

Volume VI I

VOLUME VI I

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

- - -
IN RE: : NO. 58,788

THE BARNES FOUNDATION, :
a corporation :
:
- - -

Peti ti on To Amend Charter and Bylaws

- - -

Courtroom A

Thursday, September 23, 2004

Commenci ng at 1:28 p. m.
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Amy Beth Boyer, R. P. R.
Offi ci al Court Reporter
Montgomery County Courthouse
Norri stown, Pennsyl vani a

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BEFORE: THE HONORABLE STANLEY R. OTT, JUDGE

- - -

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COUNSEL APPEARED AS FOLLOWS:

RALPH G. WELLINGTON, ESQUIRE
HONORABLE ARLIN M. ADAMS
CARL A. SOLANO, ESQUIRE
BRUCE P. MERENSTEIN, ESQUIRE
for the Petitioner,
The Barnes Foundation

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LAWRENCE BARTH, ESQUIRE

Deputy Attorney General

for The Commonwealth of Pennsylvania

as parens patriae for charities

TERRANCE A. KLINE, ESQUIRE

HOWARD MASON CYR, III, ESQUIRE

PAUL M. QUINONES, ESQUIRE

for the Intervenors,

The Students of The Barnes Foundation

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I N D E X

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PETITIONER'S EVIDENCE

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Witness	Voir Dire	Direct	Cross	Redr	Recr
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JEREMY A. SABLOFF	2	8		18	
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By Mr. Barth			13		
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By Mr. Kline			14		
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STEPHEN J. HARMELIN		21		67, 83	
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By Mr. Barth			50		71, 84
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By Mr. Kline

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85

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E X H I B I T S

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PETITIONER'S

13

Number

Marked Rec'd

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P-69 Jeremy A. Sabloff Curriculum Vitae 7 --

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SABLOFF - VOIR DIRE

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MR. WELLINGTON: Your Honor, over

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the lunch I mentioned to counsel in order to keep the

4

de-accessioning testimony consistent, we're going to

5

call our other witness on that and then Mr. Harmelin,

6

who has now made it, if that's all right with Your

7

Honor.

8

THE COURT: All right. That's

9

fine. Go ahead.

10

PETITIONER'S EVIDENCE

11

MR. WELLINGTON: Dr. Jeremy

12

Sabloff.

13

MR. KLINE: Your Honor, may we have

14

a sidebar, please?

Volume VII

15 (A conference was held at sidebar,
16 not reported.)

17 - - -

18 JEREMY ARAC SABLOFF, having been
19 duly sworn, was examined and testified as follows:

20 VOIR DIRE EXAMINATION

21 BY MR. WELLINGTON:

22 Q Good afternoon, Dr. Sabloff.

23 A Good afternoon.

24 Q By whom are you employed, Dr. Sabloff?

25 A University of Pennsylvania.

1 SABLOFF - VOIR DIRE 3

2 Q And what is your expertise in your profession?

3 A I am an archeologist, and my special area is the
4 ancient Maya.

5 Q And what is your current position at the

6 Uni versi ty?

7 A I'm professor of anthropology.

8 THE COURT: They di d human

9 sacri fi ce, di dn' t they?

10 THE WITNESS: Yes, they di d.

11 THE COURT: It sends chi lls down

12 me, just thi nki ng about i t.

13 Go ahead. Sorry for that

14 i nterrupti on.

15 MR. WELLINGTON: It's all ri ght.

16 BY MR. WELLINGTON:

17 Q And unti l recentl y, di d you have another posi ti on

18 at the Uni versi ty of Pennsyl vani a?

19 A Yes.

20 Q And what was that, si r?

21 A For the past ten years, I've been di rector of the

22 University of Pennsylvania Museum of Archeology and

23 Anthropology, until this past June 30.

24 Q Can you just generally describe your duties as the

25 director, the kind of things you were responsible for

1 SABLOFF - VOIR DIRE 4

2 as the director of that museum?

3 A It's a large anthropology archeology museum,

4 obviously, focused towards the University. It's

5 probably the leading museum of its kind in this

6 country. There is more than a million objects, a

7 budget in excess of \$12 million a year. A staff of

8 about 125 full-time, a number of part-time volunteers.

9 Active archeological and anthropological research in

10 over 18 countries around the world. Very active

11 education program, more than 40,000 school kids from

12 the tri-state area come to the University's museum

13 annually.

14 There are also outreach programs to

15 the schools, particularly the Philadelphia Public

16 School System, but obviously throughout the general

17 area. And there are also a state-wide lecture program

18 that's supported by the Commonwealth of Pennsylvania

19 for lectures in every one of the counties in the

20 Commonwealth are given by lecturers from the

21 University. So, a wide array of a number of University

22 classes are held in the museum, and the collections are

23 used to support that. International scholars come to

24 use the collections on a regular basis.

25 Q So it sounds to me, Dr. Sabloff, although the

1 SABLOFF - VOIR DIRE 5

2 title is museum, it is both an educational institution

3 and a museum; is that fair?

4 A Absolutely.

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5 Q By the way, why do you bother with these 40,000
6 students who are not University students who come
7 there? Do you really think they can learn something
8 from that University experience?

9 A I do indeed. I think it's the responsibility, I
10 would think, of if not all, virtually all museums to do
11 educational outreach. And I would like to think,
12 unfortunately, given the world today, that the more
13 students -- and this would be from K-12, as well as the
14 University and above -- who learn about other people,
15 other cultures, other traditions, the accomplishments,
16 the achievements of people, both through time and
17 space, those lessons are more important today than
18 they've ever been. And it's clear to us from feedback
19 from both teachers and students that certainly the K-12

20 students, a lot of them get that message. And so I

21 think the museum is doing something very important.

22 Q Did your duties at the Museum at the University of

23 Pennsylvania include decision-making about acquisition

24 of works to add to the collection and about

25 de-accessioning of the collection?

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SABLOFF - VOIR DIRE

6

2 A Yes. Both.

3 Q In that experience, Dr. Sabloff, did you become

4 familiar with the practices and ethical precepts of the

5 AAM, the AAMD, the American Association of State and

6 Local History?

7 A Yes. Particularly the AAM.

8 Q And you were present in court this morning, were
9 you not, when Dr. Wade was testifying about those?

10 A Um-hmm. Yes.

11 Q Is there anything about his understanding or
12 representation of those general principles or precepts
13 that you would disagree with?

14 A Not that I can recall.

15 Q For time-saving purposes, I am not going to then
16 go through all of that again.

17 MR. WELLINGTON: Your Honor, I
18 would offer Dr. Sabloff as an expert on the
19 administration of museums and the care of collections.

20 THE COURT: I don't know that you
21 mentioned it, but his resume is your Exhibit 69, is it

22 not?

23 MR. WELLINGTON: Thank you. An

24 oversight, Your Honor. I appreciate it. I was going

25 to do that, yes.

1 SABLOFF - DIRECT 7

2 THE COURT: I wanted to point that

3 out.

4 (Photocopy of Jeremy A. Sabloff

5 Curriculum Vitae marked Petitioner's Exhibit 69 for

6 identification.)

7 BY MR. WELLINGTON:

8 Q It's now on the screen. I would like to identify

9 Exhibit 69, just ask you to verify if you would, Dr.

10 Sabloff, that is your current CV?

11 A It is.

12 MR. WELLINGTON: Thank you. And I

13 then renew my motion, Your Honor.

14 THE COURT: All right.

15 Mr. Barth, questions on

16 qualifications?

17 MR. BARTH: No questions, Your

18 Honor.

19 THE COURT: Mr. Kline, on

20 qualifications?

21 MR. KLINE: No questions.

22 THE COURT: Very well.

23 You may proceed.

24 MR. WELLINGTON: Thank you, Your

25 Honor.

1 SABLOFF - DIRECT 8

2 DIRECT EXAMINATION

3 BY MR. WELLINGTON:

4 Q Just in general, is there a view in the museum

5 community -- is there a general view in the museum

6 community on the issue of de-accessioning?

7 A Yes.

8 Q When it's appropriate and when it's not?

9 A I would divide that: De-accessioning, in

10 principle; and then what to do with the proceeds of

11 de-accessioning once it happens.

12 Q Just explain to us your views on those, your

13 understanding on those two things.

14 A I think de-accessioning itself, I think it's

15 obviously a widespread practice. There is certainly a

16 certain amount of disagreement in the field. One sees

17 it regularly in the newspaper, even de-accessioning

18 where, as was discussed this morning, it's used to

19 purchase other like or other objects for the

20 collection. For example, there are arguments -- the
21 Museum of Modern Art does a fair amount of
22 de-accessioning, selling some paintings and using that
23 to buy others. Ample justification for doing that,
24 although there are others in the museum community who
25 would wonder whether curatorial judgments today about

1 SABLOFF - DIRECT 9

2 the strength of A and the weakness of B, the next
3 generation might be different. Are you making
4 irreparable decisions on something that might change?
5 There is always disagreement. But, by and large, it's
6 an accepted practice that de-accessioning will occur.

7 I think where you get the more
8 disagreement is the whole area of if you're
9 de-accessioning, what you do. But by and large, even
10 there, I think the strong majority opinion is that the

11 proceeds from de-accessioning should be used for the
12 acquisition of other materials or for the direct
13 preservation, care of collections.

14 Q You have served on the Barnes Foundation's
15 Curatorial Advisory Committee, have you not, sir?

16 A Correct.

17 Q Just tell us briefly what that committee is
18 responsible for.

19 A It's a committee that's chaired by Joe Rishel of
20 the Philadelphia Museum of Art. Representation
21 literally from different experts from around the
22 country to advise Kimberly Camp and her staff on the
23 whole collections management project, basically to
24 assess the collections, to bring order inventory,
25 conservation opinions, and so on, to professional

1 SABLOFF - DIRECT 10

2 standards.

3 Q Does your involvement or has your involvement with
4 that committee influenced at all any opinions you might
5 give on de-accessioning of artwork?

6 A I think it couldn't help, but yes, in certain some
7 way, although I think my general opinions would not
8 change if I had not had that experience and that
9 exposure. It might have refined it, but the basic
10 opinion was there and still is.

11 Q Have you viewed any of the Foundation's collection
12 that is not on display in its gallery?

13 A Yes. I have been shown the off-exhibit materials
14 that are in what's now the administration building, and
15 I've also had two visits to Ker-Feal to see the
16 collections out there.

17 Q Do you have any opinion, Dr. Sabloff, on the

18 importance of the 3,000 or so pieces of the collection

19 at Ker-Feal in what you understand admission to the

20 Barnes Foundation to be?

21 A What impressed me most on seeing that collection

22 at Ker-Feal is how, having seen the gallery collection

23 in Lower Merion, how in a sense the same vision is

24 there. There is not an object on the wall, on a table,

25 that's not carefully placed. There has been general

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SABLOFF - DIRECT

11

2 thought about where it is, where it is in relation to

3 others, just like the gallery. The same intelligence

4 that one sees in the gallery -- you are struck -- is

5 there at Ker-Feal, as well.

6 Q And that's an ensemble intelligence created by

7 Dr. Barnes himself, correct, sir?

8 A Absolutely.

9 Q In one case at Ker-Feal with American decorative

10 arts substantially, and at Merion with European and
11 other paintings?

12 A Correct.

13 Q Have you reviewed the petition that the Barnes
14 Foundation has submitted to this Court, sir?

15 A Yes.

16 Q And have you reviewed the Opinion that the
17 Honorable Judge Ott issued earlier this year?

18 A Yes, I have.

19 Q Do you have any views, Dr. Sabloff, as to whether
20 the Barnes Foundation, which is primarily an
21 educational institution rather than a museum, is or
22 should be governed by the ethical precepts of the three
23 organizations that we've identified?

24 A It's my opinion, although it is an educational

25 institution, that it's an educational institution with
1 SABLOFF - DIRECT 12

2 a collection that's integral to its mission and in many
3 ways or acts like aspects of a museum. And, yes, I
4 would think the same principles, in terms of
5 collection, care, and management that are widespread
6 and accepted in the museum world would be applicable to
7 the Barnes.

8 Q Dr. Sabloff, I then want to ask you if you have an
9 opinion to a reasonable degree of certainty as to which
10 of the following alternatives would be the least
11 drastic means of meeting the financial needs of the
12 Barnes Foundation and continuing its mission,
13 alternative one being moving the principal gallery of
14 the Barnes Foundation from Merion to the Benjamin
15 Franklin Parkway and receiving a \$50 million endowment
16 and maintaining the entire collection of the Barnes

17 Foundation; or alternative two being selling as much of
18 the nongallery collection as necessary in order to
19 raise sufficient funds to try to stay in Merion?

20 A I'll preface my answer by saying neither one of
21 those alternatives are ones that I would like to see
22 for the Barnes. Accepting the current situation as it
23 is, both of these are drastic proposals. I think the
24 more drastic would be selling aspects of the nongallery
25 collection.

1 SABLOFF - CROSS 13

2 Q And tell us your --

3 A But I say that with reluctance, because I think,
4 you know, all things being equal, I'd rather not see
5 either one of those happen.

6 Q In a perfect world there would be enough money for
7 everything to flourish where it is and for access to be

8 wonderful.

9 A Or at least sufficient, yes.

10 Q Okay.

11 MR. WELLINGTON: Thank you. That's

12 all the questions I have, Dr. Sabloff.

13 THE COURT: Mr. Barth?

14 CROSS-EXAMINATION

15 BY MR. BARTH:

16 Q Just one quick question, Dr. Sabloff. You

17 indicated you served on the Curatorial Committee of the

18 Barnes Foundation?

19 A Yes.

20 Q Have there ever been any issues before you

21 regarding de-accessioning or accessioning?

22 A No. We've certainly been briefed on, you know,

23 current operation, but no, that's not been a topic

24 beyond general discussions that we've focused, then,

25 on.

1

SABLOFF - CROSS

14

2 Q De-accessioning and accessioning, at least up to

3 now, does not enter into discussions of that committee,

4 given the indenture terms?

5 A Correct.

6

MR. BARTH: That's all I have.

7 BY MR. KLINE:

8 Q Dr. Sabloff, I just have a few questions for you.

9 A Sure.

10 Q Mr. Wellington presented two alternatives to you.

11 He said alternative number one would be moving the

12 gallery to the Parkway, establishing a \$50 million

13 endowment, and keeping those works in storage. The

14 second alternative would be to sell the nongallery

15 assets, the works in storage, in order to keep the
16 Barnes Foundation where it is in Merion. And your
17 response to that was that you would choose alternative
18 number one, which was to move the gallery and achieve a
19 \$50 million endowment.

20 Now, Dr. Sabloff, isn't there a
21 third alternative? And that is to say, if you had now
22 to choose among three alternatives and not two, the
23 third being the trustees redoubling their efforts to
24 develop funds to keep what they have in Merion,
25 wouldn't you choose that alternative, Dr. Sabloff?

1 SABLOFF - CROSS 15

2 A If that could be achieved.

3 Q Dr. Sabloff, are you familiar with any legal
4 impediments to selling the nongallery art at the Barnes
5 Foundation?

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6 A Not that I'm aware of.

7 Q Are you familiar with any legal impediments to

8 selling Ker-Feal or the contents therein?

9 A Not that I'm aware of.

10 Q De-accessioning, then, is an ethics issue; is that

11 correct?

12 A Absolutely.

13 Q And these ethics guidelines are not legally

14 binding; is that correct?

15 A Absolutely.

16 Q Is the Barnes Foundation a member of the AAMD?

17 A Not that I'm aware of.

18 Q I have one final question. Selling art, you said,

19 would violate these ethical guidelines that are set

20 forth by the AAA and AAM and the AAMD, unless the

21 proceeds are used to enhance the collection or acquire

22 new paintings; is that correct?

23 A Yes.

24 Q Dr. Sabloff, we have a unique situation at the

25 Barnes Foundation. What do you do with objects, the

1 SABLOFF - CROSS 16

2 nongallery art, that cannot be used, that can't be

3 displayed in the gallery, that can't be used in the

4 educational programs, that can't be sold to reinvest in

5 the collection? They've been sitting in storage,

6 according to testimony, for 50 years, and loaning them

7 would be equivalent to a sale, since you could never

8 use them in your own collection. What do you suggest

9 that the Barnes Foundation do with this stuff?

10 A Let me take a step back. My understanding is that

11 not all of the items that you've listed necessarily

12 hold.

13 THE COURT: Your objection is to

14 the compound nature of the question, Doctor?

15 THE WITNESS: Yes.

16 THE COURT: I would have also.

17 THE WITNESS: Thank you, Your

18 Honor.

19 Let me give an example. At least

20 it is my understanding that Dr. Barnes himself

21 regularly moved art from the nongallery to the gallery

22 and back and forth. Therefore, presumably, he didn't

23 draw a hard line.

24 BY MR. KLINE:

25 Q Are you aware that in his indenture of trust, he

1 SABLOFF - CROSS 17

2 did draw --

3 MR. WELLINGTON: Excuse me. I

4 don't believe that Dr. Sabloff was finished with his

5 answer.

6 THE WITNESS: I was just going to

7 say, given that, at least my interpretation of that

8 would be that the items would -- my understanding would

9 be that I wasn't aware that all of those objects that

10 were not in the gallery could not be used for

11 educational purposes. Certainly, materials at

12 Ker-Feal, I understand, have been used.

13 BY MR. KLINE:

14 Q So you were not aware of Judge Ott's 2001
Page 29

15 adjudication that determines that those objects, the
16 nongallery art, is not subject to Paragraphs 10 and 13
17 of the indenture of trust which prevent their sale or
18 their loan or their touring? You weren't familiar with
19 that, were you?

20 A No.

21 MR. KLINE: Thank you. No further
22 questions.

23 THE COURT: Any redirect?

24 MR. WELLINGTON: Just one, Your
25 Honor.

1 SABLOFF - CROSS 18

2 REDIRECT EXAMINATION

3 BY MR. WELLINGTON:

4 Q Dr. Sabloff, does the fact of whether an
5 institution can afford to be a member of some of these
6 associations govern, in your opinion, whether they
7 should honor the ethical precepts in their field or
8 not?

9 A No. I think the precepts are generally
10 applicable, whether or not you are indeed a member of a
11 particular organization.

12 MR. WELLINGTON: Thank you.

13 Nothing further.

14 MR. BARTH: No.

15 MR. KLINE: No.

16 THE COURT: But you can't be
17 sanctioned by an organization to which you don't
18 belong, right?

19 THE WITNESS: Correct.

20 THE COURT: Other than for public
21 purposes?

22 THE WITNESS: Yes. In any formal
23 sense. That's correct.

24 THE COURT: Doctor, I see that you
25 have a Bachelor's, a Master's, and a Ph.D. Can you

1 JEREMY A. SABLOFF 19

2 simply tell me what subjects those are in?

3 THE WITNESS: Yes. The Bachelor's
4 at Penn was in Anthropology, and both my Master's and
5 Doctorate from Harvard were in Anthropology generally,
6 and more particularly in American Archeology.

7 THE COURT: Very good.

8 Doctor, I only have one other

9 question, and it's the same one I put to Dr. Wade.

10 Without getting into a discussion about the various

11 very complex legal documents which underlie this, I

12 would like you to assume for the purpose of this

13 question that there is a provision in the trust

14 indenture which provides under certain circumstances

15 that the collection will be liquidated.

16 THE WITNESS: I understand.

17 THE COURT: So my question to you

18 is, assuming that, what's your opinion about the

19 interplay, if any, between the ethical standard which

20 you've just endorsed and the provision of a donor who

21 talks about, under certain circumstances, liquidating

22 his collection? In other words, what trumps the other?

23 If there is -- and if "trump" is the wrong word, you
24 use what you want to use.

25 THE WITNESS: That's an important
1 JEREMY A. SABLOFF 20

2 question, as it was this morning, and still is. And
3 it's a very -- I'm going to say --

4 THE COURT: It's a tough question.

5 THE WITNESS: It's a tough and
6 difficult one where I think people of good intent will
7 differ greatly, and with similar --

8 THE COURT: And do.

9 THE WITNESS: And do.

10 My opinion would be similar to
11 Dr. Wade's this morning. I think, in the end, it is
12 worse to sell parts of the collection for operating
13 expenses or endowment than it would be to move.

14 THE COURT: Okay. Thank you. I

15 don't have anything further.

16 Has this prompted anything?

17 Thank you, Doctor.

18 (Witness excused.)

19 - - -

20 MR. WELLINGTON: May I call my next

21 witness?

22 THE COURT: Yes. Of course.

23 MR. WELLINGTON: The Foundation

24 calls Mr. Stephen Harmelin.

25 THE COURT: As Mr. Harmelin

1 HARMELIN - DIRECT 21

2 approaches the witness stand let me say that

3 Mr. Harmelin is well-known to this Court. He is a

4 distinguished member of the Philadelphia Bar who

5 practices in this court. And were it up to me, I would

6 not have you swear in Mr. Harmelin. There was a better
7 day when being an officer of this court carried with it
8 certain perquisites, that being one of them. But the
9 law requires otherwise, of course, so we will obey
10 that.

11 - - -

12 STEPHEN J. HARMELIN, having been
13 duly sworn, was examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. WELLINGTON:

16 Q Good afternoon.

17 A Good afternoon.

18 THE COURT: We won't have trouble
19 hearing you, I can tell.

20 BY MR. WELLINGTON:

21 Q Is that the managing partners' voice we're
22 hearing?

23 A No. Trustee of the Barnes Foundation.

24 Q Mr. Harmelin, you are with the Dilworth firm?

25 A Yes, I am.

1 HARMELIN - DIRECT 22

2 Q And have you been there your entire career?

3 A Yes, I have.

4 Q Are you currently the managing partner of that
5 firm?

6 A Yes, I am.

7 Q My sympathies as a fellow ...

8 In what area of law do you
9 specialize?

10 A Generally corporate transactions, business
11 transactions.

12 Q And you are a member of the Barnes Foundation

13 Board, are you not, sir?

14 A Yes, I am.

15 Q Give us just a little bit of your nonlegal

16 background. We're not qualifying you as an expert, so

17 we're not going to spend a lot of time on that, but

18 give us a little bit of your background. You graduated

19 from where, sir?

20 A I graduated from Harvard Law School, went to work

21 briefly at the Federal Communications Commission. I

22 then worked in the White House as an aide to President

23 Lyndon Johnson. I was in the Coast Guard briefly. I

24 came back to Philadelphia, worked here in Philadelphia.

25 I've been a Special Assistant District Attorney

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HARMELIN - DIRECT

23

2 briefly. I was General Counsel to the General

3 Assembly, the Commonwealth of Pennsylvania, in 1990, in

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4 connection with reapportionment. I've been on the
5 Board of the Convention Center, presently on the Board
6 of the National Constitution Center.

7 In the private sector, I've been on
8 a number of privately held boards. I was the Chairman
9 of the Board of a company in Montgomery County that was
10 the second largest employer I think in Montgomery
11 County called Confab. And I was also Chairman of the
12 Board of Publicker Industries, which was a company down
13 along the river in Philadelphia, along with
14 international assets.

15 Q And when did you become a member of the Board of
16 the Barnes Foundation?

17 A In February of 2002.

18 Q You were a nominee at that time of either Lincoln
19 or Mellon, I gather?

20 A Mellon Bank.

21 Q Was your service on the National Constitution

22 Board, by the way, during the time of its construction?

23 A Yes, it was.

24 Q Did you know Mr. Perks?

25 A Yes, I did.

1

HARMELIN - DIRECT

24

2 Q And do you confirm his recollection that that

3 project was brought in on time and on budget?

4 A Yes. I think you are referring to the Convention

5 Center, where we worked both of those projects,

6 however, were brought in on time and on budget.

7 Q Thank you.

8 At the time you joined the Barnes

9 Board, who were the other trustees?

10 A Dr. Watson was a trustee. I believe I came on at

11 the same time as Stefanie Bell-Rose and within a month
12 or so of Judge Jacqueline -- Jacqueline Allen.

13 Q Was Dr. Jeff Donaldson at that time also --

14 A Yes. I'm sorry. Yes.

15 Q And he has now passed away?

16 A He has now passed away. Yes.

17 Q At the first phase of this hearing, Mr. Harmelin,
18 there was some extensive testimony about the financial
19 problems of the Barnes, the history and so forth. When
20 you joined the Board, did you confront this situation?
21 Were you made aware of it, and you still agreed to
22 join. Let's talk about that judgment.

23 A Well, I think Dr. Watson made me somewhat aware
24 and I knew from the newspapers that there were some
25 financial problems at the Barnes Foundation.

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2 Dr. Watson is a master of understatement, though, and I
3 don't think I fully appreciated it until I got on the
4 Board, the nature and extent of those problems.

5 Q What did you and the Board do to address the
6 situation when you became a member?

7 A I attempted early on, obviously, and familiarized
8 myself with the circumstances. I talked to Dr. Watson,
9 and it became increasingly clear that this was not a
10 temporary situation, that it appeared to be both
11 structural and increasing daily in the severity.

12 Dr. Watson said that he was redoubling his efforts to
13 go out into the community where he has a superb
14 reputation in the Foundation community to continue to
15 seek support, but that we were doing the best we could,
16 but we obviously had to redouble our efforts.

17 I told him I thought that was

18 critical because although I didn't understand it fully
19 in-depth at that time, I was sufficiently comfortable
20 with the financial information to foresee that we were
21 headed for a very, very difficult period.

22 Q When you joined the Board, had there already been
23 a strategic plan prepared a year or two before?

24 A There was a strategic plan that had been prepared
25 at the request of the Board that was issued sometime in

1 HARMELIN - DIRECT 26

2 2000, yes.

3 Q Did you familiarize yourself with that?

4 A Yes.

5 Q Was the Board trying to make efforts to --

6 A Yes.

7 Q -- achieve that strategic plan?

8 A Yes. There was, I believe at a minimum, a full

9 day of Board indoctrination carried on by our counsel
10 and by our executive director and Dr. Watson to do what
11 they could to familiarize us with a massive amount of
12 information that you needed to be able to put the
13 Barnes Foundation into an appropriate context.

14 Q There was some testimony yesterday from
15 Mr. Schwendeman who I think was asked a number of
16 questions primarily by Mr. Cyr about a cash analysis,
17 where are we in 2002, that Deloitte was asked to do.
18 Do you recall that study?

19 A That study was conducted in the late spring and
20 summer of 2002. It followed the presentation at the
21 Board meeting earlier than that, of what was called a
22 memorandum of understanding which broadly outlined what
23 ultimately has become the petition. When outlined by
24 Dr. Watson, I think it was the Board's view, one, that

25 they were a little young and inexperienced; and two,
1 HARMELIN - DIRECT 27

2 that this was such a significant step in the history of
3 the Barnes Foundation that we wanted to explore every
4 alternative before we undertook anything of that size.

5 So we asked Deloitte to come in and
6 to look back a little bit at what was it about this
7 strategic plan that wasn't working. And then going
8 forward I wanted two things, which was somewhat -- what
9 were our options, given our cash; and then how much
10 time did we have to deploy those options? And the
11 reason that I asked them to do it on a cash basis is
12 because it's not easy to accustom yourself to the
13 financial statements as presented by not-for-profits
14 because they are sometimes rather confusing.

15 And to give you an example, a

16 not-for-profit will accrue as revenue a commitment that
17 extends out over three years. If it's a firm
18 unqualified commitment, you'll bring it into revenue in
19 the year the commitment is made, even though the money
20 doesn't arrive for two years. So you may end up with
21 an inappropriate belief in your prosperity when, in
22 fact, it's not there. So we were asking them, tell us
23 on a cash basis what was really happening here and help
24 us have a better sense of what the future looks like.

25 Q Are you in fact Chair of the Finance Committee of
1 HARMELIN - DIRECT 28
2 the Barnes Board?

3 A Yes, I am.

4 Q So, what did the Deloitte & Touche analysis that
5 you just talked about tell you?

6 THE COURT: When?

7 THE WITNESS: In 2002, when it was

8 received.

9 BY MR. WELLINGTON:

10 Q I'm sorry. Thank you.

11 The 2002 cash analysis that you had

12 just talked about, when it was received, what did you

13 conclude?

14 A Well, it more confirmed, I think, a few

15 impressions that were already beginning to develop.

16 Obviously, there was almost a complete absence of an

17 unrestricted endowment. That meant, with my experience

18 in the not-for-profit world, that that 20 to 25 percent

19 block of money that you sort of need every year that

20 you can count on predictably from an endowment was

21 completely missing.

22 In addition, for a lot of reasons,

23 the developmental income was unpredictable, that
24 although we were able, frankly, with many of the
25 foundations that were providing assistance, to continue

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2 to collect the collection assessment program, and
3 although Dr. Watson had done a superb job of getting us
4 additional assistance, that it wasn't predictable that
5 you could continue to count on that. So that what we
6 were looking at, at that moment in time, was an
7 operation --

8 And you'll have to forgive me, Your
9 Honor. I'm imperfect with numbers sometime like most
10 lawyers, but I'll do the best I can.

11 We were looking at an operation
12 where we were raising, from ongoing activities
13 including the admissions and including students and the

14 gallery, I believe somewhere around a million and a
15 half dollars, give or take some amount of money, and
16 that we needed 2 1/2 more million dollars to continue
17 to function at a level that we felt was appropriate.
18 And we were certainly covering part of that with the
19 1.2 or 3 million that we were getting in the collection
20 assessment area, but it looked to us as if there was
21 going to be plus or minus more than a million dollars
22 structural deficit.

23 Now, that meant that you were
24 rapidly going to run out of money, which by September
25 of 2002 is exactly what the Deloitte Touche report
1 HARMELIN - DIRECT 30

2 showed. I believe that Deloitte showed that we would
3 end up with about \$13,000 of sort of free cash flow in
4 either December or January and our own management said,
5 well, that may be a little pessimistic. And they were

6 off, you know, maybe 30 days more, we would have. But,
7 obviously, we were facing insolvency.

8 Q What options or alternatives did you look at or
9 consider or talk about?

10 A Well, we looked at the as-is scenario. And the
11 as-is scenario created a deficit, plus or minus, of
12 \$1 million a year. I then thought to myself, well, you
13 know, we're charged with the responsibility for a world
14 asset -- not a Pennsylvania asset or a Lower Merion
15 asset or Philadelphia asset, but this is part of the
16 patrimony of the world. And so my mind went to simply
17 preserve it and protect it until smarter minds can
18 think of what to do.

19 So, one of the scenarios was simply
20 close it to the public, in order to start reducing

21 expenses. One of the sad things that one always finds
22 out in that exercise is that when you start reducing
23 expenses, you also start reducing revenue almost
24 invariably. So at the end of that exercise, we
25 realized that that wasn't going to correct it.

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2 So then we said, well, what if we
3 close it to the public and to the students, can we
4 survive in that environment? And the answer was that
5 we could not survive in that environment.

6 We looked at the prospect of the
7 sale, sort of the one great work of art scenario. And
8 I was reminded that in 1990 that had been proposed and
9 it created such a firestorm that it did not seem like a
10 readily available alternative, because you then end up
11 with three years worth of litigation, trying to
12 determine whether you can sell that or any other piece

13 of art. So we were concerned about that alternative.

14 THE COURT: You're talking now
15 about selling a gallery piece?

16 THE WITNESS: A gallery piece, yes.
17 At that moment in time, we were focused on the gallery
18 pieces.

19 BY MR. WELLINGTON:

20 Q As you were thinking through these potential
21 alternatives as a relatively new trustee, Mr. Harmelin,
22 did you have any guideposts or touchstones that were
23 governing your thinking, things that mattered or didn't
24 matter, in your view?

25 A Well, when you're charged with, you know, sort of

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2 a fiduciary responsibility, what you're constantly
3 doing is weighing the alternatives to do the least harm
4 in your own heart and mind and based upon the
5 information that is available. So what we were trying
6 to do was to do that alternative and to explore those
7 alternatives that, under the information available to
8 us, would be the least disruptive over the long haul.
9 And that was sort of my touchstone, that I wanted --
10 I'm a trustee for relatively a brief period of time,
11 and on my watch, I would hope we would do no great
12 harm.
13 Q Were there any portions of the -- strike that.

14 Had you reviewed the indenture of

15 Dr. Barnes as a trustee?

16 A I did review the indenture, and you try to put

17 yourself in the place of Dr. Barnes. So I was

18 reviewing the indenture as a trustee and not as a trust

19 lawyer. And I was trying to think of what he would do

20 under similar circumstances, and there was sort of some

21 interesting things.

22 Obviously, he had a strong feeling

23 that don't sell works in the collection. So, I knew

24 sort of clearly what he didn't want us to do. Although

25 interestingly, he did refer to the gallery and the

1 HARMELIN - DIRECT 33

2 collection as an experiment within the document, and

3 during his lifetime, he reserved to himself the fact

4 that it may not work. He said that in the documents.

5 He said if it turns out that this doesn't work, I would
6 hope the trustees will return it or dispose of it in
7 some way, shape, or form, because to him, this was an
8 educational institution and these works of art were
9 there to assist him in the articulation of an aesthetic
10 philosophy and the advancement of education. And he
11 was, among other things, a pragmatist and a
12 businessman. So I think he, within his own life, was
13 constantly weighing the alternatives in much the same
14 way that I was trying to.

15 Q You referenced -- I don't recall exactly the
16 language, Mr. Harmelin, but you referenced if the
17 Foundation ran into some difficulties, think of
18 something.

19 A Right.

20 Q Was there some specific part of the indenture that

21 you recall --

22 A Well, it was Section 11 which really struck me as
23 a guidepost. I realized within the trust profession --
24 I think it's called cy-pres provision or private
25 cy-pres provision, but it was an insight into his mind.

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2 And so I had these two polars, one was a clear don't,
3 and the other was Section 11. And he said if the trust
4 is ever impossible to administer, then what I would
5 like my trustees to do is to associate themselves with
6 Philadelphia area institutions in being and to remain
7 as close to what I would call the mission of the
8 Foundation as the circumstances permitted. Well, had
9 we struggled with this -- I must admit I am rattled
10 when no one focuses on that provision. I mean, to me
11 that was, in a sense, an insight.

12

13 Impossible may mean something -- to a trustee it means

14 is it impossible to fulfill this mission? Is it

15 impossible to articulate his philosophy, if you

16 continue with essentially the status quo? I think one

17 of the saddest parts about what has happened at the

18 Barnes Foundation and with Dr. Barnes is that his

19 aggressive personality and battle continued even today

20 with some of the atmosphere at the Barnes Foundation

21 has overshadowed the brilliance and generosity of his

22 spirit.

23 I mean, the whole purpose of the

24 Foundation was to increase the cognitive ability of

25 human beings by introducing them to the sort of

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2 teaching function of art. I mean, he felt -- in his

3 factory where he worked, he felt that at the

4 Foundation, that if you could focus on works of art
5 without, for instance, necessarily understanding all
6 the contextual aspects of it and whether it was French
7 Impressionist, but if you could focus on that, that you
8 would become a brighter person. And if you were a
9 brighter person, you'd be a better citizen. And if you
10 were a brighter, better citizen, then a lot of the
11 irrelevancies, like the race of someone, would give way
12 to what he felt very strongly about, which was
13 meritorious. And I think what has happened is that the
14 value of the collection has run far ahead of the value
15 of his philosophy, which may be reversed as the years
16 continue.

17 Q At some point in this deliberative process that
18 you and the Board were going through, Mr. Harmelin --

19 and I think you actually may have said it was -- all
20 right. That was the third question. Let's start
21 again.

22 At some point there was a potential
23 resolution or proposal that Dr. Watson had brought to
24 the Board that I think you said resulted in this
25 petition.

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HARMELIN - DIRECT

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2 A It resulted in the petition after approximately
3 six months of sort of what I would call ongoing
4 discussions. We went back to the foundations because

5 of our belief that the very announcement of this move
6 would immediately result in litigation, and we had to
7 be sure that we had the resources to handle that kind
8 of controversy. There was nothing in the history of
9 the Barnes certainly in the past 15 years which would
10 lead one to believe this would go smoothly. So we
11 needed that.

12 We also needed essentially what was
13 called bridge financing over the estimated two years.
14 And we weren't certain that what was offered initially
15 was sufficient, and so we went back to our executive
16 director and asked her to do projections with respect
17 to what she anticipated we would need, because she had
18 accurately predicted that she felt other sources would
19 dry up. And once you were a foundation that was in,
20 quote, play, that others would await the outcome of

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21 that until they made any determination as to whether
22 there would be significant support from the community.
23 So there were many issues along the way which we wanted
24 to negotiate with the Foundation to try to come to a
25 conclusion.

1 HARMELIN - DIRECT 37

2 The basic thrust, certainly on the
3 administrative side, were nothing which we were free to
4 even put in place ourselves that we found erroneous. I
5 mean, it was self-evident to us that this Board was
6 simply not sufficient in the world of not-for-profits,
7 with Sarbanes-Oxley out there and all of the other
8 obligations, that we needed a broader-based Board to
9 raise money. So that was not difficult.

10 And the problem that we were
11 addressing was whether or not we could fulfill our

12 mission in Merion. That was a very tough one to
13 address, but it seemed on balance that we probably
14 could not. And we ended up, as you're well aware, in
15 support of our agreement with the Foundation and in
16 going forward with the petition.

17 Q I want to get to that proposal, but why did you
18 not conclude, Mr. Harmelin, that your responsibility as
19 a trustee was basically to roll up your sleeves, get on
20 the phone, and raise more money?

21 A Well, number one, I had tried from a variety of
22 sources to raise money, sometimes successfully and
23 sometimes less so. But it was increasingly clear that
24 large predictable sources of funds were just not being
25 made available to the Barnes Foundation. And I can

1 HARMELIN - DIRECT 38

2 understand it in part, by the way. For instance, at
3 the National Constitution Center, you have a wide array
4 of capabilities. If you have the opportunity, you can
5 cater a social event. You can name buildings after
6 Mr. Kimmel or Verizon or any one of a number of naming
7 opportunities. There are just so many different tools
8 that are simply not available for a variety of reasons.

9 And we have limitations on our
10 admissions. I mean, we kept can't go increasing the
11 number of admissions. We could increase the admission
12 price, but the more you increase the admission price,
13 the higher on the socio-economic scale you go up. And

14 that runs you up against the offsetting consideration
15 that he wanted this gallery and the works to be
16 available to the working people. So, you're always
17 operating in an environment of cross purposes.

18 Q Now, it's obviously been suggested by some that
19 you could solve at least some of the financial
20 difficulties by selling the property at Ker-Feal and
21 selling as much of the nonpermanent gallery hung art in
22 the collection as you could. Why didn't you conclude
23 that that was the right thing to do?

24 A I guess I could speak for myself. I don't know
25 how all of us vote, and we talked about different

1 HARMELIN - DIRECT 39

2 considerations.

3 I think one of the experts said it
4 today, but it affected me profoundly, and that was that

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5 there was something incredibly irrevocable about sales.
6 Ker-Feal is used not only for its educational purposes,
7 for its superb collection of American antique
8 furniture, but it is a backup for an increasingly
9 crowded horticultural education program. Everything
10 that is planted in Lower Merion, I believe, is also
11 planted out at Ker-Feal, so that we have a backup.

12 As a very personal matter, when I
13 lived in that area, my former wife spent, I believe,
14 two years in that program. And I saw the profoundly
15 wonderful effect that it had on our children. Just
16 walking through Lower Merion, which is probably one of
17 the most beautiful suburbs in the world, but what a
18 difference when she could point out to them all the
19 different kinds of leaves and trees and everything.

20 And so having the option not to
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21 sell, holding the collection together permits me wider
22 scope. It could well be when you look out over the --
23 and this becomes important when you're a trustee of
24 something of this importance. You want to look out
25 over fifty years, you want to look out over a hundred
1 HARMELIN - DIRECT 40
2 years -- it's conceivable that at some time in the
3 future in our three campuses, you would move things
4 around. And who knows whether or not all or some
5 portion -- fifty years from now, if there were other
6 problems.

7 My point is I would hate to wake up
8 one morning and find out that something was absolutely
9 critical and that we had sold it. I'm not that smart.
10 And Dr. Barnes, one of his great contributions was
11 connections. And so, it is an expression, as someone

12 said, of this man's life's work. It is a closed
13 collection, I may add. This is not something like with
14 a museum where you can replace one piece with another
15 piece. That's not what we have.

16 Q There, turning to the proposals that is the
17 concept of the petition or the essence of the petition,
18 there have been a lot of news articles and perhaps some
19 testimony in a prior hearing that this decision of the
20 Barnes Board to move the gallery to the Parkway is, in
21 essence, a takeover by three prominent charitable
22 institutions. As a Board of Trustee member, can you
23 tell us what you -- is that true?

24 A Well, you have finally come upon an area that I
25 know something about. This is not a takeover. I mean,

1 HARMELIN - DIRECT 41

2 a takeover in the world is when you have, you know,

3 control of all the levers and power and particularly
4 control of the Board. I mean, anyone who looks at this
5 realizes that there is no control over the Board of
6 Directors. We have broad representation from Lincoln.
7 And I think one of the things that Dr. Watson made as a
8 critical precondition with respect to anyone we were
9 talking to was that consistent with Dr. Barnes'
10 desires, that this would remain a free and independent
11 institution, charged fully with the responsibility of
12 fulfilling his desires for the advancement of education
13 and the appreciation of art, and that we would not be
14 subordinate to the agenda of any university or any
15 other institution that wanted us to become part of it
16 Q As a board member, Mr. Harmelin, if the Court
17 ultimately were to grant an order permitting the
18 relocation of the gallery, do you sort of view -- is

19 the game over, full speed ahead?

20 A Oh, I think the game's begun. I don't think that
21 that frees the trustees from their responsibility to
22 continue to act responsibly and to continue to make
23 significant decisions as you go along and to continue
24 to tweak what you're doing to make sure that it works
25 in a manner that it's supposed to work.

1 HARMELIN - DIRECT 42

2 Along with the building of the
3 Convention Center, I can think of one instance where we
4 started the convention center at one point and the day
5 after we opened, we realized we didn't have handicapped
6 access. So we had to go back and deal with that.

7 The National Constitution Center,
8 we got to the point where we realized that we could not
9 really fit out the changing art section the way we

10 wanted to, so that section remains yet to be done. You
11 constantly match your desires against your resources
12 and keep in mind your main goal. That's what trustees
13 are charged with the responsibility of doing.

14 Q Judge Ott asked an interesting and important
15 question this morning of one of the witnesses, and it
16 was I think, in essence, what if the grand finance plan
17 that has been rolled out, the aggressive plan of
18 contributions that are expected and the Deloitte &
19 Touche pro forma doesn't work? What if two, three
20 years down the road you find yourself a little short,
21 it's not working? What then?

22 A Well, then you would do all of the things that
23 you're charged with doing when you're a prudent trustee
24 or director. You start looking at what things -- what
25 is it that you can reduce in terms of personnel costs

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2 without significantly damaging your revenues? What can
3 you defer? And how can you increase your capabilities
4 so that your revenues match your expenses? That's the
5 normal panoply of things that a trustee or a director
6 does.

7

And we will continue to look,

8

although it fits well within the numbers and

9

percentages that I have looked at, \$4.25 million is not

10

a slam dunk and if need be, you will focus then on

11

raising your endowment.

12

Q Are there any -- strike that.

13

You heard -- I don't know if you

14

were here this morning -- in fact, I think you weren't.

15

That's the reason we had some of the experts we had on

16

this morning, because you were caught in traffic.

17 There has been a fair amount of testimony about the
18 ethical precepts that govern the de-accessioning of
19 collections. I wondered if you are familiar in general
20 with the concepts that were testified this morning, try
21 to avoid selling through profferating --

22 A Yes.

23 Q Is there a -- do those -- do those ethical
24 guidelines play any role in your decision or not,
25 Mr. Harmelin?

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2 A Well, I think that they're appropriate in the
3 sense that you have to look beyond the act itself into
4 having done something once, and what's the environment
5 you operate in after you've done it? What kind of
6 reception are you going to get when you're out there
7 again looking for support from foundations? There are

8 consequences to every act, there is consequences that
9 you have to take into consideration. Obviously, there
10 is some portion that would be available, but it won't
11 solve our problem.

12 Q Now, Mr. Harmelin, there have been, since the
13 filing of the petition, a campaign among I think some
14 residents of Merion Township and others to keep the
15 Barnes in Merion. I guess my first question is, is the
16 Barnes leaving Merion?

17 A The Barnes is not leaving Merion. The Barnes is
18 remaining in Merion much more consistent with
19 essentially zoning laws as they exist and the
20 environment in which it operates. I mean, it's
21 operating in a residential neighborhood, a very
22 beautiful residential neighborhood. To the extent that
23 they permit traffic on that street, that Episcopal

24 Academy, with which I'm familiar, the parents that come

25 in, they know when to drop the children off, they know

1 HARMELIN - DIRECT 45

2 where they were going, and they would leave. And I'm

3 sure parts of all of that traffic as attendance at the

4 gallery increases was of great trouble to the neighbors

5 because people get lost. And before there was the

6 parking lot, people would -- I used to go by there,

7 people would park on the streets.

8 So, it's terribly constraining, the

9 way that it is right now. The greater the density, the

10 greater the friction. And I just was increasingly

11 aware of that problem.

12 Q What of the Barnes Foundation will remain in

13 Merion if the new gallery is permitted?

14 A Well, the original sort of guidelines we were

15 using was it would certainly continue to hold all of
16 the horticultural activities and all of the
17 horticultural students.

18 It would be the reservoir for all
19 of the intensive and continuing scholarly work that was
20 going to go on there. So, in that sense, it certainly
21 would remain an educational institution.

22 And there has been no final
23 determination as to the extent to which art education
24 would continue there. That will depend upon some
25 things. But we're not leaving. We're opening up a

1 HARMELIN - DIRECT 46

2 third campus. So that what you will end up with,
3 hopefully, is this superb regional cultural asset with
4 capabilities in Chester County and capabilities in
5 Montgomery County and Philadelphia County.

6 Q Have you had any discussions with any of the Lower
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7 Merion Township Commissioners that attempted to
8 reaffirm the Barnes' continuing presence there and
9 continuing role of education there?

10 A I have had I think two telephone conversations
11 with Joe Manko. Joe Manko and I were both at law
12 school at the same time. We've known each other I
13 guess at this point close to 35 years. And so I picked
14 up the phone, I guess about two weeks ago, trying to
15 break the deadening silence and asked him what was on
16 his mind. He spoke about the resolution that was
17 passed by Montgomery County -- I'm sorry. By the
18 Commissioners. But he expressed a real desire that no
19 matter what the result, that could we commit to keeping
20 an art education program there? And I told him I
21 thought we could commit to keeping a portion of the art

22 education program there.

23 He spoke about rotating art back

24 and forth. I told him that that was problematic. And

25 I'm far from an expert, but the more you move

1 HARMELIN - DIRECT 47

2 paintings, particularly old paintings, the greater the

3 risk. So I'm sure I couldn't answer that question. I

4 didn't want to preclude it, but that one was

5 problematic.

6 He also asked about keeping works

7 of art there, and I said that we could keep, it seemed

8 to me, the nongallery works, a lot of the works which

9 are spread throughout the facility there, but that in

10 fairness to the students, there is in the Barnes in

11 educational philosophy, as I understand it, a critical

12 component between your ability to be in a classroom and

13 simply have an immediate experience with a work of art.

14 And that were you to try to divide those two, you would
15 be diminishing the educational experience and that no
16 aspect of what we were attempting to do did you want to
17 diminish that educational experience.

18 Q So, you have related the commitment of the Barnes
19 to continue the horticultural programs there, some art
20 education at that facility, and some works of art in
21 some capacity?

22 A My only response would be that "commitment" is a
23 little too strong a word. I had essentially polled the
24 Board members, all of whom showed great sympathy, but

25 since there hadn't been any formal act on the other

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2 part and this was all sort of vague, but they were

3 certainly, I would say, in accord with my expressions.

4 Q Having thought your way through this over the past

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5 2 1/2 years I guess it's been since you've been on the
6 Board, are you still of the view that the most
7 appropriate and least drastic solution is to relocate
8 the main gallery?

9 A Yes.

10 MR. WELLINGTON: Thank you. I have
11 nothing further. Thank you, Mr. Harmelin.

12 THE COURT: Mr. Barth?

13 MR. BARTH: Thank you.

14 CROSS-EXAMINATION

15 BY MR. BARTH:

16 Q Mr. Harmelin, regarding your conversations with
17 Mr. Manko, did he give you any assurance on behalf of
18 the Merion Commissioners to change any of the zoning
19 regulations that have been enacted which limit access
20 to the Barnes Foundation?

21 A No, he did not. And, in fairness, I did not ask
22 him for that. But he did not.

23 Q Did he make any commitment or offer any financial
24 support to enable the Barnes Foundation to remain in
25 Merion in its totality?

1 HARMELIN - CROSS 49

2 A I guess my answer would be the same, no, he did
3 not.

4 Q Regarding the independence of the Barnes
5 Foundation and your observation regarding Section 11 of
6 the indenture and cy-pres, would the Barnes Foundation
7 remain independent if those provisions became operable;
8 that is, if the Barnes Foundation was forced to
9 institute a cy-pres because of its insolvency?

10 A I think if --

11 THE COURT: You're asking now

12 specifically about the Section 11 he was talking about?

13 MR. BARTH: Yes.

14 THE COURT: Yes.

15 THE WITNESS: Well, I did ask about

16 insolvency. It's a very murky area when it comes to

17 not-for-profits. The questions are becoming are you

18 going into state insolvency, are you going into federal

19 insolvency? Very often they understand in both

20 environments, Courts give great deference to your

21 office, and often it is turned back over to the

22 Attorney General and to the presiding court judge to

23 try to work out a mechanism. Obviously, to the extent

24 that you ever have any negotiating power as trustees at

25 that point, you've obviously lost that power. And then

1 HARMELIN - CROSS 50

2 you truly are not constrained by the documents at all.

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3 You are what others are, which is at the mercy of
4 whoever can help you work your way out of your
5 insolvency.

6 BY MR. BARTH:

7 Q So, should that come about, then, there is no
8 guarantee that the collection would remain intact?

9 A No, there is not.

10 Q There is no guarantee that the educational program
11 would continue?

12 A That is correct.

13 Q Indeed, there is no guarantee that anything would
14 remain in Merion, other than the land, which may no
15 longer be a Barnes Foundation asset?

16 A That's correct.

17 Q Are you satisfied, as a board member of the Barnes
18 Foundation, that the proposal that has been made to the

19 Foundation is the least drastic alternative?

20 A Yes.

21 Q Under your proposal, will the gallery ensembles
22 and collection remain intact?

23 A That was an absolute precondition by this Board,
24 that those ensembles remain intact and that the Barnes
25 education program remain intact.

1 HARMELIN - CROSS 51

2 Q Will the arboretum and the horticultural program
3 remain intact under that plan?

4 A Not only intact, we would expect that they would
5 be enhanced.

6 Q Will Ker-Feal and the totality of the collection,
7 both gallery and nongallery which was collected by
8 Dr. Barnes during his lifetime, remain intact?

9 A As certainly as intact as it is today, and we

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10 would hope, with enhanced capabilities, to provide, as
11 I think you saw in the projections, some things that
12 don't exist there today.

13 Q Will the educational mission of the Barnes
14 Foundation -- or rather the educational program of the
15 Barnes Foundation remain intact?

16 A Yes. It is our goal to keep that intact.

17 Q Will the underlying mission of the Barnes
18 Foundation regarding its mission for education and
19 appreciation of fine art remain intact?

20 A Yes, they will.

21 Q Is it not the fact that the only provision of
22 Dr. Barnes' indenture -- primary provision of
23 Dr. Barnes' indenture, that will be violated is that
24 the physical presence of the gallery collection will be
25 shifted -- not destroyed, but shifted several miles

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2 from Merion to Philadelphia?

3 A That is the major impact of the petition, yes.

4 Q And consequently, you are of the belief that this

5 would do the least harm, not only to Dr. Barnes'

6 wishes, but Dr. Barnes' wishes as expressed in his

7 indenture?

8 A In comparison to the other alternatives, which

9 involves a certain degree of irreparability, the answer

10 to that is yes, clearly.

11 MR. BARTH: Thank you. I have

12 nothing else.

13 THE COURT: Mr. Kline?

14 BY MR. KLINE:

15 Q Mr. Harmelin, good afternoon.

16 A Good afternoon.

17 Q Yesterday Mr. Cyr had Mr. Schwenderman on the
18 stand and Mr. Schwenderman confirmed that the Barnes
19 Foundation, in 2002, 2003, and 2004, operated at a cash
20 deficit of something like one million or one million
21 two, something like that. Were you here during that
22 testimony?

23 A You said that the -- you said that we were
24 operating at a deficit today?

25 Q No. I'm saying that in 2002, 2003 --

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HARME LIN - CROSS

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2 A In 2002, I think we had a small deficit. In 2003,
3 yes, I think there was a deficit.

4 Q Well, that's right. I actually meant that you,
5 under the as-is scenario that was proposed -- and let
6 me correct myself, because that seems misleading.

7 What I really meant to say is that

8 in the as-is scenario that was prepared, and you are

9 the Chairman of the Finance Committee --

10 A Right.

11 Q -- of the Barnes Foundation, and that as-is

12 scenario which was presented to this Court a year and a

13 half after it was prepared, in that as-is scenario for

14 the year 2003, it showed a budget deficit of I think

15 about \$2.3 million, and for 2004, a deficit of about

16 \$2.7 million. And what Mr. Cyr established on the

17 stand yesterday with Mr. Schwendeman is that, in fact,

18 additional grants came in for collection assessment

19 that reduced that deficit, in fact, from about 2.3 to

20 1.3 or 1.3.

21 A But you've got to --

22 Q 1.3 or 1.2, that is.

23 A You have to look at the timing. The report is

24 prepared in the late summer of 2002, while we were
25 still negotiating and not at all clear that we're going

1 HARMELIN - CROSS 54

2 to have an agreement. We were hopeful that we were
3 going to have an agreement. What that was was a
4 projection of a standard that did not include what we
5 had available to us in 2003, which is the bridge
6 financing from the Pew Foundation and the other
7 foundations. So that made a vast difference.

8 Q Well, Mr. Harmelin -- I'm sorry to disturb you.

9 Please finish.

10 A I'm just saying that that as-is scenario was a
11 scenario which did not take into consideration the
12 bridge financing, and also assumed that in a true
13 go-it-alone, that it would be even more difficult than
14 it had been before or at least that difficult to raise

15 any significant development funds, and that we had
16 essentially no endowment.

17 Q Well, you're a brighter and more successful man
18 than me, and I'm not going to get picky over these
19 issues, but it seems to me that the funds that came
20 in -- the Pew Charitable Trust came in sometime in
21 September of 2003 for the following fiscal year. I
22 could be wrong, but --

23 A But that --

24 Q -- in any event --

25 A Excuse me. That was upon the execution of our

1 HARMELIN - CROSS 55

2 agreement.

3 Q In 2002?

4 A In 2002, correct.

5 Q Okay. But in any event, what Mr. Cyr's dialogue

6 with Mr. Schwenderman showed was that, in fact, the

7 deficit at the Barnes Foundation was not \$2.3 million
8 before 2003 ended, and it would not be \$2.7 million for
9 2004, it would be significantly less than that, about
10 half of that. And, in fact, on the stand, you said
11 that you were looking at these figures and it looked as
12 though there was a one million plus or minus structural
13 deficit; is that correct?

14 A Yes.

15 Q So the Barnes Foundation has been struggling with
16 a \$1 million structural deficit. And again, that makes
17 sense to me because I know that in newspaper reports,
18 the Pew Charitable Trust, the Lenfest Foundation, and
19 the Annenberg Foundation have been providing bridge
20 financing, something like \$1.5 million a year, within
21 the trust?

22 A Right.

23 Q And that out of that money comes attorney fees for
24 your counsel, correct?

25 A Yes.

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2 Q So it makes sense that that deficit, that that
3 structural deficit would be somewhere around
4 \$1 million, 1.1, 1.2, whatever it is. But we've
5 established yesterday that, in fact, for 2003, the
6 deficit was something like \$1.3 million or \$1.2
7 million.

8 A I think there is a correction, and that is that
9 the bridge financing is separate from the absorption of
10 the attorneys' fees. So they're on top of the bridge
11 financing.

12 THE COURT: That has always been my
13 understanding, by the way.

14 Are you fairly certain that you're
15 right about that?

16 THE WITNESS: Yes, I am.

17 THE COURT: Yeah. That has been my
18 understanding. I was going to follow-up on that. BY

19 MR. KLINE:

20 Q Okay. But it still gives us a good ballpark of
21 what the expenses are out there, and we can come up
22 with somewhat of a surplus of \$300,000 this year or
23 last year. I can't remember what the numbers showed.

24 But we're looking at a structural
25 deficit of now 2.7 million, which would require a

1 HARMELIN - CROSS 57

2 \$50 million endowment, but something about half of
3 that. And you would agree to that?

4 A I think in the structural deficit if you have

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5 \$25 million, your endowment could cover that deficit.

6 Q Now, Mr. Harmelin, you referred to Paragraph 11 of
7 the indenture, which is what we estate lawyers call
8 sort of the private cy-pres clauses. So that if it did
9 have this clause, then Mr. Barth and Judge Ott and the
10 parties would decide where that money goes. But since
11 I have it, deference is going to be given to this
12 provision.

13 And it says, as you have indicated,
14 that if the collection were to become destroyed or for
15 any other reason became impossible to administer it,
16 that the money would be applied to an institution in
17 Philadelphia or its suburbs. And that's a private
18 cy-pres clause, and you say that that detained you when
19 you arrived at the Foundation and for a year or two
20 after that; is that correct?

21 A I'm sorry. What was the question?

22 Q You said that this particular Paragraph 11 was of
23 concern, you thought this was an important provision of
24 the Barnes --

25 A I think what I said was it gave me an insight into

1 HARMELIN - CROSS 58

2 what he would have wanted us to do if we were in
3 significant trouble. And I felt certain, by the fall
4 of 2002, that we were in significant trouble.

5 Q Did you know that in May of 2001, Judge Ott of

6 this court issued an adjudication which determined that
7 the nongallery art, which includes the stuff at
8 Ker-Feal, is not subject to Paragraphs 10 and 13 of the
9 indenture of trust?

10 A Yes. I knew that he had permitted -- I knew that
11 he had permitted the lending, because we had some brief
12 conversations about leasing, you know, works and trying
13 to establish whether that would work or not and how it
14 would work. And so yes, I was aware of that.

15 Q Okay. And you are aware that in Footnote 13 to
16 his adjudication dated January 29th of 2004, he said
17 that he gave permission to sell that nongallery art in
18 his adjudication of 2001? Are you aware of that?

19 A You're more thoroughly prepared than I am,
20 Mr. Kline, and I'm not aware of Footnote 13.

21 Q The nongallery art, by the sworn testimony of your

22 executive director Kimberly Camp, said something to the
23 effect that this art had not been used much in the art
24 education program for 50 years, that it has not been
25 used in the art education program since she has arrived

1 HARMELIN - CROSS 59

2 at the Barnes Foundation, although from time to time it
3 was used prior to her arrival I think in 1999 at the
4 Barnes Foundation. Were you familiar with that?

5 A I was familiar that some of the works had been
6 used, but it seemed to me that most of them had not
7 been used, and that certainly there was a distinction
8 between what was in the gallery and what was not being
9 used on a consistent and current basis.

10 Q Then I go back to Paragraph 11 now of the
11 indenture and I'm concerned that you think that a
12 million-dollar deficit, that this provision, when you

13 were looking at the million-dollar deficit, might mean
14 the wholesale destruction of the trust by turning it
15 over to another institution in Philadelphia rather than
16 pursuing a less drastic option of selling that stuff
17 that was not subject to the indenture that had been
18 held in the basement or somewhere in the Barnes
19 Foundation for 50 years; is that right?

20 A I don't think -- you may want to read my
21 testimony, but I'm not sure that one of the options
22 that we considered was the wholesale destruction of the
23 collection by turning it over to another foundation.

24 Q Well, no, but you said that you referred to
25 Paragraph 11. That's why I brought that up. You

1 HARMELIN - CROSS 60

2 referred to Paragraph 11 of the indenture of trust and
3 in that paragraph, that talks about the private cy-pres
4 of turning everything over to another institution in

5 Philadelphia or its suburbs. It's for that reason you
6 were concerned that that might happen. And my question
7 to you is wouldn't you have looked for an alternative
8 that would be less serious than the wholesale
9 destruction of the trust by doing that, by relying on
10 that?

11 A Well, I asked myself this question, and it's not
12 an easy one. All right, I start selling assets. Now
13 where am I? I've now done clearly irreparable harm of
14 the nature and size that is beyond my panacea and I'm
15 still living under an exception to a zoning law, I
16 still am constrained in terms of the fulfillment of our
17 mission in a variety of different ways, and the only
18 thing I've done is gone down a path of selling assets.
19 And I think although there may be differing views about

20 accessi on, certainly in the museum world when you can
21 replace one work with another work, that may fall into
22 a different category, but starting to sell assets to
23 cover operating expenses and then not improving the
24 environment that you're working in was something that
25 that I, frankly, found unacceptable and would not

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HARMELIN - CROSS

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2 support.

3 Q All that art that was in storage for 50 years, not
4 used in the art education program except maybe a little
5 sporadically, but is basically in storage in the
6 basement, all that stuff should just continue to stay
7 there?

8 A Well, let me just postulate for the purposes since
9 you've raised this, and this is probably even beyond
10 the purview of two lawyers. I don't know how valuable
11 that work is. I don't -- as I said before, we have to

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12 let the time come through so that the philosophy of
13 Dr. Barnes will be permitted to unfold in its fullness
14 and his art education unfold in its fullness. It may
15 well be that among those paintings there is an
16 incredible masterpiece, and since I have an alternative
17 which doesn't involve something as irreparable as
18 selling things like Ker-Feal or works of art that do
19 diminish his collection, which is the ultimate
20 expression of his immortality, consistent with his
21 pragmatic philosophy, I'd like to try the others first.
22 We're not moving this collection to the Soviet Union.
23 We are moving it to Philadelphia. And it keeps options
24 open, I hope.

25 Q Mr. Harmelin, are you aware that a public

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HARMELIN - CROSS

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2 walk-through museum was anathema to Albert Barnes?

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3 A Yes. He instructed Paul Cret as to what he would
4 and would not want in his experience, and we intend to
5 replicate that by not having a public walk-through
6 museum. That it was the proximity of the paintings in
7 a relatively small section, and the absence of the long
8 corridors which were so important to him. And
9 certainly, to the extent my voice -- and we haven't
10 seen the architectural drawings -- has any influence,
11 we're going to try to keep that expression of
12 Dr. Barnes in simply a different location.

13 Q Are you aware that in his indenture he said that
14 after his death, the Barnes Foundation will be open one
15 day a week for public inspection, and that all the
16 other days shall be devoted to scholarly study?

17 A Well, he did say that as I recall, yes. And
18 amazingly enough, through a great many proceedings, the

19 requirement of the Internal Revenue Code, decisions in
20 this courtroom, petitions filed by the Attorney General
21 and others, there has been a constant pressure on the
22 Barnes Foundation to continue to make its collection
23 accessible. I think actually it is in that context, it
24 is as we increased the density that the friction
25 increases.

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HARMELIN - CROSS

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2 Q And you're aware that your petition and what we
3 heard in testimony yesterday from either
4 Mr. Schwendeman or Mr. Perks would basically double
5 the number of hours each week that the public would be
6 given access to the Barnes Foundation?

7 A Well, I do take some comfort, you're right, but I
8 looked at the statistic which said that not 6,000
9 school kids through Philadelphia and other parts of the

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10 country would see that collection, but more like 16- to
11 20,000. And I hope that it is, if it works, a
12 profoundly beneficial influence on them.

13 Q Was Dr. Barnes interested in mini courses and
14 school children parading through his gallery or was he
15 interested in the serious study of art through a two-
16 to three-year program and the scientific study of art
17 through learning the painters' tools, essentially
18 light, line, color, and space, and this sort of thing?

19 A I think he may have had some mixed emotions, and
20 it could have been on different days. But he certainly
21 articulated his concern for the working people and that
22 they should be given the opportunity -- and he
23 certainly lived his life that way, in terms of when he
24 had the business. So I think he was -- as a matter of
25 fact, as I look back on him, how often he tried,

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2 through contacts with the University of Pennsylvania
3 and others, to create an environment where he would
4 have a larger audience for his somewhat unique
5 philosophy. So a great portion of his life was working
6 on deals, none of which came through. So I think he
7 did want to expand his philosophy to others, yeah.

8 Q You've been very kind to put up with my questions,
9 Mr. Harmelin. Thank you very much. I might have just
10 one or two more.

11

And I guess I wanted to know

12 whether you discussed with Mr. Manko on those two
13 telephone calls any of the other alternatives that have
14 been floated in Merion, such as what is sometimes
15 commonly referred to as the St. Joe's alternative, that
16 is building a road off of Lancaster Avenue and

17 establishing a parking area, or another use, let's say,
18 of Lapsley Lane, which is a private road that is owned
19 jointly by the Barnes Foundation and St. Joe's
20 University?

21 A Joe Manko expressed his support for some
22 affiliation between St. Joe's and our art education
23 program. He thought that that would be a wonderful
24 thing. And certainly nothing we were planning, I told
25 him, as far as I knew, would preclude that possibility.

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HARMELIN - REDIRECT

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2 He did talk about, very briefly,
3 the other alternatives, and my problem is that they're
4 not even on the drawing board. I mean, City Avenue,
5 for instance, is a state road. It's a very highly
6 traveled road. Simply saying that you're going to
7 have, you know, access off of City Line Avenue and

8 putting it in place in a manner in which it would work
9 is a long-term proposition. It may work, it may not
10 work. But interestingly to me, a resolution is passed
11 and then no one calls our Board. Nothing happens. So
12 we just touched on it very briefly in two quick
13 conversations.

14 MR. KLINE: Mr. Harmelin, once
15 again, thank you.

16 THE COURT: Redirect?

17 MR. WELLINGTON: I do have a little
18 redirect, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. WELLINGTON:

21 Q Mr. Harmelin, the structural deficit that has been
22 referred to, that structural deficit we get to based
23 upon an assumption that assumes 1.2 or \$3 million of

24 annual fundrai si ng? --

25 A Yes.

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HARMELIN - REDIRECT

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2 Q -- doesn't it?

3 A Yes. Because I think we only raise about 1.3.

4 Q Do you continue to believe it is a reasonable

5 assumption that if Barnes sells the "stuff," as

6 Mr. Kline refers to it -- we'll come back to that in a

7 moment -- sells much of its collection, do you think

8 it's -- do you have any view as to whether it's a

9 reasonable assumption you will continue to be able to

10 get people and foundations to donate?

11 A Well, I've heard the testimony and I think that

12 there will be large sections of the community that will

13 simply not be open to any request for funds from us.

14 Q That would then raise that structural deficit,

15 wouldn't it, sir?

16 A It would, depending upon what other steps we take,

17 yes.

18 Q All right. And the Board would then be faced with

19 some other issues if contributions went down?

20 A That's correct.

21 Q Do you understand when Mr. Kline refers to that

22 "stuff," what we're really talking about here?

23 A That stuff meaning the nonworks -- the nongallery

24 works of art? Yes. I am aware that there are -- we're

25 talking about many millions of dollars worth of works

1 HARMELIN - REDIRECT 67

2 of art and very valuable rugs. And so I guess in

3 comparison to everything else, that's stuff, but it's

4 valuable stuff.

5 Q I understand. When he refers to that "stuff," I

6 think it includes the collection of North American

7 weavings that Dr. Wade said this morning was the most

8 important collection in the United States. I don't

9 know if you were here for that testimony.

10 A I was not.

11 Q But that would be part of that "stuff," wouldn't

12 it, because it doesn't hang in the gallery?

13 A I assume that's correct.

14 Q And it would include -- that "stuff" would include

15 the 3,000-piece collection of decorative arts that

16 Dr. Sabloff described this morning that has been

17 personally placed in ensemble fashion in Ker-Feal,

18 wouldn't it?

19 A Well, I think what you're saying -- and one of the

20 things that is sort of frustration to the Barnes

21 Foundation is one of the great contributions that our

22 executive director has made is that we're beginning,

23 just beginning to understand all of the aspects, the

24 provenance and importance of so many of the works of

25 art. And that whatever Dr. Barnes' philosophy was, he

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HARMELIN - REDIRECT

68

2 had an unbelievable eye for collecting and works of

3 art. It just turns out that what attracted his eye

4 ends up being incredibly valuable. So I assume that

5 says something very positive about his underlying

6 philosophy.

7 Q The most amazing thing -- one of the most amazing

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8 things -- one, not one the most. One of the most
9 amazing things about Dr. Barnes was the collection that
10 hangs in the permanent gallery was that "stuff" of the
11 1920s, wasn't it, that nobody else wanted?

12 A I accept that characterization, yes.

13 Q And now is among the most valuable things?

14 A (Nods head up and down.)

15 Q As a trustee, can you predict today whether any of
16 that "stuff" that's not hanging on the wall, in 50, 60
17 years will also be viewed by the world as equivalent to
18 the type of Impressionist paintings that they now view,
19 or will be viewed, as junk?

20 A As I said, that's -- permitting this to unfold and
21 having what I've already described as a lesser
22 alternative or the less disruptive alternative is why I
23 have come to the comfortable conclusion that I want to

24 keep the collection intact, so we can all find out more
25 about it.

1 HARMELIN - RE CROSS 69

2 MR. WELLINGTON: Thank you.

3 THE COURT: Mr. Barth?

4 MR. BARTH: Thank you.

5 RE CROSS-EXAMINATION

6 BY MR. BARTH:

7 Q Do you know why the petition resulting in

8 Judge Ott's Opinion of 2002 was brought?

9 A Why the petition was brought? The original one,
10 why was it brought?

11 Q Well, the petition resulting in Judge Ott's

12 petition of 2002, authorizing the sale of the

13 nongallery collection.

14 A That preceded, I believe, my service on the Board.

15 I believe the petition was filed before I was there. I
16 think, from what I've heard -- maybe I shouldn't
17 testify to that, but it was another effort to see
18 whether or not one could loan out of that petition.
19 But I'm not really familiar with it, but I shouldn't
20 speculate.

21 Q Well, you mentioned loan. Do you know whether or
22 not it was the Barnes Foundation province to sell, as
23 to opposed to loan, the nongallery art?

24 A I don't believe that there was ever a discussion
25 about selling, and it certainly wasn't brought to my

1 HARMELIN - RE CROSS 70

2 attention.

3 Q Was the permission in the decree to sell ever seen
4 or taken by the Barnes Foundation to sell it?

5 A I don't remember any discussion about the specific

6 authority to sell that, as set forth in Footnote 13. I

7 just don't remember that.

8 Q And, of course, the Barnes Foundation has not

9 sold?

10 A That's correct.

11 Q Mr. Kline asked some questions about that previous

12 decision of this Court, and also about some of

13 Dr. Barnes' wishes regarding limitation of hours and

14 use of the gallery as a walk-through museum. But are

15 you also aware that there have been decisions by the

16 Supreme Court of Pennsylvania specifically authorizing

17 the use of the gallery and expanding public access

18 thereby?

19 A Yes.

20 Q And finally, I'd like to just talk briefly about

21 "stuff." It's fair to say that some of the "stuff" has

22 been used and some has not been used in the educational
23 program of the Barnes Foundation. Is it fair to say
24 that some of those materials that are not used or less
25 likely to be used are not particularly valuable in
1 HARMELIN - RE CROSS 71
2 terms of bringing great amounts of funds to the Barnes
3 foundation if they were sold? I guess what I'm trying
4 to say is, wouldn't it be accurate to say that the
5 materials that are most often used in the educational
6 program are those that would bring a very nice price
7 should they be sold?

8 A Obviously, the ones that are recognized as the
9 most valuable, I believe, are the ones that are most
10 used, but I really can't say that with the authority
11 perhaps that our executive director could, because it
12 could well be that in showing a profession that you

13 would show a profession working from the most valuable
14 to things that are least valuable. There are lots of
15 different displays that I can think of. So I can't
16 answer that specifically.

17 Q Okay. Fair enough, but can you answer this
18 question. Is all of the materials in the nongallery
19 collection, even if they may not be valuable or used
20 more or less often in the art educational program,
21 nevertheless still used by scholars in evaluating
22 Dr. Barnes' lifetime collective efforts?

23 A It's my understanding that that becomes yes. To
24 the scholars, it becomes very important because they
25 want to see the growth and development of this sort of

1 STEPHEN J. HARMELIN 72

2 a collector's mind and, as I said, they may understand
3 why he chose to go down one path and not down another.

4 Q Finally, regarding the exploration of other
5 alternatives such as the St. Joe's plan referred to by
6 Mr. Kline, could the Barnes Foundation survive the
7 exploration of these or many other alternatives, given
8 the time it would take to really consider them?

9 A Well, the only way that I would see that we could
10 survive, failing our petition, is probably the sale of
11 assets. Because, as I said, shrinking down the
12 so-called Fort Barnes scenario doesn't work. We can't
13 have sufficient resources to do -- we can't shrink fast
14 enough, we can't close it down enough financially
15 without suffering great losses on the revenue side that
16 offset your expenses. So I do think that the only
17 option, then, would be to sell assets.

18 MR. BARTH: All right. Thank you.

19 MR. KLINE: No questions.

20 THE COURT: I have a few,

21 Mr. Harmelin, if I may.

22 THE WITNESS: Yes, sir.

23 THE COURT: I'm going to go a

24 little off topic, but -- at least until the lawyers

25 object to it. You're the first board member I have, so

1 STEPHEN J. HARMELIN 73

2 the first time I have to ask certain questions.

3 Has the Board, in its discussions

4 with the City of Philadelphia, gotten into the subject

5 of who would own the building and the land where the

6 third campus would be built?

7 THE WITNESS: I would -- let me

8 just say that's been reported back to the Board, that

9 there has been any discussions on that subject, but

10 Dr. Watson has been conducting those with the

11 administration. I'd have to defer to him on that.

12 THE COURT: All right. You've made
13 no assumptions in that regard?

14 THE WITNESS: No. Although quite
15 often, because it's so difficult, the City ends up
16 owning -- I just happen to know the City often ends up
17 owning the underlying ground and the building and
18 leasing it to the facility.

19 THE COURT: That's what I was
20 wondering about. Have discussions along those lines
21 yet taken place, to your knowledge?

22 THE WITNESS: Not to my knowledge.

23 THE COURT: All right. You talked
24 about a phone call with Joe Manko.

25 THE WITNESS: Yes.

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THE COURT: Another member of the
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3 Bar well-known to this Court.

4 THE WITNESS: Yeah.

5 THE COURT: I don't recollect your

6 saying who called whom. Who was it that called the

7 other one?

8 THE WITNESS: I called him.

9 THE COURT: Okay.

10 THE WITNESS: Initially.

11 THE COURT: I'm sorry?

12 THE WITNESS: Yeah, I placed the

13 first call to him.

14 THE COURT: All right. What was

15 your purpose in placing that call?

16 THE WITNESS: I couldn't understand

17 the silence.

18 THE COURT: Are you talking about
19 the silence that took place after the public
20 announcement of the passing of a resolution?

21 THE WITNESS: Yeah. And I wanted
22 to learn, was I missing something? Was I
23 misinterpreting the signs? Was there anything that we
24 could do to fill in the silence? Were there
25 assurances? It was, as I believe you've seen, the

1 STEPHEN J. HARMELIN 75

2 Barnes belongs in Merion; and it struck me the Barnes
3 is staying in Merion, that it will be staying in a
4 configuration consistent with essentially the
5 neighborhood that it's in. So we're not leaving
6 Merion. And I sort of wanted to say, do they
7 understand the 3-campus scenario? And that led to the
8 initial discussion. There were two discussions,
9 really -- well, maybe three. The first was just very

10 quickly down the shore, and both of us were running in
11 different directions and we agreed to talk again.

12 And then the second was about five
13 or six days ago, in which we did talk in somewhat
14 greater detail about his strong desire that if in fact
15 the Barnes ever left, that there would be works of art
16 that would remain there, there would be a credible art
17 education program remaining there. And so I was trying
18 to give him assurances along those lines. And it was
19 that nature of a discussion.

20 THE COURT: Is it fair to say,
21 having listen to you explain what that subject matter
22 was, that there was no substantive discussion between
23 you and Mr. Manko about trying to resolve the
24 differences that have historically existed between the

25 Barnes and the Township?

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THE WITNESS: I think that's fair

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to say. This was just two people who knew each other

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well trying ever so hesitantly, realizing I was going

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to be under oath, to bridge the gap and see if there

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were things that were unclear that we could make

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clearer. And so this was just the very beginning of

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dialogue.

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THE COURT: Did you perceive --

10 when you heard about the passing of the resolution, did

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you perceive that as an attempt on the part of the

12

Township to extend an olive branch, if you will, for

13

lack of a better term?

14

THE WITNESS: Well, yes. I thought

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it was a hopeful sign, and frankly expected that

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someone would contact our executive director and

17 someone would contact our chairman and that there would
18 begin that dialogue. We had articulated our position
19 at great expense in a petition. And so if there were
20 to be avenues of communication, we were awaiting some
21 response. And it just wasn't forthcoming.

22 THE COURT: And when that response
23 wasn't forthcoming, if you know, did you or the Board
24 have any discussions about being the ones to make that
25 overture, if you will?

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2 THE WITNESS: We had some -- we had
3 some discussions at the board meetings about whether we
4 should go forward, and I think we concluded that since
5 our positions were so much a matter of the public
6 record, that if there was an interest on the other
7 side, that they would contact us. And so we awaited

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8 that contact. And as far as I know, until Joe and I
9 spoke, there had been no what I would call official
10 contact.

11 THE COURT: When you use the phrase
12 "our interest being a matter of public record," you're
13 speaking about the relief requested in the petition
14 before the Court?

15 THE WITNESS: Yes, I am.

16 THE COURT: All right. Shifting
17 gears for a bit, there was discussion between you and
18 Mr. Kline and perhaps with other counsel about the
19 intention to replicate in a third campus the gallery as
20 it is presently configured, I imagine in terms of
21 dimensions and the like. And then I think in the last
22 discussion with Mr. Kline about that, you used the
23 phrase -- or at least I wrote this down -- "will try to

24 keep that." Here is my question to you, based upon
25 that: There was testimony from earlier experts about
1 STEPHEN J. HARMELIN 78
2 how the planning process goes. It works its way
3 through preliminary steps, which is what we've largely
4 been limited to to date, and you get more specific as
5 you go.

6 THE WITNESS: Right.

7 THE COURT: And it gets tweaked as
8 necessary, given budget constraints, reality coming out
9 of more detailed financial analysis, et cetera.

10 THE WITNESS: Um-hmm.

11 THE COURT: Do you, in your
12 capacity as board member, see the replication of the
13 gallery as it presently exists in Merion to be a
14 nonnegotiable component of that final plan, whatever

15 else it is?

16 THE WITNESS: We stated as a matter
17 of philosophy that we were going to keep the ensembles,
18 we were going to keep the art education program, and
19 that although it has not been as definitively
20 discussed, that there was some talk about simply
21 replicating the Cret Building in Philadelphia, and we
22 just didn't think that that would work.

23 But as counsel has pointed out,
24 there is a difference in the presentation that
25 Dr. Barnes has, as opposed to a museum. And I think

1 STEPHEN J. HARMELIN 79

2 that there is a strong consensus on the Board that want
3 to keep that very personal kind of presentation. I
4 mean, he has sort of a small center gallery area, and
5 then you go from relatively small room to small room.

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6 You have the ability, in that environment, to
7 personally connect to paintings, which runs to the very
8 core of Dr. Barnes' belief, that that experience
9 between you and the painting can, in fact, have a
10 transforming effect upon yourself that perhaps doesn't
11 exist as you run down long corridors.

12 And so although I cannot say that
13 we have made it a cardinal principle, to my
14 recollection, I would say to you that we certainly will
15 do everything we can to replicate the spirit of that
16 presentation.

17 THE COURT: Forgive me if I sound
18 like I'm badgering you, I'm not sure that's responsive
19 to my question.

20 THE WITNESS: Then the answer is do
21 I have a specific recollection that we have made a flat

22 commitment to do that? I do not recall that flat
23 commitment, but I could be wrong. I have operated on
24 the assumption that it's there, but I just cannot
25 recall that.

1 STEPHEN J. HARMELIN 80

2 THE COURT: So that you're not
3 misled by the question, I will tell you that I had
4 operated on the assumption all along that that had been
5 the core principle with respect to that gallery. And I
6 only asked the question because you used the phrase
7 "we'll try to keep that," and that was the first what I
8 call equivocal language I had here in that regard. I
9 take it you weren't attempting to become equivocal --

10 THE WITNESS: No, I'm not that --

11 THE COURT: -- when you used that
12 phrase?

13 THE WITNESS: I'm not. And as I
14 said, it may well be. It is just a function of my
15 imperfect recollection, because I have not really even
16 seen yet a schematic of what --

17 THE COURT: I understand. I
18 understand.

19 THE WITNESS: I didn't want to
20 mislead you in my state of mind.

21 THE COURT: The schematic does not
22 yet exist.

23 THE WITNESS: Okay.

24 THE COURT: Right?

25 THE WITNESS: That's correct.

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2 That's my understanding.

3 THE COURT: That's all I have.

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4 Does that prompt anything further,

5 Mr. Wellington?

6 MR. WELLINGTON: Just one or two

7 questions that you prompted, Your Honor.

8 FURTHER REDIRECT EXAMINATION

9 BY MR. WELLINGTON:

10 Q The petition was filed in September of 2002, was

11 it not?

12 A Yes, it was.

13 THE COURT: I think it was October,

14 to be honest.

15 MR. WELLINGTON: I'm sorry. Thank

16 you, Your Honor.

17 THE COURT: I could be wrong.

18 BY MR. WELLINGTON:

19 Q The fall of 2002. And when did Lower Merion first

20 pass a resolution addressing the move?

21 A I can't recall.

22 Q It was earlier this year, was it not?

23 A I don't recall.

24 Q Other than that resolution, are you aware of any

25 contact in that two-year period of time, except the

1 HARMELIN - FURTHER RECROSS 82

2 occasional service of a notice of violation on the

3 Barnes Foundation for some of the restrictive

4 ordinances, that Lower Merion Township officials have

5 had with the Barnes Foundation?

6 A The Township? No. I am not familiar with any

7 effort other than this conversation to have a

8 communication. At the Commissioners' level, the answer

9 is no.

10 MR. WELLINGTON: Thank you. That

11 was all.

12 FURTHER RE-CROSS-EXAMINATION

13 BY MR. BARTH:

14 Q One question, Mr. Harmelin. Are you aware of any

15 lessening political pressure on the Commissioners of

16 the Zoning Board by the neighbors of the Barnes

17 Foundation to allow the types of concessions that would

18 enable the Barnes to increase access in its present

19 location?

20 A No. I have -- to the contrary. I think their

21 vigilance would indicate very little support for any

22 exceptions. But that's just speculation. But I'm not

23 aware of any, no.

24 BY MR. KLINE:

25 Q Mr. Harmelin, just two questions to follow up what

1 HARMELIN - FURTHER RE-CROSS 83

2 Judge Ott had asked you. Isn't it normally true that
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3 one approaches a Zoning Board, which is really an
4 independent commission from the Township, so after the
5 proclamation or declaration or whatever that was was
6 issued back in January or February of 2004, wouldn't it
7 have been the duty of the Barnes Foundation to approach
8 the Zoning Commission of Lower Merion Township?

9 A We could have gone to the Township Commission.
10 I'm not -- frankly, you're assuming that there haven't
11 been ongoing discussions with the Zoning Commission on
12 other issues, and I believe our lawyers have been in
13 touch with the Zoning Commission on some issues, but
14 that there has been nothing like what I think you're
15 talking about, which is some strategic overview.

16 Q But you have not approached --

17 A No, we have not.

18 Q -- the Zoning Commission --

19 A We --

20 Q -- any request for --

21 THE COURT: You're talking through

22 each other, folks, and she can't get you that way.

23 THE WITNESS: I'm sorry.

24 THE COURT: So, let's have

25 question to which Mr. Harmelin can respond, and then

1 HARMELIN - FURTHER RE-CROSS 84

2 each let the other finish, please. Thank you.

3 MR. KLINE: It's a bad habit of

4 mine, Judge Ott.

5 BY MR. KLINE:

6 Q You have not approached, the Barnes Foundation has

7 not approached, since January or February, the Zoning

8 Commission to seek a zoning variance or additional

9 numbers, additional visitors that might be allowed to the

10 Barnes Foundation, an additional use of Lapsley Lane,
11 the existing private road; is that correct?

12 A That's true.

13 Q And I touched upon this topic with some
14 trepidation because I was -- I'm unclear about the
15 replication of the proposed gallery in Philadelphia, as
16 well. We had heard, maybe not in testimony but perhaps
17 again by newspaper or reports that -- and it may have
18 been in testimony in December -- that there was some
19 thought of increasing the size of the rooms in the
20 gallery by some amount, 20 to 30 percent. And we know
21 from Mr. Schwendeman's presentation yesterday --
22 again, it may have been Mr. Perks' testimony, I can't
23 be sure on that -- that we would triple the square
24 footage at the new building in Philadelphia.

25

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HARMELIN - FURTHER RE CROSS

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2 you -- and maybe this is badgering in a sense because

3 you did answer the question -- a replication --

4 THE COURT: It's never badgering

5 when the judge does it. It might be badgering.

6 BY MR. KLINE:

7 Q -- a replication of this in Philadelphia, you're

8 not sure -- your answer is you're not sure whether that

9 has been decided upon or discussed or whatever?

10 A My memory does not improve with repetition.

11 MR. KLINE: Once again, thank you.

12 THE COURT: Thank you,

13 Mr. Harmelin.

14 We're past our break time, so we'll

15 take that. May I ask counsel to assemble in the robing

16 room after five or ten minutes, whatever is convenient

17 for you. Okay?

18 - - -

19 (Recess, 3:26 - 3:40 p.m.)

20 - - -

21 (A conference was held in

22 chambers, not reported.)

23 - - -

24 (At 3:45 p.m., proceedings were

25 adjourned until Friday, September 24, 2004, at 9 a.m.)

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C E R T I F I C A T E

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I hereby certify that the

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proceedings and evidence are contained fully and

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accurately in the notes taken by me in the above cause

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and that this is a correct transcript of the same.

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Amy Beth Boyer, R. P. R.

Official Court Reporter

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Received and directed to be filed

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15 this day of , 2004.

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20 Stanley R. Ott, Judge

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