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VOLUME XI I

2

IN THE COURT OF COMMON PLEAS IN AND FOR

3

THE COUNTY OF MONTGOMERY, PENNSYLVANIA

4

ORPHANS' COURT DIVISION

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IN RE: : NO. 58,788

7

THE BARNES FOUNDATION,

a corporation :

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Petition to Amend Charter and Bylaws

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Courtroom B

Monday, September 27, 2004

12

Commencing at 2:45 p.m.

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14

Afternoon Session

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W. Byron Battle, RPR  
Official Court Reporter  
Montgomery County Courthouse  
Norristown, Pennsylvania

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BEFORE: THE HONORABLE STANLEY R. OTT, JUDGE

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COUNSEL APPEARED AS FOLLOWS:

2

RALPH G. WELLINGTON, ESQUIRE

3 ARLIN M. ADAMS, ESQUIRE  
CARL A. SOLANO, ESQUIRE, and  
4 BRUCE P. MERENSTEIN, ESQUIRE  
for the Petitioner, The Barnes  
5 Foundati on

6 LAWRENCE BARTH, ESQUIRE  
Deputy Attorney General  
7 for the Commonweal th of Pennsylvani a  
as parens patri ae for chariti es

8  
TERRANCE A. KLINE, ESQUIRE  
9 HOWARD MASON CYR, III, ESQUIRE  
PAUL M. QUI NONES, ESQUIRE  
10 for the Intervenors, the Students of  
The Barnes Foundati on

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1 I N D E X

2 AMICI CURIAE'S EVIDENCE

3 WITNESS Voir Dire Direct Cross Redirect Recross

4 RICHARD L. FEIGEN

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6 By Mr. Cyr 32

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17 AMICI CURIAE

18 Number Marked Admitted

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1 RICHARD FEIGEN - CROSS By Mr. Wellington

2 PROCEEDINGS

3 MR. WELLINGTON: May I proceed,

4 Your Honor?

5 THE COURT: You may.

6 CROSS-EXAMINATION

7 BY MR. WELLINGTON:

8 Q. Mr. Feigen, good afternoon, sir.

9 A. Hello.

10 Q. My name is Ralph Wellington, Mr. Feigen. Nice

11 to meet you.

12 A. Nice to meet you.

13 Q. You are, from what I have read and have been

14 told, a pretty prominent person in the world of art



15 as an art dealer, sir. I won't ask you to comment  
16 on that.

17 I think you, in your  
18 questioning with Mr. Cyr, were clear that, whereas  
19 Masterson Gurr Johns, for example, primarily is an  
20 appraisal firm, you are not primarily an appraisal  
21 individual; is that fair?

22 A. Yes.

23 Q. You did testify early on that the reason you  
24 are donating your time for this, if I heard it  
25 correctly, is that you believe the gallery should

♀

6

1 RICHARD FEIGEN - CROSS By Mr. Wellington

2 not be relocated, and in lieu of that, some of its

3 work should be sold; is that fair?

4 A. That is not entirely accurate.

5 I believe that it is a unique  
6 institution that has a great value as have other  
7 idiosyncratic small museums, such as the Gardener,  
8 the Frick, the Phillips, the Wallace, Kenwood. I  
9 don't think everything has to be homogenized into a  
10 mega-museum in the public interest.

11 I think the quality of the  
12 experience for the public in the certain context is  
13 more important than the quantity of public that is  
14 exposed to it.

15 I think that this is a unique  
16 institution that documents a period in American art  
17 patronage that is very important to preserve.

18 So why am I coming down here a

19 couple of times? Because I feel that it is a  
20 worthy, worthy cause. I also do not think that it  
21 is a good precedent to break the will of a man who  
22 has his own philosophy and intentions.

23 Q. And by agreeing to assist amici by appraising  
24 nine of the works, you are implicitly and maybe  
25 explicitly sanctioning their sale, correct, sir?

‡

7

1 RICHARD FEIGEN - CROSS By Mr. Wellington

2 A. I am not deciding what is to be done with  
3 them. I was asked to set a value that I thought  
4 could be realized if they were sold. Maybe it  
5 won't be necessary to sell them. Maybe funding can  
6 be found from private sources outside of selling  
7 them.

8 I was asked to make this  
9 appraisal. I understood what was at issue here was  
10 the possible breaking of the whole institution,  
11 which I think would not be in the public interest.

12 Q. You testified that you served on the art  
13 advisory committee of the Barnes and helped set it  
14 up, in fact, in 1990/'91 time frame?

15 A. Yes.

16 Q. In fact, your resume that Mr. Cyr put up there  
17 includes, among other things, that you were  
18 dismissed from that committee because of your  
19 objections to de-accessioning of the collection,  
20 correct, sir?

21 A. In general, yes.

22 Q. About that time frame, you were reported in

23 the USA Today as: New York dealer Richard Feigen,  
24 who serves on Lincoln's Board calls the plan a  
25 scandal and a cultural tragedy.

♀

8

1 RICHARD FEIGEN - CROSS By Mr. Wellington

2 That was the plan of proposed

3 de-accessioning of some of the works to raise 15

4 million dollars back then. Was that a correct

5 statement by the press of what you said?

6 A. I don't know what I said specifically or what

7 they quoted me as saying. It was a scandal what

8 Richard Glanton was trying to do, which was to

9 de-accession works from the core collection, not

10 hanging in the offices or not things that were

11 peripheral, not antiques, not real estate.

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12 He was intending to  
13 de-accession 15 million, and he confided in the  
14 deputy director of the National Gallery, Roger  
15 Mandle, that his real intention was 200 million.

16 As far as I knew --

17 MR. BARTH: Objection, Your  
18 Honor. A hearsay objection, Your Honor.

19 THE COURT: Well, yes, but, it  
20 was responsive to the question.

21 Thus, it is not offered for  
22 whether that is true. It is offered as to why he  
23 said what he said at the time, I imagine. So it is  
24 a distinction.

25 THE WITNESS: I mean, that was

1                   RICHARD FEIGEN - CROSS By Mr. Wellington

2       an effort to dismantle the Barnes core collection

3       to, as I interpreted it, further a political

4       career. This was not the same as this effort,

5       which is to preserve the Barnes Foundation.

6       BY MR. WELLINGTON:

7       Q.    In your interpretation, correct, sir?

8       A.    Well, Glanton said it in my presence. I mean,

9       basically speaking, that he just wanted to sell

10       pictures. He was talking about selling Renoirs and

11       things like that that were in the core collection.

12       Q.    In fact, Mr. Feigen, the petition and proposal

13       at that time was not to sell 200 million dollars

14       worth of art, it was to sell 15 million dollars,

15       correct, sir?

16 A. I didn't read the petition, but I assume.

17 Q. That is what was approved by the board of  
18 trustees at that time, was it not, sir?

19 A. I don't know what the board of trustees  
20 approved, but our art advisory committee wasn't  
21 even informed of that intention. We were simply  
22 told by Glanton that he had already submitted the  
23 petition. He never even asked our advice on which  
24 pictures he was de-accessioning.

25 Q. In the Washington Post on April 28, 1991, a

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1 RICHARD FEIGEN - CROSS By Mr. Wellington

2 story in which you are quoted again talks about

3 permission to sell 15 of its pictures --



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4 THE COURT: You were so quick,  
5 I didn't get a chance to read that on the screen.

6 MR. WELLINGTON: I apologize,  
7 Your Honor.

8 THE COURT: I am a little  
9 slower than rest of you.

10 MR. WELLINGTON: This board is  
11 seeking five amendments to its deed of trust, one  
12 of which would let it sell 15 of its pictures.

13 BY MR. WELLINGTON:

14 Q. And then you are quoted on the next page,  
15 Mr. Feigen, as describing the sale as immoral, as  
16 well as a cultural tragedy.

17 Is that an accurate statement  
18 that you made to the press concerning the proposal  
19 to sell 15 paintings?

20 A. I don't recall, but I don't question it.

21 Q. There are a number of other articles around

22 the time. There is another New York Times article

23 where you are quoted as saying -- this one is from

24 July 27: The commercial interest is on the part of

25 Mr. Glanton, who has tried to break the Barnes

♀

11

1 RICHARD FEIGEN - CROSS By Mr. Wellington

2 trust indenture to sell works from the collection.

3 Do you see that, sir?

4 A. Yes.

5 Q. Now, the collection of the Barnes Foundation

6 includes gallery and non-gallery artworks, does it

7 not, Mr. Feigen?

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8 A. I didn't so construe it. I didn't even know  
9 there was a non-gallery collection at the time.

10 Q. And in the book that you talked about "Tales  
11 of the Art Crypt," on page 84 -- there is a cover  
12 copy of that book, is it not, sir?

13 A. Right.

14 Q. Page 84, you state: Glanton said only that he  
15 had filed a petition with the Montgomery County  
16 Orphans' Court to sell 15 million dollars worth of  
17 paintings from the collection, a collection  
18 supposedly protected by the donor's trust indenture  
19 from any incursions whatsoever, a trust indenture  
20 that would not even allow paintings to be shifted  
21 from one place to another on the walls.

22 In that, are you referring to  
23 the permanently hung gallery, sir?

24 A. Yes.

25 Q. Are you aware that the petition did not

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12

1 RICHARD FEIGEN - CROSS By Mr. Wellington

2 distinguish between selling non-gallery and gallery

3 art?

4 A. As I say, I didn't read the petition.

5 MR. CYR: Objection, Your

6 Honor.

7 BY MR. WELLINGTON:

8 Q. And you --

9 THE COURT: Already answered.

10 BY MR. WELLINGTON:

11 Q. You tried to oppose this sale, did you not,

12 sir?

13 A. Yes.

14 Q. And in your book you say, when you couldn't

15 get it opposed, you phoned Grace Gleuck of the New

16 York Times and gave her the story, right?

17 A. Yes.

18 Q. When in doubt, bring in the press?

19 A. Right.

20 Q. And within the last year or so, a couple of

21 years, you have been quoted about this petition,

22 which says -- in which words to this effect --

23 that, first, they are asking to move the gallery;

24 next thing they are going to do is try to sell the

25 paintings.

1 RICHARD FEIGEN - CROSS By Mr. Wellington

2 MR. CYR: Objecti on.

3 Foundati on.

4 THE COURT: Well, I have to

5 assume a good faith basis for the questi on.

6 Is there, Mr. Wellington?

7 MR. WELLINGTON: Yes, Your

8 Honor.

9 THE COURT: All right. Then

10 the objecti on is overrul ed.

11 BY MR. WELLINGTON:

12 Q. The Art Newspaper, May 2001, Barnes

13 Foundati on, bon vi aggi o all over agai n. Ri chard

14 Feigen. Once the will is broken -- you can read

15 thi s all the way through. Thi s has to do wi th the

16 potential move -- excuse me, this has to do with  
17 the tour.

18 THE COURT: I think in  
19 fairness, Mr. Wellington, when you said with  
20 respect to this petition, in May of 2001 it didn't  
21 exist.

22 MR. WELLINGTON: I am  
23 withdrawing it. I meant to say the petition we  
24 were talking about this morning, the petition  
25 involving the tour, the permission to tour.

♀

14

1 RICHARD FEIGEN - CROSS By Mr. Wellington

2 BY MR. WELLINGTON:

3 Q. And then your next concern was, once the will

4 is broken, the next thing they will do is try to  
5 sell paintings.

6 Do you understand that the  
7 Barnes Foundation board is not trying to sell  
8 paintings, don't you, sir?

9 A. At this point.

10 Q. And you do not personally have a lot of  
11 respect for Dr. Barnes and his educational  
12 philosophy, do you?

13 A. I don't believe I was ever quoted on that, was  
14 I?

15 Q. It just so happens -- but even if you weren't  
16 quoted, in your book on page 80, following a nice  
17 picture of Mr. Glanton, it is written: "I had from  
18 the outset envisioned an eventual shift away from  
19 Dr. Barnes' idiosyncratic anti-art-historical



20 program. But Franklin had no knowledge of these  
21 matters."

22 Franklin, being the president  
23 of Lincoln University who was then responsible for  
24 the Barnes, correct?

25 A. Yes.

♀

15

1 RICHARD FEIGEN - CROSS By Mr. Wellington

2 MR. CYR: What is the question,

3 Your Honor?

4 BY MR. WELLINGTON:

5 Q. This was your view --

6 THE COURT: The only question

7 that has been asked, as I understand, is who

8 Franklin was.

9 So let the question come out,

10 and then perhaps it will be clear.

11 BY MR. WELLINGTON:

12 Q. This was your statement in your book about  
13 what you viewed Dr. Barnes' philosophy, Dr. Barnes'  
14 idiosyncratic anti-art-historical program, correct,  
15 sir?

16 A. That I wrote, yes.

17 Q. Now, do you have, Mr. Feigen, a financial  
18 interest in the potential sale of any of this  
19 artwork?

20 A. Quite the contrary. I opposed it and I have  
21 no interest, whatsoever.

22 Q. I am now talking now about amici's effort to  
23 get the Court's approval so that the Barnes can

24 sell certain artwork, the artwork that you just  
25 appraised.

†

16

1 RICHARD FEIGEN - CROSS By Mr. Wellington

2 A. I have no interest --

3 MR. CYR: Objection, Your

4 Honor.

5 THE WITNESS: I have no --

6 THE COURT: Wait.

7 What is the objection?

8 MR. CYR: The objection to the

9 characterization of the amici's position.

10 THE COURT: Restate your

11 question. Let's start over again on that.

12 MR. WELLINGTON: That is fine,

13 Your Honor, thank you.

14 BY MR. WELLINGTON:

15 Q. Mr. Feigen, you appraised nine works of art?

16 A. Right.

17 Q. At the request of the amici.

18 Do you have, and would you ever

19 have, a financial interest as a dealer in selling

20 any of those?

21 A. I wouldn't involve myself in their sale. I

22 would consider it a conflict of interest.

23 Q. So you would disavow any potential commission

24 from any of those sales?

25 A. Yes.

1 RICHARD FEIGEN - CROSS By Mr. Wellington

2 Q. One of the paintings that you were asked to  
3 appraise, Mr. Feigen, was is it Chirico?

4 A. The Chirico, which is a portrait of  
5 Dr. Barnes.

6 Q. Do you have an opinion whether that should be  
7 sold by the Foundation?

8 A. I guess I wouldn't sell it. I think it should  
9 hang somewhere in the Foundation. If it were up to  
10 me, I wouldn't sell it. It isn't that valuable to  
11 make it expendable. In my view, I would keep it.  
12 But that is not my decision to make.

13 Q. Included among the nine works were Signac, the  
14 Prendergast Landscape Beach Scene, and the Glackens  
15 Washington Square?

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16 A. No. Those were Debra Force's.

17 Q. And I apologize. Thank you very much. Let

18 me get my notes in order here.

19 The Signac was among those?

20 A. Yes.

21 Q. And you testified about that. Here is a -- is

22 that the one, sir? It is hard to tell, perhaps

23 (indicating).

24 A. I tell you the truth, I am not sure. I mean,

25 I am not positive. It may well be. I can't tell

♀

18

1 RICHARD FEIGEN - CROSS By Mr. Wellington

2 from that reproduction.

3 Q. I would represent to you that we believe this

4 to be the same one we are talking about.

5 A. I will accept that. Okay.

6 THE COURT: I did not hear what  
7 you represented it to be.

8 MR. WELLINGTON: It is the  
9 Signac, the one Signac that is in the 19 paintings.

10 THE COURT: Very good.

11 BY MR. WELLINGTON:

12 Q. Yesterday, we had testimony from the archivist  
13 that this particular one was written about by the  
14 Barnes Foundation Vistas journal in 1990, talking  
15 about an important part of the collection.

16 Have you seen this particular  
17 journal, sir?

18 A. No, I have not.

19 Q. And I think another one that you had -- I hope

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20 I have the right one here, sir -- a Soutine

21 landscape?

22 A. Well, there are several Soutine landscapes.

23 Q. There were three that you appraised. There

24 were three Soutines?

25 A. Right.

‡

19

1 RICHARD FEIGEN - CROSS By Mr. Wellington

2 Q. I can get your appraisal out if you want

3 (pause).

4 I think this is Winding Road?

5 A. That would be -- let's see -- that would be

6 the number, the Barnes Foundation 2044?

7 Q. Yes.



8 A. Right. Okay.

9 Q. And this was shown yesterday to have been one  
10 of the pieces in a book published by the Barnes  
11 Foundation, An Approach to Art, back in 1923.

12 Is that a publication you are  
13 familiar with at all?

14 A. No, I am not.

15 Q. Another of the paintings that you did talk  
16 about at some length is, let's just call it the  
17 Courbet?

18 A. Yes.

19 Q. And I show you a page from an archival  
20 document dated 1925, with a reprint in 1928,  
21 written by Dr. Barnes himself, discussing the  
22 significance of this particular painting within the  
23 collection.

24 A. Right.

25 Q. And we saw yesterday, as well, a letter from

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20

1 RICHARD FEIGEN - CROSS By Mr. Wellington

2 Dr. Barnes talking about the new Courbet Landscape.

3 "We hung it in the main gallery

4 on the wall where Renoir's Large La Promenade was,

5 but which we replaced by the Large Daumier. The

6 Courbet Landscape hangs on top of the Daumier and

7 gives a fine note of dignity and importance to the

8 whole gallery.

9 "I'm sure that with these new

10 paintings the collection becomes very much more

11 important and that it will not be so difficult now

12 for us to convince the professors and academics in  
13 America that our collection is destined to be  
14 perhaps the most important in the world."

15 Like you, Dr. Barnes thought  
16 this was a pretty important painting, didn't he?

17 A. I think so.

18 Q. He was right about that?

19 A. I think so.

20 Q. Your original appraisal of the Courbet at  
21 three million five was the highest value of the  
22 nine paintings that you appraised, correct, sir?

23 A. Yes.

24 Q. And then the Friday night before these  
25 hearings started, we got a letter from you raising

1 RICHARD FEIGEN - CROSS By Mr. Wellington

2 that by five million dollars?

3 A. Yes.

4 Q. I think that it was because of a Courbet that

5 was on sale in Paris. Is that primarily the

6 reason?

7 A. Well, that was only part of the reason.

8 I then went back to find out

9 what the landscape that sold at Christie's

10 ultimately brought from the Houston Museum of Fine

11 Arts and what was asked for it.

12 So I developed a different

13 context I was unaware of when I made the original

14 appraisal.

15 Q. The Christie's had asked for the one that

16 Houston purchased, they asked nine million, but

17 didn't get it, correct?

18 A. I was told that was the figure by the chief

19 curator at Houston.

20 Q. The Courbet in Paris has been in the art news

21 for three or four months, that it was going to go

22 on sale for 12 million. There has been a fair

23 amount of buzz about that, correct?

24 A. I didn't see it in the art news, but I saw it

25 in Paris. I saw the picture there. That was the

‡

1 RICHARD FEIGEN - CROSS By Mr. Wellington

2 price I inquired and was given.

3 Q. That hasn't sold either, has it?

4 A. I don't know. I saw it about three weeks ago.

5 I don't know whether they sold it or not.

6 Q. And art appraisers who actually appraise art

7 under IRS rules and others would not use as an

8 asked-for value of a painting that has never been

9 sold as a comparable, would they?

10 A. I don't know. I am not an appraiser for the

11 IRS. They wouldn't also know the price that

12 Houston paid for that one, because it wasn't the

13 auction price.

14 Q. In looking at the AMR service, Exhibit 117,

15 which we had talked about last week, the top 25

16 percent of Courbet's paintings in the last six

17 years have actually declined slightly in the world

18 market in terms of actual sales.

19 Is that compatible with your

20 experience?

21 A. No.

22 Q. Are you aware of the AMR index?

23 A. No.

24 Q. And just one or two other things, Mr. Feigen.

25 Several people talked about the cache impact,

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23

1 RICHARD FEIGEN - CROSS By Mr. Wellington

2 potentially, of a mini-Barnes collection?

3 A. Right.

4 Q. You talked about the DeMazia cache, people

5 running around, hard to get into, et cetera.

6 I am looking at this list that

7 counsel handed out. I think this was from today

8 involving during the testimony of Ms. Force. And

9 this is the property from the sale of the DeMazia  
10 collection.

11 And there's a summary at the  
12 bottom. The two principal categories being  
13 Glackens' seven works. Here is the estimate, the  
14 high-end estimate, which she said was really what  
15 the fair market value would be, and then you do --  
16 you may range it lower and up to there.

17 Here is the total result. For  
18 those seven total, there was a 14 percent above the  
19 estimate, unless my math is incorrect.

20 But, can you verify that, or  
21 take my word for it?

22 A. I have no idea.

23 Q. For the Prendergast, of which there were four,



24 the cache effect of that DeMazia sale was only five  
25 percent, 891 versus 850 aggregate estimate.

♀

24

1 RICHARD FEIGEN - CROSS By Mr. Wellington

2 Do you see that?

3 A. I see it.

4 Q. Would that be the range of cache effect that,  
5 in fact, might happen?

6 A. No, it wouldn't.

7 First of all, the DeMazia sale

8 I was referring to was much earlier. I don't

9 remember the date. It was right after she died.

10 There was a Matisse in it and

11 so on.

12 Secondly, this sale took place  
Page 41

13 over 15 years ago. That was a moment when the only  
14 force in the art market were the Japanese, who had  
15 no interest in American art at all. It was before  
16 the explosion of the art market, and the explosion  
17 of the interest in American art.

18 So this is absolutely  
19 irrelevant right now, because that was done at a  
20 time when none of these buyers existed. So I have  
21 no idea, and percentages and AMR indexes are not  
22 things that come within my purview, because I don't  
23 do this professionally.

24 Q. But you have no doubt that you could find a  
25 private buyer who would love to have this Courbet,

1 RICHARD FEIGEN - CROSS By Mr. Barth

2 at a pretty high value, for example?

3 A. I know about three museums that would probably

4 come up here and rip it off of the wall, yes, at

5 whatever price.

6 MR. WELLINGTON: Thank you very

7 much.

8 THE WITNESS: Among them the

9 Getty, which doesn't have any price parameters.

10 MR. WELLINGTON: Thank you.

11 THE COURT: Mr. Barth.

12 BY MR. BARTH:

13 Q. Besides the Getty, who are the other two

14 museums?

15 A. I would have to go back. I think the National

16 Gallery needs a Courbet like that. I am pretty

17 sure Chi cago does. I j ust see who doesn' t have a  
18 maj or Courbet.

19 They don' t exist. You don' t  
20 find anything like this, so I would have to go and  
21 check, but I am pretty sure those museums which  
22 don' t have a maj or Courbet like this one. This is  
23 a maj or picture that hasn' t been on the market. I  
24 mean, I don' t remember one like it.

25 So it would take me about half

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1 RICHARD FEIGEN - CROSS By Mr. Barth  
2 an hour to figure out which museums I should offer  
3 it to, if it were mine to offer.  
4 Q. The fact that a museum doesn' t have one and

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5 might like it doesn't necessarily mean they could  
6 raise the money to purchase it, does it?

7 A. Well, Getty just simply would have to get out  
8 his checkbook. The other museums, I don't think  
9 this kind of money -- in days when contemporary art  
10 by Jeff Koons and Baptista are bringing five, six,  
11 seven, eight million dollars, and they need a  
12 Courbet to fill out its pre-impressionist  
13 collection, and a thing of this importance with  
14 this kind of distinguished provenance, I think that  
15 they probably would call up three trustees, and  
16 they would have the money.

17 I don't think any major museum  
18 would have a problem, let alone European museums  
19 like Stuttgart and some of those. I have a whole  
20 list of museums that I could -- that would buy this

21 painting.

22 Q. You're talking about all the museums that you

23 could pitch it to?

24 A. Not pitch it to. I wouldn't have to pitch it.

25 I would say which number in the Fernier it is, and

♀

27

1 RICHARD FEIGEN - CROSS By Mr. Barth

2 it belongs to the Barnes Foundation, and they would

3 be down here on the first plane to Philadelphia.

4 Q. And you have knowledge that they are willing

5 and able and have the money to purchase this, just

6 out of your own experience?

7 A. Well, you know, I talk to about two or three

8 of these museums a day. So I am pretty sure I am

9 not wrong in their capacity to manage a purchase  
10 like this. I'd just have to find the right museum  
11 and into whose collection this would fit and plug a  
12 big hole.

13 Q. Regarding your conversations with museums, I  
14 believe you indicated that, or rather earlier you  
15 gave testimony that the other Courbet, regarding it  
16 was involved with the Houston museum, they paid  
17 approximately six million dollars for.

18 A. That's what the chief curator told me, yes.  
19 Obviously, it's not a matter of public record.

20 Q. I thought, if I heard your testimony earlier,  
21 you said that he refused to tell you what was paid  
22 for it?

23 A. They won't tell me the exact figure, but the  
24 man is a very good friend. We do a lot with them.

25 And he toyed around that figure, so I know that it

♀

28

1 RICHARD FEIGEN - CROSS By Mr. Barth

2 is not far off.

3 Q. This is information that he gave you in

4 confidence, which shouldn't have been released to

5 the general public?

6 A. It isn't public information, but it's in that

7 vicinity.

8 By the way, this is not a

9 painting, were it up to me, that I would opt to

10 sell. There are other paintings that are not in

11 this category that I would much rather sell than

12 this very important Courbet.



Volume XII

13 Q. We are talking about in this case?

14 A. Yes.

15 Q. But those paintings, this, of course, is the  
16 most valuable one that you have appraised?

17 A. In that non-core expendable, apparently  
18 expendable collection, of the ones that I was asked  
19 to appraise.

20 Q. At eight million dollars, it is a significant  
21 part of what I believe the amici are claiming could  
22 be used as an alternative to raise the endowment  
23 that the foundations would otherwise provide if the  
24 petition is granted?

25 A. Well, I don't know what they're claiming, and

1 RICHARD FEIGEN - CROSS By Mr. Barth

2 I don't know the contents of the petition. And I  
3 wasn't asked to make an assessment on what ought or  
4 ought not to be sold.

5 There may be other objects to  
6 which I have not been exposed, which are  
7 expendable, or more expendable than the Courbet. I  
8 don't know. I was just asked to appraise these  
9 specific paintings.

10 Given options, which I was not,  
11 and the decision, which is not mine to make, I  
12 would, if I could, I would keep the Courbet. And  
13 there are other things that I would rather sell,  
14 even things in the core collection. I would rather  
15 sell -- like I would rather sell two or three  
16 redundant Renoirs than I would this picture here.

17 Q. Well, let me ask you this, Mr. Feigen.

18 Could you articulate for us

19 what your understanding of the mission of the

20 Barnes Foundation is?

21 MR. CYR: Objection. This is

22 beyond the scope.

23 THE COURT: Sustained. That is

24 beyond the scope.

25 BY MR. BARTH:

♀

30

1 RICHARD FEIGEN - CROSS By Mr. Barth

2 Q. You testified that you were opposed to the

3 sale because you believed that portions of

4 Dr. Barnes will will be broken, will or indenture

5 will be broken.

6 What particular portions or  
7 provisions of his will or indenture are going to be  
8 broken, in your mind, by this particular petition?

9 MR. CYR: Same objection, Your  
10 Honor. I think we are well beyond the scope.

11 THE COURT: Let's frame the  
12 question and the objection. Let's go back to where  
13 all of this started. We got off the track a little  
14 bit, although I don't think inappropriately.

15 This all arises from the  
16 question, what are you being charged, what are you  
17 charging?

18 Nothing.

19 You are doing this pro bono?

20 Yes.

21 Why?  
22 It was that response to that  
23 question which has allowed, to the extent that I  
24 have allowed it, all of that which has followed  
25 about his personal feelings about the Barnes, et

†

31

1 RICHARD FEIGEN - CROSS By Mr. Barth  
2 cetera.  
3 Now, a certain amount of that  
4 is fair cross, because it goes to bias. And that's  
5 the basis on which I have allowed it.  
6 However, at some point there is  
7 a line that has to be drawn, because it is not  
8 coming in so that I can test his understanding of

9 the Barnes mission. It is not coming in so that I  
10 can test what he does or doesn't know about the  
11 history of the Foundation.

12 It only came in for the purpose  
13 of allowing the Foundation to test a bias. I  
14 really think that we have done about all on bias  
15 that that answer authorizes, frankly.

16 Now, if you think that you  
17 haven't, and you want to explain to me how this  
18 will help me with the bias question, I will hear  
19 you. But I really think we have done about all we  
20 can do with it.

21 MR. BARTH: That's fair enough,  
22 Your Honor. I was exploring it in that direction,  
23 the basis for the bias and whether or not it was  
24 erroneous or well founded.

25 THE COURT: It doesn't really

♀

32

1 RICHARD FEIGEN - REDIRECT By Mr. Cyr

2 matter, does it?

3 MR. BARTH: No.

4 MR. WELLINGTON: A bias is a

5 bias if it is one. That's really the question for

6 the Court. Is it a bias? And if it is, to what

7 extent does it impact the opinion?

8 I think legally and from an

9 evidentiary standpoint, that is what I have got to

10 be considering.

11 MR. BARTH: I have no problem

12 with that, Your Honor. I will withdraw the

13 question.

14 I have no other questions, Your

15 Honor.

16 THE COURT: Will there be

17 redirect?

18 MR. CYR: Very briefly, Your

19 Honor.

20 REDIRECT EXAMINATION

21 BY MR. CYR:

22 Q. Mr. Feigen, Mr. Wellington showed you the

23 second edition of the Art in Painting.

24 I am showing you the third

25 edition.



1

2

I would like to go to the

3

appendix for that. This was, the third edition was

4

done by Dr. Barnes in March of 1937. I will hand

5

that up to you.

6

Do you see any evidence or

7

reference to the Courbet in the appendix to the

8

third edition?

9

A. If it is alphabetical, I don't, no. It seems

10

to be alphabetical. I don't see it listed.

11

Q. Okay.

12

MR. CYR: That's all I have.

13

Thank you.

14

THE COURT: Mr. Wellington,

15

does that prompt any questions?

16

MR. WELLINGTON: No.

17 THE COURT: Mr. Barth?

18 MR. BARTH: No.

19 THE COURT: Very good. Thank

20 you, Mr. Feigen. You may step down.

21 MR. WELLINGTON: Thank you,

22 sir.

23 (Witness excused.)

24 - - -

25 MR. KLINE: The amicus will

‡

34

1 JOSEPH MANKO - DIRECT By Mr. Kline

2 call Lower Merion Township Commissioner Joseph

3 Manko.

4 - - -



21 BY MR. KLINE:

22 Q. Mr. Manko, welcome. Just to clarify that a

23 bit more, would you please tell the Court the

24 office that you hold in Lower Merion Township?

25 A. I am the president of the Board of

♀

35

1 JOSEPH MANKO - DIRECT By Mr. Kline

2 Commi ssi oners.

3 Q. How long have you been the president?

4 A. This time, since January, the first Monday in

5 January. Before that, in 1992.

6 Q. How long, Mr. Manko, have you been a member of

7 the Board of Commi ssi oners?

8 A. It is my 25th year.

9 Q. How many Commissioners serve on the Board of  
10 Commissioners?

11 A. Fourteen.

12 Q. Each has an equal voice in voting?

13 A. Yes.

14 Q. Mr. Manko, in asking the following questions,  
15 I am not so much interested in the history of  
16 relations between and among the Barnes Foundation,  
17 its neighbors, and the Township, as I am the  
18 Township's position moving forward with respect to  
19 the Barnes Foundation.

20 Are you aware of this Court's  
21 decision in January that the gallery may move to  
22 Philadelphia, if the Foundation can show that such  
23 a move is both the least drastic deviation in terms  
24 of Dr. Barnes' trust and also financially feasible?

25 A. That is my understanding of the petition.

♀

36

1 JOSEPH MANKO - DIRECT By Mr. Kline

2 Q. And are you aware that the Court has decided  
3 that it may deny such a move if there are  
4 sufficient alternative assets to maintain the  
5 gallery in Merion?

6 A. That's also my understanding.

7 Q. Mr. Manko, what was the response of the Board  
8 of Commissioners upon learning of Judge Ott's  
9 January 29th decision?

10 A. A resolution was crafted to explain to the  
11 public, and I assume that the Judge would be able  
12 to take official notice, that the Township wished

13 to have the Judge explore all feasible alternatives  
14 since it was not the Township's intention that the  
15 Barnes move to Philadelphia.

16 Q. I'm going to, Mr. Manko, put on a copy of the  
17 resolution, mark amici's Exhibit A-92?

18 THE COURT: I think you have an  
19 A-92.

20 MR. KLINE: I'm sorry, Your  
21 Honor.

22 THE COURT: I think you have an  
23 A-93, also. So I think that you are at A-94.

24 (Resolution was marked as Amici  
25 Exhibit A-94, for identification.)

♀

2 BY MR. KLINE:

3 Q. Is this the document, the resolution that the  
4 Township passed, Mr. Manko, in February of 2004?

5 A. It appears to bear my signature and the  
6 signature of the secretary Eileen Trainer, yes.

7 Q. Can you tell me how many Commissioners in  
8 Lower Merion Township joined with the Commission in  
9 passing this resolution?

10 A. Fourteen.

11 Q. Fourteen Commissioners joined with you in  
12 passing this resolution?

13 A. My recollection, it was unanimously adopted.

14 Q. Can you tell me, in the nutshell, what this  
15 resolution says?

16 A. What the resolution says is that for most of



17 the 82 years since the Barnes was open, it has been  
18 a part of Lower Merion. Until recent events that  
19 stimulated this filing of this petition, it was a  
20 part of Lower Merion.

21 It has been there all of my 64,  
22 almost 65 years. And that before we were to see it  
23 cease to fulfill the function that was intended,  
24 that the Judge would hopefully take into account  
25 all alternatives, number one.

♀

1 JOSEPH MANKO - DIRECT By Mr. Kline

2 And, number two, we wanted to  
3 make certain, having read the Judge's opinion, that  
4 the Township was not in favor of the move, nor  
5 hostile to continuing to be the host municipality

6 for the Barnes.

7 Q. Since the time of the issuance of this  
8 resolution in February of this year, has the Barnes  
9 Foundation approached the Township for any zoning  
10 variances or to pursue any alternatives that might  
11 enhance its current financial position?

12 A. Not to my knowledge.

13 Q. Mr. Manko, I want to show you an article that  
14 appeared in the Philadelphia Inquirer on April the  
15 18th of 2004.

16 This is Amici's Exhibit 48 and  
17 Amici's Exhibit 49.

18 (Newspaper Article was marked  
19 as Amici Exhibit A-48, for identification.)

20 (Map accompanying newspaper

21 article was marked as Amici Exhibit A-49, for

22 identification.)

23 MR. WELLINGTON: Your Honor, we

24 will object to that, to total hearsay in all

25 respects.

♀

39

1 JOSEPH MANKO - DIRECT By Mr. Kline

2 THE COURT: Before you put it

3 up, let me just take a look at it because I haven't

4 looked at it.

5 MR. WELLINGTON: It is also

6 completely irrelevant. There is no basis on which

7 you can permit it, Your Honor. Thank you.

8 THE COURT: Well, I don't know

9 that I can rule in advance that it is irrelevant.

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10 I will wait to hear what the questions are about  
11 it.

12 You may put it up.

13 MR. KLINE: Thank you, Your  
14 Honor.

15 MR. WELLINGTON: Again, my  
16 other reason, Your Honor, is that it was hearsay  
17 and he is on direct, not cross.

18 THE COURT: I understand.

19 It depends on how it is used.

20 Obviously, simply reading a newspaper article  
21 doesn't admit any facts in the record. It simply  
22 may form the basis for a question. I don't know at  
23 this point. I don't choose to guess.

24 BY MR. KLINE:

25 Q. Mr. Manko, are you familiar with this

♀

40

1 JOSEPH MANKO - DIRECT By Mr. Kline  
2 newspaper article that came out in April of 2004,  
3 that talked about an alternative at the Barnes  
4 Foundation that might be used to increase access to  
5 enhance attendance by using property that currently  
6 belongs to Episcopal Academy to construct a parking  
7 lot adjacent to the premises of the Barnes  
8 Foundation?

9 A. I do remember reading the article.

10 Q. Are you familiar with alternatives like this  
11 that have been floated in Lower Merion Township?

12 A. I don't know what you mean by "floated." I  
13 will say that I, and several other of the



Volume XII

2 Looking at egress and ingress from City Avenue,  
3 which is shown at the bottom of the screen, was  
4 something that needed exploration with Episcopal.

5 I would say also between Saint  
6 Joe's and Episcopal have at least been in  
7 conversation about the possible acquisition of  
8 Episcopal to afford its move to Chester County  
9 involving Saint Joe's, as well.

10 So that it is not something  
11 that could be done by the Township, but it would  
12 require the cooperation of several institutions,  
13 including, of course, the Barnes.

14 Q. As president of the Board of Commissioners,  
15 are you aware that this road, beginning here, which  
16 is called Lapsley Lane, that runs here and then  
17 around the Barnes Foundation, is privately owned by

18 Saint Joseph University and the Barnes Foundation?

19 A. Absolutely. I remember when it became owned,  
20 because I grew up with the Bronsteins who lived on  
21 Lapsley Lane and gave their house to Saint Joe's.

22 Q. In order for enhanced traffic to use that road  
23 or get more vehicles on that road to enhance  
24 attendance at the Barnes Foundation, is it your  
25 belief that the cooperation of Lower Merion

♀

1 JOSEPH MANKO - DIRECT By Mr. Kline

2 Township might be needed?

3 A. Yes, from a land development standpoint, as  
4 well as traffic safety.

5 Q. Mr. Manko, if this Court determines that the



6 gallery must remain in Merion, would you support  
7 reasonable efforts by the trustees to enhance  
8 access to the Barnes Foundation?

9 A. Yes.

10 Q. Mr. Manko, if this Court determines that the  
11 gallery must remain in Merion, would you support  
12 reasonable efforts to enhance fund raising efforts  
13 at the Barnes Foundation?

14 A. Yes.

15 Q. Mr. Manko, I know that you can't speak for the  
16 entire Board of Commissioners, but as president of  
17 the Board of Commissioners, do you believe that  
18 your fellow Commissioners would join you in your  
19 support of enhanced access to the Barnes Foundation  
20 and reasonable fund raising efforts there?

21 MR. WELLINGTON: Objection,  
Page 73

22 Your Honor.

23 THE COURT: Sustained.

24 MR. KLINE: No further

25 questions, Your Honor.

♀

43

1 JOSEPH MANNKO - CROSS By Mr. Wellington

2 CROSS-EXAMINATION

3 BY MR. WELLINGTON:

4 Q. Mr. Manko, good afternoon. I am Ralph

5 Wellington.

6 Since the resolution was passed

7 in February of 2004, has the Township removed any

8 of the traffic restrictions that it imposed on the

9 Barnes Foundation?

10 A. I don't know that they were asked to.

11 Q. My question, sir, was, since the resolution  
12 has been passed in February of 2004, has the Lower  
13 Merion Township or the Zoning Commission removed  
14 any of the traffic restrictions imposed on the  
15 Barnes Foundation?

16 A. I don't know.

17 Q. Has the Township removed any of the attendance  
18 restrictions imposed on the Barnes Foundation?

19 A. I don't know, but I would expect that without  
20 an increase in parking, they probably would stay as  
21 they were.

22 Q. Are you aware that the Township continued to  
23 serve citations on the Barnes Foundation for  
24 violations of the restrictions since the passage of  
25 the resolution?

1 JOSEPH MANNKO - CROSS By Mr. Wellington

2 A. I don't know that they have or haven't. They  
3 wouldn't come to the attention of the president,  
4 though.

5 Q. So you don't know whether that has happened or  
6 not?

7 A. Correct.

8 Q. Have you, since the passage of the resolution,  
9 picked up the telephone and called the president of  
10 the board of trustees of the Barnes Foundation,  
11 Dr. Watson, and asked to speak with him about this  
12 issue?

13 A. I have not.

14 Q. Have you called Ms. Camp, the executive  
15 director?

16 A. Again, I have not.

17 Q. This petition has been pending for two years,  
18 has it not, sir?

19 A. I don't have the date of it. I would accept  
20 it if that is what you say.

21 Q. In that two-year period of time has Lower  
22 Merion Township taken any initiative to intervene  
23 in these proceedings?

24 A. In these proceedings?

25 Q. Yes.

♀

2 A. No.

3 Q. And are you aware of Mr. Kenneth Davis being  
4 quoted in the Philadelphia Inquirer? Mr. Kenneth  
5 Davis was a Commissioner?

6 A. He still is.

7 Q. He is a Commissioner of the Lower Merion  
8 Township?

9 A. One of the 14, yes.

10 Q. He is quoted in the Inquirer as saying, "No,  
11 frankly, there is no effort to keep them here. In  
12 fact, I hope they find a home in Philadelphia. It  
13 is the only way the public will get access to this  
14 leading art collection. I wish them well," end  
15 quote.

16 Are you aware of that sentiment  
17 expressed by Mr. Davis?

18 A. No, but if that is what it says, that is what  
19 it says. He is one of 14 people who voted in favor  
20 of this resolution.

21 Q. Is Mr. Randolph Lawless still a Commissioner?

22 A. No, he is not.

23 Q. Are you aware, about the time of this being  
24 passed, his statement that, "Any change would  
25 impact the neighbors and certainly no one has come

‡

46

1 JOSEPH MANNKO - CROSS By Mr. Wellington

2 to me saying we should do something"?

3 Is that the sentiment of some

4 of the people on the Board?

5 A. I am not familiar with that statement. I have

6 not heard anyone express that on the Board. I can  
7 only go by the fact that it was a unanimous  
8 adoption of the resolution.

9 Q. Is Mr. Sonenshein still a Commissioner?

10 A. No, he is not.

11 I don't want you to think that  
12 nobody is still on the board except me, but several  
13 people have stepped down. Those two, in fact.

14 Q. In fact, Mr. Harmelin of the board of trustees  
15 has reached out to talk to you about this issue has  
16 he not, sir?

17 A. Yes, he has.

18 Q. Among the things, Mr. Harmelin tried to  
19 reassure you as president of the Township  
20 Commissioners that the Barnes Foundation, itself,  
21 is not leaving Lower Merion Township. Isn't that



22 one of the things that he told you?

23 A. We have spoken for several hours. I am not an

24 art expert. I did see my first Courbet on my first

25 day with my wife in 1959 when it was at the art

♀

47

1 JOSEPH MANNKO - CROSS By Mr. Wellington

2 museum.

3 But in terms of what would be

4 where if there were two museums, that conversation,

5 Mr. Harmelin, has attempted to have with me several

6 times, yes.

7 Q. And in those conversations, he has assured you

8 that the entire horticultural program of the Barnes

9 Foundation will be centered there, plus the

10 property out in Chester County, has he not?

11 A. That is what he said.

12 Q. And that the classes in horticulture will

13 continue to take place in Lower Merion Township?

14 A. That is what he said. Because it is my

15 understanding that there is no intention to build a

16 horticultural center in Philadelphia.

17 Q. He has also assured you, has he not, that

18 there will be continuing art education programs at

19 the facility?

20 A. He has said that. It depends what "art

21 education" means in terms of what Dr. Barnes

22 intended and what would be there to do the

23 education with.

24 Q. In terms of what Mr. Harmelin has told you, do

25 you have any reason to believe that he is not

1                                   JOSEPH MANNKO - CROSS By Mr. Wellington

2    telling you the truth?

3    A.    I have no reason to believe that he didn't say

4    what he said.  It is not a question of truth or

5    falsity.  It is a question of what is art

6    educati on.

7                                   For example, in conversations I

8    have had with Saint Joe's, they have a fine arts

9    program, which would be a lovely adjunct as a next

10   door neighbor to the Barnes.  What would go into

11   the collection that gave the art education is

12   certainly not for me to say.

13   Q.    Let me go back to my question, Mr. Manko:  Has

Volume XII

14 Mr. Harmelin told you that the Barnes Foundation  
15 would continue to offer art education classes at  
16 the Barnes Foundation gallery and location in  
17 Merion?

18 A. Yes, without describing what they would be,  
19 yes.

20 Q. Has Mr. Harmelin also told you that the Barnes  
21 Foundation would continue to have artworks of some  
22 kind and type on a rotational basis at that  
23 facility?

24 A. I don't know about the rotational. He said  
25 there would be art of some kind.

‡

49

1 JOSEPH MANNKO - CROSS By Mr. Wellington

2 Q. And has Mr. Harmelin tried to assure you that  
3 those activities will continue, while removing the  
4 density issues that have plagued the relationship  
5 for a long period of time?

6 A. Our conversation really didn't get much into  
7 density, because I had my own thoughts in terms of  
8 density, as I think was just explained on direct.

9 Q. This proposal of Saint Joe's and Episcopal,  
10 there have been a number of articles in the  
11 newspaper concerning that, in addition to the one  
12 that Mr. Kline showed you, haven't there, sir?

13 A. Yes.

14 Q. And Saint Joseph's -- I can pull them out and  
15 we can look at them -- Saint Joseph's has talked  
16 about how they are landlocked, cannot wait to get  
17 ahold of this property, if possible, and have need

18 for all of it. Haven't they been quoted as saying

19 that?

20 A. You say all of it?

21 Q. Yes.

22 A. Are you referring to Episcopal?

23 Q. Yes.

24 A. I am not aware of that. I am aware of the

25 fact that they would intend to use the same

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1 JOEPH MANKO - CROSS By Mr. Barth

2 buildings that Episcopal had, which is why the

3 Township would be in favor of continued

4 institutional educational use.

5 Q. Has Lower Merion Township allocated any funds

6 to purchase property from Episcopal that it could

7 dedicate or donate to the Barnes Foundation?

8 A. No.

9 Q. Do you intend to do so as a leader of the

10 Lower Merion Township Board?

11 A. No. If the Judge's decision was to explore

12 the alternative of egress and ingress from City

13 Avenue, I would want to meet with Episcopal and

14 Saint Joe's and the Barnes to see if that could be

15 worked out before you jump to the conclusion that

16 we have got to go out and buy it ourselves.

17 MR. WELLINGTON: Thank you very

18 much, Mr. Manko.

19 THE WITNESS: You're welcome.

20 THE COURT: Mr. Barth?

21 BY MR. BARTH:

22 Q. Mr. Manko, in response to some of Mr. Kline's  
23 questions, I believe you indicated that you would  
24 attempt to augment or assist the Barnes Foundation  
25 in raising additional funds. Did you testify as to

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51

1 JOEPH MANKO - CROSS By Mr. Barth

2 that?

3 A. I didn't say how I would. We certainly would  
4 be in favor of them becoming financially well  
5 again. And whether I as an individual or as  
6 president of the Board would be able to lend my  
7 fund raising experience to them, I would be glad to  
8 try to do that. Unfortunately, I have too much  
9 experience in it.



10 Q. When you said that, you are only talking as an  
11 individual and not as a member of the Lower Merion  
12 Board of Commissioners?

13 A. Let me make it pretty clear if I didn't from  
14 the cross-examination by Mr. Wellington. I can't  
15 speak for the Board. I can only speak for myself,  
16 and what the Board has done.

17 Q. All right. Well, then, has the Board ever  
18 gone about raising money for charitable  
19 institutions within the Township?

20 A. The answer is that there are nonprofits that  
21 come to us and ask for assistance in services that  
22 they render to the Township constituents on a  
23 relatively small scale. I mean, conservancies and  
24 ambulance corps and things like that.

25 To my knowledge, the Barnes

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52

1 JOEPH MANKO - CROSS By Mr. Barth

2 never requested us to provide any funds to them.

3 Q. And I take it, then, you have never offered

4 any funds to them, even though you were quite aware

5 of their financial difficulties?

6 A. I am quite aware of their financial

7 difficulties, yes.

8 Q. But you haven't offered them any funds?

9 A. No, we haven't.

10 Q. I believe you also said that you would welcome

11 the opportunity to sit down with Saint Joe's and

12 Episcopal to see whether --

13 A. And the Barnes.

14 Q. And the Barnes.

15 -- to see whether or not the

16 proposal regarding the contiguous land could be

17 made available to the Barnes Foundation, did you

18 not?

19 A. Yes.

20 Q. Do you know how long it would take, or do you

21 have an estimate how long it would take, to conduct

22 such meetings, assuming they were positive, sell

23 the land, and make the corrections that would

24 alleviate the Barnes' financial condition?

25 A. You are asking me how cooperative and how

♀

1 JOSEPH MANKO - CROSS By Mr. Wellington

2 quickly cooperative other people would be. I can't  
Page 91

3 answer that.

4 I would also expand my answer  
5 to say that I would want to include the foundations  
6 in conversations, as well, since they obviously  
7 have funds.

8 Q. But you have no ability to guarantee that  
9 Saint Joe's or Episcopal would be cooperative  
10 insofar as land is concerned?

11 A. That is correct. I would only try to convene  
12 discussions.

13 MR. BARTH: Thank you.

14 THE COURT: Mr. Kline, anything  
15 on redirect?

16 MR. KLINE: Nothing.

17 MR. WELLINGTON: Your Honor,

18 just however, I forgot a question of him.

19 THE COURT: Go ahead and ask

20 it.

21 MR. WELLINGTON: Thank you very

22 much.

23 BY MR. WELLINGTON:

24 Q. I mentioned to you Saint Joseph's potential

25 reaction. I did want to show you this and see if

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54

1 JOSEPH MANKO - CROSS By Mr. Wellington

2 you were aware of it.

3 This is a Philadelphia Inquirer

4 article, January 3rd of 2001, Uphill Climb Ahead on

5 the Road to the Barnes: The idea, build a direct

6 link between City Avenue and the art gallery's

7 parking lot. Not everyone likes it.

8 Then at the top of the next

9 page, as part of this article, there is a statement

10 from Episcopal's head of school: Obviously, we

11 want to be good neighbors, but we ourselves are

12 plot bound and need every inch of open space we

13 have, said Mr. Crawford, Episcopal's head of

14 school.

15 Have you had similar

16 discussions with Mr. Crawford about this or any

17 discussions at all about this?

18 A. No. The last time Jay Crawford and I had a

19 discussion was when I was playing for Lower Merion

20 and he was the goalie for Episcopal.

21 THE COURT: That probably was

22 not something repeatable? (Laughter.)

23 THE WITNESS: No, it is.

24 Actually, he slipped in the mud on a penalty kick

25 and the ball went into the goal. We won one

‡

55

1 JOSEPH MANKO - CROSS By Mr. Wellington

2 nothing. It was a terrible kick and Jay kidded me

3 all about it.

4 In all seriousness,

5 Mr. Wellington, that is back in January 2001. I

6 don't remember when the Episcopal move was

7 announced, nor whether that involved Saint Joe's.

8 Now, again, Saint Joe's, at

9 this particular point without any additional land

10 from Episcopal, has what it has.





1 JOSEPH MANKO - CROSS By Mr. Wellington

2 A. I'm sorry.

3 Q. It says here, "An agreement worked out several  
4 years ago, the Barnes promised not to send buses up  
5 the lane." That's the lane Mr. Kline was talking  
6 to you about, designated the Latches gateway, its  
7 primary entrance. "Lapsley Lane is heavily  
8 traveled by Saint Joseph's students walking to and  
9 from classes and dormitories."

10 Then a statement, Saint  
11 Joseph's, that the university would probably oppose  
12 a dedicated road that crossed Saint Joseph's  
13 property.

14 You are aware that the Lapsley  
Page 97

15 Lane that you asked about is, in fact, largely a  
16 student access for Saint Joseph's because many of  
17 them live on that street?

18 A. I can't say whether it is largely or not. I  
19 can tell you that the Commissioners have met from  
20 time to time at Saint Joe's in the visitors'  
21 parking and admissions parking. So it is  
22 frequented by students walking and by cars driving.

23 I haven't done a count on the  
24 cars or anything. But it has parking off Lapsley  
25 Lane, yes.

♀

1 JOSEPH MANKO - REDIRECT By Mr. Kline

2 MR. WELLINGTON: Thank you.

3 That's all I have, Your Honor.

4 REDIRECT EXAMINATION

5 BY MR. KLINE:

6 Q. Tell me, Mr. Manko, what would be your own  
7 thinking about the sale of the Episcopal property  
8 to Saint Joe's?

9 MR. WELLINGTON: Objection,  
10 Your Honor. What is the possible relevance?

11 THE COURT: Well, there's all  
12 kinds of reasons for that objection.

13 Let me attempt to elicit what  
14 it is that you are thinking. It is easier that  
15 way, Mr. Wellington.

16 MR. WELLINGTON: My objection  
17 was relevance, Your Honor. I just...

18 THE COURT: Yes. As talented  
Page 99

19 and connected as Mr. Manko is, I don't know that  
20 his personal opinion is relevant.

21 Sustained.

22 MR. KLINE: We have no further  
23 questions for Mr. Manko. Thank you, Mr. Manko.

24 THE COURT: Thank you,  
25 Mr. Manko.

♀

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1 JAMES ETTELSON - DIRECT By Mr. Cyr

2 THE WITNESS: Thank you, Judge  
3 Ott.

4 (Witness excused.)

5 - - -

6 THE COURT: Mr. Cyr?

Volume XII

7 MR. CYR: At this time, the  
8 amici would like to call James Ettelson.

9 MR. WELLINGTON: Your Honor, we  
10 have a motion.

11 THE COURT: Let's have a quick  
12 side bar while Mr. Ettelson is coming on up here.

13 (A conference was held at side  
14 bar, not reported.)

15 - - -

16 JAMES ETELSON, having been  
17 first duly sworn, was examined and testified as  
18 follows:

19 THE COURT: Let me just say,  
20 generally I have been a little lax in keeping  
21 control of this room. Let me just remind the  
22 gallery, this is a courtroom and this is a court

23 proceeding, and so I would like to keep comment and  
24 reaction to an appropriate minimum.

25 I am not trying to put a gag on

♀

59

1 JAMES ETTELSON - DIRECT By Mr. Cyr

2 everybody, but let's remember it is a courtroom.

3 It is a serious place.

4 Mr. Cyr, you may begin.

5 DIRECT EXAMINATION

6 BY MR. CYR:

7 Q. Mr. Ettelson, could you state for the record  
8 the course of office that you hold in Lower Merion  
9 Township?

10 A. Yes. I am a Commissioner from Lower Merion

11 Township. I represent Merion.

12 Q. How long have you been a member of the Board  
13 of Commissioners?

14 A. For 11 years.

15 Q. And you represent the, is it a ward?

16 A. Yes. We have 14 wards in Lower Merion.  
17 Merion is one of them.

18 Q. Is the Barnes Foundation situated in that  
19 ward?

20 A. That's correct.

21 Q. Now, Mr. Ettelson, have you attempted to reach  
22 out to the Barnes Foundation since the filing of  
23 this petition in an effort to make reasonable  
24 efforts on alternatives that are facing the Barnes  
25 Foundation?

1 JAMES ETTELSON - DIRECT By Mr. Cyr

2 A. I don't know that my reaching out to the  
3 Barnes was as a result of the petition. I think  
4 that there has been an ongoing effort, wherever  
5 possible, to reach out to the Barnes as a matter of  
6 course. So I would assume -- I just don't know the  
7 timing of the last effort. I believe the last  
8 effort was one to Mr. Watson.

9 Q. Can you describe for the record what your  
10 efforts have been in reaching out to the Barnes?

11 A. Basically, I see my role as a Township  
12 Commissioner representing that area as one which,  
13 hopefully, can facilitate operations of either  
14 constituents as residents or constituents as



15 institutions.

16 And as I did with Mr. Glanton  
17 and actually with Ms. Camp, Mr. Bradford, I did  
18 with Mr. Watson, also, try to reach out to see what  
19 we could do to help them in their efforts.

20 When I say "we," we being the  
21 Township, and also as a representative of the local  
22 neighborhood.

23 Q. And what has been --

24 MR. WELLINGTON: Your Honor, I  
25 am going to renew my objection, unless this can be

‡

61

1 JAMES ETTELSON - DIRECT By Mr. Cyr  
2 specified as basically ongoing, or something in

3 response to this petition or resolution. There has  
4 been nothing that clarifies that at all.

5 THE COURT: I don't know that  
6 yet. Let's see how that comes out.

7 So far, he is being responsive  
8 to the questions. I don't know that that issue has  
9 been asked. So, next question.

10 BY MR. CYR:

11 Q. Well, Mr. Ettelson, have you reached out to  
12 Dr. Watson in response to the petition that is  
13 presently pending before the Court with respect to  
14 moving the Foundation from Merion to Center City?

15 A. Not specifically to that petition, no.

16 Q. What have you reached out to Dr. Watson with  
17 respect to?

18 A. With respect to possible alternatives that

19 might exist, which began prior to even the  
20 petition, and probably -- and discussions maybe  
21 that took place after the petition. I can't  
22 remember the exact dates.

23 But they were to address  
24 possible alternatives that might exist to allow the  
25 Barnes to maybe achieve some of its goals.

♀

62

1 JAMES ETTELSON - DIRECT By Mr. Cyr

2 Q. What was Dr. Watson's response to those  
3 outreaches?

4 A. Only that they were just considered and they  
5 would be considered. But nothing specific.

6 Q. Mr. Ettelson, should the Court determine that

7 the gallery must remain in Merion, will you support  
8 reasonable efforts by the trustees to enhance  
9 access to the Barnes Foundation?

10 A. Yes.

11 Q. And would you also support enhanced fund  
12 raising efforts by the Barnes Foundation?

13 A. Yes.

14 MR. CYR: Thank you. That's  
15 all I have, Your Honor.

16 THE COURT: Mr. Wellington?

17 MR. WELLINGTON: I have no  
18 questions, Your Honor.

19 THE COURT: Mr. Barth?

20 MR. BARTH: None.

21 THE COURT: Thank you,  
22 Mr. Ettelson.

23 THE WITNESS: Thank you, Judge.

24 (Witness excused.)

25 - - -

‡

1 KENNETH BARROW - VOIR DIRE By Mr. Kline

2 MR. KLINE: Your Honor, we call

3 Mr. Barrow.

4 THE COURT: That's fine if you

5 want to proceed with that.

6 Mr. Barrow.

7 - - -

8 KENNETH BARROW, having been

9 first duly sworn, was examined and testified as

10 follows:

11 VOIR DIRE EXAMINATION

12 BY MR. KLINE:

13 Q. Mr. Barrow, good afternoon. Would you state  
14 your educational background for the Court?

15 A. I am a graduate of Episcopal Academy. I am a  
16 graduate of Temple University. I have taken  
17 numerous courses in real estate law practices and  
18 appraisal.

19 THE COURT: Mr. Barrow, will  
20 you move closer to that mic, please.

21 BY MR. KLINE:

22 Q. Do you want to state again your educational  
23 background for the Court, please?

24 A. I am a graduate of the Episcopal Academy. I  
25 am graduate of Temple University. I have an

1 KENNETH BARROW - VOIR DIRE By Mr. Kline

2 Associate's Degree in horticulture and landscape

3 design. I have a Bachelor of Arts Degree.

4 I also have many years of

5 courses in real estate, real estate law and

6 appraisal.

7 Q. Your professional background, please?

8 A. I am currently a licensed real estate broker

9 in the State of Pennsylvania; state certified

10 general real estate appraiser in the State of

11 Pennsylvania; a senior member of the American

12 Society of Appraisers; past president of the

13 Delaware County Association of Real Estate

14 Appraisers, and I also have a teaching certificate

15 for real estate from Pennsylvania.

16 Q. You are a licensed real estate broker?

17 A. I am a licensed real estate broker.

18 Q. A certified appraiser?

19 A. A certified general appraiser.

20 (Curriculum Vitae of Mr. Barrow

21 was marked as Amici Exhibit A-59, for

22 identification.)

23 BY MR. KLINE:

24 Q. Mr. Barrow, we marked this document as Amici

25 Exhibit A-59.

♀

1 KENNETH BARROW - VOIR DIRE By Mr. Kline

2 Do you recognize this document



3 as your resume?

4 A. Yes, sir.

5 Q. Does it accurately reflect your educational  
6 and professional background?

7 A. If it is a two-page document, it does, yes.

8 Q. It says here on your resume that you have  
9 given real estate expert testimony in Delaware,  
10 Chester and Montgomery County Courts; is that  
11 correct?

12 A. That is correct.

13 Q. I want to move to the partial list of clients  
14 that you have on page 2 of your resume.

15 I see that my name appears at  
16 the end of this list.

17 Can you explain to the Court  
18 why my name appears on your list?

19 A. I have done real estate appraisals for you in  
20 Delaware County, primarily estate appraisals. You  
21 are one of the three or four estate attorneys that  
22 I have done work for, that practice primarily  
23 estate work.

24 Q. In any of those real estate appraisals which  
25 my firm has retained your services, were you ever

♀

66

1 KENNETH BARROW - VOIR DIRE By Mr. Kline  
2 asked by me or anyone in my firm to value a piece  
3 of real estate at anything other than fair market  
4 value?

5 A. No, sir.

6 Q. And, specifically, did I or anyone in my firm

7 ever ask you to value real estate higher or lower  
8 than fair market value for federal gift or estate  
9 tax purposes or for any purpose?

10 A. Absolutely not.

11 Q. What is the geographical focus of your  
12 appraisal business?

13 A. Delaware County, Chester County, Lower  
14 Montgomery County, every so often to Bucks County  
15 and Berks County, and every so often down into  
16 Delaware State.

17 Q. Mr. Barrow, have you appraised large tracts of  
18 land in the past?

19 A. Yes, I have.

20 Q. Have you appraised such land in Chester  
21 County?

22 A. Yes, I have.

23 Q. Are you familiar with Ker-Feal, which is that  
24 137.7 acre parcel in West Pikel and Township in  
25 Chester County?

†

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1 KENNETH BARROW - VOIR DIRE By Mr. Kline

2 A. Yes, I am.

3 Q. Is there anything that would prevent you from  
4 offering a professional opinion as to the value of  
5 that land?

6 A. No.

7 Q. So you believe you are qualified to offer such  
8 an opinion?

9 A. Yes.

10 Q. Were you paid for your appraisal services?

11 A. Yes, I was paid.

12 Q. How much were you paid?

13 A. I was paid \$3,500 for my services.

14 Q. Are you being paid for your testimony here

15 today?

16 A. Yes, I am.

17 Q. How much are you being paid?

18 A. \$125 an hour.

19 MR. KLINE: Your Honor, I would

20 like to offer Mr. Barrow as an expert witness on

21 the subject of real estate valuation.

22 THE COURT: On qualifications?

23 MR. WELLINGTON: No questions,

24 Your Honor.

25 THE COURT: Mr. Barth?

1 KENNETH BARROW - DIRECT By Mr. Kline

2 MR. BARTH: No questions.

3 THE COURT: Very well. You may  
4 proceed.

5 DIRECT EXAMINATION

6 BY MR. KLINE:

7 Q. Mr. Barrow have you had an opportunity to  
8 inspect Ker-Feal?

9 A. Yes. I had an opportunity to inspect parts of  
10 the main residence, and I did inspect the  
11 outbuildings. There are portions of the  
12 outbuildings that I did not inspect, including the  
13 second floor of the springhouse. I didn't enter  
14 the smokehouse, which is a very small building.

Volume XI I  
I was unable to inspect

15  
16 anything but one bathroom and a hallway on the  
17 second floor of the main residence. So I had to  
18 refer to other data or information for some  
19 information that I used in my report.

20 Q. As a result of your inspection, were you able  
21 to render an opinion as to the fair market value of  
22 Ker-Feal?

23 A. Yes.

24 Q. And what was that opinion? In your  
25 professional opinion, let me state it this way,

♀

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1 KENNETH BARROW - DIRECT By Mr. Kline  
2 what is your professional opinion of the value of  
3 Ker-Feal?

4 A. It was my professional opinion that the market  
5 value of Ker-Feal as of the date of inspection was  
6 ten million three hundred thousand dollars.

7 (Expert Report of Kenneth  
8 Barrow marked as Amici Exhibit A-60, for  
9 identification.)

10 BY MR. KLINE:

11 Q. I will show you Amici Exhibit 60. Can you  
12 identify this as the valuation, the appraisal  
13 that you prepared?

14 A. Yes, sir.

15 Q. Did you, Mr. Barrow, appraise Ker-Feal at fair  
16 market value?

17 A. Yes.

18 Q. How did you define fair market value?



19 A. It is the most probable price that a property  
20 will command in the open market, a buyer and seller  
21 both willing and able and knowledgeable, and if  
22 they are not individually knowledgeable, having the  
23 assistance of other experts or knowledgeable  
24 people.

25 Q. Now, Mr. Barrow, did you value the building

‡

70

1 KENNETH BARROW - DIRECT By Mr. Kline

2 and seven acres separately from the balance of the  
3 land?

4 A. Yes, I did.

5 Q. I want to show you, if I may -- give me one  
6 moment, please (pause) -- a sketch that you  
7 prepared in preparing your appraisal.

8 And we will mark this as Amici

9 A-95.

10 (Sketch was marked as Amici

11 Exhibit A-95, for identification.)

12 BY MR. KLINE:

13 Q. Tell me, Mr. Barrow, this is a sketch of how

14 you arrived at value for the property at Ker-Feal.

15 Can you tell me why you set aside the seven acres?

16 I might just point out that the entrance to

17 Ker-Feal off Bodine Road is right here. And one

18 would come in here. The buildings are in about

19 that area (indicating); is that correct?

20 A. That is correct.

21 Q. Can you tell me why you set aside seven acres

22 for those buildings?

23 A. It was my estimation that seven acres would  
24 provide the cluster of buildings, sufficient land  
25 to stand alone, if necessary, as an entity.

♀

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1 KENNETH BARROW - DIRECT By Mr. Kline

2 Q. Now, is it possible that the Foundation could  
3 retain those buildings and allot more than seven  
4 acres without earning less than the value, say,  
5 that you ascribed to the property? What I am  
6 getting to, the property that is not used here in  
7 the development on your sketch, all of this  
8 property --

9 A. The Ker-Feal could maintain its seven acres as  
10 a fee simple interest and maintain the other space  
11 that is noted here as open space. I didn't

12 specifically delineate an area for the Ker-Feal  
13 complex, itself, within that large open area.

14 But it could be separately  
15 deeded and then retained in a plan, the balance of  
16 the open space, in some manner.

17 Q. Mr. Barrow, would you explain to the Court how  
18 you valued the remaining, in your case, 130 acres,  
19 or so? That is to say, you set aside in that  
20 circle five to seven acres or seven acres relative  
21 to the building. But the rest of the property,  
22 about 130 acres, how did you value that?

23 A. I valued that on a per-lot basis.

24 And that was based upon what  
25 the zoning permitted under the West Pikel and

1                                   KENNETH BARROW - DIRECT By Mr. Kline  
2 Township Ordinance.

3                                   I reviewed the Ordinance and  
4 made the appropriate calculations as to the  
5 probable number of lots that the Zoning Ordinance  
6 permitted under the CR district and the lot  
7 averaging district, which is another basically  
8 overlying density allowance.

9                                   The density is based upon a two  
10 acre lot size, after deductions for a certain  
11 portion of wetlands or flood zone, specifically  
12 flood zone soils, and existing and probable  
13 right-of-way for roads.

14 Q. In valuing the property, did you consider the  
15 value of homes around Ker-Feal?

16 A. That is one of the primary things that I do  
17 when I am looking at a parcel of land, because the  
18 value of the homes in the neighborhood tend to set  
19 the value of the land in that neighborhood.

20 Q. Are there properties in the immediate  
21 neighborhood that are currently in the subdivision  
22 process?

23 A. There is one -- actually, it is within roughly  
24 500 feet of the subject property that is in  
25 subdivision right now.

‡

1 KENNETH BARROW - DIRECT By Mr. Kline

2 Q. Can you tell the Court briefly about that  
3 proposed subdivision?

Volume XII

4 A. That is the Lillimars' property which is off  
5 of Bodine Road. If you look at your X and proceed  
6 to the upper right, there is an intervening  
7 property where there is a soil survey listing the  
8 soils.

9 The next property up is the  
10 Lillimars' property. That is currently going  
11 through the subdivision process. David Dagostino,  
12 son of Tony Dagostino, is doing that subdivision  
13 now.

14 He is purchasing the property  
15 based upon he getting all of the approvals and  
16 paying for all of the approvals for the subdivision  
17 and permitting process.

18 I found that to be one of the  
19 best indicators of value for the general area.

- 20 Q. The seller is receiving what for the lots?
- 21 A. The seller is receiving roughly 150,000. It
- 22 might go to 160,000 a lot, depending upon the final
- 23 number of lots.
- 24 Q. If you are appraising property in this area,
- 25 or any area, do you look to property that is in

♀

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- 1 KENNETH BARROW - DIRECT By Mr. Kline
- 2 development as this one is?
- 3 A. You try to. You also look at existing lot
- 4 sales throughout a neighborhood or a market area or
- 5 similar markets.
- 6 Q. And now, Mr. Barrow, have you reviewed the
- 7 appraisals that were submitted by Mr. Wood and



Volume XII

8 Mr. Perry on behalf of the trustees?

9 A. Yes.

10 Q. I want to show you a summary of those values,  
11 which we have marked as Amici Exhibit A-66.

12 (Summary of Values was marked  
13 as Amici Exhibit A-66, for identification.)

14 BY MR. KLINE:

15 Q. Mr. Barrow, could you explain your  
16 professional opinion why your value of the  
17 buildings and land at Ker-Feal, your value is  
18 double the average of Mr. Perry and Mr. Wood's  
19 appraisal?

20 A. I think primarily it is because Mr. Wood and  
21 Mr. Perry appraised the property as is, without the  
22 real potential for the subdivision. Whereas, I  
23 appraised the property as being available for

24 subdivisi on the way many, many properties are now  
25 being sold in the marketplace.

±

75

1 KENNETH BARROW - DIRECT By Mr. Kline

2 Q. Can you elaborate on that a bit?

3 A. Many of the properties that I end up

4 appraising are brought into the marketplace by the

5 buyer, who goes through the subdivisi on process,

6 having agreed to pay the seller a speci fic price

7 per lot. The lot value is where value actual ly

8 arises for a piece of real estate.

9 A 100 acre parcel may yi el d

10 only 30 lots in some instances, whereas another 100

11 acre parcel could yi el d 100 lots depending upon the

12 zoning, or more.

13 Parcel s really are bought on a

14 per-lot basis, not necessarily a per-acre basis.

15 So the productive unit that

16 goes to value is really a per-lot valuation.

17 Q. I want to get this straight, though. You are

18 valuing the land as land available for development?

19 A. Yes.

20 Q. And are you suggesting that Mr. Wood and

21 Mr. Perry are valuing the land as in as-is

22 condition?

23 A. I think Mr. Wood actually said he valued it as

24 is.

25 Q. What does that mean to you?

1 KENNETH BARROW - DIRECT By Mr. Kline

2 A. There are three or four ways that land is  
3 sold. One is, at the lowest end of values, is raw,  
4 where there is absolutely no contingencies. It is  
5 put out into the marketplace. The seller says I  
6 will not wait for contingencies. I just want to  
7 sell my land. That's usually the low end of value.

8 The second way is the way a lot  
9 of land is actually sold today, where the buyer  
10 comes in and makes an offer subject to the buyer  
11 getting the subdivision done. Sometimes the seller  
12 will get the subdivision done, but more often than  
13 not now the buyer is the one that obtains the  
14 subdivision, agreeing to pay the property owner on  
15 a per-lot or per-unit basis.



4 your opinion, in which fashion did Mr. Wood and

5 Mr. Perry value the land?

6 A. Basically, as is.

7 Q. Which would bring?

8 A. The least value.

9 Q. And which way did you value the land?

10 A. I valued the land in the middle of the range,

11 which is very typical of the marketplace today, how

12 a lot of these things are being sold.

13 Q. Does that explain the difference in value?

14 A. Yes, it does, really.

15 Q. And in the case of Mr. Perry and Mr. Wood,

16 would an immediate sale as is bring proceeds

17 immediately?

18 A. Within a short period of time, usually 90

19 days, 120 days, something along those lines.

20 Q. And when you do it in the fashion that you  
21 have described as land available for development,  
22 how long does it take to get the proceeds?

23 A. It could take anywhere from 18 to 24 months,  
24 typically. It might take a little longer, but a  
25 good buyer, a Toll Brothers or a Hovnani an will

♀

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1 KENNETH BARROW - DIRECT By Mr. Kline

2 push the process along very quickly.

3 Q. I want to turn, if I could, to the trustees

4 Exhibit No. 67, which is the appraisal valuation

5 report that was prepared for the Barnes Foundation

6 by Mr. Perry.

7 Specifically, I will put it on

8 the Elmo. I want to look at page Roman numeral

9 IV-3.

10 I will read, if I may, the  
11 first line of that paragraph here that begins with  
12 the words, it is: "It is further noted that this  
13 class of real estate is typically sold with  
14 contingency agreements for zoning modifications  
15 and/or land development in accordance with local  
16 zoning restrictions."

17 Mr. Barrow, is that a correct  
18 statement?

19 A. Absolutely. That is a correct statement.

20 Q. Now I want to turn to page Roman numeral IV-1  
21 of the same report.

22 Mr. Perry's conclusion here --

23 I am going to read the middle portion of the



24 conclusion, beginning with the words, it is: "It  
25 is your appraiser's opinion that the maximally

†

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1                                   KENNETH BARROW - DIRECT By Mr. Kline  
2       productive financially feasible and legal use of  
3       the subject property, as if vacant, is a minor  
4       subdivision creating a private enclave of eight to  
5       ten building sites in the southerly portions along  
6       Seven Oaks Road, and large lot subdivisions for ten  
7       plus acre sites in the northwesterly portions in  
8       accordance with the area and bulk regulations of  
9       the CR district. The highest and best use, as  
10      improved, would be a similar low impact residential  
11      subdivision of lots, with tract one consisting of

12 12 acres surrounding the existing improvements."

13 Have you reviewed Mr. Perry's

14 appraisal, Mr. Barrow?

15 A. Yes, sir.

16 Q. And in your opinion, did Mr. Perry appraise

17 the land pursuant to his own definition of highest

18 and best use?

19 A. No, sir. He appraised it on a per-acre basis.

20 Q. Will you explain what that is, please, to the

21 Court?

22 A. He did not delineate the number of lots that

23 he would obtain, so he has no idea what he is

24 actually getting in the way of the total number of

25 lots. He varies in the southern section eight to

1                                   KENNETH BARROW - DIRECT By Mr. Kline  
2       ten, without choosing a number.

3                                   And even if I agreed with his  
4       analysis or highest and best use, he doesn't tell  
5       you how many ten acre lots or the value of the ten  
6       acre lots that he would be getting.

7                                   He just used an acreage number.  
8       He didn't use a per-lot number.

9       Q.     So, in your opinion, he valued the land on an  
10      as-is basis?

11      A.     As is. He also, I think, deducted for the  
12      approval process in his adjustment group.

13      Q.     Now, I want to turn for just a moment to  
14      Mr. Wood's appraisal, at page 11. This would be  
15      Trustees Exhibit No. 68. I will put it on the

16 Elmo.

17 (Mr. Wood's Appraisal was

18 marked as Trustees' Exhibit 68, for

19 identification.)

20 BY MR. KLINE:

21 Q. I want you to look at that bottom sentence

22 there, the last sentence.

23 It says, "The appraiser valued

24 the property on an as-is basis. Any other

25 arrangement involves some element of risk on the

♀

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1 KENNETH BARROW - DIRECT By Mr. Kline

2 part of the seller, which was not included in our

3 assignment. "

4 Volume XI I  
Now, on page 12 --

5 MR. WELLINGTON: Was there a  
6 questi on, Your Honor?

7 THE COURT: Not yet.

8 MR. KLINE: I am looking for  
9 the comment of the professional opini on. I have to  
10 give the expert two pieces of information.

11 BY MR. KLINE:

12 Q. And then on the following page, at page 12, he  
13 says, "Highest and best use for the vacant land is  
14 residenti al subdivisi on as zoning permits. The  
15 number of home sites is estimated to be  
16 approxi matel y 40."

17 Mr. Barrow, in your opini on,  
18 di d Mr. Wood' s apprai sal set forth values  
19 consi stent wi th hi s own defi ni ti on of highest and

20 best use?

21 A. No, he didn't. He, again, valued it, as he  
22 said on the previous page, page 11, as-is. When he  
23 concluded at 40 lots, he didn't value 40 lots. He  
24 he valued acres.

25 Q. In your professional opinion, Mr. Barrow, what

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1 KENNETH BARROW - DIRECT By Mr. Kline

2 is the impact of the imposition of a conservation  
3 easement on the property?

4 A. A conservation easement can drastically reduce  
5 the value, decimate the value of the real estate,  
6 depending upon the strength of the conservation  
7 easement, itself.

- 8 Q. Are you aware of any conservation easement  
9 that has been applied to this property?
- 10 A. No, sir, I am not.
- 11 Q. Who is the most likely buyer of this land?
- 12 A. The most likely buyer of this land, if it were  
13 offered in the market, would be either a land  
14 developer or a builder, such as a Toll, a Realen, a  
15 Hovnani an, a David Cutler. You can go through a  
16 list of developers, regional and local.
- 17 Q. Are they likely to be in the same groups that  
18 would pay the most for the property?
- 19 A. Historically, they have, yes.
- 20 Q. In your professional opinion, could any of  
21 those groups pay more than the value of your  
22 ascribed value to that property for the property?
- 23 A. It is possible, yes, it is.

24 Q. How so?

25 A. Some of the developers will press for a higher

♀

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1 KENNETH BARROW - DIRECT By Mr. Kline

2 density than is available by right and some of them

3 win.

4 They may have a different view.

5 They may look at the market neighborhood as being a

6 higher priced final product, housing product, than

7 I did. I was looking at roughly 750 to 900

8 thousand as being my market range. The

9 neighborhood could easily support that.

10 They may conclude that Ker-Feal

11 could yield a higher sale price, given the existing



12 neighborhood right around it, where a lot of the  
13 homes are already selling in that bracket, and  
14 there are some that are actually selling around a  
15 million seven forty, a million five, granted on  
16 larger lots.

17 So they probably would n' t get  
18 that high. But they might approach a million or a  
19 little over a million. Thereby, they would pay  
20 more for the land.

21 Q. In December, at the prior hearing, Ms. Camp,  
22 the executive director of the Barnes Foundation,  
23 testified that she had received frequent offers for  
24 the sale of the land at Ker-Feal. One I think was  
25 as high as 12 million dollars.

1 KENNETH BARROW - DIRECT By Mr. Kline

2 She clarified that this morning  
3 in testimony saying that this was via some sort of  
4 a cell phone call that she had with someone who  
5 might have been interested in buying the property,  
6 although she didn't have much certainty there.

7 Would that have had an impact  
8 on your decision if you had known that information?

9 A. Yes, it would. I listen to everything anyway.  
10 I try to pull everything in when I am in an area  
11 looking at a marketplace. So I do take into  
12 account what people are saying.

13 Q. Mr. Barrow, I want to show you an appraisal  
14 that was done by Emlen Wheeler of the same land  
15 that you looked at in 1990.

Volume XI I  
Did you see this appraisal when

16

17 you prepared your report?

18 A. Yes. You had shown me this appraisal.

19 Q. And this appraisal ultimately valued the land

20 at Ker-Feal at 6.3 million dollars, 4.5 for the

21 acreage and 1.8 for the land. Again, this is Amici

22 Exhibit No. 67.

23 (Appraisal was marked as Amici

24 Exhibit A-67, for identification.)

25 BY MR. KLINE:

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85

1 KENNETH BARROW - DIRECT By Mr. Kline

2 Q. What weight did you give an appraisal like

3 this done in the form in 1990?

4 A. I gave it a sufficient weight. I have been  
Page 147

5 doing a lot of appraisals for years, and it seemed  
6 reasonable at the time. It did value it on a  
7 per-lot basis rather than on an acreage basis. So  
8 I gave it some credence.

9 I still go back to the current  
10 market and current location, again, how it is  
11 working in the marketplace today. But I thought  
12 about this, yes.

13 Q. Well, let's assume for a moment that that is a  
14 correct assessment of value. To your knowledge and  
15 in your professional opinion, have real estate  
16 values in West Pike and Township fallen by 20  
17 percent over the last 14 years?

18 A. No. They have actually risen substantially.

19 Q. Mr. Barrow, do you hold all of the opinions

20 that you rendered today to a reasonable degree of  
21 certainty in the profession of real estate  
22 appraising?

23 A. Yes.

24 MR. KLINE: I have no further  
25 questions, Your Honor.

♀

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1 KENENTH BARROW - CROSS By Mr. Wellington

2 MR. WELLINGTON: Does Your  
3 Honor want to continue today?

4 THE COURT: Let's finish  
5 Mr. Barrow today.

6 CROSS-EXAMINATION

7 BY MR. WELLINGTON:

8 Q. Mr. Barrow, nice to see you again, sir.  
Page 149

9 A. Nice to see you, Mr. Wellington.

10 Q. First question: You are not telling us, are  
11 you, that within the next 90 days when the Barnes  
12 Foundation needs money, someone will hand them a  
13 check for 10.3 million dollars for the Ker-Feal  
14 property?

15 A. I am not saying that.

16 Q. If, in fact, the question that you were  
17 supposed to respond to, or the question that you  
18 were asked, how much will someone hand them in the  
19 next 90 to 120 days for Ker-Feal, you would have  
20 valued the property on an as-is raw basis, would  
21 you not?

22 A. If I was so directed to do a quick sale, which  
23 is at a big discount, a real big discount, I would

24 have valued the property lower.

25 I probably would have been

♀

87

1 KENENTH BARROW - CROSS By Mr. Wellington

2 higher than the other two, but I would have had to

3 have valued it lower, because you are talking about

4 a discounted sale. It is almost a distressed sale.

5 Q. In the continuum of real estate development,

6 there is raw property, approved property, improved

7 property, correct?

8 A. Yes, sir.

9 Q. And raw property is the way Ker-Feal is today?

10 A. It is the way Ker-Feal is today.

11 Q. And in order to find out what the value that

12 the Barnes Foundation could raise in a short term

13 for selling that property, you would assess it on a  
14 raw-value basis; and you might agree or disagree a  
15 little bit with what Mr. Perry and Mr. Wood did,  
16 but that would be how you would find out what they  
17 could get full value today?

18 A. Quite honestly, the only way you are going to  
19 find out what kind of value you could get today  
20 would be to put it on the market for sale.

21 I am not only an appraiser, I  
22 am a broker. I do a fair amount of brokerage. I  
23 am continually surprised at the prices being paid  
24 for real estate.

25 So I have to qualify it. I



1 KENENTH BARROW - CROSS By Mr. Wellington

2 just can't say I would do it that way.

3 Q. But you understand perfectly well, do you not,

4 sir, that Mr. Perry and Mr. Wood, both certified

5 real estate Appraisers in Chester County, appraised

6 the property as to what in the near term someone

7 would hand a check to the Barnes Foundation for?

8 A. They appraised it as raw land, yes.

9 Q. Now, were you instructed to appraise it on

10 some other basis?

11 A. I was instructed to appraise it based upon

12 highest and best use, which is the normal appraisal

13 method, which they both state in their reports. I

14 think Mr. Perry said he appraised it based upon

15 highest and best use.

16 He did not. And, again, I  
Page 153

17 would have to look at the marketplace differently  
18 than I did, because this class of real estate is  
19 not sold generally, typically on that basis. This  
20 is a discount basis.

21 Q. Do you remember my question, sir?

22 A. Yes.

23 Q. My question was, were you instructed to  
24 appraise it on an approved basis?

25 A. No. I was instructed to appraise it based

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1 KENENTH BARROW - CROSS By Mr. Wellington

2 upon market value, and that is the most probable or  
3 typical way this class of real estate would sell.

4 Q. And, Mr. Perry, in fact, said that a higher

5 value could be obtained by selling it in the  
6 developers' approach, as you assess the property?

7 A. Yes, sir.

8 Q. Correct?

9 A. Yes.

10 Q. He acknowledged that, however, in that  
11 situation, money would not be forthcoming to the  
12 Barnes Foundation, and his estimate was for 12 to  
13 36 months. Do you remember that?

14 A. Yes, sir, I do remember that.

15 Q. You just said that, in fact, on that basis,  
16 money wouldn't be coming until 18 to 24 months or  
17 longer, correct?

18 A. I said primarily 18 to 24 months, or it could  
19 be a little longer, yes.

20 Q. And that is also assuming that the property

21 sold. There's risk involved in these deals. That  
22 is why you describe in it your report about a dozen  
23 times as contingent value?  
24 A. Yes. Well, actually, I didn't say -- excuse  
25 me, it is not contingent value. I didn't use that

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1 KENENTH BARROW - CROSS By Mr. Wellington

2 term.

3 Q. By the way, you did say that other approaches,

4 other land valuation methods or approaches were

5 considered but deemed inappropriate?

6 A. Correct.

7 Q. What other valuations did you consider and

8 deem inappropriate?

Volume XII

9 A. There are five basic valuation methods for  
10 land.

11 One is the sales comparison  
12 approach. One is the developers' or anticipated  
13 use procedure. The other three are the land  
14 residual technique, an allocation or extraction  
15 method and an income ground rent valuation  
16 analysis.

17 Q. And the reason that you picked this one was  
18 because, tell us just one more time?

19 A. Because this type of property, in this  
20 marketplace, is generally sold on a per-lot basis.

21 And the developers' approach, which incorporates  
22 local sales, tends to provide the best valuation  
23 method.

24 Q. Valuation -- I am looking at page 7 of your  
Page 157

25 report, sir. We will go to the chart where you do

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91

1 KENENTH BARROW - CROSS By Mr. Wellington

2 your discussion or your summary. But just down

3 here: The analysis deducts from the ultimate lot

4 value/price all of the probable costs to the stage

5 where the subject would most probable have been

6 purchased by a subdivider/developer under the

7 contingency arrangement.

8 When you are referring to the

9 contingency arrangement, are you not referring,

10 Mr. Barrow, to the fact that until the developer

11 gets approvals and sells lots, the seller doesn't

12 get money?

Volume XII

- 13 A. Generally, the seller does not get the money.
- 14 The seller may get a portion of the money up front.
- 15 Q. There is a deposit up front, correct?
- 16 A. Yes.
- 17 Q. Small portion?
- 18 A. Generally, a small portion.
- 19 Q. If we walk through your appraisal, we
- 20 understand that you started assessing this property
- 21 in the third category, not raw, not approved, but
- 22 improved?
- 23 A. Yes.
- 24 Q. And at that you had a \$240,000 dollar value
- 25 you put on these lots?

1 KENENTH BARROW - CROSS By Mr. Wellington

2 A. Yes.

3 Q. That is subject, after they have been lotted,  
4 after they have been divided, approved, all of the  
5 environmental problems have been solved, all of the  
6 litigation has transpired, all of the adjustments  
7 by the Township have been made, all of the streets  
8 have been put in, the lights have been put in, the  
9 sewage has been put in, correct?

10 A. No.

11 Q. What did I overstate?

12 A. The sewage has not been put in.

13 Q. Everything else?

14 A. The water would not be put in, because there  
15 is no water and there is no sewer out here. Those  
16 would be left to the home builder or the developer



17 to put in later.

18 Q. I see. But everything else, streets, lighting

19 and everything, that is what improved means?

20 A. Yes, streets. Also, the storm water

21 management facilities.

22 Q. How many years down the road are we from 2004?

23 A. We would probably be three years down the

24 road.

25 Q. All of these lots would be divided, approved,

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1 KENENTH BARROW - CROSS By Mr. Wellington

2 constructed, streets, lighting in three years?

3 A. Assuming that it was an aggressive developer,

4 yes. And they are out there.

5 Q. Now, you and Mr. Wood and Mr. Perry,  
6 essentially had the same value for the house and  
7 the property surrounding it?

8 A. Yes. Well, I had a smaller parcel.

9 Q. You did have a smaller parcel.

10 Let me talk about that for just  
11 a second.

12 You felt you could squeeze in a  
13 couple more lots by making the parcel smaller, was  
14 that the idea?

15 A. Excuse me?

16 Q. You felt that you could squeeze in a couple  
17 more lots?

18 A. No. No. If you looked at the analysis, you  
19 start with a gross acreage under the Township code  
20 and you work down from there.

Volume XII

21                                    If this was zoned one acre  
22    lots, you are looking at 110 lots, maybe, out of  
23    this thing after everything is done.

24                                    In order to find out the number  
25    of lots, you have to follow the Ordinance. If you

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1                                    KENENTH BARROW - CROSS By Mr. Wellington  
2    follow the Ordinance, you get 60 lots. 61 acre  
3    lots still leaves 77 acres, roughly, of available  
4    land for any purpose, whether it is the street,  
5    itself, or open space.

6                                    In my analysis, I could have  
7    actually, if I had done a full subdivision on an  
8    acre basis, gotten more lots. But I am only

9 permitted 60 under the terms of the Ordinance, so I  
10 stopped at 60.

11 Q. And why did you conclude five to seven around  
12 the buildings?

13 A. To get a sufficient piece of land around the  
14 building so that the Ker-Feal cluster worked.

15 Q. Isn't there a substantial tax benefit from the  
16 Clean Green Act if you have at least ten acres?

17 A. There is some benefit, but that does not make  
18 up the difference in the value of the land.

19 Q. It is about 75 percent of that valuation,  
20 isn't it?

21 A. On the land, yes, not on the building.

22 Q. So anyway, we get to your conclusion here: I  
23 concluded that the subject's hypothetical 59 vacant  
24 lots had a most probable market value, in bulk,

25 approved but unimproved --

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1 KENENTH BARROW - CROSS By Mr. Wellington

2 Now we are into the middle

3 range, raw, approved?

4 A. Yes, I'm backing back down.

5 Q. -- of 155, each assuming the contingency sale

6 was accomplished and the subdivision was approved

7 and recorded but the site and infrastructure

8 improvements had not been installed.

9 Is that a correct conclusion?

10 A. Yes.

11 Q. Now, it is true that none of the approval

12 processes have even been thought about or applied

13 for; isn't that correct?

14 A. That is correct.

15 Q. If we are looking at it at raw value, what you

16 could get in the next 90 to 120 days, you said your

17 value might be more than Mr. Perry and Mr. Wood's.

18 Do you have any idea what that value would be?

19 A. No. I did not do that.

20 Q. You have not done that?

21 A. Correct, I did not do that.

22 Q. Are you aware that this property, Ker-Feal,

23 has been designated a National Historic place by

24 the National Register of Historic Places?

25 A. I was not aware that the land was. I was told

1

2 that the buildings were.

3 Q. The buildings are. And from the United States

4 Department of Interior, on their web site

5 description about the historical significance of

6 these buildings and the property, does the fact

7 that this is now a National Historic property under

8 the National Registry affect the value, one way or

9 the other, sir?

10 A. I might make the land a little bigger around

11 the main dwellings, or the buildings. However, I

12 don't see where this restricts the subdivision.

13 Does it restrict the subdivision? I don't think

14 that it restricts the subdivision.

15 Q. I am sure you can still sell it off and still

16 build houses around it, right?

17 A. Fine.

18 Q. This Emlen Wheeler 1990 letter, I want to

19 clarify this. It is clear from the language of

20 this, if we look at this, Mr. Barrow, that this

21 letter -- I will even call it an appraisal. It is

22 not really an appraisal, but let's call it an

23 appraisal -- does it on the same basis that you did

24 it, doesn't it, sir, on an approved basis, per-lot

25 basis?

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1 KENENTH BARROW - CROSS By Mr. Wellington

2 A. Yes. Yes.

3 Q. So it is not looking at the raw value in 1990,

4 but it is clearly looking at what could we sell the



5 lots for in 1990 on an approved basis.

6 In fact, it refers to 49 lots;

7 two acres per building lot, correct?

8 A. It says 45 lots.

9 Q. I apologize. I meant 45.

10 A. Before the improvements are put in place here,

11 they didn't say that they would have to put the

12 improvements. It says unimproved, 100,000 per lot.

13 Q. Approved but --

14 A. Unimproved.

15 Q. Just the same way you appraised it?

16 A. The same way I concluded it.

17 Q. Except this was a conclusion 14 years before,

18 that the lots would be 100,000 approved but

19 unimproved, and you're concluding now in this day

20 and age that they would be 156,000 approved but

21 unimproved?

22 A. Yes.

23 Q. But this is not the same way -- this appraisal

24 is not the way Mr. Perry and Mr. Wood appraised it

25 as what cash would be handed over immediately?

♀

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1 KENENTH BARROW - CROSS By Mr. Wellington

2 A. That is correct. Mr. Perry and Mr. Wood

3 appraised it as is on a quick sale basis.

4 Q. Right. And they also mention here that it

5 should be noted that some of the land in this

6 parcel is somewhat low-lying and would be

7 unbuildable.

8 In fact, there are wetlands on

9 this property, are there not?

10 A. There are wetlands that -- I haven't seen the  
11 specific delineation -- that say Worsham silt. It  
12 is roughly 12 acres.

13 And under the Township  
14 Ordinance, you are allowed to include in your lot  
15 area 25 percent of the wetlands. They don't call  
16 it wetlands. They call it flood zone under their  
17 Ordinance. It is a flood zone soil.

18 MR. WELLINGTON: Thank you very  
19 much. That is all I have.

20 THE COURT: Mr. Barth?

21 MR. BARTH: No questions.

22 THE COURT: Will there be  
23 redirect?

24 REDIRECT EXAMINATION

25 BY MR. KLINE:

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1 KENNETH BARROW - REDIRECT By Mr. Kline

2 Q. Mr. Barrow, if the parties took out a loan on  
3 this land from a bank and the bank sought security  
4 in this land, how would the bank value the land?

5 A. The bank could value the land in one of two  
6 ways. They could do it either again as raw land or  
7 as land available for development.

8 If the process was one in which  
9 the builder was there and there was an agreement  
10 struck, they could go and borrow a -- make a loan  
11 based upon the likely value or a portion of the  
12 likely value approved, unimproved.

Volume XI I  
Worst case scenario, it would

13

14 be raw. But that is still a substantial amount of  
15 money.

16 MR. KLINE: Thank you. No

17 further questions.

18 MR. WELLINGTON: No questions.

19 THE COURT: Very good. Thank

20 you, Mr. Barrow. You may step down.

21 (Witness excused.)

22 - - -

23 THE COURT: I think this is a

24 good time to break for the day.

25 (Discussion off the record.)

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2 THE COURT: I made some  
3 inquiries. Apparently, we would resume at 1:00 on  
4 Thursday afternoon here, unless I get word to you  
5 about a different location. Fair enough?

6 MR. KLINE: Thank you, Your  
7 Honor.

8 (Proceedings were adjourned  
9 until Thursday, September 30, 2004, at 1:00 p.m.)

10 - - -

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THE BARNES FOUNDATION

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C E R T I F I C A T I O N

4

5

I hereby certify that the  
Page 175

6 proceedings and evidence are contained fully and  
7 accurately in the notes taken by me, to the best of  
8 my ability and skill, in the above cause and that  
9 this is a correct transcript of the same.

10

11

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W. BYRON BATTLE, RPR  
Official Court Reporter

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Received and directed to be

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filed this \_\_\_\_\_ day of \_\_\_\_\_, 2004.

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THE HONORABLE STANLEY R. OTT, JUDGE

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