

IN RE: THE BARNES FOUNDATION
CLOSING ARGUMENT OF AMICUS CURIAE
SEPTEMBER 30, 2004

Introduction

MR. CYR:

I wish to thank the Court on behalf of our clients for the Court's attention and hard work in adjudicating the difficult issues before it in this matter. The amicus and their counsel likewise have taken their charge very seriously in this case and have worked very hard to provide the Court with balanced evidence, the best experts in their fields, and carefully crafted legal arguments for the Court's consideration in these very weighty matters.

At the outset it should be observed that the Trustees as the Petitioners have the burden of proof as they are the party seeking deviation from the express terms of Dr. Barnes' indenture. It is important to keep this evidentiary principle in mind, because if the Court remains in doubt on any issue or finds that the evidence is evenly balanced on a particular issue, then the moving party, in this case the Trustees, has not met its burden of proof and the issue must be resolved against it.

Central Issue

In the present case the central issue before the Court is whether the Barnes gallery may be relocated to Center City. The Court stated in its January 2002 opinion that:

“[R]elocation may be permitted if necessary to achieve the settlor's ultimate purposes. . . [T]he element of necessity has not been established clearly and convincingly.”

As a consequence, the Court gave the Trustees another opportunity to prove its case of deviation and instructed,:

We need to be persuaded that the move to Philadelphia is the least drastic deviation that will stabilize The Foundation's future."

It is the position of the Amicus that the Trustees did not sustain their burden of proof that the move to Center City was the least drastic deviation.

Indeed the move to Center City was presented as the only feasible option.

However, nothing has changed since the Court's adjudication in January of this year!

Where was the evidence that the Trustees considered other less drastic alternatives? The only testimony or evidence on this point came during cross examination of Dr. Watson.

Dr. Watson testified only that the Trustees reviewed all their options but did not give any specifics as to whether other options were seriously considered or explored. Instead the Trustees marshaled evidence for this Court case to suggest that the move to Center City was the only viable option. In other words, to draw upon the Court's metaphor, after the January decision, the Trustees continued to float the Center City move as the only boat in the sea.

Here are the options that the Trustees did not seriously consider as less drastic alternatives to moving the gallery to Center City:

Increased Admission Fees:

Despite the fact that the petition seeks the permission from the Court to set the admission fees as the Trustees deem appropriate, there has been no consideration or calculation by the Trustees of what increased admission fees could do to alleviate the present financial problems. We do know however that the Center City proposal contains a plan to increase the admission fees to approximately \$12 a ticket. Simple arithmetic will show that a similar increase to ticket prices at Merion will lead to an additional 400 thousand dollars in revenue with no change in the number of visitors.

Enhanced Fundraising:

During the first trial Ms. Camp acknowledged that formal fund-raising had just commenced under her tenure and was just starting to bear fruit. Despite this, the Trustees warn that fund-raising will shrivel up if the Barnes remains in Merion. However, the Trustees do not back up these assertions with any facts or figures. This is in spite of the testimony you heard today from unsolicited friends of the Barnes who want to support it in its present location.

Additionally, the Trustees have not taken steps beyond the fledgling efforts spearheaded by Ms. Camp to develop a permanent endowment from which funds could be drawn to continue operations in Merion. No formal capital campaign has been launched to develop a permanent endowment other than what a prior board did in the 90s to develop funds for renovation of the Gallery and for a building maintenance fund. Also, no outside consultant has been sought like

expert Mr. Callahan who has only been retained in this litigation to ratify the very ambitious fund raising goals necessary to make the 3 campus model pass muster.

Finally, there has been almost no evidence of any inability of the Trustees to increase the Foundation's annual fund-raising with fund-raising events in its present location. The Trustees would undoubtedly again point to the township and its neighbors as the convenient scapegoat for its failings in this regard, but no affirmative evidence has been put to this Court as to whether the Trustees have been thwarted in this regard and why it has not been able to accomplish more, other than self-serving testimony that no one wants to give support to an institution afflicted with difficulties.

Expanded board of Trustees:

It must be recognized that the Court has given the Trustees permission to expand its Board of Trustees. This will undoubtedly enhance its ability to raise funds as stated by the Trustee's expert in the December trial. The Board has not yet done this, but one can safely predict that the newly expanded Board will generate increased annual giving and capital campaign fund-raising ability for the facility in Merion if given the opportunity to do so.

Increased Attendance:

No information has been set forth by the Trustees about working to increase the attendance with alternative access for the Merion facility. My co-counsel will address this in his review of the township situation. Suffice it to say,

though, the Trustees have not reached out to the Township or its neighbors for creative solutions to its goal of increased access.

Unnecessary Expansion of Ker-Feal:

The Trustees have come into this Court arguing that it must increase its operational overhead by expanding its operations at Ker-Feal. Indeed, the Court must remember that Ker-Feal is not part of the Indenture and not governed by same. When the Court sifts through the evidence on Ker-Feal it will undoubtedly come to the conclusion that Ker-Feal was the country estate home of Dr. Barnes which houses a collection of furniture, pottery, and miscellaneous art which could be easily displayed in many other settings. Additionally, Ker-Feal is at best used only sporadically by the education programs but can hardly be viewed as central to the mission of the Barnes Foundation. As Professor Malaro stated, unless there is a specific proscription against the alienation of property, the property of the donor can be sold. At a minimum the property surrounding the buildings at Ker-Feal can be sold. The maintenance of, let alone the expansion of Ker-Feal, is a luxury which the Barnes in its present financial condition can ill afford.

What did the Trustees consider as an alternative?

The Trustees considered one less drastic alternative, and only when ordered to do so by the Court; specifically they considered the sale of the non-gallery art and the sale of Ker-Feal. However, instead of exploring the feasibility

of this option, they spent the entirety of their case demonstrating why this option was more drastic and/or a less feasible alternative than their proposed solution.

How did the Trustees attempt to show that the sale of the nongallery assets was a more drastic alternative?

First, they raised the problem of reaching the Court's stated endowment goal of \$50M as being unattainable. As the Court will recall, it calculated the \$50M endowment goal based upon an average stated deficit of \$2.5 M as represented to the Court during the December 2003 Trial.

As quickly became apparent in this proceeding, however, the projected deficit was not \$2.3 M for 2003, nor \$2.7M for 2004, but instead as Mr. Schwenderman and Mr. Harmelin testified to something more akin to \$1M to \$1.2M. Mr. Schwenderman acknowledged under cross examination that without increased income from any other source, an endowment of approximately \$25M would eliminate a structural deficit of \$1.2M.

Accordingly, a primary underpinning of Trustees' case of financial distress was severely weakened when the Trustees revealed the actual size of the deficit.

What else did the Trustees do with respect to the Court's mandate to explore less drastic alternatives? They conducted appraisals of the non-gallery art and Ker-Feal, and they produced valuations which at best could be called very conservative estimates.

The Trustees retained Masterson Gurr Johns to value the nongallery art. They enlisted the appraisal expertise of a Mr. Ruzika who our experts did not recognize as an authority in this field and indeed specializes in the valuation of prints and not paintings. Further, Mr. Ruzika rendered his valuation opinions on the basis of viewing tiny postage- stamp-sized digital images which showed little of the detail of the original art piece. Thus it is not surprising that the original evaluation of the 19 most valuable paintings was way off the mark to the tune of almost \$10M (\$10M vs. \$19.8M).

The Amicus then had 2 preeminent experts in their fields of American and European Art, Ms. Force and Mr. Feigen, appraise the art, without the benefit of the Masterson original evaluation. They found the art to be substantially more valuable. It was only after the Amicus presented their appraisals that the Trustees had a change of heart and retained a generalist who substantially increased the Trustees' values, but only after looking over the Feigen and Force valuations.

The Trustees have attacked the valuation of the Courbet (The Shepards) as being an unsubstantiated guess by Mr. Feigen. The stature and authority of Mr. Feigen in the field of art is unparalleled and Mr. Feigen would not stake his reputation on some baseless hunch of the value of the piece. Mr. Feigen spoke with unchallenged authority with respect to its value as based upon his intimate knowledge of the very rarefied world of art valuation. Indeed, the Trustees only sought to challenge Mr. Feigen's bias based upon statements he

made many years ago with respect to previous attempts to sell the permanent gallery collection.

One can only conclude that the rest of the valuation commissioned by the Trustees is equally flawed by the same tendency of undervaluation – approximately 50% as demonstrated in Exhibit A-69. If the rest of the collection was as undervalued as original estimate, simple math shows that the art collection is worth much more (by Amicus’s estimate approximately \$30M). If you add to that the Lipschutz sculpture of the Bather at \$1.6 M you have a total of \$32.7M.

The same is true of the real estate appraisal. Instead of valuing the real estate at Ker-Feal at fair market value, which would assume highest and best use, the Trustees valued the land “as is,” a value which they should have known would be substantially less than the fair market value determined by highest and best use. Kenneth Barrow, the real estate expert for the Amicus, testified that highest and best use is land ready for development which would more than double the Trustees’ value to \$10.3M. Trustees’ defense to this approach is that it will take some time to sell the land but certainly bridge financing secured by the land as collateral could provide funds in the short term.

In summary, the Amicus demonstrated that the Trustees’ appraisal of real estate and art was grossly undervalued by nearly \$18M. Of more importance is the fact that the Trustees’ undervalued assets could easily provide adequate capital to establish an endowment to meet the operating deficit.

Feasibility of the Move

The Trustees, against the backdrop of grossly undervalued property, instead floated the 3 campus model as the panacea for all of the Foundation's financial problems. However, this time, instead of hewing to the very conservative approach used in the non-gallery art and land valuations, we find upon close examination of the 3 campus business model, that it is filled with ambitious and aggressive assumptions which leave little room for error. There are multiple examples to point to but a few bear mentioning:

Trustees project \$4.25 Million in annual giving in the second full year of operation. This figure is well above the current level of giving and exceeds the benchmark of institutions with a median attendance substantially higher than that of the projected attendance of the Barnes (200,000). The AAM survey concluded that museums in the 90th percentile which have annual attendance of 347,000 visitors will raise \$3.9 M. The custom survey had median attendance of 490,000 visitors and still did not quite average (\$4.225M) the annual giving projected at the Barnes. Even Mr. Callahan, the ever optimistic fund raiser, admitted that this is a very ambitious fund raising goal.

The financial model is further premised on a break even or surplus of \$25,000 per year. As was pointed out, the revenue model for the Barnes is extremely sensitive; small swings in revenue assumptions can lead to large swings from profit to loss. For example, if the visitor counts are off by more than 1.24 visitors per hour, then the revenue shortfall causes there to be a deficit.

Additionally, if the capital campaign misses the \$50 M endowment mark by only \$550,000, then there is not enough endowment to break even.

The Court rightly raised the question of what is the Trustees' solution if everything does not go as planned. Other than the modest contingency in the construction budget of 10%, there appeared to be no stated fall back plan to address cost overruns and revenue shortfalls. Remember Mr. Perks used an inflation factor of 1% when construction and building costs have increased from 6% to 8% in just the last year .

However, what was not stated, but demonstrated to the Court was the tremendous expense of running Merion and Ker-Feal in the face of de minimus revenues supporting those facilities. It is not beyond peradventure that after the Barnes has ensconced itself on the Parkway that it will be back in Court seeking approval to sell off Merion and Ker-Feal and even the non-gallery art which they so adamantly oppose at the present.

In summary, when the Court evaluates the risk of uprooting the Barnes, transforming its very nature by moving it to the parkway, it must balance that against the much smaller risk of maintaining and enhancing its present operation with the multiple revenue tools at its disposal.

Recently, New Yorker Magazine Art Critic, Peter Schjeldahl, stated it best about the uniqueness of the Barnes and the proposed move of the Gallery:

“Altering so much as a molecule of one of the greatest art installations I have ever seen would be an aesthetic crime. . .The Barnes is a work

of art in itself, more than the sum of its fabulous parts. . .If there were other places like the Barnes, dispensing with it would not be tragic. But one minus one is zero.”

The financial risk of the move to center city will not balance the artistic equation caused by an irreparable aesthetic loss .

I will now turn to Mr. Kline who will address the remaining issues in the case.

MR. KLINE:

Deaccessioning

This week we heard testimony from Professor Malaro on the ethics guidelines used by museums when they sell art. She acknowledged this Court’s 2001 Order that the nongallery assets are not subject to restrictions against sale set forth in the trust. She was clear that there are no legal impediments to the sale of the nongallery assets. And as to the application of museum ethics guidelines, Professor Malaro, who is the most respected authority in the nation on the subject, said that those museum guidelines do not apply to the Barnes Foundation because the mission of the Barnes Foundation is not a public museum, but a school.

Your honor, the *amicus curiae* does not relish the sale of nongallery assets held in storage by the Foundation. We invite such a sale only to the extent that it is necessary to keep the gallery in Merion. And based upon the values of the nongallery assets that we presented to the Court this week, we believe that a sufficient endowment can be raised while retaining much of the nongallery art.

Lower Merion Township

Testimony was given in December suggesting that Lower Merion Township bears some responsibility for the Barnes financial problems. In response to that record, the Township unanimously passed a Resolution against the proposed move. Since that Resolution, the record shows that the Trustees failed to approach the Township for any relief from zoning restrictions that might have enhanced revenues at the Barnes Foundation. Instead, the Trustees said that they were waiting for the Commissioners to come to them. With all due respect for the Trustees, that was not an effective way to explore less drastic alternatives.

When we asked Commissioners Manko and Ettelson whether they would support reasonable efforts by the Trustees to enhance access to the Barnes Foundation, both said yes. When we asked them whether they would support reasonable efforts to enhance fund raising efforts at the Barnes Foundation, both said yes. Their testimony establishes for the record the willingness of Lower Merion Township to cooperate with the Barnes Foundation.

Turning to the Future

Mr. Wellington asked Dr. Sabloff whether the least drastic deviation would be moving to the city or selling the nongallery art. Dr. Sabloff chose the move, but prefaced his answer by saying “neither one of those alternatives are ones that I would like to see for the Barnes.”

During this hearing, the Trustees presented two stark alternatives — move to the City of Philadelphia, or sell the nongallery assets. No other

alternatives – no other options – were considered by the Trustees, notwithstanding that they had the burden to show by clear and convincing evidence that the move to the City of Philadelphia is the least drastic of ALL available alternatives.

We asked Dr. Sabloff about a third alternative – the Trustees redoubling their efforts to develop funds to keep what they have in Merion,” and Dr. Sabloff said he would choose that alternative “if it could be achieved.”

We believe it can be achieved. And at less financial risk to the Foundation than moving it to the City of Philadelphia and simultaneously maintaining three campuses.

The third alternative is really a menu of options — including:

Increasing the admission fees to \$12.

Adding new Trustees.

Professional fundraising.

Alternative access routes.

And the selective sale of nongallery assets.

Many of these options are simple to implement. Some are available immediately. Collectively, these options will satisfy the million dollar deficit, and put the Barnes Foundation on strong financial footing.

Conclusion

We have done our best in these proceedings to test the evidence presented by the Trustees, but as the Court is aware, our role as *amicus curiae* was limited. We had no right to discovery, so we could not verify whether extrinsic

evidence, such as historical documents submitted by the Trustees, accurately reflected Dr. Barnes' intent when the trust was written or when he died, or whether there were other historical documents that might have refuted those that were introduced. We were not allowed to depose any of the Trustees' witnesses, so many of the statements from them must of necessity go unchallenged, although we leave for the Court the task of determining the veracity of such testimony. We were denied access to the work papers of the Deloitte report which might have allowed us to challenge the Trustees unstated financial assumptions. But at the end of the day, on the major issue of least drastic deviation, we were able to penetrate the Trustees plan and provide independent advice to the Court about the impact of their plan on the educational programs at the Foundation. We trust that, no matter what the outcome of this hearing, the interests of the students of the Barnes Foundation will continue to be heard.

We are fortunate in this country to have a strong nonprofit sector of diverse institutions that offer Americans a wide range of intellectual opportunities, many of which do not conform to the norm. Albert Barnes contributed a school, unique in the world, idiosyncratic to be sure, intimate, so that those people, who have an interest, could learn to see and appreciate the art in painting. This Court has long protected his mission against Trustees who would deviate from it, reminding those men and women of their duty of obedience and the importance of adhering to donor intent so that all of us may have the opportunity to experience the richness of diverse organizations like the Barnes Foundation.

On behalf of my co-counsel, Howard Cyr and Paul Quinones, and my clients, the *amicus curiae*, we respectfully request that this Court deny the Trustees' Second Amended Petition to Amend the Charter and Bylaws of the Barnes Foundation.