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Fall 2005***63** SETTLOR'S INTENT VS. TRUSTEE'S WILL: THE BARNES FOUNDATION CASE

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INTRODUCTION

"In the world there is not, and will never again be, a comparable collection of masterpieces by the two greatest painters of the nineteenth century, Cézanne und Renoir," the great Parisian art dealer Ambroise Vollard said in 1936. [FN1] This collection still exists and contains more than 2,000 objects, including 69 paintings by Cézanne, 181 by Renoir, 60 by Matisse, 44 by Picasso and 8 by van Gogh, [FN2] as well as works by Modigliani, Soutine and many other icons of the second half of the nineteenth and first half of the twentieth centuries. Estimated at a fair market value of twelve billion dollars, this collection is the life-work of the medical doctor, chemist, visionary, art theorist, collector and philanthropist Albert C. Barnes. [FN3] It is ***64** the property of The Barnes Foundation (the "Foundation"), a charitable corporation under Pennsylvania Law founded in 1922 by Albert C. Barnes and located in Lower Merion Township. The peculiarity of the Foundation lies in the fact that it is not a museum but an educational institution that aims "to promote the advancement of education and the appreciation of the fine arts." [FN4] To date, following its settlor's intention, the art collection is primarily reserved for study by a small number of hand-picked students and open to the wider public only on a limited basis. [FN5]

The Foundation's bylaws are restrictive: the arrangement of the paintings and sculptures inside the Foundation-owned gallery, which Barnes, as director, refined until his death, [FN6] may never be changed, [FN7] nor may any of the exhibited works of art ever be alienated or loaned. [FN8] The bylaws also forbid the Foundation from purchasing or otherwise obtaining works of art [FN9] or even receiving art on loan. [FN10] The collection is therefore bound by these bylaws to its provincial domicile like a frozen aesthetic manifesto from another time. As a result, despite its quality and volume, [FN11] which are highly competitive with world-famous museums such as the ***65** Musée d'Orsay in Paris and the Museum of Modern Art in New York, the Barnes collection is little known to the general public.

Now all this will change. While the value of its unique, yet unalienable, art collection over the years has steadily increased, the Foundation's operative endowment has declined, and, in 2002, the Board of Trustees disclosed that the endowment could no longer sustain the Foundation's operative costs. In effect, insolvency was imminent. Three large charitable institutions from the Philadelphia area--The Pew Charitable Trusts, The Lenfest Foundation and the Annenberg Foundation--thereupon agreed to help the Foundation raise 150 million dollars, provided the latter would agree to relocate its art collection from Lower Merion to nearby Philadelphia, change all restrictive provisions of its bylaws and obtain the necessary approval of the Montgomery County Orphans' Court in Norristown. One hundred million dollars of the pledged contribution was to be set aside for the construction of a new museum building, the rest to be added to the Foundation's endowment fund. [FN12]

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The Foundation's Board agreed and received judicial approval on December 13, 2004. [FN13]

It is clear that the relocation runs counter to the settlor's intention. Left to be investigated is whether it does so justifiably. [FN14] The public discussion surrounding this question is still ongoing, multifaceted and determined by moral, sociological, philosophical as well as pragmatic approaches to the broader questions of how far the current generation should be impaired by the will and actions of previous generations and the general relationship between time and law. [FN15] Furthermore, some use the Barnes case as an opportunity to make a general claim about the higher social liabilities that exist for owners of works of art. [FN16] However, while many such arguments might be relevant for considerations *de lege ferenda*, they *66 are futile *de lege lata*. It is the latter, the law in force, which the present contribution emphasizes. For this undertaking, I will first reconstruct the settlor's intent based on Albert C. Barnes's biography and The Barnes Foundation's history and then analyze it against the court-approved decision. In order to focus on the case's legal challenges and to preempt disagreements about the facts, I shall rely exclusively on the facts that are consistent with those established by the Montgomery County Orphans' Court during the procedure.

I. HISTORY OF THE BARNES FOUNDATION

A. The Settlor Albert C. Barnes [FN17]

Albert Coombs Barnes was born on January 2, 1872 in Kensington, PA, a working-class quarter of Philadelphia. He counts as one of the prototypes of the self-made millionaire. Despite an impoverished family background, delivering newspapers and prize boxing enabled him to pay for his studies at the University of Pennsylvania Medical School, where he also began to foster his interest in psychology and aesthetics. He received an M.D. at only age twenty. Recognizing the potential of the pharmaceutical industry in his time, he studied chemistry from 1893 to 1896 at Friedrich-Wilhelm-Universitaet in Berlin. In 1902, with money borrowed from his father-in-law, [FN18] Barnes founded a pharmaceutical company and marketed the disinfectant Argyrol, [FN19] which quickly became the best-selling product of its kind for the next two decades. During this time he also founded, in 1922, The Barnes Foundation. In 1929, a few months before Black Friday and the ensuing market depression, he sold his company at the peak of the *hausse* and retired from business life. [FN20] He continued to pursue psychological and theoretical art studies, as well as art collecting, until his death in a car accident on July 24, 1951. After Barnes's death, as during his life, most of his fortune was given to the Foundation. [FN21]

B. The Barnes Collection

Barnes believed that a deeper occupation with art could make men become "better" not only in a moral but also in an intellectual sense. From his early youth, *67 he displayed a keen interest in the fine arts [FN22] and likely developed his theory of art and education as a result. His art collection, begun around 1911, reflected this interest and mainly focused on Impressionist and classical Modern art. [FN23] Barnes's considerable financial resources and enthusiasm for art, combined with high artistic standards and acquaintance with key personalities, [FN24] enabled him to purchase such gems as van Gogh's 1889 Portrait of the postman Joseph Etienne-Roulin and Picasso's 1901 Woman with a Cigarette in the early stages of his collection. [FN25] In subsequent years in anticipation of The Barnes Foundation, his collection took a more didactic shape, expanding to include Medieval

and Old Masters, [FN26] African [FN27] and Far Eastern art, antiquities and decorative arts. In total, the collection grew to consist of some 2,000 [FN28] paintings, drawings, etchings, lithographs, sculptures and other items during his lifetime.

C. The Foundation

1. Motive for the foundation

The Barnes Foundation was established on December 4, 1922 in the Township of Lower Merion, County of Montgomery, under the laws of the Commonwealth of Pennsylvania. [FN29] Two days later, Albert C. Barnes and the Foundation entered into a trust indenture [FN30] with reciprocal duties that became irrevocably incorporated into *68 the Foundation's bylaws in their entirety. [FN31] Despite the availability of Barnes's written works, which clearly described his educational and philanthropic beliefs and intentions, the Foundation was often characterized by the public as the kinky idea of a crackpot, eccentric millionaire. [FN32]

His intentions were far more complex. Barnes was influenced by the most progressive intellectual currents of his time and engaged vigorously in philosophical and sociological studies. His progressive modernism was reflected in his corporation, which employed workers of both sexes and different racial backgrounds. Working hours were limited to eight, two of which were reserved for reading groups partly guided by Barnes himself. During these sessions, contemporary philosophers and sociologists were discussed. [FN33] This revolutionary blend of corporate management and worker edification was based on the philosophical theories of John Dewey, who held that democracy--and hence society--could only be perfected by the introduction of new educational methods. [FN34] Dewey's theories provided the point of departure for Barnes when he suggested that education in and appreciation of art constitute such new educational methods. [FN35] Though detailed discussion of these theories would go beyond the scope of this paper, simply put, Barnes believed in an organic logic that inhered in nature and applied to all life experience. [FN36] In visual art he saw an easily accessible bridge between man and nature because he believed art, as a derivative of this organic logic, to be understood not by means of critical thinking but through feeling. Therefore, instructors should expose students to works of art in an effort to elicit new feelings and thereby help them to discover this universal, organic logic. [FN37] Barnes established the Foundation as an attempt to prove his theory: he wanted to create an educational institution where students could independently develop a progressive understanding of democracy in Dewey's sense and engage with Barnes's theory of aesthetics. [FN38] Barnes sought to express his theory about the *69 educational value of aesthetic experience through the composition and arrangement of his collection inside a foundation-owned gallery, the location of the gallery within an arboretum [FN39] and the Foundation's educational program. [FN40]

2. Purpose

The Foundation's general purpose, as outlined in its bylaws, is "to promote the advancement of education and the appreciation of the fine arts." [FN41] Specifically, this goal was to be achieved through the "erect[ion], found[ing] and maintain[ance], in the Township of Lower Merion, County of Montgomery, and State of Pennsylvania, [of] an art gallery . . . 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." [FN42] Accordingly, the Foundation was created as an educational institution modeled on Dewey's thinking. [FN43]

3. Endowment Fund

In combination with the trust indenture, Barnes made an arrangement to transfer title of 710 works of art from his collection to The Barnes Foundation. [FN44] In ***70** addition, Barnes transferred land in Lower Merion containing an arboretum that has today over 2,000 different species of plants. [FN45] Amid the trees he erected a twenty-four-room gallery to house his paintings. The endowment fund was augmented by various means: the Foundation received 900 shares of the A. C. Barnes Company [FN46] and further donations from the settlor until the time of his death. [FN47] Among these donations, Barnes conveyed some 1,300 paintings destined for retention in the gallery building, a farm house with 137 acres in Chester County named Ker-Feal, [FN48] an archive comprising 400,000 documents, a collection of 3,000 objects of pre-nineteenth century American decorative arts, Mrs. Barnes's personal items, a collection of Oriental rugs and some other items, totaling 4,532 objects. [FN49] Barnes had purchased Ker-Feal in 1940; the gardens were designed by his wife. [FN50] According to his last will from 1944, Ker-Feal was destined to house the collection of decorative arts, the rugs and the archive, and to be used for the educational program "as a living museum of art and botanical garden." [FN51] However, during the remaining seven years of the settlor's lifetime, the project of constructing a second Foundation facility in Ker-Feal never advanced beyond its planning stages, and at no time did it become incorporated into the Foundation's educational program. In contrast to the art collection destined by provisions in the bylaws for the gallery building in Lower Merion, neither Barnes's last will nor the Foundation's charter or bylaws provided any restrictions for the hanging, loaning or sale of the collections housed therein.

4. Organization

The initial Board of Trustees consisted of Albert C. Barnes, his wife and three other individuals. [FN52] The vacancy incurred by the death of the sole survivor of Mr. and Mrs. Barnes was to be filled with a nominee of the Girard Trust Company, and the next and every subsequent vacancy, with a nominee of Lincoln University. [FN53] As the board members at the time of the death of the sole survivor of Mr. and Mrs. Barnes were to stay in office until they resigned, became incapacitated or died, [FN54] it was not until 1989 that a majority of the members of the Board of Trustees had been nominated by Lincoln University. [FN55]

***71** D. Financial Situation

The Barnes Foundation is a corporation that is rich in assets, but not in revenue. Though the art collection has an estimated market value of twelve billion dollars, [FN56] the Foundation is not profitable. Due to the interdiction in the bylaws on alienation, [FN57] the Foundation may not realize an increase in the displayed collection's value as profit. Moreover, due to the interdiction on loaning works, it can make no income from leasing art to other galleries and museums. [FN58] Further, because Barnes wished the gallery to be most accessible to the lower classes, the Foundation historically has kept standard entrance fees to a minimum. [FN59] In addition, revenue through admissions has been further constrained by Lower Merion Township's restriction to no more than 1,200 visitors per week. [FN60] Together, these limitations have resulted in inordinate reliance upon endowment return. At the time of the Foundation's creation, profitable funds consisted of shares in the A.C. Barnes Company, which the Foundation later converted to government bonds. [FN61] According to the original trust indenture, the Foundation could purchase only federal, state and municipal bonds. [FN62] While such forms of investment can offer high levels of security, [FN63] isolated, they are profitable only with ***72** low inflation; as inflation rises, revenues are absorbed through depreciation. Because of inflation and sporadic mismanagement by the Board, [FN64] the fund's value steadily declined: when Barnes died in 1951, the fund totaled ten million dollars, [FN65] the equivalent of about sixty-two million dollars in 2004, [FN66] but by the early 1970s it approached only six million. Although by 1989 the value of the fund had risen again to nine million, when adjus-

ted for inflation, this amount represented only twenty percent of its original value. [FN67] From 1990 to 1998, due to the ambitious (and, according to various opinions, [FN68] prestige-seeking) endeavors of the President of the Foundation, [FN69] Richard Glanton, [FN70] to transform the Foundation by stretching the settlor's intention [FN71] to encompass Glanton's vision of an internationally-operating and profit-oriented art company, the Lower Merion site was rebuilt to accommodate a larger number of visitors, [FN72] while the Foundation became entangled in a series of costly and, in several cases, unsuccessful lawsuits. [FN73] When Glanton's *73 appointed term ended in 1998 and was not extended, the endowment had fallen to \$2.4 million. Worse, it continued to fall, bottoming at \$1.6 million the following year. Since then the Foundation has met its operation costs only with rigorous fundraising, including considerable funding from The Pew Charitable Trusts, The Lenfest Foundation and the Annenberg Foundation since 2002. [FN74]

II. THE RELOCATION OF THE ART COLLECTION

A. Reasons

In permitting the decision of the Foundation's Board of Trustees to relocate the Foundation's art collection from Lower Merion to Philadelphia, the Montgomery County Orphans' Court relied on three factors. First, the court determined that the Foundation's acute financial distress threatened its mission. [FN75] Second, it concluded that breaking the settlor's intention would impact only administrative, and not any substantial, provisions. On this assumption, the court believed the Foundation's decision to relocate its art collection to be subject to the Doctrine of Deviation, which allows deviation from administrative provisions only. [FN76] Third, the court identified no alternatives to relocating the collection that would constitute "the least drastic modification of the indenture that would accomplish the donor's desired ends." [FN77]

B. Review

1. Financial distress

As far as the assessment of the Foundation's current and future financial situation is concerned, the arguments offered by the Montgomery County Orphans' Court are entirely defensible. Under the status quo, the possibilities for increasing revenue are limited by the Foundation's bylaws and zoning. Sufficient fundraising for continued operation is a vague hope. Avoiding insolvency would require immediate action. Thus, the court was correct in its determination that the Foundation was facing a dire financial situation.

2. Doctrine of Deviation

Turning to the second finding of the court, however, reasonable doubt should *74 exist whether the relocation of the Foundation's collection from Lower Merion to Philadelphia would effect a mere administrative change in the settlor's intention. Consequently, reasonable doubt should exist whether the Doctrine of Deviation, which permits deviation from a term of the settlor's intention only where an administrative provision is impaired, was correctly applied. If the proposed relocation were deemed to affect a substantial provision of the settlor's intention, the court should have applied the Doctrine of Cy Pres, which permits deviation from the settlor's intention only when a substantial provision is impaired such that it is "impossible" or "illegal" to carry out a purpose of the settlor's original intention. While the aim and scope of both doctrines are quite similar, the

doctrines differ significantly as far as the degree of discretion that courts may permissibly exercise in applying them. To better illustrate the impact that their differences have on the correctness of the Board's argument and the lawfulness of the Orphans' Court's decision, the following two sections will compare the two doctrines and evaluate the relevant case, respectively.

a. Differences Between the Doctrines of Deviation and Cy Pres

The Doctrine of Deviation has been summarized in the Restatement (Second) of Trusts § 381 (1959) as follows: "The court will direct or permit the trustee of a charitable trust to deviate from a term of the trust if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust." [FN78] The doctrine allows deviation only "from terms of the trust in matters [relating] to the administration of the trust." [FN79]

In contrast, substantial changes are solely possible under the Doctrine of Cy Pres: "If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor." [FN80] While "substantial" refers to whether or not a trust accomplishes its purpose as intended by the settlor, "administrative" pertains to how such accomplishment is effected. Comparing the wording of both provisions one could easily conclude that the required elements for each doctrine's application are virtually identical, and indeed, provided that a "general intention to *75 devote the property to charitable purposes" exists, this is true. [FN81] Nevertheless, there is a significant difference: under the Doctrine of Deviation, the suggested modifications do not interfere with the trust's purpose, which allows a decision to be made that is more contrary to the settlor's intention than it can be under the Doctrine of Cy Pres, where modifications are considered significant and therefore decisions are to be constrained as much as possible. In other words, the degree of discretion permitted under the Doctrine of Deviation is significantly different from that allowed under the Doctrine of Cy Pres. Consequently, a decision that erroneously applies the Doctrine of Deviation rather than the Doctrine of Cy Pres is based on the incorrect assumption that a modification does not change a trust's purpose. Such an erroneous assumption results in an inappropriate degree of discretion.

b. The Relevant Case

In the present case, the Foundation's Board and the Montgomery County Orphans' Court deemed the relocation of the art collection an administrative matter, not a substantial change. For the court's decision, it referred to two previous decisions of the Pennsylvania Superior Court [FN82] that compared the situation faced by the Foundation to another case in which the court authorized a trust to sell and rebuild a nursing home under the Doctrine of Deviation, despite that the trust's bylaws forbade this measure *expressis verbis*. [FN83] It was argued that "the use of the specific home . . . was merely one method, convenient at the time of the trust's establishment, for carrying out [the settlor's] intent." [FN84] Thus, relocation of the nursing home did not impair the accomplishment of the trust's purpose as intended by the settlor. Nevertheless, the comparison of the two cases could only be fruitful and offer supporting arguments for the Barnes decision if, as in the case of the nursing home, the Foundation's location in question "was merely one method . . . for carrying out [the settlor's] intent." In that case, moving the collection would not prevent or impair fulfillment of this intent.

The charter, indenture and bylaws do not specifically state that the Barnes collection must remain in Lower Merion. From the provision that "all the paintings shall remain in exactly the places they are at the time of the death of the Donor and his said wife," however, it can be deduced that the settlor acted on the assumption that the collection would stay in Lower Merion. [FN85] Regardless, it is inconclusive from this language whether the permanence of this location was an integral part of *76 Barnes's vision. Two additional points strongly suggest that Barnes intended his collection to remain permanently at its original location. First, as previously discussed, and as Barnes's writings show, the motive behind the Foundation was the experimental application of Barnes's theory of education, an integral part of which was the idea that a particular physical environment in which to view and experience the collection would strongly influence and thereby educate observers. [FN86] The realization of Barnes's intention relied on unconventional juxtapositions, thematic compositions and cultural associations that only as broad a collection as his could provide. Medieval painting merged with African sculpture, Post-Impressionists with Egyptian antiquities, Chinese scrolls with Baroque altarpieces, all juxtaposed with ordinary items and tools such as strike plates, fire irons, and soup spoons. [FN87] But more than just the placement of objects, the art had to be experienced within galleries designed by the most progressive artists of the time, [FN88] and these galleries had to rest within an arboretum designed by Barnes and his wife. Only then could the collection fulfill its function as expressed within the associative system of modern education according to Albert C. Barnes.

Second, the interdiction of changing the placement and arrangement of the artworks after the death of Albert C. Barnes and his wife is expressed through a series of coherent, not isolated, provisions: Barnes was Director of the gallery during his lifetime [FN89] and had "absolute power and discretion" to cause the Foundation to buy, sell or exchange "any works of art now contained in [its] collection." [FN90] Furthermore, "the scope, character and location of [the Lower Merion] gallery and adjacent buildings [was] to be solely in accordance with the desire, judgment and discretion of [the] Donor [Albert C. Barnes]." [FN91] This grant of authority entailed the right to form the arboretum. [FN92] Finally, Barnes also enjoyed the right to change the hanging and display of the works at his discretion. [FN93] Thus, Barnes had reserved to himself all of the liberties for further development of an experiment whose content was expressed only generally in the Foundation's charter and bylaws. Upon the death of Barnes, the definition of the collection, i.e., the visible content of the experiment, would be fixed categorically, and because from that moment on the collection was an unalterable entity, [FN94] the interdiction of *77 loaning would be enforced. [FN95] Should Barnes's wife survive him, she would retain full rights to change the arrangement of art, the gallery and the arboretum. After her death, making any changes to them would be impermissible. [FN96] These provisions make it clear that Barnes intended to refine his ideas and collection as long as he and his wife were alive. No distinction is made in the relevant legal documents between the composition and arrangement of the art collection, the arboretum and the buildings. [FN97]

Consequently, the educational system intended by the settlor through a series of provisions in the Foundation's bylaws suggest that the existing site in Lower Merion as an entirety is integral to the Foundation's educational experiment, and its preservation is necessary to accomplish the Foundation's described purpose. Therefore, relocation of the art collection affects a substantial, rather than an administrative, change and should be decided under the Doctrine of Cy Pres rather than the Doctrine of Deviation. The arguments of the Board of Trustees were accordingly unfounded, and the Montgomery County Orphans' Court's decision, based on the Doctrine of Deviation, was a judicial error.

3. Evaluation Under the Doctrine of Cy Pres

The question remains: would moving the art collection be justifiable according to the Doctrine of Cy

Pres? As previously mentioned, provided that a "general intention to devote the property to charitable purposes" exists, the required elements for the doctrine's application are virtually identical to those of the Doctrine of Deviation. [FN98] As the general charitable intention of the Foundation was written expressis verbis in the bylaws, [FN99] and the existence of financial distress was clear, discussion can be limited to the question of whether relocation represented the least drastic modification of the indenture to accomplish the settlor's desired ends. [FN100] Based on the premise that relocation would change the content of Barnes's experiment and thus the nature of the accomplishment of the Foundation's purpose, any measure that did not interfere with this purpose, i.e., that did not require *78 relocation, would be less drastic and so preferable.

Assuming increased attendance and fees and greater merchandising [FN101] and fundraising opportunities [FN102] once in Philadelphia, the Foundation's finances stand to improve from moving. Thus, from an economic perspective, relocation makes sense. Nevertheless, if the Foundation were sustainable at its original location, these considerations would be irrelevant. Concerning this the Montgomery County Orphans' Court stated [FN103] that profitable endowment funds of fifty million dollars and a conservative investment policy free of previous restrictions [FN104] could allow the Foundation to meet its immediate and future operational needs.

The question then becomes whether the Foundation would have a realistic chance of building such an endowment. This seems possible. The interdiction of alienation of works of art applies only to works that are part of the collection displayed in Lower Merion's gallery; the Foundation may dispose of all other works of art in its collection. [FN105] Any scruple that such a sale would be unethical [FN106] is irrelevant for two reasons. First, even assuming that principles against alienation exist in the museum context, [FN107] it should be reaffirmed that the Foundation is not a museum but an educational institution and therefore not bound by such principles. [FN108] Second, in the law of foundations and endowments, such general principles give way to more specific intentions of the settlor. By subjecting only part of his art collection to certain provisions, Barnes divided his art collection into two groups. The first group, which comprises works of art exhibited in Lower Merion's gallery, expressly cannot be hung elsewhere than in its present position, loaned or sold. The second group, which comprises all unexhibited artworks in the collection, consequently can, because it is not subject to these provisions. The fact that Barnes intended many of these items to be used for the educational program does not affect this conclusion; how an owned item would be most useful for the fulfillment of its purpose is different from the question of whether an item should be owned at all. [FN109] The Foundation's bylaws even expressly encourage the sale of *79 a number of items that the Foundation owns. [FN110]

Although the number of works in storage is minimal, several important paintings are located in the Foundation's administration buildings and thus are not part of the collection on display. [FN111] The same is true of the 3,000 works of decorative art situated in the Ker-Feal estate in Chester County, the personal items of Mrs. Barnes, the Oriental rugs and other items. [FN112] Finally, the sale of Ker-Feal (the farmhouse and 137 surrounding acres) is not prohibited by the settlor's intention as articulated in the bylaws. The Montgomery County Orphans' Court states that proceeds from a sale of the alienable works of art and the real property would total approximately twenty-three million dollars. [FN113] The court stops here with its analysis, stating that revenues from the sale of all the Foundation's alienable assets would yield less than half of the sum that is necessary to sustain the Foundation's operations in Lower Merion. Nevertheless, in light of the Doctrine of Cy Pres and with respect to the settlor's intention, it would have been more correct to ask whether there were other ways of proceeding. One way could have been the temporary leasing of works of art. The seven-city, year-and-a-half-long tour of eighty works of the Barnes collection in the mid 1990s brought in sixteen million *80 dollars. [FN114] Combined fundraising could save both time and effort. Assuming such a measure would be technically feasible and economically reasonable, it would nonetheless destroy the integrity of the ensemble of collection, buildings

and arboretum in Lower Merion. Therefore, the suggested measure would violate the settlor's intention.

The question now becomes which of the two choices--relocation of the collection to Philadelphia, on the one hand, and deaccessioning and temporary leasing of artworks, on the other hand--constitutes "the least drastic modification of the indenture that would accomplish the donor's desired ends." [FN115] Because the sale of assets within the described limits would not interfere at all with the settlor's intention, the question is reduced to whether temporary leasing or relocating would be less drastic and hence preferable. In terms of proportionality, leasing, being temporally limited, would present less interference with the settlor's intention compared with relocation, which is practically irreversible. In making this decision, one would have to consider the risks of damage to the paintings during shipment and loan.

III. CLOSING

The arguments the Foundation's Board of Trustees used in deciding to relocate its art collection were legally unfounded. The decision of the Montgomery County Orphans' Court was based on an inappropriate premise and therefore mistaken. While a decision under the relevant Doctrine of Cy Pres might ultimately have led to relocation of the Foundation's art collection to Philadelphia, this outcome seems as likely as unlikely, and only additional investigation could have brought greater certainty. Alas, at the end of the day, neither the court nor the parties to the case, the Foundation and the Attorney General, showed any interest in such certainty anymore. [FN116] In the latter's case, this reaction came as especially surprising because the Attorney General's duty as *parens patriae* for charitable corporations is to protect the settlor's intention, neutrally. However, it seems that the office of the Attorney General came to an understanding with the Foundation's Board of Trustees before hearings began to support its petition, which violated neutrality. [FN117] An appeal from the Attorney General was therefore just as unlikely as from the petitioning Barnes Foundation.

The Barnes case was wrongly decided and improperly violated the settlor's *81 stated intention. The Foundation itself continues to exist and will open its spectacular art collection to a broader public. Ultimately, the Trustee's will prevailed over the settlor's intent; the accomplishment of the Foundation's purpose will not continue as intended by Albert C. Barnes. As an indirect result, future potential donors to similar institutions will probably think more carefully about how to ensure the financial stability of those institutions and whom to trust with the fulfillment of their visions. [FN118] This is a very positive effect of an otherwise unfortunate and erroneous judicial decision.

[FNal]. Visiting Researcher, Harvard Law School (2004-2005); doctoral candidate at Ludwig-Maximilians-Universität, Munich (since 2001); Bavarian First Juristic State Exam, Munich (2001); art critic for the *Frankfurter Allgemeine Zeitung* (2001-2003). This Essay resulted from my doctoral research about "Forms of Survival for Art Collections." German versions were published earlier this year. See Heinrich Schweizer, *Letzter Ausweg oder Verrat am Stifterwillen. Die Barnes Foundation verlegt ihre Kunstsammlung*, 3 *Kunstrecht und Urheberrecht* 65 (2005); Heinrich Schweizer, *Stifterwille contra Vorstandswille--Der Fall Barnes Foundation*, 6 *Zeitschrift zum Stiftungswesen* 129 (2005). I am deeply grateful to Marion R. Fremont-Smith of the Hauser Center for Nonprofit Organizations at John F. Kennedy School of Government and Prof. Harry S. Martin of Harvard Law School for their encouragement and critical comments. Thanks are also due to Kimberly Camp, President and CEO of the Barnes Foundation, for her unbiased cooperation and detailed comments. Last, but not least, I thank Chinnie Ding and Brian Sadie, whose meticulous editing guided me through the purgatory of the

English language. Errors are mine alone.

[FN1]. Louis Wonderly, *Mit der Gier des Autodidakten*, *Frankfurter Allgemeine Zeitung*, Aug. 12, 1995, at 35 (translated by author).

[FN2]. All numbers provided by The Barnes Foundation. The discrepant numbers given in Peter Linett, *An Opening Doesn't have to Mean a Closing*, *Wall St. J.*, Feb. 24, 2004, at D8, Wonderly, *supra* note 1, at 35, and Francis J. Serbaroli & William Schwartz, *Circumventing a Donor's Wish*, *New York L.J.*, May 17, 2005, at 2; should be adjusted accordingly.

[FN3]. My estimate is admittedly speculative. A sale of the Impressionist paintings en bloc could, on the one hand, flood the market and cause a drop-off in prices. However, on the other hand, a blockbuster sale could result in sensational price increases. An example of the latter would be the auctioning of the African art collection Goldet, objects of which frequently have sold for prices that are several times higher than their fair market value. See Heinrich Schweizer, *Afrika wie es Europa gefällt*, *Frankfurter Allgemeine Zeitung*, July 7, 2001, at 57. Apparently due to these unpredictable sale prices, some other estimates diverge widely. See Christopher Knight, *Another Sort of Culture Vulture*, *L.A. Times*, Aug. 17, 2003, Part V, at 1 (projecting six billion dollars); Serbaroli & Schwartz, *supra* note 2, at 2 (suggesting "\$6 to 30 billion"); and Jörg Häntzschel, *Philadelphia und die Hoffnung*, *Süddeutsche Zeitung*, June 6, 2004, at 13 (estimating up to seventy billion dollars).

[FN4]. Barnes Foundation Charter, approved by decree dated December 4, 1922, para. Second (Nov. 1, 1922), http://www.barneswatch.org/main_charter.html [hereinafter Charter]. See also By-Laws of the Barnes Foundation art. 2 (Aug. 2002), in *Legal Problems of Museum Administration*, at 88 (American Law Institute--American Bar Association 2004) [hereinafter By-Laws]. Copies of the original charter and by-laws are on file with the author.

[FN5]. During the lifetimes of Albert C. Barnes and his wife, the art gallery was "open to the public on not more than two days in each week, except during July, August and September of each year," when visits were by appointment only and admission reserved. By-Laws, *supra* note 4, at 108, art. 9, sec. 2, para. 29. After the death of Barnes and his wife, the gallery was intended to be open to the students of the Foundation five days per week and every Saturday to the public. During the months of July and August, the gallery was to be closed. *Id.* at 108-09, art. 9, sec. 2, para. 30. According to the indenture, the Board of Trustees was required to "ensure that the plain people, that is, men and women who gain their livelihood by daily toil in shops, factories, schools, stores and similar places, shall have free access." *Id.* at 109, art. 9, sec. 2, para. 30. After the Foundation had closed its doors to the public completely while Barnes was still alive, it was forced in 1960 by a juridical settlement to reopen the gallery's doors to the public on two days per week. *Commonwealth v. Barnes Foundation*, 159 A.2d 500, 506 (Pa. 1960). Today, the gallery is open all year long on three days per week from 9:30 am to 5 pm. The Barnes Foundation: Reservations, http://www.barnesfoundation.org/r_main.html (last visited Oct. 13, 2005).

[FN6]. This competence was reserved to Barnes by the indenture and agreement. By-Laws, *supra* note 4, at 98-99, art. 9, sec. 2, para. 7-8.

[FN7]. *Id.* at 100, art. 9, sec. 2, para. 13. For the scope of application beyond "paintings," see the following note.

[FN8]. *Id.* at 99, art. 9, sec. 2, para. 10. Read literally, the provision would refer only to "pictures," but to keep the provision in harmony with the general spirit of the indenture and by-laws and, in particular, to maintain con-

sistency with the use of “[art] collection,” it should be subject to broad interpretation and include any work of art, especially sculptures. “[T]he collection shall be closed, and thereafter no change therein shall be made by the... obtaining of additional pictures, or other works of art, or other objects of whatsoever description.” *Id.* at 99, art. 9, sec. 2, para. 9 (emphasis added). See also *The Barnes Foundation*, No. 58,788 (Pa. Com. Pl. May 17, 2001).

[FN9]. *By-Laws*, supra note 4, at 99, art. 9, sec. 2, para. 9.

[FN10]. *Id.* at 111, art. 9, sec. 2, para. 34.

[FN11]. The paintings by Renoir and Cézanne owned by the Foundation are the largest holdings of those painters' works in any single collection in the world. In contrast to the 181 Renoirs owned by the Foundation, the Musée d'Orsay in Paris, for example, owns “only” 94; in contrast to the 69 Cézannes owned by the Foundation, the Metropolitan Museum of Art in New York has 39. See David Zucchini, *Great Art Framed by Turmoil*, L.A. Times, Sep. 3, 2003, Part I, at 1.

[FN12]. Nonetheless, the undertaking is not without risk; the annual expenses after the relocation will rise to between \$8 and \$10 million per year, of which only \$2.5 million can be financed from the revenue of profitable endowment funds while the rest has to be obtained from entrance fees, merchandising and fundraising. *The Barnes Foundation*, No. 58,788, 18 (Pa. Com. Pl. Jan. 29, 2004), available at http://www.barneswatch.org/ott_1_30_04.pdf.

[FN13]. **The Barnes Foundation, 2004 WL 2903655 (Pa. Com. Pl. Dec. 13, 2004).**

[FN14]. In the indenture, Barnes did raise the possibility of relocating the educational institution to Philadelphia if “said collection [was] ever... destroyed, or should it for any other reason become impossible to administer the trust hereby created concerning said collection of pictures.” *By-Laws*, supra note 4, at 99, art. 9, sec. 2, para. 11. It is obvious that this option was available only to accommodate a worst-case scenario.

[FN15]. See Günther Winkler, *Zeit und Recht* (1995); Francois Ost & Mark van Hoecke, *Temps et droit: le droit a-t-il pour vocation de durer?* (1998); Gerhart Husserl, *Recht und Zeit* (1955).

[FN16]. Some celebrate the December 13, 2004 Montgomery County Orphans' Court's decision as a landmark case. See, e.g., Roberta Smith, *Does it matter where this painting hangs?* N.Y. Times, Dec. 15, 2001, at E1 (“The decision is a triumph of accessibility over isolation, of art over the egos of collectors.”). In a similar but more moderate vein, art lawyer John Merryman states that “[w]hen you happen to own something of world importance and a world-class work of art... it is in the better interest of mankind not to impose the dead hand... It is the property of the human race.” Patricia Horn, *A good move?*, Artnews, Feb. 2005, at 49 (internal quotation marks omitted).

[FN17]. See Mary Ann Meyers, *Art, Education, & African-American Culture: Albert Barnes and the Science of Philanthropy* (2004); Howard Greenfeld, *The Devil and Dr. Barnes* 4-7 (1987); John Anderson, *Art held hostage: the battle over the Barnes Collection* 11-14 (2003).

[FN18]. Anderson, supra note 17, at 20.

[FN19]. Argylol was used in particular for the preemptive treatment of eye infections during babyhood and remained largely unrivaled until the launch of Penicillin.

[FN20]. Anderson, *supra* note 17, at 36.

[FN21]. See Albert C. Barnes, Last Will and Testament, dated Oct. 6, 1944, Clauses 1-3 (on file with author). A photocopy of the last will was provided to the author by the Foundation. Barnes left behind a wife and no children.

[FN22]. Meyers, *supra* note 17, at 6-7.

[FN23]. Anderson, *supra* note 17, at 24.

[FN24]. For example, **Barnes** knew the Parisian art dealers Volland and Durand-Ruel as well as the collectors Leo and Gertrude Stein.

[FN25]. Furthermore, the early acquisitions include more than a dozen Renoirs, half a dozen Cézannes as well as works by Modigliani, Matisse, Derain, Utrillo and de Chirico.

[FN26]. Paintings by Old Masters in the collection include works by Bosch, Giorgione, Veronese, El Greco, Titian, Tintoretto and Rubens--although in comparison to Barnes's holdings in Impressionist and classical Modern Art, the quality of these paintings is low.

[FN27]. African art in the Foundation's collection includes remarkable examples like a Dogon statue depicting a seated couple and a rare seated Fang reliquary guardian figure. Barnes's collecting interest in this area can be understood in connection with his general admiration for African-American culture, which he encountered during his youth at "camp revival meetings." He described these experiences as "so vivid and so deep that it has influenced my whole life, not only in learning much about the Negro, but in extending the aesthetic phase of that experience to an extensive study of art in all its phases, and particularly in the art of painting." Anderson, *supra* note 17, at 12. He became an "addict to Negro camp-meetings, baptizings, revivals, and to seeking the company of individual Negroes." *Id.* On the other hand, among collectors of avant-garde art the preoccupation with African art is anything but rare. See Heinrich Schweizer, Frühe Lieblinge der Avantgarde, Frankfurter Allgemeine Zeitung, March 9, 2002, at 58.

[FN28]. As only the works of art on display in the Lower Merion gallery are part of the educational experiment intended by Barnes, the following survey is limited to those works. See discussion *infra* Part II.B.2. For mention of other works of art owned by the Foundation, see *infra* Part I.C.3. For the problem of alienability of these items, see *infra* note 110.

[FN29]. Charter, *supra* note 4.

[FN30]. By-Laws, *supra* note 4, at 95, art. 9, sec. 2.

[FN31]. *Id.* at 97-98, art. 9, sec. 2, para. 5-6.

[FN32]. See Noel Weyrich, All Aboard the Barnesmobile!, Philadelphia Magazine, Apr. 2004, at 42. See also Mike Boehm & Diane Haithman, Barnes Artwork Can Be Moved, Despite Donor's Instructions, The Morning Call (Allentown, Pa.), Dec. 14, 2004, at A1.

[FN33]. Michael Horwitz, The Fate of the Barnes Foundation: Pragmatic Philosophy and Pragmatic Legal Analysis 6-7 (2004) (unpublished essay, on file with author); Anderson, *supra* note 17, at 23.

[FN34]. See John Dewey, *Democracy and Education* ch. 9 (The MacMillan Company 1916). See also John Dewey, *Education and the Social Order* (1934).

[FN35]. The aesthetic-theoretical contemplations by which he was guided when assembling his collection can be traced in several of Barnes's published and edited volumes. E.g., Albert C. Barnes, *The Art in Painting* (Harcourt, Brace and Co. 1937) (1925); Albert C. Barnes & Violette de Mazia, *The French Primitives and Their Forms* (Barnes Foundation Press 1931); John Dewey et al., *Art and Education* (1929).

[FN36]. See John Dewey, *Affective Thought in Logic and Painting*, J. of the Barnes Foundation, Apr. 1926, reprinted in Dewey et. al., *supra* note 34, at 63, 66-71.

[FN37]. Barnes's educational system resembled Dewey's approach in preferring practical, applied and experimental instruction to allow students to develop independence, curiosity and purposeful interaction with the world. All this aimed for an education equally accessible to all citizens, regardless of their origins, race and creed. See Dewey, *Democracy and Education*, *supra* note 35, at ch. VIII.

[FN38]. See *By-Laws*, *supra* note 4, at 110, art. 9, sec. 2, para. 32 ("The establishment of the art gallery is an experiment to determine how much practical good to the public of all classes and stations of life, may be accomplished by means of the plans and principles learned by the Donor from a life-long study of the science of psychology as applied to education and aesthetics."). For the Foundation's motive, see also Albert C. Barnes, *Preface to Dewey et. al.*, *supra* note 34, at v, v ("The Foundation from the start was intended not only to offer instruction to individual students enrolled in its own classes or in those of allied institutions, but also to put before the public a tried and tested method for education in art, and an outline of what such education should be.").

[FN39]. The arboretum was to apply the principles used for the compilation and exhibition of the art collection also to garden and landscape architecture, thus making nature, like art, into a field of application for the Barnesian educational and aesthetical theory. For the significance of the interaction of art and nature, see John Dewey, *Foreword to John Dewey et al.*, *Art and education* 3, 3 (2d ed. 1947).

[FN40]. His system was considered radical in its opposition to conventional museum didactics. Barnes and Dewey propagated art as a daily life experience and therefore refused to assign it to a realm separate from common life, such as "culture." See *id.* at 3. The conventional view of art museums regarded them as a symptom of this separation and as a meaning-depriving apotheosis of art that would lead to nothing but "pretense or self-deception, sham erudition masquerading as 'culture.'" Albert C. Barnes, *John Dewey's Philosophy of Education, The Humanist*, Winter 1946, reprinted in Dewey et. al., *supra* note 38, at 9, 10-11. They opposed the traditional schools of art that had not even a rudimentary understanding of the principles and methods according to which art can be studied prolifically and made a living reality in the experience of the student. See Albert C. Barnes, *Sabotage of Public Education in Philadelphia*, in Dewey et al., *supra* note 38, at 272, 276.

[FN41]. *By-Laws*, *supra* note 4, at 88, art. 2.

[FN42]. *Id.*

[FN43]. "From the very beginning, the program of the Foundation has been based upon the philosophy of John Dewey." Albert C. Barnes, *Preface to Dewey et. al.*, *supra* note 38, at v. See also Horwitz, *supra* note 33, at 7. A signed photograph of Dewey in the possession of the Foundation is inscribed with the dedication: "To the Barnes Foundation, which puts in practice my beliefs and hopes for democracy and education." Anderson, *supra*

note 17, at 217.

[FN44]. By-Laws, *supra* note 4, at 97, art. 9, sec. 2, para. 3; Louis Gerber, *The Barnes Foundation Merion, PA, just outside Philadelphia. Biography of Albert Barnes, the history of his foundation and an exclusive interview with Kimberly Camp, Executive Director & CEO of The Barnes, Cosmopolis (2001)*, available at <http://www.cosmopolis.ch/english/cosmo13/barnes.htm>.

[FN45]. By-Laws, *supra* note 4, at 96, art. 9, sec. 2, para. 1; Gerber, *supra* note 44.

[FN46]. By-Laws, *supra* note 4, at 97, art. 9, sec. 2, para. 4.

[FN47]. See **Barnes**, *supra* note 21.

[FN48]. Ker-Feal is Breton and stands for "Fidel's house" in memory of Barnes's dog Fidel. Gerber, *supra* note 44.

[FN49]. **The Barnes Foundation**, 2004 WL 2903655 (Pa. Com. Pl. Dec. 13, 2004).

[FN50]. Gerber, *supra* note 44.

[FN51]. **Barnes**, *supra* note 21.

[FN52]. Charter, *supra* note 4, para. Sixth.

[FN53]. By-Laws, *supra* note 4, at 90, art. 4, sec. 2. The competence for nomination granted to Lincoln University, a small African-American university in Chester County, mirrors Barnes's special appreciation of African-American culture. See *supra* note 27 and accompanying text; Meyers, *supra* note 17, at 269-290.

[FN54]. By-Laws, *supra* note 4, at 90, art. 4, sec. 2.

[FN55]. Anderson, *supra* note 17, at 57-72.

[FN56]. See *supra* note 3.

[FN57]. See *supra* note 8.

[FN58]. How lucrative this practice can be for the lender is shown by two recent examples. First, the Museum of Modern Art in New York earned part of the budget for its renovation by leasing its collection to several museums worldwide. For the exhibition in the Neue Nationalgalerie in Berlin, the organizers paid over \$11.5 million. Second, in 2006, the Louvre will lease works of art from its storage to the High Museum of Art in Atlanta for three years for an estimated \$10 million. See Emma Beatty & Daphne Betard, *Louvre Goes Global*, *The Art Newspaper*, Dec. 9, 2004, available at http://www.forbes.com/lifestyle/2004/12/09/cx_1209hot.ls.html. For discussion of the one-time exception to the interdiction of loaning any of the Foundation's artworks, see *infra* note 72.

[FN59]. Originally, the "plain people" should have received free admission. See By-Laws, *supra* note 4, at 109, art. 9, sec. 2, para. 30. In 1963, however, the Orphans' Court decided to assimilate to "economic realities" and approved the charge of a one dollar admission fee as compatible with the settlor's intention; in 1995, the same court permitted an increase of the admission price to "not more than five dollars." In re: Barnes Foundation, 15

Fiduc.Rep.2d 381, 382 (Pa. Com. Pl. Sept. 21, 1995), available at http://www.barneswatch.org/main_court_sept21.html.

[FN60]. The limitation on the number of visitors was based on local zoning law and was justified by the fact that the Foundation is located in a residential area where museums are not allowed. As the Foundation is an educational institution, not a museum, it can be visited as long as the number of visitors does not make it qualify as a de facto museum. Zucchini, *supra* note 11; The Barnes Foundation, No. 58,788, 14 (Pa. Com. Pl. Jan. 29, 2004), available at http://www.barneswatch.org/ott_1_30_04.pdf.

[FN61]. At the time of the trust indenture, the Foundation was funded with an endowment of approximately six million dollars, including the art collection and the real estate in Lower Merion. See By-Laws, *supra* note 4, at 96, art. 9, sec. 2. The funds were considered so abundant that surpluses were anticipated and instructions were given for their proper distribution. *Id.* at 108, art. 9, sec. 2, para. 28.

[FN62]. Only too late, in 1995, the provision was changed to its current version, making investments in private (bank) time deposits, company-issued bonds and stocks permissible. By-Laws, *supra* note 4, at 107, art. 9, sec. 2, para. 27. See also 20 Pa. Cons. Stat. Ann. §§ 7307, 7310, 7317 (West 1951); *In re: Barnes Foundation*, 15 Fiduc.Rep.2d 381, 382 (Pa. Com. Pl. Sept. 21, 1995), available at http://www.barneswatch.org/main_court_sept21.html.

[FN63]. In the years 1893, 1907, 1921 and 1929, Barnes witnessed four economic depressions of different kinds. From them, he apparently came to the erroneous conclusion that federal, state and municipal bonds would be the most secure form of investment. See Anderson, *supra* note 17, at 48.

[FN64]. For details, see *id.* at 49. The Board of Trustees's big stake in the financial recession that occurred, in particular, during the 1990s is also referred to by the Orphans' Court. *The Barnes Foundation*, No. 58,788, 24 (Pa. Com. Pl. Jan. 29, 2004), available at http://www.barneswatch.org/ott_1_30_04.pdf ("It is unnecessary and probably futile to review the last ten years of The Foundation's administration in order to lay blame for this [current financial] situation.").

[FN65]. E-mail from Kimberly Camp, President and CEO of The Barnes Foundation (Aug. 25, 2005) (on file with author).

[FN66]. Anderson, *supra* note 17, at 49.

[FN67]. *Id.* at 60.

[FN68]. See *id.* at 80; Horwitz, *supra* note 33, at 17.

[FN69]. The by-laws specify that the office of President of the Foundation is invested with executive powers. See By-Laws, *supra* note 4, at 92, art. 6, sec. 2.

[FN70]. Glanton was elected after Lincoln University nominated the majority of the members of the Board of Trustees. See *supra* note 53. The background of his election is described illuminatingly by Anderson, *supra* note 17, at 73, 80.

[FN71]. This is documented by fourteen court cases during Glanton's term, all of which aimed to deviate from and to change the charter, indenture, and by-laws. For a listing of all procedures, see *Legal Problems of Museum*

Administration 53-58 (American Law Institute--American Bar Association 2004). However, arguably none of the attempts represented a literal breaking (contrary to "stretching") of the settlor's intention. The case referred to in the following note is a good example of mere "stretching."

[FN72]. The costs of renovation were paid from revenues received from a traveling exhibition of the collection's highlights to Washington D.C., Paris, Tokyo, Philadelphia, Fort Worth, Ontario and Munich that brought in over sixteen million dollars. The violation by this world tour of the indenture's provision prohibiting any loan of the Foundation's artworks, By-Laws, *supra* note 4, at 99, art. 9, sec. 2, para. 10, was justified by the need for the gallery's renovation in connection with the by-laws's command for its renovation, *id.* at 102, 108, art. 9, sec. 2, para. 16, 30, as well as by the argument that during the renovation an exhibition of the paintings in the Lower Merion setting would not have been possible anyway. For the whole discussion, see *In re: Barnes Foundation*, 12 Fiduc.Rep.2d 349 (Pa. Com. Pl. July 21, 1992); *In re: Barnes Foundation*, 14 Fiduc.Rep.2d 92 (Pa. Com. Pl. Feb. 1, 1994); *In re: Barnes Foundation*, 15 Fiduc.Rep.2d 54 (Pa. Com. Pl. Jan. 19, 1995); *In re: Barnes Foundation*, 15 Fiduc.Rep.2d 212 (Pa. Com. Pl. May 11, 1995) in connection with *In re: Barnes Foundation*, 672 A.2d 1364 (Pa. Super. Ct. 1996). The latter argument is particularly striking because the prohibition of leasing did not come from Barnes's wish to exclude others from contemplating his paintings, only from his commitment to maintaining the integrity of the Foundation's educational experiment, where every single painting was assigned a specific role within the entire collection. See discussion *supra* Part I.C.3.

[FN73]. See *supra* note 71. An example of an especially dispensable and unsuccessful lawsuit was where Glanton filed suit against Lower Merion Township for obeying its own zoning laws. *Barnes Foundation v. Township of Lower Merion*, 242 F.3d 151 (3d Cir. 2001).

[FN74]. *The Barnes Foundation*, No. 58,788 13 (Pa. Com. Pl. Jan. 29, 2004), available at http://www.barneswatch.org/ott_1_30_04.pdf.

[FN75]. *Id.* at 13.

[FN76]. *Id.* at 21-22.

[FN77]. *The Barnes Foundation*, 2004 WL 2903655, at * 1 (Pa. Com. Pl. Dec. 13, 2004).

[FN78]. Restatement (Second) of Trusts § 381 (1959).

[FN79]. *Id.* at § 399 cmt. a (1959) ("[P]ermitt[ing] a deviation from the terms of the trust in matters relating to the administration of the trust..."). See also Marion Fremont-Smith, *Governing Nonprofit Organizations* 183 (2004).

[FN80]. *Id.* The name of the Doctrine is descended from Franco-Norman legal language, *cy près comme possible*, and means that the original purpose is to be maintained as close as possible. See James J. Fishman & Stephen Schwarz, *Nonprofit Organizations: Cases and Materials* 116 (2d ed. 2000).

[FN81]. See also Fishman & Schwarz, *supra* note 80, at 117. Due to the structural likeness of the two doctrines, some authors suggest a merger. See, e.g., Alex M. Johnson, *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Pres Doctrine*, 21 U. Haw. L. Rev. 353, 380-82 (1999).

[FN82]. *In re Barnes Foundation*, 684 A.2d 123 (Pa. Super. Ct. 1996); *In re Barnes Foundation*, 683 A.2d 894 (Pa. Super. Ct. 1996).

[FN83]. Colin McK. Grant Home v. Medlock, 349 S.E.2d 655 (S.C. Ct. App. 1986).

[FN84]. Id. at 658.

[FN85]. See supra note 7.

[FN86]. See supra notes 34-40.

[FN87]. This was meant to help the understanding of art not as a sublime, inapproachable ideal but as part of a real daily experience. See also Albert C. Barnes, *John Dewey's Philosophy of Education, The Humanist*, Winter 1946, reprinted in Dewey et. al., supra note 40, at 10 (“[It is a] misconception which identifies art with what is remote, high-flown and artificial...”). This concept is completely misunderstood (“ornaments”) by Häntzschel, supra note 3.

[FN88]. The gallery was designed by Paul Philippe Cret, the architect of the Rodin Museum in Philadelphia; the building's decoration was executed among others by Henri Matisse and Jacques Lipchitz.

[FN89]. By-Laws, supra note 4, at 98, art. 9, sec. 2, para. 7.

[FN90]. Id. at 98, art. 9, sec. 2, para. 8.

[FN91]. Id. at 99-100, art. 9, sec. 2, para 12.

[FN92]. Argumentum e contrario ex id. at 98, 100, art. 9, sec. 2, para. 7, 12.

[FN93]. This can be inferred from paragraphs twelve and thirteen (e contrario) of the indenture and agreement. By-Laws, supra note 4, at 99-100, art. 9, sec. 2, para. 12-13.

[FN94]. The indenture expresses this with the words “the collection shall be closed.” See supra note 8.

[FN95]. See By-Laws, supra note 4, at 99, art. 9, sec. 2, para. 10.

[FN96]. Id. at 98-100, art. 9, sec. 2, para. 7, 9, 12, 13.

[FN97]. “The Trustees of the Donee [The Barnes Foundation] shall control both the art gallery and the arboretum of the Donee, both of which are integral parts of the educational resources of the Donee. It is further stipulated that the identity of Donee as an educational institution is to be preserved for all time.” Id. at 91, art. 4, sec. 2 (emphasis added).

[FN98]. See supra note 81.

[FN99]. By-Laws, supra note 4, at 99, art. 9, sec. 2, para. 11.

[FN100]. Edith L. Fisch, *The Cy Pres Doctrine in the United States* 215-19 (Mathew Bender & Co. 1950). The same question is raised by the Doctrine of Deviation. See supra note 76; *The Barnes Foundation*, No. 58,788, 21-22 (Pa. Com. Pl. Jan. 29, 2004), available at http://www.barneswatch.org/ott_1_30_04.pdf. However, the deliberations of the Montgomery County Orphans' Court should be excluded from consideration because the court's decision was essentially arbitrary. As mentioned above, the court mistakenly assumed that moving the art collection would have no substantial effect on the accomplishment of the foundation's purpose. Consequently,

the court's discretion when applying the Doctrine of Deviation would be different from the discretion requested under the Doctrine of Cy Pres. See supra Part II.B.2.a.

[FN101]. The **Barnes Foundation**, 2004 WL 2903655, at * 5 (Pa. Com. Pl. Dec. 13, 2004) (discussing an expert report by Deloitte Consulting).

[FN102]. **Id.** at *6.

[FN103]. The Barnes Foundation, No. 58,788, 25 (Pa. Com. Pl. Jan. 29, 2004), available at http://www.barneswatch.org/ott_1_30_04.pdf. See also The **Barnes Foundation**, 2004 WL 2903655, at * 8 (Pa. Com. Pl. Dec. 13, 2004).

[FN104]. See supra note 62.

[FN105]. See supra note 8; supra Part I.C.3.

[FN106]. The Foundation's Board alleged this in Orphans' Court. The Barnes Foundation, No. 58,788, 15 (Pa. Com. Pl. Jan. 29, 2004), available at http://www.barneswatch.org/ott_1_30_04.pdf ("As for... 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.").

[FN107]. See American Association of Museums Code of Ethics for Museums (amended 2000), <http://www.aam-us.org/museumresources/ethics/coe.cfm>; International Council of Museums Code of Ethics for Museums (amended July 6, 2001), secs. 4.1-4.3, http://icom.museum/ethics_2001_engl.html. Nonetheless, it remains questionable both whether such lobby organizations' statements are valid for all kinds of museums and what the legal impact of such ethical standards would be.

[FN108]. See The **Barnes Foundation**, No. 58,788, 2004 WL 2903655, at * 17 (Pa. Com. Pl. Dec. 13, 2004).

[FN109]. See supra note 21. Kimberly Camp, President and CEO of The Barnes Foundation, stated, "our archival proof and testimony noted that work not on display at the time of Barnes's death was used regularly for the education program." E-mail from Kimberly Camp (notes on file with author) (Aug. 25, 2005).

[FN110]. "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." By-Laws, supra note 4, at 100, art. 9, sec. 2, para. 13 (emphasis added).

[FN111]. See The Barnes Foundation, No. 58,788, 25 (Pa. Com. Pl. Jan. 29, 2004), available at http://www.barneswatch.org/ott_1_30_04.pdf; The **Barnes Foundation**, 2004 WL 2903655, at * 18 (Pa. Com. Pl. Dec. 13, 2004). But cf. supra note 110 and accompanying text, which in the first instance seems only to pertain to the sale of the other mentioned works of art.

[FN112]. The **Barnes Foundation**, 2004 WL 2903655, at * 1 (Pa. Com. Pl. Dec. 13, 2004).

[FN113]. **Id.** at *18. This was the number assumed by the Montgomery County Orphans' Court with regard to pertinent expert reports that estimated the value of the works of art from the administration buildings at nineteen million dollars and of the real estate Ker-Feal including the farmhouse at \$5.3 million. **Id.** at *2. By contrast, the

amicus curiae assumed a much higher value of over twenty-four million dollars for only the twenty most valuable works of art and estimated the value of Ker-Feal and the surrounding land at \$9.2 million. See In re: The Barnes Foundation, Post Hearing Brief of the Amicus Curiae, Students of the Barnes Foundation, at 8, available at http://www.barneswatch.org/pdf/student_brief.pdf. It should also be noted that in its discussion the court not only did not allow for selling the farmhouse Ker-Feal (with a value of one million dollars), but it also did not allow for the sale of the works of decorative art contained therein, because it found convincing historical evidence that “the farmhouse and the collection contained therein represent a significant opportunity... to advance the educational process championed by Dr. Barnes; and, for this reason, The Foundation should maintain ownership.” **The Barnes Foundation, 2004 WL 2903655, at * 18 (Pa. Com. Pl. Dec. 13, 2004)** (emphasis added). This is a good example of how different the scale of discretion was when the Montgomery County Orphans' Court applied the Doctrine of Deviation in contrast with what its scale of discretion would have been under the Doctrine of Cy Pres: if relocating the art collection would have no substantial effect on the accomplishment of the Foundation's purpose and hence violate only administrative provisions, then “significant opportunities” may be taken into account. However, if it does have a substantial effect, mere opportunities cannot justify the breaking of the settlor's intention. See supra Part II.B.2.a. and note 101.

[FN114]. See supra note 72.

[FN115]. See supra notes 77 and 101.

[FN116]. *The Barnes Foundation*, No. 58,788, at 2 (Pa. Com. Pl. Jan. 29, 2004), available at http://www.barneswatch.org/ott_1_30_04.pdf.

[FN117]. The Montgomery County Orphans' Court is ruthless in its observations: “However, the Attorney General did not proceed on its authority and even indicated its full support for the petition before the hearings took place. In court... he... merely sat as second chair to counsel for The Foundation, cheering on its witness and undermining... attempts to establish [another view]. 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.” *Id.* at 20-21.

[FN118]. See Serbaroli & Schwartz, supra note 2.
29 Colum. J.L. & Arts 63

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