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IN RE: : COURT OF COMMON PLEAS
THE BARNES FOUNDATION, : MONTGOMERY COUNTY
A CORPORATION : ORPHANS' COURT DIVISION
: CASE NO. 58,788
:

BRIEF OF THE FRIENDS OF THE BARNES, ET AL., IN
OPPOSITION TO THE PRELIMINARY OBJECTIONS OF
THE BARNES FOUNDATION, ET AL., STEPHEN J. HARMELIN,
AND THE ATTORNEY GENERAL OF PENNSYLVANIA

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Dated: February 29, 2008

I. INTRODUCTION

On December 13, 2004, this Court issued a decree granting The Barnes Foundation's Second Amended Petition to Amend Charter and Bylaws. That ruling authorized The Barnes Foundation to construct a gallery in Philadelphia to serve as the new home of The Foundation's art school and collection of artwork. The school and the artwork currently remain located in Merion, Pennsylvania, in the setting selected by the charitable donor to serve perpetually as permanent home to both the school and the collection.

It is undisputed that in establishing in 1922 the charitable trust now known as The Barnes Foundation in order to "promote the advancement of education and the appreciation of the fine arts," Dr. Albert C. Barnes intended for the school and art gallery that he was creating in Merion, Pennsylvania, to remain in that location forever. In authorizing the irreversible dismantling of the unique prized centerpiece of what Dr. Barnes created in his charitable bequest, this Court relied on the "doctrine of deviation" — a doctrine intended to assure that a charitable bequest does not fail to accomplish its essential purpose. According to this Court's December 13, 2004 opinion:

We * * * determined that The Foundation was on the brink of financial collapse, and that the provision in Dr. Barnes' indenture mandating that the gallery be maintained in Merion was not sacrosanct, and could yield under the "doctrine of deviation," provided we were convinced the move to Philadelphia represented the least drastic modification of the indenture that would accomplish the donor's desired ends.

In re Barnes Foundation, 2004 WL 2903655, at *1 (reported at 69 Pa. D. & C.4th 129 (2004)).

Very recently, however, a series of developments have arisen that did not exist and could not have been anticipated when this Court authorized The Barnes Foundation to pursue the relocation of the artwork and art school to Philadelphia. Specifically, on June 12, 2007, the government of Montgomery County, Pennsylvania made an offer to The Barnes Foundation that would result in an immediate infusion of \$50,000,000.00 in cash in exchange for promising to keep the artwork and art school at their original, and intended permanent, location in Merion, Pennsylvania. Within a week's time, however, The Barnes Foundation rejected that offer, which was conservatively estimated as capable of generating \$1,000,000.00 in income per year to The Barnes Foundation.

In addition, on July 18, 2007, Lower Merion Township amended its zoning code to permit visitation at The Barnes Foundation's location in Merion to increase from 62,400 visitors per year to 140,400 visitors. A true and correct copy of the Ordinance is attached as Exhibit A and is fully incorporated herein by specific reference. At a ticket price of \$15 per adult, the increased visitation levels would generate \$2,106,000.00 per year. Additional revenues would be received from an increase in the number of student visitors permitted under the zoning change by the Township. The total new gross revenues from visitors under the Township ordinance would be in excess of \$2,106,000.00. The Barnes Foundation has rebuffed the invitation to increase its visitation levels at the Merion site. Nevertheless, The

Barnes Foundation's leadership has ignored this development and intends to move forward with the relocation of the artwork and art school to Philadelphia.

These two recent developments, in combination, demonstrate that regardless of the situation that existed when this Court approved the deviation authorized in its December 13, 2004 ruling, at the present time a long-term solution to The Barnes Foundation's financial difficulties exists that does not entail either disregarding the donor's express intention that the artwork and art school should remain in Merion or constructing a museum in Philadelphia to serve as the new home of The Foundation's art school and collection of artwork.

This Court's December 13, 2004 ruling authorizes The Barnes Foundation to relocate the artwork to Philadelphia, but that ruling does not require The Barnes Foundation to do so. Now, long before any significant and irreversible steps have been taken to relocate the artwork and art school to Philadelphia, it has become economically feasible to honor the donor's express and unambiguous intent that the artwork and art school should remain in the setting he intended in Merion.

Efforts to relocate the artwork to Philadelphia remain in their incipiency. According to published reports, a location for the construction of a new gallery has been selected on the Parkway in Center City Philadelphia. And, after the Petitions to reopen were filed, The Barnes Foundation announced that it had hired architects to plan the new structure that is to be built once the existing structure at the location on the Parkway in Philadelphia is demolished. The Barnes Foundation has yet to accomplish raising all of the funds needed to relocate the artwork, the

expansion of The Foundation's Board of Directors to fifteen members has not yet been completed, and it is entirely beyond dispute that it would be far less expensive, financially wasteful, and disruptive to permit The Barnes Foundation's artwork and art school to remain in the present location.

This Court's intervention is once again required to ensure that these two significant and outcome-determinative changes in circumstances that have just arisen are not improperly disregarded by The Barnes Foundation's leadership in their single-minded efforts to transform The Barnes Foundation into something that its creator never intended nor would have authorized. This Court's December 13, 2004 ruling was premised on a finding that these recent developments have proved mistaken — that it was financially infeasible for The Barnes Foundation to remain in Merion.

The preliminary objections to which this Brief in Opposition responds proceed from the premise that The Barnes Foundation, as a result of this Court's December 13, 2004 ruling, no longer has any obligation to adhere to Dr. Barnes's express intent that the artwork remain in Merion even though now it is financially feasible for the donor's intent to be vindicated. Through no fault of its own, this Court, in its ruling authorizing the deviation, did not foresee that subsequent events would make it financially feasible for the artwork to remain in Merion. The Barnes Foundation itself recognizes, in its Brief in support of its Preliminary Objections, that this Court continues to have the inherent power and the jurisdiction to oversee whether The Barnes Foundation is proceeding properly in continuing to favor a

move to Philadelphia notwithstanding the now financially feasible option of remaining in Merion. *See* The Barnes Foundation's Brief at 10. All that the parties that have filed the current Petitions are asking this Court to do is to exercise its power to decide whether this Court's December 13, 2004 ruling relieves The Barnes Foundation of any continuing obligation to adhere to its founder's express intent that the artwork and art school should remain in Merion now that it is financially feasible to achieve that goal.

By contrast, the Preliminary Objections ask this Court to hold that so long as the leadership of The Barnes Foundation and the Attorney General of Pennsylvania continue for their own reasons to prefer relocating the artwork and art school to Center City Philadelphia, no one — neither this Court nor anyone else — can stand in their way even though it can now be established to this Court's satisfaction that the considerations that led this Court to approve the deviation in December 2004 no longer exist and that it would be far preferable for the artwork and art school to remain in Merion, as Dr. Barnes had always intended.

Notwithstanding all the technical objections, bluster, and bombast The Barnes Foundation and the other objectors have marshaled against reopening this proceeding so the Court may consider significant changes in circumstances, that is the stark choice confronting this Court. This Court can either hold that its December 13, 2004 ruling relieves The Barnes Foundation's leadership from any obligation to adhere to the donor's intent that the artwork and art school should remain in Merion even now that it has become financially feasible to do so. Or, this

Court can hold that The Barnes Foundation's leadership continues to have the obligation to adhere to the donor's intent, and that this Court's deviation only continues to authorize a move to Philadelphia for so long as it remains financially infeasible for the artwork and art school to be located in Merion, especially when no major, irreversible steps to implement the move have been undertaken.

II. RELEVANT FACTUAL AND PROCEDURAL HISTORY

On September 24, 2002, The Barnes Foundation filed in this Court a Petition to amend The Foundation's charter and bylaws to authorize, among other things, the relocation of The Foundation's art school and artwork to Philadelphia from the original permanent location in Merion, Montgomery County, Pennsylvania specifically mandated by Dr. Albert Barnes.

On October 10, 2002, a group of Barnes Foundation students filed a Petition to Intervene in that proceeding. This Court, while recognizing that it had allowed students to intervene in earlier proceedings involving The Barnes Foundation in which The Foundation sought deviations from its governing documents, nevertheless denied the students' Petition in a decision issued February 12, 2003. In denying the request to intervene, this Court reasoned that the students' interest in this proceeding of utmost importance was no different than the interest of the general public and therefore the Attorney General of Pennsylvania would adequately represent the students' interests.

On September 23, 2003, three Barnes Foundation students, including one who had previously sought to intervene as a student in the proceeding, filed a new Petition to Intervene or, alternately, to participate as *amici curiae*. On October 29, 2003, this Court denied that Petition to Intervene but allowed the three students to participate in the proceedings as *amici curiae*. The Barnes Foundation has previously referred to these *amici* as "de facto parties" to the Orphans' Court proceedings in a brief The Barnes Foundation submitted in 2005 to the Superior Court of Pennsylvania. The *amici* were allowed to represent the interest of students opposed to the relocation of The Foundation's art school and artwork, and counsel for the students filed briefs and examined witnesses. This Court knows better than anyone else the indispensable role that the student *amici* played in assuring that the original proceeding was litigated as a contested case instead of one in which both The Barnes Foundation and the Attorney General favored the identical result.

Following many days of hearings and rounds of briefing in which counsel for the student *amicus*/participated, this Court on December 13, 2004 issued a decision that approved The Barnes Foundation's request to relocate its art school and artwork from Merion, Pennsylvania, to Center City Philadelphia. The ruling reflected that this Court viewed this matter to be a very close case and that this Court harbored substantial doubt about the permanence of its ruling. This Court's ruling was received as major, and largely unwelcome, news throughout the

worldwide arts community. This Court's ruling has also been the subject of criticism from experts in the law of charitable trusts.

Notwithstanding their great dismay and disappointment with this Court's December 13, 2004 ruling, the Friends of The Barnes recognize the binding nature of this Court's ruling and have treated that decision with appropriate respect. They have not attempted before, and they are not attempting now, to relitigate the correctness of that ruling. In the more than three years since that was decision issued, they have not returned to this Court seeking any reexamination of that decision based on the record created during that proceeding. Petitioner Jay Raymond did pursue an appeal from this Court's final decrees and from this Court's earlier order that had denied his request to intervene. After the Superior Court denied The Barnes Foundation's application to quash Raymond's appeal, the Supreme Court of Pennsylvania, exercising King's Bench jurisdiction, ultimately agreed with The Barnes Foundation's argument that Raymond's failure to appeal within thirty days from this Court's earlier order denying his request to intervene precluded him from appealing from the two final decrees at the conclusion of the case.

Accordingly, The Barnes Foundation's eventual success in obtaining the dismissal on a technicality of the only appellate challenge to this Court's December 13, 2004 ruling assured that no appellate review whatsoever of that ruling would occur. It is ironic, to say the least, that The Barnes Foundation seeks to gain some advantage in its Brief in support of its Preliminary Objections by noting that none

of the student *amic*/sought to appeal from this Court's December 13, 2004 ruling, because it was (and likely remains) The Barnes Foundation's position that none of those *amic*/had standing to pursue such an appeal.

Despite The Barnes Foundation's bombastic efforts to portray the Friends of The Barnes's Petition to reopen as nothing more than an attempt to relitigate the case that this Court decided in December 2004, it is clear that the Petition to reopen has as its central focus and motivation two significant developments that occurred in mid–2007 that now make it financially feasible for The Barnes Foundation to remain in Merion as Dr. Barnes had expressly intended.

It is absurd that The Barnes Foundation attempts to blame the Friends of The Barnes, Montgomery County and Merion Township for procrastinating in their attempts to realize alternative funding strategies that would allow The Barnes Foundation to remain in Merion. In fact, it was incumbent on the trustees of The Barnes Foundation to explore any and all opportunities that would fulfill the original intent of Dr. Barnes. Instead, the trustees of The Barnes Foundation never reached out to Lower Merion Township and Montgomery County for assistance. Instead, the trustees pursued a single-minded strategy of moving to Philadelphia—even lining up the \$107,000,000.00 in funding from the Commonwealth of Pennsylvania. If any blame exists concerning procrastination, that blame rests with trustees of The Barnes Foundation for failing to carry out their fiduciary duties.

Two significant developments have occurred since the Court's December 13, 2004 ruling. The first of these new developments was the offer that the Montgomery County Commissioners extended to The Barnes Foundation on June 12, 2007 to immediately infuse \$50,000,000.00 in cash in exchange for a purchase and leaseback of The Barnes Foundation's land and buildings. At the conclusion of the arrangement, ownership of the land and buildings would revert to The Barnes Foundation.

The Barnes Foundation's leadership, however, promptly rejected this offer without any substantive explanation. Notwithstanding that rejection, the current Montgomery County Commissioners have reaffirmed their continued willingness to enter into this arrangement with The Barnes Foundation. The refusal of the Barnes Foundation's leadership to seriously consider Montgomery County's offer is highly ironic given the Pennsylvania General Assembly's enactment of legislation in 2002 containing \$107,000,000.00 in "itemizations" for the benefit of The Barnes Foundation project in Philadelphia. Despite protestations by The Barnes Foundation's leadership and the Attorney General's Office denying any prior knowledge of this 'Immaculate Appropriation' legislation, their pleas of ignorance are incredible. Further, \$25,000,000.00 of the earmarked \$107,000,000.00 has been approved by the Governor to build the new art gallery in Center City Philadelphia. The irony is that the leadership of The Barnes Foundation will accept tax dollars from the Commonwealth to relocate the art gallery to Philadelphia, but it has

refused to seriously consider the purchase and leaseback offer of Montgomery County.

The second of these new developments is the zoning change that Lower Merion Township implemented on July 18, 2007. The amendment to the Lower Merion zoning code allows the visitation at The Barnes Foundation's location in Merion to increase from 62,400 visitors per year to 140,400 visitors. *See* Exhibit A. At a ticket price of \$15 per adult, the increased visitation levels would generate \$2,106,000.00 per year. The total new gross revenues from the increase number visitors under the Township ordinance would be more than \$2,106,000.00.

More than \$3,000,000.00 in revenue for the Barnes Foundation at the Merion location would be generated from the \$1,000,000.00 in interest revenue from Montgomery County's \$30,000,000.00 sale and leaseback offer and the \$2,106,000.00 in revenue from the increased visitors. Notwithstanding this newfound ability to generate more than \$3,000,000.00 in revenue per year, the leadership of The Barnes Foundation has refused to reconsider whether it remains appropriate to relocate the artwork and art school to Philadelphia, even though it is now financially feasible to remain in Merion as Dr. Barnes expressly intended.

Additionally, this Court was not aware at the time it issued its December 13, 2004 decision that the Pennsylvania General Assembly had enacted legislation in 2002 containing a total of \$107,000,000.00 in itemizations for the benefit of The Barnes Foundation. The Friends of the Barnes do not dispute that this enactment was intended for the benefit of The Barnes Foundation in Philadelphia.

Nevertheless, had the existence of this legislation been brought to this Court's attention before this Court issued its December 13, 2004 ruling, this Court could have ascertained whether the Pennsylvania legislature's newfound financial commitment in support of The Barnes Foundation was capable of being translated into any level of financial support for retaining the artwork and art school at its original location in Merion, Montgomery County.

Had the student *amicus*/or their counsel participating in the earlier proceeding become aware of this enactment before this Court issued its ruling in December 2004, they assuredly would have drawn the enactment to this Court's attention. It defies belief that neither The Barnes Foundation itself — as the subject of this legislation — nor the Attorney General's Office — which undoubtedly has a continuing focus on laws under consideration for passage in the General Assembly and oversees The Barnes Foundation as *parens patriae* — was aware of the legislation's existence. The Attorney General, as counsel for the Commonwealth of Pennsylvania, could even be charged with constructive notice of legislation passed by the General Assembly.¹ Is this Court to believe that Pennsylvania's legislature coincidentally approved \$107,000,000.00 in itemizations — consisting of \$7,000,000.00 in site preparation and \$100,000,000.00 to construct a gallery in Philadelphia — precisely the amount of money that The Barnes Foundation was telling this Court would be necessary to construct the gallery? That The Barnes

¹ It is noteworthy that the General Assembly's passage of the legislation placed the Attorney General in a conflict of interest vis-à-vis the citizens of Montgomery County because the legislation favored the interest of the City of Philadelphia over the citizens of Montgomery County. This conflict of interest made it all the more imperative for the Attorney General to bring the legislation to the attention of the Court.

Foundation and the Attorney General apparently failed to disclose the legislation's existence from this Court calls into question their belated assertion that the legislation would have only provided additional support for this Court's decision to approve a deviation from Dr. Barnes' original intent.

Finally, the Friends of the Barnes have also devoted substantial effort toward investigating whether The Barnes Foundation's facilities in Merion would qualify for recognition as a National Historic Landmark. The Friends of the Barnes hired the Philadelphia-based Cultural Resource Consulting Group to prepare a report, authored by Emily Cooperman, on the prospects of achieving National Historic Landmark recognition for The Barnes Foundation's location in Merion. The report concludes that The Barnes Foundation would be eligible for National Historic Landmark designation if The Barnes Foundation applied for the designation with the National Park Service. By receiving National Historic Landmark status, The Barnes Foundation would become eligible for federal grants and additional grants from other philanthropic institutions.

However, the report makes clear that if the artwork and art school are relocated to Philadelphia, then The Barnes Foundation's Merion location would no longer qualify for recognition as a National Historic Landmark. Likewise, The Barnes Foundation's new gallery building in Philadelphia would not qualify for National Historic Landmark status either.

The report that Cultural Resource Consulting Group prepared contains the following description of the historic significance of The Barnes Foundation's presence in Merion:

The Barnes Foundation Property encompasses the buildings, landscape, and collections compiled or commissioned by Albert C. Barnes at 300 North Latch's Lane in Lower Merion. Barnes made a substantial amount of money in the production of the antiseptic Argyrol, and had amassed a substantial collection of paintings and objects to aid in his vision for an educational program by 1922, when Barnes used the property for the purposes of establishing facilities for his foundation, its educational and curatorial activities, and the materials that enabled the educational program Barnes established for the foundation. A notably large amount of controversy has surrounded: 1) Barnes himself and his relationship to academic art historians, art collectors, and art museum curators and administrators; 2) the management of his collection and, more recently, 3) the fate of the Foundation itself. It must be recognized, however, that a fundamental defining characteristic of the property as a whole is its role as an educational institution created by Barnes beginning with the purchase of the property in 1922 and the creation of the Indenture of Trust establishing the Foundation and its characteristics.

The Barnes Foundation is arguably best known for the assemblage of important works by renowned 20th-century artists such as, *inter alia*, Pierre-Auguste Renoir, Paul Cézanne, and Henri Matisse. As Barbara Supplee has aptly noted, however:

along with the extraordinary collection of moderns are paintings representative of old masters . . . art from cultures and ethnic sources as diverse as African, Egyptian, Greek, Hindu, Chinese, Persian, Native American, and Pennsylvania Dutch share space with Italian, Spanish, German, Flemish and French primitives. What is most [sic] unique about this world renowned collection is its *raison d'être*. This incredible assemblage of art and artifacts are a principle resource for the Barnes Foundation, an educational institution chartered in 1922. . . . The collection and institution exist solely for the purpose of education, an education directed toward a specific aesthetic philosophy and educational methodology.

The individual components, or character defining features of the property, were purposefully created, specifically installed, and assembled or adapted to the educational uses of the Foundation. Finally, it is crucial to note that the interactive role of the components of the property – that is, the relationship of the building to the collection, collection to building, building to landscape setting, and collection to landscape views – are among the most important of the character-defining features of the property.

Architecture

The Barnes Foundation Museum buildings are the work of architect Paul Philippe Cret (1876-1945). The Cret's commission was first announced in the *Philadelphia Real Estate Record and Builders' Guide* in November, 1922, when it was revealed that he was preparing plans for a "private museum and art gallery."⁴ March of the following year, the designs had sufficiently progressed that the architect was soliciting estimates.⁵ In April, 1923, contracts were awarded for an "art gallery, administration building, and service building." As these brief descriptions published in the period indicate, the Barnes Foundation buildings were purpose-built to house the Foundation's art and object collections as the facilities and tools for its educational program in art appreciation, not simply as the residence for Dr. Barnes and his wife, as has sometimes been supposed. The details of the main building attest to this purpose, including the scale of most of the gallery spaces, which provide the opportunity for intimate and extended study of the groups of objects installed specifically to meet Barnes's purpose of experiential learning; in spaces where the exterior is visible, the installations specifically took this into account.

Paul Cret (1876-1945) has been called "One of the most influential forces in Philadelphia architecture during the early part of the twentieth century." He was also one of the most influential architectural educators and designers in the United States between the turn of the twentieth century and World War II. Born in Lyon, France, Cret (originally Crêt) came to the United States in the first decade of the 20th century as the first Professor of Architecture at the University of Pennsylvania under Dean Warren Powers Laird. Although American architects had been studying at the Ecole des Beaux-Arts in Paris since the period of the Civil War, Cret revolutionized American architectural education by influencing generations of architecture students who would become the most important designers in the United States. Cret's own work as a designer is prominent not only throughout the Philadelphia region, but

internationally, and includes such prominent work as the Folger Shakespeare Library in Washington, D.C., as well as such projects as the Rodin Museum in Philadelphia. Cret's work extended beyond buildings to large-scale urban planning projects in Philadelphia and elsewhere.

The Barnes Foundation Buildings embody many of the key characteristics of Cret's work. Its simplified (sometimes call "stripped down") Classicist details and functionalist plan are hallmarks of the Beaux Arts methods. The grand purpose of this institutional building is embodied in the *gravitas* of the style Cret employed. The nature of the commission and purpose of the building was reflected in details expressive of those that, typically of Cret's work, can be found throughout the building, including the Jacques Lipchitz bas-relief sculptures on the exterior commissioned by Dr. Barnes and the interior and exterior custom ironwork, as well as custom crown moldings, all with African mask motifs commissioned to relate to the collection.

Education, Integration, and Philosophy

One of the fundamental precepts of the educational program of art appreciation of the Barnes Foundation has been, from its inception, the ability of all people, particularly those of the working class of all races and both sexes, to appreciate artistic production. Barnes's educational activities began with his own factory employees before the establishment of the Foundation, and his desegregated program stood in stark contrast to contemporary practice and policy.

A key figure in the Barnes Foundation's program is John Dewey, whom Barnes appointed as the Foundation's first director of education. As Barbara Supplee has detailed, the relationship between Dewey and Albert Barnes was not simply one of employer and employee by any stretch of the imagination. Instead, it was one of philosophical and educational collaboration. As Larry Hickman has also noted

Dewey's influence on American life can scarcely be underestimated. During his lifetime he was America's leading educational theorist, and his work continues to be a source of insight for reformers in that field. His social and political ideas, especially his radical conception of democracy, continue to be assaulted from both the right and the left.

Collections

As noted above, while the works of famous artists are the best known objects in the Barnes Foundation Collection, they cannot be separated from the collection as a whole in terms of its purpose in the Foundation's program, nor within the property as an entirety. The site-specific role of the objects in the collection, manifest through the installation that both exemplifies and enables the experience of the Barnes method, and the objects' role as character-defining of the Barnes Foundation property, can be exemplified by the creation and installation of Henri Matisse's famous *La Danse*, one of the most celebrated paintings in the Barnes Foundation. As Jack Flam has documented, Matisse created the work in relationship not only to the other paintings in the room, but in connection with the view of the garden outside. Flam records Matisse as asserting that "it is really immovable," that "it cannot be separated" from the Barnes art gallery, and that he conceptualized the mural "with the idea always of creating the sky for the garden one sees through the doors."

Landscape

From the inception of the Barnes Foundation, the 13-acre Arboretum (begun by the previous property owner Joseph Lapsley Wilson) was not simply an incidental feature of the property, but was instead an integral part of the institution and its program. The Arboretum has provided a "setting that reflects concepts from the unique arrangement of art works in the Gallery rooms." John Dewey explained that "the art gallery and the arboretum make a unit each of definite educational value and one must reinforce the other. . . ."

The Indenture of Trust for the Barnes Foundation includes the statement that

Donor (Albert C. Barnes) desires to endow said art gallery and arboretum to the end that the educational work for which Donee (the Barnes Foundation) is organized may be adequately accomplished.

The Trustees of the Donee shall control both the art gallery and the arboretum of the Donee, both of which are integral parts of the educational resources of the Donee.

In 1933, Dr. Barnes, Director of the Foundation, Mrs. Barnes, Director of the Arboretum, and John Dewey, Director of Education, provided testimony about the relationship between the Art Gallery and the Arboretum. Dr. Barnes's statements included the following:

Our Charter calls for a plan for advancement of education by instruction in knowledge of the fine arts and the maintenance of an arboretum. These two aspects of one and the same purpose cannot be separated: they are one and indivisible and both are educational in their essence. . . .

In short, the Foundation as it exists at present may be compared to a composition by Titian or a symphony by Beethoven; that is, every unit was studied in relation to what was the ultimate composite entity which prompted us to establish the Foundation and devote our money and the rest of our individual lives to make the Foundation the servant of educational authorities in advancing the knowledge and happiness of mankind.

National Historic Landmark Eligibility Overview Assessment, Barnes Foundation Property, June 5, 2007 at pages 11–15 (footnotes omitted). A true and correct copy of the Report is attached as Exhibit B and is fully incorporated herein by specific reference.

Petitioner Sandra Bressler inquired with the National Park Service about the potential National Historic Landmark eligibility of The Barnes Foundation's property in Merion. J. Paul Loether, Chief, National Register of Historic Places and National Historic Landmarks Program, responded by writing:

Thank you for your inquiry about the potential National Historic Landmark (NHL) eligibility for the Barnes Foundation property in Merion Station, Pennsylvania, and for the submission of a related "overview assessment." The property appears to have significance as the physical evocation of an approach to art education put into tangible practice by owner Albert Barnes. We would be pleased to consider the NHL eligibility of this resource under Criterion 1.

National Park Service letter to Ms. Sandra Bressler dated July 31, 2007 (emphasis added). A true and correct copy of the letter is attached as Exhibit C and is fully incorporated herein by specific reference.

In late August 2007, almost immediately after The Barnes Foundation refused to reconsider its plans to relocate the artwork and art school to Center City Philadelphia despite the ability to succeed financially in Merion due to the two new developments from mid–2007 described above, the Friends of the Barnes filed their Petition to reopen in this Court. And in early September 2007, Montgomery County, Pennsylvania filed its own Petition to reopen based on those same two new developments that combine to allow The Barnes Foundation to enjoy adequate cash flow and funding to remain in Merion.

In response to these Petitions to reopen, The Barnes Foundation and the Attorney General of Pennsylvania have filed preliminary objections that ask this Court to dismiss the Petitions to reopen without addressing on the merits the two new developments that combine to offer a long–term solution to The Barnes Foundation’s financial difficulties while simultaneously honoring the donor’s express intention that the artwork and schools should remain intact in Merion.

Those preliminary objections assert that the Petitions to reopen have been filed by non–parties who lack standing to intervene in this case. The preliminary objections also make the astounding assertion that this Court’s December 13, 2004 ruling is *res judicata* concerning whether the two new developments from mid–2007 should affect The Barnes Foundation’s ability to proceed with its plans to relocate

the artwork and art school to Philadelphia even though The Foundation's financial survival would be assured if the donor's intent were honored and the artwork and art school remained in Merion. The preliminary objections next seek to strike the references in the Petitions to reopen to the legislation itemizing \$107,000,000.00 to finance the move of The Barnes Foundation to Philadelphia as scandalous and impertinent matter. Finally, The Barnes Foundation's preliminary objections seek to recover counsel fees from the Friends of the Barnes for Petitioners' supposed "arbitrary and vexatious" conduct in filing the Petitions to reopen.

Concurrent with the filing of this Brief and the answers of the Friends of The Barnes to the preliminary objections, Petitioners are filing a Motion for Leave to File a Petition to Intervene. The proposed Petition to Intervene incorporates and relates back to the Petition to reopen filed in late August 2007.

For the reasons that follow, the preliminary objections and The Barnes Foundation's request for sanctions should be denied.

III. ARGUMENT

A. This Court Possesses Jurisdiction To Decide The Petitions To Reopen, And The Question Of Petitioners' Standing Is So Enmeshed With The Merits As To Be Unsuit For Resolution On Preliminary Objections.

As The Barnes Foundation concedes in its Brief in support of its preliminary objections, this Court possesses continuing jurisdiction to oversee The Barnes Foundation's implementation of this Court's decision authorizing The Barnes Foundation to pursue the relocation of the artwork and art school to Center City

Philadelphia. *See* The Barnes Foundation's Brief at 10. Moreover, as the Supreme Court of Pennsylvania recognized in *Alpern v. Girard Trust Corn Exchange Bank*, 403 Pa. 391, 399, 170 A.2d 87, 91 (1961), "It is true that all courts have authority to supervise their process and correct their decrees so long as the proceedings are within their grasp. That principle is applicable, not only to the orphans' court, but to the common pleas." (internal quotations omitted).

The Superior Court of Pennsylvania explained in *In re Barnes Foundation*, 684 A.2d 123, 130 (Pa. Super. Ct. 1996), that this Court exercises its equitable powers in deciding whether to approve a change under the doctrine of deviation. Indeed, this Court's December 13, 2004 ruling that exempts The Barnes Foundation from having to comply with particular aspects of The Barnes Foundation's governing documents is in the nature of an injunctive decree allowing the amendment of those aspects of The Barnes Foundation's governing documents.

Pennsylvania law is clear that a court sitting in equity maintains the ability to reevaluate whether or not to keep its decree in force after changed circumstances have arisen. *See Tamagno v. Waiters & Waitresses Union, Local 301*, 373 Pa. 457, 460, 96 A.2d 145, 146 (1953). In *Tamagno*, Pennsylvania's highest court explained: "There is, of course, no question but that a court of equity has the power to modify or vacate an injunctive decree previously granted by it if the circumstances and situation of the parties have so changed as to make it just and equitable to do so and if the court feels that the protection given to the complainant is no longer necessary." *Id.*

Similarly, in *Ladner v. Siegel*, 298 Pa. 487, 148 A. 699 (1930), the Supreme Court of Pennsylvania cited with approval the proposition that “[t]he court which rendered a decree for an injunction may, without even any statutory authority to do so, open, vacate or modify the same where the circumstances and situation of the parties are shown to have so changed as to make it just and equitable to do so.” *Id.* at 496, 148 A. at 702 (internal quotations omitted).

Thus, at the end of the day, the question of whether Petitioners possess standing is immaterial. If the Petitions to reopen have merit, this Court can grant them, and if the Petitions lack merit, this Court can deny them. Moreover, the question of standing is so intertwined with the merits as to be unsuitable for resolution at the outset of this proceeding by means of preliminary objections.

The Barnes Foundation and the Attorney General, in seeking to deny standing to Petitioners, rely on the legal fiction that the Attorney General is entrusted with the duty to represent the interests of the general public in charitable matters and that Petitioners' interest is no different from the interests of the general public. This Court knows first-hand, from having presided over the litigation that culminated in this Court's December 13, 2004 decision, that the student *amicus*/presented this Court with evidence and argument that was crucial to the questions before this Court — evidence and argument that the Attorney General did not present and would not have presented had those *amicis* not been involved in the case.

The pending preliminary objections demonstrate that for The Barnes Foundation and the Attorney General no change in the circumstances after this Court's December 13, 2004 ruling, no matter how drastic or important, would suffice to enable this Court to reconsider that ruling. Dismissing any and all alternatives, The Barnes Foundation and the Attorney General remain unalterably committed to their longstanding position that the artwork and art school should be relocated to Philadelphia. Their position, taken to its logical extreme, appears to be that even if an anonymous donor appeared on the scene more than thirty days after this Court announced its approval of the requested deviations and offered to donate to The Barnes Foundation whatever amount of money was needed to keep the artwork and art school in Merion, that offer could be refused by The Barnes Foundation with the Attorney General's concurrence, and judicial review could never be obtained from this or any other court.

The Petitions to reopen are based on the existence of two important new developments that, in combination, now make it financially feasible for The Barnes Foundation to remain in Merion. These two new developments provide a long-term solution to The Barnes Foundation's financial crisis that eliminates any need for The Barnes Foundation to relocate the artwork and art school to Philadelphia.

While the Brief of The Barnes Foundation in support of its preliminary objections devotes more than ten pages to discussing the impact of the Capital Budget Project Itemization Act of 2002, that very same Brief devotes only a single paragraph — indeed, just a single sentence — to describing the steps that The

Barnes Foundation has accomplished since December 13, 2004 to implement this Court's decree. According to that Brief, "The Foundation has (among other things) expanded its Board of Trustees from five to twelve members, acquired a site for its gallery on the Benjamin Franklin Parkway in Philadelphia, hired architects to design the new building, and continued to raise funds to finance the move." *See* The Barnes Foundation's Brief at 10.

The Friends of the Barnes agree with The Barnes Foundation that it would have been preferable for Montgomery County to have made its recent offer of substantial financial assistance before this Court issued its December 13, 2004 ruling. Likewise, it would have been preferable had Lower Merion Township approved the recent zoning changes before this Court issued its December 13, 2004 ruling. Nevertheless, as matters now stand, these two significant recent events have occurred before The Barnes Foundation has taken any substantial, irreversible steps toward relocating the artwork and art school to Center City Philadelphia.

Thus, at the present time, it can easily be demonstrated that the value of keeping the artwork and art school in Merion, thereby vindicating the express intent of Dr. Barnes and avoiding the destruction of a unique and irreplaceable cultural treasure, far outweighs any value of the expenditures that would be lost in terminating the preparations to eventually move the artwork and art school to Center City Philadelphia. But if this Court refuses to intervene now, then potentially at some later date — say after hundreds of millions in public funds and

charitable donations have been squandered to build a new site for The Barnes collection in Center City Philadelphia even though that relocation is no longer necessary to the financial survival of The Barnes Foundation — it may as a practical matter be too late for this Court to hold that the artwork and art school should remain in their original, intended location.

For that reason, this Court should hold that it is not possible at the outset of this matter to adjudicate on preliminary objections whether the Petitioners possess standing because the question of standing is directly enmeshed with the merits.

See Barrett Computer Servs., Inc. v. PDA, Inc., 884 F.2d 214, 219 (5th Cir. 1989) (“[I]n cases in which the merits of the claims asserted are intertwined with the jurisdictional issue of standing, challenges to standing are frequently resolved in summary judgment proceedings ... or at a trial on the merits.”) (emphasis added); *see also Coan v. Kaufman*, 457 F.3d 250, 256 n.3 (2d Cir. 2006) (recognizing a class of cases in which “standing is sufficiently intertwined with the merits of the action, such that its determination requires an evaluation of the merits of the action and makes any potential distinction between the merits and ... standing exceedingly artificial”) (internal quotations omitted); *Providence Baptist Church v. Hillandale Committee, Ltd.*, 425 F.3d 309, 313 (6th Cir. 2005) (noting, in that very case, the question of standing was postponed until a decision on the merits because standing was “complex and is intertwined with the merits”); *Largent v. Supreme Judicial Court for State of Massachusetts*, 373 F.3d 219, 224 (1st Cir. 2004) (“the

circumstances of this case present a rare instance in which the standing issue is intertwined and inseparable from the merits of the underlying claim").

If the two significant new developments that have precipitated the Petitions to reopen suffice to cause this Court to reconsider its approval of the deviations, then it is clear that neither The Barnes Foundation nor the Attorney General are properly acting in the public interest because they have both failed to bring those new developments to this Court's attention to seek a ruling on whether it remains appropriate to pursue the relocation to Center City Philadelphia.

It is the position of The Barnes Foundation and the Attorney General that so long as they continue to support relocation of the artwork and art school to Center City Philadelphia, no one else has the ability to seek this Court's consideration of significant new developments that eliminate The Barnes Foundation's financial difficulties, even though that was the single most important consideration that led this Court to approve the requested deviations in December 2004. This Court has never previously endorsed such an astounding position — which would render this Court powerless to monitor The Barnes Foundation's ongoing behavior in reliance on this Court's December 13, 2004 ruling — and this Court should not do so now.

Rather, this Court should set these matters down for hearings on the merits, to allow this Court to properly exercise its continuing oversight over the charitable organization known as The Barnes Foundation. What those hearings will demonstrate, Petitioners believe, is that the two significant new developments that have given rise to the Petitions to reopen combine to eliminate the short-term and

long-term financial difficulties that caused this Court to approve the deviations. Thus, it is now possible for The Barnes Foundation to remain in its original location, thereby honoring Dr. Barnes' express intention and preserving the unique and irreplaceable cultural treasure that The Barnes Foundation and the Attorney General would allow to be dismantled.

Whether the Friends of the Barnes has standing to serve as a party to the reopened proceeding is simply a question intended to divert this Court's attention from addressing on the merits the matters of great significance that are now before this Court for its consideration. As explained in its Petition to reopen, the Friends of the Barnes Foundation would be satisfied to serve as *amicus* in assuring that this Court has access to all relevant information in deciding whether its approval of the deviations should be reconsidered.

Moreover, this Court must not lose sight of the fact that the pleadings that have been filed are petitions to *reopen*. If this Court allows this matter to proceed, the parties to the proceeding will remain as they were in December 2004 — The Barnes Foundation and the Attorney General — and they will need to address whether the significant changes in circumstance that have given rise to the Petitions to reopen should cause this Court to reconsider its approval of the deviations. It is not necessary for this Court to add new parties to this action to undertake that adjudication.

The preliminary objections take the remarkable position that no change in circumstances — no matter how convincingly they eliminate the central concern

that caused this Court to authorize the deviations and no matter how little has thus far been accomplished to relocate the artwork and art school — can suffice to trigger this Court’s reconsideration so long as both The Barnes Foundation and the Attorney General remain unalterably committed to that relocation. Because the undisputed evidence now before this Court demonstrates that such reconsideration is necessary, and because the question of Petitioners’ standing is inexorably intertwined with the merits, this Court should deny the standing-based preliminary objections without prejudice and proceed to hear this matter on the merits.

The Barnes Foundation predictably will argue in its reply brief that any reopening of this proceeding would cause irreparable harm to its continuing efforts to implement this Court’s December 2004 decree authorizing the relocation of the art collection and the art school to Philadelphia. Indeed, The Barnes Foundation made this very same “time is of the essence” argument, replete with affidavits of impending harm, in order to persuade the Supreme Court of Pennsylvania to assume Kings Bench jurisdiction over Jay Raymond’s appeal from this Court’s final adjudication. Hindsight, however, reveals that The Barnes Foundation has done precious little to implement this Court’s December 2004 ruling in the nearly three and one-half years that have followed. Any claim by The Barnes Foundation that reopening this proceeding will irreparably harm efforts to relocate to Philadelphia should therefore be discounted because The Barnes Foundation was not being truthful the last time that it made such assertions.

B. The Friends Of The Barnes Cannot Be Considered Non-Parties To This *In Rem* Proceeding Concerning A Charity, And They Have Now Formally Moved To Intervene.

The pending preliminary objections also assert that the Friends of the Barnes cannot file a Petition to reopen because they are non-parties who have not sought to intervene. The argument that the Friends of the Barnes have not sought to intervene is no longer correct, because such a request has now been filed with this Court. Moreover, because this matter and the litigation that produced this Court's December 13, 2004 ruling are in the nature of *in rem* proceedings, the preliminary objections are incorrect in asserting that the Friends of the Barnes are not parties to this proceeding.

The Barnes Foundation's argument and the argument of the Attorney General that the Friends of the Barnes cannot file a petition to reopen because they are non-parties is based on an incorrect premise — that the Orphans' Court proceeding is an *in personam* action that binds only the named parties and no one else. In fact, this action was and remains an *in rem* proceeding that binds the whole world. Not only does the title of the action reveal its *in rem* nature — *In re: The Barnes Foundation* — but the action clearly was not a proceeding to determine the rights of parties joined before the court and no one else. Rather, the Orphans' Court proceeding has determined with respect to the entire world where The Foundation's art school and artwork would be located into the future: the unique and historically significant location in Merion selected by Dr. Albert C. Barnes himself, or the

commercial location in Center City Philadelphia determined by corporate sponsors and influential politicians.

The Supreme Court of Pennsylvania in *Estate of Craig (Appeal of Stahl)*, 379 Pa. 157, 158–59, 109 A.2d 190, 198 (1954), recognized that a proceeding “involving the accounting and distribution of a decedent’s estate” is a proceeding *in rem*. Likewise, in *In re Pew Memorial Trust No. 2*, 5 Pa. D&C.3d 698, 705–06 (C.C.P. Phila. Cty. 1977), the Orphans’ Court of Philadelphia County recognized that it possessed *in rem* jurisdiction over the assets of that charitable trust.

Here, this Court exercised *in rem* jurisdiction in deciding whether to grant or deny The Barnes Foundation’s Petition to Amend The Foundation’s governing documents. That action was not a dispute between two parties over their respective rights nor was it a dispute over whether certain parties are entitled to obtain assets that currently belong to the charitable trust. Rather, the proceeding below was in its truest nature a proceeding *in rem*, to decide for the entire world the use to which The Barnes Foundation’s charitable assets would be put.

It is a venerable rule of law that “all persons having any interest in the thing are deemed parties” in an *in rem* proceeding. *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130, 136 (1875); *see also Darlak v. Columbus-America Discovery Group, Inc.*, 59 F.3d 20, 23 n.6 (4th Cir. 1995) (“No man is allowed to come in and say that the decree does not bind him and that he will have the matter retried; this is because all the world is a party to a suit *in rem*”) (internal quotations omitted).

Because this proceeding was and remains *in rem*, The Barnes Foundation and the Attorney General err in basing their preliminary objections on the argument that the Friends of the Barnes are not parties to the Orphans' Court proceeding. To be sure, the observation that the whole world is a party to an *in rem* proceeding does not give those lacking an interest in the proceeding standing to file a petition to reopen. But an organization such as the Friends of the Barnes, consisting of individuals who have a personal and direct, not to mention deeply abiding, interest in the reconsideration of this Court's decree, cannot be denied their right to judicial review based on the erroneous assertion that they are not parties to the *in rem* proceeding. And if this Court agrees that the pending request to intervene should be granted, then the Friends of the Barnes certainly would possess standing to participate in this proceeding.

Finally, the argument of The Barnes Foundation that these Petitioners fail to meet the requirement for intervention lacks merit. This Court's previous rulings that denied the request of various Barnes students to intervene were based on a substantially different record in a proceeding in which the Attorney General was a willing participant. Here, by contrast, the Attorney General is asking this Court to reject the petitions to reopen without any inquiry into their substantive merit. Accordingly, this Court's earlier rulings on the subject of standing are not *res judicata*. Moreover, this Court can and should hold that the Attorney General is an inadequate representative of the general public given that substantial grounds for reconsideration of this Court's earlier ruling exist, but the Attorney General

remains unalterably opposed to allowing this Court to undertake any such reconsideration.

C. The Issues Raised In The Petitions To Reopen Have Not Already Been Decided By This Court In Its December 2004 Ruling.

One of the more frivolous arguments that The Barnes Foundation advances in its Brief in support of the preliminary objections is that *res judicata* precludes this Court's consideration of the Petitions to reopen because the issues raised in the Petitions were already decided by this Court in its December 2004 ruling.

As explained above, the Petitions to reopen were filed due to the existence of two significant new developments that, in combination, resolve the short-term and long-term financial concerns of The Barnes Foundation while allowing both the artwork and art school to remain in Merion in the location chosen by the original donor. When this Court issued its December 2004 ruling, this Court did not foresee, nor could it have been expected to foresee, that Montgomery County would nearly three years later offer an immediate \$50,000,000.00 cash infusion to The Foundation. Nor did this Court foresee in December 2004, nor could it have been expected to foresee, that Lower Merion Township would enact zoning changes that would permit significantly increased visitation at The Barnes Foundation, thereby generating an additional \$2,418,000.00 in additional revenue per year.

Because neither of these two significant changed circumstances that give rise to the Petitions to reopen existed or were anticipated when this Court issued its December 2004 ruling, The Barnes Foundation's assertion that the doctrine of *res*

judicata precludes this Court from reopening this proceeding based on those new developments is entirely lacking in merit. *See Pennsylvania State Univ. v. County of Centre*, 532 Pa. 142, 145, 615 A.2d 303, 304 (1992) (holding that changed factual circumstances sufficed to defeat assertion of issue preclusion). This Court's December 13, 2004 ruling did not decide, and could not have decided, whether reconsideration based on significant and unanticipated new developments that did not arise until mid-2007 would provide a basis for reconsidering this Court's approval of the requested deviations. Moreover, this Court's December 13, 2004 ruling contained no holding that this Court would be unwilling to reconsider that ruling even if circumstances changed to make it financially feasible for The Barnes Foundation to remain in Merion before significant, irreversible steps had been implemented to move the artwork and art school to Center City Philadelphia.

Likewise, The Barnes Foundation's contention that Petitioners should have filed exceptions to this Court's adjudication within thirty days of the judgment entered in December 2004 again overlooks that the Petitions to reopen are based on the existence of significant new developments that did not arise until mid-2007. Had those significant new developments arisen before the expiration of the time to file exceptions in January 2005, then The Barnes Foundation's preliminary objections might have some degree of merit. But it is simply illogical to argue, as The Barnes Foundation now does, that the Friends of the Barnes should be precluded now from bringing significant new developments that occurred in mid-

2007 to this Court's attention because those developments were not brought to this Court's attention in early 2005, more than two years before they had even occurred.

D. It Is Inexplicable Why The Barnes Foundation Devotes More Than Ten Pages Of Its Brief To Arguing That References To The Capital Budget Project Itemization Act Of 2002 Should Be Stricken As "Scandalous And Impertinent" Matter, But This Court Should Deny That Relief In Any Event.

The extensive attention devoted by the Barnes Foundation and the Attorney General to the \$107,000,000.00 in Capital Budget line items is reminiscent of the oft-quoted line from "Hamlet," "The lady doth protest too much, methinks." The Barnes Foundation inexplicably devotes more than ten pages of its forty-four page Brief in support of preliminary objections to arguing that those portions of the Friends of the Barnes's Petition to reopen that rely on the existence of the Capital Budget Project Itemization Act of 2002 should be stricken as "scandalous and impertinent" matter. This may represent the first time in the long history of the Commonwealth of Pennsylvania that a court has been asked to hold that discussion of an item of legislation was either scandalous or impertinent, let alone both simultaneously.

In *Commonwealth Dep't of Environmental Resourcesv. Peggs Run Coal Co.*, 423 A.2d 765, 769 (Pa. Commw. Ct. 1980), the Commonwealth Court held that "To be scandalous and impertinent, a complaint's allegations must be immaterial and inappropriate to the proof of the cause of action." And in *Commonwealth Dep't of Environmental Resourcesv. Hartford Acc. and Indem. Co.*, 396 A.2d 885, 888 (Pa.

Commw. Ct. 1979), the Commonwealth Court recognized that "the right of a court to strike impertinent matter should be sparingly exercised and only when a party can affirmatively show prejudice." Here, the allegations in question are not immaterial to the Petition to reopen, nor are the allegations inappropriate to proof. Moreover, The Barnes Foundation has utterly failed to show, and is unable to show, any prejudice. For all of these reasons, The Barnes Foundation's request to strike must be denied.

The Petition to reopen that the Friends of the Barnes filed does not say, nor does it even imply, that the legislative itemizations totaling \$107,000,000.00 would be available to The Barnes Foundation if the artwork and art school remain in Merion in the location that the original donor intended would be their perpetual home. Rather, the Friends of the Barnes simply observe that it would have been preferable had either The Barnes Foundation or the Attorney General brought the existence of those itemizations to this Court's attention before this Court issued its December 13, 2004 ruling. At a minimum, this Court could then have inquired into whether the Pennsylvania legislature's newfound support for The Barnes Foundation was capable of translating into any funding to keep the artwork and art school in Merion.

It defies belief to suggest that neither the recipient of a \$107,000,000.00 legislative earmark nor the Attorney General of Pennsylvania were aware of this budget itemization between the time it was enacted in 2002 and the time this Court issued its ruling in December 2004. There exists little to no dispute over the

meaning and legal effect of the itemization, and thus this Court can resolve those questions as a matter of law. Where dispute remains is over the facts concerning when The Barnes Foundation and the Attorney General's Office learned of these itemizations, and why they failed to bring the itemizations to this Court's attention in a timely manner. At a minimum, before striking averments relating to those issues as "scandalous or impertinent," a factual hearing is required at which testimony under oath is presented along with an opportunity for cross-examination. Or, in the alternative, and based on the law cited above, this Court should simply deny The Barnes Foundation's audacious request to strike those averments as "scandalous or impertinent."

E. This Court Should Deny The Barnes Foundation's Request For Counsel Fees Because Petitioners' Request To Reopen Is Neither Arbitrary Nor Vexatious.

The Barnes Foundation concludes its Brief in support of preliminary objections with a request that this Court assess counsel fees against the Friends of the Barnes due to Petitioners' supposed arbitrary and vexatious conduct. This request for counsel fees is nothing more than a transparent effort to frighten into silence the only group of individuals committed to preserving the original intention of the donor, Dr. Albert C. Barnes, that the artwork and art school should perpetually remain in Merion.

The Petition to reopen was not "arbitrary" because it was plainly based on the occurrence of two significant new developments that in combination now make

it financially feasible for The Barnes Foundation to remain in Merion. *See* *Thunberg v. Strause*, 545 Pa. 607, 615, 682 A.2d 295, 299 (1996) (defining "arbitrary" as "conduct is based on random or convenient selection or choice rather than on reason or nature"). Moreover, this Court has never previously denied standing to the Friends of the Barnes under the circumstances now presented, nor do this Court's earlier standing decisions mandate the denial of standing at this juncture. And the Supreme Court of Pennsylvania's recent ruling in *In re Milton Hershey School*, 590 Pa. 35, 911 A.2d 1258 (2006), did not involve a petition to reopen a proceeding over which the Orphans' Court already had jurisdiction.

The Friends of the Barnes wish, as much as anyone, that they did not have to reach into their own pockets, depleting their own personal financial resources, to vindicate the charitable intentions of Dr. Barnes. These Petitioners have no huge corporate or "philanthropic" sponsors willing to pledge astronomical sums of money to vindicate those sponsors' particular corporate ends. Rather, what these individual Petitioners have done and are doing is the purest form of charity — giving of their own time and resources to vindicate the charitable intentions of someone whose generous gifts to the world of art and culture they greatly value. But their repeated efforts to implore both The Barnes Foundation and the Attorney General's Office to cease their efforts to relocate the artwork and art school to Philadelphia now that it is financially feasible for the artwork and art school to remain in Merion have been repeatedly rebuffed, ignored, and even ridiculed by The Barnes Foundation and the Attorney General's Office.

As matters now stand, The Barnes Foundation is unnecessarily approaching a precipice. It would destroy a unique cultural treasure that belongs not only to the people of Montgomery County, the people of the Commonwealth of Pennsylvania, and the people of the United States, and also unnecessarily squander hundreds of millions in donations and other gifts that could instead be put to other charitable uses.

Perhaps it would have been arbitrary for the Petitioners to have sought reconsideration in the absence of any significant new developments and based on nothing other than the original record in this matter. Perhaps it would have been arbitrary for Petitioners to have sought reconsideration if this Court had previously ruled that no change in circumstances no matter how significant — not even changes that solve The Barnes Foundation's financial difficulties without requiring any relocation of the artwork or the art school — would justify this Court's reconsideration of its approval of the deviations. But that is not what happened here.

In sum, the Petition to reopen that the Friends of the Barnes have filed is not arbitrary, and thus this Court must reject The Barnes Foundation's request for counsel fees predicated on that basis.

Similarly, the Petition to reopen is not vexatious. A matter is vexatious only if it lacks any basis in law or fact and was filed solely for the purpose of annoyance. *See Thunberg*, 545 Pa. at 615, 682 A.2d at 299. Here, by contrast, the Petition to reopen has a valid basis in fact, predicated on the two significant new developments

that make it financially feasible for The Barnes Foundation to remain in Merion. This Court has the legal capacity and jurisdiction to determine whether those significant new developments should result in a reconsideration of this Court's approval of the deviations. Finally, the Friends of the Barnes have not expended their precious and limited time, effort, and financial resources to annoy The Barnes Foundation, but rather in the hope of causing this Court to reconsider its approval of the deviations so that the original intent of Dr. Barnes may be vindicated.

Regardless of whether this Court's December 13, 2004 ruling represented a grievous error inflicting irreparable harm both to a unique and irreplaceable cultural treasure and to Pennsylvania's law governing the disposition of charitable bequests, all that the Friends of the Barnes ask this Court to recall is the considerable equivocation and doubt that this Court expressed regarding the correctness of that ruling. Now, due to the significant new developments that have given rise to the Petitions to reopen, this Court can with confidence conclude that a relocation of the artwork and art school to Philadelphia is no longer necessary to the financial survival of The Barnes Foundation. And, upon so holding, this Court can withdraw its approval of the deviations due to the changed circumstances that have given rise to the Petitions to reopen.

IV. CONCLUSION

For all of the foregoing reasons, the preliminary objections filed to the Petitions to reopen should be denied, The Barnes Foundation's request for sanctions

should also be denied, and this matter should proceed on the merits so that this Court can decide whether to rescind its approval of the deviations based on the significant new developments that allow The Barnes Foundation to remain economically viable while staying in Merion, which Dr. Barnes himself intended to be the perpetual home for both the artwork and the art school.

Respectfully submitted,

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