

EXCERPTS FROM LAW REVIEW ARTICLES ON THE BARNES FOUNDATION CASE BEFORE
MONTGOMERY COUNTY ORPHANS' COURT DECEMBER 2004

(1) Jonathan Scott Goldman, "Just What the Doctor Ordered? The Doctrine of Deviation, the Case of Dr. Barnes's Trust and the Future Location of the Barnes Foundation," Real Property, Probate and Trust Journal (39 *Real Prop. Prob. & Tr. J.* 711), Winter, 2005

"The role of the Court is to look back to the mind of the settlor of the trust, to determine what he would have done when faced with conditions which were unanticipated at the time of the creation of the trust and nearly as possible to fulfill the intention of the conveyor....

..(W)hat I want to happen to the Barnes Foundation collection, or what the Governor of Pennsylvania, the Attorney General, a judge, the heads of the Pew or Lenfest Charitable Trusts, or even what you want to happen to the Barnes Foundation collection is, or should be, completely irrelevant. What happens to the Barnes Foundation is not supposed to be a matter of public policy; what happens to the Barnes Foundation is supposed to be a matter of law. That matter of law begins and ends with one simple question: What would Barnes do?...

Almost every indication gleaned from Dr. Barnes's colorful life history, the Trust Indenture, and Bylaws indicates that he would have resisted a move. Dr. Barnes chose to set up his foundation in Lower Merion in buildings built expressly for exhibiting his art and in connection with an immovable arboretum. Based on the Trust Indenture and Bylaws, Dr. Barnes clearly did not want any changes after his death to what he had created. Furthermore, Dr. Barnes disliked the moneyed elite of Philadelphia, the same people who are backing this move. He consistently refused to loan his paintings to museums, including the Philadelphia Museum of Art, and often refused access to his gallery. While the trustees maintained that the proposed move would allow greater access to the Barnes Foundation's collection, this clearly would be a negative to Dr. Barnes because during his life he sought to limit, not expand, access to his art collection. Dr. Barnes was quite clear: his foundation was to be an educational institution and not a museum. However, all indications are that the proposed move will morph Dr. Barnes's unique Lower Merion Foundation into something not significantly different from a typical modern day museum."

(2) Heinrich Schweizer, "Settlor's Intent vs. Trustee's Will: The Barnes Foundation Case," The Columbia (University) Journal of Law & the Arts (29 Colum. J.L. & Arts 63), Fall, 2005.

"(A) decision that erroneously applies the Doctrine of Deviation rather than the Doctrine of Cy Pres is based on the incorrect assumption that a modification does not change a trust's purpose. Such an erroneous assumption results in an inappropriate degree of discretion....

(A)s Barnes's writings show, the motive behind the Foundation was the experimental application of Barnes's theory of education, an integral part of which was the idea that a particular physical environment in which to view and experience the collection would strongly influence and thereby educate observers. The realization of Barnes's intention relied on unconventional juxtapositions, thematic compositions and cultural associations that only as broad a collection as his could provide. Medieval painting merged with African sculpture, Post-Impressionists with Egyptian antiquities, Chinese scrolls with Baroque altarpieces, all juxtaposed with ordinary items and tools such as strike plates, fire irons, and soup spoons. But more than just the placement of objects, the art had to be experienced within galleries designed by the most progressive artists of the time, and these galleries had to rest within an arboretum designed by Barnes and his wife. Only then could the collection fulfill its function as expressed within the associative system of modern education according to Albert C. Barnes....

No distinction is made in the relevant legal documents between the composition and arrangement of the art collection, the arboretum and the buildings....

Consequently, the educational system intended by the settlor through a series of provisions in the Foundation's bylaws suggest that the existing site in Lower Merion as an entirety is integral to the Foundation's educational experiment, and its preservation is necessary to accomplish the Foundation's described purpose. Therefore, relocation of the art collection affects a substantial, rather than an administrative, change and should be decided under the Doctrine of Cy Pres rather than the Doctrine of Deviation. The arguments of the Board of Trustees were accordingly unfounded, and the Montgomery County Orphans' Court's decision, based on the Doctrine of Deviation, was a judicial error.

The arguments the Foundation's Board of Trustees used in deciding to relocate its art collection were legally unfounded. The decision of the Montgomery County Orphans' Court was based on an inappropriate premise and therefore mistaken.... (T)he Attorney General's duty as *parens patriae* for charitable corporations is to protect the settlor's intention, neutrally. However, it seems that the office of the Attorney General came to an understanding with the Foundation's Board of Trustees before hearings began to support its petition, which violated neutrality. An appeal from the Attorney General was therefore just as unlikely as from the petitioning Barnes Foundation.

The Barnes case was wrongly decided and improperly violated the settlor's stated intention.... Ultimately, the Trustee's will prevailed over the settlor's intent; the accomplishment of the Foundation's purpose will not continue as intended by Albert C. Barnes.

(3) Terrance A. Kline, "Comment on the Barnes Foundation Case," The American College of Trust and Estate Counsel (31 ACTEC Journal 173) 2005.

"Did the court stretch the doctrine of administrative deviation too far and ignore alternatives that would have done less harm to the settlor's intent?... The Students argued that the move involved more than just a relocation of the gallery. It involved a wholesale change to the character of the Foundation... They argued that the paintings, the gallery, the limestone buildings, the arboretum—all were part of an organic enterprise in the scientific study of art, developed by Dr. Barnes, focusing on the relationship between the student and the environment at the Foundation....

The Court determined that the financial mess at the Foundation threatened the purpose for which the Foundation was established. That meant that some form of deviation would be necessary in order to save the Foundation from the precipice. The Students argued that any remedy must be consistent with the specific intent of Dr. Barnes as set forth in his Trust. Any solution, they said, must do the least harm to the purposes of the Trust pursuant to the Pennsylvania deviation doctrine. Breaking the Trust and moving the gallery to Philadelphia, they contended, was not necessary to resolve the Foundation's financial problems. There were other less drastic measures, not considered by the Trustees, that would cure the ailments (such as increased admission, sale of non-gallery assets, augment admissions with the blessing of the Lower Merion Township, implementation of a capital campaign and increased annual giving).

Dr. Watson, head of the Trustees, testified that the Trustees reviewed all their options but gave no specifics as to whether any options were seriously explored. Instead, the Trustees continued to marshal evidence to support the move to Philadelphia. They continued to float the move to Philadelphia as the only boat in the sea. The Court directed the Trustees to consider less drastic alternatives to the move, but then refused to hold the Trustees' feet to the fire. The Students showed, beyond peradventure, that (the options they proposed) would do less damage to the Trust than the Trustees' plan to move the gallery to the City of Philadelphia. On that evidence, the Court should have denied the Trustees' plan to break the Trust.

The Students argued that the Foundation's financial woes may have been self-made by the Trustees in order to thwart the terms of the Barnes Trust. The remedy was "not in the destruction of the charity, but in its more efficient administration...." The Trustees... in effect... argued that, having established financial exigencies, they could do anything reasonable to solve them. They were not limited to implementing the least drastic deviation to the Trust, but rather any deviation that furthered the purposes of the Trust....

(The court proceedings were not truly adversarial.) The Trustees were represented by their own counsel and by the Attorney General. The Students' voice against the move was heard by the Court. But their resources were limited, and the restraints on their participation made them superficial parties, appearing to be adversaries, but in fact not. Giving the Students full standing, or appointing a trustee ad litem to challenge the Trustees actions, would have quelled any criticism of the Court for failing to test the Trustees' claims and proposed solutions.

The Court's decision itself, however, was less than satisfactory to those (including the author) who argued that the Barnes Trust should have been preserved. The Court's denial of standing to all adverse parties except Lincoln University meant that most of the Trustees' allegations could not be challenged in Court. With Lincoln University's withdrawal from the case, and with the Attorney General supporting the Trustees, the Court's decision could not be tested on appeal. Questions of fairness will linger as a result.

On the issue of administrative deviation, the Court's decision gives one pause because the changes to the Trust are substantive deviations not countenanced under the doctrine. More disturbing was the Court's failure to enforce less drastic deviations to the Trust that would have preserved the Trust consistent with Dr. Barnes' intent.