

**IN THE COURT OF COMMON PLEAS
OF MONTGOMERY COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION**

**IN RE: THE BARNES FOUNDATION,
A CORPORATION**

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No. 58,788

**MEMORANDUM OF LAW
OF TOWNSHIP OF LOWER MERION, *AMICUS CURIAE*
IN OPPOSITION TO PRELIMINARY OBJECTIONS**

I. INTRODUCTION

This memorandum is respectfully presented so that the Court might have the view of the Township of Lower Merion, the municipality in which the Barnes Foundation is located at 300 N. Laches Lane, Merion. The Court has before it Montgomery County's Petition To Intervene and Reopen Proceedings to which the Barnes Foundation, Stephen J. Harmelin, one of its Trustees, and the Office of the Attorney General of Pennsylvania have filed Preliminary Objections. The Court has had the benefit of extensive briefing with respect to these Preliminary Objections. Because of this, and because the Court has addressed Barnes related issues on numerous occasions, there is no need to extensively address the background giving rise to the current Petition filed by Montgomery County.

The question before the Court raised by the Preliminary Objections is whether Montgomery County should be granted standing in this matter. Montgomery County seeks to present its case that the Court should revisit its 2004 decision granting the Barnes Foundations' request to amend its indenture to allow the art collection to be moved to a location in the City of Philadelphia. That indenture set aside the property in Lower Merion for the Foundation to carry out its educational mission. This Court

concluded in its January 29, 2004 decision that if economic necessity dictated a change of location for Dr. Barnes' ultimate purposes to be achieved, then the Trustees could move the collection. Following hearings, the Court in its December 13, 2004 Order determined that "necessity" was dictated by the financial prospects for the Foundation testified to as of the date of the hearings.

The Foundation had presented testimony that its ability to raise money to meet its operating needs was hampered by two factors: the limitations imposed by Lower Merion Township on the number of daily visitors, and the inability of a five person Board of Trustees to raise significant philanthropic donations. The Foundations' Executive Director testified that there was no hope of enlarging the number of visitors because Lower Merion would not amend its zoning code to permit it. There was further testimony that the number of Trustees should be raised from five to fifteen to expand the Foundations' fund raising horizon. Montgomery County now asserts that these two factors have been overtaken by events and the "necessity" to move no longer exists. It seeks standing to present its case.

II. DISCUSSION

The Barnes Foundation is located in a residentially zoned district that in 2004 allowed a certified educational institution as a primary use, but did not allow a museum as a primary use. The Lower Merion Zoning Hearing Board determined that if the gallery was to be an accessory use of the property, the number of visitors had to be limited to 1200 per week over a period of 3 ½ days per week. The Trust indenture, modified with Court approval, also limited gallery visitations to 3 ½ days each week. The inability to increase revenue from operations because of the zoning restrictions was a

fundamental premise of the Court's decision. "The Foundation's ability to generate revenue from visitors to or fundraising activities at the Merion gallery is limited by the existing zoning restrictions in Lower Merion Township." See: Opinion of Ott, J., dated January 29, 2004, p. 4. Observing this statement in the Court's opinion, the Township passed a Resolution on February 17, 2004, a copy of which is attached as Exhibit "A", in which it expressed the hope that the Court could fashion a final order that would allow the Barnes to stay in Lower Merion. Having to rely on the testimony before it, the Court determined that financial "necessity" dictated its December 13, 2004 order giving authority for the collection to be moved.

Since then things have changed. The zoning restriction on the number of gallery visitors was relaxed by the Township by an amendment to its zoning code on July 18, 2007. This amendment, attached hereto as Exhibit "B", specifically permits a gallery or museum use in conjunction with a certified educational institution. It further permits the educational institution to admit up to 450 visitors per day for six days a week, i.e. 2700 visitors per week, rather than 1200.¹ In addition up to 100 primary and secondary school children could visit the facility daily. The ordinance also invites educational institutions to seek higher limits subject to a conditional use being granted by the Board of Commissioners. This ordinance applies to the Barnes Foundation. Thus the first mentioned impediment to the Foundation's prospects for achieving financial operating stability no longer exists. If it would seek court approval to increase the number of days visitors can visit the gallery, it could more than double the number of weekly visitors.

¹ The decision of the Lower Merion Zoning Hearing Board dated November 19, 1998, limited the number of visitors to the gallery to 1200 weekly.

The Court's January 29, 2004 Order also granted the Foundation's request to enlarge its board to 15 persons, thus removing whatever impediment the more restrictive five person board had previously imposed on the Foundation's fund raising efforts. The Foundation has taken advantage of this by increasing the size of its Board to 12 members. Thus, at the present time, the two impediments to meeting the Foundation's operating income needs have been removed. It would appear, therefore, that the "necessity" to move the collection no longer exists. The Court's final decision in this matter was handed down almost 3 ½ years ago. It is appropriate to now inquire as to what impact the additional trustees and the removal of the zoning restrictions have had on the Foundation's operations.

A brief look at the Foundation's website reveals that the Foundation is open Friday, Saturday and Sunday from September through June, and on Wednesday, Thursday and Friday during July and August. Thus the Foundation has not taken advantage of the relief from the zoning restrictions to expand the number of days visitors may use the gallery. One has to wonder why, even during the high tourist summer months when the educational program is not in operation, the Foundation has not sought to open its doors six days a week. Why has the Board of Trustees not availed itself of the opportunity to gain additional operating income? It is a question that deserves an answer to the Court, since the Township's zoning restrictions clearly did not present the impediment to which the Foundation testified.

It is noteworthy that in their brief filed in this matter the Foundation states that "Nothing in the new ordinance prevents its amendment to return to more restrictive visitation limits in the future." (see Foundation Brief, p. 11) That is certainly true –

unless the Foundation would begin operations pursuant to the authority granted by the ordinance, in which case they would be entitled to continue those operations as a non-conforming use if the ordinance were changed.² In the absence of some other explanation, one has to conclude that the Foundation trustees have no desire to increase the number of visitors to the gallery in Lower Merion and the zoning restrictions to which they testified in 2004 were nothing more than a convenient excuse! Why? Perhaps because they don't need additional revenue having operated well into the "black" since 1995, as noted below. Or perhaps the Foundation simply doesn't care about the number of visitors, since its fund raising activities have apparently been quite successful and the institutions' energy is being exhausted in planning their move to Philadelphia.³

What about the necessity to increase the number of trustees to 15 in order to improve management and broaden fund raising potential? In the last 3+ years the Foundation has raised the number of trustees from five to twelve. Presumably the Foundation is satisfied with this level of Trustee involvement in terms of the fund raising success they have been able to achieve. Exhibit I attached to Montgomery County's brief summarizes the Barnes Foundations' 990 annual filings and shows that in 2005 and 2006 the Foundations' revenue substantially exceeded expenses, where the prior seven years showed annual losses. If so, then, is there any longer a financial "necessity" which dictates that the gallery be moved? Montgomery County would like to intervene to explore the answer to this question. Lower Merion would urge the Court to find that

² The Lower Merion Code provides: § 155-99. Nonconforming buildings or uses.

A. Continuation. The lawful use of a building or land existing on the effective date of this chapter or any amendment thereto, or authorized by a building permit issued prior thereto, may be continued although such use does not conform to the provisions of this chapter.

³ Sensing this inertia, Lower Merion Township approved a Resolution on August 2, 2006 urging all parties having an interest in the Foundation's financial plight, to explore ways for it to stay in Lower Merion. The only response received was a statement by the Barnes Foundation that the move was a *fait accompli*. A copy of this Resolution is attached as Exhibit "C".

Montgomery County has standing to do so. If there has been a change of circumstances so that there is no longer a financial necessity for the Barnes to move the gallery, then the Court should amend its December 13, 2004 order.

There is no dispute on the law to be applied to the question of standing to intervene. The interest of the intervenor must be “substantial, direct and immediate” as it relates to the subject matter of the litigation. Where a charitable trust is the subject of the controversy, the intervenor’s interest must be separate or distinct from that of the general public. The County’s brief sets forth the reasons why its interest is substantial, direct and immediate. They are very persuasive. The County is statutorily authorized to appropriate funds to operate museums of fine art and to assist non-profit institutions with respect to historic or museum projects. 16 P.S. §5199.12(3). It has a duty to promote tourism and the economic interests of its citizens.⁴ As the County’s brief notes, the provision of these powers also implies the duty to use them. The loss to Montgomery County of its most significant cultural asset clearly gives the County substantial, direct and immediate interest in preventing that loss. *City of Philadelphia v. Commonwealth of Pennsylvania*, 575 Pa. 542, 838 A.2d 566 (2003) (Philadelphia has a substantial, direct and immediate interest permitting it to challenge legislation reorganizing the governance of the Pennsylvania Convention Center.)⁵

The more difficult question is whether the County has a “special interest” as a County, and whether that “special interest” is being represented by the Attorney General.

⁴ It is noteworthy that these powers belong uniquely to the County, as opposed to any form of municipality within the County.

⁵ The magnitude of the loss to the County is reflected in the substantial commitment being made by the City of Philadelphia to acquire this institution. One person’s loss is another’s gain. It is understood that the City of Philadelphia is providing the long term, rent free use of the current site of the Youth Detention Facility, and that it has committed \$25 million in a state appropriation for the City’s capital needs to assist with the construction of a new gallery.

Montgomery County argues that the Attorney General represents the interest of all citizens of Pennsylvania. Since the gallery is proposed to be moved to Philadelphia, and since the Attorney General doesn't represent Philadelphia's citizens any less than those who live in Montgomery County, the Attorney General cannot and will not favor one County's citizens over those of another. Thus the special interests of Montgomery County's citizens are not being represented by the Attorney General, who has no mandate to favor those citizens over the residents of Philadelphia.

Whether Montgomery County has a "special interest" clearly depends on the question being asked. If the question were whether the Barnes' Board of Trustees should be enlarged, Montgomery County has no special interest in that matter. But here the question is whether financial "necessity" exists to allow the most important cultural institution in Montgomery County to be moved to Philadelphia. Certainly Montgomery County does have a "special interest" in the enforcement of the charitable trust as to that issue.

The most recent and authoritative pronouncement on the question of "special interest" is *In re Milton Hershey School*, 590 Pa. 35, 911 A.2d 1258 (2006). There our Supreme Court found that the Alumni Association of the school did not have standing to challenge the abrogation of an agreement previously entered into between the Attorney General, the school and the Trust Company administering the schools assets. The Supreme Court found that the Association did not have a special interest sufficient to vest it with standing. It noted that the Association had nothing to gain or lose in the litigation. It further noted that the trust instrument not only did not contemplate that the Association would play an oversight role with respect to the Board of Trustees, but the trust

instrument specifically excluded most of the Association's members from receiving the benefits of the trust. The Supreme Court thus reversed the Commonwealth Court and abrogated the Commonwealth Court's effort to formulate new rules for standing in litigation involving a charitable trust.

The Supreme Court scrutinized the issues involved in the litigation in determining whether the Milton Hershey School's alumni had standing. In doing so it determined that the Association had nothing to gain or lose from the litigation. That is not the case here, of course, as Montgomery County has amply demonstrated. Montgomery County has much to gain or lose by the collection moving to Philadelphia. It is true that Montgomery County has not been specifically given an oversight role with respect to the Board of Trustees.⁶ However, the by-laws of the Barnes Foundation specifically state that the maintenance of the art gallery and the arboretum at its location in Montgomery County was integral to the purpose of the Foundation, i.e. to promote the advancement of education and the appreciation of the fine arts. The Court is urged to find that the original establishment of the Foundation in Montgomery County, together with the loss which the County will sustain if the collection is moved, gives Montgomery County the "special interest" necessary for standing.

It is interesting to contemplate how the Court could bring the issue of ongoing "necessity" before it if, per chance, the Barnes Foundation was given a gift so large that its future financial security would be assured, and if that gift bore no requirement that the gallery move to Philadelphia. Would the donor of that gift have standing to ask the Court

⁶ It is noteworthy that in paragraph 33 of the Foundation's by-laws, Dr. Barnes specifically gave to "any citizen of the Commonwealth" the right to enjoin the violation of his stipulation that there be no "society functions" held in any building or buildings on the property. Thus he contemplated that at some point the intervention of third parties might be required to enforce his wishes.

to amend its prior order if the Foundation's trustees remained wedded to moving the collection even in the absence of financial "necessity?" Montgomery County raises the prospect that it has devised a way to resolve the Barnes' financial shortfall. It's insistence that the court examine its prior order because of this offer is compelling; because if there has been such a change in circumstances as to remove the justification for the Court's prior order, that order should be reconsidered. The Orphan's Court has plenary powers over charitable trusts along with the Attorney General. *Pruner Estate*, 390 Pa. 529, 136 A.2d 107 (1957). A charitable trust is initially and continuously subject to the *parens patriae* power of the Commonwealth and the supervisory jurisdiction of its courts. *Coleman Estate*, 456 Pa. 163, 317 A.2d 631 (1974). In the exercise of that supervisory jurisdiction the court should now review its December 13, 2004 order.

CONCLUSION

For the reasons stated above it is respectfully requested that the Court find that Montgomery County has standing to request the Court to reopen and amend its December 13, 2004 Order allowing the Barnes Foundation to remove its art collection from Montgomery County.

Respectfully submitted,



Gilbert P. High, Jr. Esquire
PA Attorney I.D. No. #09419
High Swartz LLP
40 E. Airy Street
Norristown, PA 19404
(610) 275-0700
Solicitor, Township of Lower Merion

EXHIBIT “A”

RESOLUTION

WHEREAS, the Barnes Foundation has been located in and been an integral part of a residential community in Lower Merion Township for over 82 years after it was founded by Dr. Alfred C. Barnes, and has quietly and steadfastly provided educational programs at that site in art appreciation and arboriculture to generations of students; and

WHEREAS, because of the insightful acquisitions of Dr. Barnes, the trustees of the Barnes Foundation now find themselves overseers of one of the world's great collections of Impressionist art and artifacts in private ownership, and have been engaged in a process to redefine the mission of the Barnes Foundation both within and without the constraints of the trust indenture; and

WHEREAS, it now appears that the economic viability of the Barnes Foundation has reportedly been placed at risk by this process to the end that the trustees of the Barnes Foundation have petitioned the Orphans Court of Montgomery County for allowance to modify the terms of the trust indenture, one result of which could be that the situs of the Foundation's collection would be relocated to a site in the City of Philadelphia; and

WHEREAS, the Township has carefully reviewed the initial decision of the Court on the Barnes Foundation's petition wherein the Court acknowledges: that heretofore it was the Court's decision to limit access and admission prices to the gallery in order to conform to Dr. Barnes' wishes; that even tripling the number of visitors per week would reportedly not come close to closing the financial gap reported by the Barnes; and thus, in light of these facts, the Court has requested the Barnes Foundation to provide additional information to justify the need for a move to a different location, as the trustees have requested.

NOW, THEREFORE, the Board of Commissioners of the Township of Lower Merion hereby resolves:

1. That the Township hereby expresses its gratitude to the Barnes Foundation for its contribution to this community as a unique educational and cultural institution.
2. That although the Township is not a participant in the trial of this matter, it recognizes that the future financial well-being of the Barnes Foundation is a matter of public concern.
3. That the Township supports the Court's decision to explore all possible alternatives for the retention of the Barnes at its present location.
4. That the Township is hopeful that, through the ongoing efforts of the Court and the parties to the Orphans Court litigation, the appropriate balance can be struck between the need to assure the Foundation's financial well-being, and the need to respect and preserve to the extent possible the wishes of Dr. Barnes as expressed in the trust indenture.

Approved by the Board this 18th day of February, 2004.

BOARD OF COMMISSIONERS

BY: 
Joseph M. Manko, Esq., President

Attest:

BY: 

Eileen R. Trainer, Township Secretary

EXHIBIT “B”

AN ORDINANCE

NO. 3823

AN ORDINANCE To Amend The Code Of The Township Of Lower Merion, Chapter 155, Zoning, To Regulate The Number Of Visitors That May Be Admitted On A Daily Basis To A Gallery Or Museum Maintained By An Accredited Or Certified Educational Institution In Conjunction With Its Educational Program On Property In A Residential Zoning District.

The Board of Commissioners of the Township of Lower Merion hereby ordains:

Section 1. The Code of Lower Merion Township, Chapter 155, Entitled Zoning, Article IV, R AA Residence Districts, § 155-11, Use Regulations, subsection M thereof, previously noted as “Reserved”, shall be amended to provide as follows:

§ 155-11 Use regulations

A building may be erected or used and a lot may be used or occupied for any of the following purposes and no other:

* * * * *

(M) Educational institution gallery or museum

(a) Where an accredited or certified educational institution maintains a gallery or museum in a residential zoning district in conjunction with its educational program, it may admit up to four hundred fifty (450) daily visitors to the gallery or museum provided:

(i) On-site parking is provided for at least 50 vehicles for the exclusive use of such visitors; and

(ii) The maximum number of daily visitors are admitted in equal groups at regular intervals throughout the day on a time ticketed entry basis; and

(iii) The hours of operation are limited to 9 A.M to 5 P.M daily, six days per week.

(b) Additional numbers of daily visitors to the gallery or museum may be admitted upon the grant of a special exception by the Zoning Hearing Board. In considering such an application, the Zoning Hearing Board shall impose such additional conditions at it deems appropriate to assure the adequacy of public accommodation and the preservation of the character of the surrounding neighborhood.

(c) The term “visitors” as used in this § 155-11(M) shall not include the following:

- (i) Up to one hundred primary and secondary school students per day provided they visit the gallery/museum during school hours (9a.m. – 4 p.m., Monday through Friday)
- (ii) The educational institution’s own currently matriculated students.
- (iii) Employees and officials of the educational institution.

(d) The regulations set forth in this section shall not supercede limitations otherwise applicable to the use of a particular property, including conditions imposed by zoning or land development approvals, except those limitations which are in direct conflict with the provisions of this section.

Section 2. Nothing in this Ordinance or in Chapter 155 of the Code of the Township of Lower Merion, as hereby amended, shall be construed to affect any suit or proceedings in any Court, any rights acquired or liability incurred, any permit issued, or any cause or causes of action existing under the said Chapter 155 prior to the adoption of this amendment.

Section 3. The provisions of this Ordinance are severable, and if any section, sentence, clause, part, or provision thereof shall be held illegal, invalid, or unconstitutional by any Court of competent jurisdiction, such decision of this court shall not affect or impair the remaining sections, sentences, clauses, parts or provisions of this ordinance. It is hereby declared to be the intent of the Board that this ordinance would have been adopted if such illegal, invalid, or unconstitutional section, sentence, clause, part, or provision had not been included herein.

Section 4. This Ordinance shall take effect and be in force from and after its approval as required by law.

Approved by the Board this 18th day of July, 2007.

BOARD OF COMMISSIONERS OF THE
TOWNSHIP OF LOWER MERION

Maryam W. Phillips, Vice President.

ATTEST:

Eileen R. Trainer, Township Secretary

EXHIBIT “C”

**RESOLUTION OF THE BOARD OF COMMISSIONERS OF
THE TOWNSHIP OF LOWER MERION**

WHEREAS Governor Rendell has advocated for and pledged 25 million dollars of taxpayer funds to facilitate the construction and relocation of the Barnes Foundation to the Benjamin Franklin Parkway.

WHEREAS the unique and intended educational and aesthetic experience of visitors to the Barnes Foundation would be forever lost if moved from its home in Merion, Lower Merion Township, a mere five miles away from the proposed location.

WHEREAS the Barnes Foundation is our treasured institution and is part of the fabric, character and culture of Lower Merion Township.

WHEREAS keeping the Barnes Foundation in Merion presents a significant opportunity to advance true regionalism, tourism and cooperation between the suburbs and the City of Philadelphia as expressed by the Greater Philadelphia Tourism and Marketing Corporation, the City Avenue Special Services District, and other bodies devoted to regionalism and economic development;

WHEREAS the Merion neighbors and Friends of the Barnes have asked the Barnes Foundation to explore steps to dramatically increase the number of visitors to the Barnes in Merion, to increase opportunities for social events, to improve ticketing procedures including a live operator, and to take such other measures as to enhance and increase visitation to the Barnes and to substantially improve the financial condition of the Barnes Foundation.

WHEREAS it is our belief that moving the Barnes from Merion is in direct contravention of the intent and purpose of Albert Barnes.


NOW THEREFORE, BE IT RESOLVED THAT:

1. That plans to move the Barnes Foundation from Merion to the Parkway in Philadelphia should be forever abandoned.
2. The Barnes Foundation Board of Trustees should explore all means to maximize revenues from operations in Merion and work with the neighbors in Lower Merion to increase visitation and financial opportunities.
3. The Barnes Foundation Board of Trustees should explore avenues to integrate visitation into the Philadelphia tourist experience without relocating the Barnes.

It is hereby directed that the Township Secretary shall forward a copy of this resolution to the Barnes Foundation Board of Trustees, and the Boards of the Pew Charitable Trusts, the Annenberg Foundation, the Lenfest Foundation, Governor Edward G. Rendell, State Senator Constance Williams, State Representative Michael Gerber, U.S. Senator Arlen Specter, U.S. Senator Rick Santorum, U.S. Representative Jim Gerlach, Mayor John F. Street and Councilman Michael Nutter.

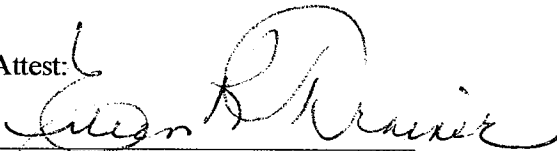
Dated this 2nd day of August, 2006.

Board of Commissioners



Matthew J. Comisky, Esq., President

Attest:



Eileen R. Trainer, Township Secretary