

IN THE COURT OF COMMON PLEAS  
OF MONTGOMERY COUNTY, PENNSYLVANIA

ORPHANS' COURT DIVISION

NO. 58788

IN RE: THE BARNES FOUNDATION

POST-HEARING BRIEF OF THE *AMICUS CURIAE*,  
STUDENTS OF THE BARNES FOUNDATION,  
SUE S. HOOD, WILLIAM PHILLIPS AND HARVEY A. WANK

**I. Introduction.**

In January, this Court found the Barnes Foundation's finances sufficiently exigent to consider the application of the doctrine of deviation with respect to the location of the Foundation's gallery art collection. At that time, however, there had "not been an adequate showing [by the Trustees] that sufficient revenue can not be generated by other means." Memorandum and Opinion Jan. 29, 2004 at 25

("Op. January 2004"). If the hearings before this Court in September, 2004 demonstrated anything, it is that sufficient revenue *can* be generated by other means, and equally importantly, the state of financial exigency is far less dire than the Court had been led to believe.

The Foundation's current structural deficit, confirmed by two of its witnesses, is less than half what was stated in December, or roughly \$1 million. The unrestricted assets that the *Amicus Curiae* were permitted to value far exceed the \$20 million needed for an endowment sufficient to eliminate the deficit. Given this fact and the host of other revenue-enhancing alternatives, the Court must conclude that the Barnes Foundation did not demonstrate "by clear and convincing evidence" that moving the gallery collection to Philadelphia, and eliminating the restrictions on public visitation days, are the least drastic means of furthering Dr. Barnes' central aims under his Indenture.<sup>1</sup> For this reason, the *Amicus Curiae* believe the Court must deny the Trustees' Second Amended Petition to Amend the Charter and Bylaws to allow relocation of the art

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<sup>1</sup>Indenture of trust of Albert C. Barnes dated December 6, 1922 (hereinafter the "Indenture").

collection and elimination of the terms setting the balance between public visitation and educational use of the Merion gallery.

## **II. The Trustees Did Not Meet the Legal Standard for Deviation**

As stated by the Superior Court, and observed by this Court, deviation from administrative trust provisions is permitted only in limited circumstances:

[A] court will direct or permit the trustee of a charitable trust to deviate from a term of the trust if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust. *Restatement (Second) of Trusts* §381 (1959). Those terms subject to deviation are limited to administrative provisions of the trust, *i.e.*, "the details of administration which the settlor has prescribed in order to secure the more important result of obtaining for the beneficiaries the advantages which the settlor stated he wished them to have." § 561 Bogert, *The Law of Trust and Trustees*, at 27.

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It must be emphasized that the relief afforded by deviation is not based on mere convenience, but on the *necessity* of effecting a change in a situation where compliance with the terms of the trust "would defeat or substantially impair the accomplishment of the purposes of the trust."

*Barnes Foundation, a Corporation-Estate of Violette de Mazia, Deceased*, 453 Pa. Super. 436, 451-52, 684 A.2d 123, 130-31 (1996) (emphasis added).

The Court has suggested that deviation from the Indenture terms prohibiting the movement of the gallery art collection would be permissible "*if necessary*" to stabilize the Foundation's future. Op. Jan. 2004 at 24. Even if necessary, the deviation, however, *must be the least drastic modification necessary to preserve the trust*. Op. Jan. 2004. at 22 (citing Uniform Trust Code at §413(c)). Finally, the burden of proving necessity and least drastic deviation is always on the party seeking the deviation. *Barnes Foundation, A Corporation*, 453 Pa. Super. 243, 253, 683 A.2d 894, 899 (1996).

As demonstrated below, the Trustees have not met that burden. Several Foundation witnesses admitted that moving the gallery collection to the City of Philadelphia is a drastic measure. See Edwin Wade, Ph.D., N.T. 9/23/04 a.m., 86; Jeremy Sabloff, Ph.D., N.T. 9/23/04 a.m., 109; Matthew Schwenderman, N.T. 9/22/04 p.m.2., 482 ("You're really transforming the organization"). Yet in terms of the trust, the sale of non-gallery paintings and the land at Ker Feal are non-issues. The settlor, who during his life meticulously adjusted the Indenture,

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<sup>2</sup> The following abbreviations are applied to identify hearing sessions: morning session: "a.m."; afternoon sessions are identified as "p.m." for days with only one session and "p.m.1" or "p.m.2" on days where two sessions were recorded by different reporters.

certainly could have directed, as he did for the gallery works, that these assets not be sold, but he did not. Over ten years elapsed between the purchase of Ker Feal<sup>3</sup> and Dr. Barnes' death, during which time he modified the Indenture five separate times and made no provisions even mentioning Ker Feal or its contents. *See* Pet. Ex. 2, Indenture of Trust. As Professor Malaro testified, "there are certainly assets that Dr. Barnes has left to them, and there is no reason, ethically or legally, why those objects cannot be used to further the school." (N.T. 9/24/04 p.m., 71).

The availability of sufficient unencumbered assets vitiates any claim that deviation is necessary to allow moving the collection and eliminating the terms that balance public versus school gallery use. Moreover, other alternatives and revenue sources exist that are far less drastic and less risky than the grossly expensive plan to move the gallery to the City of Philadelphia. For example, the Trustees seek unfettered discretion to set admission fees and estimate a paid ticket price of about \$12. (Schwenderman, N.T. 9/22/04 a.m., 98). At current attendance limits in Merion, this would eliminate over one third of the present

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<sup>3</sup> The Ker Feal deed is dated December 4, 1940. (Pet. Ex. 68).

structural deficit, and as shown below, the Trustees' fundraising prospects are nowhere near as bleak as they claim.

Finally, it is not clear that all of the Indenture terms the Trustees seek to eliminate are "administrative." The provision setting the balance between educational program and public visitation use of the gallery – paragraph 30 – is one that has a direct impact on the intended beneficiaries of the trust. As Judge Taxis noted in an earlier Barnes proceeding:

*In Lehigh University v. Hower*, 159 Pa. Super. Ct. 84, 93, the Court said, "it was held in *City of Philadelphia v. The Heirs of Stephen Girard*, 45 Pa. 9, 25: In all gifts for charitable uses the law makes a very clear distinction between those parts of the writing conveying them, which declare the gift and its purposes, and those which direct the mode of its administration. . . . A court may vary specific instructions given by a testator in his will in order to accomplish the end which he had in view, *provided such a departure does not impair the interest of any beneficiary or violate the testator's primary purpose.*

*In re The Barnes Foundation, A Corporation*, No. 58,788 April 21, 1971 Op. and Order, Taxis, J.

The Trustees are relying on a major shift in the present balance of educational to visitational use of the gallery to balance the budget under their plan to move the gallery to the City of Philadelphia. Whereas Dr. Barnes set that

ratio at five days to one, and it is now evenly split, the Trustees seek unfettered discretion, while suggesting for now that two days out of seven days (27 hours out of 69 hours) will be used for education. (Schwenderman, N.T. 9/23/04, a.m. 98; Kimberly Camp, N.T. 9/27/04 a.m., 75). No details of the activities on those two days were presented. The *Amicus Curiae* question whether deviation is the appropriate mechanism for this provision of the Indenture that goes to the heart of the testator's primary purpose. The Foundation's reliance on further eroding the gallery use balance is further evidence of the drastic nature of the plan to move the gallery to the City of Philadelphia.

**A. The Current Structural Deficit of Roughly \$1 Million Can Be Cured Without Moving the Gallery Collection and Without Deviating from the Terms of the Indenture.**

Last December, the Trustees projected an annual "as is" deficit of \$2.7 million. See Pet. Ex. 20 "Overview of Financial Condition" at 29. In September, the Trustees' witnesses admitted that the projected structural deficit is only \$1.2 to \$1.3 million dollars, or \$1 million, plus or minus (Schwenderman, N.T. 9/22/04 p.m., 1 42-43; Stephen Harmelin N.T. 9/23/04 p.m., 29, 30 & 55). This grossly misleading error was largely caused by the Trustees directing Deloitte to assume

that certain funding would not be renewed, when, in fact, it was renewed.

(Schwenderman, N.T. 9/22/04 p.m.1, 36; p.m.2, 37). "Assumptions in this as-is scenario were different from what the Barnes actually did." (N.T. 9/22/04 p.m.1, 46).

As the Trustees' witnesses admitted, the current structural deficit would be eliminated by income earned from a \$25 million endowment.

(Schwenderman, N.T. 9/22/04 p.m.1, 50; Harmelin 9/23/04 p.m., 57). The sale of just 20 out of the over 4000 non-gallery works and the unused acreage surrounding Ker Feal would likely create an endowment far exceeding this \$25 million needed to balance the current deficit.<sup>4</sup> In fact, an endowment of only \$20 million would be

necessary to eliminate an operating deficit of \$1 million.

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<sup>4</sup> The *Amicus Curiae's* witnesses estimated the value of 19 non-gallery paintings and one non-gallery sculpture at \$24,865,000. (*Amicus Exs.* 53, 56 and 57). These estimates were made without accounting for the escalation in value attributable to the cachet these works would have in the art market. (Debra Force, N.T. 9/27/04 p.m.1, 15; Richard Feigen, N.T. 9/27/04 p.m.1, 62). Foundation witness Nancy Harrison confirmed that the cachet factor could be as high as 25 to 50%. (N.T. 9/21/04 p.m. 74-75). The 130 acres surrounding Ker Feal were valued at \$9.2 million. (*Amicus Ex.* 59). Under this scenario the Foundation can keep Ker Feal and the thousands of objects in it as well as over 90% of the non gallery paintings.



While the Trustees argue that the sale of just 20 out of over 4000 works could hamper fundraising, they presented no hard evidence on this fact apart from Ms. Camp's unsupported claim that they would lose a \$220,000 grant for a book project that is not essential to the Foundation's operations. (Camp N.T. 9/27/04 a.m. 30.)<sup>5</sup> As discussed below, appropriately handled, the sale of 20 out of 4000 objects to set the Foundation on firm financial footing should not hamper its ongoing fundraising efforts, because the sale does not run afoul of the philanthropic community's ethical guidelines.

Thus, the Trustees have not proven the necessity to deviate from the Indenture, since the purposes of the Indenture can be continued without deviating from a single term. As the Superior Court has noted, "the relief afforded by deviation *is not based on mere convenience*, but on the necessity of

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<sup>5</sup> It appears from the 2002 "as-is" scenario (Pet. Ex. 20 at 29) that about \$1 million of the current \$1.3 million in annual funding is for collections assessment, a non-essential activity that (1) is an expense that will not continue indefinitely and (2) can be scaled back if funding drops. Scaling back non-essentials was Mr. Harmelin's suggestion should the Philadelphia plan fall short. "You start looking at what you can reduce in terms of personnel costs without significantly damaging your revenues. What can you defer?" (N.T. 9/24/04 p.m., 43). See also John Callahan N.T. 9/23/04 a.m., 46 ("You look for ways to reduce or diminish expectations to put on hold, if you will, certain kinds of activities until the resources are available.").

effecting a change in a situation where compliance with the terms of the trust 'would defeat or substantially impair the accomplishment of the terms of the trust.'" *Barnes Foundation, A Corporation-Estate of Violette de Mazia, Deceased*, 453 Pa. Super 436, 451-5, 684 A.2d 123, 130-31 (1996)(emphasis added).

**B. The Trustees Did Not Adequately Explore Alternative Means of Meeting the \$1 Million Deficit.**

At a time when many of the Foundation's fundraising and revenue initiatives appear to be bearing first fruit,<sup>6</sup> the Trustees argue that it is not possible to make up the roughly \$1 million deficit while staying in Merion. They had the burden to demonstrate this, yet the evidence belies their claim.

**1. Enhanced Fundraising**

Several factors indicate that the Foundation's fundraising efforts will be significantly enhanced once the cloud that surrounds the present plan to move the collection has lifted.

First, the Trustees' fledgling fundraising effort have already produced some results in Merion and sustained moderate annual growth.

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<sup>6</sup> Dr. Watson admitted a number of fundraising successes in Merion and that "every area of the Foundation's operations is far outperforming." (N.T. 9/27/04 a.m., 91-93; *Amicus Ex. 90*).

(Schwenderman, N.T. 9/22/04 p.m.1, 52). Dr. Watson appears to have been incorrect in his claim that the Foundation has not received any unrestricted grants. (See Pet. Ex.42, Statement of Activities, listing over \$1.9 million in such grants for 1999-2001. Another \$4.7 is shown for 2002 and 2003, some of which is bridge financing. See also Pet. Ex. 25 (listing grants for 1999-2002)).

Second, the Foundation admits that the instant petition has disrupted its fundraising efforts. By rejecting Dr. Barnes' express wishes, the Trustees have temporarily alienated some donors. "In the 2002 report, in working through assumptions with the Barnes, they were particularly of the opinion that some of the initiatives they were considering would thwart fundraising in the short term . . ." (Schwenderman, N.T. 9/22/04 p.m.1, 34)<sup>7</sup> Not only has the petition to move affected fundraising, but it has held up the process of selecting new board members that can only improve the current fundraising results. (Watson, N.T. 9/27/04 a.m., 82-83; Callahan, N.T. 9/23/04 a.m., 49).

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<sup>7</sup> See also Harmelin, N.T. 9/23/04 p.m., 36 ("once you were a foundation that was in, quote, play . . . others would await the outcome of that until they made a determination as to whether there would be significant support from the community"); Camp, N.T. 9/27/04 a.m, 65 ("Fundraising, actually, tanked the year that petition was filed.") and Callahan, N.T. 9/23/04 a.m., 39 (donors' perceptions that Dr. Barnes' intentions were being thwarted could adversely affect decisions to give to the foundation).

Only after the uncertainty due to the possible removal of the Foundation's art collection is eliminated can a true picture of its fundraising potential in Merion emerge. This is especially so since the Foundation has yet to receive the many benefits that additional board members are expected to bring. *See Op. Jan. 2004 at 6-8* (noting testimony of Maureen Robinson and Rebecca Rimel as to salient effects of larger board). Moreover, the Foundation does not appear to have in place the factors that Mr. Callahan testified to as essential for fundraising, nor do they appear to have engaged a consultant of his caliber. (N.T. 9/23/04 a.m., 18, 33).

In addition to new board members, the Foundation's fundraising abilities in Merion have been barely tested. This February, the township commissioners passed a unanimous resolution supporting efforts to keep the art collection in Merion. (*Amicus Ex. 94*). Further, Commissioners Joseph Manko and James Ettelson testified to their commitment to support reasonable efforts by The Foundation to enhance fundraising and visitor levels. (N.T. 9/27/04 p.m.2, 42, 62). Thus, large events such as the annual gala described in the 2004 Deloitte

report as grossing \$250,000 would be a likely source of revenue in Merion that has yet to be tapped. (*See* Pet. Ex. 62 at 33).

Finally, counter to the Trustees' assertions, there are those who would support the Foundation if it stayed in Merion. A case in point is the Kelly Foundation, whose president testified as to a pledge of \$100,000 conditioned on the Foundation keeping its collection in Merion. (N.T. 9/30/04, 4).

## **2. Increased Admission Revenue**

As the Court noted in its January 2004 Memorandum Opinion, any deviation from the terms of the Indenture must be the least drastic solution necessary to advance the trust's central purpose. (Op. Jan. 2004 at 21-22 & n.15). One deviation that the Trustees are seeking is the unfettered discretion to set admission fees upon moving the gallery collection to the City of Philadelphia. While increasing admission fees runs counter to Dr. Barnes' direction regarding "free access" on public visitation days (*see* Indenture paragraph 30), this single deviation, if allowed in Merion at the rate the Trustees estimate for the Philadelphia gallery, would eliminate over one third of the present annual

deficit.<sup>8</sup> Since this would be only one deviation as opposed to the many the Foundation now seeks (gallery location, hours of public visitation, display of non-Barnes artwork, in addition to admission price increases), it is demonstrably "less drastic" than the plan to move the gallery collection to the City of Philadelphia. The Foundation presented no evidence that a \$12 admission charge would affect visitor levels any differently in Merion than in Philadelphia.

Admission revenue might also be increased by additional gallery attendance if alternative means of ingress and egress are pursued. *See* Manko, N.T. 9/27/04 p.m.2, 41-42 (Lapsley Lane provides direct access to City Avenue, township would support efforts to enhance access); Ettelson N.T. 9/27/04 p.m.2, 62. Mr. Harmelin called alternative access routes "a long-term" solution, (N.T. 9/23/04 p.m., 45) but the fact is that Lapsley Lane is already there and being used and, at the very least, a few extra shuttle buses per day would seem acceptable to all parties.<sup>9</sup>

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<sup>8</sup> The Foundation's ticket prices in Philadelphia will be about \$12. (Schwenderman, N.T. 9/22/04 a.m., 98). At current Merion visitor limits of 62,400 per year, a \$7 ticket increase would yield over \$420,000.

<sup>9</sup> Lapsley Lane has already been used on a limited basis for access. *See* Pet. Ex. 28 tab 8, Zoning Hearing Board Appeal no. 3859, Oct. 14, 2003 at 5: "All

### **3. Increased Educational Revenue**

The 2004 Deloitte Report relies on a doubling of accredited program students and a tripling of education revenue, from \$253,000 to \$750,000 per year. (Pet. Ex. 62 at 24, 30). Since there are no township visitation limits for regular program students in Merion, some, if not all, of that predicted additional education program revenue should also be attainable if the art collection remains in Merion. In fact, part of that figure is attributable to a doubling of horticultural student revenue, which will take place in Merion regardless of where the artwork resides. (Schwenderman N.T. 9/22/04 p.m.2, 11). Indeed, education director Robin McClea admitted that enrollment has steadily increased since she arrived in 1999. (N.T. 9/24/04 a.m., 98). Also, the recent accreditation of the Foundation's classes will further increase attendance and resultant revenue. (*Id.* at 123).

### **4. Cost-Cutting and Scaling Back**

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pedestrian and vehicular traffic generated by the event will enter Applicant's premises at City Avenue via Lapsley Lane."

The Trustees' witnesses admitted that the fall-back position for the plan to move the gallery collection to the City of Philadelphia would be to cut costs, scale back and defer, should revenues not meet expectations. (Harmelin, N.T. 9/23/04 a.m., 43; Callahan, N.T. 9/23/04 a.m., 46). Yet there was no evidence that the Trustees had pursued these devices in Merion or predicted what their net effect might be on the \$1 million deficit, plus or minus. As an example, the Foundation is pursuing a costly renovation of Ker Feal, with no idea of the ultimate cost of the project. (Camp, N.T. 9/27/04 a.m., 41). Equally costly is the conservation of non-gallery art work (Camp, N.T. 9/27/04 a.m., 58 and 71). The Foundation is also incurring costs for "educational outreach" -- sending teachers to Lower Merion schools (McClea, N.T. 9/24/04 a.m., 105). While all of these might be useful programs, there has been no demonstration that their costs or those of other non-essential operations are not contributing to the roughly \$1 million deficit and that they should not be "deferred" as Mr. Harmelin would do in Philadelphia.

## **5. Loans and Use of Tour Fund Income**



Given that the Foundation's revenue enhancing options (with the exception of increased admission fees) might take some time to develop, there will be a need for short-term financing should the current bridge financing supporters abandon the Foundation if the Trustees' plan is denied, and the Foundation choose to defer the possibility of selling non-gallery works or land at Ker Feal. At least two options are available there. First, the Court can direct the use of income (and, if necessary, principal) from the restricted \$4 million-plus tour proceeds. Second, a loan can be taken against the land at Ker Feal. (Barrow, N.T. 9/27/04 p.m.2, 99).

**C. The Sale of Non-Gallery Works and Land at Ker Feal are Appropriate Fall- Back Measures.**

Although they are willing to separate the artwork and arboretum that Dr. Barnes called "integral parts," and further dilute the hours dedicated solely to educational use of the art gallery, the Trustees attempted to frame the *Amicus Curiae* as the party hostile to Dr. Barnes' intent for pursuing the Court's direction to value non-gallery works and land at Ker Feal. The legal reality is that these properties are not alienated from sale by the express terms of the Indenture or by Dr. Barnes' will. The Foundation cannot claim financial necessity to deviate from

the testator's express mandates while assets exist that can put the Foundation on firm financial footing.

In response, the Trustees have reversed their 2001 position and sworn testimony on the use of the non-gallery artwork, and attempted to graft a *House and Garden* article written nine years before Dr. Barnes' death onto the Indenture. The stark fact remains that the non-gallery works were little-used after Dr. Barnes' death, he made no provisions for their public display and he made no prohibition against the sale of Ker Feal or its contents.

**1. The Non-gallery Works and Ker Feal Are Not Essential to the Foundation's Educational Program.**

In 2001, Ms. Camp told this Court that the non-gallery works "had not been seen or used by scholarly communities or students since Barnes' death in 1951." (Camp, N.T. 9/27/04 a.m., 52; *Amicus Ex. 88* at 25). Ms. Camp further testified that, for the same period, the non-gallery works had not had a material role in the educational program nor had the instructors expressed a desire to use them in any systematic way. (*Id.* at 52-53.) In her affidavit accompanying the Foundation's petition to exclude the non-gallery works from the prohibitions in

Indenture paragraph 10, Ms. Camp stated: "The works in storage have not served [Dr. Barnes' mission] for more than half a century. Nor is there a prospect that the works will serve Dr. Barnes's mission in the future unless they can be sent to locations that have the capacity and environment to exhibit them properly."

(Affidavit of Camp, March 6, 2001 *Amicus* Ex. 87).

Despite Ms. Camp's present protestation that she has "plans on the drawing board that use these non-gallery assets" (N.T. 9/27/04 a.m., 29), it is clear that they are not essential or even tangentially necessary to accomplish the Foundation's mission. Meanwhile, their conservation is an "extraordinary" expense. (Camp, N.T. 9/27/04 a.m., 58). Harry Sefarbi (the one person who appeared before this Court with the closest link to Dr. Barnes and who has been a Foundation teacher for over 50 years) testified that selling the non-gallery paintings was preferable to moving the collection. (N.T. 12/11/03 p.m., 62).

Similarly, Ker Feal has not served the purposes of the Indenture in any meaningful way since Dr. Barnes' death. As Dr. Wank testified on cross examination: "As far as Ker Feal goes, I was there a few times for classes, and the

educational program there is pretty much non-existent." (N.T. 9/22/04 a.m., 55).

Ker Feal is not open to the public nor is it an integral part of the educational program and there is no evidence that it ever was. (McClea, N.T. 9/24/04 a.m., 112-114). It is currently "limited to a very small number of individuals to occupy the building safely." (*Id.* at 101). In order to allow greater use, structural elements must be changed, bathrooms and potable water added. Ms. Camp could not estimate the cost of such work. (N.T. 9/27/04 a.m., 39, 41).<sup>10</sup>

Finally, as in the case of the non-gallery artwork, Mr. Sefarbi felt that the sale of the land at Ker Feal was preferable to relocation of the gallery artwork. (N.T. 12/11/03 p.m., 62).

**2. Museum Rules Do Not Apply to the Non-Gallery Works and Their Sale Is Not Precluded by Museum Policies.**

All three witnesses who testified on the subject of the museum community's views toward selling artwork agreed on one point: there is no legal

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<sup>10</sup> The *House and Garden* article proffered by the Trustees as evidence of Dr. Barnes' aims for Ker Feal was published nine years before his death, during which time there was no evidence that it had been truly integrated into the Foundation's educational programs. The reality is probably best described by Dr. Barnes: Ker Feal was "the practical result. . .of an education in aesthetics -- intelligent enjoyable living." (Letter from Dr. Barnes to Henry Humphrey, June 6, 1942, Pet. Ex. 121).

impediment to selling the non-gallery artwork. (See Edwin Wade, Ph.D., N.T. 9/23/04 a.m. 72, 89; Jeremy Sabloff, Ph.D, N.T. 9/23/04 p.m. 15; Marie Malaro, Esq., N.T. 9/24/04 p.m. 26, 27). While Dr. Sabloff admitted to a certain disagreement in the field (N.T. 9/23/04 p.m., 8), Professor Malaro was unequivocal that the non-gallery art is not subject to museum community deaccessioning rules:

For that to happen, you have to have a museum, you have to have a mission and you have to have collecting goals. . . None of this applies to the non-gallery objects of the Barnes. There is no museum. (Id. at 19-20.) Nothing about that gallery is a museum. . . . The main work of that organization is to teach the students. (Id. at 30.) The petitioners appear to think that just because they have a collection of art, it must be a museum collection, even though the donor didn't appear to want that. (Id. at 33.) In my opinion, those objects are free of any legal or ethical restrictions and they could certainly be used to further what is, I believe the core purpose that Dr. Barnes had in mind. (Id. at 20).

Given this professional opinion by a member of the panel that wrote the American Association of Museum's ethical guidelines, the Trustees' argument that they could lose funding if they sold works to secure its position in Merion is unjustified.

The museum community rules are based in part on giving donors "a sense of security" that their donations will be used as intended. (Wade, N.T. 9/23/04 a.m., 73). With that in mind, it seems absurd that in an environment where donors apparently are willing to raise \$150 million to move the collection against Dr. Barnes' express wishes, that selling works that he did not prohibit from sale should be judged by museum ethics rules written decades after his death. Moreover, the *Amicus Curiae* remind the Court that the Trustees' petition seeks to change the language of Indenture paragraph 10 to explicitly allow the sale of non-gallery art "to give The Foundation discretion to manage its collection." (Pet. Ex. 53, and Memorandum of Law in Support of the Barnes Foundation's Petition to Amend its Charter and Bylaws, "Petition Brief" at 33). The museum deaccessioning argument is nothing more than a red herring and clearly inapplicable to the present situation.

**D. The Plan to Move the Gallery to the City of Philadelphia Is a Drastic Deviation and Too Risky to Assume It Will Secure the Foundation's Future.**

The Court's January 2004 Opinion stated that "[w]e need to be persuaded that the move to Philadelphia is the least drastic solution that will stabilize the

Foundation's future." (Op. Jan. 2004 at 25). Neither of these two conditions was proven by clear and convincing evidence.

**1. The Trustees' Plan to Move the Gallery Collection to the City of Philadelphia Requires Drastic Deviation from the Terms of the Indenture.**

In a question to Mr. Harmelin, Senior Deputy Attorney General Barth seemed to imply that the present petition is only a minimal deviation: "Is it not a fact that the only provision of Dr. Barnes' Indenture -- the primary provision of Dr. Barnes' Indenture, that will be violated is that the physical presence of the gallery collection will be shifted. . . ?" (N.T. 9/23/04 p.m., 51). While that is how the Trustees have framed the instant petition, in fact, the request has far broader impact on the Foundation, its mission and Dr. Barnes' intent.

As Professor Malaro observed:

I find it strange that the Trustees are suggesting that they are going to put up a very large traditional museum and then have the gallery in one corner, because it will be lost, and also it will put such a burden on the Trustees to maintain that building. They won't have much time for Dr. Barnes' core purpose. (N.T. 9/24/04 p.m., 15).

Professor Malaro was correct, both literally and figuratively. The gallery and Dr. Barnes' intentions for it will be put into a corner by the Trustees' plan to

move the gallery collection to the City of Philadelphia. In addition to seeking permission to move the collection, the Trustees seek permission to *inter alia*: (1) have complete discretion to set admission fees (Indenture paragraph 30, Pet. Ex. 57); (2) have complete discretion to set hours of public visitation (*Id.*); (3) loan or sell non-gallery art (Indenture paragraph 9, Pet. Ex. 52); (4) add works to the collection (*Id.*); (5) display works not owned by the Foundation (Indenture paragraph 34, Pet. Ex. 59) and (6) hold "special events" and use the facilities in any fashion and not limited to Barnes' fundraising events.<sup>11</sup> (Indenture paragraph 33, Pet. Ex. 58).

Taken collectively, the effect of these changes will be to "really transform. . .the organization." (Schwenderman, N.T. 9/22/04 p.m.2, 48). For example, the Trustees seek to "tak[e] advantage of opportunities to enhance its collection through strategic purchases of works of art that would compliment its current possessions, and borrow. . .works that, when added to its own works of art would offer unique special exhibits that could attract both donors and public

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<sup>11</sup> The Superior Court has interpreted the prohibition against society events in paragraph 33 to allow events the sole purpose of which is to benefit the Barnes Foundation. See *In re The Barnes Foundation, A Corporation*, 453 Pa. Super. 243, 251, 683 A.2d 894, 898 (1996).



visitors." (Petition Br. at 33). Dr. Sabloff called the movement of the collection "a drastic proposal" (N.T. 9/23/04 p.m., 12) and Dr. Wade recognized it was "not what Dr. Barnes had envisioned." (N.T. 9/23/04 a.m., 86). The gallery collection will become one part of an ever-changing environment where the bottom line will be revenue and not the donor's original mission. Indeed, the Foundation's president, Dr. Watson, expressed contempt at having to operate as mandated by Dr. Barnes. *See* N.T. 9/27/04 a.m, 86 ("I know of no other institute of this size or importance which operates under those restrictions.").

Because the sale of non-gallery art and the land at Ker Feal can provide sufficient endowment to secure the Foundation's future in Merion, all of the Indenture changes that the Trustees seek are more drastic deviations that the Trustees' plan to move the gallery collection to the City of Philadelphia. Even the alternative proposal the *Amicus Curiae* suggests, an increase in admission fees to meet more than a third of the structural deficit, would be far less drastic than the many changes the Trustees are now seeking.

In short, deviation from the terms of the Indenture should be denied because the deviations requested are far more drastic than other options that the Trustees refused to pursue.

**2. The Trustees' Plan Is Far too Risky to Ensure the Foundation's Future.**

In the December 2003 hearings, Rebecca Rimel, President of the Pew Charitable Trusts, stated that the four or five year pro forma for the Trustees' plan to move the gallery collection to the City of Philadelphia "needs to look at . . . *the most conservative or the most disappointing scenario* and the most positive, and it needs to have contingency planning in it." (N.T. 12/11/04 a.m., 84)(emphasis added). But that was not what was done. "What we attempted *at the Barnes's request*, was to present an estimate that was more of a midpoint estimate and not an aggressive or a conservative estimate." (Schwenderman, N.T. 9/22/04, p.m.2, 33) (emphasis added). Understandably, the Deloitte pro forma states its caveat at least twice: "The purpose of this report is to estimate the reasonableness of estimated operating revenue. *It is not a prediction of future results.*" (Pet. Ex. 62 at 3, 27)(emphasis added)

In fact, the pro forma was a very aggressive estimate. Its reliance on \$4.25 million in annual fundraising was termed: "not a walk in the woods . . . not a job for neophytes . . . aggressive by definition. It's audacious." (Callahan, N.T. 9/23/04, 20, 30-31). Even Mr. Harmelin, who has served on many non-profit boards, recognized that the figure "is not a slam dunk." (N.T. 9/23/04 p.m., 43). Mr. Callahan established four criteria for successful fundraising, yet he was unaware whether the Foundation had any of these in place. (N.T. 9/23/04 a.m., 33).

Not only was the fundraising estimate aggressive, but some of the earned revenue and expense estimates were as well. Mr. Schwenderman testified that he is accustomed to seeing 20% dropoffs in attendance after the initial year, yet his consolidated model was based on a 15% drop off.<sup>12</sup> (N.T. 9/22/04 p.m.2, 57). He admitted that the accuracy of his model was heavily dependent on attendance predictions, and that a statistically valid market survey should be

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<sup>12</sup> See Pet. Ex. 62 2004 Deloitte report at 30, Table 1. General visitors for year 1 are 236,664 and for years 2 and 3 are 200,760 or a 15% decline. A 5% difference is 10,000 visitors, or \$90,000 in admission revenue alone.

done, but was not. (N.T. 9/22/04 p.m.1, 14, 23 and 30). On the expense side, the pro forma specifically excluded capital or non-operating expenses. (*Id.* at 26).

One figure that the Court specifically raised in its January, 2004 Opinion, "the costs to maintain the Merion facility for administrative purposes and for the horticultural course," went unanswered. Mr. Schwenderman could not state costs for the Merion facility alone, nor does his report (Pet. Ex. 62) list them. (N.T. 9/22/04 p.m.2, 12-14).

Equally alarming was the aggressive approach to the building budget. In December, Ms. Rimel stated that she used a conservative figure of \$1000 per square foot to estimate building cost. (N.T. 12/11/04 a.m., 34) In stark contrast, Mr. Perks used \$400-\$500 per square foot. (N.T. 9/21/04 p.m., 142). Mr. Perks built in a 10% contingency, yet he admitted that he recommends a 15% contingency at the schematic phase. (N.T. 9/22/04 a.m., 26). His estimates for annual cost escalation were very far off from reality. He used a 1% annual cost increase, yet admitted that last year the index he used was not 1% but 6.4% and that the billing cost inflation estimate was 8%. (*Id.* at 29, 30).

Past projects cited as examples were hardly reassuring. The Kimmel Center "came within budget, but the budget was adjusted during construction" and the final costs exceeded the original estimate. (*Id.* at 14, 32). Likewise, while Mr. Harmelin testified that the National Constitution Center was completed "on time and on budget," he later admitted that there is a section that remains to be done. (N.T. 9/23/04 p.m., 24 and 42).

Finally, unlike the December 2003 hearings, where Ms. Rimel testified that \$100 million in pledges for the building had been secured (N.T. 12/11/03 a.m., 40), there was no sworn testimony from anyone with actual knowledge of the pledges that the \$50 million endowment is fully pledged. Indeed Dr. Watson referred to "fifty million for an endowment, which *we hope to receive.*" (N.T. 9/27/04 a.m., 89)(emphasis added). Instead, the Court heard third parties (Schwenderman<sup>13</sup> and Callahan) who relied on the Trustees' representations to assume the \$50 million was pledged. Given the gravity of what is being sought, and their burden to prove the case by clear and convincing evidence, the fact that

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<sup>13</sup> E.g. "The representations to us would be that it's likely that all of the \$50 million would be in hand by 2006." (Schwenderman, N.T. 9/22/04 p.m.1, 19).

neither Dr. Watson, Mr. Harmelin nor Ms. Camp testified directly that the \$50 million was pledged is a dubious indication that that is not the case.

Unlike the conservative approach Ms. Rimel suggested in December, the Deloitte pro forma and the Perks construction budget assume best case scenarios. The risk inherent in this approach is compounded by the fact that none of the Trustees' witnesses had a solid answer as to what the contingency plans would be if any of the funding sources fell short. In sum, the Trustees' plan to move the gallery collection to the City of Philadelphia is not only a drastic deviation from the settlor's wishes, but it takes an institution with about a million dollar deficit (and assets sufficient to cure that deficit indefinitely) and transforms it to one with an \$11.3 million budget that relies on \$4.2 million in fundraising every year that by the Trustees own terms "is not a slam dunk."

### **III. Conclusion.**

During the hearing, the Trustees presented two stark alternatives — move to the City of Philadelphia, or sell the nongallery assets. No other alternatives — no other options — were considered by the Trustees, notwithstanding that they had the burden to show by clear and convincing evidence that the move to the

City of Philadelphia is the least drastic of all available alternatives. The Trustees continued to float the move to the City of Philadelphia as the only boat in the sea. They fought the idea of selling some of the nongallery assets to create an endowment which would wipe out the structural deficit. They ignored all the other options that, collectively, will satisfy the deficit and preserve the Foundation in Merion. By so doing, they failed to show by clear and convincing evidence that moving the gallery to the City of Philadelphia does the least damage to the Indenture. Thus the Trustees failed the test of deviation. Accordingly, the *Amicus Curiae* respectfully requests that this Court deny the Trustees' Second Amended Petition to Amend the Charter and Bylaws of the Barnes Foundation.

Respectfully submitted,

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Dated: October 20, 2004

Certification

I, Terrance A. Kline, counsel for the *Amicus Curiae*, Sue S. Hood, William Phillips and Harvey A. Wank, hereby certify that the enclosed Post-Hearing Brief of the *Amicus Curiae* in the action of The Barnes Foundation to Amend the Foundation's Charter and Bylaws has today been sent by United States mail and via facsimile to the following counsel of record:

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