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July 6, 2012

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**VIA FIRST CLASS MAIL**

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**RE: In re: The Barnes Foundation**  
**Nos. 810 EDA 2012, 992 EDA 2012, 1038 EDA 2012**

TO ALL COUNSEL IN THE BARNES LITIGATION:

I am enclosing a response to Mr. Stretton's recent petition to remand.

Very truly yours,



Carl A. Solano

For SCHNADER HARRISON SEGAL & LEWIS LLP

Enclosure

*Handwritten signature and date: 11/19/12*

**IN THE SUPERIOR COURT OF PENNSYLVANIA**

**In re** : No. 810 EDA 2012  
**The Barnes Foundation,** : No. 992 EDA 2012 (Consolidated)  
A Corporation : No. 1038 EDA 2012

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**RESPONSE BY THE BARNES FOUNDATION  
TO PETITION BY APPELLANTS IN NO. 992 EDA 2012  
FOR REMAND OF THIS ACTION  
“BASED ON NEWLY DISCOVERED EVIDENCE”**

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The appellants in No. 992 EDA 2012, Samuel Stretton and Barnes Watch (“Appellants”), have filed a petition “to remand based on newly discovered evidence.” The purported “new” evidence is a fax quoting an excerpt from an informal comment in an Internet blog! Not only should the petition be denied, but the Court should impose sanctions for Appellants’ cavalier disregard of the record and proceedings in this long-running litigation.

In 2002, appellee The Barnes Foundation, a Pennsylvania nonprofit corporation that operates an educational institution in Montgomery County, petitioned the Orphans’ Court Division of the Montgomery County Court of Common Pleas to permit it to deviate from terms of a trust indenture that is incorporated into its governing bylaws. Part of the requested relief was permission to relocate some of its operations — including its main educational programs in

art appreciation and the world-renowned art gallery used in connection with those programs — from suburban Lower Merion Township to downtown Philadelphia. The Foundation explained that it needed to relocate in order to better fulfill its mission of advancing appreciation of the arts — a mission that was hobbled by zoning and other restrictions at the Merion location that restricted The Foundation's ability to make its facilities widely accessible to the public. One result of the restrictions under which the Foundation was operating was a steady decline in its financial resources that had resulted in The Foundation's severe financial distress.

The Orphans' Court held ten days of hearings on The Foundation's petition in 2003 and 2004, hearing testimony from almost two dozen witnesses and receiving scores of documentary exhibits. A substantial part of that evidence concerned The Foundation's finances. The court heard testimony from The Foundation's accountants, questioned The Foundation's Board members and personnel, and heard from outside experts. The Office of the Attorney General participated in the hearings as *parens patriae*, and the court permitted a group of students opposed to The Foundation's petition to present evidence and cross-examine witnesses under an enhanced *amici curiae* status (the students did not have standing to participate as parties). In the end, the Orphans' Court concluded that The Foundation had proven the need for the requested relief. In 2004, the court entered a decree permitting deviation from provisions of the indenture (The Foundation relocated the gallery and art educational program in its new Philadelphia campus earlier this spring), a belated appeal from an opponent of that decree was quashed by the Supreme Court of Pennsylvania the following year, and the legal proceedings then should have ended.

But they did not end. Opponents of the relief granted to The Foundation — particularly, relocation of its gallery to Philadelphia — brought successive petitions to reopen the

proceedings, claiming that various types of “newly discovered evidence” — none of which is new — justified reconsidering what the Orphans’ Court already had considered exhaustively. Among those opponents was Barnes Watch, an organization of opponents that has been “watching” The Barnes Foundation and seeking to obstruct its efforts to advance its mission for years. As the courts have repeatedly held, Barnes Watch and similar organizations to which it is related have no standing to litigate issues regarding The Foundation’s indenture. *See, e.g., In re Barnes Found.*, 453 Pa. Super. 436, 450, 684 A.2d 123, 130 (1996); *In re Barnes Found.*, 449 Pa. Super. 81, 85, 672 A.2d 1364, 1366 (1996). But they have persisted in trying to do so nonetheless. The Orphans’ Court rejected petitions by Barnes Watch and others to reopen the proceedings based on “newly-discovered evidence” in 2007, and last year when Barnes Watch and others filed still more petitions, the Orphans’ Court dismissed them again. In addition, the court ordered the petitioners to pay sanctions for their vexatious litigation. These pending appeals are from the Orphans’ Court’s orders regarding last year’s petitions.

Now, in the midst of these appeals, Barnes Watch asks for a remand so that it can engage in still another round of litigation about The Foundation’s indenture and its move to Philadelphia. This time, Barnes Watch’s “newly discovered evidence” is a blog entry by The Foundation’s former executive director, Kimberly Camp, that, according to Barnes Watch’s petition, calls into question the accuracy of information presented at the 2003-04 Orphans’ Court hearings regarding The Foundation’s need for the relief it requested. This newest petition raises nothing new and is just another example of the vexatious litigation for which the Orphans’ Court held Barnes Watch and its allies should be sanctioned.

Procedurally, Appellants cite no authority by which a case may be remanded merely because a party finds something in a blog post that they think should provide fodder for

more litigation. The very decision from which Appellants appeal rejected Appellants' efforts to reopen the earlier litigation because of "newly discovered evidence," since the Appellants lack standing to litigate any of the issues raised in that litigation. Appellants' "remand motion" is just an effort to circumvent that decision. Their lack of standing is as real here as it was in the Orphans' Court.

Substantively, Appellants' evidence is not new. The statement by Ms. Camp that forms the basis for their petition is in an excerpt from Ms. Camp's blog that is quoted in a fax from Evelyn Yaari (one of the sanctioned petitioners in the Orphans' Court proceedings who elected not to appeal) that is attached to Barnes Watch's petition. The excerpt includes a comment that, "Bankruptcy was not the reason we filed the petition to move the Foundation to the city [of Philadelphia]. At the time the petition was filed, the Barnes Foundation had a cash surplus and we had no debt — none. But, saying so made the rescue so much more gallant." The quoted blog entry then goes on to explain that The Foundation needed to move because it "was not viable in Merion" any longer, and it discusses the restrictions on public access that resulted from local hostility. Barnes Watch claims that these statements somehow call the accuracy of the proceedings before the Orphans' Court into question, but they do no such thing. No witness at the hearing ever claimed that the Foundation filed its petition because it was bankrupt; indeed, the testimony made clear that the Foundation was desperately seeking to reverse its financial distress so that it could *avoid* bankruptcy. And throughout the hearing, all Foundation witnesses made clear that neighborhood restrictions on public access were a primary cause of the need to relocate. That Appellants call such facts "newly discovered evidence" discloses only that Appellants have chosen to ignore what this case has been about.

The Orphans' Court judge who presided over this litigation, the Honorable Stanley Ott, has had familiarity with The Foundation and its finances from decades of prior proceedings in which, among other things, he rendered decisions permitting some of The Foundation's art works to be placed on a world tour to raise money for capital improvements, and supervised proceedings resulting in a settlement with a related charitable institution, the Violette de Mazia Trust, that provided a short-term infusion of cash. He thus addressed The Foundation from a position of special expertise. In a January 29, 2004, interim opinion in the proceeding Barnes Watch wishes to reopen, he summarized the evidence regarding the "financial necessity" for a deviation from terms of The Foundation's indenture, providing citations to the voluminous record as he did so:

The world tour of some of The Foundation's artwork in the mid-1990s generated approximately \$16 million. Half of that money was used for the renovations to the Merion gallery, and the other half was placed in a restricted account to be used for capital improvements, subject to court approval. Approximately \$4 million remains in the restricted account. (N.T. 12/8/03, morning session, 39; Exhs. P-42 and P-45.) Regarding assets available for operating expenses, these totaled approximately \$9.5 million at the end of the 1980s. Even with addition of the money received in settlement from the de Mazia trust (\$2.5 million), the available assets totaled \$6.6 million by the end of 1997, \$2.4 million by the end of 1998, and \$1.6 million by the end of 1999. For the past four years, the end-of-year assets have fluctuated between \$2.4 and \$3.3 million. Included in these year-end totals are the bridge financing received from Pew (\$3.1 million paid in two installments in 2002 and 2003) and \$1.7 million realized in 2000 when The Foundation restructured its pension plan. (N. T. 12/9/03, morning session, 46-48.)

Except for those years when The Foundation has enjoyed these non-recurring infusions of cash, The Foundation has been operating in the red over the past decade. The deficits can be traced, in large part, to the incredibly expensive and lengthy litigation in which The Foundation was embroiled in the 1990s. In addition to obtaining permission to send some of the collection on tour, the previous administration attempted to increase revenues by increasing public admission to the gallery. This effort was stymied by the limits imposed by Lower Merion Township, to wit, the gallery can be open only on Fridays, Saturdays, and Sundays, and only 1200 visitors are allowed per week. The admission price remains at five dollars (\$5) as per the decree of this court which was affirmed at 453 Pa. Super. 243, 683 A.2d 894 ....

In the late 1990s, the Board of The Foundation instituted several changes in hopes of ameliorating The Foundation's future, financially and otherwise. The Board hired its first professional art administrator, Kimberly Camp, as executive director and chief executive officer in 1998. Since her arrival, the income from the sale of merchandise at the gallery store has quadrupled. (N.T. 12/9/03, afternoon session, 89.) Ms. Camp also hired professional staff for the purposes of, *inter alia*, development and collection assessment. She testified that the efforts of the development staff have resulted in significant contributions to The Foundation. (N.T. 12/9/03, afternoon session, 86-87.) The Foundation demonstrated an increase in same from \$0 in 1990 to an average of \$2.9 million a year over the past three years. (Exh. P-49.)

Inevitably, the "professionalization" of these aspects of the Foundation's operations has raised costs. Also on the debit side of The Foundation's ledger is an award of legal fees assessed against a predecessor administration in an unsuccessful federal suit. In Ms. Camp's opinion, there is no possibility of the township's loosening its restrictions on visitors. (N.T. 12/10/03, afternoon session, 10.) On the issue of seeking an increase in the ticket prices, Ms. Camp testified that would do little to cure The Foundation's financial woes, since doubling or tripling the current amount would not approach the operating cost per ticket, and would likely reduce the number of people willing to visit. (N.T. 12/9/03, afternoon session, 115-16.) In essence, the Foundation is covering its costs of operation at present only because of the bridge financing from Pew and Lenfest.

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Lower Merion Township certainly bears some of the responsibility for the financial crisis. The Foundation's attempt to raise revenues by increased public access to the gallery was met with hostility, bordering on hysteria, from some of the owners of the adjacent houses. The township reacted to the situation by imposing a series of administrative regulations that have put a stranglehold on The Foundation's admissions policy. The witnesses for The Foundation expressed no hope of winning concessions from the Township; and this Orphans' Court has no jurisdiction to broker or impose any changes to the unfortunate situation.

*In re Barnes Foundation*, No. 58,788, at 13-15, 24 (Jan. 29, 2004) (copy attached as Ex. A). After surveying this evidence, Judge Ott found that the "financial exigency [has] been demonstrated," stating: "What has been established beyond peradventure is that The Foundation's finances have reached a critical point." *Id.* at 24-25.

One of the most frustrating things about the proceedings below that ended with Judge Ott's sanctions order is that Appellants consistently have made claims of "new evidence"

that is not new. They have tried repeatedly to revisit issues litigated at length in the 2003-04 proceedings — with no indication that Appellants even have bothered to familiarize themselves with the record from those proceedings that documents the prior litigation. If Appellants had reviewed that record, they would know that The Foundation’s petition never alleged bankruptcy, but instead claimed that The Foundation’s finances had reached a point requiring drastic changes to its operations in order for it to carry out its educational mission. While The Foundation did indeed have a cash surplus, some of that money was in a restricted capital account from the world tour and, as Judge Ott found, remaining funds were dwindling. And while The Foundation had no debt prior to filing its 2002 petition, that filing brought The Foundation the bridge financing referenced in Judge Ott’s petition, which then kept The Foundation afloat. The various measures taken by The Foundation that culminated in the filing of its 2002 petition were designed to *stave off* bankruptcy; indeed, Ms. Camp herself testified that had those measures not been taken, “[The Foundation] wouldn’t be here. I think we would have been in this courtroom four years ago with a straight-out bankruptcy case.” N.T., 12/10/2003 a.m., at 59 (excerpts from testimony are attached at Ex. B). The president of The Foundation’s Board, Dr. Bernard Watson, testified that The Foundation was determined to avoid bankruptcy because that would destroy the ability of The Foundation to continue its mission as an independent institution. N.T. 12/8/2003 a.m., at 63-65.

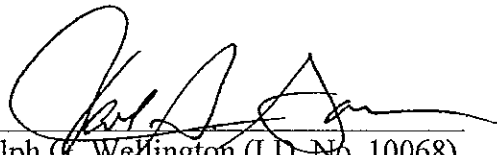
None of this information is new. Barnes Watch could find it if it only reviewed the record from the 2003-04 hearings. Nothing in Ms. Camp’s blog post calls into question the extensive *evidence* on which the Orphans’ Court based its 2004 decree. Indeed, after Appellants sought to generate press attention for their new petition by characterizing Ms. Camp’s blog post as “shocking,” Ms. Camp herself is reported to have explained in a press interview that, “There is no new news.” C. Allison, “Lawyer: ‘Shocking’ New Evidence in Barnes Foundation Case,”



*The Times-Herald* (July 2, 2012) (copy attached as Ex. C). According to that article, Ms. Camp explained that the “key word” in her comment is “bankruptcy”: “Camp said [The Foundation] never claimed bankruptcy, because it had no debt,” but it had to move because local hostility in Merion created such a “financial exigency” that “it could not survive financially in its historic home.” *Id.* The next day, Ms. Camp posted another article on her blog that reiterated that explanation and stated, “It seems that opponents of the Barnes Foundation think there was some revelation in my blog that contradicted testimony given in the three-year legal process in Montgomery County Orphans Court. There isn’t.” K. Camp, “What’s the Problem Now?,” [http://www.kimberlycamp.com/index.php?option=com\\_easyblog&view=entry&tmpl=component&print=1&id=6&Itemid=8](http://www.kimberlycamp.com/index.php?option=com_easyblog&view=entry&tmpl=component&print=1&id=6&Itemid=8) (July 3, 2012) (copy attached as Ex. D).

Barnes Watch’s petition to remand this case for still more proceedings about matters that already have been fully litigated is irresponsible. And it is vexatious. For that reason, this Court should not only affirm the Orphans’ Court’s award of sanctions, but should impose new sanctions against Barnes Watch and its counsel as well.

Respectfully submitted,



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Dated: July 6, 2012.



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

\* \* \* \* \*

THE BARNES FOUNDATION, A CORPORATION

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MEMORANDUM OPINION AND ORDER SUR SECOND AMENDED  
PETITION TO AMEND CHARTER AND BYLAWS

OTT, J.

January 29, 2004

The next chapter of The Barnes Foundation saga opened on September 24, 2002, when the Board of Trustees of The Foundation (hereinafter "The Foundation") filed a petition to amend its charter and bylaws. A number of individuals and entities filed pleadings seeking to intervene in the matter. Among them were Lincoln University,<sup>1</sup> the Board of Trustees of the Violette de Mazia Trust,<sup>2</sup> and three students currently enrolled in the art education program at The Foundation. By memorandum opinion and order dated February 12, 2003, the Court granted the status of intervenor to Lincoln University only. *See* 23 Fiduc. Rep.2d 127. On June 5, 2003, The Foundation filed for leave to file an amended petition, which was granted on July 3, 2003. On September 23, 2003, the same

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<sup>1</sup> Lincoln University has the power to nominate four of the five trustees of The Foundation's Board pursuant to the trust indenture executed by and between Dr. Albert C. Barnes and The Barnes Foundation under date of December 6, 1992, as amended and The Foundation's bylaws.

<sup>2</sup> Violette de Mazia, who served as Director of Education of the art education program at The Foundation for approximately fifty years, established this charitable trust for the benefit of The Foundation in her will.

three students of The Foundation's art education program again filed a petition for leave to intervene or to be granted status of *amicus curiae*. On October 21, 2003, The Foundation filed for leave to file a second amended petition to amend the charter and bylaws<sup>3</sup> (hereinafter "the petition"). On October 23, 2003, the de Mazia Trust filed a second petition to intervene. On October 29, 2003, the undersigned entered orders granting The Foundation leave to file a second amended petition, granting *amicus curiae* status to the students, and again denying intervenor status to the de Mazia Trust. The current petition includes provisions that resolved all of the differences between The Foundation and Lincoln University, and the latter has now withdrawn from participation in the case.

At the outset, we must comment on the unprecedented public interest in this case. Since the filing of the original petition, rarely a day has gone by without a letter or phone call arriving at the undersigned's chambers from someone wanting to weigh in on this matter. Politicians, art scholars, financial experts, and former students have sent suggestions for saving The Foundation. Major newspapers have published endless dialogues of letters to the editors, as well as editorials endorsing one outcome or another, as if this were a political race. Even legal scholars, attorneys, and law professors, who know that cases are determined by applying the law to the evidence produced in court and not by public opinion, have sent unsolicited opinion letters for our edification. The

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<sup>3</sup> Although omitted from the title of the pleading, the nature of the requested relief also entails amendments to the trust indenture of December 6, 1922, as amended.

court has studiously avoided being influenced by these outside forces;<sup>4</sup> however, the experience has been unique.

As this court and higher courts of the Commonwealth have recited on numerous occasions, The Foundation is a Pennsylvania nonprofit corporation created by Dr.

Barnes:

to promote the advancement of education and the appreciation of the fine arts; and for this purpose to erect, found and maintain, in the Township of Lower Merion, County of Montgomery and State of Pennsylvania, an art gallery and other necessary buildings for the exhibition of works of ancient and modern art, and the maintenance in connection therewith of an arboretum, wherein shall be cultivated and maintained trees and shrubs for the study and for the encouragement of arboriculture and forestry. . . .

*See Barnes Foundation Charter, approved by decree dated December 4, 1922.*

Dr. Barnes and The Foundation entered into a trust indenture under date of December 6, 1922, whereby Dr. Barnes donated his artwork to The Foundation to accomplish its charitable purposes. The collection amassed by Dr. Barnes during his lifetime which is housed at the Lower Merion gallery is large and virtually priceless. Dr. Barnes also funded The Foundation with an initial endowment of approximately six million dollars. The Foundation's bylaws incorporate the December 6, 1922 indenture, as amended, in its entirety.

In the instant petition, The Foundation sets forth its current financial state as follows. Dr. Barnes' initial endowment has been depleted. The Foundation is unable to

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<sup>4</sup> Copies of all *ex parte* communications received by the court were forwarded to all counsel immediately after their receipt.

cover its general operating expenses and to meet its needs in areas such as professional staffing, conservation treatment, fund-raising, collection assessment, facilities care, and public relations. The Foundation's ability to generate revenue from visitors to or fund-raising activities at the Merion gallery is limited by the existing zoning restrictions in Lower Merion Township. The Foundation's ability to raise revenue is also limited by the small size of its Board of Trustees.

The Foundation states that its "current fiscal situation is dire, puts at risk The Foundation's ability to fulfill its primary purpose, and threatens The Foundation's survival." (Petition, ¶15.) In the hopes of ensuring its ability to continue its purpose in the future and to improve its finances, The Foundation struck an agreement with two of Philadelphia's leading philanthropic institutions, the Pew Charitable Trusts (hereinafter "Pew") and the Lenfest Foundation (hereinafter "Lenfest,") whereby Pew and Lenfest promised to help The Foundation raise approximately \$150 million.<sup>5</sup> It is the conditions attached to this promise that have catapulted The Foundation back into court.<sup>6</sup> The fund-raising assistance from Pew and Lenfest is predicated upon the relocation of The Foundation's art collection from Merion to a new site to be built in Philadelphia, and upon the expansion of the number of trustees on The Foundation's Board. Both of these proposals run afoul of Dr. Barnes' indenture and The Foundation's charter and bylaws.

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<sup>5</sup> In addition to their offer to help raise this substantial amount, Pew and Lenfest, joined by the Annenberg Foundation, have provided \$3.1 million to The Foundation to cover its immediate operating costs. In addition, these organizations are paying the legal costs incurred in the pursuit of the present matter.

<sup>6</sup> The petition also requests permission to redraft the indenture to include other changes not mandated by the agreement with Pew and Lenfest. Some of these proposals are discussed *infra*; consideration of others is being deferred at this time.

Accordingly, The Foundation now seeks to amend these documents as set forth in detail, *infra*.

It was decided that the issues raised in the petition should be bifurcated and the court should first determine the following issues: 1) The Foundation's financial circumstances, and 2) the proposed changes to The Foundation's charter and bylaws relating to governance. After a period of discovery, hearings were held before the undersigned on December 8, 9, 10, and 11, 2003.

The least controversial of the matters presently before us is the proposed change in the size of the Foundation's Board of Trustees. Dr. Barnes' indenture provided for five trustees. The initial Board consisted of Dr. Barnes, his wife, and three other individuals. After the deaths of Dr. and Mrs. Barnes,<sup>7</sup> vacancies in the office of trustee were filled as follows: Girard Trust Company (now Mellon Bank) nominated one trustee, and Lincoln University nominated the other four. The indenture specified that: "no Trustee shall be a member of the faculty or Board of Trustees or Directors of the University of Pennsylvania, Temple University, Bryn Mawr, Haverford or Swarthmore Colleges, or Pennsylvania Academy of the Fine Arts." (Indenture, as amended, ¶17.)

Under the changes now being proposed by The Foundation, the Board would consist of fifteen members. Lincoln University would nominate five persons for election. Mellon would no longer be involved. Upon approval of the changes, the current five trustees would immediately elect three additional trustees and Lincoln would

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<sup>7</sup> Dr. Barnes died in a car accident in 1951; his wife, Laura L. Barnes, died in 1966.

immediately nominate three new names for election. A nominating committee chosen from these trustees would then recommend the remaining nominees for election to the Board. For the election of these final trustees on the initial expanded Board, Pew and Lenfest would jointly have the power to approve the nominations, however, the two institutions would have no authority in the nomination or election of trustees thereafter. The petition asserts that a larger Board is necessary because modern nonprofit corporations require larger governing boards consisting of "members who have access to a variety of communities and resources and who can provide governance expertise." (Petition, ¶38.)

In support of this proposal, The Foundation presented the testimony of Doctor Bernard C. Watson, who has served as president of The Foundation's Board of Trustees since 1999. Dr. Watson testified that the expansion of the Board is crucial to the proposed fundraising campaign. He explained that donors will commit large sums to a nonprofit only if they have confidence in its Board of Trustees. He stated that the board members must have the experience, the level of achievement, and the contacts with individuals of means and eleemosynary leanings to attract the kinds of gifts needed by The Foundation. He stated that the current Board is too small to embark on and execute the grand scale fundraising presently under consideration. (N.T. 12/8/03, morning session, 73-74.)

Testimony on this issue was also elicited from Maureen K. Robinson, a consultant for nonprofit organizations. She testified that boards of nonprofits must be large enough



to meet their basic responsibilities but not so large that the decision-making process becomes cumbersome. (N.T. 12/10/03, afternoon session, 145.) She quoted statistics generated by the National Center for Nonprofit Boards and Stanford University's Graduate School of Business showing that the average size of nonprofit boards for 2002 was nineteen (19) and the median was seventeen (17). (N.T. 12/10/03, afternoon session, 146.) Ms. Robinson opined that the current size of the Board of The Foundation is too small to do its work effectively. She stated that the proposal to triple the size would greatly improve the Board's fundraising abilities. She testified that raising millions of dollars "... is not a task for a one-man band. It's not even a task for a quintet. You need a pretty full orchestra in order to achieve those kinds of results." (N.T. 12/10/03, afternoon session, 149.)

Ms. Robinson also explained that a larger board brings greater participation and accountability. Under the current organization, a quorum is reached with only three trustees, and decisions can be made by a simple majority vote of only two. The witness stated that such a scenario fosters neither accountability nor participation. She also explained that with a larger board, there is a larger pool from which to draw leadership on a continuous basis. Ms. Robinson also commented on the fact that Lincoln University currently has the power to nominate eighty percent (80%) of The Foundation's Board. She noted the inherent conflicts in one nonprofit's having this authority over another's governing body. To paraphrase Ms. Robinson's explanation, Lincoln is in a position to compete with itself for stellar candidates, *i.e.*, it does itself a disservice if it nominates stellar candidates for The Foundation's Board and does not keep them for Lincoln's

Board, and does The Foundation a disservice if it keeps such candidates for its own Board.

In response to questions posed by the court, Ms. Robinson suggested that, had she been involved in drafting the changes currently under consideration, she would have proposed to cap the Board at 25 trustees, rather than only 15, for increased flexibility in the future. (N.T. 12/10/03, afternoon session, 186.)

The issue of increasing the size of The Foundation's Board was also touched upon during the testimony of Rebecca Rimel. Ms. Rimel is the president and chief executive officer of the Pew Charitable Trusts, which is made up of seven individual trusts. Pew has been in existence for 50 years and, during that time, has provided approximately \$1.4 billion in support to various other organizations (N.T. 12/11/03, morning session, 7.) In her capacity as president and CEO, Ms. Rimel is responsible for the operations and management of the trusts and oversees all of their grant-making activities. In addition to sitting on the Pew's Board, she is or has been a member of the board of several other nonprofits.

Ms. Rimel testified that organizations must meet Pew's stringent criteria before receiving any grants. Among the criteria are "the fact that an organization is well governed, that it has a Board, that it's diverse in experience and is capable of carrying out their stewardship." (N.T. 12/11/03, morning session, 8-9.) Regarding the proposal to expand The Foundation's Board of Trustees, Ms. Rimel testified that Pew and Lenfest are

seeking the power to approve four of the additional trustees to assure potential donors to the Foundation that its Board is “of absolute exceptional quality and up to the task of managing a very complex institution.” (N.T. 12/11/03, morning session, 27.)

In light of the testimony summarized *supra*, we find ample support for the proposal that the Board of Trustees of The Foundation should be expanded. It is clear that the stewardship of a modern-day nonprofit must rest on many shoulders. It is imperative that the trustees have wide-ranging experience, expertise, and contacts, and the ability to attract donors of substance. A board of only five trustees, no matter how talented and dedicated the individuals may be, cannot meet the enormous responsibility of carrying The Foundation into the twenty-first century.

The legal authority for amending Dr. Barnes’ indenture on this issue can be found in the doctrine of deviation. This doctrine has played a part in much of the recent litigation involving The Foundation.<sup>8</sup> This court and the Pennsylvania Superior Court examined the doctrine in connection with certain changes to Violette de Mazia’s testamentary trust that were being proposed to carry out a settlement agreement between the de Mazia trust and The Foundation. The undersigned determined that the changes were substantive, not administrative, and that the doctrine was inapplicable. See Barnes

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<sup>8</sup> By recent litigation, we refer to the period dating from 1991 when The Foundation’s previous administration sought to remedy its financial woes by obtaining permission to sell up to 15 of its paintings, which was prohibited by Dr. Barnes’ indenture. An amended petition (seeking permission instead to send some of the collection on a world tour to generate funds to renovate the gallery in Merion) was granted by the late Honorable Louis D. Stefan of this court. See Barnes Foundation, a Corporation, 12 Fiduc. Rep.2d 349 (1992).

Foundation, a Corporation-Estate of Violette de Mazia, Deceased, 15 Fiduc. Rep.2d 322

(1995). In its opinion reversing this decision, the Superior Court stated:

The doctrine of deviation has been summarized in the Restatement (Second) of Trusts:

[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.

In order to permit deviation from the administrative provisions of a trust, courts generally require the presence of two elements: “(1) unforeseen and unforeseeable change in circumstances, and (2) a frustration of the settlor’s main objectives by this change, if strict obedience to the settlor [sic] directions were required.” Bogert, supra at 230. 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.” Colin McK. Grant Home v. Medlock, 292 S.C. 466, 472, 349 S.E.2d 655, 659 (1986).

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

The doctrine of deviation also played a role in another proceeding wherein The Foundation sought permission 1) to hold fundraising events at its Merion facility, and 2) to increase the admission fee to the gallery to \$10 and 3) to open the gallery to the public six days a week. The undersigned denied the first request on the grounds that it ran afoul of language in Dr. Barnes’ indenture<sup>9</sup> and The Foundation had failed to prove that,

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<sup>9</sup> Paragraph 33 states: “The purpose of this gift is democratic and educational in the true meaning of those words, and special privileges are forbidden. It is therefore expressly stipulated by the Donor that at no time

because it was impossible to raise adequate funds otherwise, deviation was necessary. This court approved an increase in the admission price to \$5 and agreed that the gallery could be open one additional day per week. Barnes Foundation, a Corporation (No. 6), 15 Fiduc. Rep.2d 381 (1995). On appeal by The Foundation, the Superior Court reversed us on the fundraising issue, on the grounds that the events contemplated by The Foundation fell outside the ambit of prohibited activities in Dr. Barnes' indenture, and, as a result, deviation was not an issue. That Court upheld the undersigned on the other two issues, agreeing that The Foundation had failed to show that deviations from the terms of the indenture were necessary. The Superior Court noted:

The burden of proof is always on the party seeking the deviation because in the case of "an express trust, favorable presumptions arise, and the burden of proof is on the party disputing its validity or terms. 89 C.J.S. Trusts § 66, at 845. . . [The Foundation] argues that it should have prevailed below because the evidence offered was "uncontradicted," and the proposed charges were "approved" by the Attorney General. Such an argument has no foundation in law. The mere fact that evidence is uncontradicted does not automatically imbue that evidence with sufficient weight to sustain one's burden of proof. Additionally, although the law requires the participation of the Attorney General's Office in any proceeding to modify the terms of a charitable trust, [The Foundation] cites no support for the proposition that the Court is bound by the position espoused by the Office of the Attorney General, and a reviewing judge must exercise his or her independent power of review.

Barnes Foundation, a Corporation, 453 Pa.Super. 243, 253, 683 A.2d 894, 899 (1996)

(citations omitted.)

This court also approved a deviation from the language in Dr. Barnes' indenture requiring the gallery to be closed entirely for the months of July and August. In that

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after the death of said Donor, shall there be held in any building or buildings any society functions commonly designated receptions, tea parties, dinners, banquets, dances, musicales or similar affairs, whether such functions be given by officials, Trustees or employees of The Barnes Foundation or any other person or persons whatsoever, or whether such functions be private or public."

matter, The Foundation produced direct evidence, in the form of a 1949 letter from Dr. Barnes, that attempts to protect the artwork from summer's heat and moisture had been unsuccessful. After determining that modern climate-control technology could not be anticipated by Dr. Barnes, we decreed that year-round access to the gallery was permissible. *See Barnes Foundation, a Corporation (No.9)*, 18 Fiduc Rep.2d 393 (1998).

With this authority in mind, we believe it appropriate to permit deviation on this issue. We determine that the provisions in the indenture concerning the structure of the Board of Trustees of The Foundation are administrative in nature. We agree that Dr. Barnes could have foreseen neither the complicated, competitive, and sophisticated world in which nonprofits now operate, nor the range of expertise and influence the members of their governing bodies must now possess. We conclude that maintaining the *status quo* in this regard would substantially impair the accomplishment of the Foundation's charitable purposes, and that approving the expansion of its Board of Trustees is therefore necessary.

The second major issue before us -- relocating the art collection to Philadelphia -- is far more complex. The pertinent provisions of the December 6, 1922, indenture between Dr. Barnes as donor, and The Foundation as donee, as amended, are as follows:

¶9. At the death of Donor, the collection shall be closed, and thereafter no change therein shall be made by the purchase, bequest or otherwise obtaining of additional pictures, or other works of art, or other objects of whatsoever description. Furthermore, after the death of Donor and his wife, no buildings, for any purpose whatsoever, shall be built or erected on any part of the property of Donee.

¶10. After Donor's death no picture belonging to the collection shall ever be loaned, sold or otherwise disposed of except that if any picture passes into a state of actual decay so that it no longer is of any value it may be removed for that reason only from the collection.

¶11. Should the said collection ever be destroyed, or should it for any other reason become impossible to administer the trust hereby created concerning said collection of pictures, then the property and funds contributed by Donor to Donee shall be applied to an object as nearly within the scope herein indicated and laid down as shall be possible, such application to be in connection with an existing and organized institution then in being and functioning in Philadelphia, Pennsylvania, or its suburbs.

¶13. . . . After the death of Donor and his said wife, the furniture, the rare and valuable collection of rugs, together with the Chinese vases and other objects of art, but exclusive of the paintings, that are located in the administration building, shall be sold as expeditiously as may be found necessary at public auction. All the paintings shall remain in exactly the places they are at the time of the death of Donor and his said wife. . . . <sup>10</sup>

The basis for the proposed relocation is financial necessity, and the following evidence was presented on this issue at the hearing. The world tour of some of The Foundation's artwork in the mid-1990s generated approximately \$16 million. Half of this money was used for the renovations to the Merion gallery; the other half was placed in a restricted account to be used for capital improvements, subject to court approval. Approximately \$4 million remains in the restricted account. (N.T. 12/8/03, morning session, 39; Exhs. P-42 and P-45.) Regarding assets available for operating expenses, these totaled approximately \$9.5 million at the end of the 1980s. Even with addition of the money received in settlement from the de Mazia trust (\$2.5 million), the available assets totaled \$6.6 million by the end of 1997, \$2.4 million by the end of 1998, and \$1.6 million by the end of 1999. For the past four years, the end-of-year assets have fluctuated

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<sup>10</sup> By order dated May 17, 2001, the undersigned interpreted the language of paragraphs 10 and 13 to prohibit the loan, sale, or other disposition of only those works hanging permanently in the gallery.

between \$2.4 and \$3.3 million. Included in these year-end totals are the bridge financing received from Pew (\$3.1 million paid in two installments in 2002 and 2003) and \$1.7 million realized in 2000 when The Foundation restructured its pension plan. (N.T. 12/9/03, morning session, 46-48.)

Except for those years when The Foundation has enjoyed these non-recurring infusions of cash, The Foundation has been operating in the red over the past decade. The deficits can be traced, in large part, to the incredibly expensive and lengthy litigation in which The Foundation was embroiled in the 1990s. In addition to obtaining permission to send some of the collection on tour, the previous administration attempted to increase revenues by increasing public admission<sup>11</sup> to the gallery. This effort was stymied by the limits imposed by Lower Merion Township, to wit, the gallery can be open only on Fridays, Saturdays and Sundays, and only 1200 visitors are allowed per week. The admission price remains at five dollars (\$5) as per the decree of this court which was affirmed at 453 Pa.Super. 243, 683 A.2d 894, discussed *supra*.

In the late 1990s, the Board of The Foundation instituted several changes in hopes of ameliorating The Foundation's future, financially and otherwise. The Board hired its first professional art administrator, Kimberly Camp, as executive director and chief executive officer in 1998. Since her arrival, the income from the sale of

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<sup>11</sup> Dr. Barnes' indenture provided for the gallery to be open to the public on Saturdays only. Ironically, after his death, it was The Foundation that resisted all public access. In 1960, an additional day of public admission was added by the late Honorable Alfred L. Taxis, Jr. of this court, on remand from the Supreme Court. In 1967, Judge Taxis decreed that the gallery should also be open Sunday afternoons. In 1995, the undersigned added one more day for a total of 3-1/1 days per week. The number of visitors permitted on those days was never at issue before this or the appellate courts.



merchandise at the gallery store has quadrupled. (N.T. 12/9/03, afternoon session, 89.) Ms. Camp also hired professional staff for the purposes of, *inter alia*, development and collection assessment. She testified that the efforts of the development staff have resulted in significant contributions to The Foundation. (N.T. 12/9/03, afternoon session, 86-87.) The Foundation demonstrated an increase in same from \$0 in 1990 to an average of \$2.9 million a year over the past three years. (Exh. P-49.)

Inevitably, the "professionalization" of these aspects of the Foundation's operations has raised costs. Also on the debit side of The Foundation's ledger is an award of legal fees assessed against a predecessor administration in an unsuccessful federal suit. In Ms. Camp's opinion, there is no possibility of the township's loosening its restrictions on visitors. (N.T. 12/10/03, afternoon session, 10.) On the issue of seeking an increase in the ticket prices, Ms. Camp testified that would do little to cure The Foundation's financial woes, since doubling or tripling the current amount would not approach the operating cost per ticket, and would likely reduce the number of people willing to visit. (N.T. 12/9/03, afternoon session, 115-16.) In essence, the Foundation is covering its costs of operation at present only because of the bridge financing from Pew and Lenfest.

The Foundation painted a bleak picture of its options for getting out from under this financial crush. As for deaccessioning, that is, selling some of the Foundation's artwork, Dr. Watson and Ms. Camp testified that this drastic course of action is considered unethical in the art world and would not bring enough money for a long-term

solution. (N.T. 12/8/03, morning session, 65-66; N.T. 12/10/03, morning session, 41-45.) The collection amassed by Dr. Barnes is much larger than what hangs on the walls of the Merion gallery. Even if The Foundation were to ignore the taboo against deaccessioning and "marketed" some pieces not used in the gallery, (*i.e.*, in storage, on the walls of the administrative offices, or elsewhere,) Ms. Camp minimized the interest in such works at present, largely because there is so little public awareness of them. (N.T. 12/10/03, afternoon session, 85-88.) The Foundation also owns Ker-Feal, a 137.7 acre parcel of land in Chester County, bequeathed to it in Dr. Barnes' will. Dr. Barnes had acquired the property "to create a living museum of art and to develop a botanical garden, both to be used as part of the educational purpose of The Barnes Foundation." (Exh. P-6.) The farmhouse on the property is filled with 3,000 pieces of 18<sup>th</sup> century decorative art collected by Dr. Barnes. (N.T. 12/9/03, afternoon session, 19, 24.) Ker-Feal has never been utilized as the "living museum" envisioned by Dr. Barnes, and the farmhouse is in a state of disrepair. Recently, however, The Foundation has taken steps to improve the condition of the house, including mold remediation. Ms. Camp stated that The Foundation constantly receives offers from developers to purchase the property, the most recent offer being \$12 million. (N.T. 12/9/03, afternoon session, 26.) Ms. Camp testified that The Foundation is not inclined to consider selling Ker-Feal and/or its contents because they make up part of Dr. Barnes' collection and should not be deaccessioned. (N.T. 12/9/03, afternoon session, 21; 12/10/03, morning session, 36.) Dr. Watson also testified that the money that would be realized from the sale of Ker-Feal would not solve The Foundation's long-term financial problems. (N.T. 12/8/03, morning session, 67.)

Dr. Watson chronicled other avenues that The Foundation has explored to avert the financial crisis. The Board retained the firm of Deloitte and Touche to conduct a financial analysis of three different operating scenarios at The Foundation, specifically: 1) "as-is" (continuing the education programs and public visitation schedule as they now stand,) 2) maintaining the education programs but discontinuing public access, and 3) discontinuing both and strictly conserving the collection. All three were projected to result in deficits. (N.T. 12/8/03, morning session, 59-63.) The Board rejected the idea of filing for bankruptcy. (N.T. 12/8/03, morning session, 63.)

The Board also sought out benefactors, and enjoyed some success (with Pew, the J. Paul Getty Fund, the Henry Lewis Foundation, and the Mellon Foundation) in obtaining funding for the collection assessment program. (N.T. 12/8/03, morning session, 42-43.) However, the attempts to build up the Foundation's endowment were met with negative responses. The potential individual donors and philanthropic organizations alike were unwilling to support The Foundation because of the restrictions imposed by the township and the indenture. (N.T. 12/8/03, morning session, 51.) Some urged The Foundation to merge with another entity and possibly relocate the collection. The Board was unwilling to relinquish control over The Foundation's future by becoming subservient to another board. (N.T. 12/8/03, morning session, 52.) Dr. Watson approached Pew and Lenfest who came up with the concept now under consideration. Dr. Watson and the rest of the Board decided to accept the offer from Pew and Lenfest

(who were joined by Annenberg) because it allowed The Foundation to maintain its independence. (N.T.12/8/03, morning session, 54.)

The particulars of the plan envisioned by Pew, Lenfest, Annenberg, and The Foundation are as follows: the outside organizations will commit to helping raise \$150,000,000. The cost of constructing the new facility in Philadelphia is projected to be \$100,000,000; and the remaining \$50,000,000 will be used to replenish The Foundation's endowment. Ms. Rimel testified Pew has already obtained pledges totaling \$100,000,000. (N.T. 12/11/03, morning session, 40.) Regarding the site of the new building, Dr. Watson testified:

I have spoken to Philadelphia city officials about it on a number of occasions. I have spoken to the Mayor and the Mayor committed to finding space on the Parkway for this move if the Court grants this petition. He has stated that publicly and he has said that he is strongly in support of this. . . This property would be donated. The land would be donated. We would obviously have to use part of the money that we're attempting to raise for the construction of an appropriate building.

(N.T. 12/8/03, morning session, 81-82.) Ms. Camp and Ms. Rimel indicated that the \$100,000,000 figure for construction is a conservative estimate and is based on costs incurred in building other gallery spaces around the country. (N.T. 12/9/03, afternoon session, 110, 12/11/03, morning session, 34.) No architectural plans have been drafted at this preliminary stage because The Foundation did not feel it appropriate to commit any funds to this endeavor unless and until this court gives its approval to the move. (N.T. 12/8/03, morning session, 85; 12/9/03, afternoon session, 109.) For the same reason, The Foundation has not commissioned a feasibility study to assess whether \$100,000,000 will

be enough to build the new site and whether \$50,000,000 will be enough of an endowment to ensure The Foundation's future. (N.T. 12/9/03, afternoon session, 109.)

Ms. Rimel estimated that the \$50,000,000 endowment will yield a yearly income of approximately \$2.5 million. Based upon an estimated annual budget for The Foundation's operations at three locations<sup>12</sup> of \$8 to \$10 million, Ms. Rimel explained that The Foundation would be looking to make up the difference (\$5.5 to \$7.5 million) through admissions, merchandise sales, and contributed revenue. (N.T. 12/11/03, morning session, 80.) Regarding the latter source of income, Ms. Rimel suggested that a new gallery in Philadelphia, operating without the current restrictions in Merion, would generate sufficient excitement and interest to attract donors to The Foundation on an ongoing basis. (N.T. 12/11/03, morning session, 82.)

We begin our analysis of this evidence with the observation that the fact-finding in this case has been seriously hamstrung by the total absence of hard numbers in evaluating these proposals. We have only a preliminary "guesstimate" about the real cost of constructing the new venue. We have no concept of The Foundation's operating expenses at the new space. There have been no feasibility studies or *pro formas* projecting the success of the proposed venture. We don't know how much it would cost to maintain the Merion facility for administrative purposes and for the horticultural course. And The Foundation's plans for Ker-Feal are far too rudimentary and amorphous to assign any costs to them.

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<sup>12</sup> Ms. Camp testified that The Foundation's ideal would be a "three-campus" operation -- art classes and public visitation at the Philadelphia site; administrative offices and horticulture classes in Merion; and the living museum at Ker-Feal. (N.T. 12/9/03, afternoon session, 111.)

On the opposite side of the coin, we have no hard numbers to evaluate options other than the Pew/Lenfest/Annenberg plan. Other than the offers for the land surrounding Ker-Feal, we have not heard even a wild estimate of the value of the items owned by The Foundation but not on display in the gallery in Merion. Nevertheless, the possibility of selling some of these holdings has been dismissed by The Foundation as too little, too shortsighted, or unethical. The move to Philadelphia has been floated as the only lifeboat in the entire sea. Since the outside charities are footing The Foundation's legal bills in these hearings, we accept their single-option theory as the product of zealous advocacy. We find nothing, however, to commend the Office of Attorney General's actions in this regard.

The Attorney General, as *parens patriae* for charities, had an absolute duty to probe, challenge and question every aspect of the monumental changes now under consideration. The law of standing, which has been repeated so many times<sup>13</sup> in opinions concerning The Barnes Foundation by this court and Pennsylvania appellate courts, permits only trustees, the Attorney General, and parties with a special interest in the charitable trust to participate in actions involving the trust. In these proceedings, the three students were granted *amicus curiae* status, but their participation was limited to exploring the impact of the proposals on The Foundation's education programs. Thus, the Attorney General was the only party with the authority to demand, via discovery or otherwise, information about other options. However, the Attorney General did not

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<sup>13</sup> "Standing" as a leitmotif in Barnes cases dates back to 1953, when the Supreme Court determined that "The Philadelphia Inquirer" could not bring proceedings to enforce Dr. Barnes' indenture. See Wiegand v. The Barnes Foundation, 374 Pa. 149, 97 A.2d 81.

proceed on its authority and even indicated its full support for the petition before the hearings took place.<sup>14</sup> In court in December, the Attorney General's Office merely sat as second chair to counsel for The Foundation, cheering on its witnesses and undermining the students' attempts to establish their issues. The course of action chosen by the Office of the Attorney General prevented the court from seeing a balanced, objective presentation of the situation, and constituted an abdication of that office's responsibility. Indeed it was left to the court to raise questions relating to the finances of the proposed move and the plan's financial viability.

Having established the record summarized above, The Foundation suggests that it has laid the groundwork for invoking the doctrine of deviation on the issue of relocating the collection. We have set forth the basic concepts of this doctrine, including the language of the Restatement (Second) of Trusts, *supra*. Our Superior Court has cited to Corpus Juris Secundum for the proposition that the party seeking the deviation (here The Foundation) has the burden of proof. 453 Pa.Super. at 253, 693 A.2d at 899. We too quote therefrom as follows:

In exercising its jurisdiction to modify or alter, the court should . . . be exceedingly cautious. Courts will exercise such power only when it clearly appears to be necessary and only in extreme cases.

90 C.J.S. Trusts, §97 (2002 ed.) This language sets forth a "clear and convincing" standard of evidence in deviation matters. Furthermore, if the court is convinced that

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<sup>14</sup> The Attorney General's Office did advocate for changes in the petition as originally filed by The Foundation in September of 2002. These changes, which were incorporated in The Foundation's amended and second amended petitions, did not touch on the proposal to relocate the gallery to Philadelphia.

deviation is appropriate, it must choose the least drastic modification.<sup>15</sup> In support of its argument, The Foundation cites to Comment e of §381 of the Restatement, which provides:

If a testator devised land for the purpose of maintaining a school or other charitable institution upon the land, and owing to a change of circumstances, it becomes impracticable to maintain the institution on the land, the court may direct or permit the trustee to sell the land and devote the proceeds to the erection and maintenance of the institution on other land, even though the testator in specific words directed that the land should not be sold and that the institution should not be maintained in any other place.

The Foundation did not set forth the remainder of that comment, to wit:

If, however, the testator provided that if the institution should not be maintained upon the land devised the charitable trust should cease, the trustee will not be directed or permitted to maintain the institution on other land.

So also, if the maintenance of the institution on the land devised was an essential part of the testator's purpose, the court will not direct or permit the trustee to maintain the institution on other land.

Dr. Barnes' indenture does not specifically state that the gallery must be maintained in Merion or cease to exist. Nevertheless, it is difficult to dismiss Dr. Barnes' choice of venue as a minor detail. Dr. and Mrs. Barnes lived on the site, in the administration building adjacent to the gallery. Dr. Barnes' indenture provided for the administration building to be used as classrooms for the art education program after his and Mrs. Barnes' deaths. The focus of the education program is the ensembles of art in the gallery. The arboretum on the grounds is also an integral part of the educational work that was the goal of Dr. Barnes' experiment. Certainly, a strong argument can be made that these facts fall within the parameters of the last sentence of the comment quoted above ("the

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<sup>15</sup> The Uniform Trust Code at §413(c) states: "A court may modify an administrative provision of a charitable trust only to the extent necessary to preserve the trust." The Pennsylvania comment to the UTC states that this subsection is a codification of existing state law. Approval of this provision, as 20 Pa. C.S. §7740.3(c), and the rest of the Pennsylvania Uniform Trust Act is pending in the Pennsylvania legislature.



maintenance of the institution on the land . . . was an essential part of the . . . testator's purpose.")

In resolving this very close question, we turn for guidance to the decisions of the Pennsylvania Superior Court in earlier Barnes Foundation matters. In the two opinions issued in September of 1996 (453 Pa.Super. 436, 684 A.2d 123, and 453 Pa.Super. 243, 683 A.2d 894,) that Court examined cases from other jurisdictions where deviation was allowed, noting:

In each of the above-cited cases, the respective Court made a thorough effort to avoid the momentary impediment and apply a pragmatic approach to ensuring that the settlor's primary goal be achieved.

453 Pa.Super. at 458, 684 A.2d at 133. In both of these opinions, our Superior Court considered the case of Colin McK. Grant Home v. Medlock, 292 S.C. 466, 349 S.E.2d 655 (1986), in which:

the Supreme Court of South Carolina was confronted with a petition by the trustee of a testamentary trust who wished to sell real estate upon which existed a nursing home which had been provided for the care of "elderly Presbyterians." Because of gradual dilapidation of the surrounding neighborhood, it was the intent of the trustees to sell the existing buildings and use the proceeds of the sale to build another facility in a different part of town. Despite the fact that the by-laws of the home, at the time of death of the remaining trust settlor, specifically provided that "[t]he Colin M.K. Grant [sic] shall always be located and conducted in the property at the corner of Hagen and Meeting Streets in the City of Charleston, as Memorial to the late Colin C.K. [sic] Grant," *Id.* at 471-72, 349 S.E.2d at 658, the Court permitted the requested deviation and allowed the sale and the rebuilding of a facility at a separate location.

The Court shared the observation that "[t]here is no reason to doubt that if that particular real estate should become unsuitable for [its] purpose, [settlers] would have wished the funds to be used to provide some other means of housing for the intended beneficiaries of the trust. Thus, the use of the specific home they established was merely one method, convenient at the time of the trusts' establishment, for carrying out this intent." *Id.* at 471-72, 349 S.E.2d at 658. The Court then found because the neighborhood in which the home was located had become so dilapidated and unsafe that the purpose of the trust could no longer be carried out, deviations from the terms of the trust was permissible.

453 Pa.Super. at 457, 684 A.2d at 133.

From its favorable reviews of the Colin McK. Grant Home case, we gather that our Superior Court would find that the present location of the gallery is not sacrosanct, and relocation may be permitted if necessary to achieve the settlor's ultimate purposes. We therefore rule in favor of The Foundation on this preliminary point.

That is not the end of our inquiry, however, because the element of necessity has not been established clearly and convincingly. What has been established beyond peradventure is that The Foundation's finances have reached a critical point. It is unnecessary and probably futile to review the last ten years of The Foundation's administration in order to lay blame for this situation. At the hearings in December, the *amicus curiae* attempted to raise the specter of runaway spending by the present administration as the root cause. However, based on this court's prolonged experience with this organization, we accept its claim that the installation of professional management was necessary, expensive and long overdue. Lower Merion Township certainly bears some of the responsibility for the financial crisis. The Foundation's attempt to raise revenues by increased public access to the gallery was met with hostility, bordering on hysteria, from some of the owners of the adjacent houses. The township reacted to the situation by imposing a series of administrative regulations that have put a stranglehold on The Foundation's admissions policy. The witnesses for The Foundation expressed no hope of winning concessions from the Township; and this Orphans' Court has no jurisdiction to broker or impose any changes to the unfortunate situation.

The financial exigency having been demonstrated, there are still issues of necessity and the least drastic solution. There has not been an adequate showing that sufficient revenue can not be generated by other means. We need to be persuaded that the move to Philadelphia is the least drastic deviation that will stabilize The Foundation's future. As we stated above, there is a dearth of hard evidence on the value of the assets that are not displayed in the gallery and could be sold. We heard from several witnesses about the ethical implications of deaccessioning in art administration. However, we are not here focusing on the gallery collection, and we are not convinced that the prohibition is or should be absolute in a non-museum setting. Otherwise stated, we question whether the same constraints on a museum not to sell its art bind an educational institution with works of art among its assets. On these unanswered questions, The Foundation must produce additional evidence.

To that end and pursuant to our broad supervisory powers in the area of charitable trusts,<sup>16</sup> we direct The Foundation to undertake an analysis of its assets other than the works in the gallery in Merion. The goal will be to ascertain whether \$50,000,000 or more can be raised for The Foundation's endowment through the sale of non-gallery artwork and/or the real estate in Chester County. If it appears that adequate capital can be produced by deaccessioning, the ethical problems presented thereby may have to yield to the donor's expressed wishes. We take our cue here from Dr. Barnes' mandate in ¶13 of the indenture that everything except the paintings in the gallery should be sold "expeditiously" after his and Mrs. Barnes' deaths. The details as to how this assessment

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<sup>16</sup> See, In re Estate of Coleman, 456 Pa. 163, 317 A.2d 631 (1974).

will be conducted and what experts will be retained shall be determined after meetings *in camera* with counsel.

In addition to this assessment, the court must insist on some reason to believe that the bold proposals before us will accomplish the desired ends. This will require the submission of a business plan for the Philadelphia operation. The Foundation and its backers chose not to commission a feasibility study of this nature on the grounds such an expense should not be incurred prematurely. However, we are convinced that a *pro forma*, including projections for earned revenue, is a crucial piece of evidence at this stage in the decision-making process.

The petition proposes additional changes relating to Paragraphs 6, 30, 33, and 34 of Dr. Barnes' indenture. We will rule on these proposed amendments after the additional information requested above is made part of the record. At present, the following Decree is appropriate.

**DECREE**

AND NOW, this 29th day of January, 2004, upon consideration of The Foundation's second amended petition and after hearing thereon, the Board of Trustees of The Foundation are hereby granted permission to amend the bylaws of The Foundation as they relate to the Board's powers, trustees' qualification, number, composition and selection, election, term and compensation to conform to ARTICLE V of the proposed bylaws introduced at the hearing as Exh. P-4. The disposition of the remaining requests for relief in the second amended petition is deferred, pending the court's receipt of additional information.

This is an interlocutory decree, not subject to the filing of exceptions or appeal.

BY THE COURT:

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J.

Copies to:  
Arin M. Adams, Esquire, for The Foundation  
Lawrence Barth, Esquire, for the Office of Attorney General  
Terrance A. Kline, Esquire, for *amicus curiae*



1 Kimberly Camp - Cross 59

2 temporary CEO, a gentleman from Arco, who was at  
3 least for a period of time running the  
4 foundation?

5 A. He was an interim -- I believe his title  
6 was interim CEO. Earl Bradford.

7 Q. Earl Bradford.

8 A. And he was there from February of '98 to, I  
9 think, October of '98.

10 Q. All right. But there was someone else. It  
11 was just interim; not a full-time professional.

12 A. Right.

13 Q. As part of your administration of the  
14 Barnes Foundation, you testified, at some  
15 length, as to your expansion of the professional  
16 staff. Why not just keep doing it the way it  
17 was always done? I mean, the Barnes Foundation  
18 seems so steeped in tradition. Why change it?

19 A. I think if I hadn't changed it, it wouldn't  
20 be here. I think we would have been in this  
21 courtroom four years ago with a straight-out  
22 bankruptcy case. There was -- the  
23 inefficiencies in that organization were  
24 profound.

25 Q. So, in other words, change was necessary.

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Bernard C. Watson - Direct

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get you additional resources for that cutoff for no real purpose, and that's why you continue to have a deficit.

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(The witness returned to the stand.)

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BY MR. WELLINGTON:

Q Now, did the Barnes's Board consider yet some other alternatives, such as filing bankruptcy?

A Yes. We considered filing bankruptcy in Federal Court. That would have done such a violation to Doctor Barnes's intentions and what the Barnes Foundation was created for.

In addition to the cost of doing that, it meant changing the Bylaws, it meant giving up the authority of the Board to oversee that and having no control over what a Bankruptcy Court would instruct us to do, and so that was rejected.

Q Did you consider having some other art organization come in and manage the Barnes?

A Yes, we considered that, and it might have been possible to have another organization do that, but this is the net result of having some other



1 organization do it.

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3 One, they would want substantial  
4 fees for doing the management and carrying out the  
5 activities, which our own staff carries out. They  
6 would want to have us conform to their method of  
7 operation, and their rules and procedures and all of  
8 that. They would want some kind of concessions over  
9 the art and how it is used and fundraising, and,  
10 essentially, we would be giving up, by going to  
11 another organization, the kind of control that we  
12 have refused to give up for any of those who have  
13 offered to provide any help to us.

14 Q Did you consider a merger with another art  
15 organization?

16 A The same conclusion would apply for that. If we  
17 merged with another organization, we would be merging  
18 out of weakness. We would be merging without any  
19 kind of endowment, without funds, and we would be  
20 doing it clearly because we needed that other  
21 organization, and we would again become subservient  
22 to or a subset of or a junior partner in another  
23 organization. Their priorities would prevail, their  
24 rulings would prevail, and we would essentially  
25 become, again, an advisory Board, and it would not

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2 address the long-term financial requirements of the  
3 Barnes Foundation.

4                   Furthermore, if you merged with  
5 another organization, it is clear that the paramount  
6 driving force would not be Doctor Barnes's vision and  
7 it would not be the advancement of education as he  
8 foresaw it and it would clearly not be what Doctor  
9 Barnes had in mind when he created and funded this  
10 foundation.

11 Q     Well, Doctor Watson, this collection has been,  
12 in the press, purported to be worth billions and  
13 billions and billions of dollars. Why didn't you  
14 just sell a couple of van Goghs?

15 A     The answer to that is very simple.

16                   One, selling one or two of the  
17 paintings would not solve our long-term financial  
18 problems. It would not create an endowment large  
19 enough for us to operate the way we should operate.

20                   Number two, it still would not  
21 address the restrictions that we operate under in the  
22 current location. We would still have those  
23 restrictions on attendance, the number of people who  
24 can come, the days we can be open, the hours, how  
25 much we can charge, and that would not be addressed



## Lawyer: ‘Shocking’ new evidence in Barnes Foundation case

By CHERYL ALLISON  
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Monday, July 2, 2012

In the latest twist in the Barnes Foundation case, the citizens group that has opposed the art collection’s move to Philadelphia has filed a new petition to send the matter back to the judge who approved it nearly eight years ago.

Citing “shocking” new evidence, attorney Samuel C. Stretton, representing the group Barnes Watch, filed a petition in Pennsylvania Superior Court Friday, asking it to remand the case to Montgomery County Orphan’s Court Judge Stanley R. Ott.

The “newly discovered evidence” consists of comments in a recent blog posting by former Barnes Foundation president and CEO Kimberly Camp which Stretton said is “absolutely contrary to the position and information presented by the Barnes Foundation” during court hearings in 2003 and 2004.

Camp, who is writing a book about her experiences with the foundation in its home in Merion and that long legal battle, included the following comment among her musings on attending the May opening of the new Barnes museum on the Benjamin Franklin Parkway in Philadelphia.

“Bankruptcy was not the reason we filed the petition to move the Foundation to the city. At the time the petition was filed, the Barnes Foundation had a cash surplus and we had no debt — none,” she wrote, adding, “But, saying so made the rescue so much more gallant.”

Camp’s comments can be found on her website at [www.kimberlycamp.com](http://www.kimberlycamp.com).

Stretton, in a phone interview Monday, said a member of the group that has fought the move came across the blog entry and faxed it to him last week.

“It was very disturbing to me,” he said. “The whole thrust of her testimony and the testimony of the organization for which she was CEO was, ‘We can’t stay in Merion because we don’t have the money,’ and that it might have to file for bankruptcy.”

An effort to reach a Barnes Foundation spokesman for comment Monday was not successful.

In April, Stretton filed an appeal in Superior Court of Ott’s order denying standing to the Friends of the Barnes Foundation and Barnes Watch to reopen the case and requiring them to pay \$25,000 of the foundation’s legal costs. The groups had argued that Ott should allow them to pursue a Private

Attorney General strategy because comments by then-Attorney General Mike Fisher in the film "The Art of the Steal" revealed a conflict of interest in the office's role in the 2003-2004 hearings.

The Attorney General's Office has filed a cross-appeal in Superior Court, seeking sanctions against the group to cover a portion of its costs in objecting to the petition.

Stretton and his clients had been working on a resolution of that matter, but now the attorney says that, having seen the information in Camp's blog, he wants to pursue the remand, even if the appeal is withdrawn.

"I am asking that this matter be sent back to so we can have a hearing on this issue since apparently false information was presented," he wrote in a notice to the court.

"Although it is late in the game now with the Barnes Foundation open in Philadelphia, the court system has to have integrity," Stretton said in a statement.

"There is no new news," Camp said when contacted Monday in Washington state, where she relocated in 2007 to lead the effort to open a new museum and interpretive center on the area's history and pre-history. She currently works as a consultant and lecturer to non-profits and cultural organizations, and is at work on a book with the working title, "Defending the Dead," which she describes as "The totally true story about the Barnes Foundation transformation."

A key word in her comment, she said in the interview, is "bankruptcy." Going back to the Barnes Foundation original petition in 2002 to alter the terms of founder Dr. Albert C. Barnes's indenture of trust and permit the move, Camp said it never claimed bankruptcy, because it had no debt. However, after lengthy clashes with Merion neighbors and Lower Merion Township, she said the foundation did seek to prove "financial exigency" for a move, because it could not survive financially in its historic home.

Its endowment had been spent down, it was threatened with more litigation. The institution said it was "OK now," but did not have "enough of a safety net" to continue in Merion.

At that point, the foundation had commitments from three prominent Philadelphia philanthropies, the Annenberg Foundation, the Lenfest Foundation and the Pew Charitable Trusts, to support a new location in Philadelphia.

Camp did not explain her further comment in the blog that "Saying so made the rescue so much more gallant."

In the lengthy blog post, Camp, an architect of the Barnes move, goes on to point out her disappointment with some aspects of the new museum, including what she sees as a diminishment of Albert Barnes's intention to make his collection and art education accessible to the "common man" and his statement about the influence on and equal footing African art should have with European art.

In reaction to Camp's blog comment, Evelyn Yaari, a member of the Friends of the Barnes Foundation, said, "Of course the Barnes wasn't broke. How could an institution with a tiny budget, a rich history eligible for National Landmark status, and an unparalleled art collection be broke?"

"Making it appear to Judge Ott and the press to be broke without an alternative to the move was the essential task for Ms. Camp and other witnesses during court hearings. They performed their roles superbly — but not admirably — in a court process that lacked anyone in opposition with legal standing, including the right to discovery," Yaari went on to say. "The consequences are an immense

loss to the public of an irreplaceable cultural asset and a permanent stain on those who maneuvered it.”

In previous court petitions, move opponents have questioned the Barnes Foundation’s financial need to relocate. Their inability to gain standing to intervene, combined with what they see as the Attorney General’s Office’s conflicted role, is a basis of the higher court appeal.

Stretton said he can’t predict what the court will do, but he said, with the new questions raised by Camp’s comments, “this matter needs to be sent back down to Judge Ott to sort this out.”

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# Whats the problem, now?

Jul 04 Posted by Kimberly Camp in Uncategorized  
July 3, 2012

Yesterday morning, I checked my e-mail. The usual smattering of bookings for lectures, and collectors wanting prices for paintings or dolls, was outnumbered with buzz about my very first blog. Until yesterday, I was never really convinced that busy people had time to read blogs. I'm happy to be wrong.

It seems that opponents of the Barnes Foundation think there was some revelation in my blog that contradicted testimony given in the three-year legal process in Montgomery County Orphans Court. There isn't.

I wrote, "Bankruptcy was not the reason we filed the petition to move the Foundation to the city. At the time the petition was filed, the Barnes Foundation had a cash surplus and we had no debt - none. But, saying so made the rescue so much more gallant." Before I go any further with addressing that comment, I'll start with the word "bankruptcy."

Complex ideas are condensed for print/broadcast media, to make sharp, clean compelling stories. Words are used that cut to the chase, that capture the sentiment, the moment, and the reader/viewer's attention. They do it because they have deadlines, limited space and other assignments. The media used "bankruptcy" to describe our situation. It was convenient and it stuck, and it made the story of the donors and the \$150 million campaign larger than life.

Believe me, what funders and philanthropists did for the Barnes is larger than life; unprecedented and courageous. Without them, who knows what our future would have been. No matter how many times we tried to explain our financial situation, reporters and journalists abbreviated the complexities to "bankrupt." The more complex the explanation, the more difficult the search is for just one word to sum it all up.

Private and public philanthropies, individuals, and others helped us turn the Foundation around and position it for where and what it is today. When the petition was filed, as documented in court testimony (which are public documents available through the Montgomery County Court system), attorney Sherry Swirsky took our accountant through one of the most exhaustive, yet easy-to-understand analyses of the Barnes' finances on the stand, before Judge Ott. Swirsky's examination was nothing short of brilliant. I would find it hard to imagine anyone could witness that part of the hearing and not understand where we were, financially. Montgomery County Orphan's Court Judge Stanley Ott certainly did. Anyone who is curious enough can read the transcripts of testimony and Judge Ott's opinions. The IRS form 990's are public documents and are accessible on-line.

The term bankruptcy has a specific meaning. It is protection from creditors because of an inability to meet obligations. That did not apply to the Barnes Foundation in 2002 when the petition to relocate the Foundation was filed. An article from 2000, correctly reported that we were projecting a \$500,000 cash shortfall - then. Getty, Pew, the Mellon Foundation, and Wilmington Trust were among the philanthropies who stepped up. In 1998 when I arrived at The Barnes, they had a deficit of over \$3 million. That too, was changed by the time we filed the petition.

But then, there's the problem created by the small group of people who, for whatever reason seem hell-bent on keeping the Barnes in court. There was a story in the Inquirer about why a certain neighbor was hell bent on chasing us out of Merion. He said, "If you had a golden splinter in your ass, wouldn't you want it removed?" He clarified his comment with a letter a few days later and said it was the current administration and not the Barnes that was the "...golden splinter in his ass."

From 2002 to 2005, after having personally spent 10 hours on the stand, we demonstrated more than adequately, in Dr. Barnes' only words, his feelings about Philadelphia and the Barnes Foundation. He wrote about Philadelphia children using the Barnes Foundation. The architect Paul Philippe Cret initially designed the Barnes Foundation building to be built to the left of the Eakins oval, near the Rodin Museum also designed by Cret.

And then there is the Barnes Foundation Indenture, which very specifically states if the Barnes Foundation can't make it in Merion, the collection should go to a Philadelphia institution. The Indenture also said the Barnes should remain a separate and distinct institution that should not be merged with any other organization. Moving the Barnes Foundation and remaining an independent institution was the least drastic alternative. Judge Ott's ruling concurred with our reading of our situation.



What boggles my mind is the group of "friends" who believe they know more about what Dr. Barnes would have wanted than the good doctor himself. Their motivations have never been in line with what Dr. Barnes and the Barnes Foundation are all about.

We made our case over three years, and seemingly endless days of testimony. Judge Stanley Ott's brilliant assessment said we proved financial exigency. We were okay, but in the face of a disaster, an emergency, or the six-figure settlement being demanded by the very neighbors who put signs on their lawns about the Barnes staying in Merion, we could have been in very dire financial straits. When you have stewardship of a \$70 billion plus collection, having a financial cushion is mandatory. We had a small cash surplus and we had no debt. That wasn't enough.

As attested by Judge Ott's last decree, the Foundation has been abused by frivolous legal actions to the point that restitution was ordered. Those ordered to pay restitution are fighting it, of course. They are the same folks exhibiting hysteria about my blog. Their learning curve seems high.

No I didn't lie on the stand. I was taught that lying to someone is one of the worst forms of contempt anyone could display for another human being. I was educated by Quakers. Speaking truth to power is so much more fun.

In writing my book about my seven years at the Barnes, I plowed through thousands of pages of court transcripts to create a fact-based narrative for anyone who wants to know what really happened. Maybe since I included a few ghost stories, the "friends" will claim that Dr. Barnes really isn't dead. Trust me, he is. I'd rather keep editing that get sidetracked with "Yaarian" hyperbole

You could walk yourself over to the Montgomery County Courthouse, get the transcripts, and a good chair and start reading. My favorite part was when Judge Ott said the neighbors' and the Township's behavior bordered on hysteria! Isn't there therapy for that?

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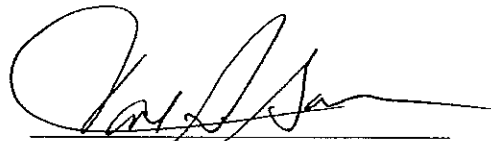
I, Carl A. Solano, hereby certify that on July 6, 2012, I served a copy of the foregoing Response by The Barnes Foundation to Petition by Appellants in No. 992 EDA 2012 for Remand of this Action "Based On Newly Discovered Evidence" upon the persons set forth below, which service satisfies the requirements of Pa. R. App. P. 121:

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Dated: July 6, 2012