United States Court of Appeals,
Third Circuit.
The **BARNES FOUNDATION**,
v.
The TOWNSHIP OF LOWER MERION; The Lower Merion Board of Commissioners; Gloria P. Wolek, individually and in her capacity as President of the Township Board of Commissioners; Frank Lutz, individually and in his capacity as Commissioner; Kenneth E. Davis, individually and in his capacity as Commissioner; Phyllis L. Zemble, individually and in her capacity as Commissioner; Ora R. Pierce, individually and in her capacity as Commissioner; James J. Prendergast, individually and in his capacity as Commissioner; Alan C. Kessler, individually and in his capacity as Commissioner; Brian D. Rosenthal, individually and in his capacity as Commissioner; Joseph M. Manko, individually and in his capacity as Commissioner; Howard L. West, individually and in his capacity as Commissioner; W. Bruce McConnel, III, individually and in his capacity as Commissioner; James S. Ettelson, individually and in his capacity as Commissioner; David A. Sonenshein, individually and in his capacity as Commissioner; Regene H. Silver, individually and in her capacity as Commissioner; Steven Asher; Ina Asher, h/w; Robert Marmon; Toby Marmon, h/w; Walter Herman; Nancy Herman, h/w; Arthur Gershkoff; Leonard H. Ginsberg; Beth R. Ginsberg, h/w; Mark Moster; Marlene Moster, h/w; James Nealon; Lester Schaevitz; Diane Schaevitz, h/w; Michael Toaff; Anna Lev-Toaff, h/w; Bruce Schainker, Ina Asher, Steven Asher, Nancy Herman, Walter Herman, Robert Marmon and Toby Marmon, Appellants.

No. 99-2055.
Argued Oct. 5, 2000.
Filed March 5, 2001.

Foundation which operated art museum brought suit under § 1983 and § 1985 against township officials, and residents of neighborhood surrounding museum, alleging that defendants had acted to oppose expansion of museum operations as part of conspiracy to violate foundation's constitutional rights on basis of race of some of its trustees. After all claims were ultimately dismissed, 927 F.Supp. 874 and 982 F.Supp. 970, defendants sought attorney fees under § 1988. The United States District Court for the Eastern District of Pennsylvania, Ronald L. Buckwalter, J., denied motion, 1999 WL 1065213. Six residents appealed denial of attorney fees. The Court of Appeals, Greenberg, Circuit Judge, held that: (1) action was not legally frivolous, as it was not clearly established at time it was filed that *Noerr-Pennington* doctrine barred claims; but (2) claims were factually without support as to five residents, and thus would support award of attorney fees under § 1988; and (3) matter would be remanded to allow determination whether it had been brought in bad faith sufficient to allow sixth resident to recover attorney fees.

Reversed and remanded.

Nygaard, Circuit Judge, dissented and filed opinion.

West Headnotes

[1] Federal Civil Procedure 170A ⚿652

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(A) Pleadings in General
170Ak652 k. Irrelevant and Immaterial Matter. Most Cited Cases

An organization which is a party to litigation should not gratuitously set forth in its pleadings the political affiliation of its president, lest the court believe that the party is making an appeal for favorable treatment on account of that affiliation.

[2] Federal Courts 170B ⚿830

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170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk830 k. Costs, Attorney Fees and Other Allowances. Most Cited Cases

Court of Appeals reviews district court's order denying motion for attorney fees on an abuse of discretion basis.

[3] Federal Courts 170B ⚷754.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk754 Review Dependent on Whether Questions Are of Law or of Fact
170Bk754.1 k. In General. Most Cited Cases

Federal Courts 170B ⚷763.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk763 Extent of Review Dependent on Nature of Decision Appealed from
170Bk763.1 k. In General. Most Cited Cases

Federal Courts 170B ⚷850.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)5 Questions of Fact, Verdicts and Findings
170Bk850 Clearly Erroneous Findings of Court or Jury in General
170Bk850.1 k. In General. Most Cited Cases

Court of Appeals exercises plenary review over sufficiency of evidence issues and legal issues, but uses the clearly erroneous standard when reviewing factual findings.

[4] Civil Rights 78 ⚷1484

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1484 k. Awards to Defendants; Frivolous, Vexatious, or Meritless Claims. Most Cited Cases
(Formerly 78k298)

Prevailing party in civil rights action who may be awarded attorney fees can be either the plaintiff or the defendant, but the standard for awarding attorney fees to prevailing defendants is more stringent than that for awarding fees to prevailing plaintiffs. 42 U.S.C.A. § 1988(b).

[5] Civil Rights 78 ⚷1478

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1478 k. In General. Most Cited Cases
(Formerly 78k292.1)

Civil Rights 78 ⚷1586

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1585 Attorney Fees
78k1586 k. In General. Most Cited Cases
(Formerly 78k410.1)

Standards for assessing claims for attorney fees pursuant to § 1988, and under the Civil Rights Act of 1964, are identical, and accordingly, cases used to interpret one statute may be used to interpret the other. 42 U.S.C.A. § 1988; Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

[6] Civil Rights 78 ⚷1484

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees

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78k1484 k. Awards to Defendants; Frivolous, Vexatious, or Meritless Claims. Most Cited Cases
(Formerly 78k299)
While prevailing plaintiffs in civil rights actions should ordinarily recover an attorney fee under § 1988 unless special circumstances would render such an award unjust, a prevailing defendant is entitled to attorney fees only upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation. 42 U.S.C.A. § 1988.

[7] Civil Rights 78 ⚿ 1484

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1484 k. Awards to Defendants; Frivolous, Vexatious, or Meritless Claims. Most Cited Cases
(Formerly 78k298)
It is not necessary that a prevailing defendant in a civil rights action establish that the plaintiff had subjective bad faith in bringing the action in order to recover attorney's fees under § 1988; rather, the relevant standard is objective. 42 U.S.C.A. § 1988.

[8] Civil Rights 78 ⚿ 1484

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1484 k. Awards to Defendants; Frivolous, Vexatious, or Meritless Claims. Most Cited Cases
(Formerly 78k299)
Factors considered in determining whether a plaintiff's unsuccessful civil rights claim was frivolous, so that prevailing defendant may recover attorney fees under § 1988, include whether plaintiff established a prima facie case, whether defendant offered to settle, whether trial court dismissed the case prior to trial or the case continued until a trial on the merits, whether question in issue was one of first impression requiring judicial resolution, and whether controversy is based sufficiently upon a real threat of injury; however, such considerations are merely guidelines and not strict rules, and determinations regarding frivolity must be made on a case-by-case basis. 42 U.S.C.A. § 1988.

[9] Civil Rights 78 ⚿ 1484

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1484 k. Awards to Defendants; Frivolous, Vexatious, or Meritless Claims. Most Cited Cases
(Formerly 78k299)
Civil rights action brought by foundation which operated art museum against residents of neighborhood in which museum was located, in which foundation alleged that actions of residents in publicly opposing expansion of museum's operations were part of conspiracy along with township officials to violate foundation's constitutional rights on basis of race of some of its trustees, was not legally frivolous, and thus could not on that basis support award of attorney fees under § 1988 to residents following dismissal of complaint; availability of *Noerr-Pennington* doctrine as a defense was not clearly established at time suit was filed in 1996. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1988.

[10] Constitutional Law 92 ⚿ 1437(1)

92 Constitutional Law
92XV Right to Petition for Redress of Grievances
92k1437 Noerr-Pennington Doctrine
92k1437(1) k. In General. Most Cited
(Formerly 92k91)
Scope of *Noerr-Pennington* doctrine, under which an individual is immune from liability for exercising his or her First Amendment right to petition the government, has been extended beyond the antitrust context. U.S.C.A. Const.Amend. 1.

[11] Civil Rights 78 ⚿ 1484

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78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1484 k. Awards to Defendants; Frivolous, Vexatious, or Meritless Claims. Most Cited Cases
(Formerly 78k299)

Civil rights action brought by foundation which operated art museum against residents of neighborhood in which museum was located, in which foundation alleged that actions of residents in publicly opposing expansion of museum's operations were part of conspiracy along with township officials to violate foundation's constitutional rights on basis of race of some of its trustees, was factually without foundation as to five residents, and thus was frivolous and could support award of attorney fees to those residents under § 1988 following its dismissal; evidence relied on to support claims was totally inadequate to serve as foundation on which to predicate inference that racial animus motivated residents. 42 U.S.C.A. §§ 1983, 1985, 1988.

[12] Conspiracy 91 ⚷7.5(1)

91 Conspiracy
91I Civil Liability
91I(A) Acts Constituting Conspiracy and Liability Therefor
91k7.5 Conspiracy to Interfere with Civil Rights
91k7.5(1) k. In General. Most Cited Cases

Section § 1985 provides a cause of action if (1) two or more persons conspire to deprive any person of the equal protection of the law, (2) one or more of the conspirators performs or causes to be performed any overt act in furtherance of the conspiracy, and (3) that overt act injures the plaintiff in his person or property or deprives the plaintiff of any right or privilege of a citizen of the United States. 42 U.S.C.A. § 1985(3).

[13] Conspiracy 91 ⚷7.5(3)

91 Conspiracy
91I Civil Liability
91I(A) Acts Constituting Conspiracy and Liability Therefor
91k7.5 Conspiracy to Interfere with Civil Rights
91k7.5(3) k. Color of State Law; State Action. Most Cited Cases

Section 1985, which prohibits conspiracy to interfere with civil rights, does not include a requirement that the conspirators act "under color of state law," as is the case in an action under § 1983, since § 1985 makes actionable private conspiracies to deprive a citizen of the equal enjoyment of rights secured to all. 42 U.S.C.A. §§ 1983, 1985.

[14] Civil Rights 78 ⚷1484

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1484 k. Awards to Defendants; Frivolous, Vexatious, or Meritless Claims. Most Cited Cases
(Formerly 78k299)

Civil rights action brought by foundation which operated art museum against residents of neighborhood where museum was located, in which foundation alleged that one of residents who publicly opposed expansion of museum had acted with racial animus, and was part of conspiracy along with township officials to violate foundation's constitutional rights, was not factually without support, and thus was not frivolous and could not support award of attorney fees under § 1988 following dismissal of claim; while comments by resident during public meeting were arguably racially ambiguous, it was not unreasonable to infer that they communicated racial hostility and discriminatory motivation. 42 U.S.C.A. §§ 1983, 1985, 1988.

[15] Civil Rights 78 ⚷1490

78 Civil Rights
78III Federal Remedies in General
78k1477 Attorney Fees
78k1490 k. Taxation. Most Cited Cases

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(Formerly 78k305)

In determining whether to make award of attorney fees under § 1988, it is incumbent upon a district court to make its reasoning and application of fee-awards jurisprudence clear, so that Court of Appeals has a sufficient basis to review for abuse of discretion. 42 U.S.C.A. § 1988.

[16] Federal Courts 170B ⚷830

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk830 k. Costs, Attorney Fees and Other Allowances. Most Cited Cases

Federal Courts 170B ⚷947

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(L) Determination and Disposition of Cause
170Bk943 Ordering New Trial or Other Proceeding
170Bk947 k. Further Evidence, Findings or Conclusions. Most Cited Cases

District court's failure to mention, in denying motion for attorney fees under § 1988 which was asserted by defendants after they successfully moved to dismiss civil rights action, claim by defendants that action had been brought in bad faith, required remand for determination as to that issue; it was incumbent upon district court to make its reasoning and application of the fee-awards jurisprudence clear, so that Court of Appeals had a sufficient basis to review for abuse of discretion. 42 U.S.C.A. § 1988.

***153** David H. Weinstein (argued), Kellie A. Allen, Weinstein, Kitchenoff, Scarlato & Goldman, Philadelphia, PA, Attorneys for Appellants.

Sheryl L. Auerbach, Maura E. Fay (argued), Dilworth, Paxson, Kalish & Kauffman, Philadelphia, PA, Attorneys for Appellee.

BEFORE: NYGAARD, GREENBERG, and COWEN, Circuit Judges.

OPINION OF THE COURT

GREENBERG, Circuit Judge:

I. FACTUAL & PROCEDURAL HISTORY

A. *Factual History*

This matter comes on before this court on appeal from an order entered on November 24, 1999, denying an application seeking attorney's fees filed by certain successful defendants in the aftermath of ***154** the entry of an order dismissing the complaint against them in this civil rights action. The **Barnes Foundation** (the " **Barnes** "), which brought the action, is a Pennsylvania corporation that operates an art gallery on North Latches Lane in Lower Merion Township, Pennsylvania, in the Philadelphia suburbs. Dr. Albert C. **Barnes** established the **Barnes** in 1922 by Indenture and Agreement conveying the real estate that the **Barnes** currently occupies, as well as his art collection. The Indenture provides that the **Foundation's** purpose is "to promote the advancement of education and the appreciation of the fine arts." App. at 178. The **Barnes** is governed by a board of trustees that during the time relevant to this action consisted of Shirley A. Jackson, Niara Sudarkasa, Charles A. Frank III and Richard H. Glanton, the board's president. Lincoln University, which the **Barnes** describes as "a predominately and historically African-American university," *see* br. at 4, located in Chester County, Pennsylvania, appoints all but one of the trustees and the Mellon Bank appoints the other. At the times relevant to this opinion, the trustees except for Frank, who is or was a Senior Vice President of Mellon, were African-American.

The six appellants-defendants, Ina Asher, Steven Asher, Nancy Herman, Walter Herman, Robert Marmon and Toby Marmon, are residents of the neighborhood in which the Barnes is located. Even though the Barnes brought this action against 17 neighbors as well as Lower Merion Township (the "Township"), the Lower Merion Board of Commissioners (the "Board"), and each of the

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township commissioners (the "Commissioners") in their individual and official capacities, the six appellants are the only defendants who are parties to this appeal.

The events giving rise to this case originate from the Barnes' operation and use of its gallery. For many years access to the gallery was limited, *see Barnes Found. v. Keely*, 314 Pa. 112, 171 A. 267, 268 (1934), but in 1960, pursuant to the entry of a consent decree between the Barnes and the Commonwealth of Pennsylvania, the Barnes opened the gallery to the public two days per week, except during July and August of each year. Subsequently, the Barnes opened the gallery to the public for an additional half-day per week. In 1990, Glanton became president of the Barnes' board of trustees and in that capacity, beginning in 1993, initiated a major renovation of its facilities and art gallery. By reason of the renovation, the Barnes was closed until November 1995. To fund the renovations, the Barnes sent certain selected works of art from its collection on a world tour which generated a great deal of publicity for the Barnes.

Around August or September of 1995, prior to the Barnes' reopening, it sought permission from the Township to construct a parking lot on its property. This application prompted the neighbors and other individuals to voice concerns over the facility's scheduled reopening as they believed that the reopening would cause parking, noise and pollution problems. Contemporaneously, individuals living in the area of the Barnes, including the appellants, formed The Latches Lane Neighborhood Association to oppose the Barnes' reopening, as well as to challenge certain of its other activities that they believed violated the 1922 Indenture and Agreement as well as local zoning laws. The Barnes alleges that this opposition included supporting litigation in the Montgomery County Orphan's Court concerning its request to change the terms and conditions for the operation of the gallery, in particular opposing its attempt to expand its operations from two and one-half to six days per week.

The complaint in this action alleges that the Barnes' neighbors and township officials conspired to deprive it of its constitutional rights on the basis of the race of three of the four Barnes trustees and that the neighbors and officials agreed that the Township would discriminate against the ***155** Barnes by requiring "strict compliance" with township rules and regulations and by "closely monitor[ing]" the Barnes, while not treating its institutional neighbors in this way. *See* app. at 185. According to the Barnes, the conspiracy's ultimate goal was to prevent its reopening.

The Barnes set forth particularized allegations in its complaint. Thus, it charged that in the months preceding its scheduled reopening, the Township and neighbors engaged in several activities with the intention of preventing its reopening. The Barnes said that to further this goal during the last two months of construction at the Barnes, a township inspector made six unannounced visits to the site and that during the final inspection of the premises on October 30, 1995, approximately two weeks prior to the scheduled reopening, the deputy fire marshal announced prior to beginning an inspection that the facility would not pass. The Barnes alleges that he imposed several arbitrary and unreasonable requirements on it as requirements for obtaining a certificate of occupancy.

On November 9, 1995, two days before the Barnes' scheduled opening gala events, David Latshaw, the Township Manager, sent Glanton a letter criticizing, among other things, the Barnes' lack of a traffic plan for the reopening. Glanton responded by letter indicating his belief that Latshaw's letter was overly hostile and that the Township was treating the Barnes differently from other entities because of racial animus. The Barnes asserts that when the parties met the day of the opening gala, the Township treated it in an overtly hostile man- ner.

The complaint further alleges that on November 10 and 11, 1995, during the opening gala events, certain persons, including appellants Ina

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Asher, Walter Herman, Robert Marmon, and Toby Marmon, congregated and picketed at the Barnes' main gate to protest its reopening. Moreover, it asserted that unspecified individuals carried placards that read, among other things, "From LA to PA, Money Buys Justice" and "Lincoln University-Go Home." In addition, Robert Marmon and Toby Marmon videotaped gallery visitors entering and exiting the Barnes.

Four days after the gala events, the Commissioners held a meeting to discuss the Barnes situation. At the hearing, several neighbors, including Robert Marmon and Steven Asher, spoke out against the official reopening scheduled for the following day, November 16, 1995. Specifically, Robert Marmon stated, in relevant part:

> For sixteen years we hardly knew the Barnes Foundation was across the street. They were good neighbors. Then, something changed. We didn't change. We did nothing wrong. Outsiders have taken over the Barnes, people who have no attachment to the neighborhood, to the life we have quietly enjoyed. We have been citizens here for decades. Mr. Glanton and his people have not been. We have been voters here for decades. Mr. Glanton and his people have not. And most importantly, we have been taxpayers here for decades and Mr. Glanton and his people have not. I now finally understand what a carpetbagger is and how one operates.

Id. at 94. The Barnes contends that Marmon's use of the words "outsiders," "Mr. Glanton and his people," and "carpetbagger" indicates a racially hostile attitude both on his part and on that of his fellow neighbors.

At the end of the meeting, the Commissioners adopted a resolution requesting that the Barnes delay its reopening until it developed plans to manage the parking and crowd problems effectively, or, if the opening proceeded, to "take any and all appropriate actions necessary to maintain the peace, safety, and quality of life of the surrounding neighborhood and its residents and assure that the operation of the facility by the Barnes Foundation complies with the Township of Lower Merion zoning code." *Id.* at 100. The Commissioners ***156** adopted the resolution pursuant to their findings that the Barnes estimated that it would have significantly more visitors in the first year following the reopening than in previous years, and that the parking and crowd control arrangements to accommodate the visitors were inadequate. Moreover, the Commissioners were concerned that the proposed use did not comply with the Township's zoning laws which apparently zoned the Latches Lane area for residential and educational use, but not for an art gallery. The Commissioners therefore believed that the Barnes might violate the local zoning ordinances if the primary focus of its operations was the operation of the gallery, as opposed to conducting its educational programs.

Notwithstanding the objections, the Barnes reopened, though it did not attract as many people as anticipated. The neighbors still had complaints, however, about traffic and parking, and the concerns about potential zoning violations persisted. The Township addressed these issues in a letter dated November 29, 1995, from the President of the Township Commissioners to the neighbors informing them that the Commissioners had heard their concerns and had been moved to act in response.

On December 13, 1995, the Township issued a violation notice against the Barnes because it was open more than two and one-half days per week and received more than 500 visitors per week, thus violating the operating restrictions imposed on it since 1961. The Barnes contends that the Township zoning officer admitted that he had no rational basis for ordering the Barnes to comply with the 1961 attendance levels restrictions, particularly inasmuch as the Township had not been doing so immediately prior to its closure for renovations.[FN1]

FN1. The notice of violation was withdrawn, but filed again on the same grounds on August 6, 1996.

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B. *Procedural History*

[1] Following the issuance of the December 13, 1995 notice of violation the Barnes filed a district court complaint on January 18, 1996, alleging that the Township, the Board, the Commissioners and 17 of the Barnes' residential neighbors deprived and conspired to deprive it of its rights under the Due Process and Equal Protection Clauses of the United States Constitution contrary to 42 U.S.C. §§ 1983 and 1985 by treating it differently from its institutional neighbors as a result of a racially-motivated conspiracy between the Township and the neighbors.[FN2] On March 18, 1996, the Township, the Board and the Commissioners filed motions to dismiss the Barnes' complaint, but the district court denied the motions by Memorandum and Order dated June 3, 1996. *See Barnes Found. v. Township of Lower Merion,* 927 F.Supp. 874, 875 (E.D.Pa.1996).[FN3] Between March 18, 1996, and April 1, 1996, all of the neighbor defendants also filed motions to dismiss the complaint, contending that they enjoyed First Amendment immunity from liability for petitioning the government. *Id.* at 875-76. The district court agreed with the neighbors and thus, in its June 3, 1996 Memorandum and Order, granted their motions to dismiss. *See id.* at 878.

FN2. The complaint included an immaterial allegation that Glanton is a Republican. *See* app. at 179. In this regard, we point out that a party to litigation should not gratuitously set forth in its pleadings the political affiliation of its president lest the court believe that the party is making an appeal for favorable treatment on account of that affiliation.

FN3. The Commissioners and other Township officials also filed a defamation action against the trustees of the Barnes on March 3, 1996, in state court.

Subsequently the Township and the Commissioners filed a joint counterclaim asserting that by bringing this action the Barnes abused the judicial process. The Barnes responded to the counterclaim with a motion to dismiss which the district court denied. Thereafter, the Barnes unsuccessfully*157 sought permission to amend the complaint further, adding new claims against the neighbor defendants and asserting claims on behalf of Glanton individually.

Following the close of discovery, the Township, the Board and the Commissioners filed motions for summary judgment on all of the Barnes' claims, which the district court granted on September 26, 1997. *See Barnes Found. v. Township of Lower Merion,* 982 F.Supp. 970, 1005 (E.D.Pa.1997). The Township's and Commissioners' counterclaim was dismissed thereafter pursuant to a settlement, and a final order was entered on October 2, 1998, and then amended on October 28, 1998. The Barnes appealed from the district court's final order but then voluntarily dismissed the appeal. Glanton also filed an appeal which we dismissed on March 12, 1999.

Upon resolution of the summary judgment motions, the appellants filed a motion for attorney's fees and expenses pursuant to 42 U.S.C. § 1988 which the district court denied on November 24, 1999. *See Barnes Found. v. Township of Lower Merion,* No. CIV. A. 96-372, 1999 WL 1065213 (E.D.Pa. Nov.24, 1999). The appellants then appealed from the district court's November 24, 1999 order.[FN4]

FN4. Defendants Leonard H. Ginsburg and Beth Ginsburg joined in the motion but are not parties to the appeal. Other defendants also submitted motions seeking fees but as those motions are not implicated on this appeal we need not discuss their disposi- tion.

II. DISCUSSION

A. *Standard of Review*

[2][3] We review the district court's order denying the appellants' motion for attorney's fees on an abuse of discretion basis. *See EEOC v. L.B. Foster Co.,* 123 F.3d 746, 750 (3d Cir.1997);

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Brown v. Borough of Chambersburg, 903 F.2d 274, 277 (3d Cir.1990). In this case, the appellants challenge the district court's conclusions both as to the legal and factual sufficiency of the Barnes' claims. We exercise plenary review over sufficiency of evidence issues and legal issues but use the clearly erroneous standard when reviewing factual findings. *See Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 502 (3d Cir.1991); *Rode v. Dellarciprete*, 892 F.2d 1177, 1182-83 (3d Cir.1990).[FN5]

FN5. We note that in his dissenting opinion Judge Nygaard recites that we have vested the trial court with "discretionary authority [with respect to fee applications] for good reason [as it] has the distinct advantage of hearing and seeing evidence and testimony first-hand and has viewed the parties and the cause over a longer time period." Dissent at 167. While we do use an abuse of discretion standard on this appeal, we point out that Judge Nygaard's reasoning is not applicable in this case inasmuch as Judge Brody granted the motions to dismiss and for summary judgment and thereafter, on May 26, 1998, the case was reassigned to Judge Buckwalter who denied appellants' application for fees. Furthermore, Judge Buckwalter did so on the basis of the record without conducting a trial-type hearing. Consequently, he did not have an opportunity to see the parties testify first-hand and, in reality, even though we are adjudicating this appeal on an abuse of discretion basis, we doubt that Judge Buckwalter had any advantage over us in considering the appellants' fee application.

B. *Availability of Attorney's Fees Pursuant to Section 1988*

[4][5][6][7] The appellants contend that the district court erred in concluding that the Barnes' claims were neither legally nor factually frivolous and that it should have awarded them attorney's fees on both of those bases pursuant to section 1988 . Section 1988 provides, in relevant part: "In any action or proceeding to enforce a provision of sections ... 1983 [and] 1985 ... of this title, ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs...." 42 U.S.C. § 1988(b). The "prevailing party" can be either the plaintiff or the defendant but the standard for awarding attorney's fees to prevailing defendants is more stringent than that for awarding fees to prevailing ***158** plaintiffs. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978); *L.B. Foster*, 123 F.3d at 750-51.[FN6] As the Supreme Court held in *Christiansburg*, while prevailing plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust," a prevailing defendant is entitled to attorney's fees only "upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation...." *Christiansburg*, 434 U.S. at 416-17, 421, 98 S.Ct. at 698, 700. Nevertheless, it is not necessary that the prevailing defendant establish that the plaintiff had subjective bad faith in bringing the action in order to recover attorney's fees. Rather, the relevant standard is objective. *See Hughes v. Rowe*, 449 U.S. 5, 14, 101 S.Ct. 173, 178, 66 L.Ed.2d 163 (1980). Furthermore, the Supreme Court has indicated that "it is important that a ... court resist the understandable temptation to engage in *post hoc* reasoning by concluding that because a plaintiff did not ultimately prevail his action must have been unreasonable or without foundation." *Christiansburg*, 434 U.S. at 421-22, 98 S.Ct. at 700.

FN6. The standards for assessing claims for attorney's fees pursuant to section 1988 and under the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), are identical. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 433 n. 7, 103 S.Ct. 1933, 1939 n. 7, 76 L.Ed.2d 40 (1983); *Hughes v. Rowe*, 449 U.S. 5, 14, 101 S.Ct. 173, 178, 66 L.Ed.2d 163 (1980). Accordingly, cases used to in-

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terpret one statute may be used to interpret the other. *See Brown,* 903 F.2d at 277 n. 1; *Sullivan v. Pennsylvania Dep't of Labor & Indus.,* 663 F.2d 443, 447 n. 5 (3d Cir.1981).

[8] We have relied on several factors in determining whether a plaintiff's unsuccessful civil rights claim was frivolous including whether the plaintiff established a prima facie case, the defendant offered to settle, the trial court dismissed the case prior to trial or the case continued until a trial on the merits. *See L.B. Foster,* 123 F.3d at 751. Other factors that courts have considered in determining if an action was frivolous include whether the question in issue was one of first impression requiring judicial resolution, the controversy is based sufficiently upon a real threat of injury to the plaintiff, the trial court has made a finding that the suit was frivolous under the *Christiansburg* guidelines, and the record supports such a finding. *See Unity Ventures v. County of Lake,* 894 F.2d 250, 253-54 (7th Cir.1995). These considerations, however, are merely guidelines, not strict rules; thus "[d]eterminations regarding frivolity are to be made on a case-by-case basis." *Sullivan v. School Bd.,* 773 F.2d 1182, 1189 (11th Cir.1983).

C. *Legal Sufficiency of the Barnes' Claims*

The appellants first argue that the Barnes knew or should have known that they enjoyed First Amendment immunity for their conduct pursuant to the *Noerr-Pennington* doctrine. The Barnes contends that an individual's immunity under that doctrine for alleged violations of civil rights was not established in this circuit at the time it filed suit, particularly in cases in which it was alleged that a racially discriminatory animus motivated a defendant's actions. Therefore, it argues that its case against the neighbors, including the appellants, was not legally frivolous.

[9] Unquestionably, given the outstanding case law at the time the Barnes filed suit against the neighbors, the district court properly dismissed its case against them by reason of their First Amendment immunity and, indeed, the Barnes on this appeal does not challenge that disposition. But, as we shall explain, prior to the institution of this action neither the Supreme Court nor this court had held expressly that the *Noerr-Pennington* doctrine provides an immunity for First Amendment activity allegedly constituting a civil rights abuse, especially when a racially discriminatory animus allegedly motivated the activity.

***159** 1. *Status of the Law in the Supreme Court and this Circuit*

The *Noerr-Pennington* doctrine originated more than 30 years prior to the Barnes filing the complaint in this action when the Supreme Court held in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) (" *Noerr* "), and *United Mine Workers v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965) (" *Pennington* "), that an individual is immune from liability for exercising his or her First Amendment right to petition the government. *See Pennington,* 381 U.S. at 669-70, 85 S.Ct. at 1593; *Noerr,* 365 U.S. at 137-38, 81 S.Ct. at 529-30; *see also City of Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 379-80, 111 S.Ct. 1344, 1353-54, 113 L.Ed.2d 382 (1991). The Court made these rulings in an antitrust context where the defendants engaged in campaigns directed towards obtaining governmental action for the purpose of eliminating competition in their respective industries. *See Pennington,* 381 U.S. at 660, 85 S.Ct. at 1588; *Noerr,* 365 U.S. at 129, 81 S.Ct. at 525. In those situations, the plaintiffs alleged that the defendants' conduct violated the Sherman Antitrust Act. *See Pennington,* 381 U.S. at 659, 85 S.Ct. at 1588; *Noerr,* 365 U.S. at 129, 81 S.Ct. at 525. The Supreme Court disagreed with the plaintiffs, holding that the Sherman Act did not proscribe the campaign. *See Pennington,* 381 U.S. at 671, 85 S.Ct. at 1594; *Noerr,* 365 U.S. at 145, 81 S.Ct. at 533. The Court recognized that the "right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an in-

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tent to invade these freedoms." *Noerr*, 365 U.S. at 138, 81 S.Ct. at 530. The Court held that there was immunity regardless of the defendants' motivations in waging their campaigns, as it recognized that the right of individuals to petition the government "cannot properly be made to depend on their intent in doing so." *Id.* at 139, 81 S.Ct. at 530.

[10] The Supreme Court and this court have extended the scope of the *Noerr-Pennington* doctrine beyond the antitrust context. Thus, in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982), the Court applied the *Noerr-Pennington* doctrine to a civil conspiracy claim by white merchants whose businesses were boycotted by the NAACP. *See id.* at 912-14, 102 S.Ct. at 3425-26. The boycott was intended to force compliance with a list of demands for racial equality and integration that had been presented to white elected officials. *See id.* at 889-90, 102 S.Ct. at 3413. The boycott was supported by speeches, meetings and picketing, although there were threats of actual violence as well. Applying the principles set forth in *Noerr-Pennington*, the Court unanimously held that the First Amendment protected the nonviolent aspects of the boycott. *See id.* at 907-08, 102 S.Ct. at 3422 (reaffirming principle that " 'the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process' " (quoting *Citizens Against Rent Control Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 294, 102 S.Ct. 434, 436, 70 L.Ed.2d 492 (1981))). The Court reached its conclusion even though some members of the group may have engaged in unprotected conduct.

We extended the principles of the *Noerr-Pennington* doctrine in *Pfizer Inc. v. Giles (In re Asbestos School Litigation)*, 46 F.3d 1284 (3d Cir.1994), and *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155 (3d Cir.1988), in which we held that the respective defendants were immune from liability for civil conspiracy pursuant to the First Amendment. *See Pfizer*, 46 F.3d at 1289-90; *Brownsville*, 839 F.2d at 160. In *Brownsville*, the plaintiff, a nursing home, alleged that the defendants engaged in a civil conspiracy designed to lead to the state revoking its nursing home license. *See Brownsville*, 839 F.2d at 156. Two defendants, private ***160** citizens who visited the nursing home, communicated their concern over what they viewed as appalling conditions to federal and state officials. *See id.* at 157-58. They engaged the efforts of Senator Heinz, and together sought to have the home decertified. *See id.* at 158. The district court granted the defendants' summary judgment motions, and we affirmed. *See id.* Relying on the *Noerr-Pennington* doctrine we held that the defendants were immune from conspiracy liability for damages resulting from inducing official action. *See id.* at 160.

Likewise, in *Pfizer* the plaintiff alleged that the defendants, several manufacturers of asbestos-containing building products ("ACBPs"), conspired with each other and acted in concert to produce and sell ACBPs without warnings and with knowledge of the danger they presented. *See Pfizer*, 46 F.3d at 1286. One of the defendants, Pfizer, moved for summary judgment on the civil conspiracy and concert of action claims, claiming that the evidence supporting the plaintiffs' claims consisted entirely of the fact that Pfizer had manufactured an ACBP from 1964 until 1972 and that in 1984, Pfizer became associated with the Safe Buildings Alliance ("SBA"), a lobbying organization that, among other things, represented its members' interests before federal, state and local government officials and agencies. *See id.* at 1287. The district court denied Pfizer's motion on the ground that a jury reasonably could conclude there was a conspiracy based on Pfizer's involvement with and financial support for the SBA. *See id.* Pfizer unsuccessfully moved for reconsideration and, following the denial of its request for certification of an interlocutory appeal, it petitioned us seeking a writ of mandamus that effectively would overturn the district court's decision. *See id.* at 1288.

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We granted Pfizer's petition. *See id.* at 1290. Relying on *Claiborne Hardware,* we found that the First Amendment right to petition government protected Pfizer's association with the SBA and that to the extent that the First Amendment did not protect the SBA's activities, Pfizer could not be held liable absent evidence that its actions with regard to the SBA were intended specifically to further that wrongful conduct.

Therefore, at the time the Barnes filed its complaint, we already had applied the *Noerr-Pennington* doctrine in varied contexts. Nevertheless, while in *Pfizer* we stated that we saw no reason why this principle of First Amendment immunity was not meant to have general applicability, we had not determined in an actual case involving a claim of an infringement of civil rights that a *Noerr-Pennington* defense was available when the Barnes filed its complaint in this action. While not determinative, this circumstance mitigates against a finding that the Barnes' suit against the neighbors was legally frivolous. *See Tarter v. Raybuck,* 742 F.2d 977, 987 (6th Cir.1984) (reversing award of attorney's fees to prevailing defendant in part because legal issue was not well-settled in circuit or country).

2. *Status of the Law in Other Circuits*

We recognize that by the time the Barnes filed its complaint, several other courts of appeals had made the *Noerr-Pennington* doctrine and First Amendment immunity expressly applicable as defenses to causes of action arising under federal civil rights laws. *See Eaton v. Newport Bd. of Educ.,* 975 F.2d 292, 299 (6th Cir.1992) (holding teachers' union and individual immune under *Noerr-Pennington* for lobbying that led to school principal's discharge); *Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc.,* 858 F.2d 1075, 1084 (5th Cir.1988) (finding *Noerr-Pennington* precluded defendant's liability as conspirator with city in violation of civil rights under 42 U.S.C. § 1983); *Stevens v. Tillman,* 855 F.2d 394, 404-05 (7th Cir.1988) (noting applicability of *Noerr-Pennington* as defense to plaintiff's civil rights action, but finding for defendants on other grounds); ***161** *Evers v. County of Custer,* 745 F.2d 1196, 1204 (9th Cir.1984) (upholding award of attorney's fees to defendants immunized from liability by *Noerr-Pennington* for petitioning government to declare road spanning plaintiff's land public); *Gorman Towers, Inc. v. Bogoslavsky,* 626 F.2d 607, 614-15 (8th Cir.1980) (holding private citizen immune from section 1983 liability in zoning dispute). We think that this point is important because, even in the absence of binding precedent in this court, the presence of well-established case law in other circuits when an action is filed could demonstrate that the action was frivolous.

Only one of the foregoing cases, however, arose in the context of allegedly racially-motivated petitioning activity. *Stevens* involved a federal civil rights claim filed by a school principal against members of the local parent-teacher association. *See Stevens,* 855 F.2d at 395. The plaintiff alleged that certain members of the association conspired to influence the board of education to transfer her to another school because of her race.[FN7] *See id.* But the court of appeals did not reach the immunity issue because it determined that the plaintiff had not suffered an injury at official hands. *See id.* at 405. The court remarked in dicta, however, that it "very much doubt[ed] that § 1985(3) properly may be used to penalize racially-motivated political campaigns, any more than the antitrust laws may be used to penalize deceitful campaigns to obtain protection from competition." *Id.* at 404. While we recognize that this statement certainly should have been an indication to the Barnes that its claims against the neighbors likely would not succeed, still inasmuch as it was made in a different circuit it does not carry such weight as to make the Barnes' claim legally frivolous.

FN7. The plaintiff was white while the defendants, as well as the majority of the population of the plaintiff's school, were African American. *See Stevens,* 855 F.2d at 395.

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Moreover, we are encouraged to reach the conclusion that the Barnes' action was not legally frivolous by the circumstance that courts addressing that doctrine in a civil rights context have not adopted the *Stevens* position universally. In *LeBlanc-Sternberg v. Fletcher,* 781 F.Supp. 261 (S.D.N.Y.1991), the district court denied the defendants' motion to dismiss in a situation in which they were accused of petitioning for the incorporation of a village to impose strict zoning rules which would discourage and prevent Orthodox Jewish residential neighborhoods from developing in the community. *See id.* at 267. The court stated:

> Taking the plaintiffs' allegations of defendants' motives as true, we are not prepared to conclude that defendants' conduct is protected by the first amendment. The 'first amendment ... may not be used as the means or the pretext for achieving "substantial evils" which the legislature has the power to control.' ... To allow individuals to avail themselves of first amendment protections when it is alleged that their conduct will lead to official misconduct in violation of the United States Constitution would defeat the purpose of the civil rights laws.

Id. (quoting *California Motor Transp. Co. v. Trucking Unlimited,* 404 U.S. 508, 515, 92 S.Ct. 609, 614, 30 L.Ed.2d 642 (1972)). In *California Motor Transport,* the Court held that the plaintiff, a trucking company, stated a cause of action under the Clayton Act against its competitors where the competitors engaged in concerted activities to institute state and federal proceedings designed to interfere with the plaintiff's business. *See California Motor Transp.,* 404 U.S. at 509, 92 S.Ct. at 611. The Court relied on the "sham" exception to the *Noerr-Pennington* doctrine which denies immunity for petitioning activity where the purpose is solely to interfere with the business relationships of a competitor rather than to effectuate governmental action aimed at accomplishing the same result. *Noerr,* 365 U.S. at 144, 81 S.Ct. at 533.

Obviously *LeBlanc-Sternberg* was not binding authority in this circuit when the ***162** Barnes initiated this case but the sham exception to *Noerr-Pennington* immunity as set forth in *Noerr* and *California Motor Transport* certainly was. While there is a legitimate argument that the sham exception to the *Noerr-Pennington* doctrine could not have been applicable here and that the Barnes should have so recognized, nevertheless *LeBlanc-Sternberg* demonstrates that when the Barnes instituted this action there was some question as to the applicability of the *Noerr-Pennington* doctrine as a defense to its claim.

Overall, we are satisfied that the availability of the *Noerr-Pennington* doctrine as a defense to a federal civil rights claim where a defendant's conduct allegedly was racially motivated was not completely established in this court at the time the Barnes filed suit in this matter. Moreover, we are satisfied that notwithstanding the trend of the cases at that time, other courts had not come to a uniform conclusion on the point. Accordingly, taking into account the standards set forth in *Christiansburg* and *L.B. Foster,* we conclude, though the issue is close, that the district court did not err in determining that the Barnes' claim was not legally frivolous.

Before we close our discussion of the *Noerr-Pennington* doctrine we hasten to add that persons contemplating bringing suits to stifle First Amendment activity should draw no comfort from this opinion because the uncertainty of the availability of a First Amendment defense when a plaintiff brings a civil rights case now has been dispelled. This point is of particular importance in land-use cases in which a developer seeks to eliminate community opposition to its plans as this opinion should make it clear that it will do so at its own peril.

D. *Factual Sufficiency of Barnes' Claims*

[11][12][13] Notwithstanding our conclusion with respect to the legal question of the applicability of the *Noerr-Pennington* doctrine, the factual sufficiency *vel non* of the Barnes' claims is quite another matter which we must consider separately.

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In considering this issue, we start by setting forth the elements of a cause of action under 42 U.S.C. § 1985(3), as Barnes sued the neighbors and thus the appellants under that statute. Section 1985(3) provides a cause of action if: (1) two or more persons conspire to deprive any person of the equal protection of the law; (2) one or more of the conspirators performs or causes to be performed any overt act in furtherance of the conspiracy; and (3) that overt act injures the plaintiff in his person or property or deprives the plaintiff of any right or privilege of a citizen of the United States. *See Griffin v. Breckenridge*, 403 U.S. 88, 102-03, 91 S.Ct. 1790, 1798-99, 29 L.Ed.2d 338 (1971); *Bougher v. University of Pittsburgh*, 882 F.2d 74, 79 (3d Cir.1989). Section 1985(3), however, does not include a requirement that the conspirators act "under color of state law," as is the case in an action under 42 U.S.C. § 1983, as section 1985(3) makes actionable private conspiracies to deprive a citizen of the equal enjoyment of rights secured to all. *See Griffin*, 403 U.S. at 95-102, 91 S.Ct. at 1794-98; *Phillips v. Trello*, 502 F.2d 1000, 1004-05 (3d Cir.1974). Here, the Barnes predicated its claim of an equal protection violation on racial discrimination. While the Barnes also brought its action against the appellants under 42 U.S.C. § 1983, we see no need to discuss the possible applicability of that section to the appellants who are private parties as our conclusion with respect to the Barnes' section 1985 claim applies to its section 1983 claim as well.

In analyzing the sufficiency of the factual basis for the Barnes' claims, the district court first recognized that the Barnes never proffered any direct evidence of racial hostility. *See Barnes Found.*, 1999 WL 1065213, at *3. The court found that instead the Barnes based the suit on conduct that, while subtle, could be considered no less discriminatory. *See id.* Therefore, the court characterized the issue as follows:

> ***163** Thus, in deciding the groundless issue, the key questions are: Can this complaint be said to have a factual foundation for its allegations of discriminatory treatment based on race when those allegations are based upon a theory that defendants' conduct, though not found by direct evidence to be racially motivated, was actually a sophisticated cover-up for racial discrimination. That is, can a reasonable factual foundation be established to support plaintiff's theory by drawing inferences from certain objective facts which are generally not in dispute?

Id. at *4. The district court answered its question affirmatively, though it qualified the answer by requiring that the inference be reasonable. *See id.* The court held that to base a complaint on circumstantial evidence, the "plaintiff must be able to point to a factual pattern which fairly implies racial discrimination, going beyond a mere suggestion that in today's world, subtle conduct masks racism." *Id.* The court found that the inferences supporting the Barnes' complaint were reasonable and thus it denied the appellants' motion for attorney's fees.

In so holding, however, the district court completely ignored the opinions of the Supreme Court in *Claiborne Hardware* and of this court in *Pfizer* which held that the First Amendment requires more than evidence of association to impose liability for conspiracy and, in fact, prohibits liability on that basis alone. *See Claiborne Hardware*, 458 U.S. at 918-19, 102 S.Ct. at 3428-29; *Pfizer*, 46 F.3d at 1289. Thus, the Supreme Court in *Claiborne Hardware* explained that "[f]or liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *Claiborne Hardware*, 458 U.S. at 920, 102 S.Ct. at 3429; *see Pfizer*, 46 F.3d at 1289. Furthermore, the court must judge this intent "according to the strictest law." *Claiborne Hardware*, 458 U.S. at 919, 102 S.Ct. at 3429. Therefore, while it is clear that *Claiborne Hardware* and *Pfizer* were the controlling legal authorities when the district court denied the appellants' applications, and continue to be so, the dis-

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trict court did not follow or even cite either of those cases when it made its ruling.

How, then, did the district court reach its result inasmuch as it acknowledged that there was no direct evidence of racial hostility on the appellants' part? *See Barnes*, 1999 WL 1065213, at *3. It did so by concluding that on the record before it, one reasonably could draw an inference of racial animus by the appellants sufficient to support a claim against all of them. *Id.* at *4. It based this conclusion on what it deemed a representative example of the Barnes' evidence of discriminatory treatment including: (1) an affidavit from Thomas Massaro, a land use consultant, who opined that the neighbors were so firmly and irrationally opposed to the Barnes' proposal that it suggested their concerns were a pretext for racial prejudice; (2) Massaro's opinion that the neighbors' concerns about traffic problems caused by the Barnes were inconsistent with the realities of the neighborhood given the close proximity of St. Joseph's University and the Episcopal Academy; (3) an affidavit from Peter Kelsen, the attorney retained by the Barnes to secure a parking lot building permit, stating the Township should have allowed the parking lot without zoning board approval, Township representatives and neighbors expressed a high level of animosity towards Glanton, their meetings were becoming increasingly confrontational and that comments by the neighbors were of an overly discriminatory nature; (4) an affidavit from Ann B. Laupheimer, an attorney for the Barnes, stating that she discussed the possibility of a lawsuit with other lawyers and, following an investigation into the law and facts, determined there was sufficient evidence to warrant proceeding; (5) an affidavit from Jordana Cooper, an attorney for the Barnes, acknowledging that while she did ***164** not anticipate the *Noerr-Pennington* defense, there was little reason to do so because it was a novel one in this court at the time; (6) examples of unequal treatment by the Township with regard to traffic and parking between the Barnes and its institutional neighbors; (7) a Township Commissioner's alleged statement that the Commissioners were outraged and were going to help; and (8) Robert Marmon's statements at the November 15, 1995 meeting where he used "code words" such as "Mr. Glanton and his people," "carpetbaggers" and "outsiders" in discussing the situation at the Barnes. *See id.* at *2-*3. This evidence, in addition to the historical background of the Barnes which involved overt racial hostility from the surrounding community, led the district court to conclude that it was reasonable to infer that each of the neighbors and thus each of the appellants was motivated by racial hostility. *Id.* at *4.

We hold that the district court erred in its conclusion as obviously the items it cited were a totally inadequate foundation on which to predicate an inference that racial animus motivated the appellants, except possibly Robert Marmon. Indeed, it is not acceptable to predicate inferences of racial animus against the neighbors and thus the appellants because of the legal views of the Barnes' professional representatives supporting its cause or because of the actions of Township officials. In particular, we point out that the Barnes' representatives and the Barnes itself should have recognized that persons may controvert their views without being racists.

Furthermore, with the exception of the last example considered by the district court, which mentions only Robert Marmon, none of the evidence that does refer to the Barnes' neighbors specifies which neighbors were involved in the actions. There are merely allegations that certain unnamed and unidentified "neighbors" were involved in allegedly discriminatory treatment. The same is true for the evidence the Barnes has highlighted on this appeal, *see* Barnes' Br. at 22-24, namely that: (1) the neighbors expressed concerns over increased traffic and parking problems associated with the use of the Barnes' facility, but did not complain about the traffic generated by St. Joseph's University and the Episcopal Academy; (2) Robert Mar mon and Toby Marmon, Ina Asher and Walter Herman were seen in front of the Barnes among picketers holding signs reading "From LA to PA, Money Buys

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Justice" and "Lincoln University-Go Home;" and (3) the neighbors founded, were members of, and contributed money to the Latches Lane Neighborhood Association for the purpose of acting in concert against the Barnes.[FN8]

FN8. We are aware that the Barnes alleged that appellant Steven Asher stated that we would prefer to live across the street from a "Kravco mall" than across the street from the Barnes. In this regard the Barnes points out that Kravco owns or operates the King of Prussia mall which it asserts is "the largest mall in Pennsylvania." App. at 20-21. Obviously there was nothing racial in this statement as it merely demonstrated the strength of his opposition to the Barnes' reopening. We also point out that there is some question as to whether anyone, let alone any of the appellants, picketed with the signs that the Barnes mentions. Indeed, the district court in its opinion granting summary judgment said "[t]he Barnes offers only a newspaper article published in the *Philadelphia Inquirer* reporting that such picketers and signs had been seen. The newspaper article is hearsay and cannot be considered on a motion for summary judgment." *Barnes Found.*, 982 F.Supp. at 988 n. 14. Nevertheless we will assume that the signs were present.

There was, therefore, no evidence indicating racial animus on the part of five of the six defendants: Ina Asher, Steven Asher, Nancy Herman, Walter Herman or Toby Marmon. Nevertheless, in the absence of that evidence the district court relied on generalized assertions of discriminatory treatment to permit an inference to be drawn of racial animus on the part of all of the neighbors and thus of the appellants. This reliance plainly was contrary to the Supreme Court's ruling in *Claiborne* ***165** *Hardware* that in order to hold an individual liable by reason of association with a group there must be evidence, judged according "to the strictest law," that the individual held a specific intent to further those illegal aims. Accordingly, as to appellants Ina Asher, Steven Asher, Nancy Herman, Walter Herman and Toby Marmon, the district court erred in concluding that the Barnes' complaint was not factually groundless and we thus will reverse the district court's order denying their motion for attorney's fees.

In reaching our result, we feel constrained to point out that surely it is outrageous that the Barnes, while purportedly securing its own civil rights, brought a groundless action against the appellants thereby trampling their First Amendment rights. To justify its conduct, the Barnes in the conclusion of its brief quotes our opinion in *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir.1996), to the effect that discrimination "continues to pollute the social and economic mainstream of American life" and that the courts should "ensure that prohibited discrimination is not approved under the auspices of legitimate conduct." But in *Aman* we did not suggest that a minority-led organization was free to file a baseless suit against persons challenging its activities and then be able to seek shelter behind its minority status when the wrongfully charged defendants seek redress against it for having been put to the expense of defending against the action. In short, a minority-led organization is not exempted from facing the consequences of its wrongful actions merely because of the race of its leadership. But the fact is that unless we discredit the deposition testimony of Charles A. Frank, III, which we discuss below, we must conclude that the Barnes cynically brought this frivolous action to capitalize on its minority status to achieve its goal of alleviating its parking problems.

[14] Notwithstanding our result with respect to the other five appellants, we are satisfied that the Barnes did proffer evidence that racial animus may have motivated Robert Marmon's conduct. While his comments during the Commissioners' meeting were arguably racially ambiguous, we cannot say

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that it is unreasonable to infer that they communicated racial hostility and discriminatory motivation. Accordingly, although the evidence is thin, given the deferential standard of review on this appeal we cannot conclude that the district court abused its discretion in determining that the Barnes' claim against Robert Marmon was not factually groundless.[FN9]

FN9. The appellants recognize that there was evidence that Robert Marmon acted for racial reasons, see br. at 33, though they deny that he did so. Of course, the absence of evidence to support a conclusion that the other appellants acted out of that motivation would not mean that the section 1985 conspiracy claim against Robert Marmon therefore was necessarily groundless as there were other defendants in this action with whom he could have conspired.

The appellants also contend that the district court erred by failing to consider their evidence that Glanton and thus the Barnes had a wrongful ulterior motive in filing suit against them, namely to expedite the Township's approval for an on-site parking lot in part by stifling public opposition to its plans. The appellants argue that if left undisturbed, the district court's denial of their motion for attorney's fees will have a chilling effect on First Amendment activity by private individuals as they will face the possibility of being burdened with substantial legal expenses for engaging in constitutionally-protected conduct. In considering this argument we point out that the appellants' evidence of the Barnes' wrongful motive in bringing this action obviously was compelling because they elicited the information from Franks at his deposition. After all, inasmuch as Franks was a Barnes trustee he would have been in a position to understand what the Barnes was doing and the motivations for its actions. Franks testified that Glanton "has all along represented his interest in ***166** resolving the parking issues, and [Glanton] felt that the filing of [the] complaint [in this action] would accelerate the settlement of that issue. [Glanton] was only after his parking and nothing else." App. at 276. Furthermore, Franks stated his position that this action was of doubtful validity contemporaneously with the events as they unfolded for on January 18, 1996, the day the Barnes filed this suit, he wrote Glanton and indicated that he was opposed to filing the complaint because he had "serious concerns whether the allegations in the draft complaint are appropriate or accurate." App. at 279.

[15][16] In denying the appellants' motion for attorney's fees, the district court did not mention their claim that the Barnes had brought this action in bad faith. The Barnes seems to suggest that from this omission we should infer that the court considered and rejected the bad faith claim. See Barnes' Br. at 27-30. We, however, recently have held that "it is incumbent upon a district court to make its reasoning and application of the fee-awards jurisprudence clear, so that we, as a reviewing court, have a sufficient basis to review for abuse of discretion." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 196-97 (3d Cir.2000). Without any statement from the district court explaining its reason for not allowing the appellants attorney's fees on the basis of this claim, we are not able to say the district court rejected their argument. We recognize that a reversal on this bad faith point may have no practical consequences to the appellants other than Robert Marmon as they are entitled to reasonable attorney's fees for the reasons we already have set forth. Nevertheless, we will reverse on the bad faith claim and will remand the case to the district court for a determination of the appellants' claim that the Barnes brought this action in bad faith because Robert Marmon is entitled to receive the benefit of a reconsideration of his claim on this basis.

III. CONCLUSION

For the foregoing reasons we will reverse the order of the district court of November 24, 1999, and will remand the case to that court for calculation of the attorney's fees that should be allowed to

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the appellants other than Robert Marmon and to reconsider the claim that the **Barnes** brought this action in bad faith. In the event that the court determines that the **Barnes** brought this action in bad faith it shall allow him reasonable attorney's fees as well.

NYGAARD, Circuit Judge, dissenting.

Although I agree with the Majority's holding that the **Barnes Foundation's** claims against the neighbors were not frivolous, I disagree that the **Foundation's** claims were factually groundless. I would affirm the District Court because its factual findings support its conclusion that the **Foundation** had a reasonable factual basis for bringing its § 1985 claims. The decision made by the District Court was discretionary and mere disagreement with the lower court's decision is insufficient to overcome the substantial discretion the District Court has traditionally enjoyed. I fear the Majority elides our deferential posture when reviewing for an abuse of discretion and crosses the line that limits our interference with a District Court's decision under an abuse of discretion standard. Accordingly, I dissent.

Before focusing on the District Court's factual findings and why I find them sufficient to defeat the neighbors' argument that the Foundation's claims were not groundless, a review of our abuse of discretion standard for reviewing attorney's fees is instructive. We have a long and well-established history of deferring to a District Court's award of attorney's fees. As we have often said, "the award of a reasonable attorney's fee is within the District Court's discretion." *Silberman v. Bogle*, 683 F.2d 62, 64-65 (3d Cir.1982); ***167***Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 115 (3d Cir.1976). Thus, as with any issue reviewed for abuse of discretion, our standard of review is narrow. *See Silberman*, 683 F.2d at 65. We will reverse only when the "judicial action is *arbitrary, fanciful,* or *unreasonable*, or when improper standards, criteria, or procedures are used." *Evans v. Buchanan*, 555 F.2d 373, 378-79 (3d Cir.1977). Stated differently, discretion is abused only where "no reasonable [person] would take the view adopted by the trial court." *Lindy*, 540 F.2d at 115. If, however, reasonable persons could differ as to the propriety of the challenged action, then it cannot be said that the trial court abused its discretion. *See id.*

Moreover, our task on review "is not to substitute the remedy [we] would have imposed had [we] been the district court; rather it is to determine whether the district court observed the promulgated guidelines." *Evans*, 555 F.2d at 379. An abuse of discretion does not exist simply because we disagree with the District Court's decision. *See Lindy*, 540 F.2d at 116.

We have vested the District Courts with discretionary authority for good reason. The District Court has the distinct advantage of hearing and seeing evidence and testimony first-hand and has viewed the parties and the cause over a longer time period. As one commentator remarked,

> [i]t is not that [the trial judge] knows more than his loftier brothers; rather, he sees more and senses more. In the dialogue between the appellate judges and the trial judge, the former often seem to be saying: 'You were there. We do not think we would have done what you did, but we were not present and we may be unaware of significant matters, for the record does not adequately convey to us all that went on at the trial. Therefore, we defer to you.'

Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 663 (1971). Given the trial court's proximity to the issues, it is eminently appropriate that "[o]ne seeking to establish [ ] an abuse of discretion bears a heavy burden." *Lindy*, 540 F.2d at 116.

I heartily agree with our esteemed colleague, Judge Aldisert, who, in an earlier fee case, said:

> At bottom, this case is about whether an appellate

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court appreciates the allocation of competence between trial courts and reviewing courts. To be sure, statements of deference by appellate courts to district courts appear in this court's dispositions.... But quoting a standard of review and respecting it are different matters.... We must be vigilant of this court's increasing proclivity to deny substituting its judgment for that of the district court, but then to proceed with the tack that it expressly renounces.

Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1044 (3d Cir.1996). Moreover, I identify fully with what he referred to as "a personal expression of what troubles me":

Appellate courts seem to have lost respect for the narrow review encompassed in reviewing an exercise of discretion.

....

... Instead of playing a limited role in the determination of attorney's fees in limited review of discretion, the appellate courts, like the proverbial camel, have not only stuck their noses under the district court's tent, but they are fully inside ranging around in the turf that properly belongs to the district courts.

Id. at 1048. Judge Aldisert was dissenting from an opinion I had joined. But, I was as wrong then as I believe the majority is now. "Abuse" itself is a serious accusation and in using the term "abuse" to define our standard of review, our jurisprudence has recognized the institutional superiority of the District Court. Therefore, we should not readily discard its findings and conclusions.

***168** A prevailing defendant seeking an award of attorney's fees carries an even heavier burden than a typical litigant trying to prove an abuse of discretion in another context. It is imperative that we use the utmost restraint in awarding attorney's fees to prevailing defendants, lest the award discourage novel or unpopular litigation, stifle attorneys' enthusiasm and creativity, and chill citizens' constitutional right to meaningful access to the courts. *See, e.g., Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 885 (5th Cir.1988) (warning that overuse of Rule 11 sanctions may "chill attorney's enthusiasm and stifle the creativity of litigants in pursuing novel factual or legal theories"); Thomas D. Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L.J. 651, 661 (1982) (arguing that fee shifting should not "deter good-faith pressing of tenable but not clear-cut claims and defenses, especially those turning on unresolved points of law or, in many instances, genuinely controverted factual disputes"); Eric Y. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 429 n. 180 (1990) (arguing that the Supreme Court "curbed the [Civil Rights Attorney's Fees Awards] Act's impact on access [to the courts] by authorizing payment of fees to prevailing defendants where the plaintiff's claim is 'unreasonable' even though not made in bad faith"). Because of these concerns, awards of attorney's fees to prevailing defendants should be made sparingly and in only the most egregious cases. In my view, the present case does not meet this stringent standard.

In contrast to the Majority, I believe that the District Court's factual findings are sufficient to meet the legal threshold for allegations of racial animus on the part of the neighborhood association and the six neighbors (Ina Asher, Steven Asher, Nancy Herman, Walter Herman, Robert Marmon and Toby Marmon), all of whom are Caucasian. *See* Appellee's Br. at 4, 6. With respect to the association, the District Court noted that during a Commissioner's meeting, Robert Marmon, one of the association's creators, coordinators, and spokespersons, made racially disparaging remarks about the Barnes Foundation. Specifically, Mr. Marmon repeatedly referred to the Foundation's members as "Mr. Glanton and *his people*," a paradigmatic reference to African-Americans, and then called them "carpetbaggers" and "outsiders." Given Mr. Marmon's leadership role, it was reasonable to believe

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that his racial animus represented the views of the association. Additionally, the neighbor hood association's lack of opposition to other institutions with parking and traffic needs similar to the **Barnes Foundation** further evidences a racially discriminatory motive.

Other facts in evidence also support the **Foundation's** allegations. For example, the District Court noted the affidavit of Thomas Massaro, a land use consultant, who opined that the neighbors were so irrationally and firmly opposed to the **Foundation's** proposal that it suggested their concerns were a pretext for racial prejudice. These attitudes could also suggest the same to the **Foundation** and the District Court. The **Foundation** also noted in its complaint that, along with other persons, appellants Ina Asher, Walter Herman, Robert Mar mon, and Toby Marmon congregated and picketed outside the **Foundation** during its opening gala event. Several of the picketers were observed holding signs that read, "From LA to PA, Money Buys Justice" and "Lincoln University-Go Home." Mr. and Mrs. Marmon stood in the midst of traffic flow with their video cameras, shining the camera's lights into the cars pulling in for the opening event. Even if the defendants were not personally holding the racially derogatory signs, they protested alongside others who were. This provided the Foundation with a reasonable inference that the defendants sought to promote a message charged with racial overtones. Far from arbitrary or fanciful, these facts, which are undisputed, suggest the District Court had a reasonable***169** basis for holding that the Foundation's allegations of racial animus were not factually groundless.

I fear that the Majority affords too little attention to our long-standing principles governing the abuse of discretion standard and too easily discounts the findings of racial hostility. Today, racially motivated conduct is rarely blatant and easily discernible. Persons acting with racial animus have become more sophisticated in disguising their motivations. Although discrimination cases rarely contain an evidentiary "smoking gun," this does not mean that racial animosity does not exist. As we earlier explained,

> [a]nti-discrimination laws and lawsuits have 'educated' would-be violators such that extreme manifestations of discrimination are thankfully rare. *The sophisticated would-be violator* has made our job a little more difficult. Courts today must be increasingly vigilant in their efforts to ensure that prohibited discrimination is not approved under the auspices of legitimate conduct, and 'a plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled ... because of crabbed notions of relevance or excessive mistrust of juries.'

Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1081-82 (3d Cir.1996) (citing *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir.1987)). In light of this reality, I believe the District Court's reliance on circumstantial evidence and its conclusion that the Barnes's claims had at least the threshold quantum of factual support was reasonable and well within its discretion.

Finally, I also disagree with the Majority's reversal of the neighbors' bad faith claim. The Majority reverses the bad faith claim because the District Court made no mention of this argument. Thus, the Majority concluded that it "was not able to say that the district court rejected [it]." Maj. Op. at 166. In reversing the bad faith claim, the Majority cites *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 196-97 (3d Cir.2000), wherein we stated that a District Court must explain its reasoning and application of the fee-awards jurisprudence to allow adequate review by an appellate court. However, we have also assumed that a District Court has considered or weighed an argument, even when it has failed to discuss the argument in its decision. *See Acosta v. Honda Motor Co., Ltd.*, 717 F.2d 828, 844 (3d Cir.1987) (assuming that the District Court weighed the amount of plaintiff's recovery as a factor in a fee award even though the District Court did not state that it was doing so). Therefore, the

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District Court's failure to discuss the bad faith claim does not necessarily imply that it overlooked or ignored it.

In summation, jurisprudence has reposed in the District Court great discretionary power in fee cases. We must respect it. For these reasons, I strenuously dissent.

C.A.3 (Pa.),2001.
Barnes Foundation v. Township of Lower Merion
242 F.3d 151

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Souderton Area School Board, Member, 1976 - 1977
Indian Valley Chamber of Commerce, Member, Board of Directors, 1983 - 1985
Evangelical Association for Promotion of Education, Member, Board of Directors, 1980 - Present
Indian Valley Scholarship Fund, Member, Board of Directors, 1991 - Present
Ambler Olympic Club, Member, Board of Directors, 1994 - Present

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ation, Washington, District of Columbia, July 6-8, 1990
Trial Preparation: The 100 Day Countdown, Pennsylvania Bar Institute, Philadelphia, Pennsylvania, January 27, 1993
Ethical Issues Affecting Domestic Relations Lawyers, Pennsylvania Bar Institute, Philadelphia, Pennsylvania, December 1-2, 1992
Matrimonial Appellate Practice, Pennsylvania Bar Institute, Philadelphia, Pennsylvania, January 14, 1992
Child Custody Litigation, Pennsylvania Bar Institute, Philadelphia, Pennsylvania, December 11, 1990
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Adjunct Instructor, Business law, Eastern College, St. Davids, PA, 1990 - 1993
Divided Families: What Happens to Children when Parents Part, National Association of Women Judges, Philadelphia, Pennsylvania, October 8, 1993
The Practice of Law: Profession or Business, The Insurance Society of Philadelphia, West Conshohocken, Pennsylvania March 25, 1996
Adoption Practice, The Center for Legal Education, Inc., Norristown, Pennsylvania June 6, 1996
Appellate Practice for the Orphans Court Practitioner, Pennsylvania Bar Institute, Philadelphia, Pennsylvania, October 8, 1996
Current Issues Facing Orphans' Court Judges, Estate Law Institute, Pennsylvania Bar Institute, Philadelphia, November 15, 1996

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H

Court of Common Pleas of Pennsylvania, Montgomery County.
THE **BARNES FOUNDATION**, a Corporation

No. 58,788.
Jan. 29, 2004.

West Headnotes

Charities 75 39

75 Charities
75II Construction, Administration, and Enforcement
75k39 k. Incorporation and organization of charitable societies. Most Cited Cases

Permission granted to Board of Trustees to amend by-laws as to Board's powers, trustees' qualifications, number, composition, selection, election, term and conpemsation; decision deferred pending receipt of additional information re trustees' request to relocate art collection to Philadelphia.

Arlin M. Adams, for The Foundation.

Lawrence Barth, for the Office of Attorney Gener- al.

Terrance A. Kline, for amicus curiae.

MEMORANDUM OPINION AND ORDER SUR SECOND AMENDED PETITION TO AMEND CHARTER AND BYLAWS

OTT, J.

*1 The next chapter of The Barnes Foundation saga opened on September 24, 2002, when the Board of Trustees of The Foundation (hereinafter "The Foundation") filed a petition to amend its charter and bylaws. A number of individuals and entities filed pleadings seeking to intervene in the matter. Among them were Lincoln University,[FN1] the Board of Trustees of the Violette de Mazia Trust,[FN2] and three students currently enrolled in the art education program at The Foundation. By memorandum opinion and order dated February 12, 2003, the Court granted the status of intervenor to Lincoln University only. *See* 23 Fiduc. Rep.2d 127. On June 5, 2003, The Foundation filed for leave to file an amended petition, which was granted on July 3, 2003. On September 23, 2003, the same three students of The Foundation's art education program again filed a petition for leave to intervene or to be granted status of *amicus curiae*. On October 21, 2003, The Foundation filed for leave to file a second amended petition to amend the charter and bylaws [FN3] (hereinafter "the petition"). On October 23, 2003, the de Mazia Trust filed a second petition to intervene. On October 29, 2003, the undersigned entered orders granting The Foundation leave to file a second amended petition, granting *amicus curiae* status to the students, and again denying intervenor status to the de Mazia Trust. The current petition includes provisions that resolved all of the differences between The Foundation and Lincoln University, and the latter has now withdrawn from participation in the case.

FN1. Lincoln University has the power to nominate four of the five trustees of The Foundation's Board pursuant to the trust indenture executed by and between Dr. Albert C. Barnes and The Barnes Foundation under date of December 6, 1992, as amended and The Foundation's bylaws.

FN2. Violette de Mazia, who served as Director of Education of the art education program at The Foundation for approximately fifty years, established this charitable trust for the benefit of The Foundation in her will.

FN3. Although omitted from the title of the pleading, the nature of the requested relief also entails amendments to the trust indenture of December 6, 1922, as amended.

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At the outset, we must comment on the unprecedented public interest in this case. Since the filing of the original petition, rarely a day has gone by without a letter or phone call arriving at the undersigned's 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; [FN4] however, the experience has been unique.

FN4. Copies of all *ex parte* communications received by the court were forwarded to all counsel immediately after their receipt.

As this court and higher courts of the Commonwealth have recited on numerous occasions, The Foundation is a Pennsylvania nonprofit corporation created by Dr. Barnes:

> 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, wherein shall be cultivated and maintained trees and shrubs for the study and for the encouragement of arboriculture and forestry....

***2** *See* Barnes Foundation Charter, approved by decree dated December 4, 1922.

Dr. Barnes and The Foundation entered into a trust indenture under date of December 6, 1922, whereby Dr. Barnes donated his artwork to The Foundation to accomplish its charitable purposes. The collection amassed by Dr. Barnes during his lifetime which is housed at the Lower Merion gallery is large and virtually priceless. Dr. Barnes also funded The Foundation with an initial endowment of approximately six million dollars. The Foundation's bylaws incorporate the December 6, 1922 indenture, as amended, in its entirety.

In the instant petition, The Foundation sets forth its current financial state as follows. Dr. Barnes' initial endowment has been depleted. The Foundation is unable to cover its general operating expenses and to meet its needs in areas such as professional staffing, conservation treatment, fund-raising, collection assessment, facilities care, and public relations. The Foundation's ability to generate revenue from visitors to or fund-raising activities at the Merion gallery is limited by the existing zoning restrictions in Lower Merion Township. The Foundation's ability to raise revenue is also limited by the small size of its Board of Trustees.

The Foundation states that its "current fiscal situation is dire, puts at risk The Foundation's ability to fulfill its primary purpose, and threatens The Foundation's survival." (Petition, ¶ 15 .) In the hopes of ensuring its ability to continue its purpose in the future and to improve its finances, The Foundation struck an agreement with two of Philadelphia's leading philanthropic institutions, the Pew Charitable Trusts (hereinafter "Pew") and the Lenfest Foundation (hereinafter "Lenfest,") whereby Pew and Lenfest promised to help The Foundation raise approximately $150 million.[FN5] It is the conditions attached to this promise that have catapulted The Foundation back into court. [FN6] The fund-raising assistance from Pew and Lenfest is predicated upon the relocation of The Foundation's art collection from Merion to a new site to be built in Philadelphia, and upon the expansion of the number of trustees on The Foundation's Board. Both of these proposals run afoul of Dr. Barnes' indenture and The Foundation's charter and

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bylaws. Accordingly, The Foundation now seeks to amend these documents as set forth in detail, *infra.*

FN5. In addition to their offer to help raise this substantial amount, Pew and Lenfest, joined by the Annenberg Foundation, have provided $3.1 million to The Foundation to cover its immediate operating costs. In addition, these organizations are paying the legal costs incurred in the pursuit of the present matter.

FN6. The petition also requests permission to redraft the Indenture to include other changes not mandated by the agreement with Pew and Lenfest. Some of these proposals are discussed *infra;* consideration of others is being deferred at this time.

It was decided that the issues raised in the petition should be bifurcated and the court should first determine the following issues: 1) The Foundation's financial circumstances, and 2) the proposed changes to The Foundation's charter and bylaws relating to governance. After a period of discovery, hearings were held before the undersigned on December 8, 9, 10, and 11, 2003.

The least controversial of the matters presently before us is the proposed change in the size of the Foundation's Board of Trustees. Dr. Barnes' indenture provided for five trustees. The initial Board consisted of Dr. Barnes, his wife, and three other individuals. After the deaths of Dr. and Mrs. Barnes, [FN7] vacancies in the office of trustee were filled as follows: Girard Trust Company (now Mellon Bank) nominated one trustee, and Lincoln University nominated the other four. The indenture specified that: "no Trustee shall be a member of the faculty or Board of Trustees or Directors of the University of Pennsylvania, Temple University, Bryn Mawr, Haverford or Swarthmore Colleges, or Pennsylvania Academy of the Fine Arts," (Indenture, as amended, ¶ 17.)

FN7. Dr. Barnes died in a car accident In 1951; his wife, Laura L. Barnes, died In 1966.

*3 Under the changes now being proposed by The Foundation, the Board would consist of fifteen members. Lincoln University would nominate five persons for election. Mellon would no longer be involved. Upon approval of the changes, the current five trustees would immediately elect three additional trustees and Lincoln would immediately nominate three new names for election. A nominating committee chosen from these trustees would then recommend the remaining nominees for election to the Board. For the election of these final trustees on the initial expanded Board, Pew and Lenfest would jointly have the power to approve the nominations, however, the two institutions would have no authority in the nomination or election of trustees thereafter. The petition asserts that a larger Board is necessary because modern nonprofit corporations require larger governing boards consisting of "members who have access to a variety of communities and resources and who can provide governance expertise." (Petition, ¶ 38.)

In support of this proposal, The Foundation presented the testimony of Doctor Bernard C. Watson, who has served as president of The Foundation's Board of Trustees since 1999. Dr. Watson testified that the expansion of the Board is crucial to the proposed fundraising campaign. He explained that donors will commit large sums to a nonprofit only if they have confidence in its Board of Trustees. He stated that the board members must have the experience, the level of achievement, and the contacts with individuals of means and eleemosynary leanings to attract the kinds of gifts needed by The Foundation. He stated that the current Board is too small to embark on and execute the grand scale fundraising presently under consideration. (N.T. 12/8/03, morning session, 73-74.)

Testimony on this issue was also elicited from Maureen K. Robinson, a consultant for nonprofit organizations. She testified that boards of nonprofits must be large enough to meet their basic re-

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sponsibilities but not so large that the decision-making process becomes cumbersome. (N.T. 12/10/03, afternoon session, 145.) She quoted statistics generated by the National Center for Nonprofit Boards and Stanford University's Graduate School of Business showing that the average size of nonprofit boards for 2002 was nineteen (19) and the median was seventeen (17). (N.T. 12/10/03, afternoon session, 146.) Ms. Robinson opined that the current size of the Board of The Foundation is too small to do its work effectively. She stated that the proposal to triple the size would greatly improve the Board's fundraising abilities. She testified that raising millions of dollars "... is not a task for a one-man band. It's not even a task for a quintet. You need a pretty full orchestra in order to achieve those kinds of results." (N.T. 12/10/03, afternoon session, 149.)

Ms. Robinson also explained that a larger board brings greater participation and accountability. Under the current organization, a quorum is reached with only three trustees, and decisions can be made by a simple majority vote of only two. The witness stated that such a scenario fosters neither accountability nor participation. She also explained that with a larger board, there is a larger pool from which to draw leadership on a continuous basis. Ms. Robinson also commented on the fact that Lincoln University currently has the power to nominate eighty percent (80%) of The Foundation's Board. She noted the inherent conflicts in one nonprofit's having this authority over another's governing body. To paraphrase Ms. Robinson's explanation, Lincoln is in a position to compete with itself for stellar candidates, *i.e.*, it does itself a disservice if it nominates stellar candidates for The Foundation's Board and does not keep them for Lincoln's Board, and does The Foundation a disservice if it keeps such candidates for its own Board.

***4** In response to questions posed by the court, Ms. Robinson suggested that, had she been involved in drafting the changes currently under consideration, she would have proposed to cap the Board at 25 trustees, rather than only 15, for increased flexibility in the future. (N.T. 12/10/03, afternoon session, 186.)

The issue of increasing the size of The Foundation's Board was also touched upon during the testimony of Rebecca Rimel. Ms. Rimel is the president and chief executive officer of the Pew Charitable Trusts, which is made up of seven individual trusts. Pew has been in existence for 50 years and, during that time, has provided approximately $1.4 billion in support to various other organizations (N.T. 12/11/03, morning session, 7.) In her capacity as president and CEO, Ms. Rimel is responsible for the operations and management of the trusts and oversees all of their grant-making activities. In addition to sitting on the Pew's Board, she is or has been a member of the board of several other nonprofits.

Ms. Rimel testified that organizations must meet Pew's stringent criteria before receiving any grants. Among the criteria are "the fact that an organization is well governed, that it has a Board, that it's diverse in experience and is capable of carrying out their stewardship." (N.T. 12/11/03, morning session, 8-9.) Regarding the proposal to expand The Foundation's Board of Trustees, Ms. Rimel testified that Pew and Lenfest are seeking the power to approve four of the additional trustees to assure potential donors to the Foundation that its Board is "of absolute exceptional quality and up to the task of managing a very complex institution." (N.T. 12/11/03, morning session, 27.)

In light of the testimony summarized *supra*, we find ample support for the proposal that the Board of Trustees of The Foundation should be expanded. It is clear that the stewardship of a modern-day nonprofit must rest on many shoulders. It is imperative that the trustees have wide-ranging experience, expertise, and contacts, and the ability to attract donors of substance. A board of only five trustees, no matter how talented and dedicated the individuals may be, cannot meet the enormous responsibility of carrying The Foundation into the twenty-first century.

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The legal authority for amending Dr. Barnes' indenture on this issue can be found in the doctrine of deviation. This doctrine has played a part in much of the recent litigation involving The Foundation.[FN8] This court and the Pennsylvania Superior Court examined the doctrine in connection with certain changes to Violette de Mazia's testamentary trust that were being proposed to carry out a settlement agreement between the de Mazia trust and The Foundation. The undersigned determined that the changes were substantive, not administrative, and that the doctrine was inapplicable. *See Barnes Foundation, a Corporation–Estate of Violette de Mazia. Deceased,* 15 Fiduc. Rep.2d 322 (1995). In its opinion reversing this decision, the Superior Court stated:

> FN8. By recent litigation, we refer to the period dating from 1991 when The Foundation's previous administration sought to remedy its financial woes by obtaining permission to sell up to 15 of its paintings, which was prohibited by Dr. Barnes' indenture. An amended petition (seeking permission instead to send some of the collection on a world tour to generate funds to renovate the gallery in Merlon) was granted by the late Honorable Louis D. Stefan of this court. *See Barnes Foundation, a Corporation,* 12 Fiduc. Rep.2d 349 (1992).

***5** The doctrine of deviation has been summarized in the *Restatement (Second) of Trusts:*

[A] 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. *Restatement (Second) of Trusts* § 381 (1959). Those terms subject to deviation are limited to administrative provisions of the trust, *i.e.,* "the details of administration which the settlor has prescribed in order to secure the more important result of obtaining for the beneficiaries the advantages which the settlor stated he wished them to have." § 561 Bogert, *The Law of Trust and* Trustees, at 27.

In order to permit deviation from the administrative provisions of a trust, courts generally require the presence of two elements: "(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 [sic] directions were required." *Bogert, supra* at 230. It must be emphasized that the relief afforded by deviation is not based on mere convenience, but on the necessity of effecting a change in a situation where compliance with the terms of the trust "would defeat or substantially impair the accomplishment of the purposes of the trust." *Colin McK. Grant Home v. Medlock,* 292 S.C. 466, 472, 349 S.E.2d 655, 659 (1986).

Barnes Foundation, a Corporation– Estate of Violette de Mazia, Deceased, 453 Pa.Super. 436, 451–52, 684 A.2d 123, 130–31 (1996).

The doctrine of deviation also played a role in another proceeding wherein The Foundation sought permission 1) to hold fundraising events at its Merion facility, and 2) to increase the admission fee to the gallery to $10 and 3) to open the gallery to the public six days a week. The undersigned denied the first request on the grounds that it ran afoul of language in Dr. Barnes' indenture [FN9] and The Foundation had failed to prove that, because it was impossible to raise adequate funds otherwise, deviation was necessary. This court approved an increase in the admission price to $5 and agreed that the gallery could be open one additional day per week. *Barnes Foundation, a Corporation (No. 6),* 15 Fiduc. Rep.2d 381 (1995). On appeal by The Foundation, the Superior Court reversed us on the fundraising issue, on the grounds that the events contemplated by The Foundation fell outside the ambit of prohibited activities in Dr. Barnes' indenture, and, as a result, deviation was not an issue. That Court upheld the undersigned on the other two

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issues, agreeing that The Foundation had failed to show that deviations from the terms of the indenture were necessary. The Superior Court noted:

> FN9. Paragraph 33 states: "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, or whether such functions be private or public."

> The burden of proof is always on the party seeking the deviation because in the case of "an express trust, favorable presumptions arise, and the burden of proof is on the party disputing its validity or terms. 89 C.J.S. Trusts § 66, at 845 ... [The Foundation] argues that it should have prevailed below because the evidence offered was "uncontradicted," and the proposed charges were "approved" by the Attorney General. Such an argument has no foundation in law. The mere fact that evidence is uncontradicted does not automatically imbue that evidence with sufficient weight to sustain one's burden of proof. Additionally, although the law requires the participation of the Attorney General's Office in any proceeding to modify the terms of a charitable trust, [The Foundation] cites no support for the proposition that the Court is bound by the position espoused by the Office of the Attorney General, and a reviewing judge must exercise his or her independent power of review.

***6** *Barnes Foundation, a Corporation,* 453 Pa.Super. 243, 253, 683 A.2d 894, 899 (1996) (citations omitted.)

This court also approved a deviation from the language in Dr. Barnes' indenture requiring the gallery to be closed entirely for the months of July and August. In that matter, The Foundation produced direct evidence, in the form of a 1949 letter from Dr. Barnes, that attempts to protect the artwork from summer's heat and moisture had been unsuccessful. After determining that modern climate-control technology could not be anticipated by Dr. Barnes, we decreed that year-round access to the gallery was permissible. *See Barnes Foundation, a Corporation (No.9),* 18 Fiduc Rep.2d 393 (1998).

With this authority in mind, we believe it appropriate to permit deviation on this issue. We determine that the provisions in the indenture concerning the structure of the Board of Trustees of The Foundation are administrative in nature. We agree that Dr. Barnes could have foreseen neither the complicated, competitive, and sophisticated world in which nonprofits now operate, nor the range of expertise and influence the members of their governing bodies must now possess. We conclude that maintaining the *status quo* in this regard would substantially impair the accomplishment of the Foundation's charitable purposes, and that approving the expansion of its Board of Trustees is therefore necessary.

The second major issue before us—relocating the art collection to Philadelphia—is far more complex. The pertinent provisions of the December 6, 1922, indenture between Dr. Barnes as donor, and The Foundation as donee, as amended, are as follows:

> ¶ 9. At the death of Donor, 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 Donor and his wife, no buildings, for any purpose whatsoever, shall be built or erected on any part of the property of Donee.

> ¶ 10. After Donor's death no picture belonging to

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the collection shall ever be loaned, sold or otherwise disposed of except that if any picture passes into a state of actual decay so that it no longer is of any value it may be removed for that reason only from the collection.

¶ 11. 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 Donor to Donee 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.

¶ 13....After the death of Donor and his said wife, the furniture, the rare and valuable collection of rugs, together with the Chinese vases and other objects of art, but exclusive of the paintings, that are located in the administration building, shall be sold as expeditiously as may be found necessary at public auction. All the paintings shall remain in exactly the places they are at the time of the death of Donor and his said wife.... [FN10]

FN10. By order dated May 17, 2001, the undersigned interpreted the language of paragraphs 10 and 13 to prohibit the loan, sale, or other disposition of only those works hanging permanently in the gallery.

*7 The basis for the proposed relocation is financial necessity, and the following evidence was presented on this issue at the hearing. The world tour of some of The Foundation's artwork in the mid-1990s generated approximately $16 million. Half of this money was used for the renovations to the Merion gallery; the other half was placed in a restricted account to be used for capital improvements, subject to court approval. Approximately $4 million remains in the restricted account. (N.T. 12/8/03, morning session, 39; Exhs. P-42 and P-45.) Regarding assets available for operating expenses, these totaled approximately $9.5 million at the end of the 1980s. Even with addition of the money received in settlement from the de Mazia trust ($2.5 million), the available assets totaled $6.6 million by the end of 1997, $2.4 million by the end of 1998, and $1.6 million by the end of 1999. For the past four years, the end-of-year assets have fluctuated between $2.4 and $3.3 million. Included in these year-end totals are the bridge financing received from Pew ($3.1 million paid in two installments in 2002 and 2003) and $1.7 million realized in 2000 when The Foundation restructured its pension plan. (N.T. 12/9/03, morning session, 46-48.)

Except for those years when The Foundation has enjoyed these non-recurring infusions of cash, The Foundation has been operating in the red over the past decade. The deficits can be traced, in large part, to the incredibly expensive and lengthy litigation in which The Foundation was embroiled in the 1990s. In addition to obtaining permission to send some of the collection on tour, the previous administration attempted to increase revenues by increasing public admission [FN11] to the gallery. This effort was stymied by the limits imposed by Lower Merion Township, to wit, the gallery can be open only on Fridays, Saturdays and Sundays, and only 1200 visitors are allowed per week. The admission price remains at five dollars ($5) as per the decree of this court which was affirmed at 453 Pa.Super. 243, 683 A.2d 894, discussed *supra*.

FN11. Dr. Barnes' indenture provided for the gallery to be open to the public on Saturdays only. Ironically, after his death, it was The Foundation that resisted all public access. In 1960, an additional day of public admission was added by the late Honorable Alfred L. Taxis, Jr. of this court, on remand from the Supreme Court. In 1967, Judge Taxis decreed that the gallery should also be open Sunday afternoons. In 1995, the undersigned added one more day for a total of 3-1/2 days per week. The number

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of visitors permitted on those days was never at issue before this or the appellate courts.

In the late 1990s, the Board of The Foundation instituted several changes in hopes of ameliorating The Foundation's future, financially and otherwise. The Board hired its first professional art administrator, Kimberly Camp, as executive director and chief executive officer in 1998. Since her arrival, the income from the sale of merchandise at the gallery store has quadrupled. (N.T. 12/9/03, afternoon session, 89.) Ms. Camp also hired professional staff for the purposes of, *inter alia,* development and collection assessment. She testified that the efforts of the development staff have resulted in significant contributions to The Foundation. (N.T. 12/9/03, afternoon session, 86–87.) The Foundation demonstrated an increase in same from $0 in 1990 to an average of $2 .9 million a year over the past three years. (Exh. P–49.)

Inevitably, the "professionalization" of these aspects of the Foundation's operations has raised costs. Also on the debit side of The Foundation's ledger is an award of legal fees assessed against a predecessor administration in an unsuccessful federal suit. In Ms. Camp's opinion, there is no possibility of the township's loosening its restrictions on visitors. (N.T. 12/10/03, afternoon session, 10.) On the issue of seeking an increase in the ticket prices, Ms. Camp testified that would do little to cure The Foundation's financial woes, since doubling or tripling the current amount would not approach the operating cost per ticket, and would likely reduce the number of people willing to visit. (N.T. 12/9/03, afternoon session, 115–16.) In essence, the Foundation is covering its costs of operation at present only because of the bridge financing from Pew and Lenfest.

***8** The Foundation painted a bleak picture of its options for getting out from under this financial crush. As for deaccessioning, that is, selling some of the Foundation's artwork, Dr. Watson and Ms. Camp testified that this drastic course of action is considered unethical in the art world and would not bring enough money for a long-term solution. (N.T. 12/8/03, morning session, 65–66; N.T. 12/10/03, morning session, 41–45.) The collection amassed by Dr. Barnes is much larger than what hangs on the walls of the Merion gallery. Even if The Foundation were to ignore the taboo against deaccessioning and "marketed" some pieces not used in the gallery, (*i.e.,* in storage, on the walls of the administrative offices, or elsewhere,) Ms. Camp minimized the interest in such works at present, largely because there is so little public awareness of them. (N.T. 12/10/03, afternoon session, 85–88.) The Foundation also owns Ker–Feal, a 137.7 acre parcel of land in Chester County, bequeathed to it in Dr. Barnes' will. Dr. Barnes had acquired the property "to create a living museum of art and to develop a botanical garden, both to be used as part of the educational purpose of The Barnes Foundation." (Exh. P–6.) The farmhouse on the property is filled with 3,000 pieces of 18th century decorative art collected by Dr. Barnes. (N.T. 12/9/03, afternoon session, 19, 24.) Ker–Feal has never been utilized as the "living museum" envisioned by Dr. Barnes, and the farmhouse is in a state of disrepair. Recently, however, The Foundation has taken steps to improve the condition of the house, including mold remediation. Ms. Camp stated that The Foundation constantly receives offers from developers to purchase the property, the most recent offer being $12 million. (N.T. 12/9/03, afternoon session, 26.) Ms. Camp testified that The Foundation is not inclined to consider selling Ker–Feal and/or its contents because they make up part of Dr. Barnes' collection and should not be de-accessioned. (N.T. 12/9/03, afternoon session, 21; 12/10/03, morning session, 36.) Dr. Watson also testified that the money that would be realized from the sale of Ker–Feal would not solve The Foundation's long-term financial problems. (N.T. 12/8/03, morning session, 67.)

Dr. Watson chronicled other avenues that The Foundation has explored to avert the financial crisis. The Board retained the firm of Deloitte and Touche to conduct a financial analysis of three dif-

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ferent operating scenarios at The Foundation, specifically: 1) "as-is" (continuing the education programs and public visitation schedule as they now stand,) 2) maintaining the education programs but discontinuing public access, and 3) discontinuing both and strictly conserving the collection. All three were projected to result in deficits. (N.T. 12/8/03, morning session, 59–63.) The Board rejected the idea of filing for bankruptcy. (N.T. 12/8/03, morning session, 63.)

The Board also sought out benefactors, and enjoyed some success (with Pew, the J. Paul Getty Fund, the Henry Lewis Foundation, and the Mellon Foundation) in obtaining funding for the collection assessment program. (N.T. 12/8/03, morning session, 42–43.) However, the attempts to build up the Foundation's endowment were met with negative responses. The potential individual donors and philanthropic organizations alike were unwilling to support The Foundation because of the restrictions imposed by the township and the indenture. (N.T. 12/8/03, morning session, 51.) Some urged The Foundation to merge with another entity and possibly relocate the collection. The Board was unwilling to relinquish control over The Foundation's future by becoming subservient to another board. (N.T. 12/8/03, morning session, 52.) Dr. Watson approached Pew and Lenfest who came up with the concept now under consideration. Dr. Watson and the rest of the Board decided to accept the offer from Pew and Lenfest (who were joined by Annenberg) because it allowed The Foundation to maintain its independence. (N.T.12/8/03, morning session, 54.)

***9** The particulars of the plan envisioned by Pew, Lenfest, Annenberg, and The Foundation are as follows: the outside organizations will commit to helping raise $150,000,000. The cost of constructing the new facility in Philadelphia is projected to be $100,000,000; and the remaining $50,000,000 will be used to replenish The Foundation's endowment. Ms. Rimel testified Pew has already obtained pledges totaling $100,000,000. (N.T. 12/11/03, morning session, 40.) Regarding the site of the new building, Dr. Watson testified:

> I have spoken to Philadelphia city officials about it on a number of occasions. I have spoken to the Mayor and the Mayor committed to finding space on the Parkway for this move if the Court grants this petition. He has stated that publicly and he has said that he is strongly in support of this ... This property would be donated. The land would be donated. We would obviously have to use part of the money that we're attempting to raise for the construction of an appropriate building.

(N.T. 12/8/03, morning session, 81–82.) Ms. Camp and Ms. Rimel indicated that the $100,000,000 figure for construction is a conservative estimate and is based on costs incurred in building other gallery spaces around the country. (N.T. 12/9/03, afternoon session, 110, 12/11/03, morning session, 34.) No architectural plans have been drafted at this preliminary stage because The Foundation did not feel it appropriate to commit any funds to this endeavor unless and until this court gives its approval to the move. (N.T. 12/8/03, morning session, 85; 12/9/03, afternoon session, 109.) For the same reason, The Foundation has not commissioned a feasibility study to assess whether $100,000,000 will be enough to build the new site and whether $50,000,000 will be enough of an endowment to ensure The Foundation's future. (N.T. 12/9/03, afternoon session, 109.)

Ms. Rimel estimated that the $50,000,000 endowment will yield a yearly income of approximately $2.5 million. Based upon an estimated annual budget for The Foundation's operations at three locations [FN2] of $8 to $10 million, Ms. Rimel explained that The Foundation would be looking to make up the difference ($5.5 to $7.5 million) through admissions, merchandise sales, and contributed revenue. (N.T. 12/11/03, morning session, 80.) Regarding the latter source of income, Ms. Rimel suggested that a new gallery in Philadelphia, operating without the current restrictions in Merion, would generate sufficient excitement and interest to

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attract donors to The Foundation on an ongoing basis. (N.T. 12/11/03, morning session, 82.)

FN12. Ms. Camp testified that The Foundation's ideal would be a "three-campus" operation—art classes and public visitation at the Philadelphia site; administrative offices and horticulture classes in Merion; and the living museum at Ker–Feal. (N.T. 12/9/03, afternoon session, 111.)

We begin our analysis of this evidence with the observation that the fact-finding in this case has been seriously hamstrung by the total absence of hard numbers in evaluating these proposals. We have only a preliminary "guesstimate" about the real cost of constructing the new venue. We have no concept of The Foundation's operating expenses at the new space. There have been no feasibility studies or *pro formas* projecting the success of the proposed venture. We don't know how much it would cost to maintain the Merion facility for administrative purposes and for the horticultural course. And The Foundation's plans for Ker–Feal are far too rudimentary and amorphic to assign any costs to them.

***10** On the opposite side of the coin, we have no hard numbers to evaluate options other than the Pew/Lenfest/Annenberg plan. Other than the offers for the land surrounding Ker–Feal, we have not heard even a wild estimate of the value of the items owned by The Foundation but not on display in the gallery in Merion. Nevertheless, the possibility of selling some of these holdings has been dismissed by The Foundation as too little, too shortsighted, or unethical. The move to Philadelphia has been floated as the only lifeboat in the entire sea. Since the outside charities are footing The Foundation's legal bills in these hearings, we accept their single-option theory as the product of zealous advocacy. We find nothing, however, to commend the Office of Attorney General's actions in this regard.

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, which has been repeated so many times [FN13] in opinions concerning The Barnes Foundation by this court and Pennsylvania appellate courts, permits only trustees, the Attorney General, and parties with a special interest in the charitable trust to participate in actions involving the trust. In these proceedings, the three students were granted *amicus curiae* status, but their participation was limited to exploring the impact of the proposals on The Foundation's education programs. 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.[FN14] In court in December, the Attorney General's Office merely sat as second chair to counsel for The Foundation, cheering on its witnesses and undermining the students' attempts to establish their issues. The course of action chosen by the Office of the Attorney General 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 viabil- ity.

FN13. "Standing" as a leitmotif in Barnes cases dates back to 1953, when the Supreme Court determined that "The Philadelphia Inquirer" could not bring proceedings to enforce Dr. Barnes' indenture. *See Wiegand v. The Barnes Foundation*, 374 Pa. 149, 97 A.2d 81.

FN14. The Attorney General's Office did advocate for changes in the petition as originally filed by The Foundation in September of 2002. These changes, which were incorporated in The Foundation's amended and second amended petitions, did not touch on the proposal to relocate the gal-

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lery to Philadelphia.

Having established the record summarized above, The Foundation suggests that it has laid the groundwork for invoking the doctrine of deviation on the issue of relocating the collection. We have set forth the basic concepts of this doctrine, including the language of the *Restatement (Second) of Trusts, supra.* Our Superior Court has cited to *Corpus Juris Secundum* for the proposition that the party seeking the deviation (here The Foundation) has the burden of proof. 453 Pa.Super. at 253, 693 A.2d at 899. We too quote therefrom as follows:

> In exercising its jurisdiction to modify or alter, the court should ... be exceedingly cautious. Courts will exercise such power only when it clearly appears to be necessary and only in extreme cases.

***11** 90 C.J.S. Trusts, § 97 (2002 ed.) This language sets forth a "clear and convincing" standard of evidence in deviation matters. Furthermore, if the court is convinced that deviation is appropriate, it must choose the least drastic modification.[FN15] In support of its argument, The Foundation cites to Comment e of § 381 of the *Restatement,* which provides:

FN15. The Uniform Trust Code at § 413(c) states: "A court may modify an administrative provision of a charitable trust only to the extent necessary to preserve the trust." The Pennsylvania comment to the UTC states that this subsection is a codification of existing state law. Approval of this provision, as 20 Pa.C.S. § 7740.3(c), and the rest of the Pennsylvania Uniform Trust Act is pending in the Pennsylvania legislature.

> If a testator devised land for the purpose of maintaining a school or other charitable institution upon the land, and owing to a change of circumstances, it becomes impracticable to maintain the institution on the land, the court may direct or permit the trustee to sell the land and devote the proceeds to the erection and maintenance of the institution on other land, even though the testator in specific words directed that the land should not be sold and that the institution should not be maintained in any other place.

The Foundation did not set forth the remainder of that comment, to wit:

> If, however, the testator provided that if the institution should not be maintained upon the land devised the charitable trust should cease, the trustee will not be directed or permitted to maintain the institution on other land.
>
> So also, 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 institution on other land.

Dr. Barnes' indenture does not specifically state that the gallery must be maintained in Merion or cease to exist. Nevertheless, it is difficult to dismiss Dr. Barnes' choice of venue as a minor detail. Dr. and Mrs. Barnes lived on the site, in the administration building adjacent to the gallery. Dr. Barnes' indenture provided for the administration building to be used as classrooms for the art education program after his and Mrs. Barnes' deaths. The focus of the education program is the ensembles of art in the gallery. The arboretum on the grounds is also an integral part of the educational work that was the goal of Dr. Barnes' experiment. Certainly, a strong argument can be made that these facts fall within the parameters of the last sentence of the comment quoted above ("the maintenance of the institution on the land ... was an essential part of the ... testator's pur- pose.")

In resolving this very close question, we turn for guidance to the decisions of the Pennsylvania Superior Court in earlier Barnes Foundation matters. In the two opinions issued in September of 1996 (453 Pa.Super. 436, 684 A.2d 123, and 453

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Pa.Super. 243, 683 A.2d 894,) that Court examined cases from other jurisdictions where deviation was allowed, noting:

> In each of the above-cited cases, the respective Court made a thorough effort to avoid the momentary impediment and apply a pragmatic approach to ensuring that the settlor's primary goal be achieved.

453 Pa.Super. at 458, 684 A.2d at 133. In both of these opinions, our Superior Court considered the case of *Colin McK. Grant Home v. Medlock*, 292 S.C. 466, 349 S.E.2d 655 (1986), in which:

> ***12** the Supreme Court of South Carolina was confronted with a petition by the trustee of a testamentary trust who wished to sell real estate upon which existed a nursing home which had been provided for the care of "elderly Presbyterians." Because of gradual dilapidation of the surrounding neighborhood, it was the intent of the trustees to sell the existing buildings and use the proceeds of the sale to build another facility in a different part of town. Despite the fact that the by-laws of the home, at the time of death of the remaining trust settlor, specifically provided that "[t]he Colin M.K. Grant [sic] shall always be located and conducted in the property at the corner of Hagen and Meeting Streets in the City of Charleston, as Memorial to the late Colin C.K. [sic] Grant," *Id.* at 471-72, 349 S.E.2d at 658, the Court permitted the requested deviation and allowed the sale and the rebuilding of a facility at a separate location.
>
> The Court shared the observation that "[t]here is no reason to doubt that if that particular real estate should become unsuitable for [its] purpose, [settlors] would have wished the funds to be used to provide some other means of housing for the intended beneficiaries of the trust. Thus, the use of the specific home they established was merely one method, convenient at the time of the trusts' establishment, for carrying out this intent." *Id.* at 471-72, 349 S.E.2d at 658. The Court then found because the neighborhood in which the home was located had become so dilapidated and unsafe that the purpose of the trust could no longer be carried out, deviations from the terms of the trust was permissible.

453 Pa.Super. at 457, 684 A.2d at 133.

From its favorable reviews of the *Colin McK. Grant Home* case, we gather that our Superior Court would find that the present location of the gallery is not sacrosanct, and relocation may be permitted *if necessary* to achieve the settlor's ultimate purposes. We therefore rule in favor of The Foundation on this preliminary point.

That is not the end of our inquiry, however, because the element of necessity has not been established clearly and convincingly. What has been established beyond peradventure is that The Foundation's finances have reached a critical point. It is unnecessary and probably futile to review the last ten years of The Foundation's administration in order to lay blame for this situation. At the hearings in December, the *amicus curiae* attempted to raise the specter of runaway spending by the present administration as the root cause. However, based on this court's prolonged experience with this organization, we accept its claim that the installation of professional management was necessary, expensive and long overdue. Lower Merion Township certainly bears some of the responsibility for the financial crisis. The Foundation's attempt to raise revenues by increased public access to the gallery was met with hostility, bordering on hysteria, from some of the owners of the adjacent houses. The township reacted to the situation by imposing a series of administrative regulations that have put a stranglehold on The Foundation's admissions policy. The witnesses for The Foundation expressed no hope of winning concessions from the Township; and this Orphans' Court has no jurisdiction to broker or impose any changes to the unfortunate situation.

***13** The financial exigency having been demonstrated, there are still issues of necessity and

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the least drastic solution. There has not been an adequate showing that sufficient revenue can not be generated by other means. We need to be persuaded that the move to Philadelphia is the least drastic deviation that will stabilize The Foundation's future. As we stated above, there is a dearth of hard evidence on the value of the assets that are not displayed in the gallery and could be sold. We heard from several witnesses about the ethical implications of deaccessioning in art administration. However, we are not here focusing on the gallery collection, and we are not convinced that the prohibition is or should be absolute in a non-museum setting. Otherwise stated, we question whether the same constraints on a *museum* not to sell its art bind an *educational institution* with works of art among its assets. On these unanswered questions, The Foundation must produce additional evidence.

To that end and pursuant to our broad supervisory powers in the area of charitable trusts,[FN16] we direct The Foundation to undertake an analysis of its assets other than the works in the gallery in Merion. The goal will be to ascertain whether $50,000,000 or more can be raised for The Foundation's endowment through the sale of non-gallery artwork and/or the real estate in Chester County. If it appears that adequate capital can be produced by deaccessioning, the ethical problems presented thereby may have to yield to the donor's expressed wishes. We take our cue here from Dr. Barnes' mandate in ¶ 13 of the indenture that everything except the paintings in the gallery should be sold "expeditiously" after his and Mrs. Barnes' deaths. The details as to how this assessment will be conducted and what experts will be retained shall be determined after meetings *in camera* with counsel.

FN16. *See, In re Estate of Coleman,* 456 Pa. 163, 317 A.2d 631 (1974).

In addition to this assessment, the court must insist on some reason to believe that the bold proposals before us will accomplish the desired ends. This will require the submission of a business plan for the Philadelphia operation. The Foundation and its backers chose not to commission a feasibility study of this nature on the grounds such an expense should not be incurred prematurely. However, we are convinced that a *pro forma,* including projections for earned revenue, is a crucial piece of evidence at this stage in the decision-making process.

The petition proposes additional changes relating to Paragraphs 6, 30, 33, and 34 of Dr. Barnes' indenture. We will rule on these proposed amendments after the additional information requested above is made part of the record. At present, the following Decree is appropriate.

DECREE

AND NOW, this 29th day of January, 2004, upon consideration of The Foundation's second amended petition and after hearing thereon, the Board of Trustees of The Foundation are hereby granted permission to amend the bylaws of The Foundation as they relate to the Board's powers, trustees' qualification, number, composition and selection, election, term and compensation to conform to ARTICLE V of the proposed bylaws introduced at the hearing as Exh. P-4. The disposition of the remaining requests for relief in the second amended petition is deferred, pending the court's receipt of additional information.

***14** This is an interlocutory decree, not subject to the filing of exceptions or appeal.

Pa.Com.Pl.,2004.
In re Barnes Foundation
Not Reported in A.2d, 2004 WL 1960204 (Pa.Com.Pl.), 24 Fiduc.Rep.2d 94

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Court of Common Pleas of Pennsylvania, Montgomery County.
THE **BARNES FOUNDATION**, A Corporation

No. 58,788.
Dec. 13, 2004.

Arlin M. Adams, for the **Foundation**.

Lawrence Barth, Deputy Attorney General, for the Office of Attorney General.

Terrance A. Kline, for amicus curiae.

Paul M. Quinones, for amicus curiae.

OPINION

OTT, J.

*1 In this opinion, we consider the evidence presented at the second round of hearings on The Barnes Foundation's second amended petition to amend its charter and bylaws. In its pleading, The Foundation sought permission, *inter alia,* to increase the number of trustees on its governing board and to relocate the art collection in its gallery in Merion, Pennsylvania, to a new facility in Philadelphia. After the first hearings in December of 2003, we ruled that expanding the size of the Board of Trustees was appropriate in today's sophisticated world of charitable fundraising. We also determined that The Foundation was on the brink of financial collapse, and that the provision in Dr. Barnes' indenture mandating that the gallery be maintained in Merion was not sacrosanct, and could yield under the "doctrine of deviation," provided we were convinced the move to Philadelphia represented the least drastic modification of the indenture that would accomplish the donor's desired ends. We felt that The Foundation needed to show more than the adumbration of proposed changes that was presented at the December hearings, and after conferences *in camera* following the issuance of our January 29, 2004 opinion, [FN1] the open areas of inquiry were distilled into three questions: 1) Can The Foundation raise enough money through the sale of its non-gallery assets to keep the collection in Merion and achieve fiscal stability; and are there ethical and/or legal constraints on such a sale of assets? 2) Can the facility envisioned in Philadelphia be constructed on the proposed $100,000,000 budget? and 3) Is The Foundation's three-campus model—the new facility housing the art education and public gallery functions, Merion as the site of the administrative offices and the horticulture program, and Ker-Feal, the Chester County farmhouse on 137+ acres, operating as a living museum—feasible? These issues were addressed at the hearings on September 21, 22, 23, 24, 27, and 30, 2004, and generated over 1,200 pages of testimony, a summary of which follows.

FN1. 24 Fiduc. Rep.2d 94.

On the issue of the value of The Foundation's non-gallery holdings for possible sale, The Foundation first called two experts to testify about the Chester County real estate known as Ker-Feal. William S. Wood, II, a certified general appraiser, performed three separate appraisals at the request of The Foundation—one for the farmhouse and outbuildings plus 12 contiguous acres, [FN2] a second for the other 125 acres of raw land, and the third for the entire property if it were made subject to a land conservation easement. The values he ascribed in his written report were $1,200,000, $4,100,000, and $2,825,000 respectively. (Petitioner's Exhibit 68.) He explained that conservation easements preserve open space by restricting development on the subject premises; and he noted that the easements are often sold or donated to municipalities or land conservancies. (N.T. Vol.I, 34 5.) Mr. Wood stated that he used the market data approach to arrive at his values. The 125 acres was appraised as raw land, *i.e.,* without taking into consideration its value if the parcel were improved and approved for development. Mr. Wood offered his opinion about the

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conclusions reached by Kenneth Barrow, a real estate appraiser retained by the Students of The Barnes Foundation (who were authorized by the court to act as *amicus curiae* in this matter) in his report (discussed at greater length, *infra.*) Mr. Wood suggested that Mr. Barrow's view that the 125 acres could be developed into 59 building lots was overly optimistic, and stated that a yield of 40 building lots was more realistic. (N.T. Vol.I, 42.)

FN2. The point of appraising a hypothetical subdivision consisting of the building plus several acres was to give the court an idea of how much might be raised if only part of the land was sold and the farmhouse kept intact for The Foundation's use.

***2** During cross-examination by counsel for the Students, Mr. Wood stated that he would be surprised to learn that the 137 acres had been appraised in 1990 at more than $6,000,000.[FN3] (N.T. Vol.I, 57.)

FN3. The basis for counsel's inquiry was a letter from a Realtor with Emlen Wheeler Company that was prepared at the request of The Foundation. The letter stated an estimated fair market value of the property, but included no comparables or other indicia of a formal appraisal. The letter was not admitted into evidence.

The second certified general appraiser called by The Foundation to give testimony on the value of the Chester County property was Glenn W. Perry. In his report, he appraised the farmhouse plus 12 acres at $1,150,000, the other 125 acres at $3,750,000, and the value of the conservation easement at $2,500,000. (Petitioner's Exhibit 67.) Mr. Perry expressed some surprise that his and Mr. Wood's numbers were so close. (N.T. Vol.I, 68.)

During cross-examination by counsel for the Students, Mr. Perry summarized the steps that must be followed to take raw land through the approval process for development. He testified that the initial process takes between 18 and 30 months, and obtaining subdivision approval takes additional time. (N.T. Vol.I, 87-88.)

On the issue of the value of The Foundation's tangible property (apart from the items installed in the gallery in Merion,) testimony was first heard from Elizabeth von Habsburg. She is the president of Masterson Gurr Johns (hereinafter "Masterson,") an international art consulting and appraisal company. After being hired by The Foundation, Masterson set about determining the fair market value of 4,532 objects. The objects were grouped into seven categories, specifically, items housed in Ker-Feal; items from another property since sold by The Foundation; artwork hanging in the administration building in Merion; Mrs. Barnes' items; Oriental rugs; household objects and decorative arts; and Renoir ceramics. A lump sum fair market value was initially assigned to each category. The reports of the appraised values of the seven groups of objects were introduced as Petitioner's Exhibit 66. The total appraised value was approximately $14,600,000, the bulk of which was attributable to some of the European and American paintings.

During cross-examination, Ms. von Habsburg stated that the personal property at Ker-Feal was appraised by Masterson's appraisers at $725,209. (N.T. Vol.II, 21.) Counsel for The Students directed her attention to a document introduced at the December hearings that estimated the value of the collection at $4,000,000. (Petitioner's Exhibit 30, p.TBF006394.) Regarding the artwork at Merion that does not hang on the walls of the gallery (referred to as "the non-gallery art') Ms. von Habsburg explained that Masterman appraisers originally set the values after studying digitized images of the pieces. Because the appraisers for the Students evaluated 19 of the more valuable works in person, The Foundation asked the Masterson appraisers to reappraise the same pieces based on personal inspections. (N.T. Vol.II, 25-26, 38.) The Masterson reappraisals were appended as a supplement to the original reports. (Petitioner's Exhibit 66.) The ori-

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ginal value of the 19 works was set at approximately $10,000,000. After the personal inspection, the value was determined to be approximately $14,750,000. The higher total was due mostly to the value of one painting, "La Bergère" by Gustave Courbet. When asked if this substantial increase after personal inspection caused her to question the accuracy of the appraisals of the other items, Ms. von Habsburg expressed confidence in the numbers. She explained that Masterson's appraisers had seen 74% of the items of tangible property in person. (N.T. Vol.I, 41.) Taking into account the revised value for the 19 paintings, the total value of the articles appraised by Masterson was approximately $19,000,000. (N.T. Vol.II, 44.)

***3** Upon redirect examination, counsel for The Foundation elicited testimony showing that the document contained within Petitioner's Exhibit 30 which suggested that the collection at Ker-Feal is worth $4,000,000 was a consultant's grant proposal submitted to Lincoln University,[FN4] and bore no relation to a professional appraisal. (N.T. Vol.II, 52.)

> FN4. Lincoln University had the authority under Dr. Barnes' 1952 trust indenture, as amended, to nominate four of the five members of The Foundation's Board of Trustees. This court's January 29, 2004 opinion approved certain amendments to the governing documents vis-à-vis the Board's size and nomination process that will change Lincoln's role in The Foundation's management in the future.

The Foundation next called Nancy Harrison, the consultant retained by Masterson to inspect the 19 works discussed *supra*. Ms. Harrison stated that she is a generalist in appraising fine arts, with a concentration in the area of 19 th century European paintings. (N.T. Vol.II, 63.) She explained her methodology for determining the fair market value of works of art, which consists of analyzing the sales of other pieces by the same artists and comparing the attributes of those works (size, condition, etc.) to those of the subject pieces. (N.T. Vol.II, 69.) Ms. Harrison stated that Deborah Force, who was retained as an expert by the Students, appraised 10 [FN5] of these 19 works, and the two experts' values were very close. (N.T. Vol.II, 71.) Ms. Harrison parted company with Richard Feigen, the other appraiser used by the Students, on the value of Courbet's "La Bergere." Ms. Harrison appraised this painting at $2,000,000; Mr. Feigen initially determined its value to be $3,500,000, and then raised it to $8,500,000. (Amicus' Exhibit 58 .)

> FN5. Ms. Force provided an appraised value for one work (an illustration by William Glacken) which Ms. Harrison did not appraise. Because Ms. Force's figure for that piece was not high ($15,000,) its effect on our analysis is *de minimis*.

Ms. Harrison suggested that selling the 19 works she appraised at one time—a "blockbuster Barnes sale" as it were—might yield prices 25% to 50% higher than her estimated fair market values. However, she explained that a mass sale might have the reverse result due to the "blockage discount," *i.e.*, offering several works by the same artist in the same auction deflates the prices actually obtained. (N.T. Vol.II, 76.) Regarding the Courbet painting, Ms. Harrison opined that Mr. Feigen based his revised appraisal (at $8,500,000) on the faulty premise that prices for Courbet's works have risen substantially over the last six years. Ms. Harrison stated that the market has, in fact, been flat. (N.T. Vol.II, 79.) She also criticized his use of a current asking price for another Courbet in arriving at his revised number, because a dealer's retail price does not establish fair market value. (N.T. Vol.II, 81.)

During redirect by counsel for The Foundation, Ms. Harrison explained that Mr. Feigen's factoring in the asking price of that other Courbet runs contra the Uniform Standards of Professional Appraisal Practices, which do not approve using, as comparables, paintings that have never been sold. (N.T. Vol.II, 111.)

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The Foundation's expert witness on the issue of the costs of building a new facility in Philadelphia was Harry Perks, a principal in Perks Reutter Associates. His company manages capital programs. Among the projects on which he has worked are the design and construction of the Kimmel Center in Philadelphia, the renovations of the Academy of Music in Philadelphia, the Primates Project at the Philadelphia Zoo, the renovation of some 50 branches of the Philadelphia Library, and the construction of Campbell Field in Camden. Prior to working at Perks Reutter, Mr. Perks was responsible for the design and construction of Philadelphia's Convention Center; and he is currently working on the expansions to that facility. Prior to these jobs, Mr. Perks was Streets Commissioner for the City of Philadelphia, and before that he was the president of Day and Zimmerman, an international design and construction company. (N.T. Vol.II, 126–130.) Mr. Perks was retained by The Foundation to evaluate whether $100,000,000 would be sufficient to build a new home for The Foundation in Philadelphia, and to estimate how many square feet could be built at that price. In his report, Mr. Perks concluded that a facility between 120,000 and 150,000 square feet could be built for $60,000,000, or $400 to $500 per square foot. (Petitioner's Exhibit 64.) He determined that the facility would incur the following additional costs (other than for construction) totaling $17,000,000: $2.2 million for site preparation, $6.0 million for furniture fixtures and equipment, $1.6 million for a didactic exhibit, and $7.2 million for architectural and other consulting fees. In addition, Mr. Perks estimated that The Foundation would spend $1,600,000 to reconfigure the Merion facility to accommodate its new uses ($800,000 for renovation, $650,000 for furniture fixtures and equipment, and $150,000 for architectural fees.) The final component of the $100,000,000 would be the $21,400,000 in other costs, consisting of $2,400,000 to relocate the collection, $3,400,000 in administrative costs, and $5,600,000 in "shutdown" costs, and a $10,000,000 contingency fund, to cover miscalculations and revisions in the plans as the project advances.

***4** Mr. Perks explained that, if the instant proposal to move the collection were approved, the next step would be the development of a program and of schematic drawings for the new facility. (N.T. Vol.II, 140.)

As part of his report, Mr. Perks analyzed the construction costs for eight museums built around the country within the past ten years. After making various adjustments, including differences in costs by location and yearly changes in construction costs, Mr. Perks determined that the costs per square foot, projected into 2007 dollars (the contemplated midpoint of construction of the project under consideration) ranged from $375 to $759. (Petitioner's Exhibit 64.) Mr. Perks considered these numbers corroborative of his estimate that the new Barnes facility could be built for $400 to $500 per square foot. (N.T. Vol.II, 142.)

Mr. Perks was asked to comment on the critique of his analysis that was prepared by a witness for the Students. Foremost among the criticisms was the suggestion that Mr. Perks did not have sufficiently detailed estimates on the costs of construction. Mr. Perks indicated that this kind of detail was not necessary for the purposes for which he was retained, and testified that obtaining such information would take time and money (to the tune of one year and one million dollars.) (N.T. Vol.III, 17–18.)

During cross-examination by counsel for the Students, Mr. Perks acknowledged that his company has never overseen the construction of a museum. (N.T. Vol.III, 23.) Mr. Perks also agreed with counsel that after a project has advanced to the schematic phase, the normal contingency fund is 15% of the budget, rather than the 10% factored into the capital cost analysis here under consideration. (N.T. Vol.III, 26.) Mr. Perks was questioned about how he factored inflation into his calculations for the projected cost of construction. He acknowledged that the most recent "Engineering News Record" (which had not yet been issued when he pre-

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pared his report) shows an increase in inflation over the index he used in preparing his report, and his analysis, if prepared now, would have to be adjusted accordingly. (N.T. Vol.III, 31.)

During redirect examination, it was brought out that the proposed facility is not a museum *per se*, but an educational facility with gallery space, and that Mr. Perks has experience with the construction of approximately 30 schools. (N.T. Vol.III, 33.)

The Foundation presented evidence on the third issue before us through the testimony of Matthew Schwenderman, a principal with Deloitte Consulting, which is a subsidiary of the Deloitte and Touche accounting firm. Among the services he renders are management consulting to for-profit and not-for-profit organizations in the areas of finance, operations, and management reporting. At Deloitte, he has experience in preparing financial, strategic, cash, and performance management analyses for museums and cultural service organizations. Previously, Mr. Schwenderman worked for the Zoological Society of Philadelphia where he had responsibility, *inter alia*, for the finance, marketing and development departments. (N.T. Vol.III, 78.)

***5** Deloitte was retained to prepare a cash-based, multi-year analysis of the proposed three-campus model for The Barnes Foundation's operations. The parameters of the proposals, as per discussions with Barnes' representatives, were as follows: the gallery in Merion would be recreated within the Philadelphia facility; the art education program would continue to have dedicated hours; there would be expanded hours of operation in Philadelphia; the horticulture education program in Merion and the public access to the grounds there would continue; the gallery building in Merion would be renovated to house the archives, a library and a research center; and Ker-Feal would be developed, as funds were available, for an educational program and for public access. (N.T. Vol. III, 82 .) With these directives in mind and after gathering historical data, Deloitte personnel conducted a series of surveys, interviews and financial analyses. The resulting report (Petitioner's Exhibit 62) projected attendance, income and expense figures for a period covering three years prior to the opening of the Philadelphia facility and three years thereafter. For the year of the move, Table 1 of the report projected approximately 16,900 visitors (down from an estimated 68,700 projected for the year before the move) as a result of closing down to effectuate the move. During the opening year, the total number of visitors was projected to be 259,864; and, after the initial burst of interest, the Deloitte report suggested the number of admissions would settle down to approximately 220,760 (consisting of 200,760 general visitors and 20,000 student visitors) for the two succeeding years. There would be corresponding changes in the admissions income, as well as licensing and merchandise income ($58,000 for the year before the move, no income for the year of the move, $180,000 for the opening year, and $150,000 for the next two years) and gallery shop sales ($512,000, $30,000, $1,169,000, and $945,000 respectively.) The projections for development, including membership, were $2,393,000 for the year before the move, $1,478,000 for the year of the move, $5,123,000 for the opening year, and $4,250,000 for the two following years. The income from special events—which is presently nonexistent—was projected at $16,000 during the year before the move, $16,000 during the year of the move, $485,000 for the opening year, and $391,000 for each of the next two years. Investment income was projected to be $2,500,000 per year each year dating from the year of the move into the future, based on the $50,000,000 endowment that the Pew, Lenfest, and Annenberg charities are committed to raising, if the instant proposal is approved.

On the other side of the ledger, drastic changes would also occur in expenses. The report projected salaries, wages and benefits to total $2,226,000 for the second year before the move, $3,873,000 for the year before the move, $4,937,000 for the year of the move, $6,426,000 for the opening year, and $6,001,000 for each of the following two years. Se-

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curity costs were projected to rise from $417,000 in the year before the move to $961,000 in the year of the move, and to $1,267,000 during the opening year, and to level off at $1,179,000 thereafter. (Table 1 to Petitioner's Exhibit 62.)

***6** Mr. Schwenderman explained that, of the approximately 200,000 general visitors predicted per year after the opening year has passed, 180,000 would visit the Philadelphia facility and the other 20,000 would be divided between Merion and Ker–Feal. He also stated that this number of visitors at the gallery in Philadelphia was based on 80% of that space's estimated capacity and on its being open 42 hours per week to the public. Public hours at the gallery in Merion are currently limited to 24 hours per week. Mr. Schwenderman also stated that, under the projections in the Deloitte report, 27 hours per week at the Philadelphia facility would be dedicated to the art education program, up from the current 24 hours per week at Merion. He explained the projected income from admissions in the Deloitte report is based on a "blended" admission rate of $9, "blended" in that some visitors would pay less and others would pay more. (N.T. Vol.III, 96–98.)

Regarding development income, Mr. Schwenderman listed the sources of same as individuals, corporations, government organizations, and foundations through annual giving, memberships in the Barnes Society, and grants. He stated that the Deloitte report projected income from development to be $4,250,000 or 37% of the budget after the opening year. (N.T. Vol.IV, 5.) The report shows development income for 2003 and 2004 totaling $3,763,000 and $2,639,000 respectively. Mr Schwenderman noted that these numbers included the bridge financing supplied by Pew, Lenfest and Annenberg to cover operating costs while The Foundation pursues the instant petition. The bottom line, according to Mr. Schwenderman, is that the three-campus model would have modest surpluses each year, based on annual budgets of $12,275,000 for the opening year, and of $11,300,000 for the two years thereafter. (N.T. Vol.IV, 8.)

To test the reasonableness of these numbers, Deloitte performed two levels of "benchmarking." One entailed developing a custom survey of financial operations; the other entailed seeking out industry-level data for comparison. The survey was sent to two dozen organizations either with operational models similar to The Foundation's or in the Philadelphia area. The survey results on the sources of funding showed that, on the median, these organizations reported that 56.7% of their money came from fundraising, 24.3% from earned income, and 19% from their investments. The industry-wide data broke down these three sources at 52%, 33% and 16%; while Deloitte's projections for The Foundation's three-campus model had these percentages at 37%, 41% and 22% respectively. (Table 7 to Petitioner's Exhibit 62.)

Mr. Schwenderman stated that the accuracy of Deloitte's projections for The Foundation's three-campus operation is largely dependent on the accuracy of the attendance projections. (N.T. Vol.IV, 14.) He explained that the investment income in the Deloitte model was set at a flat 5% draw on the $50,000,000 endowment, for each of the three years covered. (N.T. Vol.IV, 17.)

***7** Mr. Schwenderman was asked about the opinion offered by the Students' expert, James Abruzzo, that benchmarking is unreliable because the sample used is too small. He stated that benchmarking is appropriate and commonly used to make this kind of preliminary analysis. He explained that benchmarking would not be employed if the goal were to develop a detailed business plan, which would be the next step should the proposal before the court be approved. (N.T. Vol.IV, 22.) Regarding Mr. Abruzzo's critique that the Deloitte report was deficient in not factoring in temporary "blockbuster" exhibits that Mr. Abruzzo opined would be necessary at the Philadelphia gallery to keep attendance up (but would lose money,) Mr. Schwenderman suggested that any losses would be minimal and that The Foundation's collection is

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sufficiently "blockbuster" on its own. (N.T. Vol.IV, 25.) Regarding Mr. Abruzzo's criticism that the Deloitte report does not include any capital replacement costs, Mr. Schwenderman explained that this item was specifically omitted because such projects are often funded by capital campaigns. (N.T. Vol.IV, 27.) Mr. Schwenderman stated that none of Mr. Abruzzo's criticisms changed his opinion about the reasonableness of the projections in the Deloitte report. (N.T. IV, 36.)

During cross-examination, it was brought out that The Foundation's actual operating deficit for 2003 was approximately $1.2 million, a figure significantly lower than that projected in the financial analysis performed by Deloitte in 2002 and referred to in the earlier hearings. (Petitioner's Exhibit 20; N.T. Vol. IV, 46.) Counsel for the Students also elicited testimony from Mr. Schwenderman to the effect that the projections for the three-campus model place the fundraising figure at $4,250,000 per year, while the benchmarks for this level of development were institutions with 350,000 visitors per year, a number significantly higher than that projected for The Foundation's proposed three sites (220,000.) (N.T. Vol.IV, 56–57.)

The Deloitte report envisions the programs at Ker–Feal to be at full capacity in the year that the collection is being moved to Philadelphia. Mr. Schwenderman agreed with counsel for the Students that the report allocates nothing for capital expenditures at Ker–Feal, and testified that the funds for Ker–Feal would have to be obtained from other sources such as East Pikeland Township, where it is situated. Mr. Schwenderman indicated that he has been advised that The Foundation is pursuing restricted grants for Ker–Feal's operations. (N.T. Vol.V, 9–10.)

Counsel for the Students went through other details of the Deloitte report with Mr. Schwederman, attempting to show inconsistencies in the numbers and to demonstrate the effects that any deviations between the projections and the actual numbers would have on the finances. Generally, the expert was undeterred and he opined that such deviations would still yield break-even years for The Foundation from the opening year forward.

***8** Regarding The Foundation's investment income, Mr. Schwenderman clarified that the figure (5%) used in the model did *not* represent the rate of interest being earned by the endowment. Rather, as he explained:

> The way the endowment process works is there is an unrestricted endowment of $50 million. The investment committee of an organization establishes what that draw rate should be as a policy and then reviews that policy, if not annually, on a quarterly basis, with their investment managers and with the Board [of directors or trustees]. That takes into account a tremendous number of factors: the current market situation regarding investments; whether they're investing for a long-term appreciation, a current income, or a combination; as well as the prospect of generating additional endowment gifts in the future.... Using 5 percent, which estimates a long-term approach to managing an endowment from a draw rate, is appropriate. And, in general, if you use long-term indicators of that, that would still, over a 20–, 30–year period, provide somewhere in the 2–to 3–percent growth rate to endowment, as well, which we have not assumed in here because I would not feel it was prudent to assume that the endowment would grow.
>
> (N.T. Vol.V, 30–31.)

Upon questioning by the court, Mr. Schwenderman expanded on the reasons for the projected large increases in salaries, wages and benefits beginning in the year before the move and explained Deloitte's methodology in assigning the dollar amounts to these expense items. (N.T. Vol. V, 46–49; Table 1 to Petitioner's Exhibit 2.)

The next expert witness called by The Foundation was John L. Callahan, Jr., a consultant in the areas of institutional management, board develop-

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ment, and fundraising. His employment history included positions as chief development officer of the American Philosophical Society in Philadelphia and deputy director for external affairs at Winterthur in Delaware. He also worked for 25 years at Amherst College in a variety of capacities. Regarding the question of The Foundation's ability to raise the $4.25 million per year called for under Deloitte's projections for the three-campus model, Mr. Callahan stated that this goal is attainable. He made it clear that the Board of Trustees would have to be aggressive and totally committed. He explained that success would require a clear mission, a clear business plan, a strong marketing plan, and a clear fundraising plan, as well as an exceptional staff to carry these plans out. (N.T. Vol.VI, 18-19.) He stated that the Board would have to be "very swift out of the blocks," and the management, development, and public affairs staffs augmented with individuals with strong expertise in fundraising. He explained the importance of obtaining the support of the heavy-hitters or "alpha donors" to "open minds and hearts" of other donors, and noted that, in this instance, they—Pew, Lenfest and Annenberg—are already in place. (N.T. Vol.VI, 21.) He opined that The Foundation could not raise this kind of money were the collection to stay in Merion, in part, because success breeds success, *i.e.*, potential donors are attracted to organizations that are perceived to be thriving, not to ones thought to be foundering. (N.T. Vol.VI, 23.)

***9** Under cross-examination by the Deputy Attorney General, Mr. Callahan expounded on his view that The Foundation's fundraising abilities are limited if the gallery remains in Merion, suggesting that negative publicity in recent years might lead potential donors to conclude it is in disarray. On the other hand, he noted that the large amount of press attention to The Foundation has drawn attention to the quality of the art collection. (N.T. Vol.VI, 26.)

Counsel for the Students asked Mr. Callahan if The Foundation might enjoy increased success, while still keeping the gallery in Merion, because its Board (once it is expanded as per our January 29, 2004 opinion) will be more adept at raising money than The Foundation's Board has been historically. The witness reiterated the "catch-22" situation referred to by witnesses during the December 2003 hearings, *to wit*, in order to raise the kind of money at issue here, a board must consist of well-connected, highly influential people, and this caliber of individual will not likely be lured onto The Foundation's Board unless the proposals before the court are approved. (N.T. Vol.VI, 37.)

The court asked Mr. Callahan, in light of his testimony that the fundraising requirements under the Deloitte model are hugely ambitious, to comment on the possibility of The Foundation's falling short. The witness acknowledged this to be a possibility, and, in such an event, suggested that additional bridge financing could be requested. Beyond this, he declined the court's invitation to offer any "escape routes" should the finances not fall in line as hoped. (N.T. Vol.VI, 46.)

The next witness, Edwin L. Wade, Ph.D., was called by The Foundation to give testimony on the issue of deaccessioning. He is a consultant with expertise in the areas of campaign development, program development, and vision and mission planning for nonprofits. Prior to consulting, he held positions as deputy director of the Museum of Northern Arizona, director of education and curatorial services for the Philbrook Museum of Art in Tulsa, Oklahoma, and assistant director of the Peabody Museum of Archaelogy and Ethnology at Harvard, among others. Dr. Wade currently serves on the education and curatorial advisory committees for The Foundation.

Dr. Wade was originally contacted by The Foundation to be a guest curator and a collection assessor for The Foundation's Native American objects. From his experience with the Native American collection and from reading some of the related archival materials, Dr. Wade determined that Dr. Barnes' interest in the subject was part and parcel of

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the educational aesthetic to which he was dedicated. (N.T. Vol.VI, 61.) He also opined that Dr. Barnes made no distinctions between his works of art that were hanging on the wall at the gallery and those in storage; and that he considered all these objects to be of equal value to his educational process. (N.T. Vol.VI, 64.)

The witness identified two sets of ethical guidelines in the museum world—those of the Association of Art Museum Directors (hereinafter "AAMD") and those of the American Association of Museums (hereinafter "AAM.") (Petitioner's Exhibits 88, 89.) He also identified the Statement of Professional Standards and Ethics of the American Association for State and Local History. (Petitioner's Exhibit 90.) On the issue of deaccessioning, the AAM guidelines provide for sales of items in a collection "solely for the advancement of the museum's mission. Proceeds from the sale ... are to be used consistent with the established standards of the museum's discipline, but in no event shall they be used for anything other than acquisition or direct care of collections." (Petitioner's Exhibit 89, p. 9.) In approving of deaccessioning for the purpose of "acquisition," Dr. Wade explained, the guidelines suggest a museum can ethically sell works for the purpose of enhancing its collection. In approving of deaccessioning also to pay for the care of a collection, the AAM parts company with the AAMD, in that the latter organization's code does not recognize this as an appropriate purpose. (N.T. Vol.VI, 69.) The AAMD code specifies: "Deaccessioning and disposal by sale shall not serve to provide operating funds. The proceeds from disposal must be treated as acquisition funds." (Petitioner's Exhibit 88, p. 22.)

***10** Dr. Wade explained that membership in these museum associations is voluntary, and their ethical standards do not have the force of law; however, members who do not abide by the standards can be removed from the associations. When asked if these ethical standard apply to The Foundation, since it is, at its core, an educational institution, not a museum, Dr. Wade suggested all museums are educational institutions. (N.T. Vol.VI, 74.) He also related his own experience, while at the Museum of Northern Arizona, where the decision to sell off a few works to pay general operating costs resulted in rancor, recall of the members of the board, and the serious loss of financial support for the museum. Finally, Dr. Wade opined that the sale of any items in The Foundation's collection to create an endowment would cause the organization to be censured and would cause irreparable harm to Dr. Barnes' vision; and that the plan to open a new facility in Philadelphia would meet with the donor's approval. (N.T. Vol.VI, 86–87.)

During cross-examination by the Deputy Attorney General, Dr. Wade noted other downsides to deaccessioning, such as owners' hesitating to donate artwork for fear that the institution will soon dispose of their objects, and potential donors' perceiving that the institution has "excess" pieces that it is selling off, and therefore, doesn't need any more gifts.

In response to questions from counsel for the Students, Dr. Wade acknowledged that he did not know if The Foundation is a member of the AAMD, and therefore bound by, and subject to censure for running afoul of, its ethical standards. (N.T. Vol.VI, 98.) In response to a question from the court, the witness suggested that The Foundation is a member of the AAM. (N.T. Vol.VI, 111.) Dr. Wade also speculated that, in the museum milieu, the ethical limits on deaccessioning would prevail even in the face of express directions from a donor about liquidating his collection. (N.T. Vol.VI, 112.)

The Foundation's next witness was Jeremy Sabloff, Ph.D., a professor of anthropology at the University of Pennsylvania, who served as director of the University's Museum of Archeology until recently. He described the Museum as being an educational institution, as well as a museum. He is currently serving on The Foundation's curatorial advisory committee. On the issue of deaccessioning, Dr.

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Sabloff testified that there is a strong majority opinion among those in the museum community that the proceeds from sales should be used only for the acquisition of other materials or for the direct preservation and care of collections. Dr. Sabloff stated that he has seen The Foundation's non-gallery holdings and is of the opinion that these items—particularly the displays at Ker–Feal—mirror Dr. Barnes' vision for educating people in art aesthetics by the use of the ensembles installed in the gallery in Merion. (N.T. Vol.VII, 10.) The witness gave his opinion that the ethical standards for museum administration, discussed, *supra,* should apply to The Foundation because the art collection is integral to its mission. When asked to choose between two options—the proposed move to Philadelphia or selling assets to raise enough money to keep the gallery in Merion—the witness opined that the first represents the less drastic way to meet The Foundation's financial needs while still carrying out its mission. "But," he added, "I say that with reluctance, because I think ... all things being equal, I'd rather not see either one of those happen." (N.T. Vol.VII, 13.)

***11** During cross-examination by counsel for the Students, Dr. Sabloff acknowledged that he would prefer a third alternative, that the Board of Trustees redouble its fundraising efforts and succeed to such an extent that the gallery can continue where it is. (N.T. Vol.VII, 14.)

The next witness was Stephen J. Harmelin, Esquire, who has been a member of The Foundation's Board of Trustees since 2002, and chairs its finance committee. He testified to the bleak financial situation at The Foundation during his tenure and the various remedies considered by the Board. He echoed the testimony of Dr. Bernard C. Watson, Ph.D., president of The Foundation, offered during the December 2003 hearings, that the proposal before the court does not constitute a takeover of The Foundation's management, as has been suggested by some. (N.T. Vol.VII, 40.) Mr. Harmelin also related his conversations with Joseph Manko, the chairman of the Lower Merion Board of Commissioners, wherein they discussed the ramifications of the petition *sub judice*. Mr. Harmelin testified that he assured Mr. Manko that the horticulture program and perhaps some form of an art program would continue in Merion, even if the gallery does not. (N.T. Vol.VII, 44–48.) Mr. Harmelin testified that it remains his opinion that relocating the gallery to Philadelphia is the most appropriate and least drastic solution to The Foundation's fiscal crisis. (N.T. Vol.VII, 48.)

Under cross-examination by the Deputy Attorney General, Mr. Harmelin stated that the Board of The Foundation would install the art and other objects in the exact same ensembles as are currently displayed in Merion, and would keep the art and horticulture education programs intact, if the move to Philadelphia is permitted. (N.T. Vol.VII, 50–51.)

In response to questions from counsel for the Students, Mr. Harmelin agreed that a "walk-through" museum was anathema to Dr. Barnes, and that his indenture provided for the gallery to be open to the public only one day a week, with the rest of the week devoted to the educational process. (N.T. Vol.VII, 62.) Counsel also asked Mr. Harmelin about proposals recently floated in the media for easing the traffic and parking problems attendant at the Merion gallery. [FN6] Mr. Harmelin suggested, in essence, that the ideas were too nascent and/or speculative to be given serious consideration at this juncture. (N.T. Vol.VII, 65.)

FN6. It has been suggested, *e.g.*, that, if there were a street and parking lot with direct access to the facility by way of Lancaster Avenue or City Line Avenue, the neighbors' complaints would be eliminated, and the Township would allow more visitors, and the revenue from the increased admissions would put The Foundation on the road to fiscal wellness.

The court further explored the state of The Foundation's relationship with Lower Merion

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Township. Mr. Harmelin testified to being disappointed that a resolution passed by the Township's Board of Commissioners to the effect that the Board wanted the gallery to remain in Merion, did not lead to the start of a rapprochement. (N.T. Vol. VII, 76, Amicus' Exhibit 94.) When invited to confirm that The Foundation's trustees intend to replicate the Merion gallery, if the move to Philadelphia is approved, Mr. Harmelin declined, on the grounds that the plans are inchoate and there can be no such guarantees at present. (N.T. Vol.VII, 80.)

***12** Counsel for the Students elicited Mr. Harmelin's acknowledgment that, after the favorable resolution was passed, The **Foundation** took no affirmative action to secure relief from the restrictions placed by the Township on The **Foundation's** operations. (N.T. Vol.VII, 94.)

The **Foundation's** next witness was Barbara Beaucar, the archives project assistant at The **Foundation**, whose duties include processing and cataloging Dr. **Barnes**' correspondence. This witness testified about a number of archival documents, and the tenor of her testimony was that all of The **Foundation's** non-gallery holdings, including the collection placed by Dr. **Barnes** at Ker-Feal and the other objects not hanging in the gallery in Merion, were part of Dr. **Barnes**' vision for an educational experiment. (N.T. Vol VIII, 30-48.) The witness testified from The **Foundation's** archival documents that the painting by Courbet, which was the subject of much of the expert appraisers' testimony, *supra,* was at one time on display in the Merion gallery. (N.T. Vol. III, 50, Petitioner's Exhibit 80.) She also pointed out several references to non-gallery works in publications written by Dr. **Barnes** and Violette de Mazia, [FN7] and showed that The **Foundation** lent out non-gallery works over the years for exhibitions staged by other institutions. (N.T. Vol.VIII, 53-62, 64-68.)

> FN7. Ms. de Mazia worked with Dr. **Barnes**, and served as Director of Education of the art education program at The **Foundation** for approximately 50 years.

Ms. Beaucar read from a letter written in 1923 by Dr. **Barnes** to his attorney, Owen J. Roberts (later a United States Supreme Court Justice) wherein he said:

> In view of the general belief that I am about to give my life and privacy away to the public—which I never intended—I am afraid of the statement in the affidavit for the Internal Revenue Collector, which reads, "An art gallery for the education of the public," and "the education of the masses in art, etc." That, of course, is the purpose of the Foundation after I am gone, but while I am alive, I do not wish anybody to be able to put their hands on a document bearing such a statement.... In short, I am building for the future, I want to guarantee my privacy, and I want to prepare the way for the gallery to be a public one after my death.

(Petitioner's Exhibit 102.) Other documents penned by Dr. Barnes demonstrated that he wanted his educational program to be available to schools throughout Pennsylvania and beyond. (Petitioner's Exhibits 103, 104, 105, 106.)

Robin McClea, director of education at The Foundation, was the next to testify. She stated that the art appreciation and the horticulture education programs, the teaching staff, and the enrollment numbers have all increased since she accepted the position in 1999. She also testified that The Foundation recently obtained "approved provider status" (for continuing education purposes for K through 12 teachers) as well as approval of its courses for college credit. (N.T. Vol.VIII, 94-98.) Ms. McClea offered this description as to how Ker-Feal and its collection and grounds relate to the educational philosophy employed at Merion as follows:

> ***13** Ker-Feal is the site for the study of American decorative arts ... It is a collection of American ceramics and pewter, ironwork, furniture, that can be studied aesthetically, the same [way] the gallery collections can be studied. The grounds can be utilized for study in the same manner that

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the arboretum in Merion can be utilized by the horticulture program, and offers opportunity for expanded study in horticulture, because of the additional grounds and the opportunities there that the arboretum in Merion does not offer.

(N.T. Vol.VIII, 100.) The witness explained that Ker–Feal has, in the past, been used in a very limited manner, but the current board and administration have been working to expand its possibilities. (N .T. Vol. VIII, 104–106.)

During cross-examination by counsel for the Students, Ms. McClea admitted that there is no reference to Ker–Feal in The Foundation's promotional materials, the inference being that Ker–Feal was not an integral part of Dr. Barnes' vision and that the attempts currently to emphasize its importance are solely for the purposes of these proceedings. (N.T. Vol. VIII, 115–118; Amicus' Exhibits 83, 84, 85, 86.)

In response to additional questions by counsel for The Foundation, Ms. McClea testified that several of the horticulture and art instructors take their students to Ker–Feal on occasion to study the botanical specimens on the grounds and the collection in the farmhouse. (N.T. Vol.VIII, 128.).

The next witness was Marie Malaro, LL.B., who was offered by the Students [FN8] as an expert on the ethics of deaccesssioning. Professor Malaro worked as counsel for the Smithsonian Institution and ran the graduate program of museum studies at George Washington University for 12 years. She helped draft the ethics policy of the AAM, the museum association referred to in earlier testimony. She testified that she has followed the litigation surrounding The Foundation for the past 15 years, and has reviewed Dr. Barnes' will and indenture, and the adjudications and orders issued by this court. (N.T. Vol.IX, 10, 13.) With this background, she concluded that Dr. Barnes' mission was "quite narrow"—solely to promulgate his unique method of teaching art appreciation in a school format in his gallery in Merion; and she opined that the instant proposal to relocate the gallery to Philadelphia does not comport with that mission. (N.T. Vol.IX, 14.) She stated:

FN8. The Students presented this testimony out of turn, with the court's permission, for the convenience of the witness.

a large museum will overwhelm or, at least, put in the background Dr. Barnes' purpose.... I find it strange that the trustees are suggesting that they are going to put up a very large traditional museum and then have the gallery in one corner because it will be lost, and also it will put such a burden on the trustees to maintain that building. They won't have much time for Dr. Barnes' core purpose.

(N.T. Vol.IX, 16.) Regarding the non-gallery objects, the witness testified that they are not subject to deaccessioning restrictions because The Foundation is not a museum; and there is, therefore, no museum mission that forms a framework for making decisions about whether or not the non-gallery items advance the mission and can or can not be deaccessioned under the ethical guidelines. (N.T. Vol.IX, 20, 34.) She emphasized that Dr. Barnes placed restrictions only on the collection hanging in the gallery, which was to remain undisturbed after his death.

***14** During cross-examination by counsel for The Foundation, Professor Malaro set forth the definition of "deaccessioning" as: "the permanent removal of an object that was once accessioned into a museum collection; accordingly, the term does not apply when an object is placed on loan by a museum, nor does it apply if the object in question was never accessioned." (N.T. Vol.IX, 57.) The witness reiterated that the objects collected by Dr. Barnes were not accessioned in the technical sense. Counsel pointed out to the witness that Dr. Barnes left Ker–Feal to The Foundation in his will, with the direction that it should become a living history museum, and suggested that this made Ker–Feal and its collection subject to the ethical rules against deaccessioning. The witness refused to accept this

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premise on the grounds that The Foundation couldn't accession the property and its contents until the mission and collecting goals of the museum were established, which, the witness suggested, has yet to happen. (N.T. Vol.IX, 73.)

The next witness for The Foundation was Kimberly Camp, its executive director and chief executive officer. She testified to the importance of Ker–Feal to the overall mission of The Foundation. She read Dr. Barnes' correspondence wherein he described the property as:

> an historic monument which carries out the pre-Revolutionary spirit and also exemplifies the principles of art and education to which The Foundation is devoted. In other words, the central idea [for a proposed article in "House & Garden" magazine] should be a complete treatment of Ker–Feal in these respects, and sufficient account of the collection of paintings and of trees, plants and shrubs at The Foundation proper to supplement and reinforce the significance of Ker–Feal, its purpose, its equipment and its meaning in educational terms.

(Petitioner's Exhibit 124.) In another letter to the magazine's staff, Dr. Barnes stated, "Ker–Feal is not our home, but ... an outgrowth of the educational program of the Barnes Foundation exemplifying the aesthetic principles and educational practices carried out in our gallery at Merion." (Petitioner's Exhibit 126.) The article did appear in the December 1942 edition of the magazine, and a copy was introduced into evidence. (Petitioner's Exhibit 94.)

Ms. Camp testified that plans are currently under way to lend some of the non-gallery art for a traveling exhibition being assembled by the National Endowment for the Arts, and that grants have been received to fund a catalog to accompany the tour. (N.T. Vol.X, 29–30.)

In response to questions from counsel for the Students, Ms. Camp confirmed that she is not a member of the AAMD. She noted that The Foundation can not be a member since the association is made up of individuals, not institutions. (N.T. Vol.X, 59.)

The court asked the witness about reproducing the gallery in Philadelphia, if the move is authorized. Contrary to Mr. Harmelin's vacillation, Ms. Camp was emphatic that the gallery must be replicated exactly, and the issue is nonnegotiable. (N.T. Vol. X, 73 .) The court also questioned Ms. Camp about the ambitious proposals regarding hours of operation set forth in the Deloitte model, specifically 42 hours for public visitation and 27 hours for the exclusive use by students. She acknowledged that The Foundation envisions an aggressive schedule, including night hours and a 7–days a week operation. (N.T. Vol.X., 75–77.)

***15** The final witness for The Foundation was Dr. Watson, president of The Foundation's Board. He repeated his statement from the December 2003 hearings that the Mayor of Philadelphia has made a public commitment to turning over a site on which a new facility can be built. (N.T. Vol.X, 80.) He also reiterated his position that the proposed changes do not constitute a takeover of The Foundation's Board, and reaffirmed that the proposed relocation of the gallery is the least drastic alternative available to save the organization. (N .T. Vol. X, 83–85.)

The Foundation's having concluded its case, the Students called Debra J. Force, a private art dealer in New York City who has been doing appraisals since her prior employment at Christie's. While at the auction house, she was involved in the 1989 sale of Violette de Mazia's collection by her estate. She also participated in the evaluation of The Foundation's permanent collection that was handled by Christie's and Sotheby's in the early 1990s. (N.T. Vol.X, 102.) Her specialty is traditional American art, which covers works produced from the late 18th century until 1945. She was retained by the Students to evaluate eleven of the most notable works of non-gallery art. She viewed the

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works in person at The Foundation. Thereafter, she sought out comparables and made her evaluations. She appraised the fair market value of the 11 items FN9 at $9,665,000. (Amicus' Exhibit 53.)

FN9. *See* ftnt. 5, *supra.*

Regarding the present state of the art world, Ms. Force opined that the auction market is doing well, and, if the works she evaluated were offered by Sotheby's or Christie's, they would generate great interest. (N.T. Vol.XI, 9.) She discounted the "blockage discount" effect discussed *supra,* because of the quality of the works and their provenance. By way of example, Ms. Force noted that several John Singer Sargent paintings from the collection of Mr. and Mrs. John Hay Whitney all commanded seven-figure prices at an auction recently conducted by Sotheby's. (N.T. Vol.XI, 13.)

During questioning by counsel for the Students, it was brought out that the total for the 11 works appraised by Ms. Force was within 5% of the figure reached by Ms. Harrison ($9,665,000 v. $9,065,000.) (N.T. XI, 23.)

The Students presented a second expert on the art valuation issues, Richard L. Feigen, who is an art dealer, and the director of the Art Dealers Association of America. He explained that members of his association perform appraisals for museums directly and for tax purposes for individuals who are donating items to museums. (N.T. XI, 40-41.) At one time, Mr. Feigen served as a trustee of Lincoln University and, as a result of Lincoln's historical connection to The Foundation, came to form and serve on the latter's art advisory board.

Mr. Feigen personally inspected and appraised nine of The Foundation's non-gallery paintings and one sculpture. He set the value of the sculpture, a Lipschitz, at $1,600,000. (Amicus' Exhibit 57.) He originally determined the total value of the paintings to be $9,320,000. (Amicus' Exhibit 56.) He then revised the value of one—Courbet's "La Bergère"—from $3,500,000 to $8,500,000, for a total of $14,320,000, based, in part on the price currently being asked for another Courbet in Paris.

***16** Under questioning by counsel for The Foundation, Mr. Feigen agreed that his primary expertise is not appraising. He was dismissed from The Foundation's art advisory committee in 1991 for his opposition to the petition (filed and withdrawn) by the prior administration seeking court permission to sell paintings from the gallery collection. Mr. Feigen acknowledged describing Dr. Barnes' education program in less than glowing terms ("idiosyncratic" and "anti-art-history") in his book, *Tales from the Art Crypt,* that was published in 2000. After many questions from both counsel for The Foundation and from the Deputy Attorney General concerning the validity of his valuation of the Courbet at $8,500,000, Mr. Feigen suggested that selling that painting in any event would not be appropriate, and that it would be better to sell "two or three of the redundant Renoirs" hanging in the gallery instead. (N.T. Vol.XI, 29.)

Joseph Manko, the president of the Board of Commissioners of Lower Merion Township, was the next witness. He explained that the purpose of the Township's January 2004 resolution, discussed *supra,* was "to explain to the public, and I assume that the Judge would be able to take judicial notice, that the Township wished to have the Judge explore all feasible alternatives since it was not the Township's intention that the Barnes move to Philadelphia." (N.T. Vol.XII, 36.) He stated that the resolution was approved by all 14 commissioners. Mr. Manko spoke of the recent suggestions to alleviate the traffic problems at the Merion gallery, noting that it would take more parties than just the Township and The Foundation FN10 to bring them to fruition. (N.T. Vol.XII, 41.) Mr. Manko did testify that, should The Foundation be directed to keep the gallery in Merion, he would support the trustees' efforts to improve access to the gallery and to enhance The Foundation's fundraising abilities. N.T. Vol. XII, 42.)

FN10. The proposals for improving access

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> to and parking for the gallery involve land currently owned by Episcopal Academy that St. Joseph's University is looking to purchase.

James Ettelson, another member of Lower Merion's Board of Commissioners also testified. He represents the ward in which The Foundation's Merion property is located. He echoed Mr. Manko's testimony that he would support The Foundation in trying to increase public access and fundraising, should the gallery remain in place. (N.T. XII, 62.)

The Students next called Kenneth Barrow, a licensed real estate broker and certified general real estate appraiser. He determined the fair market value of the farmhouse and outbuildings, and all 137 acres at Ker–Feal to be $10,300,000. He determined that a 7–acre parcel (rather than the 12 acres used by The Foundation's real estate experts for their hypothetical subdivision) would be of sufficient size to support the existing buildings, and appraised this acreage with the buildings at $1,100,000. The remaining $9,200,000 of the total value was premised on the open land's being subdivided into 59 building lots valued at $155,932 each. He based these numbers on the density permitted under the existing zoning ordinances (two-acre lots,) the value of existing homes in the area, and the prices being realized for nearby land which is in the process of being subdivided. (N.T. Vol. XII, 70–73; Amicus' Exhibit 60.)

***17** Mr. Barrow explained that his numbers were much higher than those posited by The Foundation's real estate experts because he appraised the property as land available for development, while the other appraisers determined its value as raw land. He stated that it is often the case today that a buyer's offer is made subject to his getting subdivision approval, and the seller accepts with the understanding that the amount he actually receives will be based on the buyer's success, *i.e.,* on a per-lot or per-unit basis. He testified that, in this scenario, the seller sees no money for 18 to 24 months or more. (N.T. Vol.XII, 76–77.)

Mr. Barrow was asked to comment about the 1990 estimate of Ker–Feal's value that was referenced during the cross-examination of Mr. Wood, The Foundation's real estate expert. Mr. Barrow suggested that this figure ($6,300,000 for the entire property) seemed reasonable, and that land values in the area have risen substantially since then. (N.T. Vol.XII, 85.)

In his cross-examination of Mr. Barrow, counsel for The Foundation elicited answers that emphasized the payment delay inherent in the subdivision process on which the witness's appraised value was contingent.

The final witness for the Students was Paul E. Kelly, Jr., the president of a private charitable foundation who pledged, by letter dated September 27, 2004, the sum of $100,000, to be paid over two years to The Foundation, conditioned on the gallery's staying in Merion. (Amicus' Exhibit 97.)

DISCUSSION

After careful consideration of this evidence, we find that The Foundation met its burden of proof and the second amended petition should be granted. Returning to the three areas of inquiry outlined at the beginning of this opinion, we make the following observations. The first issue, as stated above, is as follows:

> 1) Can The Foundation raise enough money through the sale of its non-gallery assets to keep the collection in Merion and achieve fiscal stability; and are there ethical and/or legal constraints on such a sale of assets?

Our conclusion about the latter issue is a negative. We were not convinced by The Foundation's experts that museum associations' guidelines should factor into our decision, for three primary reasons. First, the idea that the Merion facility was founded by Dr. Barnes to serve as a school, not a museum, has been the refrain of every party in interest throughout these proceedings. Secondly, regarding the applicability of the ethical precepts to

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Ker–Feal—the buildings, the land, and the tangible property—Dr. Barnes, in his will, did leave instructions for it to be developed as a living museum of art and botanical garden. However, half a century has passed since his death and the plans for the museum are only now in their infancy. Extrapolating from the testimony of Professor Malaro, it would be nonsensical to determine that the inchoate idea of a museum is prohibited from deaccessioning under ethical guidelines promulgated by museum associations to which it (not *in esse*) does not belong. Finally, regarding the legality (as opposed to ethics) of selling non-gallery pieces, no party or witness suggested any legal proscription exists.[FN11]

> FN11. This comports with the undersigned's reasoning in the order of May 17, 2001, which approved The Foundation's request for permission to lend or tour works in storage. We determined therein that the prohibition in Dr. Barnes' indenture against lending or selling applied only to the paintings hanging on the walls of the gallery in Merion. Thus, the ban is irrelevant to our consideration of the land, the buildings, and the collection at Ker–Feal, as well as the other non-gallery items.

***18** Having determined that the option of selling was available, we next considered The Foundation's potential to stay afloat—and at what level—on the funds generated by such sales. Of primary importance, of course, would be the continued existence of the art and horticulture education programs at Merion, and of secondary importance, the public access to the gallery there. Regarding Ker–Feal, the historical evidence convinced us that the farmhouse and the collection contained therein represent a significant opportunity (albeit, unrealized at present) to advance the educational process championed by Dr. Barnes; and, for this reason, The Foundation should maintain ownership of the structures and the immediately adjacent land.

We therefore limited our analysis under this scenario to The Foundation's liquidating only the non-gallery art [FN12] and the 125–130 acres surrounding Ker–Feal. Using the estimated values from The Foundation's experts, these sales would yield approximately $23,000,000. From this total, it would seem appropriate to subtract the value of the Courbet, on which there was much testimony and, it seems, a consensus, that such an important piece should not be lost to The Foundation. Except for the land valuation, the numbers suggested by the Students were comparable. Regarding the value of the acreage around Ker–Feal, we are persuaded that The Foundation's lower appraisal representing "cash on the barrelhead" for the raw land, not the higher price attainable after it is improved/approved for subdivision, is germane to our inquiry. We conclude that a reasonable expectation of sale proceeds would be about $20,000,000. A five per cent draw on this would be $1,000,000. History and the evidence presented at these hearings showed this amount would not halt The Foundation's downward financial spiral.

> FN12. We refer here to those works that were appraised in person by both sides' experts, and whose values made up the bulk of the total.

As for the prospects of generating additional revenue through development, we credited the opinions of the Foundation's witnesses that maintaining the *status quo* will neither generate excitement among potential benefactors nor attract the all-crucial "alpha donors" to the cause. In the earlier hearings, it was made clear that Pew, Lenfest and Annenberg (all three unquestionably alpha donors) have deemed the current situation to be unsalvageable; and Dr. Watson has testified that The Foundation's Board has approached all other potential saviors and been rebuffed.

Regarding options for increasing the income produced by the day-to-day operations at Merion, no solid solutions surfaced. The dream of augmented admissions (with the attendant increases in shop sales and parking fees) was shown, during these hearings, to be as elusive as ever. We noted in the

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January 2004 opinion this "this Orphans' Court has no jurisdiction to broker or impose any changes in the unfortunate situation" between The Foundation and the Lower Merion Township. *See* 24 Fiduc. Rep.2d at 110. Since that opinion was issued, all that has changed is that the Township passed a conciliatory resolution, and several other parties (also outside our jurisdiction) have been thrown into the mix, *i.e.,* St. Joseph's University, Episcopal Academy, and possibly the Commonwealth of Pennsylvania (since City Avenue is a state highway.) It is also 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.

***19** We turn to the second issue at hand, *to wit:*

2) Can the facility envisioned in Philadelphia be constructed on the proposed $100,000,000 budget?

Harry Perks, The Foundation's expert on this topic, was well-credentialed, highly experienced, and quite credible. He expressed his opinion that the project is feasible within the requisite degree of professional certainty. He also made clear the nature of his charge—to analyze The Foundation's proposal at this preliminary stage—and the myriad of revisions and adjustments that will occur before the doors to a new building can open. As a result of this perspective, under questioning by both counsel for the Amicus and by the court, Mr. Perks was essentially unassailable. Therefore, on the budget issue, The Foundation met its burden of proof through Mr. Perks' direct and persuasive testimony. In accepting Mr. Perks' conclusions about the soundness of these construction estimates, we do not lose sight of the facts that the cost projections may be too conservative and that changes necessitated thereby may result in a building substantially different in size or amenities.

The third issue, as framed by the court, is as follows:

3) Is The Foundation's three-campus model—the new facility housing the art education and public gallery functions, Merion as the site of the administrative offices and the horticulture program, and Ker–Feal, operating as a living museum—feasible?

In this area as well, the Foundation presented most impressive witnesses. The articulate and concise testimony of Matthew Schwenderman made the lengthy Deloitte analysis of the three-campus model an excellent roadmap. John Callahan, the expert on development, stated that The Foundation can raise the funds needed to make this dream a reality. He emphasized that The Foundation's Board and staff will have to act quickly, to work assiduously, and to be dedicated absolutely; however, he would not waiver on his opinion that the campaign can succeed. Through the testimony of these two witnesses, The Foundation met its burden on this final question before us.

In view of the foregoing, we find that The Foundation showed clearly and convincingly the need to deviate from the terms of Dr. Barnes' indenture; [FN13] and we find that the three-campus model represents the least drastic modification necessary to preserve the organization. By many interested observers, permitting the gallery to move to Philadelphia will be viewed as an outrageous violation of the donor's trust. However, some of the archival materials introduced at the hearings led us to think otherwise. Contained therein were signals that Dr. Barnes expected the collection to have much greater public exposure after his death. To the court's thinking, these clues make the decision—that there is no viable alternative—easily reconcilable with the law of charitable trusts. When we add this revelation to The Foundation's absolute guarantee that Dr. Barnes' primary mission—the formal education programs—will be preserved and, indeed, enhanced as a result of these changes, we can sanction this bold new venture with a clear con-

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science.

FN13. As we have cited many times in the course of the litigation involving The Foundation, Section 381 of the *Restatement (Second) of Trusts* states: "[A] 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." It is only the administrative provisions of a trust that are subject to deviation, *i.e.*, "the details of administration which the settlor has prescribed in order to secure the more important result of obtaining for the beneficiaries the advantages which the settlor stated he wished them to have." Section 561 of Bogert, *The Law of Trust and Trustees*, at 27.

***20** Our conclusion that The Foundation should prevail does not mean all doubts about the viability of its plans have been allayed. Of serious concern are its fundraising goals. While Mr. Callahan was on the stand, we commented on his contagious optimism. It is clear The Foundation's Board will have to catch it. Mr. Callahan was only one of the many witnesses who acknowledged that The Foundation is raising the bar enormously above both its own fundraising abilities in the past and those of non-profits in general. "Ambitious" and "aggressive" were among the adjectives we heard to describe the target levels on which the Deloitte report is based. 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. If that occurs, or the admissions do not meet expectations, or any of the other components of the Deloitte model do not reach their targets, something will have to give. 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.

We make a final observation about finances and the plans now being approved. The capital cost analysis prepared by Perks Reutter Associates contemplates renovations to the Merion facility to the tune of $1,600,000. In excess of $12,000,000 was spent upgrading the gallery during the world tour of some of The Foundation's works in 1993 and 1994. The irony of converting a state-of-the-art gallery into perhaps the most expensive administration building in the history of non-profits is not lost to us. Looking to the future, it is of the utmost importance that that Board of Trustees steer The Foundation so that another such irony does not surface ten or fifteen years hence.

In light of the foregoing, by separate decree entered *eo die*, The Foundation's second amended petition to amend is granted.

DECREE SUR SECOND AMENDED PETITION TO AMEND CHARTER AND BYLAWS

AND NOW, this 13th day of December, 2004, after continued hearings on the Second Amended Petition of The Barnes Foundation to Amend its Charter and Bylaws ("Second Amended Petition"), on September 21, 22, 23, 24, 27 and 30, 2004, and after consideration of arguments and briefs of counsel, it is hereby ORDERED and DECREED as follows:

1. That The Barnes Foundation is granted leave to amend its Charter by replacing the current Charter with the proposed Amended and Restated Articles of Incorporation attached as "Exhibit C" to the Second Amended Petition.

2. That The Barnes Foundation is granted leave to amend its Bylaws by replacing the current Articles I through X with the provisions set forth as the

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Preamble and Articles I through XVII, which are set forth as "Exhibit D" to the Second Amended Petition.

***21** 3. That, as provided in the Preamble to the amended Bylaws, the Indenture of Albert C. **Barnes** shall continue in effect as one of the governing documents of The **Barnes Foundation**.

4. That The **Barnes Foundation** is granted leave to amend its Indenture by replacing the current Paragraph 6 with the provisions set forth as Paragraph 6 of "Exhibit E" to the Second Amended Petition.

5. That The **Barnes Foundation** is granted leave to amend its Indenture by replacing the current Paragraphs 17 through 19 with the provisions set forth as Paragraphs 17 through 19 of "Exhibit E" to the Second Amended Petition.

6. That The **Barnes Foundation** is granted leave to amend its Indenture by replacing the current Paragraph 28 with the provisions set forth as Paragraph 28 in "Exhibit E" attached to the Second Amended Petition.

7. That The **Barnes Foundation** is granted leave to amend its Indenture by deleting the provisions in current Paragraphs 21 through 25 and 37.

8. That The **Foundation** itself shall bear the total cost of the technical equipment used during the hearings, as well as the costs incurred by The **Foundation** in making certain paintings available for personal inspection by the Students' expert witnesses, on the ground that the Students served as *amicus curiae* to assist the Court, and not as a party, *per se*, in the litigation.

Pa.Com.Pl.,2004.
In re Barnes Foundation
Not Reported in A.2d, 2004 WL 2903655 (Pa.Com.Pl.), 25 Fiduc.Rep.2d 39, 69 Pa. D. & C.4th 129

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Supreme Court of Pennsylvania.
In re the **BARNES FOUNDATION**
Jay Raymond
Appeal of the **Barnes Foundation**.
In re the **Barnes Foundation**
Jay Raymond
Petition of Thomas W. Corbett, Jr., Attorney General.

Submitted March 28, 2005.
Decided April 27, 2005.

Background: Students who were enrolled in charitable foundation's programs sought to intervene in proceedings on amendments to charter and bylaws. The Court of Common Pleas of Pennsylvania, Montgomery County, No. 58,788,Stanley R. Ott, J., denied intervention and approved the restructuring. Student appealed final decree. The Superior Court denied foundation's motion to dismiss appeal. Emergency application extraordinary relief was granted.

Holding: The Supreme Court, Nos. 51 MM 2005, 59 MM 2005,Saylor, J., held that student's failure to attain intervenor status foreclosed his ability to file a cognizable appeal relative to the court's final decree.

Appeal quashed; jurisdiction relinquished.

West Headnotes

[1] Appeal and Error 30 148

30 Appeal and Error
30IV Right of Review
30IV(A) Persons Entitled
30k148 k. Persons other than parties or privies. Most Cited Cases

The general rule is that only parties may appeal a decision. Rules App.Proc., Rule 501, 42 Pa.C.S.A.

[2] Courts 106 202(5)

106 Courts
106V Courts of Probate Jurisdiction
106k202 Procedure in General
106k202(5) k. Review and vacation of proceedings. Most Cited Cases
(Formerly 30k148)

Appellant's failure to attain intervenor status before the orphans' court foreclosed his ability to file a cognizable appeal relative to the court's final decree; since appellant was unsuccessful in his effort to intervene, he had no greater rights than would be available to any other non-party. Rules App.Proc., Rule 501, 42 Pa.C.S.A.

**793 John G. Knorr, Mark A. Pacella, Lawrence Barth, Harrisburg, for the Com. of PA., petitioner.

Howard Jonathan Bashman, Fort Washington, for Jay Raymond, respondent.

Bruce Philip Merenstein, Arin M. Adams, Ralph G. Wellington, Carl A. Solano, Philadelphia, for Barnes Foundation, respondent.

Before: CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN and BAER, JJ.

*372 ***OPINION***

Justice SAYLOR.

This Court granted applications seeking an exercise of its extraordinary jurisdiction relative to an appeal challenging orphans' court approval of the restructuring of a charitable institution known as the Barnes Foundation. The dispositive legal issue centers on the timeliness of the appeal.

The Barnes Foundation is a Pennsylvania nonprofit corporation charged with implementation of a charitable trust focused on the advancement of art education and appreciation, and is presently located in Lower Merion Township, Pennsylvania. The

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Foundation recently obtained orphans' court approval to amend its charter and bylaws, as well as the trust indenture, most prominently to accomplish an expansion of the Foundation's Board of Trustees from five to fifteen members and to authorize the relocation of its art gallery to Philadelphia. The decision of the orphans' court reflects that the restructuring is necessary in light of a financial crisis experienced by the Foundation and is a prerequisite to the realization of essential financial assistance from other philanthropic institutions and organizations (asserted to be in excess of $100 million), as well as to the contribution by the City of Philadelphia of land to support the construction of the new gallery. The Office of Attorney General participated in the proceedings as *parens patriae*, and a group of students enrolled in Foundation programs sought and obtained leave to participate as *amici curiae*, but without the right to appeal.

On October 10, 2002, Jay Raymond and two other students enrolled in Foundation programs had sought to intervene in the orphans' court proceedings; however, intervention was denied by order dated February 12, 2003. Mr. Raymond did not seek to appeal the denial of intervention and did not otherwise participate in the orphans' court proceedings. He nevertheless lodged an appeal relative to the orphans' court's final decree dated December 13, 2004 (as modified by a December 22, 2004, supplement), approving the structural ***373** changes to the Foundation. No actual party to the orphans' court proceedings sought to appeal, however.

In the Superior Court, the Foundation moved to dismiss Mr. Raymond's appeal, *inter alia*, for want of jurisdiction, on the ground that, as a non-party, Mr. Raymond had no standing to appeal. Furthermore, according to the Foundation, any asserted ****794** right to appeal the denial of intervention expired thirty days after the entry of that order. *See* Pa.R.A.P. 903 (Time for Appeal). The Superior Court, however, denied the Foundation's motion on March 8, 2005, with the proviso that such denial was without prejudice to the Foundation's ability to pursue the appealability issue in connection with consideration of the merits of the appeal. The Foundation and the Office of the Attorney General sought an exercise by this Court of its extraordinary jurisdiction on the basis that, in light of the Foundation's unique and salutary charitable mission, timely redress of its precarious financial situation, as recognized by the orphans' court, is a matter of substantial public importance. Mr. Raymond agreed to the exercise of extraordinary jurisdiction, but advocated limiting its reach to the merits of the controversy. This Court elected to exercise jurisdiction over the entire controversy under Section 726 of the Judicial Code, 42 Pa.C.S. § 726, and deferred further briefing pending a review of the record lodged in the Superior Court. Exercising plenary review under Section 726, we now find that the appeal can be resolved on the existing record.

[1][2] As the Foundation and the Attorney General argue, the general rule is that only parties may appeal a decision. *See* Pa.R.A.P. 501 (authorizing appeals by "any *party* who is aggrieved by an appealable order" (emphasis added)); *accord* G. RONALD DARLINGTON, KEVIN J. MCKEON, DANIEL R. SCHUCKERS & KRISTEN W. BROWN, PENNSYLVANIA APPELLATE PRACTICE 2D § 501:5 (2d ed. 1998 & Supp. Nov. 2004) (" Rule 501 specifically requires an appellant to have party status or to be a fiduciary of an estate or trust in order to appeal." (footnote omitted)). Since Mr. Raymond was unsuccessful in his effort to intervene in the orphans' court proceedings, he had no greater rights than would be available to any other non-party, and therefore, ***374** Mr. Raymond lacked the ability to implicate the appellate process with respect to the court's final decree.

Pennsylvania law does allow for an appeal as of right from an order denying intervention in circumstances that meet the requirements of the collateral order doctrine as embodied in Pennsylvania Rule of Appellate Procedure 313. *See* Pa.R.A.P. 341 (note) (identifying an order denying the right to intervene as a type of order that is not appealable as

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a final order but which may fall under Rule 313 (Collateral Orders) or 312 (Interlocutory Appeals by Permission)); *see, e.g., Township of Radnor v. Radnor Recreational, LLC,* 859 A.2d 1, 4 (Pa.Cmwlth.2004); *Haggar v. Carbon County Tax Claim Bureau,* 839 A.2d 448, 450-51 (Pa.Cmwlth.2003); *Nemirovsky v. Nemirovsky,* 776 A.2d 988, 991 (Pa.Super.2001). Of dispositive significance for purposes of this appeal, however, a common pleas court's order denying intervention is one type of order which must be appealed within thirty days of its entry under Rule of Appellate Procedure 903, or not at all, precisely because the failure to attain intervenor status forecloses a later appeal. *See In re Rowan,* 763 A.2d 958, 961 (Pa.Cmwlth.2000) (quashing an appeal on the merits from a final order lodged by a company that had sought but failed to obtain intervenor status); *accord* G. RONALD DARLINGTON, *ET AL.,* PENNSYLVANIA APPELLATE PRACTICE 2D § 501:7 ("The failure to attain intervenor status obviates the ability to file an appeal."). This approach is consistent with that of the federal courts, *see, e.g., Credit Francais Intern., S.A. v. Bio-Vita, Ltd.,* 78 F.3d 698, 703 (1st Cir.1996) ("An order denying a motion to intervene as of right is *immediately* ***795** appealable ...[;] [t]he appeal cannot be kept in reserve; it must be taken within thirty days of the entry of the order, or not at all." (emphasis in original)); *B.H. by Pierce v. Murphy,* 984 F.2d 196, 199 (7th Cir.1993) (same), and the underlying reasoning is reflected in the following commentary:

> It is desirable to insist that timely appeal be taken from the denial, rather than permitting appeal from the denial upon entry of a final judgment disposing of the claims among the parties. To permit appeal after the final judgment would ***375** risk interference with trial court proceedings taken after the denial of intervention, a prospect far costlier than insisting that the applicant appeal the denial without waiting to see whether the outcome of the proceedings leaves intervention still desirable.

CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, 15A FED. PRAC. & PROC. JURIS.2D § 3902.1 (2005).

We hold that Mr. Raymond's failure to attain intervenor status before the orphans' court foreclosed his ability to file a cognizable appeal relative to the court's final decree.

The appeal docketed in the Superior Court at No. 112 EDA 2005 is quashed, and jurisdiction is relinquished.

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