

The Philadelphia Inquirer

“Fate of Barnes move in judge's hands”

by Don Steinberg

September 21, 2003

Lincoln University's vote yesterday to drop out of the Barnes Foundation litigation puts the ball squarely in the court of Montgomery County Orphans' Court Judge Stanley Ott, whose approval has been required for proposed changes at the Barnes since September 1994.

Barnes attorneys still must convince Ott, in hearings beginning in December, that moving the foundation's art collection to Center City is essential to the foundation's survival. The proposal would undo many restrictions imposed by Albert C. Barnes, who created the Barnes Foundation in 1922 as a school, with his priceless art collection as teaching materials.

With no one to argue against the idea, Ott is now the only party looking after Barnes' intent.

"Usually it's the trustees who are trying to protect the trust - or the attorney general," said Don Kramer, a lawyer at Montgomery, McCracken, Walker & Rhoads specializing in nonprofit organizations. In this case, the Barnes trustees and Attorney General Mike Fisher support changing the trust.

But Ott is no pushover.

"I watched him at the last [Barnes] trial, and he was, like, 'I'm not going to just roll over and play dead just because you guys are unopposed,'" said Nicholas Tinari, a Center City lawyer and self-styled Barnes watchdog who publishes the Barnes Watch newsletter.

Ott historically has been cautious in permitting changes to the bylaws left by Albert Barnes.

"It isn't a slam-dunk," said Bruce Mann, a law professor at the University of Pennsylvania who specializes in nonprofits. Ott "still has to decide if the condition of the Barnes is such that the changes must be done. . . . He still has the authority to say no, or yes, or something in between."

Ott, 54, was born in Sellersville and raised in Souderton. He graduated from Lafayette College in 1971 and Cornell Law School in 1974. He was an assistant district attorney and then practiced in private firms until he became a judge in 1988, taking over the Orphans' Court in 1994. He also is an adjunct faculty member at the Temple and Villanova Law Schools, teaching trial practice.

As a judge, Ott has been called a "strict constructionist."

"I probably would agree with that," he said in a brief phone interview Friday. "That's a judge who doesn't seek to make new law to fit his own theories, who does not read things into the law that aren't there. You take the law the way it's written, and do your best to apply it."

He would not discuss particulars of the Barnes case.

Ott often has drawn a hard line on changes at the Barnes, hewing as closely as possible to the letter of Albert Barnes' instructions.

Eight years ago today, Ott ruled on a request by then-Barnes president Richard Glanton to raise the gallery admission price from \$1 to \$10 and to keep the gallery open to the public six days a week.

Ott ruled that the admission fee should be \$5.

"A tenfold increase . . . would likely discourage 'the plain people,' i.e, the working class whom Dr. Barnes most wanted to view his collection, from visiting the gallery," he wrote.

He also ruled against keeping the gallery open six days, writing that it "would transform the foundation into a full-time museum, which goes far beyond the donor's intent."

He permitted a party celebrating the Barnes' reopening after renovations in 1995, but he ruled that guests had to stay outside in temporary tents and not enter the gallery to view the art because Albert Barnes had forbidden "society functions" inside the gallery.

That last decision was overturned by a state appeals court. So was Ott's earlier 1995 decision to deny Glanton's request to add a seventh city to the international tour of the Barnes' French painting collection. Ott had said no, citing potential damage to the artwork, the fact that the tour had already reached its target by raising \$11.1 million, and the foundation's lack of significant efforts to raise operating funds back home.

A superior court overruled Ott and allowed an exhibit in Munich, Germany, which raised an additional \$2.1 million for the Barnes' gallery-renovation fund.

The case the Barnes now has to make before Ott rests on two legal doctrines, one called "administrative deviation" and one called "cy pres." Both look to the intent of someone who has left a trust when unforeseen circumstances arise.

The Barnes Foundation will need to prove the financial necessity of its proposed changes and an "impossibility," "impracticability" or "illegality" of keeping things as they are, Kramer said. In deviation, a court can allow changes if they are deemed necessary to uphold a donor's intent. Changes to the Barnes board of trustees likely would qualify as deviation, Mann said.

Cy pres involves a more radical undoing of the directives of a will. For example, Stephen Girard directed in his will that Girard College should be open to white male orphans only. That became illegal, and cy pres was invoked to change it.

But proving financial necessity is key to getting the move approved.

"The legal standard for making the changes is not convenience, or that there's a better way to do it," Kramer said.

Failure to prove financial need hampered some Barnes requests for changes in the mid-1990s because its financial ledgers were in such disarray. Today, the Barnes' books are in better order.

Tinari, Kramer and Mann said that if Ott were to rule against the Barnes' move to Center City, the foundation would probably appeal, and a higher court could reverse the decision, as higher courts have done before.