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Judge Ott: Justice for Dr. Barnes is still 'in your court'

By Aram K. Jerrehian Jr.

An open Letter to Judge Stanley Ott

DEAR JUDGE OTT:

Although I am honored to be associated with the volunteer group known as the Friend of the Barnes Foundation, I am writing this on my own behalf. Your recent ruling denying standing to the Petitioners, including the County of Montgomery, to reopen the proceedings regarding moving the collection to Philadelphia is distressing and perplexing. It is ironic, that at the 2003/2004 hearings, the Pew, Lenfest and Annenberg foundations were effectively granted standing by virtue of only acting as financial alter egos of the Barnes Trustees. These so-called charitable organizations had no special interest in the institution save to move it to museum row in Philadelphia. Yet you allowed their mercenary lawyers unfettered legal latitude. Had they been sincerely charitable, they would have worked to support the Barnes in Merion, using their largesse to remedy the institution's well-known problems.

At the outset, it must be emphasized that the Barnes was established as an entity consisting of an educational institution, an arboretum and the art gallery - not as a museum. The absurd plan of relocating it five miles and 15 minutes from the site its founder carefully chose will cost taxpayers hundreds of millions of dollars; whereas when you granted permission for this deranged plan, the funding was to have come from private sources. This is to say nothing about an annual deficit projected to be \$4.5 million and ancillary expenses the City has agreed to assume.

Your terse memorandum summarily dismissing the petition to reopen the proceeding based on newly discovered evidence, not only failed to address any of the significant issues raised, but cloaked the attorney general with unqualified power of representation to protect the public in enforcing the terms of a charitable trust. May I remind your honor of your statement that if that Office cannot or will not perform adequately, standing could be granted to certain petitioners. You are also reminded that it was you who, post the 2003/2004 hearings, expressed surprise to learn of a appropriation of \$107 million taxpayer monies by the Pennsylvania legislature for the construction of a "museum" to house the Barnes collection on the Parkway in Philadelphia. Your response was

practically an invitation for the Friends to petition to re-open. Based on this prospect, they embarked on a fund-raising campaign to hire an attorney. Yet, when push came to shove, you didn't allow any petitioner the opportunity to delve into this or other new matters. This occurred despite your 2004 opinion in which you stated: "We will not speculate about the nature of future petitions that might come before this court; however, we are mindful of the vehement protestations, not so long ago, that the Foundation would never seek to move the gallery to Philadelphia, and, as a result, nothing could surprise us." (Emphasis yours!)

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There is an abundance of data to exhibit that for at least two decades, if not for fifty years, the attorney general's performance with respect to the Barnes' trust has been abominable. It failed to intervene on the many occasions in which its attention was directed to violations of its terms. Most egregious was its complacency as the trustees squandered its endowment by wasting approximately \$8 million on frivolous litigation. During that period, in an act that bordered on criminal, it sat by while the parent company of the publisher of the catalog of the collection donated \$2 million to Lincoln University, which controlled the Barnes board, monies that rightfully should have been paid to the Foundation. In the ensuing litigation, the presiding judge remarked: "I am more than curious as to how the attorney general as parens patriae for charities can come in on this proposed settlement and take no position".

And then, of course, there is your oft quoted excoriation of Deputy Attorney General Lawrence Barth:

" The attorney general was the only party with the authority to demand, via discovery or otherwise, information about other options. However, the attorney general did not proceed on its authority and even indicated its full support for the petition before the hearings took place. In court in December, the Attorney General's Office merely sat as second chair to counsel for the Foundation, cheering on its witnesses and undermining the students' attempts to establish their issues. The course of action chosen by the attorney general prevented the court from seeking a balanced, objective presentation of the situation and constituted an abdication of the office's responsibility."

One can only speculate why your honor did not take things into your own hands at this juncture or appoint a master to insure a full and fair hearing as has been done in other jurisdictions in the Commonwealth. Allow me to connect the dots to illustrate that the attorney general was, as you put it kindly, predisposed to seeing to it that the art collection move to a site on museum row in Philadelphia.

The smoking gun: In your January 2004 opinion, you stated that "The fund raising assistance from Pew and Lenfest is predicated upon the relocation of the Foundation's art collection from Merion to a new site to be built in Philadelphia, and upon the expansion of the number of trustees on the Foundation's Board "(emphasis added). You went on to say "It was decided that the issues raised in the petition should be bifurcated". In other words, without expansion of the Board of Trustees from five members to 15, the art wasn't going anywhere.

Why? Lincoln University was empowered to appoint four of the five Barnes Trustees. On behalf of the Barnes Foundation, Pew and Lenfest petitioned the court to increase

the number to 15. Lincoln, realizing that its control was being emasculated, intervened to object. However, prior to commencement of the hearings, Lincoln withdrew from the case and filed with the court a settlement agreement with Barnes in which it was noted that its power to appoint trustees was increased to five. A skeptic might wonder why Lincoln agreed to reduce its representation on the Barnes board from 80 percent to 33 percent. A modest amount of research shows that the matter is actually well documented:

The minutes of the Lincoln President's Cabinet meeting of Sept. 15, 2003 reveal that Gov. Rendell approved allocation of \$50 million for capital projects and another \$30 million for various other projects on its campus. At the meeting of the Lincoln's Board of Trustees on the Saturday next, it was noted that a settlement agreement regarding the Barnes litigation was accomplished and that the governor and Attorney General Mike Fisher, both of whom were at the meeting, were involved in the negotiation. Details of the machinations are outlined in a thorough investigative article authored by Patricia Horn published in *The Philadelphia Inquirer* on May 22, 2005. So, for one additional trustee and up to \$80 million (at least \$28 million having been paid to date), Lincoln gave up control of the Barnes board. This could not have occurred without the intervention of the attorney general, whose predisposition was then clearly established.

By not informing the court of its inclination, its actions border on being considered fraudulent - its participation in the role of *parens patriae* an undisguised charade! In view of this, your dismissal of the county to reopen on the basis of lack of standing left no one to represent the Barnes Trust. Effectively, Albert Barnes, the creator of the world renowned educational institution, was not afforded a right that is available to even perpetrators of heinous crimes.

In your recent opinion, you point to the notion that there can be only one sovereign, citing a case in which a state senator and a city councilman sought standing to intervene. Since the attorney general should have been disqualified, the County of Montgomery, itself a sovereign, was entitled standing. The county cannot be equated to the same category as the aforesaid individuals. It should also be noted that the case you relied upon was not decided by a court of last resort.

Also perplexing is your failure to address anywhere the matters of the mysterious \$107 million state appropriation, the prospect for National Historic Landmark designation, the township ordinance permitting increase in attendance and, of course, the bond offer proposed by the county. All of the above were initiated by and at the expense of the Friends, not by the expanded board of Barnes trustees, whose duty is to uphold the terms of the Barnes Trust. The proponents of moving the Barnes envision a three-campus model with facilities in Philadelphia, Merion, and Chester County, an ambition that will guarantee the enormous deficit. Yet, at present, the so-called highly-qualified trustees appear unable to prevent even the Merion and the Chester County property, Ker Feal, from going to seed!

At the 2003/2004 hearings, your honor was fixated on the Barnes needing a \$50 million endowment to survive. Because the student petitioners who stood alone defending Dr. Barnes' trust indenture were not afforded full standing, the actual dollar amount was never adequately established. It is inconceivable that in an institution worth conservatively \$6 billion there cannot be found an amount of less than 1 percent, and

perhaps less than one half percent, of disposable assets that could be liquidated to establish such a fund. Ker Feal alone is worth over \$10 million, to say nothing of its contents. It is unimaginable that a determination of financial viability of the Foundation is possible without an appraisal of the entirety of its assets. Since, as you have noted, Ker Feal and non-gallery art are not protected by the indenture, the sale of such assets - if necessary -do not require any deviation. Instead, the only solution given your judicial blessing is an extreme deviation to disembowel the place, a singularly curious decision.

Irrespective of the above, the Friends, in conjunction with Montgomery County, did come up with \$50 million. The mystery is why this wasn't good enough for you? What are the Friends, major out of town newspapers, international art critics and most members of the estate and trust bar missing? Contrary to Deputy Attorney General Barth's snide comment about what has been offered as being "too little, too late," it is not. Justice for Dr. Barnes is still "in your court," Judge Ott. It is in your power to recover the paintings from what has been described as the greatest art theft of the century!

Respectfully submitted, ARAM K. JERREHIAN, JR.

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