

# The Legal Intelligencer

March 25, 2008

## “Montco Judge Holds Hearing in Barnes Dispute”

by Amaris Elliott-Engel of the Legal Staff

Following a hearing Monday in Montgomery Common Pleas Court over the efforts to relitigate a judge’s 2004 decision to allow the Barnes Foundation to move its \$6 billion art collection to Philadelphia, attorneys representing both sides of the dispute expressed confidence, saying the law was on their side and predicting they would triumph in the case.

Orphans’ Court Judge Stanley R. Ott did not ask any questions during oral arguments at the Norristown courthouse, which included arguments by counsel representing Montgomery County and a group of art students, alumni and neighbor petitioners of the Barnes Foundation seeking standing in *In re The Barnes Foundation, a Corporation* to reopen the case, to bar the move of the art collection and to consider a financing proposal put forth by Montgomery County to help the Barnes Foundation afford to remain in Lower Merion Township.

Arguments in opposition were made by counsel representing the Barnes Foundation and the state attorney general who, under state law, has standing to protect the public interest in charities.

Ott’s lack of questions did not surprise Eric F. Spade, a Philadelphia solo practitioner who is representing the group of art students, alumni and neighbor petitioners of the Barnes Foundation, which includes members of the Friends of the Barnes Foundation, a citizens group with the goal of keeping the art collection in Lower Merion. Spade said that the lack of questions by the judge did not surprise him since the attorneys had met in chambers with Ott before the public oral arguments.

“I felt the judge listened to our arguments very closely, and we’re optimistic he’ll reopen the proceeding,” Spade said.

“No one can contend they did not have the opportunity to speak,” said Ralph G. Wellington of Schnader Harrison Segal & Lewis, an attorney for the Barnes Foundation, because the judge let each attorney say what they wanted to say without restriction.

“We’re confident Judge Ott will [follow] the law, which is pretty clear,” Wellington added.

The judge said he would rule expeditiously, which Wellington said he thought would be in one to two months.

Ott ruled Dec. 13, 2004, that the Barnes Foundation could depart from Dr. Albert C. Barnes’ charitable bequest, which requires that the Barnes Foundation stay in Lower Merion, and construct a gallery on Philadelphia’s Museum Row to house a world-class art collection that

includes 181 works by August Renoir, 69 works by Paul Cezanne, 59 works by Henri Matisse and 46 works by Pablo Picasso.

Barnes and the other original trustees stipulated in the founding charter that the foundation was to maintain in Lower Merion an art gallery for the purpose of the appreciative education of the fine arts, but Ott relied upon the “doctrine of deviation” – which allowed a deviation from Barnes’ bequest that his gallery remain in Lower Merion – in order to prevent the financial collapse of the Barnes Foundation keep Barnes’ desire of establishing an artistic educational institution intact, according to court papers.

In the most recent set of court papers filed in the case – the reply brief filed last Wednesday by the Barnes Foundation - the foundation argued that the petitioners don’t have standing to intervene. If they are found to have standing, the foundation argued in its brief, they can’t intervene under Rules of Civil Procedure because their delay in seeking to intervene was “inexcusable” and Ott’s 2004 decision was a “final decree.”

The petitioners argued in court papers that there have been significant changes in circumstances that warrant the case being reopened.

A zoning change by Lower Merion Township would allow an annual increase in visitors from 62,400 to 140,400 and would generate \$2.1 million in additional revenue for Barnes, according to court papers.

Montgomery County offered on June 12, 2007, to purchase the foundation’s land and buildings, including a parcel in Chester County, for \$50 million by raising funds from the sale of tax-exempt county-backed bonds, and to leaseback both parcels to the foundation for a term equal to the term of the bonds, according to a memorandum of law filed Feb. 29 in support of Montgomery County’s brief.

After either the bonds were paid back or Barnes prepaid the outstanding bonds, the foundation would once again own the properties, according to the county’s original Sept. 12 petition. In addition, the foundation also could use the difference between the county’s borrowing rate and its reinvestment rate to develop an endowment fund and the Chester County property would be security for the lease payments and be kept as open space, according to the county’s petition.

The Barnes’ reply brief faults the county’s financial offer as coming too late to be helpful and as an insubstantial promise that would be subject to change because the only support of the offer was a letter sent by the county’s former counsel, Mark D. Schwartz.

“If ‘too little too late’ means anything, it is this,” the reply brief said. “All that really is at issue here is a simple idea – that the county might finance a loan to The Foundation. The county had to know that in 2004, before the court issued its decree. All that has happened in the intervening three years is that a lawyer who no longer represents the county put that idea in a letter and invited discussion about it...If the petitioners are permitted to reopen these proceedings on evident like this, then it is hard to imagine how an end can ever be brought to these proceedings.”

Carolyn Tornetta Carluccio, a county attorney with the Montgomery County Solicitor's Office, said in an interview Monday that the county's offer of help first came in 2007 because it's the nature of government to wait to receive a request for help from nonprofit entities before proffering it. The first time Montgomery County was asked for help, despite the financial woes of the Barnes Foundation, was by the Friends of the Barnes group in 2007, she said.

Just as the city of Philadelphia fought to keep the masterpiece, "The Gross Clinic" by Thomas Eakins, in the city, "we have a right to fight for what's ours in the art world," Carluccio said.

The Barnes' reply brief said Montgomery County does not have standing to intervene in a nonprofit corporation's internal decision-making just because the nonprofit falls within its borders, and the county's interest in the economic benefits of being home to a world class art collection does not give it greater weight in the case than the public interest of the commonwealth in the art collection, which is represented by the attorney general.

Carluccio said that the preliminary work, including the ongoing development of architectural plans undertaken on the Barnes' proposed site on the Benjamin Franklin Parkway, is not so far along that Barnes would be prejudiced by reopening the case.

The Barnes Foundation says that it has raised well over \$100 million for the site move, including a \$25 million state allocation, worked to remove "substantial political obstacles" to relocate the Youth Study Center to another area; entered into a 99-year lease for the 4.5 acre property on the Benjamin Franklin Parkway; retained architect; and hired an owner's representative to oversee the facility's design and construction, according to the foundation's reply brief.

The student and neighbor petitioners argued in court papers that the question of standing is so "directly enmeshed" with the case's merits that Ott can't rule on the issue of their standing until later.

The Barnes' reply brief countered that the Friends of the Barnes petitioners did not cite any case law to support that argument, and that standing is a "threshold matter that the trial court must consider at the outset."

"The Friends petitioners cite a number of federal cases to show that the question of standing sometimes can become enmeshed in the merits," the reply brief said.

"But they provide no reason why this court should become the first Pennsylvania court ever to bypass the standing requirement by relying on that idea...Instead, they appear to suggest that the court use the 'enmeshment' concept as an excuse to avoid any consideration of their standing at all and instead to jump to the merits on its own motion, removing the need to consider the identity of the petitioner and any related jurisdictional niceties."