

**A Tale of Two Trusts:**  
**The Barnes Foundation and the Isabella Stewart Gardner Museum**

Jeannette H. Maurer

Abstract

This paper examines the law of charitable trusts and donor intent through a comparison of two museums: the Barnes Foundation and the Isabella Stewart Gardner Museum. This paper first analyzes the framework of the Barnes trust and the Gardner trust and explores the various limitations each donor placed upon their trust instruments, including the similar restriction that, after their deaths, their art could never be moved from where they placed it in their respective galleries.

The paper then compares and contrasts the Gardner trust with the Barnes trust and discusses how, given their initial similarities, the Gardner Museum has received great success, whereby the Barnes Foundation is currently facing bankruptcy. The paper's discussion particularly focuses on the recent controversial decision of a Pennsylvania court to allow the Barnes collection to be moved from its current location in the suburbs of Philadelphia, to a new building downtown in an effort to forestall bankruptcy. In conclusion, this paper argues that where Barnes's excessive use of dead hand control ironically failed to ensure that his wishes for the Foundation were respected in perpetuity, the flexibility of the Gardner trust is what led to its ultimate success.

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## Introduction

Charitable trusts are ways for donors to exert control over their property even after their death.<sup>1</sup> For a trust to qualify as “charitable” it must serve a recognized charitable purpose, that is, a purpose designed to benefit the community.<sup>2</sup> Unlike private trusts,<sup>3</sup> charitable trusts are not subject to the rule against perpetuities,<sup>4</sup> therefore, such trusts allow donors to devote their property to a specified charitable purpose forever, and thus maintain control over their property in perpetuity.<sup>5</sup>

One unusual and highly litigated example of a charitable trust is the Barnes Foundation. The Barnes Foundation was established in the early 20<sup>th</sup> century by the wealthy art collector, Albert C. Barnes.<sup>6</sup> He created the Foundation for “the advancement of education and the appreciation of fine arts.”<sup>7</sup> In establishing the trust, Barnes donated his now famous art collection to the Foundation and built a facility,<sup>8</sup> including a gallery

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<sup>1</sup> See RESTATEMENT (SECOND) OF TRUSTS §348 (1959) (“A charitable trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose”).

<sup>2</sup> See *id.* (further defining “charitable purpose” as including, but not limited to, the relief of poverty, the advancement of education, the advancement of religion, the promotion of health, or other purposes beneficial to the community).

<sup>3</sup> See Joseph A. DiClerico, Jr., *Cy Pres: A Proposal For Change*, 47 BU L. REV. 153, 154 (1967) (distinguishing that a private trust must benefit an ascertainable individual beneficiary).

<sup>4</sup> See *id.* (characterizing a charitable trust as one where the creator is theoretically able to control the use of his property forever, or at least until the trust fails, since they are not subject to the rule against perpetuities). This is in contrast to private trusts which are subject to the rule against perpetuities, which establishes only a limited time period whereby a creator of a private trust can control his property through the trust instrument. *Id.*

<sup>5</sup> See RESTATEMENT (SECOND) OF TRUSTS §348 cmt. 6.

<sup>6</sup> See JOHN ANDERSON, ART HELD HOSTAGE 2 (2003) (explaining that Barnes made his fortune in pharmaceuticals, particularly through the development and marketing of the drug Argyrol); see also Ilana H. Eisenstein, *Keeping Charity in Charitable Trust Law: The Barnes Foundation and the Case For Consideration of Public Interest in Administration of Charitable Trusts*, 151 U. PA. L. REV. 1747, 1749 (2003) (concluding that Barnes’s success and wealth enabled him to accumulate his famous art collection).

<sup>7</sup> The Barnes Foundation Bylaws art. II [hereinafter Bylaws], available at [www.barneswatch.org](http://www.barneswatch.org) (follow “Newsletters” hyperlink to “Indenture and Trust” hyperlink) (last visited Nov. 28, 2005).

<sup>8</sup> See ANDERSON, *supra* note 6, at 2 (defining the Barnes Foundation as unique in that it was neither a museum nor a gallery, but a non-profit institution dedicated to the advancement of Barnes’s own brand of art education).

to house the art, outside of Philadelphia. In addition to his art, Barnes left the Foundation with many limitations and restrictions on its access and administration.

Reflecting his eccentric personality, Barnes's heavy application of dead hand control<sup>9</sup> over the Foundation has resulted in a history of litigation rivaling the notoriety of the collection itself. The most recent litigation surrounding the Foundation involves a controversial court order issued on December 13, 2004, whereby the court authorized amending the Foundation's charter to permit the relocation of the Foundation's art gallery to downtown Philadelphia in an effort to forestall bankruptcy.<sup>10</sup> The decision is criticized by many as violating Barnes's express intent that the collection not be moved or altered in any way.<sup>11</sup>

The law of charitable trusts makes it easy for a donor to include whatever peculiarity they desire in their trust.<sup>12</sup> This is true because great deference is always given to donor intent in the administration and interpretation of charitable trusts.<sup>13</sup> There are only two methods by which a court can intervene to change the terms of the trust: the *cy pres* doctrine and the doctrine of equitable deviation. If the main purpose of the trust becomes impossible or illegal to perform, a court can intervene through the doctrine of *cy pres* to change the terms of the trust in a way that will enable the trust to continue to

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<sup>9</sup> See John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U.C. DAVIS L. REV. 375, 381 (2005) (explaining that in general, dead hand control over property is limited by states through the rule against perpetuities, but in the case of charitable gifts, states actually allow donors to extent their control indefinitely because in exchange for perpetual donor control, society gets wealth devoted to public purposes).

<sup>10</sup> *In re the Barnes Found.*, 69 Pa. D. & C4th 129 (Pa. Ct. Com. Pl. 2004).

<sup>11</sup> See The Barnes Foundation Indenture and Agreement (Dec. 6, 1922) [hereinafter Indenture], available at [www.barneswatch.org](http://www.barneswatch.org) (follow "Newsletters" hyperlink to "Indenture and Trust" hyperlink) (last visited Nov. 28, 2005).

<sup>12</sup> See 4 SCOTT, TRUSTS §348 at 2551 (2d ed. 1956) ("it is the purpose to which the property is to be devoted which determines whether the trust is charitable, not the motives of the testator in giving it...").

<sup>13</sup> See Eisenstein, *supra* note 6, at 1747 (arguing that in spite of scholarly debate for change, charitable trusts are almost always administered and supervised under the principle that donor intent in paramount).

fulfill its designated charitable purpose.<sup>14</sup> Alternatively, the doctrine of equitable deviation, which the courts have repeatedly used to allow the trustees to deviate from the trust terms of the Barnes Foundation, is applicable only to allow trustees to deviate from administrative provisions of a trust.<sup>15</sup> In general, regardless of peculiarity, trustees must comply with any and all terms of a charitable trust unless either of these doctrines is implicated.<sup>16</sup>

An example of a successful trust with peculiar provisions is the Isabella Stewart Gardner Museum in Boston, Massachusetts. The museum was established by Isabella Stewart Gardner in 1903 “for the education and enrichment of the public forever.”<sup>17</sup> When she died in 1924, her will instructed that nothing in the museum’s collection should ever be changed or moved.<sup>18</sup> If the trustees violate this wish, the trust and the museum’s contents will be donated automatically to Harvard University.<sup>19</sup> This is a classic example of a donor exerting dead hand control over her property, and an example of how the rule against perpetuities does not apply to charitable trusts. Yet despite the

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<sup>14</sup> See Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400, 1422 (1998) (explaining that in considering a cy pres petition, the court will try to carry out the donor’s wishes by departing as minimally as possible from the original instructions).

<sup>15</sup> See RESTATEMENT (SECOND) TRUSTS §381.

<sup>16</sup> See Brody, *supra* note 14, at 1422 (asserting that as long as the trust qualifies as charitable, courts will hold the trustees to the terms no matter how confident they are that a better use could be made of the funds).

<sup>17</sup> See Isabella Stewart Gardner Museum: Museum Overview, [www.gardnermuseum.org/the\\_museum/overview.asp](http://www.gardnermuseum.org/the_museum/overview.asp) (last visited Sept. 25, 2005).

<sup>18</sup> See LOUISE HALL THARP, MRS. JACK: A BIOGRAPHY OF ISABELLA STEWART GARDNER 312-313 (1965) (quoting Gardner’s will as stating that “[i]f 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,... 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 the President and Fellows of Harvard College in trust to sell... and to procure the dissolution of the... Museum”).

<sup>19</sup> *Id.*

seemingly odd conditions set by Gardner upon the trust— or perhaps because of them — the museum has continued to be successful since its inception.

On the surface Isabella Stewart Gardner and Albert C. Barnes seem to have a lot in common. Both were eccentric people and renowned art collectors who built galleries in order to share their art for the benefit of the community. They both facilitated their desire through charitable trusts, in which they placed similar restrictions that, after their deaths, their art could never be moved from its placement in their respective galleries. So how did one gallery live to become one of the most famously successful private art collections in the world<sup>20</sup> and the other end up facing financial ruin?

This paper seeks to answer this question by drawing a distinction between the kinds of limitations each included in their respective trust instruments. This paper does not attempt to establish guidelines for proper donor intent in a charitable trust, but only seeks to highlight the fact that it is possible for a donor to exert so much dead hand control over a trust as to hinder the original charitable purpose of the trust.

## **I. The Barnes Foundation**

Albert C. Barnes was born in 1872 in the slums of Philadelphia.<sup>21</sup> A self-made man, he went on to graduate from medical school, become a chemist, and eventually make his fortune in pharmaceuticals.<sup>22</sup> In 1908, Barnes established the A.C. Barnes Company, whose success enabled him to begin to collect what is now estimated to be a

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<sup>20</sup> See Christine Holderness, *Honoring Its Founder's Spirit, A Museum Glows With Spunky Joy*, BRATTLEBORO REFORMER (Vt.), July 16, 2005 (asserting that the Isabella Stewart Gardner Museum is like no other place in the world and equating it with other private collections including the Frick Collection in NY, and the Phillips Collection in Washington, DC, among others).

<sup>21</sup> See ANDERSON, *supra* note 6, at 7, 12 (suggesting that Barnes's idiosyncrasies were a result of his childhood, and that due to the fact that he had to work for everything in life, it is not surprising that he chose to collect contemporary art which, as opposed to collecting Old Masters, required judgment, passion and skill).

<sup>22</sup> See The Barnes Foundation, About the Barnes Foundation, [http://www.barnesfoundation.org/h\\_main.html](http://www.barnesfoundation.org/h_main.html) (last visited Nov. 29, 2005).

multi-billion dollar collection of Impressionist and Post-Impressionist art.<sup>23</sup> Eventually Barnes needed a large space to house all of the art he collected over the years. It was Barnes's desire to ensure the ultimate fate of his art collection that led him to establish the Barnes Foundation. He donated millions of dollars to the Foundation and created an educational program centered on his art.<sup>24</sup>

### **A. Limitations Placed on the Foundation's Trust**

Barnes developed his own unique theories about art and education from his studies in psychology, philosophy, and the arts.<sup>25</sup> His interest in combining education and art began before the inception of the Barnes Foundation, when he initiated educational seminars in art appreciation for the employees of his factory at the A.C. Barnes Company.<sup>26</sup> It was Barnes's desire to spread his principles of democracy and education that served as his framework in establishing the Foundation. The main focus was, of course, the art gallery, which he created to serve not as a public museum, but as an "educational experiment" under the "principles of modern psychology as applied to education."<sup>27</sup>

Barnes's indenture officially recognized his plan for the Foundation by laying out specific restrictions and limitations for its operation, including the placement of the art, access to the public, the use of the property, and the Foundation's management. These

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<sup>23</sup> See ANDERSON, *supra* note 6, at 5 (estimating the Barnes collection to be worth more than \$6 billion dollars, including some 69 Cezannes (more than in all the museums in Paris), 60 Matisse's, 44 Picassos, and 181 Renoirs).

<sup>24</sup> See *id.* at 28.

<sup>25</sup> See About the Barnes Foundation, *supra* note 22 (noting that Barnes was particularly influenced by the readings and studies of John Dewey, who held seminars on the scientific method in education, and believed in nondiscriminatory access to art and education). The two men became friends, and later Barnes named Dewey as the Foundation's first Director of Education. *Id.*

<sup>26</sup> See ANDERSON, *supra* note 6, at 23-24 (characterizing the factory as a "unusual place" where the workforce was mixed-sex and racially integrated, and where there was a lending library for workers, original paintings on the walls, and daily discussion group "seminars" led by Barnes).

<sup>27</sup> Indenture, *supra* note 11, at para. 29.

restrictions have been the source of ongoing struggle for the trustees and have sparked the continuous stream of litigation over the trust's terms from the time of Barnes's death until today.<sup>28</sup>

### **1. Placement of Art**

One main restriction Barnes placed upon the Foundation was that upon his death no changes could be made to the art collection at all.<sup>29</sup> He deliberately arranged each work of art in the gallery in a way in which he thought they were derivative of each other, as opposed to organizing them by artist or time period as most museums do.<sup>30</sup> Barnes forbid the Foundation from obtaining any additional works of art and also required that no picture belonging to the collection could ever be loaned, sold or otherwise disposed.<sup>31</sup>

### **2. Public Access**

Barnes limited public access to the art gallery during his lifetime to no more than two days a week, and only with cards of admission.<sup>32</sup> In the Foundation's indenture, Barnes explains this limitation as necessary because the gallery was founded "as an educational experiment" and that it was his desire during his lifetime to perfect the plan, so that it should be "operative for the spread of the principles of democracy and education" after his death.<sup>33</sup> Barnes further limited the use of the gallery once he died by

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<sup>28</sup> See Eisenstein, *supra* note 6, at 1750-51 (noting that following Barnes's sudden death in a car accident in 1951, the litigation challenging the Foundation's bylaws began, and has continued unrelentingly to the present day).

<sup>29</sup> See Indenture, *supra* note 11, at para. 9.

<sup>30</sup> See About the Barnes Foundation, *supra* note 22 (explaining that Barnes chose and arranged his art in "wall ensembles" in the gallery to illustrate for the Foundation's students the visual elements and aesthetic traditions he felt were evident in all art forms across periods and cultures).

<sup>31</sup> See Indenture, *supra* note 11, at para. 10 (granting an exception if any picture passes into a state of actual decay so that it no longer is of any value, only then may it be removed from the collection). Alternatively, Barnes also forbid the use of the art gallery for exhibitions of any work of art whatsoever that were not property of the Barnes Foundation. *Id.* at para. 34.

<sup>32</sup> See *id.* at para. 29.

<sup>33</sup> See *id.*; see also ANDERSON, *supra* note 6, at 34 (noting that to some, what set Barnes apart from other art collectors was his belief that works of art could be employed as tools in an educational experiment).

forbidding anyone from painting, drawing, or sculpting in the gallery, and prohibiting the copying of any work of art by anyone.<sup>34</sup> He specified that the Foundation is to be maintained perpetually for education in the appreciation of the fine arts and not as a school for instruction in art.<sup>35</sup> After his death, the gallery could only be open five days a week exclusively for educational purposes, and solely to students and instructors of institutions that conducted courses in art appreciation.<sup>36</sup> The public was only allowed admittance on Saturday of each week between the hours of 10am and 4pm.<sup>37</sup>

### **3. Social Functions**

Barnes expressly stipulated in the Foundation's indenture that there are never to be any society functions held by anyone in any of the Foundation's buildings.<sup>38</sup> To further emphasize his point, he included that if any citizen petitions a court for an injunction based on the violation of this provision, that person will have all of their legal expenses paid by the Foundation.<sup>39</sup> Barnes justified this limitation by emphasizing that the purpose of his gift is "democratic and educational in the true meaning of the words."<sup>40</sup>

### **4. Board of Trustees**

The Foundation's original indenture provided for five trustees, and specified that after his death, and the death of his wife, the Girard Trust Company could nominate one trustee.<sup>41</sup> The other four nominations would be split between the University of

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<sup>34</sup> See Indenture, *supra* note 11, at para. 34.

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

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

<sup>37</sup> *Id.* at para. 30 (this section was added to the indenture on April 30, 1946).

<sup>38</sup> See *id.* at para. 33 (specifying that such forbidden events include receptions, teas, dinners, dances, or musicales).

<sup>39</sup> See *id.*

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

<sup>41</sup> See ANDERSON, *supra* note 6, at 29.

Pennsylvania and the Pennsylvania Academy of Fine Arts.<sup>42</sup> But, in 1959, Barnes amended the indenture. He instead gave the last four nominations, and eventual control of the Foundation, to Lincoln University (an institution now known as the first African-American college) located in the suburbs of Philadelphia.<sup>43</sup> It is speculated that these changes arose as a result of personal issues between Barnes and the University of Pennsylvania and the Pennsylvania Museum of Art over the years.<sup>44</sup> This is evidenced in the final version of the indenture which specifies that “no Trustee shall be a member of the faculty or Board of Trustees or Directors of the University of Pennsylvania, Temple University, Bryn Mawr, Haverford, or Swarthmore colleges, or Penn Academy of the Fine Arts.”<sup>45</sup>

Some speculate that Barnes never really intended Lincoln University to possess so much control over the Foundation.<sup>46</sup> One year after changing the indenture in favor of Lincoln University, Barnes died unexpectedly in a car accident.<sup>47</sup> So it will never be known whether Barnes intended the document dated October 20, 1950 to be his final trust, just as it will never be known whether the Foundation’s existing problems could have thus been avoided.<sup>48</sup>

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

<sup>43</sup> Indenture, *supra* note 11, at para. 17 (this section was added on Oct. 20, 1950).

<sup>44</sup> *See* ANDERSON, *supra* note 6, at 44-45.

<sup>45</sup> Indenture, *supra* note 11, at para. 17.

<sup>46</sup> *See* ANDERSON, *supra* note 6, at 46 (quoting Julia Bond, wife of then-president of Lincoln University, as saying that she thought Barnes was interested in Lincoln, but he was interested in many other places as well, with whom he would get mad at and then change his will).

<sup>47</sup> *See id.* at 46.

<sup>48</sup> *See id.* at 46-47 (noting that it has been speculated- by University of Pennsylvania trustees especially- that this was only a temporary punishment aimed at making the university and academy shape up); *but see* About The Barnes Foundation, *supra* note 22 (highlighting that in addition to collecting African art, Barnes was seriously involved in African-American social and cultural issues, and supportive of African American artists throughout his lifetime).

## B. Finances

Due to all of the above-mentioned limitations, the Foundation's trustees have struggled since Barnes's death to comply with the trust's terms.<sup>49</sup> As a result, the Foundation is on the brink of bankruptcy today. The initial endowment of \$6 million with which Barnes funded the Foundation has been depleted and the Foundation is currently unable to cover its general operating expenses.<sup>50</sup> In its recent appeal to the court, the Foundation summarized that its "current situation is dire, puts at risk the Foundation's ability to fulfill its primary purpose, and threatens the Foundation's survival."<sup>51</sup>

In order to "save" the Foundation, three of Philadelphia's leading philanthropic groups (the Pew Charitable Trusts, Lenfest Foundation and Annenberg Foundation) have provided the Foundation with \$3.1 million to cover immediate operating costs, and paid the legal costs for the most recent court petition to amend the trust.<sup>52</sup> The Pew and Lenfest Foundations promised to help the Barnes Foundation raise \$150 million on the condition that the art gallery be relocated to a new site to be built in Philadelphia, and upon the condition of the expansion of the number of trustees on the Foundation's Board from five to fifteen.<sup>53</sup> Even the court acknowledged that both of these proposals run afoul of Barnes's indenture and the Foundation's bylaws.<sup>54</sup>

There is much speculation as to the reason for the Foundation's current financial difficulties. On the one hand, it appears that most of the Foundation's financial troubles

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<sup>49</sup> See ANDERSON, *supra* note 6, at 5 (asserting that the Barnes Foundation was built on litigation).

<sup>50</sup> See *In re the Barnes Found.*, No. 58,788, at 3-4 (Pa. Ct. Com. Pl. 2004) (mem. op.).

<sup>51</sup> *Id.* at 4.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*; see also Edward J. Sozanski, *Relocation Makes Sense, but it would be Wrong*, PHILADELPHIA INQUIRER, May 4, 2003, available at <http://www.barnesfoundation.org> (follow "in the press" hyperlink under "what's new" hyperlink; then follow "newspaper articles" hyperlink) (suggesting that the foundations are executing a hostile takeover of the Barnes Foundation by offering the trustees a deal they cannot refuse- big money to move, no money otherwise).

<sup>54</sup> See *in re the Barnes Found.*, No. 58,788 (mem. op.), at 4.

are due in part to the expensive and lengthy litigation the Foundation has endured over the years in the attempt to change many of the trust's limitations.<sup>55</sup> But, on the other hand, the Foundation's management has been severely criticized by many as disregarding Barnes's original art education program and has instead focused on exploiting the Foundation's art collection for its commercial potential.<sup>56</sup> Additionally, it has been argued that the investment restrictions Barnes placed upon the Foundation hampered the Foundation's ability to maintain itself. Barnes specified in the Foundation's indenture that after his death the Foundation's endowment could only be invested in federal, state and municipal bonds.<sup>57</sup> Therefore, the blame for the Foundation's situation cannot be clearly placed. The only certainty is that the limitations Barnes put upon the Foundation have made the trust difficult to administer. In turn, the amount of alteration the trust has endured over the years has left a document almost indistinguishable from the original.

## **II. The Law of Charitable Trusts in Court**

It is apparent from its current situation that not only did Barnes's plan for the Foundation not work, but more importantly, nothing in the law of charitable trusts served to keep the Foundation out of court. Over the years the Foundation's trust has been subjected to the court's intervention many times and in a variety of ways, but to no avail. The Foundation's trustees have successfully petitioned the court in the past for permission to hold fundraising events in the gallery,<sup>58</sup> expand public viewing hours, and increase admission fees,<sup>59</sup> all of which went against Barnes's expressed intent.

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<sup>55</sup> See Eisenstein, *supra* note 6, at 1751 (arguing that the Barnes Foundation's financial troubles are a result of its extensive litigation history, as well as due to the expense of maintaining a valuable art collection).

<sup>56</sup> See BarnesWatch!, *The Barnes Foundation's "Dilemma" A Self-made Crisis?*, <http://www.barneswatch.org> (last visited Nov. 28, 2005).

<sup>57</sup> See Indenture, *supra* note 11, at para. 27.

<sup>58</sup> See *In re Barnes Found.*, 683 A.2d 894, 898 (Pa. Super. 1996) (holding that Barnes's restriction against "society functions" did not prohibit on-site fundraising activities because Barnes's restriction prohibited

In an attempt to allow the Foundation a greater return on the endowment investments, the court has also freed the trustees from the investment restrictions Barnes included in the indenture.<sup>60</sup> And, in 1991, a Pennsylvania state court granted a one-time exception, allowing a number of paintings from the collection to be sent on a world tour in order to generate funds to renovate the gallery,<sup>61</sup> and then permitted an extension of the exhibition in 1996.<sup>62</sup> The court also applied the doctrine of deviation to allow an increase in the number of Foundation trustees from five to fifteen, contrary to Barnes's explicit terms regarding the number and composition of trustees.<sup>63</sup>

Most recently, trustees petitioned a Pennsylvania state court to amend the Foundation's charter to allow the art gallery's move to downtown Philadelphia so as to save the Foundation from bankruptcy.<sup>64</sup> Concluding that the Foundation was indeed on

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private affairs for purpose of participants' enjoyment, whereas the purpose of fundraising is the preservation and enrichment of assets which the Foundation protects; *but see* Indenture, *supra* note 12, at para. 33 (specifying that the prohibition of "society functions" included both "public and private" events).

<sup>59</sup> *See In re Barnes Found.*, 683 A. 2d at 249, 256 (affirming the decision of the Court of Common Pleas which amended the trust to authorize the trustees to increase the admission fee to gallery from \$1 to \$5, and increase public admission by one additional full day per week). In 1960, the Court of Common Pleas approved a limited access program of two days per week. *Id.* at 249 n.3. In 1963, the court authorized a public admission fee of \$1.00 and in 1967, the court authorized an additional half day of public access. *Id.* Thus, at the time of this case the public access to the Barnes gallery was limited to two and one-half days per week and an admission charge of \$1.00. *Id.*

<sup>60</sup> *Id.* (noting the trial court's grant of trustees' petition for permission to expand the Foundation's investment options by allowing it to invest funds pursuant to the Pennsylvania Probate and Fiduciaries Code, thus amending paragraph 27 of the Indenture which originally restricted investments to federal, state or municipal bonds).

<sup>61</sup> *See in re Barnes Found.*, No. 588,788 (mem. op.), at 9 n.8 (noting that trustees originally petitioned the court for permission to sell 15 paintings from the collection in order to fund the gallery's renovation and to cover operating expenses). The Trustees eventually withdrew this petition, succumbing to critics' protests citing the ethical standard that museums should only sell paintings (a method known as deaccession), if at all, to finance new acquisitions, not to pay for operating and maintenance expenses. Jane Goldstein, *Deaccession: Not Such a Dirty Word*, 15 CARDOZO ARTS & ENT. L. J. 213, 240-41 (1997).

<sup>62</sup> *In re Barnes Found.*, 449 A. 2d 1364 (holding that the trial court erred in finding the extension of the world tour impermissible, and allowing an extension to the off-site exhibition of the collection, despite the trust's explicit provisions prohibiting the move and/or loan of any of the artwork).

<sup>63</sup> The court's rationalization for this deviation was that modern nonprofit corporations require larger governing boards consisting of members who have access to a variety of communities and resources ). *In re Barnes Found.*, No. 588,788 (mem. op.), at 6.

<sup>64</sup> *See Judge OKs Art Collection's Move To Philadelphia*, 16 No. 12 ANDREWS ENT. INDUS. LITIG. REP. 3 (2005) (noting that officials insisted the move of the gallery from its current "hard-to-visit" location in

the brink of financial collapse, the court found that the provisions in Barnes's indenture mandating that the gallery be maintained in Merion, Pennsylvania, were not "sacrosanct" and could yield under the doctrine of deviation.<sup>65</sup> The court's decision in the case is criticized as going against Barnes's intent, yet again.<sup>66</sup>

Despite all of these examples of the court's continuous intervention in the Foundation's trust, the Foundation still finds itself on the cusp of bankruptcy today. Obviously the law of charitable trusts has not helped solve the Foundation's long-term financial problems, but has only served to whittle away at Barnes's intent over the years to the point where the gallery is now being moved to downtown Philadelphia

In applying the doctrine of deviation, courts cannot change the original charitable objective of the donor, but must take into consideration the donor's basic purpose in establishing the trust and decide what he or she would have wanted in light of the unanticipated changed conditions due to the passage of time.<sup>67</sup> Based on Barnes's indenture it seems clear that moving the gallery downtown to a new, modern facility would not be acceptable to him.<sup>68</sup> Barnes laid out provisions limiting the trust in a way that he felt necessary to further his educational goals for the Foundation, as was his

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Merion to a downtown location in Philadelphia's museum quarter, was necessary to save the Foundation from financial ruin caused by high operating costs and decades of restricted attendance).

<sup>65</sup> See *In re Barnes Found.*, 69 Pa. D. & C.4th at 1 (holding that the Foundation showed a need to deviate from the terms of the donor's indenture, and that relocating the gallery was the least dramatic modification of indenture that would accomplish the donor's desired ends); see also DiClerico, *supra* note 3, at 154 (explaining that when impossibility, impracticality, or illegality cause the failure of an administrative or procedural provision in a charitable trust, courts often apply the doctrine of equitable deviation in order to continue the operation of the trust).

<sup>66</sup> See *Indenture*, *supra* note 11.

<sup>67</sup> William F. Fratcher, *Scott on Trusts*, §348-403 (4th ed. 1989).

<sup>68</sup> See *BarnesWatch!*, *A Political Decision, Not a Legal One*, [www.barneswatch.org](http://www.barneswatch.org) (last visited Nov. 28, 2005) (arguing that the collection is being moved to what will surely be a tourist facility, and not a school as intended by Barnes).

prerogative as a donor of a charitable trust.<sup>69</sup> Barnes even explicitly provided in the Foundation's indenture that if it ever became impossible to administer the trust, the Foundation's property and funds should be given to an existing institution in Philadelphia or its suburbs similar in scope to the Barnes Foundation.<sup>70</sup> Though Barnes did not specify which institution he preferred, it is clear from his words that he did not intend the collection to be relocated in the event the trustees found themselves unable to sustain the Foundation in its current location. It appears from the language of the indenture that he would rather the Foundation be dismantled and turned over to another institution if the Foundation could not be sustained. He did not say that it would be all right to violate the terms of his trust under any circumstances.<sup>71</sup>

Taking into account the Foundation's litigation history and its dismal financial status today, it is inconclusive whether or not the move of the gallery will actually work to save the Foundation.<sup>72</sup> Given the current state of the Foundation it is clear that the other times the court applied the laws of charitable trusts, it did not remedy the Foundation's problems in the long run. The Foundation's case law is obviously still unsettled today despite the recent court ruling allowing the Foundation to move. The judge who decided the case even alluded to this fact in his opinion, stating that his decision in the case, "does not mean all doubts about the viability of (the Foundation's)

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<sup>69</sup> See DiClerico, *supra* note 3, at 153 (noting that in establishing a charitable trust, a donor is able to construct his own particular plan or scheme whereby his property will be used to benefit the community).

<sup>70</sup> See Indenture, *supra* note 11, at para. 11.

<sup>71</sup> See Chris Abbinante, *Protecting "Donor Intent" in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation*, 145 U. PA. L. REV. 665, 676 (1997) (arguing that if the Barnes trustees determined the Foundation failed, they were given the option of disposing the collection by gift to another institution, school or museum). Barnes's indenture did not provide for the transformation of the Foundation into a museum. *Id.*

<sup>72</sup> See Barnes Watch, *A Political Decision, Not a Legal One* (arguing that the gallery relocation is a risky move because it will raise the Foundation's annual expenses to \$11 million, require \$4 million in annual donations and depend on the raising an additional \$50 million endowment that was not proven in court to exist), [www.barneswatch.org](http://www.barneswatch.org) (last visited Dec. 1, 2005).

plans have been allayed.”<sup>73</sup> He indicated that this court decision may not be the last time the Foundation sees the inside of a courtroom.<sup>74</sup>

### **III. The Isabella Stewart Gardner Museum**

While a seeming parallel to the Barnes Foundation, the Isabella Stewart Gardner Museum and its charitable trust present a very different case. Where the Barnes Foundation’s trust is restrictive and limiting, the Gardner Museum’s trust is flexible, and yet authoritative, presenting an interesting comparison.

#### **A. The Museum and its Trust**

Fenway Court, as Isabella Stewart Gardner liked to call her museum, was her own creation in every sense of the word. She built the museum to resemble a 15<sup>th</sup> century Venetian palace as she claimed to dislike the cold, mausoleum-like spaces of most American museums.<sup>75</sup> She carefully designed and supervised every architectural detail of the museum and personally installed each piece of the collection which contains, to this day, over 2,500 paintings, sculptures, tapestries, furniture, manuscripts, rare books and decorative arts.<sup>76</sup>

In her will, Gardner required that the collection be permanently exhibited according to her aesthetic vision and intent.<sup>77</sup> On this point, Gardner was very inflexible. She arranged her collection, and the rooms within the museum, very specifically to evoke

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<sup>73</sup> *In re the Barnes Found.*, 69 Pa. D. & C4th at 20.

<sup>74</sup> “We will not speculate about the nature of further petitions that might come before this court; however, we are mindful of the vehement protestations, not so long ago, that the Foundation would never seek to move the gallery to Philadelphia, and, as a result, nothing could surprise us” *Id.*

<sup>75</sup> *See* Museum Overview, *supra* note 17.

<sup>76</sup> *See Id.* (noting that the collection includes mostly Italian Renaissance and 19th century art, including works by Botticelli, Vermeer, Rembrandt, Rubens, Matisse and the “most important work of art in Boston,” Titian’s *Rape of Europa*).

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

dialogue and discussion of the art.<sup>78</sup> She intentionally mixed paintings, furniture, textiles and objects from different cultures and time periods.<sup>79</sup> Like Barnes, she wanted others to experience her art collection according to her point of view and hopefully learn more about the art as a result. But beyond her restriction regarding the arrangement of the art in the museum, Gardner's will (by which she established her charitable trust) does not touch on any of the other limitations, such as public access, the board of trustees, or society functions, that Barnes mentions in his trust. In this respect, Gardner's trust was quite flexible and has enabled the trustees of the museum a large degree of freedom in its maintenance and operation.<sup>80</sup>

### **B. Gardner's View of the Public and Education**

Though Barnes and Gardner both donated their art to the community for educational purposes through charitable trusts, Gardner had a very different view than Barnes of the public and of education. She drew inspiration for the museum from her world travels and created the museum in order to bring art and culture to America.<sup>81</sup> Her vision is exemplified in the museum's organization and operation even to this day.

For example, in contrast to the Barnes Foundation, the Gardner Museum welcomes everyone, students, artists and the general public alike, to experience the collection. Today, the museum's goal is to use Gardner's collection as a source of inspiration for contemporary artists and to encourage the general public to think about art

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<sup>78</sup> See Isabella Stewart Gardner Museum, *The Making of the Museum: Isabella Stewart Gardner as Collector, Architect and Designer*, available at [http://www.gardnermuseum.org/press\\_releases/making\\_exhibitionlist.pdf](http://www.gardnermuseum.org/press_releases/making_exhibitionlist.pdf).

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

<sup>80</sup> See *infra* notes 84-87 and accompanying text (discussing the many programs the museum has created since Gardner's death, in addition to the variety of musical and artistic exhibitions).

<sup>81</sup> See THARP, *supra* note 18, at 201 (quoting Gardner in a letter to a friend "(y)ears ago I decided that the greatest need in our Country was Art. We were very largely developing the other sides. We are a very young country and had very few opportunities of seeing beautiful things, works of art, etc.. So I determined to make it my life work if I could.").

and culture in new ways.<sup>82</sup> Referring to its unconventional approach, one journalist notes that “if you are looking for a perfectly illuminated art works, all hung at a uniform level, in a logical order, the museum will flabbergast you. Gardner provides an intimate experience that promotes exploration, personal revelations and a realignment of what to expect from a museum.”<sup>83</sup>

The Gardner Museum also offers the public a variety of exhibitions, musical concerts,<sup>84</sup> lectures, and educational and community programs throughout the year.<sup>85</sup> Even though the collection can never change, it continues to serve as a source for creativity and learning. For example, the collection continues to inspire new artists through the museum’s Artists-in-Residence Program. This innovative program provides contemporary artists the opportunity to live on the museum grounds and grants them free reign over the museum in order for them to create new work.<sup>86</sup> The museum then helps the artists reach the public by hosting exhibitions of their work.<sup>87</sup>

During Gardner’s life, Fenway Court was a constant source of inspiration for artists, musicians, composers, dancers and scholars and was always full of activity. It is clear that the museum and its trustees carry on the traditions and spirit of Isabella Stewart Gardner today.

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<sup>82</sup> See Museum Overview, *supra* note 17.

<sup>83</sup> Holderness, *supra* note 20.

<sup>84</sup> See Museum Overview, *supra* note 17 (noting that the Boston Symphony Orchestra performed at the Museum’s opening night in 1903, and in keeping with Gardner’s support of music, the Museum currently hosts a Sunday Concert Series). The Sunday Concert Series developed in 1927, shortly after Gardner’s death, by Morris Carter, the museum’s first director who was hand-picked by Gardner. The Program was established to “make the museum more accessible and more attractive.” Isabella Stewart Gardner Museum, Museum Timeline, [http://www.gardnermuseum.org/the\\_museum/isabella.asp](http://www.gardnermuseum.org/the_museum/isabella.asp) (follow “Isabella Stewart Gardner” hyperlink under “the Museum” hyperlink; then follow “Museum Timeline” hyperlink) (last visited Nov. 29, 2005).

<sup>85</sup> See Museum Overview, *supra* note 19 (describing the Museum’s many programs including their School Partnership and Community Partnership programs).

<sup>86</sup> See *id.* (noting that no product is ever required of the artists though, they are free to use the collection to just think and explore).

<sup>87</sup> *Id.*

#### IV. The Gardner Trust vs. the Barnes Trust

Gardner's will was very flexible regarding the operation of the trust, whether she intended it to be or not. She left the trustees with a great amount of autonomy in how to fulfill her intended charitable purpose. This is true, especially in comparison to the restrictions Barnes laid out in his trust. As exemplified above, the trustees of the Gardner Museum have been free over the years to adapt the museum to the changing times by finding new ways for the general public and artists alike to enjoy and learn from the collection. Gardner's main limitation to her trust was that no painting, object, or other work of art could be moved from its original place in the museum after her death. While this restriction appears stringent, it has served more as inspiration than restriction, encouraging the museum's trustees to continue the dialogue Gardner herself intended to evoke from her collection.<sup>88</sup> It is clear from this case that the more flexibility the donor left the trustees to work with after her death, the easier it has been for the trustees to continue to fulfill Gardner's intent and the trust's charitable purpose.

Barnes, on the other hand, went too far in placing restrictions upon his Foundation. Even though he had a similar requirement regarding the permanent placement of his art collection, the limitations on his trust did not stop there. Barnes imposed a number of other requirements, most notably in the way the Foundation was to be administered.<sup>89</sup> Consequently, the trustees of the Foundation have struggled over the

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<sup>88</sup> *See id.* (asserting that the Museum remains as Gardner arranged it and that her vision for the Museum is reflected in every aspect of it).

<sup>89</sup> *See generally* Indenture, *supra* note 11 (enumerating the many restrictions Barnes placed upon the trust, including limiting public access to the gallery, forbidding society functions to be held on the Foundation's grounds, forbidding the sale or loan of any art in the collection and alternatively, forbidding the exhibition of any outside art on the Foundation's property, and restricting the number and composition of the Board of Trustees).

years to comply with the trust's terms, leading to the recent above-mentioned court's intervention.

In addition to the trust's overall flexibility, it seems the Gardner trust has also been effective as a result of its forfeiture and gift-over provisions.<sup>90</sup> Aside from the requirement regarding the arrangement of the collection in the museum, the other specific requirement Gardner placed over her trust was that if any of the trustees violate any of its provisions, the museum's contents and assets will automatically be given to Harvard University.<sup>91</sup> Barnes's trust did not contain any such provision (other than the general clause in the case that the trust becomes inoperable).<sup>92</sup> Though Gardner's will has yet to be interpreted by a court, if the trustees were ever to petition to amend the terms of Gardner's trust, or violate any of the trust terms themselves, a court would have to apply Gardner's instructions that the museum and its contents be given to Harvard.<sup>93</sup> It is hard to imagine any of the Gardner Museum trustees willing to risk such an outcome, and thus Gardner's terms ensure that her wishes are carried out and not challenged years after her death.<sup>94</sup>

If, as Gardner did, Barnes included a specific forfeiture and gift-over provision in his trust it is possible to imagine a different outcome for his Foundation. Instead of the long, and arguably ineffective, history of litigation it has endured, the Foundation would have either been dismantled by now and given to another organization specified by Barnes in the trust, or the trustees would have been more reluctant over the years to run to

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<sup>90</sup> See DiClerico, *supra* note 3, at 193.

<sup>91</sup> See *supra* notes 17-19 and accompanying text.

<sup>92</sup> See *supra* note 70 and accompanying text.

<sup>93</sup> See DiClerico, *supra* note 3, at 193 (explaining that when the provisions of a trust cannot be executed the *cy pres* doctrine cannot be applied if there is a gift-over provision, instead, the gift over provision must be effectuated).

<sup>94</sup> See THARP, *supra* note 18, at 344 n.2 (noting that on the dark red tiles of some of the floors, marks are painted in orange to show exactly where the feet of each chair or table must go).

the courts each time they wanted permission to deviate from a provision that proved difficult to administer. It is more likely the trustees would have hesitated to challenge the trusts' terms in fear of losing the Foundation's assets.

It is not as if the Gardner trust has not been put to the test. In 1990, thieves stole 13 pieces of art worth over \$300 million from the Gardner Museum.<sup>95</sup> The empty frames which held the stolen paintings and drawings continue to hang on the museum walls to this day, as they cannot be moved according to Gardner's trust terms.<sup>96</sup> This exemplifies the trustees' respect for Gardner and the trust and the extent to which they have gone to comply with her wishes for the museum. One can wonder what the Barnes Foundation trustees would do in the event of a theft of some of the collection's paintings. Based on prior history, it seems reasonable to conclude that they would most likely run to court and seek permission to take down the empty frames and replace the empty wall space with other art of their choosing, completely violating the main terms of the trust and Barnes's intent for the Foundation.

## **Conclusion**

In comparing the Barnes and Gardner trusts, there is no doubt that, respectively, each reflects the donor's unique personality, perspective and vision of how the art collection was to be used. Both donors had strong intent and specific ideas on what they wanted done to ensure their intent was carried out after their deaths. However, if Barnes had not placed so many restrictions upon his trust, the Foundation trustees would not

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<sup>95</sup> See Press Release, Isabella Stewart Gardner Museum, Isabella Stewart Gardner Museum Calls for the Safekeeping & Return of Art Stolen 15 Years Ago (March 13, 2005), *available at* <http://www.gardnermuseum.org> (follow "Press" hyperlink to "Press Releases hyperlink) (last visited Dec. 1, 2005) (offering a \$5 million reward for information leading to the return of the stolen art, which include such paintings by Vermeer, Rembrandt, Manet, and Degas).

<sup>96</sup> See Rochelle Steinhaus, The Isabella Gardner Museum Heist, <http://www.archives.cnn.com/2002/LAW/11/26/ctv.traces.museum.heist> (last visited Sept. 25, 2005) (noting that the thieves cut the paintings out, leaving ragged edges of canvas behind in the now-empty frames).

have found the need to go to the court to intervene as many times as it has, and most likely, the art gallery today would not be on its way to downtown Philadelphia contrary to his intent.

Whether due to the excessive application of dead hand control by Barnes, and/or the flexibility and role of forfeiture and gift-over provisions in the Gardner trust, it is clear that where the Gardner trust has succeeded over the years, the Barnes trust has failed to ensure that Barnes's wishes for the Foundation are respected in perpetuity. Thus it appears that the lesson from the Barnes Foundation case is that donor intent can go so far as to render a trust inoperable, and that the law of charitable trusts is not necessarily a safety net a donor can count on.