

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION
No. 58,788

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THE BARNES FOUNDATION, A CORPORATION

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**MEMORANDUM OPINION AND ORDER
SUR PRELIMINARY OBJECTIONS TO PETITIONS TO REOPEN**

OTT, J.

October 6, 2011

On February 17, 2011, a petition was filed on behalf of two Pennsylvania non-profit corporations (“Friends of the Barnes” and “Barnes Watch”) and twelve individuals (all of whom are referred to herein as “the Friends”) seeking, once more, to reopen the proceedings which resulted in this Court’s December 13, 2004 opinion¹ permitting the Barnes Foundation to relocate its art collection from its gallery in Merion, Montgomery County to a new building in Philadelphia. Among the Friends were several parties who had filed a similar petition in 2008 and were denied standing by this Court in 2008.² On March 28, 2011, another petition to reopen was filed by Richard Ralph Feudale. The

¹ The Barnes Foundation, a Corporation (No. 13), 25 Fiduc. Rep. 2d 39.

² The Barnes Foundation, a Corporation (No. 14), 28 Fiduc. Rep. 2d 258.

trustees of the Barnes Foundation and the Office of the Attorney General, as *parens patriae* for charities filed preliminary objections to both petitions. Petitioner Feudale filed preliminary objections to the preliminary objections which were dismissed as an inappropriate pleading under Montgomery County Local Orphans' Court Rule 3.2A.³ Answers were filed to the preliminary objections. Thereafter, the parties filed extensive briefs and reply briefs, and the undersigned heard argument on the preliminary objections on August 1, 2011.

The petition filed on behalf of the Friends requests that the Court revisit the issues based on "new evidence" presented in a 2009 movie entitled "The Art of the Steal." This film purported to document the events that led up to this Court's 2004 decision. The alleged new evidence relates to Lincoln University's involvement in the matter. Pursuant to the trust indenture executed by and between Dr. Albert C. Barnes and The Barnes Foundation under date of December 6, 1952, as amended, and The Foundation's bylaws, Lincoln University had the power to nominate four of the five trustees of The Foundation's Board of Trustees. In September of 2002, when the members of The Foundation's Board filed for permission to relocate the art collection, the petition also sought to expand the size of the Board. Lincoln University sought and was granted permission to intervene in the matter, and filed an answer opposing any diminution of its role in choosing the management of The Foundation. The Foundation filed an amended petition, which Lincoln University also opposed. By the time The Foundation filed a second amended petition in October of 2003, an accord had been reached between it and

³ This rule states: "The pleadings in matters before this court shall be limited to a petition; an answer; new matter; a reply; preliminary objections; and an answer to preliminary objections."

Lincoln University, and the latter did not participate in any of the subsequent proceedings. The agreement contemplated a proposal to the Court that Lincoln University would henceforth nominate five members of a total Board of fifteen trustees.⁴

The Friends' petition quotes from interviews which appeared in the 2009 movie with the former Governor of Pennsylvania, Edward G. Rendell, and Michael Fisher, the former Attorney General for the Commonwealth, both of whom were in office at the time The Foundation filed its petitions. Michael Fisher is now a federal judge on the U.S. Court of Appeals for the Third Circuit. On the subject of the Pew Charitable Trusts, the Lenfest Foundation, and the Annenberg Foundation,⁵ Judge Fisher opined in the film: "It was pretty clear to me they weren't just going to give 50, 70, 100 million dollars without getting control of the Barnes board." Regarding Lincoln University's decision to accept the proposal to dilute its authority in choosing the members of The Foundation's Board, Judge Fisher indicated that its cooperation was secured by a promise by then-Governor Edward Rendell to provide additional funding for the school. The Friends' petition asserts these statements are evidence of impropriety in that Judge Fisher "threatened" Lincoln and that state taxpayer funds were used to induce Lincoln to accede to the Attorney General and the Governor's wishes. The Friends allege these statements constitute evidence that the former Attorney General "violated his fiduciary duties by taking an improper role and without advising this Honorable Court of this

⁴ This proposal was among several revisions to the bylaws that were approved by the Court in its January 29, 2004 decision. See The Barnes Foundation, (No. 12), 24 Fiduc. Rep. 2d 94.

⁵ These leading charitable institutions agreed to put their considerable fundraising might behind The Foundation provided the petition was filed to pursue the move to Philadelphia and to increase in the size of The Foundation's Board.

role” and “forfeited his neutrality and *parens patriae* role by his direct involvement in forcing [Lincoln] to drop its opposition to the change of the Barnes Board.” (Friends’ Petition to Reopen, ¶ 22.)

The Friends’ petition to reopen also contains quotes from former Governor Rendell’s filmed interview on the subject of The Foundation’s dire fiscal situation in the years leading up to the petition to relocate. As for the claim that The Foundation could not survive *in situ*, the petition contends:

[T]his is absolutely false. It is now known that public monies were being set aside by the former Governor of Pennsylvania to facilitate the transfer. These funds that Governor Rendell initially had set aside were in the amount of \$107 million in an appropriation bill. This information was not presented to this Honorable Court on a timely basis.

Based on these statements in “The Art of the Steal,” the Friends argue the Court was misled as to the role of the Attorney General and as to the availability of public funds. Taking the second allegation first, the “multimillion dollar appropriation⁶” is not news. In a memorandum opinion dated May 15, 2008, explaining our dismissal of a previous attempt to relitigate The Foundation’s fate, we stated:

At some point after the December 2004 opinion was issued, it came to the Court’s and the public’s attention that a budget bill, passed by the state legislature and the Governor in 2002, contained a line item for approximately one hundred million dollars for the purpose of building a new facility in Philadelphia to house The Foundation’s art collection. This revelation caused a flurry of speculation that The Foundation’s trustees had knowledge of the budget item and had actively concealed its existence from the Court during the hearings on the petition for

⁶ The perception that this appropriation is a smoking gun in this matter has always left the Court somewhat mystified. The appropriation was earmarked to fund a new building for The Foundation in Philadelphia. Surely, even the most vehement critics of our decision in 2004 do not believe that, had the existence of the budget item been known at the hearings, the Court could have directed the legislature to redirect the funds to the existing gallery in Merion or sent The Foundation off with instructions to accomplish this on its own.

permission to move the gallery and art program from Merion. In the instant petitions, both the Friends and the County urge the Court to reopen the matter on the basis of this new information.

The Barnes Foundation, a Corporation (No. 14), 28 Fiduc. Rep. 2d at 259.

In 2008, as now, when confronted with preliminary objections contesting their standing, the Friends argued that question of standing was so “enmeshed” with the merits that the preliminary objections should be overruled and the situation vetted in depth. In the 2008 opinion, we reviewed the law of standing in Pennsylvania⁷ and determined that the “enmeshment” argument could not prevail. Presently, we have essentially the same party making exactly the same argument. This is well-trod ground, and we must reach the same conclusion as we did in 2008. The Friends are not negatively affected by the matter they seek to challenge and are not aggrieved, and thus, have no right to obtain judicial resolution of their challenge; the Friends are not aggrieved because they can not show a substantial, direct, and immediate interest in the outcome of the litigation; the Friends do not possess a substantial interest in the matter because they are suffering no discernable adverse effect to an interest other than that of the general citizenry; and the Friends are a private party and same generally lack standing to enforce a charitable trust since the public is the object of the settlor’s

⁷ In particular, we were guided by the Supreme Court’s decision in the matter of Milton Hershey School, 590 Pa. 35, 911 A.2d 1258 (2006), which reaffirmed the traditional concepts of standing in charitable matters. The Supreme Court there reversed the Commonwealth Court’s determination that a party had standing due to a “special interest” in the proceeding. This conclusion had been reached by the Commonwealth Court after applying a test, of its own making, that required an analysis of the following five factors: (1) the extraordinary nature of the acts complained of and the remedy sought; (2) the presence of fraud or misconduct on the part of the charity or its directors; (3) the attorney general’s availability or effectiveness; (4) the nature of the benefited class and its relationship to the charity; and (5) subjective, case-specific circumstances. See Milton Hershey School, 867 A.2d 674 (Cmwlth. 2005).

beneficence in a charitable trust.

The Friends' contention that this matter should be reexamined because of the improper actions of the former Attorney General requires a slightly different analysis. As noted above, his alleged transgressions have been variously characterized as a breach of fiduciary duty, a failure to ensure the charity was preserved, a failure to act in the best interest of the public, a forfeiture of his "neutrality," and misleading or outright defrauding of the Court. In its preliminary objections and brief in support thereof, the Office of the Attorney General explained the process by which decisions were made in this matter. It is not our job and this is not the time to scrutinize the process or the decisions. The Attorney General also refuted the petitioners' fundamental argument that the Office had a duty to remain neutral, as follows:

[D]espite petitioners' contention, it is never the function of the Attorney General to be neutral in matters involving charitable trusts and organizations. The Attorney General represents the interest of the general public and must act in furtherance of that interest. While the Attorney General is obliged to objectively assess the merits of every case presented, the Attorney General does not have an adjudicatory role and is not under any obligation to remain neutral. He is no less an advocate in representing the public's interest than counsel for any other interested party.

(Brief of Attorney General's Office in support of preliminary objections, 5.) The Friends' offered no case or other authority in support of this theory of mandatory impartiality. The Office of the Attorney General does not deny that the former Attorney General mediated the agreement between The Foundation and Lincoln University which resulted in Lincoln's dropping its opposition to the petition to amend The Foundation's bylaws. Rather, the Office argues this action and its conduct at the hearings were all part

and parcel of its responsibilities under the law that helped achieve a result that was in the best interest of the people of the Commonwealth. We have no basis for finding fault in this stance or embarking on a further inquiry as to the Attorney General's modus operandi. As the Supreme Court noted in the Milton Hershey School matter, with reference to a party similarly situated to the instant Friends, "disagreement with the Attorney General's decision . . . does not vest [the party seeking standing] with standing to challenge that decision in court. Ultimately, [that party's] dismay is more properly directed at the Attorney General's actions and decisions; it is insufficient to establish standing here." 590 Pa. at 45, 911 A.2d at 1263. The law of standing in matters involving charities is crystal clear and forecloses the possibility of the Friends' pursuing the instant petition. Accordingly, the preliminary objections thereto must be sustained.

The second petition to reopen filed by Richard Feudale merits little discussion. Mr. Feudale is an individual with an interest in The Barnes Foundation saga and, perhaps, in promoting the sales of his book on the subject. He, as an attorney, must be cognizant of the chaos that would ensue if anyone with an opinion about The Barnes Foundation was permitted to be heard. Simply put, he lacks standing under the principles recited *supra*, and the preliminary objections to his petition are also sustained.

The final issue we must decide is the request that counsel fees and costs be assessed against the petitioners. When faced with this question in 2008, we stated:

The parties to whom and circumstances under which reasonable counsel fees can be awarded as part of the taxable costs of a matter are set forth in 42 Pa. C.S.A. §2503, and include:

(6) Any participant who is awarded counsel fees as a sanction against another participant for violation of any general rule which expressly prescribes the award of counsel fees as a sanction for dilatory, obdurate or vexatious conduct during the pendency of any matter.

(7) Any participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter.

(9) Any participant who is awarded counsel fees because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith.

In this instance, we believe the petitioners' filings were made in good faith, and the events that precipitated the filings (the state budget appropriations' coming to light and the County's offer to explore the purchase/lease-back arrangement) were of sufficient import that the attempt to reopen the issues was not arbitrary. And, while The Foundation and the Attorney General's Office were understandably "vexed" at having to ward off these forays, the petitioners' conduct did not meet the legal definition of "vexatious." Therefore, we conclude the petitioners' conduct in bringing the instant pleadings does not justify the imposition of fees under the criteria set forth in 42 Pa. C.S.A. §2503, . . .

The Barnes Foundation, a Corporation (No. 14), *supra*, at 263. Without hesitation, we find petitioner Feudale's filing to be the epitome of vexatious, arbitrary and bad faith conduct. His brief and argument were devoid of any legal substance, relying instead on historical anecdotes, snippets of art theory and his own brand of philosophical musings,⁸ among other oddities. Even though the Friends' essay was more creditable, we find that their resurrection of the budget appropriation item as a basis for standing, which this Court rejected in 2008, renders their filing sanctionable as well⁹.

⁸ Perhaps most illustrative of petitioner's Feudale's style of writing is his statement that: "The issue before this Court is actually the cultural identity and cultural stability of a nation." (Brief of Petitioner Feudale in opposition to preliminary objections, 17.)

⁹ Private counsel's costs and fees will be awarded, as appropriate, by separate Order. We are not aware of any authority to impose monetary sanctions that benefit the Office of the Attorney General.

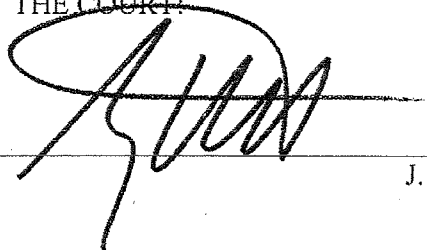
In light of the foregoing, we enter the following:

ORDER

AND NOW, this 6th day of October, 2011, after argument and consideration of briefs of counsel, the preliminary objections to the petitions to reopen filed by the Friends of the Barnes Foundation, *et al.*, and by Richard Ralph Feudale are SUSTAINED. The Court finds that some portion of the fees and costs incurred by counsel for The Barnes Foundation should be borne by the unsuccessful petitioners, pursuant to 42 Pa. C.S.A §2503. Accordingly, Schnader Harrison Segal & Lewis LLP shall submit an itemized statement of its fees and costs. Upon receipt thereof, the petitioners shall advise the Court if they wish to contest the reasonableness of the time expended and/or the hourly rates charged. If there is a challenge, the Court will schedule a hearing limited solely to those issues.

This Order is not final and is not subject to the filing of exceptions. The final order will be entered when the Court determines the appropriate award of fees and costs.

BY THE COURT:



J.

Copies of the above
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