

# **JUST WHAT THE DOCTOR ORDERED? THE DOCTRINE OF DEVIATION, THE CASE OF DOCTOR BARNES'S TRUST AND THE FUTURE LOCATION OF THE BARNES FOUNDATION**

Jonathan Scott Goldman\*

*The role of the Court is to look back to the mind of the settlor of the trust, to determine what he would have done when faced with conditions which were unanticipated at the time of the creation of the trust and nearly as possible to fulfill the intention of the conveyor.*\*\*

*Editors' Synopsis: The Barnes Foundation in Lower Merion, Pennsylvania has been involved in much litigation in recent years. This Article examines the history of the Barnes Foundation, its founder, and the recent litigation involving the Foundation's possible move from Lower Merion to Philadelphia. The doctrine of deviation is central to a discussion of the Barnes Foundation litigation, and the author discusses the doctrine and how it relates to the recent Barnes Foundation litigation. The Article also provides a discussion of other Pennsylvania case law on the doctrine of deviation. Finally, the author concludes with analysis of the most recent Barnes Foundation litigation and how the case will effect the future of doctrine of deviation.*

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\* Jonathan Scott Goldman, J.D., Temple University James E. Beasley School of Law, 2004. M.F.A., Tufts University, School of the Museum of Fine Arts, 2001. B.A., The Woodrow Wilson School for Public and International Affairs, Princeton University, 1996. I would like to thank Professor Jane Baron for conveying her excitement for the study of trusts and estates in class and for her invaluable guidance in the writing of this Article. Mr. Goldman may be contacted at jsg@alumni.princeton.edu.

\*\* *In re Barnes Found.*, 672 A.2d 1364, 1367 (Pa. Super. Ct. 1996) (citing *In re Bodine's Trust*, 239 A.2d 315 (1968)).

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## I. INTRODUCTION: A PERSONAL DISCLAIMER

Let my biases be known: I want the Barnes Foundation to move to Center City Philadelphia. If moved from residential Lower Merion, twenty minutes outside of the city, the educational facility-cum-gallery-cum-museum would be about one-eighth of a mile from my apartment on Benjamin Franklin Parkway. The museum would be nestled next to the Philadelphia Museum of Art, the Rodin Museum, and the soon-to-be Calder Museum, which is slated to be constructed on an adjacent plot along the Parkway.<sup>1</sup> If the Barnes Foundation moves, the City of Philadelphia will have a “museum row” on Benjamin Franklin Parkway to rival any other. This museum row will not be only a regional attraction, but also a true world treasure that will attract thousands more tourists—and their tourist dollars—to the City of Philadelphia in the coming years. As a student of the arts and an art-maker, I want the public to see the works of the Modern Art Masters that Dr. Albert C. Barnes collected in the beginning of the twentieth century. Particularly, the works of Chaim Soutine deserve greater public recognition. Soutine is one of my favorite artists and a painter whom Dr. Barnes arguably discovered when he purchased between fifty and one hundred of his canvases in 1922.<sup>2</sup>

However, what I want to happen to the Barnes Foundation collection, or what the Governor of Pennsylvania, the Attorney General, a judge, the heads of the Pew or Lenfest Charitable Trusts, or even what you want to happen to the Barnes Foundation collection is, or should be, completely irrelevant. What happens to the Barnes Foundation is not supposed to be a matter of public policy; what happens to the Barnes Foundation is supposed to be a matter of law. That matter of law begins and ends with one simple question: What would Barnes do?

On September 24, 2002, the trustees of the Barnes Foundation filed a petition to amend its charter and bylaws<sup>3</sup> with the Court of Common Pleas

<sup>1</sup> See Press Release, Philadelphia Museum of Art, Tadao Ando to Design Calder Museum for Philadelphia (Feb. 14, 2001) at <http://www.philamuseum.org/information/pr/010214.shtml>.

<sup>2</sup> HOWARD GREENFELD, THE DEVIL AND DR. BARNES 78-80 (Penguin Books 1989) (1987).

<sup>3</sup> By-laws of the Barnes Foundation, Article II, at

of Montgomery County, Pennsylvania Orphans' Court Division.<sup>4</sup> The trustees filed a Second Amended Petition with the court on October 21, 2003.<sup>5</sup> In this Petition, the trustees sought to "modernize[] The Foundation's Bylaws for the 21st Century."<sup>6</sup> If the court did not grant their request for relief, they claimed "the educational program of The Foundation may be seriously and detrimentally affected by The Foundation's continued financial difficulties and the litigation costs and distractions that have plagued The Foundation for the past decade."<sup>7</sup>

In their petition, the trustees outlined a proposed deal under which the Pew Charitable Trusts, the Lenfest Foundation, and to a lesser extent, the Annenberg Foundation would rescue the Barnes Foundation from its present financial quagmire.<sup>8</sup> This unprecedented offer is worth in excess of \$150 million. However, this conditional offer is dependent upon three things: (1) the Barnes Foundation must relocate from Lower Merion, Pennsylvania to Philadelphia; (2) the Barnes Foundation must expand its board of trustees from five to fifteen members; and (3) the Barnes Foundation must make other changes to Dr. Barnes's Trust Indenture,<sup>9</sup> which would insure greater operational flexibility.<sup>10</sup> To this end, in their Second Amended Petition, the trustees requested permission from the court to move the Barnes Foundation's galleries from Lower Merion to Philadelphia,<sup>11</sup> to expand its board of trustees "from five to fifteen members,"<sup>12</sup> and to make a number of other, less significant administrative changes to ensure the operational flexibility required by the Barnes Foundation's potential donors.<sup>13</sup> The trustees of the Barnes Foundation sought this relief on the basis of two legal doctrines:<sup>14</sup> deviation<sup>15</sup> and *cy pres*.<sup>16</sup>

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<sup>4</sup> See *In re Barnes Found.*, a Corp., No. 58,788, slip op. at 1 (Pa. Ct. Com. Pl. Montgomery County Orphans' Ct. Div. Jan. 29, 2004) (order to amend charter and bylaws) [hereinafter Barnes Order to Amend].

<sup>5</sup> See *In re Barnes Found.*, a Corp., No. 58,788, slip op. at 1 (Pa. Ct. Com. Pl. Montgomery County Orphans' Ct. Div. Oct. 21, 2003) (second amended petition to amend charter and bylaws) [hereinafter Barnes Second Amended Petition].

<sup>6</sup> *Id.* at 8, para. 27.

<sup>7</sup> *Id.* at 16, para. 48.

<sup>8</sup> See *id.* at 5-7, paras. 18-25.

<sup>9</sup> Indenture and Agreement of the Barnes Foundation, Art. IX, Sec. 2 of Bylaws, at [http://www.barneswatch.org/main\\_bylaws.html](http://www.barneswatch.org/main_bylaws.html) (last visited Jan. 10, 2005) [hereinafter Trust Indenture].

<sup>10</sup> See *id.* at 6, para. 19.

<sup>11</sup> See *id.* at 16, para. 47.

<sup>12</sup> *Id.* at 9, para. 32.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 18, para. 57.

<sup>15</sup> The "deviation doctrine" is "[a] principle allowing variation from a term of a will or trust to avoid defeating the document's purpose." BLACK'S LAW DICTIONARY 462 (7th ed. 1999).

<sup>16</sup> "Cy pres" is "[t]he equitable doctrine under which a court reforms a written instrument with a gift to charity as closely to the donor's intention as possible, so that the

On January 29, 2004, over fifteen months after the trustees filed their Amended Petition with the court, the court gave the trustees a response.<sup>17</sup> In the response, Judge Ott succinctly restated the legal problem:

The fund-raising assistance from [the potential donors] 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. Both of these proposals run afoul of Dr. Barnes's indenture and The Foundation's charter and bylaws.<sup>18</sup>

The court approved the expansion of the board of trustees from five to fifteen members and permitted other requested operational changes under the doctrine of deviation.<sup>19</sup> The court justified its decision under this doctrine because it found the provisions of the trust implicated in these changes to be "administrative in nature,"<sup>20</sup> unforeseeable by Dr. Barnes at the time of his death, and necessary to prevent a substantial impairment of the Barnes Foundation's charitable purpose.<sup>21</sup> However, the court described the issue of relocating the gallery to Philadelphia as "far more complex."<sup>22</sup>

On the issue of the requested relocation, the court held that it did not have enough information yet to decide on the merits because "the element of necessity [of the move] ha[d] not been established clearly and convincingly."<sup>23</sup> The Court also stated that it "need[ed] to be persuaded that the move to Philadelphia is the least drastic deviation that will stabilize The Foundation's future."<sup>24</sup> To this end, the Court demanded some hard numbers and "direct[ed] The Foundation to undertake an analysis of its

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gift does not fail." *Id.* at 392.

<sup>17</sup> Judge Ott used the second paragraph of his January 29 preliminary opinion to "comment on the unprecedented public interest" in the case before the Court. Barnes Order to Amend at 2. With a mixture of amusement and annoyance, the Judge wrote:

Since the filing of the original petition, rarely a day has gone by without a letter or phone call arriving at [my] chambers from someone wanting to weigh in on this matter. Politicians, art scholars, financial experts, and former students have sent suggestions for saving The Foundation. Major newspapers have published endless dialogues of letters to the editors, as well as editorials endorsing one outcome or another, as if this were a political race. Even legal scholars, attorneys, and law professors, who know that cases are determined by applying the law to the evidence produced in court and not by public opinion, have sent unsolicited opinion letters for our edification. The court has studiously avoided being influenced by these outside forces; however the experience has been unique.

*Id.* at 2-3 (footnote omitted).

<sup>18</sup> See Barnes Order to Amend at 4.

<sup>19</sup> See *id.* at 9.

<sup>20</sup> *Id.* at 12.

<sup>21</sup> See *id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 24.

<sup>24</sup> *Id.* at 25.

assets other than the works in the gallery in Merion . . . to ascertain whether \$50,000,000 or more [could] be raised for The Foundation's endowment through the sale of non-gallery artwork and/or . . . [a piece of] real estate in Chester County.”<sup>25</sup> The court also demanded that the Barnes Foundation submit to the Court a “business plan for the [proposed] Philadelphia operation.”<sup>26</sup>

This information was presented to the Court during six days of hearings on September 21, 22, 23, 24, 27 and 30, 2004, and Judge Ott issued his ruling on December 13, 2004<sup>27</sup> and further clarified it with a supplemental decree issued on December 22, 2004.<sup>28</sup> In this most recent Barnes Foundation case, Judge Ott granted the trustees of the Barnes Foundation everything they sought: the Barnes Foundation could move to Philadelphia, hold fundraising events in the new facility, open any days and times that the trustees choose, sell any of the Barnes Foundation’s art not currently hanging in the Lower Merion gallery, and host exhibitions of art that did not belong to the Foundation and never belonged to Dr. Barnes.<sup>29</sup> This decision is unlikely to be appealed.<sup>30</sup> Thus, the court effectively gave

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 26.

<sup>27</sup> The Barnes Found., a Corp., No. 58,788, slip op. at 2 (Pa. Ct. Com. Pl. Montgomery County Orphans’ Ct. Div. Dec. 13, 2004) (decree sur second amended petition to amend charter and bylaws) [hereinafter Ott Decree].

<sup>28</sup> The Barnes Found., a Corp., No. 58,788, slip op. at 1 (Pa. Ct. Com. Pl. Montgomery County Orphans’ Ct. Div. Dec. 22, 2004) (Supplemental decree) [hereinafter Ott Supplemental Decree].

<sup>29</sup> See Ott Decree at 39-41; Ott Supplemental Decree at 1; see also Patricia Horn, *In Amended Ruling, Barnes Gets All It Sought*, PHILA. INQUIRER, Dec. 23, 2004, at C1, available at <http://www.philly.com/mld/philly/business/10479939.htm> (last visited Jan. 10, 2005). Judge Ott’s decision sets out an elaborate three-location plan according to which the Lower Merion gallery would be recreated within a larger Philadelphia facility, which would have expanded hours of operation as a museum and hours dedicated to the art education program; the horticulture program would remain in the Lower Merion location and the current Lower Merion galleries would be renovated to house archives, a library, and a research center; and Ker-Feal, Dr. Barnes’s Chester County estate, would be developed as a living museum for the public. See Ott Decree at 10-11. Judge Ott found that “The Foundation showed clearly and convincingly the need to deviate from the terms of Dr. Barnes’ indenture; and we find that the three-campus model represents the *least drastic modification* necessary to preserve the organization.” *Id.* at 39 (footnote omitted) (emphasis added). Nonetheless, he stated that he still had “doubts about the viability of [the Foundation’s] plans,” particularly the fundraising goals. These goals, on which the viability of the new facility is based, were described as both “ambitious” and “aggressive” in testimony before the Court. *Id.* at 40. Judge Ott continued:

There is a real possibility that the development projections will not be realized, perhaps not in the first few years, but later on, when the interest and excitement about the new venture have faded. . . . 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.

*Id.*

<sup>30</sup> E-mail from Terry Kline, attorney for amicus curiae, to Jonathan Scott Goldman (Dec. 20, 2004) (on file with author). Judge Ott’s initial, October 2003 decree, which gave

the trustees of the Barnes Foundation permission to transform the Barnes Foundation from one of the most peculiar and unique art institutions in the world to an ordinary, albeit spectacular, museum on Benjamin Franklin Parkway in Philadelphia.

This Article seeks to explore the issues surrounding the doctrine of deviation as it relates to the Barnes Foundation's impending move from Lower Merion to Philadelphia. Part II will offer a brief history of Dr. Barnes and the Barnes Foundation. If the court was charged with determining the answer to the question, "What would Barnes do?", the background and history of Dr. Barnes's past behavior is highly relevant to what he might do were he confronted with the present situation.

Part III will outline what seems to be an institutional bias in favor of granting deviation, which is embedded in the structure of the court system.

Part IV will examine the doctrine of deviation and analyze the case recently before the court. This section will set out the relevant specifics of the original Trust Indenture, the Bylaws, and the requested deviations from them. Part V will discuss case law relevant to the recent decision of the Montgomery County Orphans' Court with an analysis of Pennsylvania common law on the doctrine of deviation. This Section will argue that general Pennsylvania common law on the issue of deviation is of only limited use as precedent because cases of deviation necessarily are decided on the very specific, unique facts of a particular trust or will and are awkward, if not impossible, to apply to the particular circumstances of this equally specific and unique matter.

As an extension of Part V, Part VI will focus on one highly relevant subset of Pennsylvania common law on the doctrine of deviation—prior Barnes Foundation case law. Because the wealth of prior litigation involving the Barnes Foundation interpreted the same trust documents and Bylaws and often applied facts similar to the recent Barnes matter, this subset of Pennsylvania common law is potentially quite instructive. Part VI will examine the prior Barnes Foundation case law and look for trends in this litigation history that have influenced the recent decision. Finally, the Conclusion will point out that Pennsylvania currently applies its law on deviation far more permissively than the written law allows. In fact, Pennsylvania has been applying a law on deviation akin to the law espoused by the proposed Restatement (Third) of Trusts,<sup>31</sup> rather than the

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a group of students the right to oppose the Barnes Foundation's request for deviation from Dr. Barnes's trust, denied them full standing. For this reason, they do not have a right to appeal Judge Ott's decision. These students possibly could appeal the October 2003 decree and request full standing with rights to appeal. However, even if they were granted such rights, success on appeal would be highly unlikely. Ott's Decree, a forty-one page opinion, was based entirely on the facts, and he cited almost no law. *See generally* Ott Decree. Because findings of fact are the purview of the trial court, prospects for a reversal on appeal are dubious at best. *See also, infra* Part VI for discussion of prior appeals to the Superior Court in Barnes Foundation.

<sup>31</sup> RESTATEMENT (THIRD) OF TRUSTS (2003) [hereinafter RESTATEMENT (THIRD)].

Restatement (Second) of Trusts,<sup>32</sup> which actually has been adopted by Pennsylvania. The Conclusion also will seek to analyze the recent Barnes litigation and determine what should have happened and what implications this case holds for the future of the law of deviation.

## **II. INTO THE MIND OF THE SETTLOR: DR. BARNES AND THE BARNES FOUNDATION**

If the recent challenge before the court truly was to look into the mind of the settlor and determine what Dr. Barnes might have done if he had been confronted with the current situation, details about what Dr. Barnes actually did during his lifetime should have been quite relevant to the court's decision-making process. Certainly no one possibly could know what Dr. Barnes would have done if he were making the decision before the court; Dr. Barnes never confronted a similar event, let alone this exact event, during his lifetime. However, now that Dr. Barnes is long deceased, his personal history and the history of the Barnes Foundation offer a window into his thinking and may provide clues about what Barnes might do were he in this situation. For this reason, such historical background is worth exploring and the court had a duty to do so.

By all accounts, Dr. Barnes was as colorful and controversial a figure as was the radical and cutting-edge "modern" art that he began collecting around 1912.<sup>33</sup> Various accounts have described him as being famously stubborn, eccentric, and extremely controlling of his art and who saw it. He waged personal battles with his enemies in the Philadelphia elite, and he often played them out in grand style in the public arena and through the commercial press.<sup>34</sup> One biographer described him as "an outsider fighting to get inside, an unpleasant man in a society that valued good manners, [and] a self-made millionaire of little breeding in a city ruled by men of superior upbringing."<sup>35</sup>

From his earliest days, Dr. Barnes worked to fight his way out of the lower and working classes. He was born on January 2, 1872, in the lower-middle class Kensington section of Philadelphia, Pennsylvania.<sup>36</sup> The Barnes family moved from "Kensington to one of the oldest and poorest

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<sup>32</sup> RESTATEMENT (SECOND) OF TRUSTS (1957) [hereinafter RESTATEMENT (SECOND)].

<sup>33</sup> See GREENFELD, *supra* note 2, at 31-36. When Dr. Barnes began collecting art, many of the pieces that he bought were truly on the cutting edge of art and then-contemporary culture. People thought these images were uncivilized and grotesque; some challenged whether these images, which were certainly not in the style of the Old Masters, even qualified as art at all. While artists such as Cézanne, Soutine, Seurat, and De Chirico now form the foundation of the socially acceptable and mainstream cannon of modern art history, this was far from the case when Dr. Barnes began his collection.

<sup>34</sup> See generally JOHN ANDERSON, ART HELD HOSTAGE: THE BATTLE OVER THE BARNES COLLECTION 7-9 (2003); GREENFIELD, *supra* note 2.

<sup>35</sup> GREENFIELD, *supra* note 2, at 4.

<sup>36</sup> *Id.* at 5.

sections”<sup>37</sup> of South Philadelphia when he was ten years old, and young Albert Barnes was beaten up often before he took up boxing and learned to defend himself.<sup>38</sup> In 1885, Philadelphia’s elite Central High School accepted Barnes, and he took up painting as a hobby.<sup>39</sup> Barnes graduated from Central in 1889 and directly entered the University of Pennsylvania Medical School. He worked two jobs during his first year to support himself and received a scholarship for his second year.<sup>40</sup> Barnes graduated from medical school in 1892 at the age of twenty and, thereafter, took some graduate courses in chemistry and philosophy at the University of Pennsylvania and at a university in Berlin, Germany.<sup>41</sup> Upon his return to Philadelphia, Dr. Barnes worked with a leading pharmaceutical company and soon became the advertising and sales manager for the company.<sup>42</sup>

Through his aggressive entrepreneurial nature, Dr. Barnes made his fortune in the pharmaceutical business. In 1900, Dr. Barnes went to Heidelberg, Germany on company business and hired Hermann Hille to come to Philadelphia to work for the pharmaceutical company in product development.<sup>43</sup> This job offer also proved to be personally significant for Dr. Barnes. In 1902, Dr. Barnes left the Philadelphia pharmaceutical company and went into business with Hille to sell a product called Argyrol.<sup>44</sup> Dr. Barnes had conceived of the product but Hille had actually discovered it.<sup>45</sup> According to their agreement, Hille, the only partner who actually knew the chemical formula, would manufacture the Argyrol in the lab and Dr. Barnes would market and sell it.<sup>46</sup> Each partner received half the profits.<sup>47</sup> Argyrol was a silver antiseptic compound that, among other things, was used to treat gonorrhea and as an eye drop to prevent blindness in newborns.<sup>48</sup> More importantly, Argyrol was how Dr. Barnes made his fortune.<sup>49</sup>

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<sup>37</sup> *Id.* at 6.

<sup>38</sup> *See id.*

<sup>39</sup> *Id.* at 7-8. This public magnet-type school was known at that time as “the poor man’s college” because although it was a high school, it actually offered B.A. and B.S. degrees to many of the City’s “promising poor.” *Id.* at 7.

<sup>40</sup> *Id.* at 8.

<sup>41</sup> *Id.* at 8-10.

<sup>42</sup> *Id.* at 10.

<sup>43</sup> *Id.* at 11.

<sup>44</sup> *Id.* at 16-17.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 17, 19.

<sup>47</sup> *Id.* at 17.

<sup>48</sup> *See id.* at 16-17; ANDERSON, *supra* note 34, at 7. Many states in the U.S. passed laws that required Argyrol drops be placed into the eyes of newborn babies. GREENFIELD, *supra* note 2, at 27.

<sup>49</sup> Rather than approaching pharmacists with his product, as was the custom, Dr. Barnes marketed Argyrol directly to doctors throughout the world and traveled extensively to do so. GREENFIELD, *supra* note 2, at 8. In 1904, Barnes sold \$100,000 worth of Argyrol and the company maintained offices in London and Sydney. *Id.* at 19. By 1907, yearly profits were over a quarter of a million dollars. *Id.*

Dr. Barnes and Hille did not get along and in 1907, Dr. Barnes sued Hille in the Philadelphia County Court of Common Pleas to dissolve the business.<sup>50</sup> Dr. Barnes bought the business from Hille for \$350,000 and, with it, the chemical formula for the production of Argyrol.<sup>51</sup> After the buyout, Dr. Barnes incorporated the A. C. Barnes Company and ran it by himself according to some unique methods, which make sense in light of his upbringing. He recruited his workers from the poor population of Philadelphia, starting with five white women and three black men, and he viewed them as more than just employees.<sup>52</sup> In addition to serving as the boss, Dr. Barnes acted as a father figure.<sup>53</sup> He encouraged his employees to work as a team and gave them substantial pensions; however, he always made it abundantly clear that he was in charge.<sup>54</sup> Perhaps because of his upbringing and his education in philosophy, Dr. Barnes paid particular attention to the individual psychological needs of his workers and attempted to integrate their personal interests into their work lives at the A. C. Barnes Company.<sup>55</sup> For example, based on a holistic view of philosophy and education espoused by John Dewey, Dr. Barnes required his workers to take two hours out of their work days, from 12:30 to 2:30 p.m., to study philosophy as a group. He also exposed them to modern art through his personal collection.<sup>56</sup> In return for this special treatment, Dr. Barnes demanded unwavering loyalty from his workers.<sup>57</sup>

In 1905, Dr. Barnes moved to the tony Main Line suburb of Philadelphia, where, as of the writing of this Article, the Barnes Foundation still stands.<sup>58</sup> According to one biographer:

In [the] eyes [of "most of the Main Line's well-bred citizens, Barnes"] was unacceptable—a self-made businessman of no breeding, an outsider who, with his gruff, unpolished manners, possessed none of the social graces that would have permitted him to become a part of their society. Understanding that no matter how hard he tried, he could never break the barrier that separated him from his well-behaved neighbors, Barnes reacted angrily. For the rest of his life, he played the role they had assigned to him, and he played it well.<sup>59</sup>

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<sup>50</sup> *Id.* at 19-20.

<sup>51</sup> *Id.* at 20-21. Dr. Barnes later denied Hille's role and claimed that he alone had invented Argyrol. *Id.* Dr. Barnes ultimately sold the company for four to six million dollars in the summer of 1929, just before the stock market crashed. ANDERSON, *supra* note 34, at 36.

<sup>52</sup> See GREENFIELD, *supra* note 2, at 523.

<sup>53</sup> *Id.* at 24.

<sup>54</sup> *Id.* at 24.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 55-56.

<sup>57</sup> *Id.* at 26.

<sup>58</sup> *Id.* at 27-28.

<sup>59</sup> *Id.* at 29.

Dr. Barnes began to collect art around 1910.<sup>60</sup> In 1912, he began to hone his focus on modern art when he sent his high school friend and Philadelphia painter William Glackens to Paris with a budget of \$20,000 to buy the best modern art available at the best prices possible.<sup>61</sup> Glackens returned with paintings by Manet, Gauguin, Cézanne, and Degas.<sup>62</sup> Dr. Barnes was more than a collector who made purchases for investment; he studied his paintings diligently, seeking to learn from them and to understand their genius. After this initial shopping spree, Dr. Barnes developed his own knowledge of modern art and made all future purchases himself.<sup>63</sup> He bought his art using aggressive tactics and at a feverish pitch, and he relished a good bargain.<sup>64</sup> In 1922, when Dr. Barnes first saw the works of Chaim Soutine in Paris, he bought all the painter's work on the spot—between fifty and one hundred canvases—for approximately \$3,000.<sup>65</sup> By the next year, Dr. Barnes had purchased fifty paintings by one of his favorite artists, Cézanne.<sup>66</sup> Ultimately, Dr. Barnes collected thousands of pieces of art, which are still at the Barnes Foundation in Lower Merion.<sup>67</sup>

In 1922, Dr. Barnes bought a large estate adjoining his home in Lower Merion and hired an architect to build the Barnes Foundation galleries, which would house his art collection.<sup>68</sup> On December 4, 1922, Pennsylvania granted the Barnes Foundation a charter, designating it as an educational institution and not a museum.<sup>69</sup> On December 6, Dr. Barnes executed the trust agreement and Bylaws, laying out his wishes with extreme specificity and endowing it with \$6 million.<sup>70</sup> The stated purpose of Dr. Barnes's eponymous foundation was “[t]o promote the advancement of education and the appreciation of the fine arts.”<sup>71</sup> In these documents, Dr. Barnes made specifications to control the Barnes Foundation after his death as he had controlled it during his lifetime. Among these were provisions mandating that his collection be permanently closed when he died, that the paintings remain exactly as he left them, and that the restrictive admissions policy of the Barnes Foundation remain in place.<sup>72</sup>

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<sup>60</sup> *Id.* at 31.

<sup>61</sup> *Id.* at 34.

<sup>62</sup> *Id.* at 35.

<sup>63</sup> *Id.* at 36.

<sup>64</sup> *Id.* at 69.

<sup>65</sup> *Id.* at 79.

<sup>66</sup> *Id.* at 69.

<sup>67</sup> ANDERSON, *supra* note 34, at 2.

<sup>68</sup> GREENFIELD, *supra* note 2, at 72.

<sup>69</sup> *Id.* at 73. To this end, the Barnes Foundation held and continues to hold regular classes in which Dr. Barnes's own methods for understanding art are taught. The Barnes Foundation also has its own press, which publishes work relating to arts and education. *Id.* at 104.

<sup>70</sup> *Id.* at 73. This endowment was approximately \$70 million when converted to 2002 dollars. ANDERSON, *supra* note 34, at 28.

<sup>71</sup> See Bylaws, *supra* note 3.

<sup>72</sup> See generally Bylaws, *supra* note 3.

The Barnes Foundation officially opened on March 19, 1925.<sup>73</sup>

During his life, Dr. Barnes did not open his gallery to the public; entrance was by individual permission only.<sup>74</sup> In 1961, ten years after his death, a court order forced the Barnes Foundation to open to the public.<sup>75</sup> During his life, when Dr. Barnes would receive written requests to view his art collection, he often replied with a preprinted card which read: "'The Barnes Foundation is not a public gallery. . . .' 'It is an educational institution with a program for systematic work, organized into classes which are held every day, and conducted by a staff of experienced teachers. Admission to the gallery is restricted to students enrolled in the classes.'"<sup>76</sup> Sometimes he granted individual requests at his own whim.

One might say that Dr. Barnes was extremely stingy with his famous collection of art. In his whole life, Dr. Barnes made only a single gift of artwork to a public institution.<sup>77</sup> This gift of four drawings by William Glackens was to the Blanden Art Museum in Fort Dodge, Iowa.<sup>78</sup> With all the master works in his collection, this gift was hardly generous. Furthermore, Dr. Barnes almost never loaned paintings from his collection during his lifetime, and on the rare occasion he did, he did so begrudgingly. Dr. Barnes routinely denied requests from many public institutions, including the Philadelphia Museum of Art, to borrow and exhibit works from his collection.

<sup>73</sup> GREENFIELD, *supra* note 2, at 103.

<sup>74</sup> *Id.* at 2.

<sup>75</sup> *Id.* The Pennsylvania Attorney General brought litigation that resulted in this initial opening of the gallery doors to the public, which was for a limited number of visitors and only on Friday, Saturday, and Sunday afternoons. The Attorney General argued that because the Barnes Foundation received tax exempt status as a public charity, the general public should derive some benefit from it in terms of public admission to the gallery. This case was not brought under the theory of deviation. Rather, the court stated:

Although the Foundation . . . assumed indisputable status as [a] tax-exempt public charity, its officers and trustees have consistently refused to the public admission to its art gallery. A painting has no value except the pleasure it imparts to the person who views it. A work of art entombed beyond every conceivable hope of exhumation would be as valueless as one completely consumed by fire. Thus, if the paintings here involved may not be seen, they may as well not exist. The respondents argue that the paintings may be seen, but only privately. However, that is not what Dr. Barnes contemplated and it certainly is not what the tax authorities intended. If the Barnes art gallery is to be open only to a selected restricted few, it is not a public institution, and if it is not a public institution, the Foundation is not entitled to tax exemption as a public charity.

This proposition is incontestable.

Commonwealth v. Barnes Found., 159 A.2d 500, 502-03 (Pa. 1960).

For a discussion on the tension between the public interest in the Barnes Foundation because of its status as a charitable trust and the donative intent of Dr. Barnes regarding the proposed move, see Ilana H. Eisenstein, *Keeping Charity in Charitable Trust Law: The Barnes Foundation and the Case for Consideration of Public Interest in Administration of Charitable Trusts*, 151 U. PA. L. REV. 1747 (2003).

<sup>76</sup> GREENFIELD, *supra* note 2, at 129.

<sup>77</sup> *Id.* at 38.

<sup>78</sup> *Id.*

At the time of his death in 1951, Dr. Barnes's estate was valued at \$2,123,000.<sup>79</sup> The art objects and other assets of the Barnes Foundation were appraised at approximately \$9 million. In today's dollars, that 1951 appraisal is in excess of \$62 million.<sup>80</sup> However, Barnes's own investment restrictions and the exorbitant costs of the Barnes Foundation's prodigious and constant litigation since Dr. Barnes's death has whittled away this enormous endowment, leaving the Barnes Foundation in its current financial predicament. Dr. Barnes never would have predicted this situation.

### **III. A PETITION UNOPPOSED: THE STRUCTURAL BIAS IN FAVOR OF DEVIATION**

The recent question before the Court was: should the Barnes Foundation be allowed to move from Lower Merion, Pennsylvania to Philadelphia? Fortunately, the court was able to determine its answer by a simple method. All the court needed to do was determine the answer to one other question: What would Barnes do?

The problem is that the answer to this question is not so simple. Dr. Barnes is dead. He died over fifty years ago,<sup>81</sup> and he left no specific answer to the question of whether he would allow his foundation to move to Philadelphia from Lower Merion if, more than fifty years after his death, the Barnes Foundation was short of money and had a \$150 million offer to stabilize it, conditioned on the proposed move. This scenario likely never crossed his mind. He left his foundation with the equivalent of over \$62 million in today's dollars and probably anticipated that this would be a large enough endowment to support the foundation in perpetuity. If the current scenario did cross his mind, he did not indicate what he would do. Maybe Dr. Barnes would allow the move, but maybe he would sell a couple of Matisse paintings or Renoirs to help the Barnes Foundation instead.<sup>82</sup> Maybe he would sell Ker-Feal, his antique-filled \$16 million estate in Chester County, which currently is unused.<sup>83</sup> We know that Dr. Barnes was a stubborn man who liked to be in control; we know he disliked the elite of Philadelphia. As one observer noted: "[T]he rescuers [are] led by the very same Philadelphia cultural powerhouses that

<sup>79</sup> ANDERSON, *supra* note 34, at 49.

<sup>80</sup> *Id.*

<sup>81</sup> Barnes Order to Amend at 5 n.7.

<sup>82</sup> For an interesting note rethinking the art museum taboo of selling art, see Jennifer L. White, *When It's OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses*, 94 MICH. L. REV. 1041 (1996).

<sup>83</sup> See Post-Hearing Brief of the Amicus Curiae, Students of the Barnes Foundation, Sue S. Hood, William Phillips, & Harvey A. Wank at 4-5, *In re Barnes Found., a Corp.* (No. 58,788) [hereinafter Post-Hearing Brief]; see also ANDERSON, *supra* note 34, at 43; Carl A. Solano, Attorney for the trustees of the Barnes Foundation, Talk at Temple University Beasley School of Law (Apr. 1, 2004).

Dr. Barnes had spent much of his life at war with.<sup>84</sup> However, the fact of the matter is that we will never know, and can never know, what Dr. Barnes actually would do in this situation. The court only could surmise what Dr. Barnes would do.

Speculation is the problem in any case of deviation. Although the court should do what the testator would have done, by definition the testator is dead. If the testator, while alive, had anticipated the situation before the court, the testator likely would have specified a solution to the problem in the trust indenture. A question of deviation before the court, entails (1) a deceased testator and (2) a problem unaddressed and likely unforeseen by that testator during life. Although the court should act as the testator would have acted if confronted with the problem before the court, this task is impossible. The court can never know what the testator would have done; the best the court can do in any question of deviation is make an educated guess.

Most of the time, as in the recent Barnes Foundation matter, the trustees of the testator's estate bring the request for deviation before the court. The trustees should act on behalf of the foundation, which was created according to the personal desires of the testator. In a sense, the trustees legally speak for the deceased. Thus, because of their status as trustees, there is an implicit assumption that their request is what the testator would have wanted. After all, trustees have a duty to carry out the will of the testator, and they are bringing the request for deviation before the court. Surely, one might presume that the testator would have wanted the deviation that the trustees seek.

However, in reality, the trustees seeking deviation in a given case may have no meaningful connection to the testator. Often, as in the case of the Barnes Foundation, so much time has passed that the trustees' wishes and the testator's wishes may have become so far removed from each other that the initial connection has become merely an abstraction. In many cases, the trustees have never met the testator. Thus, the loyalty of the trustees might not be to the wishes of the testator, but rather to the abstract wishes of the foundation. As trustees, they, and not the deceased testator, control the foundation. Though this should not happen, the trustees seeking deviation may have developed their own agenda for the foundation they now run, separate and distinct from the wishes of the long-deceased testator.<sup>85</sup>

Because of the nature of court proceedings in requests for deviation, often no person or entity advocates against the requested deviation; because the trustees purport to bring their request on behalf of the testa-

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<sup>84</sup> ANDERSON, *supra* note 34, at 219.

<sup>85</sup> See Chris Abbinante, *Protecting "Donor Intent" in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation*, 145 U.PA.L.REV. 665, 692-702 (1997) (arguing that the trustees of charitable foundations, and specifically the Barnes Foundation, should be held to a higher level of accountability in upholding the intentions of donors).

tor's estate, it is rare for someone to argue against the proposed deviation. After all, if the trustees are empowered to speak on behalf of the testator, who else would have standing to argue that the testator would not approve the requested deviation?<sup>86</sup> The attorney general has the power to step in as *parens patriae* for public charities, but this role is not always taken seriously. In this way, these proceedings are lopsided in favor of the request for deviation with only the judge left to play devil's advocate to the requests of the petitioning trustees.

That lopsided proceeding is what occurred in this case. In his initial opinion of January 29, 2004, Judge Ott firmly chastised the Pennsylvania Attorney General on precisely this issue:

The Attorney General, as *parens patriae* for charities, had an absolute duty to probe, challenge and question every aspect of the monumental changes now under consideration. The law of standing . . . permits only trustees, the Attorney General, and parties with a special interest in the charitable trust to participate in actions involving the trust. . . . Thus, 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 . . . . [T]he Attorney General's Office merely sat as second chair to counsel for The Foundation, cheering on its witnesses. . . . [This] course of action . . . prevented the court from seeing a balanced, objective presentation of the situation, and constituted an abdication of that office's responsibility. Indeed it was left to the court to raise questions relating to the finances of the proposed move and the plan's financial viability.<sup>87</sup>

The court, placed in this awkward position by the nature of the process inherent in seeking deviation and the Attorney General's abdication of its duties, should have looked critically and skeptically at what Dr. Barnes did and said during his lifetime to make an educated decision about what he would do in the face of the proposed deviation.<sup>88</sup>

#### **IV. TO MOVE OR NOT TO MOVE? THE DEVIATION DOCTRINE AND THE CASE BEFORE THE COURT**

The most important thing that Dr. Barnes did in his lifetime relating to

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<sup>86</sup> In this case, Barnes Foundation students were given only limited standing as *amici curiae* to advise the court on the effect of the proposal on the Barnes Foundation educational program. Barnes Order to Amend at 20.

<sup>87</sup> *Id.* at 20-21.

<sup>88</sup> In this case, Judge Ott also allowed a group of former students to participate in the case as *amicus curiae* for the limited purpose of opposing the trustees' petition for deviation. *See supra* note 28. For more information on the life of Dr. Barnes, see GREENFELD, *supra* note 2, at 78-80.

this inquiry was to create the Barnes Foundation. Dr. Barnes located this facility in Lower Merion, Pennsylvania. Presumably, Dr. Barnes could have created the Barnes Foundation anywhere he would have liked. Thus, the fact that he chose to house his paintings in Lower Merion is highly relevant and supports the position that Dr. Barnes wanted his art to be viewed precisely where he put it—in Lower Merion.

The two documents that Dr. Barnes created specifically for the purpose of governing his estate and the Barnes Foundation after his death are also highly relevant to this inquiry. These documents are the Trust Indenture and the Bylaws.<sup>89</sup> Together, they set out Dr. Barnes's intentions for his estate and provide clues as to what he might have done were he alive today.

Article II of the Bylaws states “[t]he objects for which this corporation is formed.”<sup>90</sup> The Article makes the following specifications:

To promote the advancement of education and the appreciation of the fine arts; and for this purpose to erect, found and *Maintain, in the Township of Lower Merion, County of Montgomery, and State of Pennsylvania*, an art gallery and other necessary buildings for the exhibition of works of ancient and modern art, and the maintenance in connection therewith of an arboretum. . . .<sup>91</sup>

With Article II of the Bylaws, Dr. Barnes located his foundation squarely in Lower Merion Township, not in Philadelphia or elsewhere, and specified that the Barnes Foundation be maintained in that same place. Dr. Barnes further set out his intention that the Barnes Foundation be connected with an arboretum. Because the arboretum is contiguous with the current Barnes Foundation property and gallery in Lower Merion, this specification has ramifications as to the geographic location and the portability of the Barnes Foundation. Although buildings and galleries are relatively interchangeable and artwork can be relocated rather easily, the existing arboretum is unique and cannot be moved. Then again, Dr. Barnes's specification that the art gallery be maintained “in connection” with an arboretum, need not necessitate that the arboretum be physically connected to the gallery, on the same piece of property.

In the recital clauses of the Trust Indenture, Dr. Barnes specified that he “has taken title to a tract of land heretofore owned by Joseph Lapsley Wilson, situate in Lower Merion Township, Montgomery County, Pennsylvania, and . . . proceeded with the preparation of the plans, specifications and contracts for the erection of certain buildings suitable for [his] purposes.”<sup>92</sup> Dr. Barnes further specified that “[u]pon the said land there now exists an arboretum created by Joseph Lapsley Wilson; and [his]

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<sup>89</sup> See Trust Indenture, *supra* note 9; Bylaws, *supra* note 3.

<sup>90</sup> *Id.* at Article II.

<sup>91</sup> *Id.* at Article II (emphasis added).

<sup>92</sup> Trust Indenture, *supra* note 9, at recital 2.

valuable collection of works of art . . . shall be placed in the gallery to be erected upon the said tract of land.”<sup>93</sup> Dr. Barnes made his intention clear in the Trust Indenture. Dr. Barnes located his foundation on a specifically designated piece of real estate in Lower Merion, previously owned by Joseph Lapsley Wilson and containing an arboretum.

Several other clauses in the Trust Indenture are potentially relevant to the proposed move. Paragraph nine states in part that “after the death of [Dr. Barnes] and his wife, no buildings, for any purpose whatsoever, shall be built or erected on any part of the property.”<sup>94</sup> This paragraph limits the flexibility of the trust in making changes to the existing property. However, a court might interpret this more broadly to suggest Dr. Barnes’s intent that the physical facilities stay exactly how they were configured and where they were located at the time of his death.

Paragraph thirteen of the Trust Indenture states in pertinent part that “[a]ll the paintings shall remain in exactly the places they are at the time of the death of [Barnes] and his . . . wife.”<sup>95</sup> The Barnes Foundation has followed this clause in the Trust Indenture, and with the exception of a court-sanctioned tour of the collection’s art during a gallery renovation, all of Dr. Barnes’s paintings have remained exactly where he left them at the time of his death.<sup>96</sup> Although a court might interpret the words of paragraph thirteen literally to mean that the paintings must “remain in exactly the [same] places”<sup>97</sup> on the same walls in the same gallery in Lower Merion, another interpretation might be plausible. Much of Dr. Barnes’s notion of aesthetics and the “Barnsean method,” which he was trying to teach, involved the visual relationships of different works of art to one another. Dr. Barnes routinely juxtaposed paintings from different time periods and hung student works next to master works and other non-art objects, such as tools, in “ensembles” to bring out aesthetic parallels in a way that was radical and much-criticized at the time and is still uncommon today.<sup>98</sup> Because Dr. Barnes used the physical curation of his art collection as his signature teaching tool, a court might interpret the words of paragraph thirteen of Dr. Barnes’s Trust Indenture, that “[a]ll the paintings shall remain in exactly the places,”<sup>99</sup> to refer to the juxtaposition and relation of the paintings and objects relative to one another in these ensembles on a gallery wall and not necessarily their location in the specific gallery. This interpretation would allow paragraph thirteen of the Trust Indenture to be satisfied if Dr. Barnes’s paintings were re-hung on the walls of a new Barnes Foundation gallery in Philadelphia, if they still were

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at para. 9.

<sup>95</sup> *Id.* at para. 13.

<sup>96</sup> See The Barnes Found., a Corp., 12 Pa. Fiduc. Rep. 2d 349, 357-58 (Ct. Com. Pl. Montgomery County Orphans’ Ct. Div. 1992); *infra* Part VI.A.

<sup>97</sup> Trust Indenture, *supra* note 9, at para. 13.

<sup>98</sup> Solano, *supra* note 83 (referring to these layouts of curation as “ensembles”).

<sup>99</sup> Trust Indenture, *supra* note 9, at para. 13.

hung "in exactly the [same] places"<sup>100</sup> relative to one another.<sup>101</sup>

Dr. Barnes did contemplate the failure of his trust and sought to provide for this possibility in a sort of built-in *cy pres* clause. Paragraph eleven of his Trust Indenture states:

Should the said collection ever be destroyed, or should it for any other reason become impossible to administer the trust hereby created concerning said collection of pictures, then the property and funds contributed by [Barnes] to [the Barnes Foundation] shall be applied to an object as nearly within the scope herein indicated and laid down as shall be possible, such application to be in connection with an existing and organized institution then in being and functioning *in Philadelphia, Pennsylvania, or its suburbs.*<sup>102</sup>

This language is significant because it illustrates that Dr. Barnes did contemplate a move of his art collection and the other assets of his estate from Lower Merion to Philadelphia if the trust did, in fact, fail. Dr. Barnes could have specified that in the event of a trust failure, the assets should go first to a like-minded institution in Lower Merion and then one in Philadelphia or its suburbs. However, he did not do this. One could argue that Dr. Barnes effectively preferred a Philadelphia location over Lower Merion with his grammar and syntax by denoting the City of Philadelphia with a specific citation in paragraph eleven, and secondarily adding Lower Merion by conjunction in the phrase "or its suburbs." Of course, Dr. Barnes knew that during his life no institution of similar scope was in Lower Merion and that the Philadelphia Museum of Art was in Philadelphia and had begun to collect modern art.

Finally, although Dr. Barnes did specify the Lower Merion location for his gallery, he did not explicitly prohibit the Barnes Foundation from moving from that site. By all accounts, Dr. Barnes was a particular, stubborn, and highly-opinionated man. If he did not want the Barnes Foundation to move, he could have included an explicit clause in his trust mandating that the Barnes Foundation never relocate from its current site. He did not make this specification.

Thus, from the Bylaws and the Trust Indenture, Dr. Barnes clearly wanted his art collection to live on after his death as it was when his life ended. Dr. Barnes wanted the Barnes Foundation to remain in the same location in Lower Merion, on the same property as the arboretum, unchanged, with the paintings as he left them. All things being equal, Dr.

<sup>100</sup> *Id.*

<sup>101</sup> Interview with Carl A. Solano, Phila., Pa. (Apr. 1, 2004) (discussing that this interpretation is precisely how the trustees and the court have interpreted the Trust Indenture). The court affirmed this interpretation in its recent ruling. See Ott Decree at 38-41.

<sup>102</sup> Trust Indenture, *supra* note 9, para. 11 (emphasis added).

Barnes likely would prefer that his art collection remain in Lower Merion rather than move to Philadelphia. That the intention of the testator is paramount is axiomatic.

However, all things most certainly are not equal, and relocating is not a question of mere preference. If the Barnes Foundation remains in Lower Merion, it will remain in its precarious financial position. However, if the Barnes Foundation moves to Philadelphia, it will receive a potentially life-saving infusion of funds in excess of \$150 million.<sup>103</sup> The doctrine of deviation is a tool of trusts and estates developed to deal with precisely this type of situation.

Restatement (Second) section 381 is entitled “Deviation from Terms of the Trust.”<sup>104</sup> This section of the Restatement (Second), which has been adopted by the Commonwealth of Pennsylvania,<sup>105</sup> states:

The court will direct or permit the trustee of a charitable trust to deviate from a term of the trust if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust.<sup>106</sup>

Comment d to section 381 of the Restatement (Second) on “[c]hange of circumstances”<sup>107</sup> states that in the circumstances above, “[I]f necessary to carry out the purposes of the trust, the court may direct or permit the trustee to do acts which are not authorized or are forbidden by the terms of the trust.”<sup>108</sup> Comment e to this section of the Restatement (Second) allows the court to permit a trustee to sell land bequeathed for the purpose of maintaining a charitable institution and use the proceeds to rebuild the institution somewhere else if the maintenance of the institution has become impracticable on that parcel of land.<sup>109</sup> This relocation is permitted even if the testator forbade sale of the land or relocation of the institution.<sup>110</sup> However, the comment also states that “if the maintenance of the institution on the land devised was an essential part of the testator’s purpose, the court will not direct or permit the trustee to maintain the

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<sup>103</sup> This is a strange situation of outside forces, by nature of their conditional offer, causing the court to change a testator’s trust in a significant way through the doctrine of deviation. If the offer of aid were not contingent on a relocation, the trustees likely would not have petitioned the court for deviation to move the Barnes Foundation from Lower Merion to Philadelphia. If the trustees had petitioned for such a move, their request almost certainly would have been denied in court because a move to Philadelphia would not have been perceived as necessary for the Barnes Foundation’s survival.

<sup>104</sup> See RESTATEMENT (SECOND) § 381 (1957).

<sup>105</sup> See *In re Barnes Found.*, 684 A.2d at 123; discussion *infra* Part IV.

<sup>106</sup> RESTATEMENT (SECOND) § 381 (1957).

<sup>107</sup> *Id.* at cmt. d (emphasis omitted).

<sup>108</sup> *Id.* at cmt. d.

<sup>109</sup> *Id.* at cmt. e.

<sup>110</sup> *Id.*

institution on other land.”<sup>111</sup>

The doctrine of deviation is the mechanism that the trustees of the Barnes Foundation used to persuade the court to grant their request to move the Barnes Foundation from Lower Merion to Philadelphia.<sup>112</sup> Although this case has no impossibility or illegality, the trustees argued that Dr. Barnes did not anticipate the current circumstances, including years of costly litigation and local zoning restrictions limiting visitors, which have depleted the Barnes Foundation’s endowment. For this reason, the trustees claimed that compliance with the terms of Trust Indenture and Bylaws, which situate the Barnes Foundation in its current location in Lower Merion, would “defeat or substantially impair the accomplishment of the purposes of the trust”<sup>113</sup> according to the Restatement (Second) and that the proposed move, therefore, was necessary.<sup>114</sup> The trustees of the Barnes Foundation defined this purpose or “ultimate objective” as “promoting the advancement of education and appreciation of the fine arts.”<sup>115</sup> This is the same way Dr. Barnes defined his purpose in both his Trust Indenture and the Bylaws.<sup>116</sup>

If the court did not find that “compliance would defeat or substantially impair the accomplishment of the purposes of the trust,”<sup>117</sup> the trustees petitioned the court to adopt section 66 of the Restatement (Third).<sup>118</sup> In 2003, the American Law Institute published this more permissive rule on the power of the court to modify a trust because of unanticipated circumstances, but the Pennsylvania has not yet adopted it.<sup>119</sup> Section 66 of the Restatement (Third) states in pertinent part:

- (1) The court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation *will further the purposes of the trust.*<sup>120</sup>

<sup>111</sup> *Id.*

<sup>112</sup> See Barnes Second Amended Petition at 18, para. 60.

<sup>113</sup> RESTATEMENT (SECOND) § 381 (1957).

<sup>114</sup> See Barnes Second Amended Petition at 16, para. 48:

If the changes sought in this second amended petition, including the relocation of The Foundation’s gallery, are not made, the educational program of The Foundation may be seriously and detrimentally affected by The Foundation’s continued financial difficulties and the litigation costs and distractions that have plagued The Foundation for the past decade.

<sup>115</sup> Trust Indenture, *supra* note 9, at recital 1; Bylaws, *supra* note 3, at Article II; Prehearing Brief of the Barnes Foundation Regarding Legal Issues to be Addressed by the Court at 8, 10, *In re Barnes Found., a Corp.* (No. 58,788) [hereinafter Prehearing Brief].

<sup>116</sup> See Prehearing Brief at 10.

<sup>117</sup> RESTATEMENT (SECOND) § 381 (1957).

<sup>118</sup> See Prehearing Brief at 6.

<sup>119</sup> *Id.*

<sup>120</sup> RESTATEMENT (THIRD) § 66 (2003) (emphasis added).

While the Restatement (Second) requires a finding that “compliance [with a specific provision] would defeat or substantially impair the accomplishment of the purposes of the trust,”<sup>121</sup> the Restatement (Third) would allow deviation merely if “the modification or deviation [would] further the purposes of the trust”<sup>122</sup> if the court finds the specific provisions about location to be “administrative” in nature.<sup>123</sup>

With these legal tools at their disposal, the trustees of the Barnes Foundation presented modified versions of the Bylaws and Trust Indenture to the court for its approval. The trustees presented their specific requested deviations from the language of the Trust Indenture and Bylaws *en masse* by simply attaching new versions of the documents to their brief as they would like to see the documents reformed.<sup>124</sup> Perhaps the trustees used this method because no adversarial party in this proceeding opposed their requests for deviation in any significant way. The trustees did not propose specific changes to the document language in their brief. The trustees did not argue for their requested changes individually.<sup>125</sup> Rather, the trustees generally stated the intent of their proposed revisions. In fact, to determine the actual and specific deviations the trustees proposed to the Trust Indenture and Bylaws, one must examine the original documents and Exhibits D and E of the trustees’ Second Amended Petition side-by-side and compare the two, looking carefully for differences.<sup>126</sup> When one compares these documents, one can determine what the requested deviations were and how certain proposed changes go directly to the issue of the petitioned-for relocation of the gallery to Philadelphia.

Article I of the proposed bylaws of the Barnes Foundation modifies the “Purpose and Philosophy”<sup>127</sup> of the Barnes Foundation, stating that “[t]he corporation is formed *particularly* to promote the advancement of education and the appreciation of the fine arts; and for this purpose to erect, found and maintain, *in the Commonwealth of Pennsylvania*, an art gallery and . . . in connection therewith . . . an arboretum.”<sup>128</sup> In addition to qualifying and expanding Dr. Barnes’s stated purpose of “promot[ing] the advancement of education and the appreciation of the fine arts,”<sup>129</sup> as

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<sup>121</sup> RESTATEMENT (SECOND) § 381 (1957).

<sup>122</sup> RESTATEMENT (THIRD) § 66 (2003).

<sup>123</sup> Whether the court would find the location of Dr. Barnes’s trust to be administrative is unclear.

<sup>124</sup> See Barnes Second Amended Petition at exhibits D & E.

<sup>125</sup> In the Prehearing Brief at 20-23, the trustees of the Barnes Foundation did specify five paragraphs of the trust indenture “in addition to the changes sought to the gallery location and the Board of Trustees.” *Id.* at 20. The brief discussed the intentions surrounding the proposed changes to paragraphs 6, 9, 30, 33, and 34 but did not proffer the actual language of the proposed changes. *Id.*

<sup>126</sup> This is precisely what I did.

<sup>127</sup> *Id.* at exhibit D, Article I.

<sup>128</sup> *Id.* (emphasis added).

<sup>129</sup> Bylaws, *supra* note 3, at Article II.

stated in his original Bylaws with the word "particularly,"<sup>130</sup> this clause broadened the location of the "gallery and other necessary buildings"<sup>131</sup> from "the Township of Lower Merion, County of Montgomery, and State of Pennsylvania,"<sup>132</sup> to the "Commonwealth of Pennsylvania."<sup>133</sup> This change made the move of the Barnes Foundation from Lower Merion to Philadelphia consistent with this term of the trust.

Article II of the proposed bylaws was devoted to "Offices"<sup>134</sup> of the Barnes Foundation. Dr. Barnes created no such clause in the original Bylaws. Article II maintains a "Registered Office"<sup>135</sup> in section 2.1, which will exist in the present location of the Barnes Foundation in Lower Merion "or at such other place within the Commonwealth of Pennsylvania the Board of Trustees may from time to time determine."<sup>136</sup> Additionally, section 2.2 of this proposed article would allow the Barnes Foundation to "have other offices at such other places as the Board of Trustees may from time to time appoint or the affairs of the corporation may require."<sup>137</sup> In this way, Article II of the proposed Barnes Foundation bylaws cleared the way for the Barnes Foundation to open another office or offices at any other location in Pennsylvania, including Philadelphia, in addition to or instead of the existing Lower Merion facility.

The trustees' proposed, modified version of the Trust Indenture also adds a clarification to paragraph nine. Paragraph nine in the original Trust Indenture read:

At the death of [Dr. Barnes] the collection shall be closed, and thereafter no change therein shall be made by the purchase, bequest or otherwise obtaining of additional pictures, or other works of art, or other objects of whatsoever description. Furthermore, after the death of [Dr. Barnes] and his wife, no buildings, for any purpose whatsoever, shall be built or erected on any part of the property of the Donee.<sup>138</sup>

The trustees proposed the following additions at the end of this original paragraph nine. First, they limited the last sentence "no buildings, for any purpose whatsoever, shall be built or erected on any part of the property of the Donee"<sup>139</sup> with the phrase "in Merion, Montgomery County, Pennsylvania."<sup>140</sup> This addition restricted any new buildings on the exist-

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at Article II.

<sup>132</sup> *Id.*

<sup>133</sup> Prehearing Brief at exhibit D, Article I.

<sup>134</sup> *Id.* at Article II.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Trust Indenture, *supra* note 9, at para. 9.

<sup>139</sup> Barnes Second Amended Petition at exhibit E para. 9.

<sup>140</sup> *Id.*

ing property but allowed new buildings to be built on other property that the Barnes Foundation currently owned or might acquire in the future, including any site purchased, leased, or donated in the City of Philadelphia.<sup>141</sup> Judge Ott explicitly granted this proposed change in his recent opinion.<sup>142</sup>

The trustees proposed no changes to paragraph thirteen of the original Trust Indenture, which specified that “[a]ll the paintings shall remain in exactly the places they are at the time of the death of [Barnes] and his . . . wife.”<sup>143</sup> This passage supports both the trustees’ and the court’s interpretation that the art ensembles must hang as Dr. Barnes left them but that they are not required to remain in the same exact physical location in space on the walls in the current Barnes Gallery in Lower Merion.

These deviations allow the Barnes Foundation to move its galleries from Lower Merion to Philadelphia, satisfying the conditions of the offer set by the Pew Trust and the Lenfest Foundation if the Barnes Foundation continues to hang Dr. Barnes’s paintings in the same ensemble relationships as Dr. Barnes had left them in Lower Merion.<sup>144</sup>

#### **V. RELOCATION DEVIATION: RELEVANT PENNSYLVANIA COMMON LAW ON DEVIATION**

A proper analysis of the recent Barnes Foundation matter should involve the examination of two bodies of case law. First, one must explore Pennsylvania common law on deviation to get a general sense of how

<sup>141</sup> In addition, the trustees proposed to add the modifier “gallery” to the first line in the original paragraph nine, so that it would read, “At the death of [Barnes], the *gallery* collection shall be closed . . . .” *Id.* (emphasis added). They then proposed to add the following descriptive sentence to the end of the modified last sentence of paragraph nine of the Trust Indenture: “For the purposes of this Indenture, the term ‘gallery collection’ shall mean the paintings and other objects of art displayed as ensembles in the gallery then located in Merion, Montgomery County, Pennsylvania at the time of the Donor’s death.” *Id.* This seems to clear the way for starting another “Barnes collection” if the original collection acquired by Dr. Barnes himself remains intact.

<sup>142</sup> Ott Supplemental Decree at 1. The day after the release of the Ott Decree, which permitted the Barnes Foundation to move from Lower Merion to Philadelphia, Philadelphia Mayor John Street announced that the Barnes Foundation could move to a lot between 20th and 21st Streets along Benjamin Franklin Parkway, next door to the Rodin Museum. This is the current site of the Youth Study Center, a juvenile detention hall that will be demolished and relocated to North Philadelphia, and the Barnes Foundation may be able to start construction on its new facility by the end of 2005. Patricia Horn, *Youth Center is Barnes’ New Site*, PHILA. INQUIRER, Dec. 15, 2004, at A1, available at <http://www.philly.com/mld/inquirer/10417969.htm> (last visited Jan. 10, 2005).

<sup>143</sup> Barnes Second Amended Petition at exhibit E para. 13; *see also* Trust Indenture, *supra* note 9, at para. 13.

<sup>144</sup> The trustees of the Barnes Foundation also proposed changes to paragraphs 10, 33 and 34 of the Trust Indenture that would allow the trustees to sell, loan, or dispose of any art not currently hanging in the “gallery,” to hold fund-raising events for the Barnes Foundation and others at the Barnes Foundation, and to exhibit art that does not belong to the Barnes Foundation. Judge Ott explicitly granted these suggested changes in Ott Supplemental Decree at 1.

Pennsylvania applies the doctrine. Second, one should consider with particular interest the body of case law specifically concerning the Barnes Foundation. Much of this extensive record of Barnes Foundation litigation concerns prior requests for deviation from Dr. Barnes's trust that the Pennsylvania courts have granted, denied, or granted in a modified form. By contrast, general Pennsylvania case law on deviation is highly specific and of only limited use as precedent because courts decide cases of deviation on unique facts and testamentary documents, which are awkward, if not impossible, to apply to the equally unique, different facts of the Barnes Trust Indenture and Bylaws. As such, this Article will consider prior Barnes case law separately from Pennsylvania's general common law because Barnes case law forms the most instructive and relevant subset of Pennsylvania common law on deviation.

Pennsylvania common law is quite permissive on the issue of deviation.<sup>145</sup> Absent an express prohibition against the requested deviation,

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<sup>145</sup> See *In re Estate of Coleman*, 317 A.2d 631 (Pa. 1974) (permitting deviation to strike a provision that required trustees to be married to Protestants); *In re Trust Mintz*, 282 A.2d 295 (Pa. 1971) (permitting deviation to invest unevenly in family trusts because the family business was in trouble); *In re Longbotham's Estate*, 29 A.2d 481 (Pa. 1943) (permitting deviation to allow the use of the trust principal to repair buildings in order that they not be condemned); *In re Mears' Estate*, 149 A.157 (Pa. 1930) (permitting deviation to give money to Jefferson rather than Harvard when Harvard refused the conditions of the gift); *In re Kramph's Estate*, 77 A. 814 (Pa. 1910) (permitting deviation to give money to an institution of learning outside the city when no qualifying church was in the city); *Avery v. Home for Orphans of Odd Fellows of Pa.*, 77 A. 241 (Pa. 1910) (allowing trust funds to be used to facilitate a change in location of the charitable home for orphans when the location had been specified in the trust because the location indicated by the testator was merely for purposes of identifying the place); *Brock v. Pa. Steel Co.*, 52 A. 190 (Pa. 1902) (permitting deviation to sell land for fear that value of buried ore would fall despite a prohibition against the sale of the ore); *In re Trust of Hirt*, 832 A.2d 438 (Pa. Super. Ct. 2003) (permitting deviation to adopt a funding proposal that would solve a problem with the trust's expenses); *Leigh Univ. v. Hower*, 46 A.2d 516 (Pa. Super. Ct. 1946) (permitting deviation to allow the sale of land without approval of court in the county specified by testator); *In re Rothschild's Estate*, 60 Pa. D. & C.2d 337 (Ct. Com. Pl. Phila. County 1973) (permitting deviation to move a synagogue to Wynnewood, even though a West Philadelphia neighborhood had been specified by testator); *Kirk Estate*, 38 Pa. D. & C.2d 532 (Ct. Com. Pl. Northumberland County 1965) (permitting deviation to allow for the sale of land for less than the amount specified by the testator); *Weaver Trusts*, 43 Pa. D. & C.2d 245 (Orphans' Ct. Adams County 1967) (permitting deviation to strike the racial requirement of a scholarship); *Wright Trust*, 43 Pa. D. & C.2d 181 (Orphans' Ct. Crawford County 1967) (permitting deviation to allow for the merger of companies); *Johnson Estate*, 15 Pa. D. & C.2d 407 (Orphans' Ct. Phila. County 1958) (permitting deviation to move an art collection from the testator's home gallery to the Philadelphia Museum of Art); *Wood Estate*, 12 Pa. D. & C.2d 577 (Orphans' Ct. Montgomery County 1957) (permitting deviation to distribute excess money from a fund for maintenance of heirs' grave site); *Magee Estate*, 1 Pa. D. & C.2d 447 (Orphans Ct. Phila. County 1954) (permitting deviation to change the location and plan of a convalescent home because of a change in medical trends); *Grace Evangelical Lutheran Church of Norristown Petition*, 81 Pa. D. & C. 206 (Orphans' Ct. Montgomery County 1951) (permitting deviation to combine various specific trusts for the general benefit of a church). But see *In re Estate of Banes*, 305 A.2d 723 (Pa. 1973) (denying deviation for the sale of land carried out against express provisions of the

and sometimes despite it, Pennsylvania's courts seldom deny reasonable requests for deviation from the testator's terms. This may be, in part, because of the structural bias in favor of deviation discussed above—most requests under the doctrine are effectively made unopposed. The following cases deserve special attention because, in various respects, they are similar to the requests of the trustees in the recent Barnes Foundation matter. These cases are: *Hermann*,<sup>146</sup> *Johnson*,<sup>147</sup> *Rothschild*<sup>148</sup> *Toner*<sup>149</sup> *Avery*,<sup>150</sup> and *Magee*.<sup>151</sup>

The trustees and the amici mentioned only *Johnson* and *Magee* in their briefs to the court. Footnote five of the Prehearing Brief of the Amicus Curiae briefly cited *Johnson* for the proposition that "Barnes did not intend that his art should do the greatest good for the greatest number. And he had no obligation to do so."<sup>152</sup> The trustees of the Barnes Foundation cited *Magee* in their Prehearing Brief as an example of their proposition that "[t]he primary purpose of court oversight is to ensure that institutions such as The [Barnes] Foundation remain faithful to their founder's central purpose—and not to provide an additional layer of management on top of the institution's board of trustees and management staff."<sup>153</sup>

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trust such that trustees had to buy out another party's option to buy the land with the trust receiving only twenty-five percent of profits from the sale); *In re Estate of Hermann*, 312 A.2d 16 (Pa. 1973) (denying deviation to end a museum trust that was to last "in perpetuity" despite the previous permitted deviation allowing relocation of the art from a dilapidated museum building to a library); *In re Estate of Kelsey*, 143 A.2d 42 (Pa. 1958) (denying deviation to invest in common stocks when the testator explicitly prohibited such investments); *In re Toner's Estate*, 103 A. 541 (Pa. 1918) (previously allowing deviation to move the location of school and sell the land when the move was expressly prohibited but denying the failure of the trust).

<sup>146</sup> 312 A.2d 16 (1973).

<sup>147</sup> 15 Pa. D. & C.2d 407.

<sup>148</sup> 60 Pa. D. & C.2d 337.

<sup>149</sup> 103 A. 541.

<sup>150</sup> 77 A. 241.

<sup>151</sup> 1 Pa. D. & C.2d 447.

<sup>152</sup> Prehearing Brief of the Amicus Curiae, Students of the Barnes Foundation, Sue S. Hood, William Phillips and Harvey A. Wank at n.5, *In re Barnes Found., a Corp.* (No. 58,788). The full text of the footnote is as follows:

As Judge Klein observed in *Johnson Estate*, "[w]e must not lose sight of the all-important fact that this collection belonged to John G. Johnson, testator. He had the exclusive right to dispose of it in any lawful manner he chose." *Johnson Estate*, 15 D. & C.2d 407, 425-426 (O.C. Phila. 1958) (challenging the transfer of Johnson's paintings from his gallery at 510 S. Broad Street to the Philadelphia Museum of Art against the express provisions of Johnson's Codicil and a subsequent agreement with the City of Philadelphia). "If testators are given to understand in future that their purposes, the same not being in violation of law or public policy, are to be set aside because the administrators of the charity think that something else is better, charitable and public bequests of this character will certainly diminish in number and importance." *Johnson's Estate*, 30 Dist. R. 387, 389 (O.C. Phila. 1921).

*Id.*

<sup>153</sup> Prehearing Brief of the Barnes Foundation Regarding Legal Issues to be Addressed

The idea that the court may not have been sufficiently aware of or interested in these relevant and significant cases is both confusing and troubling. Perhaps this phenomenon is a factor of this type of litigation in which the trustees posit the Restatement (Second) as the legal standard and vociferously argue that the facts of their case fall within its parameters rather than citing to case law precedent. Nonetheless, this phenomenon is not an excuse to neglect Pennsylvania's general common law on deviation.

More likely, the trustees have focused almost all their legal energies and arguments on prior Barnes case law to the exclusion of general Pennsylvania common law on deviation. Their focus is understandable. Prior Barnes case law comprises the majority of Pennsylvania common law on the subject of deviation. The Barnes cases are also of particular relevance, given that the court, once again, was interpreting the same documents created by Dr. Barnes. However, the particular request for deviation in the recent case was different from many of the other cases in the Barnes litigation library. This "one-time" request for deviation to relocate was not similar to many of the other prior requests in this body of litigation because permission to relocate is fundamental, irreversible, and permanent. For this reason, looking only at prior Barnes Foundation law would not do. The court also should have examined other Pennsylvania common law cases in which deviation was requested to permit a change in location. In this regard, the *Hermann*, *Johnson*, *Rothschild*, *Avery*, and *Magee* cases are of particular importance.

#### A. Alternative Art Collections

Two cases within the body of Pennsylvania common law on deviation concern other testators' collections of art: *Hermann* and *Johnson*. These cases are of particular relevance to the facts and subject matter of the Barnes deviation request. In both cases, the testator had devised a testamentary scheme through which his art collection was to be exhibited in perpetuity under certain specifications, including location. The court did not fully grant or completely deny specific requests to terminate the trust in *Hermann* and to relocate the collection permanently and sell the property in *Johnson*. Rather, in both *Hermann* and *Johnson*, the courts devised a third way to modify each trust, compromising between holding fast to the intent of the testator and granting the requested deviation.

In *Hermann* the testator had intended his home to serve as a free

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by the Court at 19-20, *In re Barnes Found.*, 672 A.2d 1364. The complete text of the trustees' reference to *Magee* is as follows:

*See, e.g., In re Magee Estate*, 1 Pa. D. & C.2d 447, 463 (O.C. Phila. 1954) ("It would be folly for the auditing judge, who is not a prophet, to attempt to blueprint [the donor's core] purpose. The policies in operating this hospital must never become static; they must be constantly surveyed by the board so that the hospital's facilities will be best adapted to existing needs within the limitations of the hospital's facilities.").

*Id.* at 20.

public museum for his art collection in perpetuity.<sup>154</sup> In this case, the Supreme Court of Pennsylvania maintained a museum trust despite a petition to nullify it and allow the trustees to distribute the maintenance funds to the beneficiaries of Mr. Hermann's residual estate.<sup>155</sup> However, the Court of Common Pleas of Allegheny County had previously authorized a requested deviation allowing the trustees to sell the land and the building and to transfer the art collection to the public library. The court authorized the termination of the maintenance and the distribution of the trust assets to the residual beneficiaries because the testator's home had become dilapidated and the maintenance trust lacked funds to maintain the existing facility or to build a new one. According to the Supreme Court of Pennsylvania, the lower court had granted the request for termination of the museum trust "for the sole reason that the art it is designated to support 'does not warrant the maintenance of a building' and that the public continues to ignore the display."<sup>156</sup> In reversing the lower court, the Pennsylvania Supreme Court stated that "[i]t is difficult to conceive of a subject less appropriate for judicial review than the quality of an artistic work."<sup>157</sup> Stating that the maintenance trust had sufficient funds to buy land and build a new building for the museum, and noting the intention of the trustees of the museum trust to build within five years, the court refused the trustees' request to nullify the testator's trust and distribute the maintenance funds to the beneficiaries of Mr. Hermann's residual estate.<sup>158</sup>

The facts of *Hermann* and the stipulations of the testator's will, particularly the structure of two related trusts that allowed for an adversarial proceeding, are specific to that case. *Hermann* is distinguishable from *Barnes* in that Mr. Herman's art collection does not seem to be of value or interest to the public, although the Pennsylvania Supreme Court deemed this fact irrelevant. In addition, in *Hermann*, the residual heirs had a financial interest in the termination of the museum. Although no individuals sought to terminate the indenture for personal gain in the recent

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<sup>154</sup> 312 A.2d 16. The testator had devised a testamentary scheme of two separate but related trusts. The first "museum trust" contained the art, residence, and land, which was to serve as a free, public museum in perpetuity. The second "maintenance trust," created with a \$75,000 transfer of funds at Mr. Hermann's death, was to be used to maintain the museum and property in the first trust as long as the museum existed. If the museum ceased to exist at any point, however, Mr. Hermann stipulated that the money from the maintenance trust would be used for the same purposes as his residual estate. Apparently, the trustees of the maintenance trust wanted the museum trust to be nullified so they could distribute the maintenance trust funds to the beneficiaries of Mr. Hermann's residual estate. Thus, the adversarial proceeding in this case between the trustees of the two different trusts resulted in deviation to move the museum temporarily and then to build a new building rather than to dissolve the museum entirely.

<sup>155</sup> See *id.* Again, this seems another case of trustees' acting unopposed, not out of the best interests of the testator, but to defeat the interests of the testator in favor of the residual beneficiaries.

<sup>156</sup> *Id.* at 21.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

Barnes Foundation case, there was a great public and political interest in the move.

*Hermann* is instructive because it shows that when presented with a proposed deviation by a petitioner, the court might choose a third way, which falls between taking action on the request and maintaining the status quo. Just as the Pennsylvania Supreme Court permitted deviation to move Hermann's art collection to the public library to remedy the problem of the dilapidated museum rather than granting the requested termination of the museum trust, the Montgomery County Orphans' Court could have divined a third way or middle ground solution between granting the move to Benjamin Franklin Parkway and a completely denying deviation from the trust.

Furthermore, as the *Hermann* case makes clear, the court should not make a judicial determination concerning the quality of art. Certainly, no judge would dare pronounce the artwork in the Barnes Gallery unfit for museum exhibition, as did the lower court in *Hermann*. Barnes's collection is now widely acknowledged to be of great artistic merit and financial value. However, one may assume from *Hermann* that the same rules on consideration of artistic merit would work in reverse. If this assumption is true, then the court must not posit its own artistic judgment that the public "deserves" to see this collection because of its aesthetic merit and that a new location on a museum row in Philadelphia will better facilitate this result. Rather, as in *Hermann*, the *Barnes* court must defer to the wishes and whims of the testator, Dr. Barnes.

*Johnson*<sup>159</sup> bears more than a striking resemblance to the facts of the recent Barnes Foundation matter. Citing the facts at length and the law only minimally, the court deviated from the words of the testator. As a result, the court granted deviation to move a collection of art that had been bequeathed to the City of Philadelphia from the home gallery of the testator to the Philadelphia Museum of Art.

The testator's original 1912 will created a gift of his art collection to the City of Philadelphia on the condition that the city would build an appropriate art gallery or museum to house it "as a whole . . . not . . . mingled in any way with any other collection or paintings or works of art,"<sup>160</sup> hire staff and a curator, maintain the gallery and collection, and never sell any of the paintings.<sup>161</sup> However, in 1917, the year of his death, "Mr. Johnson executed a codicil in which he changed completely his directions with respect to the housing of his art collection."<sup>162</sup> The codicil left the

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<sup>159</sup> 15 Pa. D. & C.2d 407. Dr. Barnes was aware of this testamentary scenario. During his life, Dr. Barnes actually proposed building an addition onto the Barnes Foundation gallery to hold Johnson's art collection, which he had willed to the City of Philadelphia. See also GREENFELD, *supra* note 2, at 92. The court did not deliver its opinion until seven years after Dr. Barnes's death.

<sup>160</sup> *Id.* at 409-11.

<sup>161</sup> *Johnson*, 15 Pa. D. & C.2d at 409.

<sup>162</sup> *Id.* at 412.

testator's home at 510 South Broad Street to the City of Philadelphia, together with the art collection, on the condition that the collection be housed in the testator's former residence and "maintained as a Museum—a Public Museum—to stand pretty much as it will be at my decease."<sup>163</sup> Johnson further "direct[ed] that [the residence] shall be forever kept up and maintained as such Museum in which my Art objects shall be exhibited," noting that "[t]his devise will save the need of the City contributing to build an Art Gallery, unless the house shall be so injured or destroyed as to require repairing or rebuilding."<sup>164</sup> If the home did fall into disrepair, the codicil directed that the gallery was to be restored or rebuilt "on the same site" as the bequeathed residence.<sup>165</sup> Mr. Johnson's intent was clear.

However, during the Great Depression, the funds from the estate became insufficient to maintain the gallery at 510 South Broad Street, and "without the knowledge or approval of the orphans' court," the trustees closed the gallery and moved Mr. Johnson's art collection to the Philadelphia Museum of Art, which by that time had been constructed.<sup>166</sup> According to the court, "[T]he move was stated to be a temporary one to save the expense of insurance and the rent of storage facilities required to house about two-thirds of the pictures which could not be displayed adequately at the Broad Street property."<sup>167</sup> The court noted that the closing of the gallery on Broad Street and the moving of Mr. Johnson's art collection to the Philadelphia Museum of Art was "a clear violation of the city's contract with the estate's executors."<sup>168</sup> The trustees petitioned the court to find it "exceedingly injudicious to exhibit the Johnson Collection at 510 S. Broad Street" and to permit a deviation to move the collection to the Philadelphia Art Museum on a permanent basis, rather than renovate 510 South Broad Street as the testator had intended and specified in his will.<sup>169</sup> The trustees asked the court to permit a further deviation that would allow them to sell the home gallery at 510 South Broad Street and pay the proceeds to the trust.

The court denied the outright sale of the Broad Street property, but it did reach a temporary conclusion that was based much more on public policy than on legal considerations. As the court put it, "The auditing judge is most reluctant to place the imprimatur of the court on the flagrant breach of trust which has persisted for so long in this case . . . [but] the removal of the collection to the Art Museum is fait accompli."<sup>170</sup> The court seemed torn between Mr. Johnson's clear intent that his art collection remain at his former residence on Broad Street and the two facts that:

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<sup>163</sup> *Id.* at 413.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 425.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 426.

<sup>169</sup> *Id.* at 416.

<sup>170</sup> *Id.* at 428.

"[T]he neighborhood of Broad and Lombard Streets is not at the present time a desirable place to rebuild the Johnson property as a museum in which to exhibit the collection . . . [and] the Art Museum on the [Ben Franklin] Parkway is an excellent place for such exhibition. . . ."<sup>171</sup> Chief among the court's policy considerations was "the tremendous change that [was] taking place in the physical appearance of central Philadelphia," and the fact that "the city was anxious to build a health center on the [Broad Street] site."<sup>172</sup>

At least in theory, policy considerations of this type are irrelevant and should not be considered by the court in deviation cases unless the trust would otherwise fail. What the public or the politicians may desire is of no import to the will of the testator; the court is supposed to consider only what the testator would have done in the situation. Here, Mr. Johnson likely would not have considered the city's interest in building a health center on the Broad Street site in the same way the court considered it—if he had considered it at all.

In the end, the court granted the trustees permission, albeit reluctantly, to store and display Mr. Johnson's art collection at the Philadelphia Museum of Art for a period of ten years, after which time the court would reconsider the situation. Furthermore, the judge authorized the trustee of the estate to lease the Broad Street property to the City of Philadelphia for a period of fifty years and gave the city permission to demolish the residence in its entirety so it could build a hospital on the site. The court explicitly noted that the collection belonged to Mr. Johnson and "[h]e had the exclusive right to dispose of it in any lawful manner he chose."<sup>173</sup> The court also quoted the admonition from the original opinion in the 1921 case:

If testators are given to understand in future that their purposes, the same not being in violation of law or public policy, are to be set aside because the administrators of the charity think that something else is better, charitable and public bequests of this character will certainly diminish in number and importance.<sup>174</sup>

Although the court noted these words, the court did not seem to pay particular heed to them.

In both *Johnson* and *Barnes*, a testator left his art collection in a charitable trust to be kept in a specific place. Johnson left his art collection for exhibit in his residence at 510 South Broad Street, which would be used as a museum; Barnes left his art collection in the Barnes Foundation galleries that he had built in Lower Merion. Johnson stipulated that his residence "be forever kept up and maintained as . . . [a] Museum" and

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<sup>171</sup> *Id.* at 431.

<sup>172</sup> *Id.* at 429, 432.

<sup>173</sup> *Id.* at 426.

<sup>174</sup> *Id.* at 427.

specified that if it fell into disrepair it was to be restored or rebuilt "on the same site."<sup>175</sup> By contrast, Barnes did not restrict the relocation of the Barnes Foundation. Thus, if the *Johnson* court had permitted a deviation to allow the Johnson collection to move despite the testator's restrictions, the *Barnes* court could have cited this persuasive authority in the absence of similar restrictions and allowed the relocation of the Barnes Foundation. Also, the fact that the City of Philadelphia had its own agenda to build a hospital on the Broad Street site in *Johnson* is similar to the agendas of the Pew Charitable Trust, the Lenfest Foundation and seemingly the Attorney General in this case. The priorities of these outsiders are distinct from those of Dr. Barnes.

Other than the *Barnes* cases, *Hermann* and *Johnson* are the only Pennsylvania cases concerning deviation of a testator's collection of art. While neither set of trustees was granted a request to deviate in full, in each case, the trustees were permitted to move the art collection from the location specified by the testator, although in *Johnson*, the move was perhaps for only a limited amount of time. In crafting these judicial solutions, the courts in *Hermann* and *Johnson* created compromises that sought to span the divide between the drastic deviations requested by the trustees and the contrasting clear intentions of the testator. These cases profess that, with regard to deviation, the quality of the art should not be an issue of concern for the court. In addition, irrelevant issues of public policy similar to those in the recent Barnes Foundation matter improperly influenced the court in *Johnson*. However, unlike the *Hermann* and *Johnson* case, the court in the recent *Barnes* litigation granted the trustees' full request for deviation, and it is easy to conclude that the great quality of Dr. Barnes's collection and the public policy issues at stake influenced the court's opinion.

#### B. Other Relocation Requests

Three other Pennsylvania cases on deviation concern relocation of entities other than testators' art collections. These cases are *Rothschild Estate*,<sup>176</sup> *Toner's Estate*,<sup>177</sup> and *Avery*.<sup>178</sup> In each of these cases, the Pennsylvania courts allowed the trustees to deviate from the testator's intention and to relocate the charitable entity.

##### 1. Rothschild Estate

In *Rothschild Estate* the Philadelphia County Orphans' Court permitted a deviation from the trust of Edward L. Rothschild to relocate a synagogue from West Philadelphia to Wynnewood, Pennsylvania over the ex-

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<sup>175</sup> *Id.* at 413, 428.

<sup>176</sup> 60 Pa. D. & C.2d 337.

<sup>177</sup> 103 A. 541.

<sup>178</sup> 77 A. 241.

pressed intentions of the testator.<sup>179</sup> The court officially stated that the doctrine of *cy pres* permitted the relocation of the synagogue,<sup>180</sup> but the case was probably closer to a case of deviation.

During his life, Mr. Rothschild had built a synagogue and school building for Congregation Beth El “on land situated in West Philadelphia to be selected and purchased by the donor” and left it in trust for the Congregation in 1915.<sup>181</sup> However, Congregation Beth El merged and the resulting Temple Beth Hillel-Beth El was located in Wynnewood, Pennsylvania.<sup>182</sup> Also, between 1915 and 1973, the neighborhood in West Philadelphia changed dramatically, such that a significant Jewish population ceased to exist in West Philadelphia and most of the members of Temple Beth Hillel-Beth El had moved to the western suburbs of the city.<sup>183</sup>

However, when creating his trust, Mr. Rothschild included specific provisions in case of a change of the neighborhood in West Philadelphia:

[I]n the event that the lot of ground on which said synagogue building is located should through a change in the neighborhood . . . in the opinion of a majority of the trustees . . . becomes unsuitable for synagogue purposes then and in that event said trustees shall have power and authority to sell said synagogue lot and building and the contents and from the proceeds purchase a suitable lot and erect a building *in West Philadelphia* for the use of said congregation the building to be the same in purpose object and name . . .<sup>184</sup>

Though Mr. Rothschild had specified that the synagogue be rebuilt in West Philadelphia, the court stated that because of intervening changes in the neighborhood, “There can be no doubt . . . that it is wholly impractical and probably impossible to continue the operation of a Jewish synagogue at Fifty-eighth and Walnut Streets or any other place in West Philadelphia.”<sup>185</sup> For this reason, and with the support of the Attorney General, the court allowed the transfer of funds to Temple Beth Hillel-Beth El conditioned on the construction of perpetual memorials in the Wynnewood synagogue to the Rothschild family, the reservation of the trustees’ rights into the future, and a restriction against Temple Beth Hillel-Beth El’s creating encumbrances on its property without court approval.<sup>186</sup>

Factually, this case is similar to the recent Barnes Foundation case, and it could have provided valuable persuasive authority for Judge Ott when he allowed the Barnes Foundation to move to Philadelphia. In both

<sup>179</sup> 60 Pa. D. & C.2d 337.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 338.

<sup>182</sup> *Id.* at 344.

<sup>183</sup> *Id.* at 350.

<sup>184</sup> *Id.* at 342 (emphasis added).

<sup>185</sup> *Id.* at 351.

<sup>186</sup> *Id.* at 352.

cases, the testators created charitable trusts, constructed the facilities in specific locales, and clearly intended the object of their gifts to remain in the original locations.

Just as the *Rothschild* court allowed Temple Beth Hillel-Beth El to take the remainder of the Rothschild gift with it to Wynnewood (in the form of the proceeds from fire insurance and the sale of the original real estate) when the judge found it "wholly impractical and probably impossible to continue the operation of a Jewish synagogue at Fifty-eighth and Walnut Streets,"<sup>187</sup> the *Barnes* court allowed the Barnes Foundation to relocate the assets of its charitable trust to Philadelphia because he found a similar impracticality or impossibility.

However, this impracticability in *Rothschild* was because of a change in the neighborhood, a condition that has not occurred in Lower Merion in the case of the Barnes Foundation. The impracticability of keeping the Barnes Foundation in Lower Merion is a result of the influence of a number of outside charitable groups, each with its own agenda, separate and distinct from that of Dr. Barnes. If the financial assistance contemplated by the Pew Charitable Trust and the Lenfest Foundation was not conditioned on a move from Lower Merion to Philadelphia, permission for such a move almost certainly would have been denied. Had the \$150 million gift been made to the Barnes Foundation with no restrictions, the Foundation likely could work with the Township of Lower Merion to make the Barnes Foundation succeed in its current location.<sup>188</sup>

This particular scenario—outside groups with their own agendas working to change a testator's trust through the use of a conditional offer in a way that the testator would arguably not have wanted—is both legally troubling and virtually unprecedented. Mr. Rothschild contemplated a sale of the original facility and real estate of Beth El Congregation, but still restricted any relocation to the original area of West Philadelphia, but Dr. Barnes, to the extent he contemplated a move, memorialized no such geographical restriction. In this sense, allowing a deviation for the Barnes Foundation to relocate from Lower Merion may be less a stretch than the deviation permitted in *Rothschild*.

## 2. Toner's Estate

In *Toner's Estate* the Supreme Court of Pennsylvania refused to de-

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<sup>187</sup> *Id.* at 351.

<sup>188</sup> At least part of the Township wanted this to happen. On February 18, 2004, the Lower Merion Board of Commissioners voted 14-0 to ask the Barnes Foundation to stay in its current location in Lower Merion. Ott Decree at 32. However, the trustees of the Barnes Foundation did not want to work with the Township; they wanted to move the Foundation to Philadelphia and get the influx of funds promised by Pew and Lenfest. As Judge Ott stated in the Ott Decree: "It is . . . clear that The Foundation has no interest in reaching out for the olive branch extended by the Township, and absent this first step, no resolution is possible. We have no way to force the Foundation's hand in this regard; and we will never know if a mutually-agreeable solution could have been fashioned." *Id.* at 38.

clare that a trust had failed.<sup>189</sup> James L. Toner died on January 6, 1899, and left a portion of his estate in trust to the Catholic Diocese of Pittsburgh for the establishment of a boys' school to be known as the Toner Institute.<sup>190</sup> Specifically, Toner's trust stated: "One portion of said residuary estate will consist of my farm . . . upon which I direct that . . . [the school be established.]"<sup>191</sup>

In 1911, the court granted the trustee's request for deviation to sell the coal buried below the testator's farm on the assertion that the coal could be "mined and removed without injury, inconvenience to, or interruption of, the use of said Toner Institute . . . "<sup>192</sup> Despite the trustee's claims, the coal mining did harm the land.<sup>193</sup> For this reason, the trustee petitioned the court again in 1913 for permission to move the school because the removal of the coal "has allowed the surface of said 100-acre farm, upon which said school is built, to fall in in a great number of places, and to render the larger portion of said farm unfit for use and dangerous to life."<sup>194</sup> The court also granted this petition<sup>195</sup> and subsequently granted permission for the trustee to take out a \$15,000 mortgage on the property.<sup>196</sup> The court granted all the trustee's petitions without informing the testator's next of kin.<sup>197</sup>

The appellants in *Toner's Estate* petitioned the court to vacate several of its previous orders, to annul the trust on the grounds of impossibility because of the trustee's negligence, and to award the funds to the testator's surviving heirs.<sup>198</sup> The court refused, finding the testator did not intend that the school "be located upon the farm designated in his will, and nowhere else" and that the will was a document that spoke for itself.<sup>199</sup> The court further found significant the lack of an express prohibition in the will against selling the property, purchasing other property, or relocating the school.<sup>200</sup> Though the court acknowledged that the trustee had been less than careful or diligent, in the end, the court did not find grounds to distribute the funds from the estate to the heirs under the doctrine of *cy pres* or any other doctrine.<sup>201</sup>

This case is instructive to the recent Barnes Foundation case as to the role of location in a trust. Like the Toner Estate, the Barnes Foundation is in its current situation, in large part, because of the negligence and mis-

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<sup>189</sup> 103 A. 541.

<sup>190</sup> *Id.* at 542.

<sup>191</sup> *Id.* (emphasis added).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 543.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 543-44.

management of its previous trustees. Also, as in *Toner*, while Dr. Barnes clearly intended his foundation to continue at its Lower Merion location, he did not expressly prohibit the sale of his real estate or the relocation of his gallery in the detailed Trust Indenture. Indeed, Dr. Barnes was so detailed and meticulous in his attempt to control his art collection from the grave that one might treat his failure to prohibit a relocation of the Barnes Foundation explicitly as a tacit acceptance that this possibility might one day come to pass.

### 3. Avery

In *Avery* the Supreme Court of Pennsylvania allowed trustees to use trust funds to facilitate a change in the location of a charitable home for orphans when the trust had specified a location.<sup>202</sup> In this case, the testator left the remainder of his estate to the Home for Orphans of Odd Fellows of Pennsylvania "at Twentieth and Ontario Streets, Philadelphia, to be used for the purpose of erecting a wing or addition to its building . . . to be called The James D. Thompson Memorial."<sup>203</sup> The trustees of the Home for Orphans wanted to sell the property at the Twentieth and Ontario Streets location and move the home to a new location where they would build a new building, including a wing in the name of the testator.<sup>204</sup>

The court allowed the trustees to use the testator's gift for the benefit of the home, even if it moved. "There is nothing in [the testator's] bequest to it to indicate that its continuance at that location was a condition upon which the bounty was to be enjoyed, and the location was manifestly given by the testator merely for the purpose of fully identifying the institution."<sup>205</sup> The court further surmised that "it would be doing violence to the manifest intention of the benefactor to forbid his bounty to follow the home where it will be enabled by such bounty to increase its usefulness, which he had in view."<sup>206</sup>

Again, *Avery* is instructive to the *Barnes* court. The two cases do have some differences: in *Avery* the testator, Thompson, made a charitable donation to an existing orphanage and, perhaps, needed to identify it by location, and Dr. Barnes created the Barnes Foundation himself in Lower Merion. However, in neither case did the testator indicate that the gift was contingent on the requirement that the institution remain at its present location. This fact was even more significant in the Barnes Foundation litigation because Dr. Barnes created the Barnes Foundation, out of his own imagination. The Barnes Foundation was a peculiar institution then and still is now; no other art education facility or museum is quite like it. Given all of Dr. Barnes's specifications and requirements for the Barnes

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<sup>202</sup> 77 A. 241.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 242.

<sup>206</sup> *Id.*

Foundation, the fact that Dr. Barnes never specified that the Foundation was to remain in Lower Merion in perpetuity is potentially significant.

As seen in *Rothschild, Toner, and Avery*, the Pennsylvania common law on general deviation to relocate is very permissive, and allowed the temporary relocation of the art collections in *Hermann and Johnson*. According to these cases, Pennsylvania common law liberally permits deviation to allow the trustees of an estate to relocate a charitable entity in the face of the clearly expressed intent of the testator that the entity be situated in a certain location. Unless the testator includes a provision expressly prohibiting a move, or makes the gift contingent on the charitable entity's remaining in a specified location, Pennsylvania courts clearly will permit deviation to relocate. The courts might even permit deviation over a testator's express provision against relocation, but Pennsylvania has not seen such a case. In any event, Dr. Barnes did not expressly prohibit relocation of the Barnes Foundation in the Trust Indenture. If he had done so, Judge Ott could have denied the Foundation's petition for deviation outright or would have been more reluctant in granting it.

### C. Mission Modified

In one Pennsylvania case, *Magee Estate*,<sup>207</sup> the court used the doctrine of deviation to modify the entire mission of the testator. As a byproduct of this greater conceptual deviation, the trustees were able to relocate the facility. The Orphans' Court of Philadelphia County permitted deviation from the testator's location and plan for a convalescent home so that the testator's gift could change with medical trends.<sup>208</sup>

When Anna J. Magee died on December 12, 1923, she left a trust "to commemorate [her] family name by rendering lasting service to the poor and by increasing the usefulness of the hospitals in [her] native city, Philadelphia."<sup>209</sup> Specifically, the testator wanted to:

[F]ound and endow an institution to be called 'The Magee Memorial Hospital for Convalescents,' whose object shall be the relief of the general hospitals of the City of Philadelphia from the burden of the support of patients who have passed through the active stages of acute illness or have recovered from injuries or operations, during a portion of that time which must necessarily elapse before they are able to resume their accustomed occupations or duties.<sup>210</sup>

Miss Magee left \$600,000 to purchase an appropriate site "not on the Main Line" and to build and expand the building.<sup>211</sup> She made further

<sup>207</sup> 1 Pa. D. & C.2d 447.

<sup>208</sup> *Id.* at 468.

<sup>209</sup> *Id.* at 450.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 450-51.

specifications about the architecture of the building—the words “Ad Dei Gloriam” were to be inscribed in gold above the door and portraits of her parents were to be hung in a specific place.<sup>212</sup> Miss Magee also named a board of twelve trustees for the institution.<sup>213</sup>

In the next twenty-five years, this board met periodically but had monetary and other setbacks that delayed the construction of the facility.<sup>214</sup> In 1950, a report assessed the testator’s model of a convalescent hospital as essentially obsolete and recommended the board “establish as a hospital for modern care of convalescents ‘a rehabilitation center’ and for research and professional education in physical medicine and rehabilitation.”<sup>215</sup> For this reason, the trustees petitioned the court for a deviation to sell the land and build the type of facility recommended by the report.<sup>216</sup>

In granting the trustees’ petition for deviation, the court redefined Magee’s purpose in creating her trust as follows:

Miss Magee displays unique vision back of which there must have been constant and intense preparation and study. The many revisions of her will indicate an alertness to changing conditions and her constantly increasing devotion to the poor. Her memory should be permanently respected by the city and her example considered by all possessors of wealth because of her solicitude and philanthropy for the benefit of the poor working man and woman of Philadelphia, irrespective of race, color, nativity or creed. *That* was her main purpose.<sup>217</sup>

The court communicated Magee’s main purpose in terms of two goals: “[T]he maximum direct benefit to the greatest number of the poor of Philadelphia and that which will do the utmost to relieve our hospitals.”<sup>218</sup>

*Magee* is another persuasive case for the *Barnes* court. The trustees of Magee’s estate deemed her specific model for a hospital for convalescents to be obsolete.<sup>219</sup> They petitioned for deviation to move the planned facility and to create a hospital for physical medicine and rehabilitation. This proposed hospital was distinctly different from the one that Miss Magee had envisioned. In granting this request, the court significantly changed the character of the facility that resulted from Magee’s beneficence by modernizing the interpretation of what it meant to “increas[e] the usefulness”<sup>220</sup> of Philadelphia’s hospitals to the poor in order to incorporate present day public policy goals. The court also permitted a relocation

<sup>212</sup> *Id.* at 451.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 452-53.

<sup>215</sup> *Id.* at 453-54.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 462 (emphasis added).

<sup>218</sup> *Id.* at 463 (emphasis omitted).

<sup>219</sup> *Id.* at 447.

<sup>220</sup> *Id.* at 450.

of the facility.

In similar fashion, the *Barnes* court could have defined Dr. Barnes's purpose as one of art education and enlightenment of the plain people. If this purpose were used, the argument would have flowed naturally that few so-called "plain people" live in Lower Merion and that a Philadelphia location would be more accessible and effective at reaching Barnes's target audience. Furthermore, the court could have found the specific model outlined in the Trust Indenture to be outmoded and educationally obsolete. The contemporary, wider but shallower, model of public art education is one that revolves around attracting larger audiences to "blockbuster" museum exhibitions. These exhibitions have a much greater focus on arts education than they did in Dr. Barnes's day, though they do not educate nearly to the extent of the Barnes Foundation. However, Dr. Barnes's educational methods were far from the norm when he was alive, and he preserved them in perpetuity through his Foundation.

One can see that Pennsylvania common law is very permissive on the issue of deviation as it relates to the relocation of charitable entities. Cases such as *Hermann, Johnson, Rothschild, Toner, Avery*, and *Magee*, while often distinguishable on the facts, could have enlightened the court's analysis because they paint a broad picture of Pennsylvania common law on deviation for the purpose of relocation. While the prior Barnes case law is important because the documents interpreted are the same and they comprise the judicial history of this case, that case law does not specifically address the issue of relocating a charitable entity. The cases discussed above do, and they indicate quite clearly that absent an express prohibition against a requested deviation, and sometimes despite it, reasonable requests for deviation to relocate a charitable entity are almost never denied by the Pennsylvania courts. This may be due to the structural bias in favor of deviation because most of the time, trustees' requests effectively are unopposed. This was the situation before the recent *Barnes* court.

## **VI. PRECEDENTIAL DEVIATION: PRIOR BARNES FOUNDATION CASE LAW**

The most important body of case law regarding the recent Barnes Foundation case is the body of law made up of previous requests for deviation from the Trust Indenture and Bylaws themselves. This substantial collection of case law traces a long history of court-sanctioned deviations from the trust since Dr. Barnes's death in a car accident in 1951.<sup>221</sup> The Barnes case law also makes up a significant portion of the general Pennsylvania common law on deviation, as discussed above. Because the Trust Indenture and the Bylaws previously interpreted by the courts are the same documents the court interpreted in the most recent Barnes Foundation case, these cases are of greater precedential weight than the other non-Barnes cases that comprise the Pennsylvania common law on devia-

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<sup>221</sup> Barnes Order to Amend at 5 n.7.

tion.

The past litigation history regarding Dr. Barnes's trust technically is not binding as law of the case,<sup>222</sup> because the request for deviation to allow the relocation of the Barnes Foundation had not previously been brought before the court, and the matter was at the trial level. However, it is essential to view the history, interpretation of, and deviation from the Trust Indenture holistically, as it is within the institutional memory and defining fabric of both the Barnes Foundation and the court. In fact, Judge Ott also has heard a number of previous requests for deviation from the Barnes trust. Furthermore, his rulings limiting or rejecting deviation from Dr. Barnes's specifications have been reversed by the Superior Court of Pennsylvania on more than one occasion. Certainly, the court should have looked with particular attention at its own precedent made in previous interpretations of this very same Barnes Foundation trust.

Because of the special importance to the recent Barnes Foundation case, relevant highlights from this body of case law are discussed chronologically below. In this way, the reader will be able to better follow the historical developments and evolution in Dr. Barnes's trust since his death and to discern more clearly their impact on the court's recent decision to grant the trustees' request for deviation to move to Philadelphia.

#### A. The Barnes Collection Goes on Tour

In 1992, the trustees of the Barnes Foundation proposed that the paintings of Dr. Albert Barnes be taken on a worldwide museum tour.<sup>223</sup> The Trust Indenture was explicit that his paintings were not to be loaned to any other museums or galleries. This was the intent of the testator. However, the testator also had stipulated that the buildings be maintained and kept in first-class condition. According to the trustees, those two provisions had come into conflict.<sup>224</sup> The trustees maintained that "[t]he only way feasibly to pay for the renovations and improvements [to the Barnes Foundation

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<sup>222</sup> "Law of the case" is "[t]he doctrine holding that a decision rendered in a former appeal of a case is binding in a later appeal." BLACK'S LAW DICTIONARY 903 (8th ed. 2004).

<sup>223</sup> See generally ANDERSON, *supra* note 34, at 111-15 (discussing the proposed art tour).

<sup>224</sup> It is not clear to me why these two trust provisions necessarily present a conflict. Though not economically efficient, and perhaps not what the judges on the court would do for themselves, Dr. Barnes's paintings certainly might have been locked in private storage—even kept safely within a certain part of the gallery—while the galleries were renovated. The renovation of the Barnes galleries did not necessitate loaning the artwork to another museum in the interim. Although raising money through a tour of Dr. Barnes's artwork was not the only way to pay for the renovation, it seems, perhaps, the easiest way. As the Montgomery County Orphans' Court noted during the litigation surrounding the tour, "[T]here is no history of any effective fund raising attempts on behalf of The Barnes Foundation." The Barnes Found., a Corp., 14 Pa. Fiduc. Rep. 2d 92, 95 (Ct. Com. Pl. Montgomery County Orphans' Ct. Div. 1994). Thus, the trustees of the Barnes Foundation do not appear to have made a good faith effort at paying for the necessary gallery renovations in a way that did not violate the express will of Dr. Barnes.

galleries] is to take advantage of the substantial sums which can be raised by [a] tour.”<sup>225</sup>

On July 21, 1992, the Montgomery County Orphans’ Court authorized this significant deviation from the Trust Indenture by Adjudication and Decree and permitted a tour.<sup>226</sup> At that time, the judge who was hearing the Barnes Foundation cases was the Honorable Louis D. Stefan. This decision authorized a one-time world tour of between eighty and eighty-three of Dr. Barnes’s paintings to raise funds for the gallery renovation.<sup>227</sup> The artwork was to travel by state-of-the-art methods to the finest art museums in three cities: Washington, D.C.; Paris; and Tokyo.<sup>228</sup> After the paintings completed their international tour, the court permitted the trustees to exhibit them at the Philadelphia Museum of Art until the renovations were complete and the paintings could be rehung at the Barnes Foundation galleries.<sup>229</sup>

On October 22, 1993, the trustees of the Barnes Foundation petitioned the Montgomery County Orphans’ Court to allow an expansion of the tour to museums in two more cities.<sup>230</sup> Judge Stefan produced his opinion on February 1, 1994.<sup>231</sup> In its findings of fact, the court noted that the proposed additional tour dates at the Kimbell Art Museum in Fort Worth, and The Art Gallery of Ontario in Toronto, would raise another \$6,200,000 for the Foundation.<sup>232</sup> The trustees of the Foundation claimed that this influx of revenue was necessary to complete the renovations because the construction costs had run over budget.<sup>233</sup> The trustees continued to assert that the only way to pay for the renovation costs was “to take advantage of the substantial sums which can be raised by the tour.”<sup>234</sup>

The court granted the trustees’ request for the expanded tour but mandated that the funds from the two additional tour dates be placed in a separate account to be used only “for basic renovations and overhauls of the Foundation’s buildings and systems” and withdrawn only with “the permission of the Court.”<sup>235</sup> The court further admonished the trustees of the Barnes Foundation:

It should not be necessary to iterate to the Trustees that this tour runs contrary to the expressed desires of Dr. Barnes. The Decree of July 21, 1992, did not alter the Indenture under which the Trustees are mandated to operate. The establishment of the fund

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<sup>225</sup> *Id.*

<sup>226</sup> *The Barnes Found.*, 12 Pa. Fiduc. Rep. 2d at 357-58.

<sup>227</sup> *Id.* at 352.

<sup>228</sup> *Id.* at 352-53, 357-58.

<sup>229</sup> See *The Barnes Found.*, 14 Pa. Fiduc. Rep. 2d at 94.

<sup>230</sup> *Id.* at 93.

<sup>231</sup> *Id.* at 92.

<sup>232</sup> *Id.* at 93.

<sup>233</sup> *Id.* at 95.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 96.

for basic rehabilitation and repair of the Foundation's buildings and systems should help them remain true to their charge, so that the present tour is indeed the "once in a lifetime" opportunity and event which they have asserted.<sup>236</sup>

The court also decreed that one particular painting, *The Models*, by Georges Seurat, would not continue on the additional two dates of the tour.<sup>237</sup> The court accepted that this painting showed some signs of damage as a result of the travel.<sup>238</sup> This decree spawned another case regarding the destiny of this painting.

On January 12, 1995, an article in the *Philadelphia Inquirer* stated that the Philadelphia Museum of Art planned to exhibit *The Models* as part of its planned exhibition of the Barnes collection.<sup>239</sup> This matter came before Judge Ott on the Montgomery County Orphans' Court, who had taken over the Barnes Foundation litigation after Judge Stefan died unexpectedly in a car accident on September 10, 1994.<sup>240</sup> The trustees requested that the court clarify Judge Stefan's previous order regarding the specific Seurat painting. Judge Ott permitted the painting to be shown at the Philadelphia Museum of Art, stating: "It was the prospect of additional long-distance travel to Houston and to Ontario [the two proposed extended dates] that compelled [the expert] to conclude those venues ought not be approved. The trip from the Barnes Foundation to the Museum covers the distance of a few miles."<sup>241</sup>

Successful in the request to add the Kimbell Art Museum and The Art Gallery of Ontario to the court-granted deviation, the Barnes trustees tried to expand the tour once again. On April 13, 1995, the trustees petitioned the Montgomery County Orphans' Court to add the additional venue of the Haus der Kunst, in Munich, to the court-approved tour.<sup>242</sup> This time, the court refused.<sup>243</sup>

The court's initial deviation had been premised on the assertion that the Barnes Foundation needed the money that would be generated by the proposed tour to fund the renovations to the gallery mandated by Dr. Barnes in his trust. However, the court noted that "[t]he six earlier tour venues have generated approximately \$3,500,000 more than the finally determined cost of renovations," and the trustees did not offer evidence to prove that this overage would not be enough to cover future necessary

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<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 98.

<sup>238</sup> *Id.* at 97.

<sup>239</sup> See *The Barnes Found., a Corp.* (No. 4), 15 Pa. Fiduc. Rep. 2d 54 (Ct. Com. Pl. Montgomery County Orphans' Ct. Div. 1995).

<sup>240</sup> *Id.* at 54 n.1.

<sup>241</sup> *Id.* at 57.

<sup>242</sup> *The Barnes Found., a Corp.* (No. 5), 15 Pa. Fiduc. Rep. 2d 212, 213 (Pa. Ct. Com. Pl. Montgomery County Orphans' Ct. Div. 1995).

<sup>243</sup> *Id.* at 216.

repairs.<sup>244</sup> In commenting on the petition of the trustees of the Barnes Foundation, the court wrote:

[T]he Trustees have attempted to emphasize the benefits that would accrue to the public generally by extending the tour. We need not attempt to assess this benefit because it is irrelevant. The paintings belonged to Dr. Barnes and his Trust Indenture dictates the terms of public access. Inasmuch as the Trustees have failed to establish the requisite necessity for the tour, our inquiry is at an end.<sup>245</sup>

The trustees of the Barnes Foundation appealed this ruling to the Superior Court and the ruling was reversed by a Judgment Order Per Curiam on May 17, 1995, which permitted the second tour extension.<sup>246</sup> This Per Curiam Order was reaffirmed by the Superior Court in a March 15, 1996 opinion.<sup>247</sup> According to the factual findings in the case, the one additional venue, if added to the traveling exhibition, would generate approximately \$2.25 million in additional funds.<sup>248</sup> For the Superior Court, “[P]erhaps the most significant fact established of record” was that even if the tour was not extended and the paintings were returned to Lower Merion, the artwork still would not be shown to students or visitors at the Barnes Foundation gallery because the renovations still would have been underway.<sup>249</sup> The court was bothered that during the time the paintings would be in storage in Lower Merion, they could be producing over \$2 million for the Barnes Foundation.<sup>250</sup>

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<sup>244</sup> *Id.* at 215.

<sup>245</sup> *Id.* at 216.

<sup>246</sup> *In re Barnes Found.*, 672 A.2d 1364, 1365 (Pa. Super. Ct. 1996).

<sup>247</sup> *Id.* at 1367. The court reasoned that “[w]hen two purposes of a trust become conflicted and the dominant intent of the trust . . . becomes imperiled, some provisions of the trust, such as a no-loan policy, must give way to the dominant purpose if this can be done reasonably.” *Id.* (citing *Mears’ Estate*, 149 A. 157). In this case, the court held that the purpose of preserving the artwork in the building took priority over the restriction against loaning the works of art and, therefore, permitted the extension of the already permitted tour by one additional city.

<sup>248</sup> *Barnes Found.*, 672 A.2d at 1368.

<sup>249</sup> *Id.* at 1369.

<sup>250</sup> *Id.* Given the strong views exhibited during his lifetime and memorialized in the Trust Indenture, whether Dr. Barnes would have been similarly bothered by the potential loss of income from keeping the paintings in storage throughout the remainder of the renovation is unclear. According to facts found by the court, the trustees anticipated that the cost of the renovations to the galleries was \$11,100,000 and that the estimated revenue from the six tour venues already permitted was \$14,600,000. *Id.* The money raised from the initially approved tour was enough to pay for the renovation of the galleries at the Barnes Foundation without adding an additional tour date.

In a separate issue in this case, the court held that students of the Barnes Foundation, who had been appointed to the board of trustees of the Barnes *ad litem* for the limited purpose of giving the court information regarding the particular educational curriculum at the Barnes Foundation, did not have standing to challenge the extension of the court-approved tour of the Foundation’s artwork. *Id.* at 1366.

In reversing the lower court ruling, the Superior Court made the following criticism:

Judge Ott . . . withdrew to a technical application of the trust agreement which would have unnecessarily denied the Foundation the ability to enlarge its endowment and protect what could be an inevitable defeasance of the trust based upon a corpus which fails to earn sufficient income to fulfill the dominant intent of the trust to preserve the art works intact and to teach students.<sup>251</sup>

The Supreme Court reversed the Orphans' Court ruling, which had denied the trustees' requested deviation. This was neither the first nor the last time that the lower court was reversed in Barnes-related litigation involving the doctrine of deviation.

The fact that the Pennsylvania courts allowed the trustees of the Barnes Foundation to take the majority of Dr. Barnes's art collection on a world tour was an astounding deviation. After all, Dr. Barnes was explicit in his Trust Indenture: not a single piece of his art was to be loaned to anyone. Dr. Barnes, in his life, routinely refused to allow people to see his art when it was located in his gallery. Certainly, Dr. Barnes never would have permitted a world tour of his artwork under any circumstances.

The court justified this one-time deviation based on a conflict in the trust. Dr. Barnes had required the trustees to keep his galleries in good repair and the trustees asserted the only way to afford a needed renovation of the Barnes Foundation's galleries was to take the paintings on the petitioned-for tour. But, was there really a conflict? Was there no other way to raise the money for the gallery renovations? Was anyone asking these critical and necessary questions? Many of the Barnes Foundation's holdings cannot be exhibited for lack of space. The sale of one or more of these masterpieces easily would have raised the required funds for the renovation. Dr. Barnes may have preferred this solution were he alive. Certainly, the Barnes Foundation could have explored other fund raising options to facilitate the gallery renovation.

Something else may be going on here. In light of the trustees' emphasis on the public benefits of the tour and, perhaps, the idea that artistic masterpieces deserve to be seen by the public, the court's eagerness to find a conflict within the trust suggests that the court may have been influenced by the very notions of public policy Judge Ott decried as irrelevant. Behind their black robes, judges are people too. Perhaps the court was unable to block out what it would do or was unable to consider only what Dr. Barnes would have done, were he alive at the time.

The precedent of the Barnes Foundation's world tour is extremely relevant to the recent Barnes Foundation case. In fact, the tour may be the most significant example of sanctioned deviation for the requested relocation. Just as they had claimed in the case of the tour, the trustees claimed

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<sup>251</sup> *Id.* at 1366-67.

in the case of the move to Philadelphia that it was a one-time request that was the only solution to a perceived conflict. However, this one-time deviation will result in a permanent relocation. Whether the court and the trustees earnestly investigated and considered other possible solutions in the case of both the tour and the relocation is unclear. Public policy was also implicated in the move because of the possible increase in tourism to Philadelphia and the commonly-held idea that the public deserves to see artistic masterpieces.

#### B. Deviation to Allow Legal Settlement

In *In re Barnes Foundation*,<sup>252</sup> the Pennsylvania Superior Court again reversed the opinion of the Montgomery County Orphans' Court. In this case, the Superior Court allowed deviation from the trust of Violette de Mazia, a former director of the Barnes Foundation, to enable settlement of litigation between the estates of de Mazia and Barnes. The proposed settlement required the de Mazia trust to pay \$2,750,000 to the Barnes Foundation over a period of six years. The settlement also changed the de Mazia trust so that it would no longer function solely to support the Barnes Foundation, but would act as a private organization with the broader mission to support art and aesthetics based on Dr. Barnes's theories, even if this meant giving money to organizations other than the Barnes Foundation.<sup>253</sup> For this settlement to succeed, the mission of de Mazia's trust was modified so that it no longer acted solely to support the Barnes Foundation, but instead acted as an independent, private, charitable organization. This was not Violette de Mazia's intent.

Paragraph 7 of de Mazia's trust cited the Barnes Foundation as the supported organization of the trust and stated that it would continue to support the Barnes Foundation "so long as it met certain requirements," unless it "withdr[e]w as the charitable supported organization of the Trust."<sup>254</sup> According to the court, Violette de Mazia had three primary purposes in creating her trust. First, she wanted to set up a "charitable, literary, and educational, trust for the purpose of carrying on Dr. Barnes' idea of art education."<sup>255</sup> Next, she wanted the trustees to carry on her own life's work, most of which was wrapped up in the Barnes Foundation. Finally, she wanted the trust to "qualify for favorable tax treatment."<sup>256</sup>

Judge Ott rejected the proposed change to the de Mazia trust, holding that the doctrine of deviation did not apply in this case because "[t]he Barnes Foundation continues to meet the criteria required of a 'support organization' as defined in Miss de Mazia's will."<sup>257</sup> For this reason, the

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<sup>252</sup> 684 A.2d 123.

<sup>253</sup> *Id.* at 136.

<sup>254</sup> *Id.* at 135.

<sup>255</sup> *Id.* at 136.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 129.

lower court upheld “the sanctity of the donor’s written intent” and denied the settlement because it violated the intent of Violette de Mazia.<sup>258</sup>

On appeal, the Superior Court applied the Restatement (Second) and section 561 of Bogert, *The Law of Trusts and Trustees*, which states that deviation is permitted if there is both an “(1) unforeseen and unforeseeable change in circumstances, and (2) a frustration of the settlor’s main objectives by this change, if strict obedience to the settlor[’s] directions [was] required.”<sup>259</sup> The court then cited to a series of cases from outside Pennsylvania that liberally interpreted the doctrine of deviation, “appl[ied] a pragmatic approach to ensuring that the settlor’s primary goal [was] achieved,” and allowed alteration of the testator’s intent.<sup>260</sup>

The Superior Court followed this approach in reversing Judge Ott and allowing deviation:

Although we agree in principle with Judge Ott that the sanctity of the donor’s intent should be honored and upheld whenever possible, we are convinced that the benefits of approving the present settlement will go further to advance Ms. de Mazia’s intent than forcing the parties to continue in what has obviously become a bad marriage: a marriage which threatens to damage or destroy one or both parties’ respective abilities to benefit the citizens of this Commonwealth.<sup>261</sup>

The court further quoted the Attorney General, who advocated a separation of the two trusts, despite the intent of the testator, because such court-sanctioned administration would best serve “the public interest.”<sup>262</sup>

That the Superior Court and the Attorney General of Pennsylvania actively considered the public interest is significant. This legally irrelevant public interest surprisingly was given precedence over the desires and interests of the deceased Ms. de Mazia, who, as testator, was legally entitled to do what she wanted with her estate. In many ways this case was a

<sup>258</sup> *Id.* As both the trustees of the de Mazia trust and the Barnes Foundation were in favor of the proposed settlement, a group representing students of the Barnes Foundation was permitted to advocate against the deviation denied by Judge Ott’s ruling. *Id.*

<sup>259</sup> *Id.* at 130.

<sup>260</sup> *Id.* at 133. See *In re Estate of Craig*, 848 P.2d 313 (Ariz. Ct. App. 1993); Conn. Bank & Trust Co. v. Coffin, 563 A.2d 1323 (Conn. 1989); *Thorne v. Cont’l Nat’l Bank & Trust Co. of Chi.*, 151 N.E.2d 398 (Ill. App. Ct. 1958); *Orphan Soc’y of Lexington v. Bd. of Educ. of Lexington*, 437 S.W.2d 194 (Ky. 1969); *Dartmouth Coll. v. Quincy*, 258 N.E.2d 745 (Mass. 1970); *Reed v. Eagleton*, 384 S.W.2d 578 (Mo. 1964); *In re Trust Created by the Last Will and Testament of John L. Teeters*, 288 N.W.2d 735 (Neb. 1980); *First Nat’l Bank v. Heirs of Donnelly*, 122 N.E.2d 672 (Ohio Ct. App. 1954); *Cleveland Museum of Art v. O’Neill*, 129 N.E.2d 669 (Ohio Ct. Com. Pl. 1955); *Colin McK. Grant Home v. Medlock*, 349 S.E.2d 655 (S.C. Ct. App. 1986).

<sup>261</sup> *Barnes Found.*, 684 A.2d at 136.

<sup>262</sup> *Id.* Recall Judge Ott’s criticism of the Attorney General in this case for its refusal to act responsibly as *parens patriae*. See *supra* text accompanying notes 87-88. Such criticism seems equally applicable in this instance.

harbinger for the most recent Barnes Foundation case. Just as the court did in the *de Mazia* case, Judge Ott once again construed the doctrine of deviation liberally, interpreted the primary purpose of Dr. Barnes's trust, and applied a pragmatic approach that permitted the Barnes Foundation to move to Philadelphia.

### C. Society Functions at the Barnes

The judge in *In re the Barnes Foundation*,<sup>263</sup> also referred to as *Barnes No. 6*, was once again Stanley Ott. In this case, the trustees requested deviation from Dr. Barnes's trust to address the financial situation facing the Barnes Foundation. Specifically, the trustees petitioned the court to have broader powers of investment, to open the gallery to the public for one extra day per week, to raise the admission fee for gallery visitors, and to permit social functions and fundraisers in the gallery itself. The trustees claimed that these trust provisions had "become impracticable and have caused or will soon cause the frustration of the intent of the Foundation as expressed in the Indenture and make it fail of its essential purpose."<sup>264</sup> In a September 21, 1995 Memorandum and Decree, Judge Ott granted permission to deviate from the trust in terms of the broader investment powers, gallery schedule, and admission fees, but denied deviation for the purpose of holding social functions at the gallery.<sup>265</sup>

In paragraph twenty-seven of the Trust Indenture, Dr. Barnes restricted the investment authority of the trustees to the purchase of "obligations of the United States of America, obligations of the several States of the United States and municipal corporations and districts of the several States of the United States which are legal investments for savings banks under the law of the State of New York."<sup>266</sup> This explicit and conservative investment strategy had failed to keep up with inflation and the operating costs of the Barnes Foundation in the years following the death of Dr. Barnes. As a result, the trust had been losing money. Under these circumstances, the court ruled that Dr. Barnes's restrictions on the trustees' investments were "impractical" and relaxed the terms to mirror the more liberal investment authority of Chapter 73 of the Probates, Estates and Fiduciaries Code.<sup>267</sup>

On the issue of hours of admission, Dr. Barnes had explicitly permitted his gallery to be open to the public only on Saturdays. However, in 1960 the court expanded public admission to Saturdays and "one other day of the week," and in 1967, the court further expanded admission to Sunday afternoons.<sup>268</sup> In *Barnes No. 6*, the trustees sought to open the gallery to

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<sup>263</sup> 15 Pa. Fiduc. Rep. 2d 381 (Ct. Com. Pl. Montgomery County Orphans' Ct. Div. 1995).

<sup>264</sup> *Id.* (citing paragraph 15 of the Second Amended Petition to Amend Trust).

<sup>265</sup> *Id.* at 386.

<sup>266</sup> *Id.* at 382.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 383. The Attorney General brought this case premised on the idea that be-

visitors Tuesday through Friday, 10:30 a.m. to 6:00 p.m.—hours similar to those of an ordinary museum. The court held that this request went “far beyond the donor’s intent,” but allowed the gallery to be open to the public for one additional day per week.<sup>269</sup>

On the issue of a gallery admission fees, Dr. Barnes was explicit in the Trust Indenture: admission to the gallery should be free of charge. One of Dr. Barnes’s chief concerns was that his collection of art be accessible to “the plain people, that is, men and women who gain their livelihood by daily toil in the shops, factories, schools, stores and similar places.”<sup>270</sup> However, in 1963, the same court permitted deviation from the terms of Dr. Barnes’s trust to allow the trustees “to charge an admission fee ‘not in excess of one dollar per person to all members of the general public.’”<sup>271</sup> In *Barnes No. 6*, the trustees of the Barnes Foundation asked for a deviation to permit a ten dollar admission fee for the general public and a seven dollar fee for students, which would include an audio tour.<sup>272</sup> This request was not fully granted. Instead, the court attempted to reconcile the desire of Dr. Barnes to have free admission to see his art collection with the financial realities of running the gallery, and permitted a compromise of a five dollar admission fee.<sup>273</sup>

Finally, Dr. Barnes was explicitly and adamantly against having social functions at the Barnes Foundation. In paragraph thirty-three of the Trust Indenture, Dr. Barnes specified:

The purpose of this gift is democratic and educational in the true meaning of those words, and special privileges are forbidden. It is therefore expressly stipulated by the Donor that at no time after the death of said Donor, shall there be held in any building or buildings any society functions commonly designated receptions, tea parties, dinners, banquets, dances, musicales or similar affairs, whether such functions be given by officials, Trustees or employees of The Barnes Foundation or any other person or persons, whatsoever. . . .<sup>274</sup>

To insure that the trustees upheld his views, Dr. Barnes even stipulated in his trust that the Barnes Foundation would pay the legal fees of any Pennsylvania citizen who sued for an injunction based on the occurrence of such a society function at the Barnes.<sup>275</sup>

The trustees sought to add language to paragraph thirty-three, stating

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cause the Barnes Foundation gets a tax exemption as a charitable entity, the public should be able to have greater access to the Barnes collection. *See id.*

<sup>269</sup> *Id.* at 384.

<sup>270</sup> *Id.* at 382.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 383.

<sup>274</sup> *Id.* at 384.

<sup>275</sup> Trust Indenture, *supra* note 9, at para. 33.

that “[t]he foregoing does not prohibit the Barnes Foundation, through its Board of Trustees, from organizing, sponsoring and hosting functions on Barnes Foundation property for the sole benefit of the Barnes Foundation, to enhance the Foundation’s fund raising efforts and support its operational needs.”<sup>276</sup> Judge Ott denied this clarification and applied section 381 of the Restatement (Second).<sup>277</sup> Denying deviation from the trust on this point, the court held that “the Trustees did not establish that it will be impossible for them to raise adequate funds if they can not entertain on the Foundation’s own premises, which is the prerequisite for applying the doctrine of deviation.”<sup>278</sup>

On October 26, 1995, the trustees of the Barnes Foundation filed a Petition for Clarification of Ott’s ruling regarding the prohibition on society functions at the Barnes Foundation. The result was another opinion, *The Barnes Foundation, A Corporation (No. 7)*, issued by the Montgomery County Orphans’ Court on November 2, 1995.<sup>279</sup> In this opinion, which reaffirmed the court’s refusal to add language to the Trust Indenture permitting fundraising activities, Judge Ott discussed five specific events, which had been planned by the trustees to commemorate the reopening of the renovated galleries.<sup>280</sup> A Friday press briefing and viewing of the art was permissible because, in the eyes of the court, “Introducing the media to the renovated gallery is not a ‘society’ function and is permissible under the terms of the indenture.”<sup>281</sup> A Saturday evening gala dinner for which the 540 projected attendants had paid \$500 or \$1,000 each might have been prohibited outright, but because of the court’s literal reading of the Trust Indenture, which prohibited society functions “only in the ‘building or buildings of the Foundation,’” the court only limited this gala in scope.<sup>282</sup> In light of this interpretation, the trustees were allowed to host the dinner outside, under a tent, as planned, but they were required to cancel the scheduled tour of the gallery because it would have been in a building and, therefore, would have violated the Trust Indenture. The court stated that Dr. Barnes’s “mandates for democracy and against special privilege [had] been ignored by the Barnes Trustees in planning this dinner.”<sup>283</sup> The court applied the same restriction when prohibiting a tour of the inside of the renovated gallery to a private, Monday evening event for Meridian Bank, which had helped the Barnes Foundation with the renovation and reopening because the event did not benefit directly the

<sup>276</sup> *Barnes Found.*, 15 Pa. Fiduc. Rep. 2d at 385.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* The Superior Court of Pennsylvania reversed on this point in *In re Barnes Foundation*, 683 A.2d 894 (Pa. Super. Ct. 1996), discussed *infra*.

<sup>279</sup> 16 Pa. Fiduc. Rep. 2d 1 (Ct. Com. Pl. Montgomery County Orphans’ Ct. Div. 1995).

<sup>280</sup> *Id.* at 3-4.

<sup>281</sup> *Id.* at 3.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

Barnes Foundation.<sup>284</sup> The court permitted a Sunday open house and ribbon cutting ceremony for neighbors, former students, and local dignitaries and three Tuesday programs geared toward students and the public at large.<sup>285</sup>

The trustees of the Barnes Foundation appealed Judge Ott's original ruling in *Barnes No. 6*, which granted deviation from the trust in terms of the broader investment powers, gallery schedule, and admission fees, but denied deviation for the purpose of holding social functions at the gallery.<sup>286</sup> In *In re Barnes Foundation*, the Superior Court affirmed most of the Orphans' Court ruling, but reversed the court completely on the issue of having social functions at the Barnes Foundation.<sup>287</sup> The court interpreted the language of the trust that prohibited "any society functions commonly designated receptions, tea parties, dinners, banquets, dances, musicales or similar affairs"<sup>288</sup> did not restrict on-site fundraising. The court noted that Dr. Barnes clearly "did not wish to have his school and gallery trivialized by the use of it as a mere rental hall for socialites."<sup>289</sup> However, the court held that there was a difference between these prohibited activities, each of which "[has] as its purpose nothing more than the enjoyment of its participants," and the proposed fundraising activities, "which have as their purpose the preservation and enrichment of the assets which the Foundation is charged with protecting."<sup>290</sup> The court noted, however, that its decision was one of interpretation of the terms of the trust and not one requiring deviation. In this manner, the Superior Court reversed Judge Ott's ruling that refused to allow deviation to permit fundraising activities at the Barnes Foundation galleries.<sup>291</sup>

These cases of deviation are particularly instructive with respect to the most recent Barnes Foundation opinion supporting a relocation of the Barnes Foundation. Once again, the court was very permissive on the issues of increasing the admissions fees and the hours of admission for the gallery. While it did not give the trustees all they asked for, the court did permit a compromise by increasing the admissions fees from one dollar to five dollars per person and allowing the gallery to be opened for one more day every week.<sup>292</sup> The court held that the trustees of the Barnes Foundation had fallen "woefully short of satisfying [their] burden in demonstrating the *necessity* for access of six days per week, or the tenfold increase in the admission fee."<sup>293</sup>

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<sup>284</sup> *Id.* at 4.

<sup>285</sup> *Id.* at 3-4.

<sup>286</sup> 15 Pa. Fiduc. Rep. 2d at 381.

<sup>287</sup> 683 A.2d at 898.

<sup>288</sup> *Id.* at 899 (alteration in original).

<sup>289</sup> *Id.* at 898 (emphasis omitted).

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 897.

<sup>293</sup> *Id.* (citing RESTATEMENT (SECOND) § 381 (1957); BOGERT, THE LAW OF TRUST

Remember that when Dr. Barnes died, he insisted through his trust that the Barnes Foundation continue after his death as it had in his life—primarily as an educational facility open to the public only on Saturdays and free of charge. With this latest deviation, the ticket price climbed from nothing to five dollars, and the gallery was now open to the public Saturdays, Sunday afternoons, and two other days of the week. With this ruling, the Superior Court continued to roll back Dr. Barnes's specifications to make the trustees' day-to-day financial operations of the Barnes Foundation more feasible. Though not an incremental move, granting the trustees' petition to move the Barnes Foundation to Philadelphia continued this trend of permitting deviation from the Trust Indenture in the name of financial stability.

Allowing society functions at the Barnes Foundation, while stated by the court to be an issue of trust interpretation and not trust deviation, is a more significant issue. This was a change, and not an incremental one. Though the court interpreted Dr. Barnes's restriction prohibiting “any society functions commonly designated receptions, tea parties, dinners, banquets, dances, musicales or similar affairs, whether such functions be given by officials, Trustees or employees of *The Barnes Foundation* or any other person or persons, whatsoever” as allowing fundraisers on behalf of the Barnes Foundation,<sup>294</sup> Dr. Barnes never held any fundraisers at the Foundation during his life, nor were any fundraising events held at the Foundation in the many years between Dr. Barnes's death and the post-renovation reopening of the Barnes Foundation in late 1995.<sup>295</sup> The court's opinion was a significant and dubious departure from the clear intent of Dr. Barnes and was made in the name of the financial stability of the Foundation. Permitting the Barnes Foundation to move to Philadelphia is a similar deviation from Dr. Barnes's intent.<sup>296</sup>

#### D. Summer Hours at the Barnes Foundation

In *In re Barnes Foundation*,<sup>297</sup> Judge Ott granted the trustees' petition

AND TRUSTEES § 561 (1980); *Colin McK. Grant Home*, 349 S.E.2d at 659).

<sup>294</sup> *Id.* at 896, 898 (emphasis added).

<sup>295</sup> Post-Hearing Brief at 12.

<sup>296</sup> Judge Ott's supplemental decree eviscerated Dr. Barnes's original restriction on social functions at the Barnes Foundation by allowing the trustees to replace paragraph 33 of the Trust Indenture with their own ironic version:

The purpose of this gift is democratic and educational in the true Meaning of those words, and special privileges are forbidden. The Board of Trustees of the Donee shall have the power to hold, sponsor and permit others to hold and sponsor fundraising programs and special events and to utilize the facilities of the corporation pursuant to such rules and regulations as the Board of Trustees may adopt which are applied equally and democratically, consistent at all times with the mission of the Foundation.

Ott Supplemental Decree at 1; Exhibit E, Proposed Indenture of Dr. Albert C. Barnes, paragraph 33 (emphasis added).

<sup>297</sup> 18 Pa. Fiduc. Rep. 2d 393 (Ct. Com. Pl. Montgomery County Orphans' Ct. Div.

that the court allow the trustees to open the gallery during July and August. This ruling was a grant of deviation from the express terms of the Trust Indenture, which stated in no uncertain terms that the gallery was to be closed during these summer months.<sup>298</sup> However, in this case, the deviation was unquestionably justified under the law.

The court had authenticated and entered into evidence an April 30, 1946 letter from Dr. Barnes to the Honorable Horace Stern, an acquaintance who had commented on some of the proposed amendments to the Trust Indenture. This letter stated that the gallery must be closed during the July and August because of the effect of the climate conditions on the paintings. In this letter, Barnes lamented that “[w]e spent thirty thousand dollars in air-conditioning and, in spite of the best engineers and apparatus known, the effects of the heat and moisture of July and August could not be eliminated.”<sup>299</sup> The trustees further proved that the climate control system, which had been installed during the renovation of the Barnes galleries in 1995, had rectified these problems.

The court, citing the Restatement (Second), found that the technology embodied in the climate control system qualified as a circumstance “not known to the settlor and not anticipated by him.”<sup>300</sup> The court also quoted section 167 of *Scott on Trusts (Fourth Edition)* on the application of the doctrine of deviation, which states:

[The court] is permitting the trustee to do not what the settlor intended to permit him to do but what it thinks the settlor would have intended to permit if he had known of or anticipated the circumstances that have happened. Even though the settlor has expressly forbidden what the court permits to be done, the theory is that he would not have forbidden it, but on the contrary would have authorized it if he had known of or anticipated the circumstances. In so doing the court is not interpreting the terms of the trust but is permitting a deviation from them in order to carry out the purpose of the trust.<sup>301</sup>

Based on Dr. Barnes’s stated mission to advance the education and appreciation of the fine arts, and the fact that his direction to close the gallery in July and August was merely the consequence of the technological limitations of climate control in his day, the court reasoned that “Dr. Barnes would have embraced the modern technology which has eliminated the dangers posed by extreme weather conditions.”<sup>302</sup> For these reasons, the court allowed the requested deviation and permitted the gallery to open

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1998)<sup>298</sup> See *id.*

<sup>299</sup> *Id.* at 394.

<sup>300</sup> *Id.* at 395.

<sup>301</sup> *Id.* at 395-96 (quoting SCOTT ON TRUSTS § 167 (4th ed. 1987)).

<sup>302</sup> *Id.* at 396.

in July and August "better [to] effectuate the donor's intent."<sup>303</sup>

No party appealed Judge Ott's appropriate application of the doctrine of administration. The petition by the trustees to move the Barnes Foundation was far more radical and was not as clearly permitted by the doctrine of deviation as was the request to keep the gallery open during the summer.

Taken as a whole, this chronicle of case law demonstrates that the Pennsylvania courts have been extremely willing to deviate from the intent of Dr. Barnes in the name of enhancing the financial viability of the Barnes Foundation. Furthermore, many of the decisions, at least at the Superior Court level, also have been infused with a judicial consideration of public policy and the public good, which, according to the strict law of deviation, should not be relevant. Though at odds with the will of the testator, the influence of the desires of the public to see Dr. Barnes's art collection has at times been acknowledged by the courts, but is more often a tacit current which flows beneath the courts' opinions. So it was again in this recent case.

The case law also demonstrates that Judge Ott's opinions, until this recent decision, have shown a more conservative approach to the doctrine of deviation than the opinions of Judge Stefan before him and those of the judges on the Superior Court of Pennsylvania. In the history of litigation surrounding the Barnes Foundation, the Superior Court has reversed several of Judge Ott's attempts to stay true to Dr. Barnes's intent by denying the trustees' petitions for deviation. In the long legal history of deviation sought by the Barnes Foundation trustees, Judge Ott had previously directly authorized deviation only to allow broader powers of investment and to permit summer hours for the gallery. Both of these decisions are textbook cases of how courts should apply the doctrine of deviation.

In cases in which the trustees have petitioned for deviation to increase the hours and fees of the gallery, Judge Ott has authorized compromises by allowing a fee increase to insure the Barnes Foundation's financial viability, but not for the full amount requested because he deemed it excessive and contrary to the surmised desires of Dr. Barnes. However, he refused to permit deviation on the far more questionable issues of the tour expansion, the legal settlement of the de Mazia trust, and allowing fund-raising events. On each of these issues, the Superior Court reversed his rulings. The Superior Court seems to hold a more permissive view of the doctrine of deviation, at least as it relates to the Barnes Foundation.<sup>304</sup> With this recent opinion allowing the trustees to move the Barnes Foundation to Philadelphia, Judge Ott appears to have adopted this permissive view of the doctrine of deviation.

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<sup>303</sup> *Id.*

<sup>304</sup> This view approximates the view espoused by the Restatement (Third), which permits deviation to further the purposes of the trust. *See supra* notes 118-123. This position has not been formally adopted in Pennsylvania.

## VII. CONCLUSION: *GET YOUR TICKETS NOW*

Section 381 of the Restatement (Second), which Pennsylvania has formally adopted,<sup>305</sup> allows the court to permit the trustees of a charitable foundation to deviate from terms of a trust if compliance is impossible, or if “owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust.”<sup>306</sup> Pennsylvania common law acknowledges that in applying this doctrine of deviation, the court must “look back to the mind of the settlor of the trust, to determine what he would have done when faced with conditions which were unanticipated at the time of the creation of the trust and nearly as possible to fulfill the intention of the conveyor.”<sup>307</sup>

However, Pennsylvania courts have permitted deviation in cases that have gone beyond this testator-focused scope, both in the general Pennsylvania common law of deviation as it relates to the relocation of a charitable entity and within the subset of prior Barnes Foundation case law. In truth, though Pennsylvania has not officially adopted the doctrine, its courts already have been applying a doctrine of deviation that is more closely akin to the newly proposed section 66 of the Restatement (Third). This interpretation of the doctrine of deviation allows courts to “modify an administrative or distributive provision of a trust . . . if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust.”<sup>308</sup> This more permissive standard for deviation is less deferential to the expressed intent of the testator. The new standard is prospective in that it allows deviation years after the testator’s death to improve upon the language set out by the testator to make the trust function even better—to further the purpose of the testator. For example, in their briefs, the trustees spoke of seeking deviation “not only to fulfill its founder’s central mission, but to *expand on that mission* in many ways,” and claimed that “[a]n expanded and modern facility would also allow The Foundation to *more adequately* fulfill Dr. Barnes’s mission [with added classrooms and ancillary services such as food, storage and a gallery shop].”<sup>309</sup> Judge Ott’s recent opinion even gave the trustees permission to develop Ker-Feal as a living museum for the public in what he called “a significant opportunity (albeit, unrealized at present) to *advance the educational process championed by Dr. Barnes.*”<sup>310</sup>

This interpretation of the doctrine of deviation carries with it the un-

<sup>305</sup> *Barnes Found.*, 684 A.2d at 130-31.

<sup>306</sup> RESTATEMENT (SECOND) § 381 (1957).

<sup>307</sup> *Barnes Found.*, 672 A.2d at 1367 (citing *Bodine’s Trust*, 239 A.2d 315).

<sup>308</sup> RESTATEMENT (THIRD) § 66 (2003).

<sup>309</sup> Barnes Second Amended Petition at 7, 17 (emphasis added).

<sup>310</sup> Ott Decree at 10-11, 36 (emphasis added). One might ask whether it is an appropriate time or task for the Court to *expand* Dr. Barnes’s mission, when the goal of the doctrine of deviation, here, is to deviate from the intent of Dr. Barnes in the least drastic way possible so as to keep the Barnes Foundation solvent.

comfortable implication that the trustees or the courts may know better than the testator about how best to effectuate the testator's own intent. This is particularly problematic because of the structural nature of deviation cases. The trustees of a charitable entity often appear before the court, virtually unopposed, requesting deviation and purporting to speak, based on a fiduciary duty, for the deceased testator. In fact, no one can ever conclusively know what a deceased testator would want to do in a situation not anticipated in the testator's lifetime. However, trustees have a duty to the testator's interest and intentions. If the testator is long deceased and the trustees never knew the testator, a difficult situation may arise. This is especially the case when the trustees and the courts have their own interests and opinions on the matter at issue and when public policy implications are at stake (which are supposed to be irrelevant).

No one can ever know conclusively what Dr. Barnes would want to do today. Clearly he did not foresee that over fifty years after his death, his Foundation would be short of money and would have an offer of \$150 million to stabilize it only if it moved from Lower Merion to Philadelphia. However, the court had plenty of clues about what Dr. Barnes might have wanted.

Almost every indication gleaned from Dr. Barnes's colorful life history, the Trust Indenture, and Bylaws indicates that he would have resisted a move.<sup>311</sup> Dr. Barnes chose to set up his foundation in Lower Merion in buildings built expressly for exhibiting his art and in connection with an immovable arboretum. Based on the Trust Indenture and Bylaws, Dr. Barnes clearly did not want any changes after his death to what he had created. Furthermore, Dr. Barnes disliked the moneyed elite of Philadelphia, the same people who are backing this move. He consistently refused to loan his paintings to museums, including the Philadelphia Museum of Art, and often refused access to his gallery. While the trustees maintained that the proposed move would allow greater access to the Barnes Foundation's collection, this clearly would be a negative to Dr. Barnes because during his life he sought to limit, not expand, access to his art collection. Dr. Barnes was quite clear: his foundation was to be an educational institution and not a museum. However, all indications are that the proposed move will morph Dr. Barnes's unique Lower Merion Foundation into something not significantly different from a typical modern day museum.

Despite Dr. Barnes's wishes, however, ample case law in Pennsylvania would permit the move. Unfortunately, Judge Ott did not cite any of it in his opinion granting the trustees' request for deviation.

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<sup>311</sup> Two exceptions are that the built-in *cy pres* provision in Barnes's trust seems to prefer Philadelphia over Lower Merion if the Foundation actually did fail, and the fact that Barnes did not explicitly prohibit a move in the Trust Indenture or Bylaws. However, *cy pres* is not applicable here because the Foundation has not and will not fail, and in the face of so many implications that the Lower Merion location is paramount, failure expressly to prohibit a move is of limited persuasiveness.

Though Dr. Barnes likely would be unhappy with the decision of the court, I am not. I plan to go to the Barnes Foundation more often once it is moved to its new location on Benjamin Franklin Parkway in Philadelphia. Unfortunately, the law on deviation is not supposed to require consideration of personal desires of the public, or trustees, politicians or judges; the law is only supposed to ask one question: What would Barnes do?