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The Public Value and Legal Battles of a Single Donor Museum

Emmeline Babb
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I. A Personal Introduction

I did not visit the Barnes Museum until the fall of 2000, my sophomore year at Penn. I had just declared History of Art as a second major and went on a group trip to the Barnes Foundation. We took a school van to the museum. I stared out the window and realized how quickly suburban surroundings had become strange to me now that I was living in the city, even though I had spent 18 years growing up in a suburb. We pulled into the parking lot and started walking to the museum. I remember thinking to myself how perfectly peaceful and quiet everything was. Here was a beautiful villa in a beautiful landscape. This magical place struck a chord in me on my first visit.

When I returned to the Barnes for a second time after studying abroad in Rome, I realized that it was very similar to my favorite museum, the Villa Borghese. Both were homes of remarkable patrons of art. Both collectors had impeccable taste. Both museums require timed ticket reservations, forcing some initiative on the visitor's part. Both locations provide an oasis from a chaotic city.

This encounter commenced my interest in the long and sordid legal history of the Barnes Foundation. I started to wonder why the Barnes didn't work. Why did the courts have to resort to deviation? Can there be lessons learned from the Barnes for other single donor museums? I look at a few single donor museums and make a comparative analysis of legal history, governance, economics, and establishing documents to see how these institutions can best adapt and survive. My focus is on the Barnes Foundation, but, in varying degrees of detail, I also look at the Isabella Stewart Gardner Museum, the J. Paul Getty Museum, and The Terra Museum of American Art.

In Part II, I examine at public access to these single donor museums and how sometimes the donors' wishes conflict with public benefit. It is not only donor intent that sometimes conflicts with public access, but zoning laws as well. Part III considers how single donor institutions may be especially susceptible to the doctrines of cy pres and deviation. I also analyze how these institutions' missions are affected when a court orders a deviation or cy pres. Part IV examines issues of donor control of various institutions. In this section I explore not only single donor museums, but compare this type of donation with funding of an already established public museum. Are there more or fewer conflicts with a donor trying to "buy" influence at a pre-existing museum rather than starting his own museum? Lastly, because it is impossible to understand the personality of a single donor museum without knowing who the single donor is, I have included appendices that give the background and history of Dr. Albert Barnes and Isabella Stewart Gardner.

Part II: Public Access

Allowance of Visitors

The Barnes Foundation

The most public of complaints about any museum is access. This is closest to the public's heart because it is what directly affects the public. If a charity must ultimately serve the public good, what good is a museum doing if no one can access the museum's treasures? I will argue, however, that a museum can still do a public good even with limited public access.

The fact that a charitable organization is not open to the *entire* public has never been an impeding factor for an organization to qualify as a 501(c)(3) charity. Universities are the most obvious example of this fact. Universities have an admissions process that denies and limits access to resources of the universities. It can be argued that some universities are better off for

the fact of limiting enrollment. Trying to spread resources too thinly to too large a student population would decrease the educational value for everyone and serve less of a public good. Single donor museums have a similar argument especially, as they usually have a much smaller endowment and smaller physical space than most universities. In the case of the Barnes Foundation, Albert Barnes himself embodied this same sentiment. Barnes found that he was creating an *educational* institution, not a museum. The original admission card to the Barnes read, “The Barnes Foundation is not a public gallery. It is an educational institution with a program for systematic work organized into classes which are held every day, and conducted by a staff of experienced teachers. Admission to the galleries is restricted to students enrolled in the classes.”¹

Article II of the Barnes Foundation by-laws states that the object of the corporation is “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....” Notice that education is given first billing and that the gallery is only mentioned as it is necessary to exhibit the art for educational purposes. Or at least, this is one interpretation of the objective.

While Barnes was alive, admission was granted under the direction of the board of trustees and no more than two days a week.² The museum was to remain closed during the months of July, August, and September, like many other educational facilities. Albert Barnes must have realized how restrictive these regulations were because the by-laws further explain that, “Donor makes these provisions and stipulations for the reason that said art gallery is

¹ JOHN LUKACS, PHILADELPHIA, PATRICIANS & PHILISTINES, 1900-1950, 270 (Farrar, Straus, Giroux 1981).

² See Barnes Foundation by-laws, Article IX, ¶ 29.

founded as an educational experiment under the principles of modern psychology as applied to education, and it is Donor's desire during his lifetime, and that of his wife, to perfect the plan so that it shall be operative for the spread of the principles of democracy and education."³ This limiting of public access was based on "perfecting" the educational plan.

Barnes was quite selective in who he let into his gallery. In fact, notoriety would hurt more than help you gain access to his gallery. He denied T.S. Eliot and Le Corbusier.⁴ He also did not care about admitting the press in order to gain good publicity for his gallery. His response to journalist Ben Wolf of *Philadelphia Art News* shows his lack of concern for being in the press's good graces.⁵ Barnes was most concerned with helping students with "sincere interest and intention of serious study....Persons desiring only casual amusement or other ends irrelevant to genuine art appreciation will not be helped."⁶ The gallery would be closed to those whose "aimless wandering in a gallery is about on a par with the daydreaming furnished by attendance at the movies."⁷

Public access after Barnes's death was another matter. The by-laws regarding admission after Barnes's death were changed, not once, not twice, but three separate times by Barnes

³ *Id.*

⁴ See HOWARD GREENFELD, *THE DEVIL AND DR. BARNES: PORTRAIT OF AN AMERICAN ART COLLECTOR* 252 (Viking Penguin Inc. 1987).

⁵ See *id.* at 251-252. Barnes response--"Your letter of January 29 [1938] confirms the opinion I formed of you by reading the stupid, ignorant, gossipy, sensation-hunting tripe published in your paper; in other words, you hope to climb out of the intellectual and commercial slums by pandering to the ignorant, uninformed tribe that infests the fringe of art. If, in that adventure, you think you can make use of me or the institution which I founded, "go to it" and do your damndest....Your statement that you write 'on behalf of all the painters who are sincerely trying to create works of art, and of those laymen who are endeavoring to enrich their appreciation of art'—all that, viewed in the light of actual facts, makes it pretty clear that you are either a colossal ignoramus or a demonstrable liar.

Your plea that our gallery be opened even once a week to your hypothetical group, displays gross ignorance of the purposes of our project, of the decisions of the Courts that it is not a public gallery but an educational program, that every class is filled to capacity, and that we have a waiting list of several hundred desirable students who cannot be accommodated because every available place is occupied by earnest, intelligent persons...."

⁶ *Id.* at 113-114.

⁷ *Id.* at 142.

himself.⁸ The original by-laws had the gallery open two days in each week to students and instructors of the Pennsylvania Academy of Fine Arts, as well as Sunday to the general public. The first change increased the opening days to four days and only to the students and instructors at the University of Pennsylvania in connection with the Fine Arts and Aesthetics courses. The second change then increased it to being open to any student and instructor in educational institutions located in Philadelphia and its suburbs. The final change opened the gallery five days a week to the instructors and students of *any* institution which was approved by the board of trustees. Throughout these changes, Barnes kept language in the document 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 to the art gallery and the arboretum upon those days when the gallery and arboretum are to be open to the public, as hereintofore provided.”⁹

The courts dealt with public access as well. In 1934, the Pennsylvania Supreme Court defended the Barnes Foundation’s decision to limit access to the general public.¹⁰ The Supreme Court agreed with the lower court’s decision that “it must be borne in mind that the gallery is used not as an art gallery as that term is ordinarily understood, but that it is an integral part of a new educational experiment, and the unrestricted admission of the public would be as detrimental to the work of the Barnes Foundation as it would be to the work carried on in the laboratories and clinics of the University of Pennsylvania.”¹¹

⁸ The first time the laws were amended on May 11, 1926; the second time was December 4, 1940; and the third time was April 30, 1946.

⁹ Specific hours were also kept in the by-laws. The museum was to be open during the open weekdays between 10-4. Sunday was to the public access day from 1-5, except the 1946 amendment changed the public access day to Saturday from 10-4.

¹⁰ *Barnes Foundation v. Keely*, 171 A. 267 (Pa. 1934).

¹¹ *Id.* at 117.

In 1953, there was a similar case brought by Mr. Wiegand of the *Philadelphia Inquirer* and private citizen.¹² Despite the Pennsylvania Attorney General granting Mr. Wiegand permission to bring the suit, the case was dismissed for lack of standing. In 1960, the Attorney General's Office itself brought suit inquiring why the institution would not allow the public to view its art collection even though it was considered a public charity.¹³ This time the court was willing to listen to the petitioner. The court claimed that "the test of all public charities is their extensiveness. If the general benefits of a charity are subject to private preferences or conditions by which a large proportion of the general public will probably be excluded it is a private charity, and therefore, not within the protection of the Pennsylvania Act of Assembly on tax exemption."¹⁴ Once again, the Barnes was compared to the University of Pennsylvania, but this time instead of agreeing with limited access, the court compared it to Penn's anthropology museum which was open to the public at large.¹⁵ The court grounded its decision in the Barnes Foundation's own by-laws by claiming that this institution was created for "the promotion of the advancement of education and the appreciation of fine arts." If the objective had stated that it was for "the promotion of the advancement of education IN the appreciation of the fine arts," then the Foundation's sole mission is as an educational institution.¹⁶ Instead, the objective states that it is both an educational institution and a museum. There was an out of court settlement on December 10, 1960 that created more public access.

Finally, to conclude the Barnes's admissions saga with a role reversal, in 1996, the Barnes Foundation itself petitioned the court to increase its operating hours.¹⁷ This time the

¹² *Wiegand v. The Barnes Foundation*, 97 A.2d 81 (Pa. 1953)

¹³ *Commonwealth v. The Barnes Foundation*, 159 A.2d 500 (Pa. 1960).

¹⁴ *Id.* at 503.

¹⁵ *See id.*

¹⁶ *See id.* at 504.

¹⁷ *In re: The Barnes Foundation; Appeal of Barnes Foundation and Its Trustees*, 683 A.2d 894 (Pa. Super. Ct. 1996).

court would not allow them to do so! The court stated that the Foundation did not satisfy its burden of explaining why the gallery needed to be open more days. The Foundation's financial problems alone were not a suitable explanation.

It should also be mentioned that public access did not only pertain to the general public's access, but expert analysis as well. Charles Stuckey, a former curator of modern art at the Art Institute of Chicago, noted that permission was rarely granted to x-ray or look at the back of paintings for exhibition labels, making provenance almost impossible.¹⁸ In Stuckey's words, "Little chapters in lives and work of many wonderful artists remain unwritten."¹⁹

Now that the Barnes Foundation will be moved to Philadelphia under the guise of creating even more public access, I assume that the Barnes will be as open as any other average museum.

Isabella Stewart Gardner Museum

The Barnes Foundation is not the first single donor museum to have public access issues. Isabella Stewart Gardner had been warned by her architect, Willard Thomas Sears, that she should limit the number of visitors to two hundred at any one time.²⁰ Gardner took this advice to heart and only printed out two hundred tickets for the *entire* day.²¹ When visitors were at the museum, Mrs. Gardner was known to police the halls, and understandably so. Marble was often chipped and small objects started disappearing. Mrs. Gardner caught one woman with a pair of scissors trying to cut a piece from one of the hanging tapestries. Possibly as a result of these destructive incidents, Mrs. Gardner tried to limit the 200 ticket holders to Harvard students

¹⁸ See JOHN ANDERSON, *ART HELD HOSTAGE: THE BATTLE OVER THE BARNES COLLECTION* 69 (W.W. Norton & Co. 2003).

¹⁹ *Id.*

²⁰ See LOUISE HALL THARP, *MRS. JACK: A BIOGRAPHY OF ISABELLA STEWART GARDNER* 261 (Little, Brown 1965).

²¹ See *id.*

exclusively, whom she thought would behave themselves.²² She made strict rules for the Harvard students—no sketching, no notes, no writing utensils.²³

A bigger complaint was that the Museum was open sporadically. Only Mrs. Gardner knew when the museum would be open.²⁴ The Boston newspapers began to write that the “museum” was more of a private home than a museum. The collector of customs defended the Isabella Stewart Gardner Museum as being incorporated and acting within its legal rights with the access restrictions.²⁵ However, on January 11, 1904, the government changed its mind and decided that a museum that was only open four days a month for three months (allowing a maximum of 2400 visitors in one season) was not a public museum. The Treasury Department claimed Mrs. Gardner owed over \$200,000 in unpaid taxes.²⁶

Even after Mrs. Gardner’s death, public attendance was an issue, but this time the museum wanted the people to come. The museum did not have any restrictions on opening hours, but attendance numbers were declining. Several of the introductory annual reports showed concern for attendance and would even pinpoint exact days of severe rain storms to explain the low attendance.²⁷ One can understand that the museum wanted to promote the public access as there were some questions about the tax-exemption of the museum when it first started. There was the Isabella Stewart Gardner Corporation, which was an actual corporation with shares; and it was this corporation that held the legal title to the collection and real estate.²⁸ The

²² *See id.* at 262.

²³ *See id.*

²⁴ *See id.* at 264.

²⁵ *See id.* at 265.

²⁶ *See id.* at 266.

²⁷ *See* Ninth Annual Report.

²⁸ *See* Isabella Stewart Gardner Museum First Annual Report 8 (1925).

trustees were the owners of the shares.²⁹ However, the issue was settled and the museum was declared an educational institution exempt from taxation.

After this, the museum did try to build relationships with several schools; however, it was a distant relationship by today's standards. The teachers chose various objects to be photographed, and the teachers then brought the photographs to the school. Free admission tickets were distributed "discreetly" by teachers to specific students, as this was more "satisfactory than to arrange for museum visits by entire classes, many of whose members, especially the boys, are likely to be bored by the experience."³⁰

Zoning Laws

The Barnes Foundation

Once again we start with the Barnes Foundation because it has the most sordid tale with the zoning laws. The Barnes Foundation has had an unstable relationship with its Merion residents to say the least. This goes back to the days of Dr. Barnes himself. When the township had a plan to construct 126 low-middle income houses near the Foundation, Mr. Barnes objected that "Merion will have an incipient city slum on its hand."³¹ He threatened to move his collection to the Metropolitan Museum of Art if Merion became the city and his gallery was "surrounded by the same urban conditions he had sought to escape and would destroy the atmosphere of seclusion he had tried to establish."³² The houses were never built.

²⁹ *See id.*

³⁰ Isabella Stewart Gardner Museum Tenth Annual Report 22 (1934).

³¹ GREENFELD, *supra* note 5, 135.

³² *Id.*

The most drawn out zoning battle was recently in the 1990s. Richard Glanton, the head of the Barnes Foundation's board,³³ wanted to create a parking lot for its visitors. As background, Latches Lane, the address of the gallery, is residential zoning; although the zoning code allows three private educational exceptions—St. Joseph's University's dormitory for 30 undergraduates, Episcopal Academy which has about 1,030 K-12 students, and the Barnes Foundation.

The museum was to be renovated and the board of trustees wanted a grand reopening and to increase its number of visitors. Latches Lane is 24 feet across and not equipped to handle a large amount of increased traffic. Lower Merion Township Commissioners required a zoning board hearing so that the landowners could voice their objections, which could delay the parking lot for at least a year.³⁴ Glanton wanted the zoning hearing waived, but was told the township officials could not grant special exceptions.³⁵

Glanton responded by bringing a suit against the Commissioners for a pattern of arbitrary, capricious, and racially discriminatory conduct because the Commissioners imposed parking, police, fire and zoning requirements on the Foundation. The number of lawsuits, appeals, and demands that followed could be a lesson for any first year civil procedure class. In a little over one-year, there were *twenty-one* decisions published on LexisNexis concerning this discriminatory zoning lawsuit.

The Court originally dismissed the motion against the general Latches Lane neighbors based on the Noerr-Pennington doctrine.³⁶ This doctrine protects citizens when petitioning the

³³ It should be noted that Richard Glanton is himself a character that has been written about often. He was a well-known Philadelphia lawyer, who strived for success. Many authors and journalists have commented that he attained his success by stepping on others. Many blame his ego as responsible for the depletion of the Barnes endowment.

³⁴ See MARY ANN MEYERS, *ART, EDUCATION & AFRICAN-AMERICAN CULTURE: ALBERT BARNES AND THE SCIENCE OF PHILANTHROPY* 346 (Transaction Publishers 2004).

³⁵ See *id.*

³⁶ *Barnes Foundation v. Township of Lower Merion*, 927 F. Supp. 874, 876 (E.D. Pa. 1996).

government. It does not matter what (discriminatory) factors fuel a citizen's desire to petition the government; so long as the citizen is trying to influence public officials, the citizen's speech is protected by the First Amendment. There were several discovery requests and appeals from both sides. Eventually, the court concluded that the Barnes did not meet its burden of proof and there was a summary judgment for the defendants.³⁷ The Barnes eventually did build its parking lot through out-of-court negotiations with the Township Commissioners.

This string of cases was truly unfortunate for both the township and the Foundation. The parties' refusal to cooperate or come to an agreement diminished the Foundation's funds and created bad publicity for everyone involved. The Barnes Foundation's reputation suffered as a result of its board's contentious attitude. It can be argued that the reputation never recovered and is part of the reason for the move to Philadelphia.

When the Barnes Foundation was trying to petition the court for its move to Philadelphia, the Barnes director Kimberly Camp testified that the relationship with the town was "irrevocably broken."³⁸ Even though there were fewer court battles, Camp testified as to a story that highlighted the township's severe restrictions. In 2000, police were summoned to a street near the gallery because a tour bus was above the size limit the township allows at the Barnes.³⁹ The bus had to stop on a busy road outside the Barnes's property. This story is made more sympathetic because the bus was full of senior citizens who required walkers, canes, and wheelchairs, and it took a while to get the senior citizen visitors from the bus to the Barnes.

The township of Merion seems to have a somewhat ambivalent approach to its relationship with the Barnes because while they struggled in the past, the township passed a

³⁷ *Barnes Foundation v. Township of Lower Marion*, 982 F. Supp. 970 (E.D. Pa. 1997)

³⁸ Patricia Horn, *Barnes Seeks to Prevent Testimony from Township*, THE PHILADELPHIA INQUIRER, Sept. 15, 2004 at E1.

³⁹ *See id.*

resolution expressing support for the Barnes to remain in Merion. The Township did not want to see the Barnes leave Merion.⁴⁰

The J. Paul Getty Trust

The Getty Trust did not have quite the history of legal battles with its town, but there was one conflict that occurred over a property easement. The Getty Villa, part of the Getty Trust, opened in 1974 in a residential area of Pacific Palisades. The driveway of the Getty crosses over a strip of land 9 feet by 16 feet that is owned by the Sunset Mesa Corporation. In order to use that easement, the museum had to agree to bar all pedestrian and walk-in traffic to the museum as well as use a reservation parking system for its visitors so that no one would be admitted to the museum without an advance reservation. This settlement agreement directly affected public access.

The museum closed down in 1997 to renovate and reorganize. The Getty Villa also petitioned the City to add 210,000 additional square feet to its museum, 560 new parking spaces, and a new classical outdoor theater with 45 performances per year. The City of Los Angeles approved of the plan; however, the Pacific Coast Homeowners objected.

The trial court initially agreed with the Homeowners stating that the easement would be overburdened by the proposed project and that the burden could not be increased without the Homeowners' consent.⁴¹ The appeals court reversed. The court concluded that this was not an overburden as the theater performances were held at times when the museum was closed, so there would not be an increase in traffic at any one time. The Homeowners countered that the 560 parking spaces is a 92% increase over the original 291 spaces which is an unreasonable,

⁴⁰ *Id.*

⁴¹ *Pacific Coast Homeowners v. J. Paul Getty Trust and City of Los Angeles* 2 Cal. App. Unpub. LEXIS 9738 (Cal. Ct. App. 2002)

unforeseeable burden. The Court declared that the reservation system was in no danger of being eliminated because the Agreement stated that the reservation system had to stay in effect until not only adequate parking facilities were provided, but also traffic congestion decreased at the intersection of Pacific Coast Highway and Coastline Drive.⁴² Increasing on-site parking alone would not get rid of the reservation system; hence, the easement system would not be overburdened. In addition, the Getty agreed to provide offsite shuttle service to transport visitors to the evening performances. Voice amplifications would not be above a certain decibel for the theater. The Getty agreed to fund a \$2 million neighborhood protection plan. There would be a three year review to evaluate the Getty's compliance. The penalty for any violation would be a \$250,000 fine as well as the right for the city to decrease the number of performances. There were several checks in place so that the Getty's theatre would not disturb the citizens.

While there are some similarities between this case and the Barnes case, the differences are more notable. The Getty had the city's approval for the plan; the conflict was with the Homeowners. Also, the Getty has deep pockets to offer \$2 million towards a neighborhood protection plan to help ease the neighborhood's concerns; the Barnes was running out of money. Lastly, the Getty worked with the neighborhood when first starting the museum. The Museum had a binding agreement to guarantee that the Museum would work *with* the neighborhood in the future. All valuable lessons.

Terra Foundation for American Art--Musée d'Art Américain Giverny

The Terra Museum of American Art has received most of its publicity based on its closing on Oct. 31, 2004; however, the Terra Museum of American Art had a sister museum in Giverny, the Musée d'Art Américain Giverny, that opened on June 1, 1992, under the

⁴² See *id.* at 29.

supervision of Daniel Terra, that still exists today. The people of Giverny were concerned that there would be a decline in their quality of life with the coming of the museum. The town already had the Monet Foundation, and the townspeople were concerned that the Musee d'Art Americain would create more cars and buses full of tourists.⁴³ The Terra Foundation had inadequate parking, so Terra proposed a parking lot across from the museum in the center of town. The French protested with signs that said "Parking exterieure = vie meilleure" and "Oui a la culture, non aux voitures."⁴⁴ Translated: "Exterior Parking = Better life" and "Yes to culture, no to cars." The Giverny townspeople filed a lawsuit against Terra.

Terra's architects were able to make the parking lot fit into the landscape of the quaint town and there was a settlement. Terra purchased several houses in the area as well with the intent of creating a proposed learning center. He wanted his museum in Giverny to be a site of serious scholarly study.⁴⁵

The Terra Museum is quite different from the other two examples of zoning issues because here Terra was able to come to a settlement without appeal. The former head of the Terra Museum brings up an interesting point that France is not used to the tradition of having privately funded cultural institutions.⁴⁶ The Terra Museum was opening around the same time as Disneyland, and the Giverny people may have thought the Museum was a similar business venture.⁴⁷ Once Terra was able to communicate (he had to hire a translator) and work with the townspeople, contention subsided.

⁴³ See ELIZABETH KENNEDY AND KATHERINE M. BOURGUIGNON, AN AMERICAN POINT OF VIEW: THE DANIEL J. TERRA COLLECTION 34 (Hudson Hills Press 2002).

⁴⁴ See *id.*

⁴⁵ See *id.* at 38.

⁴⁶ See *id.* at 34.

⁴⁷ See *id.*

Part III Cy pres or Deviation

This section is the most dramatic as it involves the most severe of changes. The doctrines of cy pres and deviation require conditions to have changed so gravely that it becomes unlawful, impossible, or impracticable to carry out the original purpose of the trust. Deviation is different from cy pres in that deviation is an administrative change in the trust. Cy pres affects the actual purposes of the trust. In order to petition the court, there must be evidence of “(1) unforeseen and unforeseeable change in circumstances and (2) frustration of the settlor’s main objectives by this change, if strict obedience to a settlor’s directions were required.”⁴⁸

The Second Restatement of Trusts allows deviation if it “appears to the court that compliance is impossible or illegal, or that owing to the 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.”⁴⁹ The burden of proof is always on the party seeking the deviation.

These doctrines have affected several jewel-box museums. I propose that these types of museums are especially at risk because private donors, for better or worse, are focused on their own personal agenda. The donors do not have the humility, if you will, to realize that museums need flexibility for survival. Single donors are more likely to have stringent administrative terms. Single donors are likely to see a charity’s endowment as their own money instead of being in the public trust and think they are only being prudent in leaving specific instructions.

The Barnes Foundation

Before knowing what has deviated from the original trust, one should look at what the original trust required. Dr. Barnes was extremely specific and detailed with his instructions--so

⁴⁸ *In re: The Barnes Foundation, Appeal of Barnes Foundation and Its Trustees*, 683 A.2d 894, 899 (Pa. Super. Ct. 1996).

⁴⁹ RESTATEMENT (SECOND) OF TRUSTS §381 (1959).

detailed that this became a cause for several petitions of deviation from the terms of the trust.

The description of the by-laws is long because it is important to note what Dr. Barnes restricted in order to understand how and why the Barnes Foundation needed to petition the court for deviation:

Under Article IX of the by-laws, Dr. Barnes left management instructions. Section 9 specified that after the death of the 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.”

Section 10 claimed that no picture could 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.” Dr. Barnes appeared to take this provision very seriously as he would rather have seen the artwork decay than be sold or loaned for endowment building purposes.

Section 11 states that if the collection is ever destroyed or it becomes impossible to administer the trust, then the property and funds should be applied to “an object as nearly within the scope [of the donor’s intentions] to be in connection with an existing and organized institution then in being and functioning in Philadelphia, Pennsylvania, or its suburbs.”

Section 17 explains how the board of trustees is organized. There are five positions. After the death of Barnes, his wife, and the term completion of all other elected trustees, the Girard Trust Company would nominate one trustee and Lincoln University would nominate the other four trustees. No trustees were allowed to be members of the faculty or board of directors of the University of Pennsylvania, Temple University, Bryn Mawr, Haverford, Swarthmore, or

the Pennsylvania Academy of Fine Arts (PAFA). This exclusion is quite a change from the original trust document because Dr. Barnes had first wanted the University of Pennsylvania and PAFA to nominate trustees. Then, with a 1950 amendment and a change of heart, Dr. Barnes made a drastic change to forbid Penn or PAFA from ever participating. Many claim this change shows the depth of Barnes's spite.

Section 20 provides for current employees to remain employed and states their exact salaries. Sections 21-25 provide for general employment positions (from art director to curators to watchmen to janitors) and salary caps

Sections 27 limits investments after Dr. Barnes's death to US and state bonds. Section 28 states that any extra income should be dedicated to the creation of scholarships

Sections 29 and 30 deal with the public access that was discussed earlier in Part II.

Section 32 explains that the 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." If the experiment fails, the board is allowed to dispose of the paintings by gift or otherwise, to any individual, institution, museum, school or college, specified by the board.

Section 33 states that purpose of the gift is "democratic and educational" and that all "special privileges are forbidden." There can be no "society functions, commonly designated receptions, tea parties, dinners, banquets, dances, musicales or similar affairs" for the public, the trustees, or the employees. If any citizens provides evidence that this provision has been violated then the Barnes Foundation itself must pay all legal costs.

Section 34 clarifies that this is a school for the instruction in the appreciation of fine arts, not a school for instruction in painting, drawing, or sculpturing. No one is allowed to copy any of the works of art in the gallery.

As stated in Part II, there were several changes concerning public access to the gallery. In 1963, the Court authorized the Barnes Foundation to charge an admission fee of \$1. In 1967, the court authorized the Barnes's request for an additional half day of public access. Then all remained dormant until 1991.

On March 20, 1991, the board of trustees sought to amend several sections in Article IX of the bylaws by allowing the board to remove the investment restrictions, remove the present limits on hours of operation/admission fee, sell fifteen paintings and rearrange the paintings so as to best use space after the sale.⁵⁰ Obviously, these last two requests of selling and rearranging the paintings appeared quite drastic. Dr. Barnes had personally arranged the paintings so as to create a harmonious exhibit. The arrangement is an integral part to the teaching. Dr. Barnes left specific instructions that the paintings were not to be moved. Most of the public and press were in an uproar. The Association of Art Museum Directors even filed a brief stating that deaccessioning should only be allowed for the purpose of purchasing new art, not for maintenance. Most likely realizing the unlikelihood of the petition being granted and the risk in the museum's reputation, the board amended the petition on July 11, 1991 so as to eliminate the request for selling and rearranging paintings, but added a request so that the Foundation could hold social functions.⁵¹

The students of the Barnes sought to intervene in the proceedings with information about the importance of the educational process and curriculum. The Violette de Mazia Trust also

⁵⁰ See *In re: The Barnes Foundation, Appeal of the Barnes foundation and its trustees and the Violette de Mazia Trust*, 684 A.2d 123 (Pa. Super. Ct. 1996).

⁵¹ See *id.*

sought to intervene. Violette de Mazia was Dr. Barnes's right-hand woman and deeply involved with the educational aspects of the Foundation, and thus her trust was given standing.⁵² The De Mazia Trust was outraged with the petitions and brought an additional motion to dismiss a contract that gave Alfred E Knopf, Inc. publishing rights to a Barnes Foundation catalogue. The de Mazia Trust claimed that the catalogue contract was meant to induce the Samuel I. Newhouse Foundation to donate \$2 million to Lincoln University. Remember that Lincoln University has four of the five spots on the Barnes Foundation board. The President of the Samuel I. Newhouse Foundation, Samuel I. Newhouse, Jr., was also the chairman of the board of Knopf's parent company. The de Mazia Trust thought this was a breach of fiduciary duty and an obvious conflict of interest. The de Mazia Trust claimed the trustees mismanaged the trust and failed to preserve the Barnesian art education program. She brought a suit against the directors on January 16, 1992, to surcharge the directors individually for \$2 million.⁵³ In February, the Barnes trustees answered with a blow by saying that the purposes of the Barnes Foundation are beyond the Barnesian art education; rather, the purposes of the trust had evolved into the general promotion of the advancement of education and the appreciation of the fine arts.⁵⁴ The Barnes followed this reply with an amended petition requesting the paintings be allowed on tour.

The de Mazia Trust answered by saying that the Barnesian educational program was the vital purpose and if the works were to go on tour, then the educational process would be disrupted.⁵⁵ The Pennsylvania courts allowed the one time deviation of an art tour because the museum had to close for renovations. Renovations could not be helped and thus there was no

⁵² *See In re: The Barnes Foundation, Appeal of Barnes Foundation and its Trustees* 672 A.2d 1364, 1366 (1996). Violette de Mazia was the long-time assistant, co-author and traveling companion of Dr. Barnes and was given special status in the Barnes indenture. Her trust continued her support and interest during her life and pursuant to the Foundation indenture. *See id.*

⁵³ *In re: The Barnes Foundation, Appeal of the Barnes Foundation and its trustees4 and Violette de Mazia Trust*, 684 A.2d 123 (Pa. Super. Ct. 1996)

⁵⁴ *See id.* at 126.

⁵⁵ *See id.*

loss in the paintings going on tour while the museum was closed. To add insult to injury of the de Mazia Trust, the Barnes trustees sought removal and surcharge of the de Mazia trustees. The Barnes trustees claimed that Violette de Mazia had removed an unknown number of paintings to her personal residence without anyone knowing and had sold them for a profit of \$8 million. The Barnes trustees claimed she used this money to create her own de Mazia Trust for the purpose of establishing and maintaining “her own authority, dominion and control over the Foundation following her own death, to the detriment of the Foundation.”⁵⁶ The Barnes board claimed that Violette de Mazia had always been against vesting power of the Foundation to Lincoln University.⁵⁷

Finally, the climate became so tumultuous that the Violette de Mazia Trust and the Barnes Foundation jointly sought to terminate their relationship in 1995. The trial court originally denied this petition; however, the Superior Court recognized the “bad marriage” and reversed the decision to permit the separation in 1996.⁵⁸ The de Mazia Trust would give the Barnes Foundation \$2.75 million over the next six years.⁵⁹ The de Mazia Trust would then become a private organization and advance the Barnesian education by making grants to other places besides the Barnes Foundation.⁶⁰ In addition, the court allowed the petition provision: “If the [Barnes] Foundation becomes financially unable to fund the Barnesian Art Education Program as described in the agreement, it could modify the program to the extent necessary to protect and preserve its art collection and its existing facilities.”⁶¹ This was a huge concession to the Barnes Foundation because it set the precedent that the Barnes was more important as a

⁵⁶ *Id.* at 127

⁵⁷ *See id.*

⁵⁸ *See id.* at 136.

⁵⁹ *See id.* at 129.

⁶⁰ *See id.* at 136.

⁶¹ *Id.* at 128.

museum than an educational institution. As a result of this separation, both parties agreed to cease litigation and the de Mazia Trust waived all future standing to oppose the Barnes's petitions.⁶²

Please note that the above is a summary based on struggles that Barnes had with private support groups of the Barnes. I have not begun to discuss the legal issues in the Barnes's petition. This is evidence of how much litigation the Barnes Foundation was involved with. As for the traveling show, the tour would take place during the Barnes's renovations, so there would be little disruption in the exhibits. The Deputy State Attorney General, Lawrence Barth, supported the tour, but wanted the museums to provide a written confirmation that the art was physically able to travel. This stipulation was in response to satisfy the de Mazia Trust, alumni, and students who had expressed concern that the tour would damage the art and its educational program.⁶³ There was a later petition to the Court to extend the tour to Germany as well. The Court again allowed this deviation. The judge assumed Dr. Barnes would have known that someday there would need to be renovations to the building, and to deny the Foundation a chance to earn an additional \$2.5 million would be a "travesty."⁶⁴

The change in investment of certain funds and the increase in admissions were allowed by the trial court and did not involve much battle. Because of developments in economic theory, the prudent investor standard almost requires there to be a change in investment strategy in order for the board of trustees to follow their fiduciary duties. In the 19th and early 20th century, it was

⁶² *See id.* Note that the Attorney General supported this separation. The Students of the Barnes did not support it; however, the court found that they did not have standing on this particular issue.

⁶³ MEYERS, *supra* note 31, 327.

⁶⁴ *Id.* Architect Robert Venturi worked on the renovations. Venturi was obligated to respect the Foundation's requirement that the gallery remain the same visually, but needed to update it with environmental, fire, safety, and accessibility, and lighting standards. Venturi "always considers it a compliment 'when people ask where has all the money gone.'" *See* MEYERS, *supra* note 31, 339-341. Note also that Section 16 of Article IX of the Barnes by-laws provided that "all of the buildings and improvements of Donee shall at all times be kept in first-class order and repair." The judge did not need to assume Barnes would allow for renovations; Barnes required it.

quite common for donors to leave specified investment options in their wills.⁶⁵ The rate of inflation was not as much of a problem and stocks were not as regulated.⁶⁶ Investing in government bonds was considered smart for the time. In today's world, it is accepted that having a diversified portfolio of stock investments is the most prudent and sure way to make money from investments. Inflation made an increase in the admission fee to \$5 acceptable as well.

The society functions and increase in operating hours proved to be more of a problem. The trial court denied both requests. The Superior Court reversed the society functions decision and permitted the Barnes to hold functions so long as they were for fundraising purposes.⁶⁷ The court decided this based on the theory of *ejusdem generis*. This theory says that when general words are combined with narrow meaning words, the interpretation of the general words will be limited to those narrow meaning words specifically listed.⁶⁸ Thus, the private affairs that are excluded are "receptions, tea parties, dinners, banquets, dances and musicals." Fundraising affairs are different from private social affairs that have at their core "the exclusion of many."⁶⁹ Fundraising functions are for the purpose of preserving and enriching the assets of the Foundation.⁷⁰

In my opinion, this is a bit of a stretch. Often development directors try to appeal to potential donors by creating an atmosphere of exclusivity at the fundraising functions. There is something seductive about going to a private affair, off hours, in the atmosphere of a beautiful museum. This seduction and feeling of importance often incites potential donors to empty their

⁶⁵ Robert Sitkoff, Lecture at Harvard Law School Trusts & Estates Class (Apr. 9, 2007)

⁶⁶ *Id.*

⁶⁷ See *In re: The Barnes Foundation, Appeal of Barnes Foundation and Its Trustees*, 683 A.2d 894, 898 (Pa. Super. Ct. 1996). In order to emphasize the amount of litigation, it should be noted that while this appeals case was in session, there was another petition in another court trying to release restrictions Judge Stefan had placed on the money the Foundation received from the tour of the Barnes Collection.

⁶⁸ See *id.* at 250-251.

⁶⁹ *Id.*

⁷⁰ See *id.*

pockets. Is there really that much difference between a fundraising affair full of rich people and a private affair full of rich people? In fact, two weeks after the Barnes was permitted to deviate with social affairs, Glanton organized a “fundraising event” as an opening night gala for the Pennsylvania Ballet. Large corporate sponsors were allowed to bring ten guests each to the Barnes event before the ballet. There was an AG investigation and the Pennsylvania courts found the Foundation to be in contempt, as this was exactly the type of undemocratic social event Barnes did not want.⁷¹

The Superior Court decided that the Barnes Foundation did not prove that it had to be open more days to the public than currently allowed. There was not enough evidence of the financial difficulty and it was unreliable.⁷² The accounting statements submitted to the Court had several contingencies because of the multiple lawsuits in session, making them somewhat undependable under generally accepted accounting principles.

The Superior Court claimed it their duty to look back into the mind of Dr. Barnes, the settlor of the trust, and “determine what he would have done when faced with conditions which were unanticipated at the time of the creation of the trust and nearly as possible to fulfill the intention of the conveyor.”⁷³ If the court “blindly adhered” to the trust, the Foundation would lose its tax-exempt status and the paintings would be “sold off or assigned to some other institution which would not respect the wishes of Dr. Barnes and might in fact be the very institutions he had strongly opposed during his lifetime.”⁷⁴ One can assume the institutions the judge is referencing are those such as the Philadelphia Museum of Art.

⁷¹ MEYERS, *supra* note 31, 355.

⁷² *See In re: The Barnes Foundation, Appeal of Barnes Foundation and Its Trustees*, 683 A.2d 894, 900 (Pa. Super. Ct. 1996).

⁷³ *In re: The Barnes Foundation, Appeal of Barnes Foundation and Its Trustees*, 672 A.2d 1364, 1366 (Pa. Super. Ct. 1996).

⁷⁴ *Id.* at 1367.

The most recent, and possibly the most drastic, of all the Barnes's legal battles occurred in 2004. The Barnes Foundation petitioned what was unthinkable to most people. The Barnes Foundation wanted to move to Center City in Philadelphia and increase the size of its board so that Lincoln University no longer would have majority control. These two changes were mandatory conditions in order for the Barnes Foundation to receive a \$150 million promised fundraising donation from the Pew Charitable Trusts, the Annenberg Foundation, and the Lenfest Foundation. These are three local Philadelphia powerhouse grantmaking foundations.

There was an initial hearing and the court decided that it was acceptable to increase the size of the board considering this is a fairly regular technique of charitable fundraising.⁷⁵ The court required an additional hearing so that the Foundation could provide further evidence that the move to Philadelphia was the least drastic change that would accomplish the original intent of Dr. Barnes.⁷⁶ The Court would base its decision on the answers to three questions:

- “1. Can the foundation raise enough money through the sale of its non-gallery asset 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?”⁷⁷

The court considered this a request of deviation because it did not believe the gallery's location in Merion was “sacrosanct” and thus not a fundamental purpose requiring the cy pres doctrine.⁷⁸

The court believed that the fundamental purpose is the continuation of the educational program and the Foundation was not petitioning to change the educational components. The court had

⁷⁵ See *In re the Barnes Foundation*, 69 Pa. D. & C. 4th 129, 131 (2004).

⁷⁶ See *id.*

⁷⁷ *Id.* at 131.

⁷⁸ *Id.* at 130.

1200 pages of testimony over six days. The end result deleted all of sections 21 through 25 and 37 as well as several other sections profoundly amended. The following shows how each of the three determining questions were answered by the court:

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

The court first concluded that there were not ethical limitations on the sale of the Foundation's assets. The court accepted the testimony of Marie Malero that it would be illogical to hold the Foundation to the deaccession standards of the Association of Art Museum Directors and the American Association of Museums when the Foundation does not belong to either of these associations.⁷⁹ The Foundation is an educational institution, not a museum, and thus does not have the deaccessioning ethical standards.

However, the ethics are only one part of the first question. The other part of the question is whether or not the sale of disposable assets would be enough to save the Foundation. The non-gallery assets consist of Ker-Feal (137 acres of farm land in Chester County), the objects in Ker-Feal, artwork hanging in the administration building in Merion, Mrs. Barnes's items, Oriental rugs, household objects, decorative arts, and Renoir ceramics. There were several various appraisal opinions, but the court settled with the figure of \$20 million as a reasonable expectation of sale proceeds. The court states that "history and the evidence presented at these hearings showed this amount would not halt the foundation's downward financial spiral."⁸⁰ The Court also states that an increase in fundraising efforts will not make a difference as it believes the board's testimony that it has been turned down by any donors with deep enough pockets to help the Foundation. Director Kimberly Camp testified that she could not believe the difficulty

⁷⁹ See *id.* at 166.

⁸⁰ See *id.* at 168.

in raising money—she assumed that there was still public resentment against the founder Dr. Barnes and now the former Trustee Glanton.⁸¹

One has to wonder if the court should have insisted the Foundation continue with its fundraising efforts in combination with selling the non-gallery assets. There should be a multiplier effect with the Barnes having more money. It should be easier to stimulate donations if the Foundation had some stability and financial foundation of its own. By the Foundation's own testimony of John L. Callahan Jr., a board development and fundraising consultant, "success breeds success" and "potential donors are attracted to organizations that are perceived to be thriving, not to ones thought to be foundering."⁸² Callahan was talking about the importance of having "alpha donors" attracting other donors; however, these statements hold true if the money were to come from the sale of non-gallery assets attracting other donors.

There is also some consideration in this section of the Barnes and Merion's unworkable relationship. The Lower Merion Township passed a resolution stating that it did not want the Foundation to leave; however, the Foundation has not been receptive. The court cannot force the two parties to work and the court doubts that a mutually agreeable solution can be worked.⁸³

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

The Foundation hired Harry Perks who worked with capital programs in the Philadelphia area, such as the Kimmel Center and the Academy of Music's renovations. Perks testified that the construction costs should remain under \$100 million and the court saw no reason to disbelieve him.

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

⁸¹ ANDERSON, *supra* note 19, 216.

⁸² *Id.* at 148.

⁸³ *See id.* at 169.

horticulture program and Ker-Feal, the Chester County farmhouse on 137 + acres, operating as a living museum—feasible?

The Foundation provided the testimony of Matthew Schwenderman from Deloitte Consulting who gave an in-depth analysis on the probable expenses and revenue that would come from the move to the city. The analysis assumed that there would be increased revenue from more visitors, especially at the beginning when interest would be piqued. The gallery would be more accessible as it would be in the middle of a populated city which is clearly easier for tourists. In addition, the Foundation would not have to make any special accommodations for large tour buses or have to worry about parking availability as it did in Merion.

While revenues would likely increase, so would expenses. Wages would have to be higher; security costs would increase. Both experts agreed that the target levels and the campaign could succeed. They emphasized that the board and staff “will have to act quickly, to work assiduously, and to be dedicated absolutely.”⁸⁴

This three campus approach makes little sense to me. If the Foundation is to retain the Merion buildings and have to pay for the upkeep, why can't the Foundation continue to house its collection there? Why pay the additional costs of security and salaries to have the gallery in Philadelphia? Clearly, the answer lies in the fact that Annenberg, Pew, and Lenfest will only grant the \$50 million endowment and \$100 million structure if the Barnes moves to Philadelphia. One wonders why the move to Philadelphia has to be a requirement. It seems a complete waste of \$100 million to build this unnecessary structure in Philadelphia. This is \$100 million diverted from other charities in need of grants from Annenberg, Pew, and Lenfest. In addition, it should not be forgotten that the Barnes arrived at its current financial difficulty because of 1) all the lawsuits and 2) the \$12 million renovations in making the Merion gallery a first rate museum.

⁸⁴ *Id.* at 170.

The court even admits that the Merion building is “perhaps the most expensive administration building in the history of non-profits.”⁸⁵ Not only is the \$100 million wasted, but so is the \$12 million in renovations.

Increased public access seems to be the ultimate goal of Annenberg, Pew, and Lenfest. A group statement of the three charities claims how pleased they are with the court’s decision and how this would create a reality where more people could have access to art education.⁸⁶ While access is an important value, does diversity of educational environments matter? Does staying true to donor intent and having the freedom to divest money however an individual wants matter?

This is not the first time the Annenberg, Pew, and Lenfest Foundations have come together to make a group donation. These three powerhouses have made several million dollar group donations to Philadelphia charities. The three have stood together to retain *The Gross Clinic* in Philadelphia and pooled their resources to create challenge grants for the Regional Performing Arts Center.⁸⁷ While these partnerships are fabulously effective, one may have a concern that they are *too* effective. Are these three the end all/be all for any charity in the Philadelphia region? Any charity that has a policy or purpose that is agreeable to these three foundations is bound to succeed. Will this flood the Philadelphia non-profit market with mini-Annenbergs, mini-Pews, and mini-Lenfests?

⁸⁵ *Id.* at 172.

⁸⁶ See Statement from Annenberg Foundation, The Lenfest Foundation and The Pew Charitable Trusts Regarding The Barnes Foundation, available at: http://www.annenbergfoundation.org/news/news_show.htm?doc_id=252864.

⁸⁷ See Philadelphia Leaders and Broad Public Unite to Secure Thomas Eakins's "The Gross Clinic" for Philadelphia, available at: www.annenbergfoundation.org/news/news_show.htm?doc_id=436304 and Pew Trusts, Lenfest and Annenberg Foundations Offer Financial Incentives to RPAC, Performing Companies, Academy of Music, available at: http://www.pewtrusts.org/ideas/ideas_item.cfm?content_item_id=767&content_type_id=16&issue_name=Cultural%20policy&issue=20&page=16&name=Pew%20Press%20Releases.

When the three of these foundations partner, they can take over and control any charity's board if desired. Dr. Watson, current president of the Barnes's board of trustees, claims that these proposed changes are not a "takeover of the foundation's board."⁸⁸ Even if this was not a calculating, intentional takeover, it was a takeover all the same. The governing board has completely changed. Seeing how ineffective the past board was, however, it may be a good thing to have a more diverse and numerous board.

Terra Foundation for American Art—Terra Museum of American Art

It is not every day that a museum closes shop, but this is what happened to the Terra Museum in Chicago. Daniel Terra, an inventor and later political figure, focused primarily on 19th and early 20th century American paintings. Daniel Terra was a son of an Italian immigrant and believed in the American Dream. Daniel Terra started the Terra Foundation in 1978 with a mission "to promote a greater understanding and appreciation of the country's rich artistic and cultural heritage through the acquisition, preservation, exhibition, interpretation, research, and scholarship of works of American art."⁸⁹ In order to better realize that dream, Daniel Terra opened a museum in downtown Chicago in 1987. It has been reported that he originally wanted to leave his collection to a large museum with the conditions that his collection remain intact and the majority on display.⁹⁰ Because no museums accepted these terms, Terra opened his own museum.⁹¹ He opened a museum in Giverny, France, in 1992, discussed in Part II. These two museums were left with a \$420 million endowment when Daniel Terra passed away in 1996. Thus, the museum's closing cannot be blamed on inadequate funds.

⁸⁸ *In re the Barnes Foundation*, 69 Pa. D. & C. 4th 129 (2004), 161.

⁸⁹ Terra Museum website, available at: <http://www.terraamericanart.org/about/index.asp?key=14>.

⁹⁰ See Michael Kilian, *The \$400 Million Question; With its Wealth Founder Gone, What is the Terra Museum Doing With All that Cash?* Chicago Tribune, Oct. 20, 1998 at C1.

⁹¹ See *id.*

What is interesting is that the Museum itself dissolved; however, the Foundation is still ongoing. It was not a dissolution of the charitable organization, but rather a deviation. Terra focused the mission on American art; however, he only left general instructions. This gave the board the freedom to adapt and change. However, the board may have been given too much freedom, and as a result there were internal disputes on how the museum was to work.

There was a dispute over the vision of the museum. The Chicago Terra Museum began exhibiting modern and contemporary American art, while Terra had never shown any interest in art post-WWII.⁹² He was known for his collection of American Impressionists, not avant-garde contemporary art. However, there were no restrictions on what type of American art the Terra Foundation was to maintain or study. There were disputes over what Terra would have wanted and whether the museum should evolve based on Terra's tastes or America's tastes. Because Terra did not leave restrictions on the time period of American art, the board would never have to receive court approval, but rather argue among themselves.

The museum not only struggled in identity, but in leadership as well. Terra's Chicago museum had five different directors in eleven years.⁹³ The Foundation refused to renew the contract of the director of the Giverny Museum hand-picked by the founder. The director sued the Foundation for unjust dismissal.

Another problem that existed for the Foundation was its investment strategy. While the Foundation did have a tremendous amount of money, the Foundation could only spend "income" from its endowment funds. As there is no definition of "income" under Illinois law, the Foundation spent proceeds from the interest on bonds. When interest rates fell, so did the

⁹² *See id.*

⁹³ *See id.* .

Foundation's income.⁹⁴ The chief financial officer explained that the endowment went down from \$450 million in the late 90s to \$180 million in 2003 because of the legal fees that were accrued and poor performance from stock investments, so the endowment itself was shrinking.⁹⁵ By 2004, the board was petitioning the court to allow it to be more aggressive in how it invests.⁹⁶

The biggest internal strife, and the reason for the accrual of huge legal fees, had to do with whether the museum would move (sound familiar to the Barnes?). Terra's wife, Judith, insisted that Terra intended to have his presence felt in Washington, D.C. Many on the board believed there was a conflict of interest and Mrs. Terra was only trying to move the art to Washington so she could join the cultural elite circles of the city in which she lived.⁹⁷ The Illinois Attorney General's Office became involved in the fight to keep the collection in Chicago. Several board members brought suit against Judith Terra and two of "her" board members for mismanaging the Foundation's funds in order to justify the move to Washington, D.C.⁹⁸ This legal battle started in September 2000.

It did not help Judith's case when the Illinois Attorney General brought up allegations that Judith kept her 85-year-old husband on life support for several days after his heart attack on June 22, 1996 in order to allow her to collect an additional \$1.5 million under the prenuptial agreement.⁹⁹ She waited until a few minutes after midnight on June 28, the couple's ten-year anniversary, to turn off the life support.¹⁰⁰ Under the prenuptial agreement, Judith received \$3 million if their marriage was less than ten years and \$4.5 million if the marriage lasted longer than ten years. The marriage officially lasted ten years and minutes. This additional \$1.5

⁹⁴ See Jim Kirk, *Terra Seeks More Investment Flexibility*, Chicago Tribune, June 13, 2004 at C2.

⁹⁵ See Lisa Stein, *There's No Clear Picture for Terra's Future*, Chicago Tribune, Mar. 16, 2003 at C3.

⁹⁶ See Kirk, *supra* note 91.

⁹⁷ See Robert Becker, *Lawsuit Seeks to Bar Terra Museum Move*, Chicago Tribune Sept. 23, 2000 at N1.

⁹⁸ See Kilian, *supra* note 87.

⁹⁹ See John Yates and Robert Becker, *Terra Fight Turns to Battle over Widow's Motives*, Chicago Tribune, Oct. 8, 2000 at C1.

¹⁰⁰ See *id.*

million to Judith meant \$1.5 million less for the Foundation, hence, the reason why the Attorney General became involved.

Judith insisted that Daniel Terra was not happy with the attendance numbers and thought the Chicago museum was not doing well. It is true that the attendance numbers were not inspirational. There was much talk that the building did not look inviting from the outside.¹⁰¹ Some thought the location was more for shopping than art appreciation, and the public often confused it with a store.¹⁰² The board members who brought suit against Judith believed this was cause to move to another building in Chicago, not another city. Daniel Terra, entrepreneur, chose the location of the museum on a busy commercial strip, Magnificent Mile, because he wanted the museum to have financial support from renting out museum space to stores.¹⁰³ However, this left little space for museum purposes, including exhibition space, coat racks, restaurants, or an auditorium.

There was much back-and-forth about whether Terra wanted to move the museum. The fact is, the Foundation documents are silent as to the location. The son of Daniel Terra brought his own legal suit to amend the documents to keep the Foundation and museum in Chicago.¹⁰⁴ The AG believed that the physical location of the museum while Terra was alive was evidence of his intent to keep the artwork within Illinois. Documents, verified by the Attorney General's Office, came out that in 1990, Terra prepared a 17-page report for the annual board meeting that discussed costs, attendance, difficulty in small museums attracting traveling exhibitions, and a growing lack of interest among younger viewers for historical American art. Terra then proposed six alternative options:

¹⁰¹ See Alan G. Artner, *The Terra is Small, but It's Ours*, Chicago Tribune, Oct. 1, 2000 at C9.

¹⁰² *See id.*

¹⁰³ *See* Kilian, *supra* note 87.

¹⁰⁴ *See* Alan G. Artner, *Terra Founder's Deeds May Not Reflect Desires*, Chicago Tribune, Feb. 25, 2001 at C1.

1. Embark on a campaign to raise a certain amount of money, perhaps \$20 million for an endowment.
2. Deaccession one or several of the important paintings owned by the Museum, beginning with Mary Cassatt's "Summertime."
3. Terra could, while alive, continue to make contributions to cover the deficits.
4. Increase the fiscal 1991 budget by \$300,000 to encourage the organization of important American exhibitions at other museums nationwide.
5. Sell the North Michigan Avenue real estate and move the Museum to the original Evanston location or to a new, centrally located site.
6. Close the North Michigan Avenue Museum, sell the real estate and use the foundation with assets in the \$70 million range--assuming the paintings owned by the museum would be retained--for undergraduate scholarships and graduate fellowships for American art, help fund much needed archives of American art and support national and international exhibitions of American art."¹⁰⁵

The parties were required to mediate, and eventually there was talk of a negotiation settlement. Even before the settlement was finalized, Judith Terra voiced her disappointment and her plan to appeal.¹⁰⁶ She believed the Attorney General was using intimidation tactics in order to gain support by some of the undecided board members.¹⁰⁷

The settlement was that the Terra Foundation was to remain in Illinois for at least 50 years, and while the collection was to be based in Illinois, it could be lent to other institutions. Fifty paintings and 350 works on paper would be on long-term loan to the Art Institute of Chicago. The loan would be for 15 years, but flexible, so that the Terra Foundation could loan works to exhibitions at other museums. The remaining 300 works would be in storage or in the remaining Terra Museum in Giverny. The agreement also required all current board members to step down the following year.¹⁰⁸ The board wanted this flexibility so that the Foundation could adapt to "different tastes; different curators" and allow the Foundation to buy more works.¹⁰⁹ The director of the Terra museum explained that the Terra Foundation is "in evolution," and that

¹⁰⁵ *Id.*

¹⁰⁶ See John Yates, *Terra Wants Museum Accord Voided*, Chicago Tribune, July 24, 2001 at N2.

¹⁰⁷ See *id.*

¹⁰⁸ See John Yates, *Judge to OK Museum Accor*, Chicago Tribune July 25, 2001 at N-1.

¹⁰⁹ Alan G. Artner and Charles Storch, *Terra's Closure Fast Approaching*, Chicago Tribune, Oct. 17, 2004 at C3.

while they were closing the museum, they would still be interactive with the public.¹¹⁰ Closing the museum would allow the Foundation to spend more resources on research and educational programs.¹¹¹

The director and president of the Art Institute of Chicago tried to reassure the public by stating that this was something Daniel Terra had discussed with him several times before his death. He thinks the loan to the Institute would please Terra because this will make the Institute's American art collection one of the tops in the country.¹¹² The paintings will be fully integrated and spread throughout the galleries with wall labels and text panels designating the loan from the Terra Foundation.¹¹³

The board believed funding research and educational programs would better advance Terra's core mission--disseminating appreciation of American art--than a museum would. The frustrations of the board are understandable. Attendance records were low and they were constantly fighting legal battles over the museum. These frustrations might lead anyone to throw up their hands and redirect the Foundation's funds.

In my opinion, these struggles are worth the maintenance of the museum. Too often these jewel box museums are lost to the mega-museums. It is similar to the complaints of the small bookstores being lost to the Borders and Barnes & Nobles of the world. The little coffee shops can't compete with Starbucks. However, I argue that nonprofit institutions which have a charitable purpose are different from commercial enterprises in that they have an obligation to provide different educational environments. The mega-museums become too "mega." The majority of the collection is in storage. Visitors are too overwhelmed at the large museums and

¹¹⁰ *See id.*

¹¹¹ See Charles Storch and John Yaqtas, *Terra Giving Up, Closing Doors in '04*, Chicago Tribune, June 21, 2003 at C1.

¹¹² *See id.*

¹¹³ *See id.*

they lose their focus and interest quickly. Serious observation or reading of labels is too laborious when a visitor is faced with thousands of paintings. The smaller jewel box museums can focus on a specific period or a specific collection. There is not such an overwhelming feeling. The number of visitors is not necessarily evidence of public value. The value of the educational experience itself is paramount.

One notices that much time and effort is spent looking at what Terra intended and how Terra supervised his foundation. One would think that this analysis might fit more neatly in the donor control section to follow. However, analysis of donor intent is essential in any deviation or cy pres proceeding. Knowing how a donor would have controlled the museum if he had known about changed circumstances is the key in having a deviation approved by a court.

Part IV: Donor Control

This section compares single donor museums with the standard large public museums. I reference the term “mega-museums.” Examples of mega-museums would be the Metropolitan Museum of Art, the Art Institute of Chicago, the Philadelphia Museum of Art, the Museum of Modern Art, the Smithsonian. There is usually one central museum in any large city, and I would consider this a mega-museum. Mega-museums cover all periods of art. They are the physical manifestations of Introduction to Art History 101.

I want to focus on whether a donor should contribute his art to a mega-museum or start his own museum if given the choice. There are obvious limitations to this selection, money being the first one. Opening a museum requires millions of dollars--starting an endowment, building or buying a structure, staff salaries, environment control, security. Very few collectors are fortunate enough to have the option of starting their own museum.

One would assume that a donor starting his own museum would give the donor more control. While it is certain that a donor can easily assert influence when starting his own museum, do not dismiss the fact that a donor can have control and influence at already established museums. It may be harder for a donor to exert influence at an already established museum and the donor's gift must usually be exceptional in order for an established museum to compromise its control, but it does certainly happen.

Large donations with strict stipulations to mega-museums usually have much more controversy surrounding them. When a donor sets up his own museum with certain stipulations, the public finds the donor quirky; it may even complain about the stipulations, but ultimately the public usually adheres to the belief that the donor can be as quirky as he wants—it's his money (even though when incorporated as a 501(c)(3) it becomes the public trust's money). When a donor makes stipulations to an already established museum, the public is usually upset. The public museum's first duty is to serve the public, not the interests of the donor. The museum staff themselves ultimately get upset with having to cede control to the donor. Curators especially. When I presented for part of a workshop at Brown University's John Nicholas Brown Center, several curators and humanities fellows were adamant about not ceding any control to donors. Donations that required keeping a donation in a museum's collection in perpetuity was considered an automatic "deal-breaker." Naming opportunities were quickly frowned upon. While I assume this hard-line approach may ease when curators are approached with an especially important donation, it was surprising how opposed they are.

One example is the Reynolds controversy at the Smithsonian's National Museum of American History. In 2001, Catherine Reynolds offered the Smithsonian \$38 million for a "Hall of Achievement," an exhibit that would showcase the life stories of Nobel Prize winners and

important American achievers. The catch was that Mrs. Reynolds wanted to have some part in the decision making process of who exactly would be in this exhibit. In the gift agreement, the Reynolds' Foundation would assemble a selection panel that would give the Smithsonian curators a list of nominees.¹¹⁴ The Smithsonian curators would have final say; however, the Reynolds' Foundation would be in charge of the initial screening process. Curators were furious about this and eventually Mrs. Reynolds withdrew her gift.

The National Museum of American History had a similar controversy with Kenneth Behring's \$80 million gift with several strings attached. In fact, the official name of the museum is the "Smithsonian National Museum of American History Kenneth E. Behring Center." Corporate sponsorships are another problem, such as when General Motors sponsored the American History Museum's "America on the Move" exhibit. Corporate sponsorship is outside the realm of individual donors, but it is the same problem with public perception of donors having too much control over a public museum. The Smithsonian became so concerned about its public image that they put together a blue-ribbon Smithsonian commission to study the controversy over wealthy donors' attempts to take control of exhibitions.¹¹⁵ The Commission recommended that the curators retain full control and decide the form and content before seeking donations for individual exhibitions.¹¹⁶

Another example of donor controversy is the Dallas Museum of Art and the Reves Collection. This donation took place in 1985 when Wendy Reves donated her entire 1,466 piece collection which included several famous Impressionist painters. The donation was valued somewhere between \$30 and \$40 million. This one donation doubled the value of the Dallas Museum of Art's entire collection. However, there was one non-negotiable condition. The

¹¹⁴ See Michael Kilian, *Smithsonian Lost Public Trust Over Donor Flap*, Chicago Tribune, May 8, 2002 at N20.

¹¹⁵ See *id.*

¹¹⁶ See *id.*

museum had to recreate the Reves' French Riviera villa (La Pausa) that originally housed the collection. The museum spent \$6 million recreating the six rooms. Critics grumbled that it was hard to study the great paintings because there was so much clutter, and they were annoyed at the small touches having nothing to do with art appreciation, such as Mrs. Reves' slippers at the side of her bed.¹¹⁷

What may be most disagreeable about the presentation is the glass barriers that prevent the visitors from actually entering the rooms, so there is no way the audience can get close to study the paintings. The curators do not have the ability to display the art to show relationships in styles or chronology. There was a one-time special exhibition for three months when the curators could display the art in the actual galleries. The local newspapers advertised that the readers should not "miss this rare opportunity to see what you've been missing."¹¹⁸

The museum has no regrets about agreeing to the terms. The Villa La Pausa does itself have some historical value. It was originally built in 1927, overlooking Monte Carlo, to house the Duke of Westminster and his French mistress—Coco Chanel. Henry S. Parker III, director of the museum during the time of the Reves' donation, emphasized that villa recreation is "especially unusual in Dallas where we don't have great homes of the past like the Gould and Vanderbilt estates in the East that are open and can be visited."¹¹⁹ The curators believed that people would like to see the art in the cozy setting and would even be interested in the interior decoration itself.¹²⁰ Mrs. Reves explained that the art could never be separated from the house because the sole purpose of the art was to make her home beautiful.¹²¹ She was even bold

¹¹⁷ See Clifford Pugh, *Dallas: Where 'Wretched Excess Reigns'*, The Houston Chronicle, July 25, 1999 at Travel2.

¹¹⁸ Janet Kutner, *Renoir, Cezanne: Up Close and Personal*, Dallas Morning News, Nov. 3, 1995.

¹¹⁹ Frederick M. Winship, *Dallas Museum in Home Setting*, United Press International, Nov. 30, 1985.

¹²⁰ *See id.*

¹²¹ *See id.*

enough to say, “A tremendous art collection like ours doesn’t deserve to be mixed with others.”¹²²

The Barnes Foundation

As one can see, retaining donor control with a gift to an already established public museum is bound to have public criticism. However, the Barnes Foundation is also fraught with criticism. Barnes strictly controlled public access, salaries, functions, and investments. In 1988, when Lincoln University gained the majority of the Board of the Barnes Foundation, the trustees made it very clear that this should not be seen as Lincoln University controlling the Barnes.¹²³ The University was “obligated to carry out the objectives of the Barnes Foundation as elaborated in the Indenture” and they could have no direct authority or influence over the policies of the Foundation.¹²⁴

Barnes kept a tight leash over the Foundation. The Articles of the Foundation stated that during his lifetime, Barnes could buy, sell, and rearrange as many paintings as he wanted. It was his educational experiment. After his death, nothing could be touched. His control would forever be seen. His grudges against Penn, Bryn Mawr, Haverford, the PMA, and others would be forever in stone; that is, until it was deemed impossible to remain true to these stipulations and the Foundation received a court approved deviation.

However, one should note that the public controversy over the Barnes has not been--how dare Dr. Barnes start a foundation with all these stipulations! The controversy was based more on whether the Barnes Foundation could financially survive with the restrictions placed upon it.

¹²² Julie Vorman, *Texas Museums Battle for Flashiest Collection*, Chicago Tribune, Dec. 15, 1985 at C24.

¹²³ *See id.*

¹²⁴ *Id.*

It is not the same condemnation that the National Museum of American History and the Dallas Museum of Art were faced with when given large donations with stipulations.

As several others concluded, the Barnes Foundation was faced with the combined problems of expensive litigation, not enough of an endowment, and general mismanagement. No one has argued that the Barnes Foundation has failed as an idea. Its collection is lauded and its individuality is refreshing. No one seems to mind that the collection remains the same. No one seems to mind that the Barnes Foundation holds classes based on the Barnesian method. The Barnes failed due to the financial mismanagement.

Isabella Stewart Gardner Museum

After looking at the Barnes, one has to wonder how the Barnes “failed” and the Gardner Museum has been able to stay afloat. The endowment Gardner left was even less than what Barnes left. How did the Barnes run through the endowment so quickly while the Gardner appears to be a success story?

Mrs. Gardner did indeed have suggestions for how to run the museum. She wanted two women to live in the house on “board wages” and be responsible for the cleaning and be constantly on hand. There was supposed to be one day and one night watchman who would also attend to the furnace. She began to realize that she had so many restrictions for the museum that she needed a lawyer to make them eternally binding.¹²⁵ Her biggest restriction was that none of the artwork was to be moved or changed after her death.¹²⁶ This restriction was challenged when

¹²⁵ THARP, *supra* note 21, 312.

¹²⁶ “If at any time the Trustees shall place for exhibition in the Museum established under this will any pictures or works of art other than such as I own or have contracted for at my death, or if they shall at any time change the general disposition or arrangement of any articles which shall have been placed in the first, second, or third stories of said Museum at my death, except in the kitchen and adjoining bedrooms on the first floor, then I give the said land, Museum, pictures, statuary, works of art and bric-a-brac, furniture, books and papers and the said trust fund, to

there was a robbery of twelve paintings from the museum in March 1990. The museum decided to keep the frames empty and not rearrange the paintings to replace the stolen paintings.

Mrs. Gardner knew that she was defying traditional museum convention because she chose not to hang her paintings at eye level.¹²⁷ Mrs. Gardner could care less because she wanted this museum to reflect her joy and her pleasure.¹²⁸ In fact, the motto of her museum is “C’est mon plaisir” (“It is my pleasure”) and is inscribed in stone above the entrance as well as on the official seal of the museum. The phoenix is also part of the museum’s seal as a symbol of immortality. Her personal tastes would always be reflected in her museum and this is how Mrs. Gardner would remain immortal. This is how Mrs. Gardner kept her control over the museum.

One important fact to note is that Mrs. Gardner stipulated that the collection would go to Harvard to sell if any of the works were to be moved. Harvard would not own the artwork, but rather sell the paintings and keep the profits. Professor Sitkoff, visiting professor at Harvard Law School, theorizes that leaving another specified charitable institution as a watchdog is a smart move because charities are more reliable than the Attorney General’s office in oversight.¹²⁹ The remainder charity directly gains from another charity’s loss, so there is more incentive to provide effective oversight. This brings a form of sophistication to your charitable trust as you know your wishes have a better chance of being followed.¹³⁰ While Barnes did have an article for dissolution, it is seemingly the one area where Barnes was not specific. Barnes does not specify a remainder charity, but rather says the funds should go to some charity close to his intent in the Philadelphia area. The Barnes did have groups such as the Alumni and Students

the President and Fellows of Harvard College in trust to sell and to procure the dissolution of the Museum.” Cited in THARP, *supra* note 21, 312.

¹²⁷ See DOUGLASS SHAND-TUCCI, *THE ART OF SCANDAL* 214 (Harper Collins Publishers, Inc. 1997).

¹²⁸ *See id.*

¹²⁹ Robert Sitkoff, Lecture at Harvard Law School Trusts & Estates Class (Apr. 3, 2007).

¹³⁰ *Id.*

watching over the board, but these are not as effective (either because of lack of standing or organizational power) as another established charity looking over the board's shoulder.

The first Annual Report of the Gardner Museum explains that Mrs. Gardner "left minute instructions as to the arrangement of the collections, and the duties and powers of the director whom she had chosen"; however the board's "powers and discretions are broad."¹³¹ Mrs. Gardner was only stringent with certain terms in her trust, not all terms. She declared her friend, Morris Carter, to be director of the museum and groomed him for the position. She gave him the power to "make suitable rules for the conduct of the employees and visitors...[and] the sole power of appointing and dismissing subordinate officers and employees."¹³² She named the founding trustees, and these trustees met on October 6, 1924 to establish the officers and the annual board meeting schedule.¹³³ For decades the annual reports always included the incorporating documents of the Isabella Stewart Gardner Museum at the beginning of the report to serve as a reminder of the museum's purposes and founder. The Executive Committee had full discretion over financial investments and accounted for them in the Treasurer's report.¹³⁴

Mrs. Gardner did contract to have a memorial service on her birthday, April 14th, every year in perpetuity, which continues to this day.¹³⁵ The flowers and musical concerts were not required in Mrs. Gardner's museums; however, the museum has decided to take them on as a continued tradition.¹³⁶

The J. Paul Getty Trust

¹³¹ Isabella Stewart Gardner Museum First Annual Report 17 and 24 (1925).

¹³² THARP, *supra* note 21, 313.

¹³³ *See* Isabella Stewart Gardner Museum First Annual Gardner Report 11 (1925).

¹³⁴ *See id.* at 23.

¹³⁵ THARP, *supra* note 21, 313.

¹³⁶ *See* GEORGE L. STOUT, TREASURES FROM THE ISABELLA STEWART GARDNER MUSEUM 38 (Crown Publishers Inc. 1969).

Finally, it should be noted that not all single donor museums are faced with the problems of donor control and the dead hand. For instance, the Getty Trust has almost complete freedom in how it is run as an institution. J. Paul Getty III was interested in art and had a passion for Roman antiquities, but he gave his jewel-box museum the freedom to continue collecting long after his death. Getty, who usually sought absolute control in his business ventures, allowed the board of his museum to spend the money any way they wanted under the broad parameters of spending “for the diffusion of artistic and general knowledge.”¹³⁷

The fortune that Getty left for his museum was immense. Getty left \$662 million in 1976. The endowment has grown to over \$1.26 billion. As it is a private operating foundation, the Getty has a minimum payout requirement under §4942 of the US Tax Code.¹³⁸ The private foundation must pay 5% of its net investments annually or face a penalty tax. This means that the Foundation needs to spend over \$1 million per week in order to avoid a penalty tax. Getty was in the situation where he could have made as many restrictions as he wanted, for so long as the museum qualified as a public charity, it would be hard to imagine the Getty ever running out of money. In fact, there was even talk of “The Getty Factor.”¹³⁹ Some were concerned that the Getty would drive up market prices.

This is not to say that Mr. Getty did not have his own legal battles. Mr. Getty made 21 codicils to his will. These codicils represented the various ups and downs of his life—who he married; who he divorced; which child was in trouble.¹⁴⁰ It was in the 21st codicil, shortly before Getty died, that Getty gave the majority of his money to the Getty museum. The children and

¹³⁷ See J. Paul Getty Trust Indenture, available at: <http://www.getty.edu/about/governance/pdfs/indenture.pdf>.

¹³⁸ See J. Paul Getty Trust’s Form 990-PF, available at: <http://www.getty.edu/about/governance/pdfs/990-2005.pdf>.

¹³⁹ See RUSSELL MILLER, THE HOUSE OF GETTY 315 (Michael Joseph Ltd. 1985).

¹⁴⁰ See *id.* at 304.

grandchildren contested the validity of the final codicil as this meant millions of dollars of difference to them. The codicil was found to be valid and the Getty Villa is a thriving museum.

Conclusion

I started this paper wondering why the Barnes didn't work. Financial issues, legal battles, mismanagement, and tight administrative stipulations all led to the "downfall" of the Barnes. I put "downfall" in quotes because many will argue that the move to Philadelphia is a revitalization of the museum, and that Barnes's education, paintings, and purposes will reach more people with the move to Philadelphia. I argue, however, that something vital is lost when this jewel-box museum becomes one of many along a strip of museums.

Lessons can be learned from the Barnes: Make sure that the endowment matches the value and size of the collection. Try to remain friendly with your neighbors. Make sure your trustees are knowledgeable of the institution's goals. There does not seem to be much difference in the chances of a donor's gift surviving intact whether the donor starts his own museum or contributes to an already established museum. It all depends on the individual circumstances and the stipulations. Clearly, the more stipulations put on a gift, the more likely there will be a need for deviation.

Depending on the donor's goal a single-donor museum may be necessary. The Barnes Foundation was trying to do something unique by creating an educational program with the goal of changing the way people think about art. It would have been difficult for the Barnes collection to survive in an already established museum, even if his personality were different. The Getty and the Terra probably could have latched on to an already established museum.

Their programs could have blended with another museum; however, both had such monstrous sums of money—why not start their own museums?

The Isabella Stewart Gardner Museum is a surviving treasure. It continues to flourish in a fairly saturated museum market. This jewel-box museum is able to stand out and provide visitors with something other Boston museums cannot offer. It is down the street from the Museum of Fine Arts—I wonder if the Gardner Museum foreshadows the future life the Barnes Foundation. I have my doubts, but have hope that I am proven wrong.

Appendix I: Dr. Albert Coombs Barnes

It is impossible to talk about the Barnes Foundation without talking about the founder Dr. Barnes. The personality of the institution and donor are inseparable. Critics say that “the Foundation has never been and will never be considered wholly apart from the personality of its founder. It is easier to deal with personalities than with complex ideas.”¹⁴¹

It remains to be seen whether this will remain true after the move from the original structure in Merion to the larger museum in Philadelphia. The donor’s personal imprint will be less by the very nature of building a large museum on the parkway. Some may argue that this is a good thing. Dr. Barnes has a reputation as a curmudgeon. Reading the biographies of Dr. Barnes is a project in itself. Some of his students and biographers loved him; some compared him with the devil.

As a young child, Barnes grew up the son of a butcher. In his youth, it is said that he was obsessed with African-American culture and would attend camp meetings, baptisms, and revivals.¹⁴² This attraction must have stayed with him and influenced his decision to leave the

¹⁴¹ GILBERT M. CANTOR, *THE BARNES FOUNDATION: REALITY VS. MYTH* 116 (Chilton Company 1963).

¹⁴² See WILLIAM SCHACK, *ART & ARGYROL* 22 (Sagamore Press Inc. 1960).

Foundation in the hands of the Lincoln University trustees. Lincoln University is a historically black college, with distinguished alumni such as Thurgood Marshall. Barnes himself was accepted to Central High School in Philadelphia, a prestigious public school. He obtained his medical degree from the University of Pennsylvania.

Barnes did not remain in the medical profession for long and headed to Europe to travel. It was while in Germany that Barnes met Herman Hille. Hille and Barnes returned to Philadelphia together and created Argyrol, an antiseptic composed of a protein and silver. It seems as if Hille was more responsible for the exact formula and Barnes was more responsible for the business and advertisement.¹⁴³ Instead of registering the formula for Argyrol, Barnes registered the name. Barnes knew that a patent would last for only twenty years and everyone would know the formula. Barnes registered the name and then filed law suits when people sold non-Argyrol substitutes. Argyrol was such a popular antiseptic that it was known by name, and Dr. Barnes would bring a lawsuit if someone sold a non-Argyrol substitute when someone specifically asked for Argyrol. Barnes was winning lawsuits worldwide. Perhaps this is where he got his taste for litigation. In addition, Dr. Barnes bought Hille's formula and legally ended the partnership in 1907.

As for Dr. Barnes's interest in art, it is said that William J. Glackens, an artist and high school friend of Barnes, was his first teacher.¹⁴⁴ Glackens provided advice on some of the first purchases of Barnes, but Glackens and Barnes had nowhere near the same relationship as Behrenson and Gardner did. Barnes actually tried to distance himself from art dealers like Berenson; he only trusted his own judgment.¹⁴⁵ Barnes followed the theories of philosopher and

¹⁴³ LUKACS, *supra* note 2, 263.

¹⁴⁴ See GREENFELD, *supra* note 5, 32.

¹⁴⁵ See *id.* at 38 and 147.

educator John Dewey. Dewey stressed the importance of learning by doing and how education is to help a man “better deal with his environment and the needs of modern society.”¹⁴⁶

Barnes’s first publication was an article in 1915 in *Arts & Decoration* magazine entitled “How to Judge a Painting.” Barnes later went on to write a book, *Art of Painting*. He explored the idea that art is “essentially plastic,” and that it should be removed from the environment. Plastics refer to the form of the art, the color, the physical depiction. Art is “not a literary document or an archaeological specimen” and should not be interpreted as such.¹⁴⁷ He believed in the universality of art and wanted to exclude social factors and biography and focus on the plastics.

The Barnes Foundation was started in 1922 and the galleries opened in 1924. The gallery was designed by Paul Cret. Cret designed 23 exhibition rooms of moderate and varied size to avoid monotony.¹⁴⁸ Barnes told the *Saturday Evening Post* that he paid less than \$5 million for his entire collection. Barnes enjoyed the Depression because he could buy the paintings from the wealthy who were facing hard times.¹⁴⁹

As mentioned earlier, admission to his galleries was extremely limited. However; Barnes’s cruelty went beyond the standard denial language. He would sign denial letters by his dog. Or claim that the date was inconvenient because Barnes was “swallowing goldfish that day.” Or that the debutantes were engaged for a striptease that day. Or that the last woman he let in gave him the clap. When the head of the new Philadelphia Museum of Art asked Barnes to loan some of his work, Barnes responded that the proposal “would make a horse laugh.” This request was “stereotyped blah which comes to us so often from performers who would like to

¹⁴⁶ *Id.* at 55.

¹⁴⁷ GREENFELD, *supra* note 5, 108.

¹⁴⁸ See SCHACK, *supra* note 138, 125.

¹⁴⁹ See ANDERSON, *supra* note 19, 3.

annex us as a sideshow to their circuses.”¹⁵⁰ Barnes would often send copies of his more outrageous denials to private citizens to the newspapers as well.

Barnes seemed to be a very spiteful man. He would often try to partner with other educational institutions, but it was never to his liking either because the students were not up to his standards or there was not enough advertising to the students.¹⁵¹ He explicitly disinherited these institutions in his will from ever serving as trustees. However, Barnes was a generous man to those close to him. He treated his employees like family and often paid their home mortgages.¹⁵² He would make his employees work six hours a day, with a 2 hour lecture on painting and psychology during the lunch hour.¹⁵³ Loyalty was a most important characteristic.¹⁵⁴ Many of Barnes students loved him and were grateful for the unique educational experience.¹⁵⁵

Barnes was happily married to Laura Leighton Leggett. He was originally considering naming the Barnes Foundation property, “Lauraston” as a sign of his devotion.¹⁵⁶ Laura Barnes is the reason behind the arboretum’s presence in the Foundation, as she was an avid horticulturalist.

Appendix II: Isabella Stewart Gardner

Isabella Stewart Gardner was well known for her petite stature but large personality. She was privately educated in New York City. She befriended Julia Gardner at finishing school, and it was through Julia that Isabella met Julia’s brother, Jack Gardner. Jack and Isabella married in

¹⁵⁰ LUKACS, *supra* note 2, 272.

¹⁵¹ *Id.*, at 298.

¹⁵² *Id.* at 294.

¹⁵³ *See id.*

¹⁵⁴ *See id.*

¹⁵⁵ *See* CANTOR, *supra* note 137, 24.

¹⁵⁶ *See* MEYERS, *supra* note 31, 65.

1860. They had a son, Jack Gardner, Jr.; unfortunately, he died less than two years later.¹⁵⁷

Isabella was not able to have any more children after Jack Jr.. It is said that she went into a great depression, and Jack Gardner suggested a trip to Europe to cheer her up.¹⁵⁸ It was through these travels that her obsession with art started.

During the 1880s, Mrs. Gardner met Bernard Berenson, an art history student at Harvard University. Mr. and Mrs. Gardner took an immediate liking to Mr. Berenson and sponsored a scholarship for Mr. Berenson to study in Europe.¹⁵⁹ Mr. Berenson encouraged the Gardners to purchase Italian Renaissance paintings and often acted as a connoisseur and advisor to the Gardners. Berenson did not buy all of the Gardner's paintings; however, he was often consulted.¹⁶⁰

When Mr. Gardner died in 1898, he left Isabella with an inheritance over \$2.3 million.¹⁶¹ Mrs. Gardner was also left her father's estate in 1891 of a little over \$2.75 million.¹⁶² In 1899, Mrs. Gardner used this combined money to build her dream of starting her own museum. She bought some undeveloped land in the Fenways. She approached Willard T. Sears on a train, asking if he could make plans for a museum with living quarters on top.¹⁶³ Mrs. Gardner wanted these plans to be kept top secret.

Mrs. Gardner wanted "the façade of a Venetian palace turned inward upon itself, away from the bleak New England where such a miracle of grace and ornament in architecture could never have occurred."¹⁶⁴ Mr. Sears found that working for Mrs. Gardner was quite demanding.

¹⁵⁷ Jack and Isabella Gardner were given custody of Jack's brother's three sons after they were orphaned. Jack and Isabella took care of their three nephews like they were their own sons.

¹⁵⁸ See MORRIS CARTER, *ISABELLA STEWART GARDNER AND FENWAY COURT 29* (Houghton Mifflin Company 1925).

¹⁵⁹ See SHAND-TUCCI, *supra* note 124, 116.

¹⁶⁰ See THARP, *supra* note 21, 177.

¹⁶¹ See *id.* at 216.

¹⁶² See CARTER, *supra* note 154, 121.

¹⁶³ See THARP, *supra* note 21, 203.

¹⁶⁴ *Id.* at 217.

She made almost daily changes to the plans. Sometimes it was only an inch or two off, but it would require a complete restructuring of work.¹⁶⁵ Sometimes there were major changes such as changing an iron roof to a wood roof.¹⁶⁶ Mrs. Gardner often fought with the city government and Mr. Sears as she refused to have steel enforcement in the building¹⁶⁷ She never filed plans with the city as it was unclear whether it was a private residence or a public museum.¹⁶⁸ She finally allowed the city building inspector to test one of the marble columns for strength. The Building Inspection Department has admitted to authors that the Gardner Museum is still the “joke of the department” because of all the rules it avoided.¹⁶⁹

Mrs. Gardner often worked just like the workmen and took her noon lunchbreak with them.¹⁷⁰ The modern-day tour guides tell of how Mrs. Gardner would climb the ladder and splash paint on the inner walls of the courtyard to attain the exact look of what she wanted. She even hacked at the wooden beams in the Gothic room so as to make them look older and more medieval.¹⁷¹ Eventually, the architect wrote in his journal that he saw Mrs. Gardner less as a thorn in his side, but rather wanted to help “achieve her dream of perfection.”¹⁷²

In December of 1900, Isabella Stewart signed the incorporation papers for the Isabella Stewart Gardner Museum. Sears the architect signed, as well as did her attorney John Chipman Gray. Henry W. Swift, Charles L. Pierson, and her two nephews Harold Jefferson Coolidge and William Amory Gardner signed on as trustees as well. The museum opened to the public on February 23, 1903. Always with a flair for the dramatic, Gardner invited 150 guests and treated the guests to a concert by the Boston Symphony Orchestra in one of the small rooms. After that,

¹⁶⁵ *See id.* at 226.

¹⁶⁶ *See id.*

¹⁶⁷ *See SHAND-TUCCI, supra* note 124, 207-208.

¹⁶⁸ *See CARTER, supra* note 154, 184.

¹⁶⁹ SHAND-TUCCI, *supra* note 124, 208.

¹⁷⁰ *See CARTER, supra* note 154, 181.

¹⁷¹ *See id.*, 190.

¹⁷² THARP, *supra* note 21, 231.

a large door was opened and curtains rolled back to the large grand courtyard that was lit with candles and beautiful flowers.¹⁷³

Even with the grand presentations, Mrs. Gardner was always an outsider to the Boston elite. She knew that several people hated her and wrote to Berenson often of this.¹⁷⁴ Mrs. Gardner not only collected art, but also a great rare book collection. A friend of the Gardner family, Charles Eliot Norton, founder of the magazine *Nation*, encouraged Mrs. Gardner to become a book collector.¹⁷⁵ Mrs. Gardner started her collection under his tutelage and collected many rare books.¹⁷⁶ There were also frequent musical concerts as well that continue to this day.

While Isabella Stewart Gardner was often a misunderstood woman for her time, her museum has flourished through the decades and has had a lasting imprint on Boston society. This is one of the fine examples of a single donor museum that is kept in perpetuity without a change in the majority of its collection

¹⁷³ See STOUT, *supra* note 131, 26.

¹⁷⁴ See THARP, *supra* note 21, 267. See also SHAND-TUCCI, *supra* note 124, 199 and 233.

¹⁷⁵ See STOUT, *supra* note 151, 3.

¹⁷⁶ See *id.*