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

NO. 58,788

## THE BARNES FOUNDATION, A CORPORATION

#### **ORDER**

AND NOW, this	day of	, 2011, upon consideration
of the Preliminary Objections	of the Commonwealth o	of Pennsylvania to Petition To Reopen
the Matter Based on Newly Di	scovered Evidence of I	mproper Conduct Not Known During
Time of Trial it is hereby ORI	DERED AND DECREI	ED that the Preliminary Objections are
sustained and the petition is here	by <b>DISMISSED</b> .	

IT IS FURTHER ORDERED AND DECREED that the Petitioners shall pay to the Pennsylvania Office of Attorney General its costs and attorneys' fees incurred in responding to the subject petition.

BY THE COURT:

Stanley R. C	tt, J.	-

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

NO. 58,788

### THE BARNES FOUNDATION, A CORPORATION

PRELIMINARY OBJECTIONS
OF THE COMMONWEALTH OF PENNSYLVANIA
TO PETITION TO REOPEN THE MATTER BASED ON
NEWLY DISCOVERED EVIDENCE OF IMPROPER CONDUCT
NOT KNOWN DURING TIME OF TRIAL

#### TO THE HONORABLE STANLEY R. OTT, JUDGE OF THE SAID COURT:

Pursuant to Rule 1028 of the Pennsylvania Rules of Civil Procedure, 42 Pa.R.C.P. No. 1028, the Commonwealth of Pennsylvania, acting in it capacity as parens patriae through its Acting Attorney General, William H. Ryan, Jr., preliminarily objects to the Petition to Reopen the Matter Based on Newly Discovered Evidence of Improper Conduct Not Known During the Time of Trial by the Attorney General of Pennsylvania and the Governor of Pennsylvania. As stated more specifically below, Petitioners: 1) rely on scandalous and impertinent allegations to support their misapprehension of the parens patriae function of the Attorney General; 2) have failed to allege the existence of any newly relevant and material evidence; and 3) lack the requisite legal standing to intervene in this matter.

#### **PARTIES**

- 1. Respondent, the Commonwealth of Pennsylvania is acting in its capacity as parens patriae through its acting Attorney General, William H. Ryan, Jr. ("Attorney General").
- 2. Respondent, the Barnes Foundation (the "Foundation") is a nonprofit charitable corporation located in Lower Merion, Montgomery County.
- 3. Petitioners are two nonprofit corporations, *i.e.*, the Friends of the Barnes Foundation and Barnes Watch, as well as 13 individuals consisting of former and current students and/or neighbors of the Foundation and other individuals.

# I. Pa.R.C.P. No. 1028(a)(2) PETITIONERS RAISE UNFOUNDED, SCANDALOUS AND IMPERTINENT ALLEGATIONS

- 4. The Attorney General incorporates paragraphs 1 through 3 as if fully set forth.
- 5. Petitioners seek to reopen these proceedings based upon the allegation of newly discovered evidence of misconduct on the part of former Attorney General D. Michael Fisher and former Governor Edward G. Rendell arising from their comments as depicted in an independent film, "The Art of the Steal."
- 6. An analysis of the Petitioners' allegations does not, however, reveal the existence of any newly discovered relevant and material evidence of misconduct as alleged—to the contrary, petitioners' claims are based on scandalous and impertinent information which belies their gross misunderstanding of the role of the Attorney General.<sup>2</sup>
- 7. Despite petitioners' contention, it is <u>never</u> the function of the Attorney General to be neutral in matters involving charitable trusts and organizations. The Attorney General

<sup>&</sup>lt;sup>1</sup> See petition at paragraphs 18 through 25.

<sup>&</sup>lt;sup>2</sup> See petition at paragraphs 22 through 29.

represents the interest of the general public in overseeing the due administration of property committed to charitable purposes. Pennsylvania's case law makes abundantly clear that, "[t]he beneficiary of charitable trusts is the general public to whom the social and economic advantages of the trust accrue. But because the public is the object of the settlor's benefactions, private parties have insufficient financial interest in charitable trusts to oversee their enforcement. Consequently, the Commonwealth itself must perform this function if charitable trusts are to be properly supervised." In re Pruner Estate, 390 Pa. 529, 531-532, 136 A.2d 107, 109-110 (1957).

- 8. Accordingly, while the Attorney General is obliged to objectively assess the merits of every case presented, the Attorney General is never neutral and no less an advocate in representing the public's interest than counsel for any other interested party.
- 9. Toward that end, the Attorney General conducts investigations and institutes enforcement actions against charitable organizations and/or their fiduciaries and may oppose, support or abstain from an action depending upon the applicable law and facts at hand.
- 10. In this case the Attorney General objectively assessed the underlying facts and merits of the Foundation's initial petition, he worked to achieve amendments to the Foundation's petition which preserved the substantive aspects of Dr. Barnes' intended educational mission, and he helped to reduce the costly time and expense of the litigation. In doing so, the Attorney General also served to preserve the scarce charitable resources at issue.<sup>3</sup>
- 11. The Attorney General has participated in all proceedings involving the Foundation before this Court, including the proceedings which approved amendments to the trust

<sup>&</sup>lt;sup>3</sup> Apparently, Petitioners believe that the Attorney General's proper role is to simply challenge all fiduciary relief requests regardless of their merit and surrounding circumstances. As this matter demonstrates, however, the Attorney General has far more substantive responsibilities than merely playing the part of "devil's advocate" before the courts.

indenture and the relocation of the art gallery to Philadelphia which Petitioners now seek to reopen.

- 12. Three successive former Attorneys General, D. Michael Fisher, Gerald J. Pappert, and Thomas W. Corbett, Jr., have all determined that the relief sought by the Foundation in its amended petition was warranted, that the relief constituted the best means of preserving the Foundation's educational mission, and that the relief was thereby in the public interest. Accordingly, each of these former attorneys general in exercising their discretion and supervisory authority as *parens patriae* have consistently supported the Foundation's petition in proceedings before the Courts of this Commonwealth.
- 13. As an advocate for the general public the Attorney General was under no obligation to remain neutral, especially when convinced of the appropriateness of the Foundation's proposed course.
- 14. The Attorney General agrees with the Petitioners at paragraph 21 of their petition wherein they allege that, "[t]he Attorney General, during these proceedings, had the duty and purpose to ensure this charitable collection was preserved and to act in what was in the best interest of the public." The preservation of the collection was indeed a principal objective of the Attorney General's efforts, which he accomplished through the favorable decision of this Court, albeit not to the Petitioners' satisfaction.<sup>4</sup>
- 15. All efforts undertaken by the Attorney General to accomplish this result have been known to this Court and determined to be justified and consistent with the public interest.

<sup>&</sup>lt;sup>4</sup> Petitioners make the fundamental error of assuming that only they espouse what is in the best interest of the general public. The determination of what best serves the public interest, however, is made in accordance with applicable law by the Commonwealth acting through the Attorney General and its Courts.

Efforts to gain the cooperation of Lincoln University, another charitable organization subject to the Attorney General's oversight, were entirely proper to accomplish the needed relief as expeditiously and efficiently as possible; all actions taken by former Attorney General Fisher and former Governor Rendell were free of improper motives or conflicts of interest and ultimately furthered the interests and missions of both institutions.<sup>5</sup>

- 16. The Attorney General continues to exercise visitorial and supervisory authority over the Foundation by conducting regular meetings with its counsel and authorities and reviewing its budget and operations.
- 17. Consequently, none of the Petitioners' scandalous and impertinent allegations are well-founded or otherwise sufficient to rescind any Orders of this Court.

WHEREFORE, the Attorney General respectfully requests that this Court sustain its preliminary objections under Rule 1028(a)(2) based upon the Petitioners' unfounded, scandalous and impertinent allegations, dismiss the petition, and award the Attorney General its costs and attorneys' fees incurred in responding to this matter.

## II. Pa.R.C.P. No. 1028(a)(4) -- DEMURRER FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

- 18. The Attorney General incorporates paragraphs 1 through 17 as if fully set forth.
- 19. Petitioners have failed to allege any newly discovered relevant and material evidence to support reopening the proceedings on the Foundation's amended petition.

<sup>&</sup>lt;sup>5</sup> Contrary to Petitioners' averment in Paragraph 21, the Attorney General's appearance and position taken before the Lincoln University trustees was well known and has previously been brought to this Court's attention. (See, Petition to Reopen Proceedings, to Reconsider and Rescind the Orders of January 29, 2004 and December 13, 2004, to Grant an Injunction Barring any Move of Gallery Art Collection, to Compel an Accounting, to Declare the Board Thereof in Violation of its Fiduciary Responsibilities, to Compel Surcharge Proceedings against Board Members, to Remove Board Members, and to Place the Barnes Foundation in Receivership, Paragraph 17(c), filed in August 2007, brought by some of these very same Petitioners).

- 20. As set forth above, the prior actions taken by former Attorney General Fisher and former Governor Rendell concerning Lincoln University are already known to this Court.
- 21. This Court is also well aware of the \$107M in alleged appropriations authorized by former Governor Rendell in 2002. By way of additional support for its objection, the Attorney General incorporates by reference paragraphs 54 through 63 of the preliminary objections filed by the Barnes Foundation as if fully set forth herein.
- 22. Petitioners notably overlook the reality that no tax dollars have ever been appropriated or committed to permanently establish the Foundation's art gallery at its current location.
- 23. The Attorney General is unaware of any law requiring that public tax dollars be committed to sustaining the Foundation as the Petitioners suggest and any such funding decisions are purely discretionary and outside the Attorney General's responsibility or control.
- 24. Petitioners offer no other grounds to support their relief requests, other than their self-serving allegations that they are now prepared to demonstrate that the Foundation had sufficient revenue to maintain itself at its current Lower Merion location as a more stable and sustainable setting.
- 25. All of the circumstances alleged by the Petitioners are already known to this Court and constitute the same issues that were the subject of this Court's final decree in its prior proceedings, including whether the Foundation should be permitted to relocate its gallery and whether more appropriate alternative means of solving the Foundation's financial problems existed.
- 26. Thus, the issues raised by Petitioners have been fully litigated, adjudicated, and definitively decided by this Court, and the petition should be dismissed.

WHEREFORE, the Attorney General respectfully requests that this Honorable Court sustain its preliminary objection under Rule 1028(a)(4) based upon Petitioners' failure to state a claim upon which relief can be granted, dismiss the petition, and award the Attorney General its costs and attorneys' fees incurred in responding to this matter.

## III. Pa.R.C.P. No. 1028(a)(4)--DEMURRER PETITIONERS LACK THE REQUISITE LEGAL STANDING TO SUE

- 27. The Attorney General incorporates paragraphs 1 through 26 as if fully set forth.
- 28. Petitioners may not seek to reopen proceedings to which they are not a party. *See, e.g.*, Admiral Homes, Inc. v. Floto Mgmt. Corp., 397 Pa. 509, 511, 156 A.2d 326, 327-28 (1959). "A petition to open a judgment will not be heard unless an application is first made on sufficient grounds for leave to intervene." Howell v. Franke, 393 Pa. 440, 443, 143 A.2d 10, 11 (1958).
- 29. Petitioners either already have been denied intervention or have not sought leave to intervene. Therefore, they have offered no basis on which they have standing to reopen proceedings to which they were not a party.
- 30. Moreover, Petitioners have no legal basis upon which they can seek to intervene in this matter.
  - a. Petitioners do not have a legally enforceable interest in the subject matter of these proceedings and have alleged no *legally enforceable* interest that is affected by the relief this Court has granted the Foundation.
  - b. Petitioners' interests are already adequately represented by the Attorney General, thereby making intervention inappropriate under Pa.R.C.P. No. 2329(2). Petitioners may not intervene in this matter simply because they are dissatisfied with the actions and positions taken by the Attorney

General in the original Petition, and Petitioners may not intervene in an effort to usurp the role of the Attorney General. *See, e.g.*, <u>In re Estate of Pruner</u>, 390 Pa. 529, 532, 136 A.2d 107, 109 (1957) ("The responsibility for public supervision [of charitable trusts] traditionally has been delegated to the attorney general to be performed as an exercise of his *parens patriae* powers."); <u>In re Estate of Feinstein</u>, 364 Pa Super. 221, 225 n.3, 527 A.2d 1034, 1036 N.3 (1987) ("The Attorney General represents a broader interest than that of the charity alone. He must protect the interest of the public at large to whom the social and economic benefits of charitable trusts accrue.")

This Court, the Superior Court, and the Supreme Court of Pennsylvania have held that the proper parties in a matter involving a charity like the Foundation are the charity itself and the Attorney General. See, e.g, In re Milton Hershey Sch., 590 Pa. 35, 42-43, 911 A.2d 1258, 1262 (2006); In re Barnes Found., 453 Pa. Super, 243, 253, 683 A.2d 894, 899 (1996) ("the law requires the participation of the Attorney General's Office in any proceeding to modify the terms of a charitable trust"); In re Barnes Found., 453 Pa. Super. 436, 463, 684 A.2d 123, 136 (1996) (noting that the Attorney General is "the statutorily designated guardian of the interest of the general public"); In re Barnes Found., (No. 10), 21 Fid. Rep. 2d 351, 351-52 (O.C. Montg. 2001) (rejecting argument of petition that he had standing to bring action against the Foundation because the Attorney General purportedly abdicated his responsibility to ensure that the Foundation complied with tis governing documents), aff'd without published op., 803 A.2d 802 (Pa. Super. 2002).

- 32. "The matter of standing is jurisdictional." <u>In re Barnes Found.</u>, 449 Pa. Super. 81, 84, 672 A.2d 1364, 1366 (1996). "Before a court can proceed to address the merits of a controversy, it must determine whether standing exists to maintain the action." <u>In re Barnes Found.</u>, 443 Pa. Super. 369, 377, 661 A.2d 889, 894 (1995); *see also*, Section 7735 of the Uniform Trust Act, 20 Pa. C.S. § 7735(c)("A proceeding to enforce a charitable trust may be brought . . . at any time by the Attorney General . . . or any other person who has standing to do so.")
- 33. Petitioners' lack of standing has already been determined in this matter and subject to the rules of res judicata and stare decisis. With regard to organizations of students or friends see, In re Barnes Found., 453 Pa. Super. 436, 450, 684 A.2d 123, 130 (1996); In re Barnes Found., 449 Pa. Super. At 85, 672 A.2d at 1366. See also In re Milton Hershey Sch., 590 Pa. 35, 44-45, 911 A.2d 1258, 1263 (2006) (organization of alumni did not have standing). With regard to neighbors see, In Re Barnes Found., (No. 8), 18 Fid. Rep. 2d 33, 33 (O.C. Montg. 1997); In re Barnes Found., (No. 10), 21 Fid. Rep. 2d 351, 353-54 (O.C. Montg. 2001), aff'd without published op., 803 A.2d 802 (Pa. Super. 2002).
- 34. In addition to these prior adjudications regarding standing, the Petitioners have failed to allege sufficient facts to support their claim of standing.
- 35. Standing requires a substantial, direct, and immediate interest in the subject matter of the litigation. "A litigant possessed a substantial interest if there is a discernible adverse effect to an interest other than that of the general citizenry. It is direct if there is harm to that interest. It is immediate if it is not a remote consequence of a judgment." <u>In re Milton Hershey Sch.</u>, 590 Pa. 35, 42, 911 A.2d 1258, 1262 (2006) (citations omitted; emphasis added).

36. Petitioners do not have a substantial interest in the subject matter of this litigation. In prior proceedings, several Petitioners in the same position have already been found to lack the substantial interest necessary to support their standing in this case. See, e.g., In re Barnes Found., 449 Pa. Super. 81, 85, 90-91, 672 A.2d 1364, 1366, 1369 (1996) (as to students and Friends of the Barnes Foundation); In re Barnes Found., 443 Pa. Super. 369, 380, 661 A.2d 889, 895 (1995) (as to students); In re Barnes Found. 453 Pa. Super. 436, 450, 684 A.2d 123, 130 (1996) (as to Students of the Barnes Foundation); In re Barnes Found., (No. 10), 21 Fid. Rep. 2d 351, 353-54 (O.C. Montg. 2001) (as to neighbors).

Private parties generally lack standing to enforce charitable trusts. Since the public is the object of the settlor's beneficiaries in a charitable trust, private parties generally have insufficient interest in such trusts to enforce them. Those who may bring an action for the enforcement of a charitable trust include the Attorney General, a member of the charitable organization, or someone having a special interest in the trust. A person whose only interest is that interest held in common with other members of the public cannot compel the performance of a duty the organization owes to the public.

Hershey, 590 Pa. at 42-43, 911 at 1262 (citations omitted, emphasis added).

WHEREFORE, the Attorney General respectfully requests that this Honorable Court sustain its preliminary objection under Rule 1028(a)(4) based upon Petitioners' failure to state a claim upon which relief can be granted due to their lack of standing, dismiss the petition, and award the Attorney General its costs and attorneys' fees incurred in responding to this matter.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVÁNIA,

WILLIAM H. RYAN, JR.,

Acting Attorney General

By:

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Dated: March 24, 2011

#### CERTIFICATE OF SERVICE

I, Lawrence Barth, hereby certify that I served a true and correct copy of the foregoing Preliminary Objections by first class mail, postage pre-paid, on the following:

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Dated: March 24, 2011