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Critic's Notebook

“One last try to keep Barnes art in its original home”

Petitioners give the judge who allowed the storied art collection's takeover by Philadelphia interests another chance to get it right.

by Christopher Knight

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Conspiracy theory or hostile corporate takeover?

Those two options come to mind when reading the lengthy court petition filed recently in the dispiriting case of the Barnes Foundation. Nearly three years ago, the court approved moving the unique Pennsylvania school with the drop-dead \$6-billion Modern art collection from suburban Lower Merion Township to downtown Philadelphia. The scheme wrecks the greatest American cultural monument of the early 20th century, so opponents are trying a last-ditch effort.

The petitioners, called Friends of the Barnes, are asking Orphans Court Judge Stanley Ott to rescind his earlier order, disband the Barnes' new board and put the foundation in receivership, under his supervision. Montgomery County, where the school is located, reportedly has a similar suit in the works.

Three law review articles say the original case was wrongly decided, but conventional wisdom says a successful reversal is a long shot. A ruling is a ruling. I'm no lawyer, but the shorthand reasoning seems to be "No do-overs."

No do-overs? Isn't that just what the judge granted in December 2004? Albert C. Barnes died in 1951, and Ott broke Barnes' will.

The will gave a school with a fabulous collection of paintings by Picasso, Matisse, Van Gogh, Cézanne and other masters to Montgomery County, if the state agreed to Barnes' terms. Working with education reformer John Dewey, Barnes had devised an eccentric installation that mingles Modern paintings, tools, rustic furniture, African sculpture and more, all housed inside a carefully crafted architectural milieu designed by Paul Cret -- complete with Jacques Lipchitz reliefs and a major Matisse mural -- and set in a 12-acre arboretum. Central to the bequest was a requirement that not one iota of the carefully planned Merion installation would ever be changed. Today's plan to shutter the school and build a \$100-million tourist attraction six miles away in Philadelphia would seem to count as a pretty big do-over of that half-century-old covenant.

Judges don't like breaking wills. It discourages future benefactors, who would be worried about long-term stability for their own bequests.

It also emboldens others to try the same thing. Since the Barnes ruling, two additional schools have become embroiled in litigation over valuable art collections bequeathed long ago by donors. Controversial deals pending at Tennessee's Fisk University and Virginia's Randolph College are different, since both involve selling art. But the desire for a do-over is the same.

A decision in the new Barnes petition might come down to this: How does the judge feel about being duped? Two disquieting facts that emerged after his 2004 ruling imply that he was, both relating to events in fall 2002, when the court was first asked to break the donor's will and allow the move.

On Sept. 24 the state's three richest art philanthropies -- Pew, Lenfest and Annenberg -- announced a pact to lead fundraising to accomplish the task. (Walter Annenberg, a jealous rival collector who first went to court to break the Barnes will 50 years earlier, died a week later.) Reaction outside the region was uniformly negative, but silent acquiescence was guaranteed from local art organizations, who depend on the foundations' philanthropic largess. Pew volunteered to administer the deal.

Six days later, the state appropriated \$100 million for downtown construction. But that huge budget allocation was never publicly announced. It remained undisclosed for four years -- until long after the judge's ruling. Ironically, Ott's decision was based on fears of the Barnes' financial insolvency.

No state legislator has yet stepped forward to acknowledge inserting the funding into the budget bill. Ott has said he knew nothing of it.

Finally, in December 2002 Pew filed an IRS application to change its status. Pew was a private foundation, using established assets primarily to give grants to others; it wanted instead to become a public charity. The change would save millions of dollars in taxes and reduce restrictions on how Pew spends its money.

Gifts normally provide about one-third of a public charity's support. To convince the IRS that donors would contribute to a foundation already flush with \$4 billion in assets, Pew's application held out its management of Barnes fundraising as "a prime example of the valuable role that [Pew] will play."

But that's not the story Pew Charitable Trusts President Rebecca W. Rimel later told Ott's court, according to the petition. By the time she took the stand to testify in the Barnes hearing, the successful change in her foundation's status had been announced. Yet the change, she said, was "not based on anything that may or may not happen with the Barnes. . . . It has no implications whatsoever."

In hindsight, a judge might reasonably begin to wonder whether he had been played. Especially this judge. Ott's ruling allowing the move chided the governor and the state attorney general for trying to influence his decision.

The judge blasted the attorney general's office, complaining, "It was left to the court to raise questions relating to the finances of the proposed move and the plan's financial viability." Apparently, neither official thought to mention the \$100-million state budget item. The undisclosed state appropriation and Rimel's apparent misrepresentation of Pew's conflicting interests show how limited a courtroom is as a place of discovery.

Americans do love a good conspiracy theory, though, to explain the seemingly incomprehensible by unearthing secret plots directed by powerful, hidden alliances. But forget grassy knolls in Dallas and dynamite in Building 7 at the World Trade Center. There's nothing "Area 51" about the Barnes situation.

What happened was just the nonprofit world's equivalent of a hostile corporate takeover, powered by privilege, manned by bureaucrats and operating below the public radar. A weak foundation was gobbled up by an alliance of stronger ones, which had their own motives. For \$150 million in pledges, control of the \$6-billion art collection changed hands.

The takeover was complicated. How deep are the entanglements? Start with Barnes Treasurer Stephen J. Harmelin, who joined the board in early 2002.

He's a corporate lawyer and managing partner at Dilworth Paxson, perhaps Philadelphia's most powerful law firm. Vincent J. Fumo, the recently indicted Pennsylvania state senator who worked at the firm in 2002, chaired the appropriations committee that put the \$100 million in the state budget.

Dilworth Paxson's client list has included Annenberg and his eponymous foundation. The Annenberg fortune came from Triangle Publications, whose former general counsel is H.F. "Gerry" Lenfest. He's president of the Lenfest Foundation and chairman of the Philadelphia Museum of Art.

Barnes established his foundation because he hated Philadelphia's cultural establishment. In the 1930s he'd seen the great Old Master collection assembled by his friend and lawyer, John G. Johnson, posthumously hijacked when the Philadelphia Museum went to court, broke Johnson's will and absorbed his art.

Small world, isn't it? The petition wonders whether the same scenario is the endgame to the Barnes takeover.

Annenberg and Lenfest got what they wanted -- control of an astounding art collection. Pew got what it wanted -- public charity status. The only one who didn't get what he wanted was Barnes, the guy who created the magnificent treasure.

No surprise there. Barnes was the only one at the 2004 hearing who had no filthy rich, politically wired advocate. Should the judge give that loser a do-over now? Well, yes. He should.

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