for the disposition of separate issues in the same claim. Revis' complaint only contains one count/claim, requesting relief on multiple grounds in the form of a declaration. Although the judgment entry resolves a portion of Revis' claim, it does not fully dispose of the claim because it does not address several of his requests for relief, such as the request for authority to dissolve OCB and wind up its affairs. Moreover, Civ.R. 54(B) would not support the conclusion that the court entered judgment solely as to the claim contained in Intervenors' complaint because Intervenors' claim as to the assets was inextricably intertwined with the portion of Revis' claim seeking a declaration as to the assets. See *Glenmoore Builders, Inc. v. Smith Family Trust*, 9th Dist. No. 23879, 2008-Ohio-1379, at ¶16 (providing that Civ.R. 54(B) language will not create a final, appealable order if a claim is "inextricably intertwined" to an outstanding claim that has not yet been decided). Because the court could not have entered judgment as to fewer than all the claims through Civ.R. 54(B), we next must consider whether the court properly entered judgment under Civ.R. 54(B) as to fewer than all the parties.

{¶9} In its judgment entry, the court considered both the principal amount and the income amount of the endowments that Knight and GAR donated for OCB's charitable use. The judgment entry declares that the "proceeds" donated by Knight and GAR "shall remain in the possession of [Akron Community] for use in accordance with [Knight] and GAR's charitable purposes." Because the Attorney General and Intervenors became involved in this suit solely to ensure the proper direction of the endowment assets, the court's decision effectively terminated their involvement as parties to the suit by deciding the sole issue with which they were concerned. As the court's entry contains an express determination that "[t]here is no just reason for delay" and enters judgment as to Intervenors and the Attorney General, we conclude that the entry is a final, appealable order under Civ.R. 54(B) and we have jurisdiction to consider the merits of Revis' argument. See Civ.R. 54(B) (permitting a court to enter a final judgment as to fewer than all the parties upon an express determination that there is no just reason for delay).

{¶10} As previously noted, Revis argues that the court erred by "essentially dismiss[ing]" his claim without notice or a hearing. "A complaint for declaratory relief 'may be dismissed for failure to state a claim upon which relief can be granted only if (1) no real controversy or justiciable issue exists between the parties, or (2) the declaratory judgment will not terminate the uncertainty or controversy.'" *Mt. Eaton Community Church, Inc. v. Ladrach*, 9th Dist. No. 07CA0092, 2009-Ohio-77, at ¶7, quoting *Weyandt v. Davis* (1996), 112 Ohio App.3d 717, 721. A trial court need not hold a hearing before dismissing a declaratory action on one of the foregoing bases. *Bailey v. Bailey* (Dec. 6, 2000), 9th Dist. No. 99CA007364, at *3-5. A court may not, however, dismiss a declaratory judgment action "for failure to state a claim upon which relief can be granted based upon a conclusion that the plaintiff's position on the merits of his *** claim is incorrect." *Weyandt*, 112 Ohio App.3d at 721. Accordingly, we must

first examine whether the trial court in fact dismissed Revis' claim such that a hearing was unnecessary.

{¶11} The court below entered judgment on two separate grounds. First, the court found that Revis did not establish the existence of a real controversy and that no justiciable issue existed between the parties. See *Mt. Eaton Community Church, Inc.* at ¶7. Alternatively, the court entered judgment on the merits as to the endowment funds because the pleadings, other filings, and the applicable law all supported the conclusion that the endowment funds were not assets of OCB. It is clear from the analysis contained in the court's judgment entry that the court considered Revis' claim on the merits and made a decision based upon its examination and interpretation of the endowment fund agreements. The court essentially concluded that Revis' position on the merits was incorrect because OCB was not entitled to the endowment funds. This conclusion does not support a dismissal for failure to state a claim. *Weyandt*, 112 Ohio App.3d at 721 (providing for dismissal only when there is no live controversy or justiciable issue or declaratory judgment would not resolve the controversy). Thus, to the extent the trial court relied upon Revis' failure to state a claim as a basis for entering judgment, it erred by doing so. Next, we consider whether the court also erred by entering judgment on the merits as to the endowment funds.

{¶12} Revis argues that the trial court erred by determining his claim (1) without first giving him an opportunity to present evidence, and (2) while relying upon items submitted by Intervenors that were "never subject to proof" and that "did not comprise a factual foundation upon which legal judgments could be made." The record does not support Revis' assertion that he was denied the opportunity to present evidence. The trial court ordered the parties on two separate occasions to submit a combined position statement to the court by a specific date.

Despite the court's orders, Revis never submitted a position statement and never responded to the position statement that Intervenors filed. Instead, Revis filed a motion to release the restrictions on the endowment funds. Revis' motion to release contained an argument on the merits and numerous documents cited in support of his position. Even setting aside Revis' failure to comply with the court's orders to submit a position statement, he had an opportunity to present the court with evidence via his motion to release. Revis has not indicated what additional evidence he believes the court should have considered. See App.R. 16(A)(7). He merely argues that he was denied the opportunity to present evidence. The record does not support this argument.

{¶13} Additionally, Revis' argument that the trial court based its decision upon items that were "never subject to proof" and that "did not comprise a factual foundation upon which legal judgments could be made" lacks merit. The trial court based its decision upon applicable law and items that both Revis and Intervenors attached to their separate filings. Apart from never objecting to Intervenors' attachments, Revis relied upon the *same* documents in his motion to release that Intervenors relied upon in their position statement. Revis cannot now complain that the trial court relied upon materials that he himself provided in support of his motion. *Piro v. Franklin Twp.* (1995), 102 Ohio App.3d 130, 142 ("[Appellant] cannot claim that he was prejudiced by the trial court's reliance on a document where that document was substantively identical to material he submitted to the trial court.").

{¶14} Revis also cannot complain about the procedure that the court employed in this case. Revis' motion to release provides, in relevant part:

"[Revis] move[s] this Court to: 1) Order the release of donor restrictions on all [OCB] Endowment funds; 2) Order [Akron Community] to distribute from the [OCB] Endowment two GAR Foundation *** gifts totaling \$270,000, plus the accrued appreciation and income thereon; 3) Order [Akron Community] to

distribute the Knight Funds, \$500,000 plus the accrued appreciation and income thereon, to [OCB;] and 4) Order the distributed funds be used to pay to those creditors' claims, costs and expenses of dissolution, attorney fees and court costs as the Court shall approve."

Revis' motion specifically asks the court to interpret the endowment agreements and issue a decision about the release of all the endowment funds, including the appreciation and income on the funds. The motion did not request a hearing, only a decision from the court. Revis obtained a decision, albeit an unfavorable one, as a result of his motion. This Court will not reverse the decision that Revis specifically requested on the basis of procedural error simply because Revis disagrees with it. See *McDowell v. DeCarlo*, 9th Dist. No. 23376, 2007-Ohio-1262, at ¶15, quoting *State ex rel. Bitter v. Missig* (1995), 72 Ohio St.3d 249, 254 ("[A] party is not 'permitted to take advantage of an error which he himself invited or induced the trial court to make.'"). Revis' first assignment of error is overruled.

Assignment of Error Number Two

"THE COURT ERRED IN INTERPRETING THE GIFT LANGUAGE[.]"

{¶15} In his second assignment of error, Revis argues that the trial court erred in interpreting the gift language contained in Knight's and GAR's endowment agreements. Specifically, he argues that OCB should be permitted to use endowment income to pay its debts. We disagree.

{¶16} Generally, "declaratory judgment actions are to be reviewed under an abuse-of-discretion standard." *Mid-American Fire and Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, at ¶14. An abuse of discretion is not merely an error of law or judgment, but means that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. If, however, declaratory relief depends solely upon a question of law, a non-discretionary matter, this Court will apply a de novo standard of review.

Pierson v. Wheeland, 9th Dist. No. 23442, 2007-Ohio-2474, at ¶10. “[D]e novo review requires an independent review of the trial court’s decision without any deference to the trial court’s determination.” *State v. Consilio*, 9th Dist. No. 22761, 2006-Ohio-649, at ¶4.

{¶17} Although Revis raised several statutory arguments in the court below, he limits his argument on appeal to interpreting the plain language of Knight’s and GAR’s gift instruments. According to Revis, the instruments are unambiguous; they do not restrict OCB from using the income on the endowment funds to pay bills, debts, or obligations. While Revis admits that its endowment funds would revert to Akron Community if OCB stopped operating and became a defunct organization, he argues that OCB’s continued operation does not depend upon its production of ballet performances. Specifically, Revis asserts that “[n]othing in the [endowment] instruments would prevent [OCB] from continuing to operate indefinitely, for the sole purpose of collecting endowment income distributions and applying [them] to pay its debts.” He argues that this case is indistinguishable from *Montclair Nat'l Bank & Trust Co. v. Seton Hall College of Medicine and Dentistry* (1967), 96 N.J. Super. 428.

{¶18} In *Montclair*, a testator devised a portion of his estate to the Seton Hall College of Medicine and Dentistry (“Seton Medical”). By the time the estate was administered, however, Seton Medical had sold its assets, stopped its operations, and was “primarily concerned with the payment of its debts.” *Montclair*, 96 N.J. Super. at 433. The probate court determined that Seton Medical was not entitled to a portion of the estate because it had given up its functions as an educational institution. *Id.* at 434. Because the testator intended to fund Seton Medical’s educational mission, the probate court reasoned, Seton Medical’s continued existence as a bare entity was an insufficient basis upon which to uphold its bequest. *Id.* The Superior Court reversed, however, and concluded that Seton Medical was still entitled to the bequest. *Id.* at 438.

{¶19} Presumably, Revis relies upon *Montclair* because the Superior Court still awarded Seton Medical its bequest even though the entity's activities were limited to paying the debts it had incurred in carrying on its education mission. See id. ("[T]he gift was intended to promote medical education, but nowhere is it alleged that Seton Medical's debts were not contracted as the result of services and expenses related to that end."). Yet, this reliance is misplaced because the focal issue in *Montclair* was the point at which the testator's gift to Seton Medical vested. The probate court held that vesting did not occur until the estate was administered, by which time Seton Medical had stopped operating as an educational institution. Id. at 434. The Superior Court held that Seton Medical was entitled to its bequest because vesting had occurred on the date of the testator's death, not later when the estate was administered. Id. at 438. At the time of the testator's death, Seton Medical was still acting as an educational institution. Id. at 437 ("[O]n the date of death, Seton Medical was actively pursuing its corporate purpose and did not cease the teaching of medicine and dentistry until two years later."). As such, *Montclair* does not stand for the blanket proposition that a bare entity's payment of the debts it incurred while carrying out its mission equates to a continuation of the defunct entity's underlying mission.

First Nat'l Bank of East Liverpool v. Rowan (Sept. 22, 1982), 7th Dist. No. 80-C-31, at *2.

{¶20} Revis does not deny that both Knight's and GAR's gifts are contingent upon OCB continuing to operate "in furtherance of its charitable purposes." Revis' own amended complaint provides, in relevant part, as follows:

"3) The general purpose and plan for which [OCB] was formed are *** '... the promotion of ballet, education and culture, and the *general plan of operation of the corporation shall be the presentation of ballet performances, lecture-demonstrations and instructions consistent with such general purpose.*'

"9) In or about the summer of 2006 [OCB] ceased operations and on or about February 21, 2007 its Articles of Incorporation were cancelled by the Secretary of State." (Emphasis added.)

By Revis' own admission, OCB ceased its operations as of the summer of 2006. At that time, OCB stopped acting in furtherance of its designated charitable and/or educational purpose to promote the "ballet, education and culture." We are not convinced that, by paying its debt, a defunct organization continues to carry out its once stated charitable purpose. Nor has Revis pointed this Court to any applicable law in support of that proposition. App.R. 16(A)(7). Because both Knight's and GAR's gifts depended upon OCB's continued operation in furtherance of its charitable purpose, the trial court did not err in concluding that OCB should not be permitted to use endowment income to pay its debts. Consequently, Revis' second assignment of error is overruled.

III

{¶21} Revis' assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the

period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.



BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
CONCURS IN JUDGMENT ONLY, SAYING:

INTRODUCTION

{¶22} When the Ohio Chamber Ballet, the intended beneficiary of a charitable endowment, stopped operating, the foundation administering the endowment stopped distributing income to the Ballet. The trustees of the Ballet filed this lawsuit to wind up the Ballet, and the two foundations that had donated the money in the endowment and the foundation that was administering the endowment intervened. The foundations asked for a declaration that the funds in the endowment were not assets of the Ballet. After the trustees and the foundations filed opposing motions for declarations regarding the rights of the parties in relation to the funds, the trial court ruled that the funds were restricted by the terms of the endowment and declared that they belong to the foundations rather than the Ballet. The trustees have timely appealed that decree, arguing that the trial court: (1) incorrectly entered judgment against them without permitting them to present evidence; and (2) incorrectly interpreted the language of the endowment documents. The judgment of the trial court is properly affirmed because the trial court entered judgment against the trustees only after giving them a fair opportunity to present evidence and correctly interpreted the endowment language.

BACKGROUND

{¶23} In 1986, the GAR Foundation began awarding grants to the Ohio Chamber Ballet. The record reflects that the GAR Foundation sent letters in 1986, 1988, 1998, and 1999, awarding grants to fund a “restricted endowment” for the benefit of the Ballet. Under the terms of the letters, the Ballet could use the income earned on the grant funds, but could not invade the principal without prior consent of the GAR Foundation. The final two grants were awarded under a 1997 endowment policy that required the Akron Community Foundation to administer the funds according to the terms of the award letters and the GAR endowment fund policy. Those documents required distributions to the Ballet of a percentage of the fund’s average market value and annual certifications of compliance with the terms of the agreement. From 1998 forward, the GAR Foundation endowment documents provided that, if the Ballet ceased to be covered under Section 501(c)(3) of the Internal Revenue Code, then the fund would revert to the general Akron Community Foundation Fund, which is used for the promotion of local charitable, benevolent, educational, health, aesthetic, cultural, and public welfare activities.

{¶24} Under a 1999 grant agreement, the John S. and James L. Knight Foundation committed \$500,000 to the Community Foundation for a separate endowment fund for the benefit of the Ballet. This fund was to be administered by the Community Foundation in accordance with the terms of the grant agreement and the governing documents of the Community Foundation. The agreement provides that the Community Foundation must make quarterly distributions to the Ballet of up to five percent of the fair market value of the fund each year “for the Ballet’s charitable or educational activities.” The agreement prohibits the Community Foundation from invading the principal of the fund for either distributions or administrative costs. The governing documents of the Community Foundation provide that “any

property . . . accepted by the [Community Foundation] shall be forever held, used and distributed . . . [as] specified or preferred by the donor . . . unless and until it is affirmatively determined that literal compliance with the purposes or wishes expressed in the granting instrument has become by reason of change of circumstances, unnecessary, undesirable, impracticable or illegal. Upon such determination the corpus or income or both may be applied for any purpose of [the Community Foundation]."

{¶25} The record reflects that the Ballet's financial problems began at least as early as 2004. In the summer of 2006, the Ballet stopped operating and its board of directors disbanded. Successor trustees of the Ballet later filed this action against the Ohio Attorney General and the Ballet, asking the court to construe Chapter 1702 of the Ohio Revised Code and declare the rights and obligations of the parties regarding the winding up of the Ballet, the Ballet's final assets and liabilities, and the status of all outstanding claims against it. By their first amended complaint, the trustees sought declarations on many topics, including a determination of "assets required to be retained to pay or provide for payment of any and all claims [against the Ballet]" and "the assets available for distribution to members [of the Ballet] and others."

{¶26} The Community Foundation, the Knight Foundation, and the GAR Foundation intervened as party defendants and brought a counterclaim against the trustees and a cross-claim against the Ballet, asking the trial court to construe the endowment documents to declare the rights and liabilities of the parties regarding the funds held by the Community Foundation for the benefit of the Ballet. In their pleading, the foundations alleged "that the endowment funds held by Akron Community Foundation for the benefit of Ohio Ballet are not assets of Ohio Ballet available to pay claims or to distribute to members and others." The trustees and the Ballet filed responsive declaratory judgment claims against the foundations, each alleging that "[t]he gifts

given to the Ohio Chamber Ballet by Knight Foundation and GAR Foundation, and administered by Akron Community Foundation for the benefit of [the] Ballet, are assets of [the] Ballet for purposes of the relief requested in the [trustees'] First Amended Complaint."

{¶27} After a status conference, the trial court ordered the parties to "submit to the Court a combined brief regarding disputed and undisputed gifts; the disposition of income and principles; and any other issues . . ." The parties never filed "a combined brief" as ordered. On July 16, 2008, the foundations filed a unilateral "position statement," requesting the trial court "issue its declaration that the endowment funds held by Akron Community Foundation for the benefit of Ohio Ballet are not assets of Ohio Ballet available to pay claims or to distribute to members and others." The foundations cited existing law and attached various exhibits to the position statement, including endowment documents, which, they argued, permanently restricted the funds donated by the foundations for the benefit of the Ballet. The trustees did not immediately respond to the foundations' arguments.

{¶28} On July 21, 2008, all of the parties jointly moved the trial court to continue the impending pretrial hearing in order to give the parties "sufficient time . . . to file documents with the court" regarding the alleged restrictions on the endowment funds. The trial court continued the pretrial until August, then entered another order, rescheduling the pretrial hearing for mid-September and again ordering counsel to "submit the combined brief" to the court by September 2, 2008.

{¶29} Instead of filing a combined brief, the trustees moved the trial court to "Release Restrictions on & Disbursement of Ohio Ballet's Endowment Fund to Pay Debts, Expenses & Dissolution Costs." The trustees responded to the arguments advanced by the foundations in their position statement and asked the court to interpret the endowment documents to require the

release of the funds to the Ballet for the payment of the Ballet's debts and expenses, including those incurred in pursuing this lawsuit.

{¶30} The foundations responded with a memorandum in opposition, asking the trial court to deny the trustees' motion and issue a declaration prohibiting disbursement of funds to the Ballet. The Ohio Attorney General filed a similar memorandum opposing the trustees' motion and supporting the foundations' interpretation of the endowment documents. The Attorney General also attached many of the same documents the other parties had attached to their filings.

{¶31} Following a status conference, the trial court ordered the parties to mediate the dispute and warned that, "[s]hould mediation be unsuccessful, [the trustees] shall file their reply brief within 21 days from the date of mediation. The Court will then set a status conference and/or rule on the pending motion." The record reflects that the parties participated in an unsuccessful mediation on October 10, 2008, but nothing further was filed in the case until the trial court ruled on the pending motions on March 9, 2009. The trial court denied the trustees' motion to release the restrictions on the endowment funds and allow disbursement, explaining its construction of the endowment documents and declaring that the funds "shall remain in the possession of the [Community Foundation] for use in accordance with the Knight Foundation and GAR [Foundation's] charitable purposes."

JURISDICTION

{¶32} Although the Ohio Attorney General did not directly question this Court's jurisdiction, he has pointed out that the trial court's decree did not address various issues contained in the trustees' First Amended Complaint. For instance, the trial court did not resolve questions regarding other assets of the Ballet, claims against the Ballet, compensation for the

trustees, and the role of the Attorney General in winding up the Ballet's affairs. The fact that these issues remain unresolved raises a question regarding this Court's jurisdiction to review this matter.

{¶33} Article IV, Section 3(B)(2) of the Ohio Constitution provides that courts of appeals "shall have such jurisdiction as may be provided by law to review . . . judgments or final orders . . ." Generally, "[f]or a court order to be final and appealable, it must satisfy the requirements of [Section 2505.02 of the Ohio Revised Code], and if the action involves multiple claims and the order does not enter a judgment on all the claims, the order must also satisfy [Rule 54(B) of the Ohio Rules of Civil Procedure] by including express language that 'there is no just reason for delay.'" *Int'l Bhd. of Elec. Workers, Local Union No. 8 v. Vaughn Indus. L.L.C.*, 116 Ohio St. 3d 335, 2007-Ohio-6439, at ¶7 (quoting Civ. R. 54(B)). Civil Rule 54(B) does not become relevant unless the order appealed has first satisfied the requirements of Section 2505.02. *Gen. Acc. Ins. Co. v. Ins. Co. of North Am.*, 44 Ohio St. 3d 17, 21 (1989) (explaining that only "[i]f the court finds that the order complies with R.C. 2505.02" must the court "take a second step to decide if Civ.R. 54(B) language is required"). The order from which the trustees have attempted to appeal in this case does not satisfy Section 2505.02. That, however, does not conclude the analysis of whether this case is properly before us.

{¶34} There are several Ohio statutes, other than Section 2505.02, that relate to the finality of certain specific types of trial court orders. Further, for some of those specific types, the Ohio Supreme Court has held that an order falling within them is immediately appealable without regard to whether it satisfies Section 2505.02 or, in a multi-claim or multi-party case, Rule 54(B). For example, in *Sullivan v. Anderson Twp.*, 122 Ohio St. 3d 83, 2009-Ohio-1971, at ¶13, a multi-party, multi-claim case, the Court held that Section 2744.02(C) of the Ohio Revised

Code, which provides that “[a]n order that denies a political subdivision . . . the benefit of an alleged immunity from liability . . . is a final order,” permits an immediate appeal from such an order “even when the order makes no determination pursuant to Civ.R. 54(B).” Thus, it is not necessary for an appellate court to determine whether an order denying a party the benefit of claimed sovereign immunity satisfies either Section 2505.02 or Rule 54(B) before immediately reviewing that order on appeal. *Id.* at ¶12 (citing *Hubbell v. City of Xenia*, 115 Ohio St. 3d 77, 2007-Ohio-4839, at ¶27).

{¶35} In *Mynes v. Brooks*, 124 Ohio St. 3d 13, 2009-Ohio-5946, at ¶12, the Court reached the same conclusion about attempted appeals from orders granting or denying stays pending arbitration. The statute at issue in that case, Section 2711.02(C) of the Ohio Revised Code, contains the same phrase relied upon by the Court in *Sullivan*: “an order . . . that grants or denies a stay of a trial of any action pending arbitration . . . is a final order and may be reviewed, affirmed, modified, or reversed on appeal . . .”

{¶36} Ohio’s Declaratory Judgment Act includes a provision that, although not identical to the phrase used in Sections 2744.02(C) and 2711.02(C), also addresses finality. Section 2721.02(A) of the Ohio Revised Code provides that “courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed. . . . The declaration has the effect of a final judgment or decree.”

{¶37} Generally, “the effect of a final judgment or decree” is that it is appealable under Section 2505.03(A) of the Ohio Revised Code. Under that section, “[e]very final order, judgment, or decree of a court . . . may be reviewed on appeal by . . . a court of appeals, or the supreme court, whichever has jurisdiction.” By providing that declarations properly issued under Chapter 2721 “ha[ve] the effect of a final judgment or decree,” the General Assembly has

determined that such declarations are appealable under Section 2505.03(A). Therefore, an appellate court need not consider the application of Section 2505.02(B). At least two other district courts have reached this same conclusion. *Pinkney v. Southwick Investments L.L.C.*, 8th Dist. Nos. 85074, 85075, 2005-Ohio-4167, at ¶9; *Griewahn v. United States Fid. & Guar. Co.*, 160 Ohio App. 3d 311, 313-14 (2005) (7th Dist.).

{¶38} In order to properly enter judgment in a declaratory judgment action, the trial court must set forth its construction of the disputed document or law, *Haberley v. Nationwide Mut. Fire Ins. Co.*, 142 Ohio App. 3d 312, 314 (2001) (quoting *Nickschinski v. Sentry Ins. Co.*, 88 Ohio App. 3d 185, 189 (1993)), and must “expressly declar[e] the parties’ respective rights and obligations.” *Id.* at 313-14 (quoting *Kubicki v. N. Royalton*, 8th Dist. No. 73454, 1998 WL 598795 at *1 (Sept. 10, 1998)). If the trial court fails to fulfill these requirements, its judgment is not final and appealable. *Id.* at 313-14.

{¶39} The intervening foundations asked the trial court to construe various endowment documents and declare that the endowment funds are not assets of the Ballet and, thus, are not available to the trustees to pay claims against the Ballet or to distribute to the Ballet’s members. The trustees’ and the Ballet’s claims against the foundations were a mirror image of the foundations’ counterclaim against the trustees and their identical cross-claim against the Ballet. The trial court denied the trustees’ motion to disburse the endowment funds and declared that the restrictions in the endowment documents would not be released and the funds “shall remain in the possession of the [Community Foundation] for use in accordance with the Knight Foundation and GAR [Foundation’s] charitable purposes.” The trial court set forth its construction of the disputed endowment documents, *Haberley v. Nationwide Mut. Fire Ins. Co.*, 142 Ohio App. 3d 312, 314 (2001) (quoting *Nickschinski v. Sentry Ins. Co.*, 88 Ohio App. 3d 185, 189 (1993)), and

“expressly declar[ed] the parties’ respective rights and obligations,” in regard to the funds governed by the endowment documents put at issue by the foundations’ counterclaim and cross-claim. *Id.* at 313-14. Thus, the order fully disposed of the foundations’ counterclaim against the trustees and their cross-claim against the Ballet, as well as the opposing claims against the foundations.

{¶40} The order did not, however, dispose of the trustees’ claims against the Ohio Attorney General and the Ballet. By their first amended complaint, the trustees requested a construction of Chapter 1702 of the Ohio Revised Code and sought declarations on many topics unrelated to the endowment documents. The trustees are still awaiting a declaration of their rights and responsibilities and those of the Attorney General in regard to winding up the Ballet. They have not been told what assets do belong to the Ballet, what liabilities must be paid, and what rights they may have to use the assets to satisfy the liabilities or make distributions to members. The claim that remains pending is dependent on the trial court’s construction of Chapter 1702 of the Ohio Revised Code and is not affected by the construction of the endowment documents.

{¶41} Generally, if a trial court enters final judgment on less than all of the claims and parties in a case, “the order must also satisfy [Rule 54(B) of the Ohio Rules of Civil Procedure] by including express language that ‘there is no just reason for delay.’” *Int'l Bhd. of Elec. Workers, Local Union No. 8 v. Vaughn Indus. L.L.C.*, 116 Ohio St. 3d 335, 2007-Ohio-6439, at ¶7 (quoting Civ. R. 54(B)). This order is final because the Declaratory Judgment Act provides that “[such a] declaration has the effect of a final judgment or decree.” R.C. 2721.02(A). This Court need not reach the question of whether the Declaratory Judgment Act obviates the requirement that an appellate court analyze the application of Civil Rule 54(B) when the trial

court has disposed of fewer than all claims and parties because the trial court included in its judgment entry a certification that there is no just reason for delay of appeal. Therefore, this Court has jurisdiction to review the merits of this matter.

DISMISSAL

{¶42} The trustees' first assignment of error is that the trial court incorrectly "enter[ed] judgment against [them] for failure to establish a real controversy between the parties without having provided an opportunity for [the trustees] to present evidence supporting their claims." According to the trustees, this assignment of error presents three issues for review: (1) whether the trial court denied the trustees due process of law "by summary dismissal of their claims without notice or hearing"; (2) "[w]hether the trial court may enter [j]udgment prior to the presentation of facts or other evidence and rely solely on assertions and allegations contained in non-pleadings"; and (3) whether the trial court can properly enter judgment "without notice or an opportunity to present evidence."

{¶43} The trustees' first argument is that the trial court either incorrectly dismissed their claims under Rule 41(B)(2) because the trial court's judgment entry "is, effectively, an involuntary dismissal of [the trustees' and Ballet's] claims" or incorrectly dismissed their claims under Rule 12(B)(6) of the Ohio Rules of Civil Procedure for failure to state a claim upon which relief can be granted. The premise of their first argument is faulty, however, because the trial court did not dismiss their claims. The trial court's decision does include language supportive of a dismissal of a declaratory judgment claim on the basis of a motion under Civil Rule 12(B)(6) for failure to state a claim upon which relief can be granted. That is, the trial court wrote that "[the trustees] have not established that a real controversy exists between the parties, nor have they . . . demonstrated that . . . the controversy is justiciable." See *Mt. Eaton Cmty. Church Inc.*

v. Ladrach, 9th Dist. No. 07CA0092, 2009-Ohio-77, at ¶7 (quoting *Weyandt v. Davis*, 112 Ohio App. 3d 717, 721 (1996)). But, a court cannot both “determine[e] and dismiss[] [a party’s] claims” as the trustees have argued the trial court did in this case.

{¶44} The trial court did not dismiss any claim. On the contrary, the trial court denied the trustees’ motion to disburse the endowment funds and entered the declaration requested by the intervening foundations in their pleading and position statement. Thus, rather than dismissing the trustees’ claim under either Civil Rule 12(B)(6) or 41(B)(2), it entered judgment on the merits of the foundations’ counterclaim and cross-claim and the trustees’ and Ballet’s claim and cross-claim against the foundations. The trustees’ first assignment of error is correctly overruled to the extent that it addresses their argument that the trial court denied them due process of law “by summary dismissal of their claims without notice or hearing.”

DISPOSITIVE MOTIONS

{¶45} It is the substance of a motion, rather than its caption, that determines the type of motion and, therefore, the applicable standard for evaluation. *SeaGate Manufactured Homes Inc. v. Keeton*, 6th Dist. No. WD-88-70, 1989 WL 98547 at *3 (Aug. 25, 1989); see also *Clough v. Wilson*, 80 Ohio St. 3d 1459 (1997). Under Rule 12(B)(6) of the Ohio Rules of Civil Procedure, a motion for failure to state a claim upon which relief can be granted “shall be made before pleading if a further pleading is permitted.” Civ. R. 12(B). Furthermore, if such a motion “presents matters outside the pleadings and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56 [of the Ohio Rules of Civil Procedure].” *Id.* If the motion is to be evaluated under Civil Rule 56, “[a]ll parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.” *Id.*

{¶46} In this case, the trial court denied a motion that the trustees had filed nine months after they had served the foundations with their responsive pleading and, in doing so, relied on endowment documents that had not been appended to the pleadings. Furthermore, neither the foundations nor the trustees argued that their opponents had failed to state a claim upon which relief could be granted. The trustees referred to many of the same endowment documents the foundations had referred to in their position statement and argued that the trial court should interpret those documents in a manner that would allow the trustees to obtain the funds.

{¶47} The trustees captioned their filing: "Motion to Release Restrictions on & Disbursement of Ohio Ballet's Endowment Fund to Pay Debts, Expenses & Dissolution Costs." The foundations also filed a motion requesting a declaration that the endowment funds held by the Community Foundation for the benefit of the Ballet are not assets of the Ballet available to pay claims against it or to distribute to its members. According to the trial court's stated preference, the foundations captioned their fourteen-page filing: "Position Statement."

{¶48} Thus, both sides requested, via opposing pleadings and later motions, a declaration regarding the parties' rights to the endowment funds based on different constructions of the endowment documents. Owing to the nature of the opposing claims in this declaratory judgment action, a ruling on either the foundations' position statement or the trustees' motion would necessarily dispose of the merits of the foundations' counterclaim and cross-claim and the mirror image claims against them. In substance, the foundations moved for summary judgment in regard to their interpretation of the endowment documents via their position statement and brief in opposition to the trustees' motion. The trustees also moved for partial summary judgment on their declaratory judgment claim against the foundations on the basis of their contrary interpretation of the documents.

NOTICE AND OPPORTUNITY TO PRESENT EVIDENCE

{¶49} Dispositive motions that rely on materials beyond the pleadings are governed by Rule 56 of the Ohio Rules of Civil Procedure. “[S]ummary judgment is a procedural device to terminate litigation, [so] it must be awarded with caution.” *Murphy v. Reynoldsburg*, 65 Ohio St. 3d 356, 359 (1992). “One of the overriding goals of [Civil Rule] 56 is fundamental fairness to all litigants, given the high stakes involved when summary judgment is sought. See *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 360, 604 N.E.2d 138 (because summary judgment terminates litigation without the benefit of a trial on the merits, compliance with the letter and spirit of the rule is of paramount importance).” *Hooten v. Safe Auto Ins. Co.*, 100 Ohio St. 3d 8, 2003-Ohio-4829, at ¶34. “[The] procedural fairness requirements [of Civil Rule 56] place significant responsibilities on all parties and judges to ensure that summary judgment should be granted only after all parties have had a fair opportunity to be heard.” *Id.*

{¶50} In July 2008, the trustees joined with all of the parties in a motion to continue a pretrial “in order to allow sufficient time for the parties to file documents with the court with respect to whether there are restrictions on gifts held for the benefit of . . . Ohio Chamber Ballet” The trial court granted the continuance, and the trustees filed their motion the following month. After the foundations filed a brief in opposition to the trustees’ motion, the trial court invited the trustees to file a reply brief in the event that mediation failed. The trustees never filed a reply brief. Even without a reply, however, the trustees were able to respond to the foundations’ arguments because the foundations filed their position statement regarding the endowment documents more than a month before the trustees filed their motion for judgment on the same documents.

{¶51} In the exchange of motions in this case, the trustees argued that the endowment documents required the fund restrictions to be released and the funds distributed to them. Based on a contrary interpretation of the same documents, the foundations argued that the money remains restricted and cannot be used to pay the debts of a charitable organization that is no longer operating. Each side responded to the other's arguments. Each party took advantage of an ample opportunity to be heard, filing lengthy memoranda detailing their dispositive arguments. The trustees supported their motion with twelve single-spaced pages of argument and attached six exhibits purporting to describe various endowments, all of which had been attached to the foundations' position statement.

{¶52} The trustees cannot seriously argue that they were surprised and prejudiced because the trial court failed to "indicate that the requested 'Position Statements' would be the basis on which the Court would dispose of legal issues or enter Judgment on [the trustees'] claims." The trustees moved the trial court for a disposition on the merits of their declaratory judgment claim against the foundations and, in so doing, responded in opposition to the foundations' legal arguments presented in their position statement in support of summary judgment on their counterclaim. The trial court announced that, if mediation was unsuccessful, it would either schedule a status conference or "rule on the pending motions" after the time had passed for the trustees to file a reply brief. The trustees were not surprised, nor were they prejudiced by the trial court's ruling, coming as it did four months after they forfeited the opportunity to submit a reply brief on their motion.

{¶53} Although it would have been better for the trial court to have set a traditional briefing schedule for dispositive motions rather than ordering the parties to submit a "combined brief" on contested issues, the error is harmless in light of the extensive motions and responses

filed by the parties. The first assignment of error is correctly overruled to the extent that it addresses whether the trial court gave the trustees notice or an opportunity to present evidence before entering judgment against them.

CIVIL RULE 56(C)

{¶54} The trustees have also argued that the trial court incorrectly granted judgment to the foundations based on an interpretation of unauthenticated documents. Under Rule 56 of the Ohio Rules of Civil Procedure, a court is to consider only timely filed "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact" in support of a motion for summary judgment. Civ. R. 56(C). If the opposing party fails to object to the submission of evidentiary materials that fall outside of Civil Rule 56(C), the trial court may, in its discretion, consider such evidence in ruling on a summary judgment motion. *State ex rel. Gilmour Realty Inc. v. Mayfield Heights*, 122 Ohio St. 3d 260, 2009-Ohio-2871, at ¶17.

{¶55} The judgment entry in this case refers to the Code of Regulations governing the Community Foundation and to a 1999 grant agreement whereby the Knight Foundation committed funds to the Community Foundation for the benefit of the Ballet. The judgment entry also mentions various endowment letters from the GAR Foundation. All of these documents were attached to the foundations' position statement without any incorporating affidavits to make them acceptable under Civil Rule 56(C). Most of them were also attached as exhibits to the trustees' motion to disburse funds, again without any incorporating affidavits. The trustees did not object to the trial court considering these exhibits. Therefore, the trial court was permitted, though not required, to consider them. See *State ex rel. Gilmour Realty Inc. v. Mayfield Heights*,

122 Ohio St. 3d 260, 2009-Ohio-2871, at ¶17. The trustees' first assignment of error is correctly overruled.

INTERPRETATION OF THE ENDOWMENT DOCUMENTS

{¶56} The trustees' second assignment of error is that the trial court granted judgment to the foundations based on an incorrect interpretation of the endowment documents. The trustees have argued that the trial court incorrectly determined that the documents prohibit distribution of income to the Ballet to pay its debts because the Ballet is no longer producing live performances. According to the trustees, “[n]othing in the gift instruments would prevent Ohio Ballet from continuing to operate, indefinitely, for the sole purpose of collecting endowment income distributions and applying it to pay its debts.” The foundations disagree, arguing that the endowment documents provide that the money was donated to promote the mission of the Ballet and the money cannot be distributed to “a corporate shell” that is no longer pursuing that mission. The trial court agreed with the foundations, holding that the Ballet was not entitled to income disbursements from the endowment funds because it had stopped pursuing its “charitable and educational activities” and the Ballet was no longer operating as a tax-exempt organization under Section 501(c)(3). See 26 U.S.C. § 501(c)(3).

{¶57} In reviewing a trial court's ruling on a motion for summary judgment, this Court applies the same standard a trial court is required to apply in the first instance: whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 829 (1990). Although the parties did not file a joint stipulation of fact, they did not appear to disagree on the basis of any material facts. The parties disagree only on legal issues surrounding the application of the endowment language to the current situation.

{¶58} A court's duty, in construing the provisions of a trust, is to "to ascertain, within the bounds of the law, the intent of the . . . settlor." *Daloia v. Franciscan Health Sys. of Cent. Ohio Inc.*, 79 Ohio St. 3d 98, 103 (1997) (quoting *Domo v. McCarthy*, 66 Ohio St. 3d 312, 314 (1993)). "Generally, when the language of the instrument is not ambiguous, intent can be ascertained from the express terms of the trust itself." *Id.* (quoting *Domo*, 66 Ohio St. 3d at 314).

DISBURSEMENTS FROM THE KNIGHT FOUNDATION ENDOWMENT FUND

{¶59} The Knight Foundation grant agreement provides that the funds became the legal property of the Community Foundation to be invested and used for the benefit of the Ballet in accordance with the governing documents of the Community Foundation and the grant agreement. Under the agreement, the donor authorized income-only disbursements for "the Ballet's charitable and educational activities."

{¶60} In their amended complaint, the trustees asserted that the general purpose of the Ballet was "the promotion of ballet, education and culture, and the general plan of operation . . . shall be the presentation of ballet performances, lecture-demonstrations and instructions consistent with such general purpose." The trustees admitted via their amended complaint that, in early 2006, the Ballet's board of trustees "ceased to function" and, by that summer, the Ballet "ceased operations" and later had its articles of incorporation cancelled by the Secretary of State. The trustees have not refuted the foundations' claim that the Ballet has not produced a ballet performance since 2006 and they have not asserted that they have engaged in any other educational or cultural activities. The trustees have not made any effort to point out to this Court a genuine issue of material fact regarding whether the Ballet has pursued any "charitable or educational activities" since the summer of 2006. According to the trustees, they have merely been trying to pay bills and handle claims against the Ballet.

{¶61} The trustees have argued, however, that the payment of debts incurred in the pursuit of the charitable purpose of the Ballet is a pursuit of the Ballet's charitable mission sufficient to qualify for continued disbursements from the Knight Foundation endowment fund. For this proposition, the trustees have cited cases from New Jersey and Massachusetts involving gifts to defunct charitable organizations. See *Boston Reg'l Med. Ctr. Inc. v. Reynolds*, 298 B.R. 1, 3 (2003); *Montclair Nat'l Bank and Trust Co. v. Seton Hall Coll. of Med. and Dentistry*, 96 N.J. Super. 428, 434 (Super. Ct. 1967). The argument must fail, however, because the facts of the cited cases are distinguishable from this situation.

{¶62} In the cited New Jersey case, the trial court held that "the bare existence of an entity to receive payment" was not sufficient to entitle a charitable organization named as a residual beneficiary in a will to receive disbursement of funds once the charitable purpose was no longer being pursued. *Montclair Nat'l Bank and Trust Co. v. Seton Hall Coll. of Med. and Dentistry*, 96 N.J. Super. 428, 434 (Super. Ct. 1967). But, on appeal, the appellate court determined that the unrestricted gift, intended to fund medical education, vested at the testator's death, when the school was still actively engaged in the teaching of medicine and dentistry. *Id.* at 436. It reversed, holding that "the effectiveness of an outright gift to a charitable institution should not . . . turn on the amount of time it takes to administer an estate." *Id.* at 434. It was only during the administration of the estate, prior to the final disbursement of funds, that the school closed its doors and focused on paying its bills. Thus, the appellate court determined that, because the organization was actively pursuing its charitable purpose at the time of the testator's death, the gift had vested in the organization. *Id.* at 437-38.

{¶63} The cited case from Massachusetts was similarly focused on whether a charity that had stopped operating as a hospital and entered bankruptcy proceedings was qualified to

receive an unrestricted bequest intended for charitable purposes. *Boston Reg'l Med. Ctr. Inc. v. Reynolds*, 298 B.R. 1, 3 (2003). Citing *Montclair*, the court determined that the organization was entitled to the distribution because it was a fully operational charity hospital on the day of the donor's death. *Id.* at 28 (citing *Montclair Nat'l Bank and Trust Co. v. Seton Hall Coll. of Med. and Dentistry*, 96 N.J. Super. 428, 434 (Super. Ct. 1967)).

{¶64} The trustees in this case find themselves in a very different situation involving endowment gifts that are restricted in perpetuity. Neither of the contested endowment funds is an unrestricted one-time gift that depends only on the beneficiary "outliving" the testator by being actively engaged in the pursuit of its charitable mission at the moment of the donor's death. The Knight Foundation gave money to the Community Foundation to disburse over time in accordance with the contract language and Community Foundation policy. According to the grant agreement, the Ballet is entitled to receive disbursements from the Knight Foundation fund only if it continues to engage in charitable and educational activities. The trustees have not cited any relevant authority for the proposition that the Ballet is engaging in charitable, educational, or cultural activities by paying off its debt. Contrary to the trustee's position, the trial court did not determine that the Ballet was ineligible to receive continued disbursements from the endowment fund because it was in debt. The trial court correctly determined the Ballet was ineligible for continued disbursements because it was no longer actively engaged in the pursuit of the charitable and educational activities that prompted the endowment.

{¶65} The donor's intent is clear from the face of the document. The language of the Knight Foundation grant agreement conditioned disbursement of endowment funds on the pursuit of the Ballet's charitable and educational activities. As the uncontested facts reveal that the Ballet has not actively pursued its charitable mission since 2006, the Ballet is no longer

entitled to receive disbursements under the terms of the contract. The foundations are entitled to judgment as a matter of law in regard to the Knight Foundation disbursement issue. The trial court correctly decreed that the funds "shall remain in the possession of the [Community Foundation] for use in accordance with the Knight Foundation['s] . . . charitable purposes." The trustees' second assignment of error is correctly overruled to the extent that it addresses disbursements from the Knight Foundation fund.

PRINCIPAL OF THE KNIGHT FOUNDATION FUND

{¶66} The trustees have also argued that, under the terms of the Knight Foundation grant agreement, the Community Foundation is required to transfer the principal of the fund to the Ballet due to the existence of extraordinary circumstances outlined by the contract. Under the 1999 agreement among the Knight Foundation, the Community Foundation, and the Ballet, "if any or all of the [a]ssets of the Ballet Fund are subjected to attachment, claims of liability or other legal process" the Community Foundation "shall transfer all assets of the Ballet Fund to the Ballet." Based on this language, the trustees have argued that the trial court incorrectly prohibited distribution of the fund to the Ballet.

{¶67} The trustees have not made any argument to this Court regarding how the "[a]ssets of the Ballet Fund" have been "subjected to attachment, claims of liability or other legal process" so as to invoke this provision of the endowment agreement. See App. R. 16(A)(7). Thus, the trustees have failed to point out a genuine issue of material fact regarding whether the assets of the Ballet Fund have been so encumbered as to invoke the clause.

{¶68} Even if the trustees had intended to argue that the list of liabilities it attached to its amended complaint somehow subjected the Ballet Fund assets to "attachment, claims of liability or other legal process" so as to invoke this provision, the argument fails based on the language of

the endowment agreement. The quoted language is found in numbered paragraph six of the agreement, addressing “[t]ermination and [a]ssignment of Ballet Fund and [d]istribution of [a]ssets.” The agreement provides that, if “one or more of the following events or conditions” occurs, then the Community Foundation “immediately . . . shall transfer the Ballet Fund . . . to the Ballet and assign all of its rights and duties under this Agreement to the Ballet, subject to additional written approval by the Donor.” One of the events or conditions is “if any or all of the [a]ssets of the Ballet Fund are subjected to attachment, claims of liability or other legal process.”

{¶69} All of the events or conditions described in numbered paragraph six of the agreement involve problems with the solvency or tax-exempt status of the Community Foundation or its ability to fulfill its obligations under the agreement. The paragraph does not address the solvency or tax-exempt status of the Ballet. Read in context, the quoted language refers to a situation in which the assets of the Ballet Fund are sought by creditors of the Community Foundation, not creditors of the Ballet. Since legal title to the money transferred from the Knight Foundation to the Community Foundation, the money never has belonged to the Ballet. The trustees have not explained how creditors of the Ballet could possibly subject the fund to “attachment, claims of liability or other legal process.”

{¶70} The trial court correctly granted summary judgment to the foundations because the trustees failed to present a genuine issue of material fact and, based on the language of the grant agreement, the foundations are entitled to judgment as a matter of law regarding the principal of the Knight Foundation fund. The trustees’ second assignment of error is correctly overruled to the extent that it addresses the Knight Foundation fund.

GAR FOUNDATION ENDOWMENT FUND

{¶71} Each GAR letter provides that the gift is conditioned on the protection of the principal so that only the income may be used and the principal may not be invaded or encumbered. The GAR grant agreements also specify that that condition cannot be rescinded, amended, changed, annulled, or revoked by the Ballet without the prior consent of the GAR Foundation. The two GAR letters that placed the funds with the Community Foundation provide that, if the Ballet "should not continue to be covered under Section 501(c)(3) of the Internal Revenue Code, it is our wish that the fund revert to and become a part of the Akron Community Foundation Fund to be administered for the benefit of the residents of Summit County, Ohio."

{¶72} Despite admitting that the Ballet has not operated since 2006, the trustees have argued that, "[u]nless and until [the foundations] can establish otherwise, Ohio Ballet continues to operate as a 501(c)(3) and is entitled to receive distributions." The trial court determined that, although there was no evidence that the Ballet's tax-exempt status had been canceled by the government, its failure to operate in pursuit of its charitable and educational mission was a "material change" in its 'character, purpose, or method of operation'" that caused the fund to revert to the Community Foundation Fund under the terms of the documents.

{¶73} Section 501(c)(3) of Title 26 of the United States Code provides tax-exempt status for corporations organized and operated exclusively for charitable or educational purposes. 26 U.S.C. § 501(c)(3). Under Section 1.501(a)-1 of Title 26 of the Code of Federal Regulations, "an organization that has been determined . . . to be [tax] exempt . . . may rely upon such determination so long as there are no substantial changes in the organization's character, purposes, or methods of operation." 26 C.F.R. § 1.501(a)-1(a)(2). An organization applying for

tax-exempt status under United States Code Section 501(c)(3) must submit “a detailed statement of its proposed activities” along with its application. 26 C.F.R. § 1.501(a)-1(b)(1)(iii).

{¶74} The record does not contain any evidence that the Ballet currently enjoys the tax-exempt status it once had. The trustees have offered this Court no argument regarding how the paying of bills and satisfaction of claims against the Ballet could satisfy the federal government’s requirements for tax-exempt status. They have not even suggested that they currently have any “proposed activities” of a charitable or educational nature to support an application for tax-exempt status. See 26 C.F.R. § 1.501(a)-1(b)(1)(iii).

{¶75} The Ballet was originally organized to promote “ballet, education and culture,” but the trustees have admitted that nothing has been done in furtherance of that objective since 2006. Thus, the Ballet is no longer operating exclusively for charitable or educational purposes. See 26 U.S.C. § 501(c)(3). If the Ballet can properly be said to be operating at all, it is doing so only for purposes of winding up the corporation and paying its debts. Those activities do nothing to promote ballet in the community. The trial court correctly determined that the shift from producing ballet performances to paying bills was a substantial change in the Ballet’s character, purpose, and method of operation.

{¶76} There is no genuine issue of material fact regarding whether the Ballet continued operating as a 501(c)(3) organization after it stopped producing ballets and had its articles of incorporation cancelled. The trustees have not offered any argument regarding how the Ballet could be operating under the protected status of Section 501(c)(3) when they have admitted that the Ballet long ago “ceased operations,” and they have presented no evidence that they have done anything to promote “ballet, education and culture” since that time. See App. R. 16(A)(7). The trustees’ second assignment of error is correctly overruled.

CONCLUSION

{¶77} The trustees' first assignment of error is correctly overruled because the trial court did not dismiss their claim against the foundations and the trustees took advantage of an opportunity to respond to the foundations' dispositive motion with an extensive dispositive motion of their own. Additionally, the trial court had discretion to consider documents that did not satisfy Rule 56(C) of the Ohio Rules of Civil Procedure because the trustees did not object to their submission. The second assignment of error is correctly overruled because there is no genuine issue of material of fact and the foundations are entitled to judgment as a matter of law regarding the declaration they requested defining the Ballet's rights and responsibilities in regard to the endowment funds. The trial court correctly determined that the Ballet is not entitled to the Knight Foundation fund. The grant agreement does not permit disbursements to the Ballet as it is no longer pursuing charitable or educational activities and nothing has happened to the Community Foundation that would require the transfer of the principal to the Ballet. Under the GAR endowment letters, the Ballet is not entitled to the endowment funds because the Ballet is no longer operating exclusively for charitable or educational purposes. The judgment of the Summit County Common Pleas Court is correctly affirmed.

CARR, J.
DISSENTS, SAYING:

{¶78} I respectfully dissent. "When a trial court enters a judgment in a declaratory judgment action, the order must declare all of the parties' rights and obligations in order to constitute a final, appealable order." *No-Burn, Inc. v. Murati*, 9th Dist. No. 24577, 2009-Ohio-6951, at ¶11, quoting *Dutch Maid Logistics, Inc. v. Acuity*, 8th Dist. No. 86600, 2006-Ohio-

1077, at ¶10. Because the trial court's judgment did not declare all parties' rights, there is no final, appealable order and this Court lacks jurisdiction to consider the merits of the appeal.

APPEARANCES:

TIMOTHY H. CHAMPION, Attorney at Law, for Appellant.

WILLIAM D. DOWLING, and AMY K. FRIEDMAN, Attorneys at Law, for Intervenors-Appellees.

VIVIAN P. TATE, Principal Assistant Attorney General, for Appellee.

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

CASE NUMBER : CV-2007-11-8265 4

REVIS, THOMAS

(Plaintiff)

- VS -

ORDER FILED: 03/09/2009

OHIO CHAMBER BALLET

(Defendant)

N O T I C E

TO: TIMOTHY H. CHAMPION
3296 W. MARKET ST.
AKRON, OH 44333

YOU ARE HEREBY NOTIFIED THAT A FINAL APPEALABLE ORDER IN THE ABOVE CASE HAS BEEN FILED WITH THE CLERK OF THE COMMON PLEAS COURT. SAID NOTIFICATION IS REQUIRED BY THE OHIO SUPREME COURT AND CIVIL RULE 58(b)

The following represents information that has been entered on the docket of the Clerk of the Common Pleas Court regarding this order. A maximum of the first eight (8) lines of this entry are displayed.

FINAL APPEALABLE ORDER. THE COURT FINDS THAT PLAINTIFFS HAVE NOT ESTABLISHED THAT A REAL CONTROVERSY EXISTS BETWEEN THE PARTIES. THE COURT FINDS THE INTERVENERS' DECLARATORY JUDGMENT IS WELL TAKEN. PLAINTIFFS' MOTION TO RELEASE RESTRICTIONS AND FOR DISBURSEMENT OF ENDOWMENT FUNDS TO PAY OHIO CHAMBER BALLET DEBTS, EXPENSES, AND DISSOLUTION EXPENSES IS NOT WELL TAKEN AND IT IS DENIED. THE PROCEEDS SHALL REMAIN IN THE POSSESSION OF THE ACF FOR USE IN ACCORDANCE WITH THE KNIGHT FOUNDATION AND GAR'S CHARITABLE PURPOSES. THERE IS NO JUST REASON FOR DELAY. JH

March 10, 2009

Daniel M. Horrigan, Clerk

Summit County Clerk Of Courts

EXHIBIT B

COPY 21

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

DANIEL M. HORRIGAN
1005 MAR -9 PM 2:03
SUMMIT COUNTY
CLERK OF COURTS

THOMAS REVIS, et al.)	CASE NO: CV 2007-11-8265
Plaintiffs,)	JUDGE HUNTER
v.)	<u>JUDGMENT ENTRY</u> (Final and Appealable)
OHIO CHAMBER BALLET, et al.)	
Defendants)	

This matter comes before the Court pursuant to Plaintiffs' Motion to Release Restrictions and for Disbursement of Endowment Funds to pay Ohio Chamber Ballet Debts, Expenses, and Dissolution Expenses. The Court has been advised, having reviewed the Amended Complaint for Declaratory Judgment, Intervenors' Complaint for Declaratory Judgment, Intervenors' position statement, pleadings, response briefs, and applicable law. Upon review, the Court finds the Plaintiffs' Motion to Release Restrictions and for Disbursement of Endowment Funds to Pay Ohio Chamber Ballet Debts, Expenses, and Dissolution Expenses not well taken and it is denied.

FACTS

Plaintiffs Thomas Revis, Dr. James Rehmus, and Richard Warfield (Ohio Chamber Ballet Trustees) bring their Declaratory Judgment action against the Defendants Ohio Chamber Ballet (Ohio Ballet) and the Ohio Attorney General Charitable Trust Division to wind up the affairs of the Ohio Ballet, the latter of which ceased operations on or about February 21, 2007. Namely, Plaintiffs seek permission to use the assets of the Ohio Ballet, approximately

\$855,000.00, to pay for the known debts of the Ballet of approximately \$470,000.00. The Akron Community Foundation (ACF), the John S. and James L. Knight Foundation (Knight Foundation), and the GAR Foundation (GAR) have intervened herein, also asking for Declaratory Judgment relating to the above proceeds. The Ohio Ballet has filed a cross-claim against the intervenors and asserts that Plaintiffs' requested relief is appropriate. This matter has been fully briefed and it is now incumbent upon this Court to render a decision herein.

LAW

In a declaratory relief action, a plaintiff must establish the following: "(1) that a real controversy exists between the parties, (2) that the controversy is justiciable, and (3) that speedy relief is necessary to preserve the rights of the parties." *Burger Brewing Co. v. Ohio Liquor Control Comm.* (1973), 34 Ohio St.2d 93, 97, cited in *Bd. of Trs. of Sylvania Twp. v. Bd. of Comm'rs*, 2002 Ohio 3815, P18 (Ohio Ct. App. 2002).

"A 'controversy' exists for purposes of a declaratory judgment when there is a genuine dispute between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Burger*, 34 Ohio St.2d at 97. Likewise, the issue of standing depends upon whether a plaintiff can demonstrate that he "has suffered or will suffer a specific injury, that the injury is traceable to the challenged action, and that it is likely that the injury will be redressed by a favorable decision." *Bd. of Trs. of Sylvania Twp.*, 2002 Ohio 3815 at P18 and *Wilmington City School Dist. Bd. of Ed. v. Bd. of Comm'rs of Clinton Co.* (2000), 141 Ohio App.3d 232, 238, citing *Eng. Technicians Assn. v. Ohio Dept. of Transp.* (1991), 72 Ohio App.3d 106, 110-111.

ANALYSIS

The record is clear that the following amounts were allocated to the Ohio Ballet through either direct endowments to the Ballet or through the ACF on behalf of the Ballet:

1. \$500,000 by the Knight Foundation on 12/15/99
2. \$20,000 by GAR on 11/17/86
3. \$250,000 by GAR on 5/26/88
4. \$50,000 by GAR on 12/4/98
5. \$35,000 By GAR on 3/5/99

The record is also clear that the Ohio Ballet, Knight Foundation, GAR, and ACF are all Section 501(c)(3) private philanthropic organizations.¹

Plaintiffs assert twofold – first, that the above endowments were made to the Ohio Ballet either directly or for its exclusive benefit; and second, that this Court should release any direct or indirect donor restrictions and permit the Ballet to invade the principal and income of the endowments for use to pay Ballet debts pursuant to R.C. 1702.49, 1702.50, and 1715.57.

Intervenors Knight Foundation, GAR, and ACF, and Defendant Attorney General's Office assert that the donors' intentions are specific as it relates to the endowments, and that the Ballet is not entitled to the subject assets due to specific donor language within the written documents and for reasons of equity and public policy.

In general, a charitable trust has been defined as one for the benefit of the public or limiting property for some public use. 91 Oh Jur3d, Trusts §7. As to donor intent, “[p]roperty given to a charitable corporation will be held by that corporation subject to enforceable fiduciary obligations as to its use only where the donor thereof expressed an intention to

¹ The Ohio Ballet admits that it ceased operations in the Summer of 2006, that its Articles of Incorporation were cancelled by the Secretary of State in February of 2007, and that the Trustees determined that its stated purposes could not be carried on as of October of 2007, although the Ballet denies that it is officially dissolved or that it ceases to operate as a Section 501(c)(3) organization.

impose a duty upon the corporation to use it for certain purposes and not merely where the donor expressed a desire that the corporation so use it." *Ohio Soc. for Crippled Children & Adults, Inc. v. McElroy*, 175 Ohio St. 49, syllabus paragraph 2. Generally, in the construction of a written trust, the intention of the settlor (donor) may be ascertained by both the language used, and by the examination and consideration of all the facts leading up to and surrounding the trust's execution. 91 Ohio Jur3d, Trusts, §45. Furthermore, charitable trusts should be liberally construed to carry out the intention of the testator or grantor (donor). *The Zanesville Canal and Mfg Co. v. Zanesville* (1851), 20 Ohio 483, 488. Lastly, a court of equity should not set aside or terminate a trust, unless either - all parties consent to the termination, or where the trust property and funds have been diverted from its essential purpose and no reason appears for denying said termination. 91 Oh Jur3d, Trusts, §§154, 157.

The Knight Foundation committed a total of \$500,000 to the ACF for the benefit of the Ohio Ballet via a written Grant Agreement, executed by the representatives of Knight, Ohio Ballet, and ACF. Specifically, the Grant Agreement provides endowment funds for the "educational and charitable purposes for people living in Summit County, the City of Akron, and the Ballet." (Intervenors' Position Statement, Ex. A. - Grant Agreement, ¶5 and numbered ¶14). Regarding investment and administration of the Ballet Fund, the Grant Agreement states that the ACF shall not use the principal of the Ballet Fund for permitted distributions or administrative costs (Grant Agreement, numbered ¶3) and that the annual distribution from the Ballet Fund to the Ballet shall be in the amount of 5% of the fair market value for the Ballet's charitable or educational activities (Grant Agreement, numbered ¶4). The Grant Agreement also limits the administration of the Ballet Fund consistent with the continuation of the tax-exempt status of both the ACF and the Ballet as publicly supported organizations. (Grant

Agreement, numbered ¶7). Lastly, the ACF regulations, as incorporated into the Grant Agreement, provide for the redirection of donor endowment funds back to the ACF when "literal compliance with the (donor's) purposes or wishes expressed in the granting instrument has become by reason of change of circumstances, unnecessary, undesirable, impractical or illegal." (ACF, Section 2(c)).

The GAR committed \$20,000 and \$250,000, in 1986 and 1988 respectively, directly to the Ohio Ballet. The endowments specifically restrict their use – the principle may not be invaded, and that only the income can be used. (Intervenors' Position Statement, Exs. C, D, E). Furthermore, the endowment restrictions or conditions may not be rescinded, amended, changed, annulled or revoked without the prior consent on the GAR. (Intervenors' Position Statement, Exs. C, E).

The GAR committed an additional \$50,000 and \$35,000, in 1998 and 1999 respectively, to the ACF for the benefit of the Ohio Ballet. Both of these endowments contain the limitation that, in the event the Ohio Ballet ceases to continue under 501(c)(3) status, the funds shall revert back to the ACF to be administered for the benefit of Summit County residents. (Intervenors' Position Statement, Exs. F, G). Although these two GAR gifts provide annual distributions of up to 5% of the endowments average market value for the Ohio Ballet's usage, the principal of the endowment funds were "restricted into perpetuity" and that the principal may not be invaded for use to pay operating expenses. (Intervenors' Position Statement, Exs. H, and I - X).

Plaintiffs maintain that this Court should release the above donor restrictions and order ACF to distribute the Knight Foundation and GAR endowments funds to the Ohio Ballet so that the Ballet can pay its creditors claims, costs and expenses of dissolution, attorney fees, and

court costs. Plaintiffs assert threefold – first, that the above gift instruments unambiguously permit the income of the gifts to be distributed to the Ohio Ballet or on behalf of the Ohio Ballet for the payment of bills, debts, or obligations; second, the gift instruments do not contain provisions for the disposition of the endowment funds once the Ballet is dissolved; and third, that Ohio statutory law mandates that this Court order the distribution of both principal and income for the payment of bills, debts, or obligations once the Ballet is dissolved under R.C. §1702.49(D)(2)(c), R.C. §1702.50, and §1715.57.

Regarding Knight Foundation gift income, the Grant Agreement and supporting instruments are clear - that the proceeds should be used by the Ohio Ballet or on behalf of the Ohio Ballet strictly for the purposes of preservation of the principal gift and for the expenditure of income only for the “charitable and educational activities” of the Ballet. As such, the income may not be used for the payment of operating expenses or debts. Regarding income relating to the four GAR endowment gifts, the gift instruments do implicitly permit the income to be used for the payment of operating expenses and debts provided the Ohio Ballet remains in active operation and not dissolved. Due to Ohio Ballet’s current non-active status, the gift instruments relating to 1996 and 1998 GAR endowments clearly state that in the event that the Ohio Ballet does not continue under I.R.S. Section 501(c)(3), then the funds were to revert back to the ACF to be administered for the benefit of Summit County, Ohio residents. As such, as it relates to the 1996 and 1998 GAR gifts, the gift instruments themselves prohibit the use of any GAR funds to be used for the payment of operating expenses or debts at this point. As to the 1986 and 1988 GAR endowment gifts, as well as the 1996 and 1998 GAR gifts and the Knight Foundation gift, Federal and Ohio statutes mandate that the endowments be returned to

the donors and/or the ACF due to the Ohio Ballet's being essentially dissolved, for reasons stated below.

Although the record does not indicate that the I.R.S. has officially cancelled the Ohio Ballet's 501(c)(3) tax-exempt status, based upon the material change in its "character, purpose, or method of operation", namely, its failure to operate since the Summer of 2006, the Ohio Ballet is clearly not operating under said status. See 26 C.F.R. §1.501(a)-1(a)(2) and footnote one above.

Plaintiffs assert that this Court should officially dissolve the Ohio Ballet and order the distribution of both principal and income from the endowment gifts for the payment of bills, debts, or obligations under R.C. §1702.49(D)(2)(c), R.C. §1702.50, and §1715.57.

Upon review, this Court finds that R.C. §1702.49(D)(2)(c) only applies to corporate assets of the corporation seeking wind up.² Here, the assets clearly belong to either the donors (Knight Foundation and GAR), and/or to the ACF, not directly to the Ohio Ballet.

Alternatively, the Court finds that R.C. §1702.49(D) actually supports the Intervenors' position herein. Under R.C. §1702.49(D)(1), assets held upon a condition requiring return, transfer, or conveyance, which condition shall have occurred by reason of the dissolution of the corporation (Ohio Ballet), shall be so distributed in accordance with such requirements. In this case, the assets should be returned to the Knight Foundation/GAR and/or the ACF. And, under R.C. §1702.49(D)(2)(a) and (b), in the case of a public benefit corporation such as a Section 501(c)(3) organization, the assets held by it in trust for a specified purpose shall be applied so far as practicable with the terms of the trust. See definition in R.C. 1702.01(F). In the case at hand, the donors' intent is clear and for a specified purpose, and as such, the assets should be

² R.C. §1702.50 permits a court to wind the affairs of a voluntarily dissolved corporation.

returned to them rather than used by the Ohio Ballet. R.C. §1702.49(D)(2)(c) only applies in the event and to the extent that (a) and (b) are not feasible.

The Court does not find that R.C. §1715.57 supports Plaintiffs' claims either.

R.C. §1715.57 only applies to institutional funds, funds that are held by an institution for its exclusive use, benefit, or purposes. See definition in R.C. §1715.51(B). As stated above, the funds given or held on behalf of the Ohio Ballet are not for the Ballet's exclusive use, benefit, or purpose. R.C. §1715.57(A) only applies with the written consent of the donor (Knight Foundation and GAR). The "obsolete, inappropriate, impracticable, or impossible" exceptions found in R.C. §1715.57(B) only apply if written consent of the donor cannot be obtained for reason of the donor's death, disability, unavailability, or impossibility of identification, reasons not relevant herein. Lastly, R.C. §1715.57(D) states that this section does not limit the application of the doctrine of *cy pres*.

The Ohio common law doctrine of *cy pres* has been codified in R.C. §5804.13. In pertinent part, R.C. §5804.13(A) states that when a charitable trust's purposes become unlawful, impracticable, or impossible to achieve, the court may apply *cy pres* to modify or terminate the trust only in a manner consistent with the settlor's charitable purposes. As previously stated above, donors' intent is clear, and as such, this Court may not modify or terminate the charitable trust provisions.

Regarding the above gift instruments failure to contain provisions for the disposition of the endowment funds once the Ballet is dissolved, omission of such a provision does not obviate otherwise specific provisions within the gift instruments, i.e., that the proceeds should be used by the Ohio Ballet or on behalf of the Ohio Ballet strictly for the purposes of

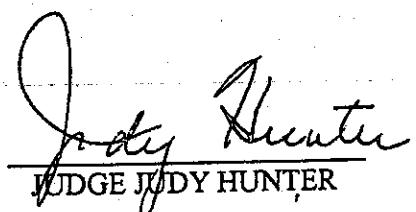
preservation of the principal gift and for the expenditure of income only for the charitable purposes of the Ballet, and not for the payment of debts.

In sum, based upon the written gift instruments themselves, application of relevant Federal and State statute, and for reasons of equity, the Court finds Plaintiffs' requests not well taken. The Court finds that no reason appears for deviating from the individual donor's specific wishes regarding the endowment gifts.

Wherefore, the Court finds that Plaintiffs have not established that a real controversy exists between the parties, nor have they can demonstrated that the alleged injury is traceable to the challenged action or that the controversy is justiciable. Conversely, the Court finds the Intervenors' Declaratory Judgment is well taken for the reasons stated above. Plaintiffs' Motion to Release Restrictions and for Disbursement of Endowment Funds to Pay Ohio Chamber Ballet Debts, Expenses, and Dissolution Expenses is not well taken and it is denied. The above proceeds shall remain in the possession of the ACF for use in accordance with the Knight Foundation and GAR's charitable purposes.

This is a final appealable judgment entry. There is no just reason for delay.

So Ordered.



Judy Hunter
JUDGE JUDY HUNTER

cc: Attorneys Timothy Champion and David Champion
Attorneys William Dowling and Philip Kauffmann
Attorney Vivian Tate