IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION
No. 58,788

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THE BARNES FOUNDATION, A CORPORATION

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MEMORANDUM OPINION SUR APPEAL

OTT, J. **May 15, 2008**

The appeal of Ronald William Taylor from the undersigned's Orders dated October 9, 2007, and February 28, 2008, should be dismissed for lack of standing. *See* the memorandum opinion and decree entered *eo del* (copy appended hereto) dismissing the petitions of Montgomery County and the Friends of the Barnes on the same grounds.

BY THE COURT:

J.

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MEMORANDUM OPINION AND ORDER SUR PRELIMINARY OBJECTIONS TO PETITIONS TO REOPEN PROCEEDINGS

OTT, J. **May 15, 2008**

On August 27, 2007, a petition was filed on behalf of several individuals and the "Friends of the Barnes Foundation" (referred to collectively herein as "the Friends") seeking, *inter alia*, to reopen the proceedings which resulted in this Court's December 13, 2004 opinion granting permission to the trustees of The Barnes Foundation to relocate its art gallery at a new location in Philadelphia. *See* Barnes Foundation, 25 Fiduc. Rep. 2d 39. On August 31, 2007, the Friends filed a petition to have citations issued to the individual trustees to show cause why the request to reopen the matter should not be granted. The trustees filed preliminary objections to the petition, which were joined in by the Office of the Attorney General, as *parens patriae* for charities. On September 12, 2007, Montgomery County filed its own petition to reopen the matter;

and the trustees[1] and the Attorney General again filed preliminary objections. Thereafter, the parties filed extensive briefs[2] and the undersigned heard argument on the preliminary objections on March 24, 2008.

The seventy-seven page petition[3] filed on behalf of the Friends was a 231 paragraph diatribe, rampant with scattershot accusations, arguments, and conjecture. Fortunately, the real issues, as honed by current counsel in his brief and argument, are much more manageable, and coincide with the specific bases for reconsidering our earlier ruling that were posited in the County's petition. Before addressing the preliminary objections to both of these petitions, we must summarize briefly certain developments in this saga.

At some point after the December 2004 opinion was issued, it came to the Court's and the public's attention that a budget bill, passed by the state legislature and the Governor in 2002, contained a line item for approximately one hundred million dollars for the purpose of building a new facility in Philadelphia to house The Foundation's art collection.[4] This revelation caused a flurry of speculation that The Foundation's

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[1] Separate preliminary objections were also filed to both petitions on behalf of Stephen J. Harmelin, one of the trustees, because of a possible conflict of interest between him and counsel for the trustees. The issue has since been resolved, and we treat Mr. Harmelin's objections as having merged with those filed by the Board of Trustees.

[2] The Township of Lower Merion, the municipality in which The Foundation's Gallery now exists, submitted an *amicus curiae* brief in support of the County's standing, just before the scheduled argument. No objections were raised by the parties and the Court considered the Township's briefs with the others.

[3] The attorney who filed this petition withdrew from representation; current counsel for the Friends filed the brief *contra* the preliminary objections and argued the matter.

[4] For our purposes, the budget process and how such itemizations actually get funded need not be explored.

trustees had knowledge of the budget item and had actively concealed its existence from the Court during the hearings on the petition for permission to move the gallery and art program from Merion. In the instant petitions, both the Friends and the County urge the Court to reopen the matter on the basis of this new information.

A second reason put forth for reconsidering our earlier decision is the proposal floated in June of 2007 by the Montgomery County Commissioners to purchase The Foundation's land and buildings for approximately $50 million, and to lease the property back to The Foundation. The County suggested that the influx of cash to The Foundation from the sale would permit the art collection to be preserved, an endowment to be established, and the gallery and art education program to remain in Merion.[5] Shortly after receiving this proposal, The Foundation rejected it, stating the decision to move to Philadelphia was irreversible. (Exhibit "C" to the County's petition.)

The preliminary objections to both petitions now before us raise the question of standing. This Court has addressed this issue in proceedings that relate to The

[5] The principal terms of the County's proposal, as described in ¶18 of its petition, were as follows:

A. The County would raise funds for the purchase of the subject real estate through funds raised from the sale of tax-exempt County-backed bonds.
B. The County would then lease-back both parcels [of land owned by The Foundation] to the Barnes Foundation for a term equal to the term of the bonds.
C. Lease payments would be established, such that the Barnes Foundation could also realize the benefit of the differences between the County borrowing rate and a reinvestment rate; thereby creating a recurring annual financial benefit for the Barnes Foundation.
D. At the earlier of the final term of the bonds or prepayment of the outstanding bonds by the Barnes Foundation, the Barnes Foundation would regain ownership to both parcels and lease payments otherwise due the County would cease.
E. The Ker-Feal property [the farm located in Chester County and owned by The Foundation] would be kept as open space and serve as security for the lease payments.

Foundation on several occasions. We conclude that, as many who have gone before, the Friends lack standing because they have no interest beyond that of the general public. The Friends, in their brief, all but concede as much, however, they claim the question of standing is so "enmeshed" with the merits that the preliminary objections should be overruled and the situation vetted in depth. In support of this argument, the Friends have cited several decisions from U.S. Circuit Courts of Appeal. As tempting as the possibility of exploring the merits of these petitions might be, we are bound, not by these federal court decisions, but by the recent holding from our Supreme Court in the matter of Milton Hershey School, 590 Pa. 35, 911 A.2d 1258 (2006). There, the Court disavowed an attempt by the Commonwealth Court to rewrite the law on standing. In the Hershey matter, a school, the trust which funds its operations, and the Office of the Attorney General reached an agreement about certain issues concerning administration of the trust and school policies. Members of the school's alumni association brought an action in Dauphin County Orphans' Court to set aside the agreement. The Orphans' Court dismissed the suit for lack of standing. The Commonwealth Court reversed and announced a five-part test[6] to determine whether a party has standing due to a "special interest." In re: Milton Hershey School, 867 A.2d 674 (Cmwlth. 2005).

On appeal, the Supreme Court reversed, citing with approval language in the dissenting opinion penned by President Judge Colins of the Commonwealth Court and joined in by two other judges. Those dissenting judges had described the majority's

[6] The Commonwealth Court set forth the factors for consideration as follows: "(1) the extraordinary nature of the acts complained of and the remedy sought; (2) the presence of fraud or misconduct on the part of the charity or its directors; (3) the attorney general's availability or effectiveness; (4) the nature of the benefited class and its relationship to the charity; and (5) subjective, case-specific circumstances." *Id.* at 689.

decision as "a dangerous expansion of standing not supported by over 300 years of case law within the Commonwealth" and "a quantum leap" away from historical concepts of standing. The Supreme Court reaffirmed the applicability of such long-standing concepts of standing as:

- a party who is not negatively affected by the matter he seeks to challenge is not aggrieved, and thus, has no right to obtain judicial resolution of his challenge;
- a litigant is aggrieved when he can show a substantial, direct, and immediate interest in the outcome of the litigation;
- a litigant possesses a substantial interest if there is a discernable adverse effect to an interest other than that of the general citizenry; it is direct if there is harm to that interest; it is immediate if it is not a remote consequence of a judgment;
- private parties generally lack standing to enforce charitable trusts; since the public is the object of the settlor's beneficence in a charitable trust:
- those who may bring an action for the enforcement thereof include the Attorney General, a member of the charitable organization, or someone having a special interest in the trust.

The Supreme Court in Hershey concluded:

> We find the Association did not have a special interest sufficient to vest it with standing. Nothing in this litigation would affect the Association itself; it loses nothing and gains nothing. The Association's intensity of concern is real and commendable, but it is not a substitute for an actual interest. Standing is not created through the Association's advocacy or its members' past close relationship with the School as former individual recipients of the Trust's benefits. . . .

> The Attorney General is granted the authority to enforce charitable trusts. Current law allowed the Association, an outside group, to urge the Attorney General to enforce the Trust. However, the Association's disagreement with the Attorney General's decision to modify the 2002 agreement does not vest the Association with standing to challenge that decision in court. Ultimately, the Association's dismay is more properly directed at the Attorney General's action and decisions It is insufficient to establish standing here.

590 Pa. at 44-45, 911 A.2d at 1263 (citations omitted).

In light of the Supreme Court's resounding ratification of these historical precepts, it is clear that the Friends lack standing in this matter. While the "intensity of concern" felt by these petitioners is, no doubt, as "real and commendable" as that of the alumni in the Hershey case, they, like the alumni, lack the requisite "actual interest" in the matter ***sub judice***.

Regarding the County's right to bring a petition to reopen, the municipality may be very -- although some might say very belatedly -- interested in The Foundation. In that, the County is not alone. A recent search on Google of "The Barnes Foundation" yielded "about 2,590,000" hits. However, binding precedent instructs us that a "special interest" is required to establish standing. As the Attorney General and the trustees point out, the County's "special interests" in protecting historical resources and nurturing economic welfare are matters within the purview of the Attorney General's office. That Office as ***parens patriae*** protects the general public, and there is no authority for a second sovereign to participate on behalf of a subset of the general public. On this point, the Commonwealth Court issued a relevant opinion after its Hershey opinion and before the Supreme Court's reversal in Hershey, in the matter of Philadelphia Health Care Trust,

872 A.2d 258 (Cmwlth. 2005). There, the Commonwealth Court upheld the Philadelphia County Orphans' Court's refusal to permit a state senator and a city councilman to intervene in a proceeding involving a charitable corporation, noting:

> As the trial court appropriately reasoned, "In matters such as the one which is now before this Court, there is only one 'Sovereign,' and that Sovereign is the Commonwealth of Pennsylvania. When engaged in litigation before this Court, the Sovereign must be of one mind and must speak with one voice. When the Commonwealth acts to protect the public interest, it does so by its Attorney General. When, as in the case at bar, the Attorney General acts to protect the public interest in enforcing the terms of a charitable trust, other Public Officers cannot be permitted to Intervene to perform the same function."

Id. at 262. We find this holding[7] to be dispositive of the issue before us, and determine that the County has no standing.

In light of the foregoing, the petitions before us must be dismissed. We must finally address the request by The Foundation and the Attorney General that fees be assessed against the petitioners. The parties to whom and circumstances under which reasonable counsel fees can be awarded as part of the taxable costs of a matter are set forth in 42 Pa. C.S.A. §2503, and include:

> (6) Any participant who is awarded counsel fees as a sanction against another participant for violation of any general rule which expressly prescribes the award of counsel fees as a sanction for dilatory, obdurate or vexatious conduct during the pendency of any matter.
> (7) Any participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter.
> (9) Any participant who is awarded counsel fees because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith.

In this instance, we believe the petitioners filings were made in good faith, and the events

[7] It is interesting to note that the Commonwealth Court made no reference in the Philadelphia Health Care Trust opinion to the five-factor analysis espoused by the majority of its judges in the Hershey case, even though it was handed down less than three months after Hershey.

that precipitated the filings (the state budget appropriations' coming to light and the County's offer to explore the purchase/lease-back arrangement) were of sufficient import that the attempt to reopen the issues was not arbitrary. And, while The Foundation and the Attorney General's Office were understandably "vexed" at having to ward off these forays, the petitioners' conduct did not meet the legal definition of "vexatious." Therefore, we conclude the petitioners' conduct in bringing the instant pleadings does not justify the imposition of fees under the criteria set forth in 42 Pa. C.S.A. §2503, and the following ORDER is hereby entered.

ORDER

AND NOW, this 15th day of May, 2008 upon consideration of the preliminary objections and briefs and argument of counsel, the petitions filed by the Friends of the Barnes, *et alii,* and by the County of Montgomery are hereby DISMISSED for lack of standing. Each party to bear its own costs.

BY THE COURT:

J.

Copies of the above
mailed May 15, 2008 to:

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By: [signature]