

**Plan to Permit the Barnes Foundation to Operate in Perpetuity**  
**in Accordance with the Indenture**

**A Plan for Raising Cash from the Temporary Sale**  
**of**  
**Partial, Undivided Interests in Paintings**

**Introduction**

James H. Maroney, Jr.<sup>1</sup> a member since its inception of the “Barnes Society,” offers the plan described in this memorandum (the “Plan”). His purpose is to propose to the Trustees of The Barnes Foundation (the “Foundation”) how they might raise a substantial amount of money so that they could operate the Foundation in accordance with the vision of its founder, Dr. Albert C. Barnes. The Plan is novel but, in the long run, it would do less damage to Dr. Barnes’s vision than other proposals - with permanent effects - suggested recently.

**Précis**

The writers are not insensitive to the salutary benefits that the Pew/Lenfest petition, through its bid to move Dr. Barnes’s art collection into Philadelphia, provides for the City or to the strength and respectability of the financial and social elements supporting it. But with nothing more than imminent insolvency for justification, the petition would dismantle Barnes’s Indenture and forever deploy his art collection to a purpose foreign and objectionable to him. The writers are not insensitive either to the somewhat unconventional educational mission described by Dr. Barnes for the Foundation or to the dire financial condition in which the

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<sup>1</sup> Mr. Maroney, the President of James Maroney Inc., holds a BA in art history from Columbia University and an MBA from UMass, Amherst. He has been Senior Vice-President and Head of American Paintings at both Sotheby’s and Christie’s in New York as well as President of his own firm buying and selling American paintings since 1976. In 1975-77, he served a two year term on the IRS Art Advisory Panel in Washington DC.

Foundation now finds itself.

However, the issue before the court is not whether Dr. Barnes's art collection would be a welcome addition to the city's amenities; the dispute is not the worthiness of the settler's educational mission and it is not the Foundation's precarious financial condition. In particular, the issue in dispute is not Dr. Barnes's art - once acquired, where, how or when to exhibit it or for whom.

At bottom, the dispute centers on the permanent authority granted by law to private donors who, in exchange for gifts of property, impose upon society contractual conditions, no matter how bizarre, to which donee institutions and their trustees agree. The dispute in this case, arising only because the Barnes Foundation has depleted its cash resources, concerns the durability of one such contract comprising a set of highly individual conditions for the use of property that happens to be very important and valuable art. If, in other words, the money to operate Albert Barnes's Foundation were raised without prejudice to his Indenture, the law would defend the Foundation's right to survive with its art collection just as and where the settlor intended.

In short, the writers submit that insolvency is irrelevant to the disposition of the Foundation's art collection. Insolvency imperils the Barnes *Foundation* not its art collection and the remedy the court seeks must, therefore, save the Foundation, which would in turn save the art. This paper suggests a mechanism for raising money sufficient to operate the Barnes Foundation, rendering petition seeking to move the art moot on its face.

## **Section 1: The Remedy**

### **Objective of the Plan**

Our solution satisfies two criteria, which, when taken together, are both necessary and sufficient: (i) to raise money for endowment - the penultimate goal - while (ii) strengthening, not subverting the Indenture, the primary goal. If, at first, our solution seems contorted, it is because the Plan is tailored to satisfy just these and no extraneous criteria.

At this point, it is evident to all that the financial status at the Barnes Foundation is untenable and that no solution will likely be put forward that does not require a court-ordered, administrative deviation. In finding a remedy for this situation, the court has a duty to elect, possibly from many submissions, the plan that will permit the Foundation to operate as closely as possible to the founder's original intent. That remedy must have the least impact upon the Indenture. Therefore, as a remedy for its present infirmity, the Plan prescribes a period of recuperation that will impose upon the operation of the Foundation a temporary - but not permanent - deviation. Clearly, in exchange for liquidity, time and inconvenience are assets the Foundation can temporarily afford to dispense. We ask that the reader keep uppermost in mind that recuperation, no matter how long and inconvenient, is still temporary and therefore, in the eyes of the law, always preferable to amendments with permanent or alien consequences, as proposed by petitioners.

### **Summary of the Plan**

Conventionally, the sale of a work of art is absolute, i.e. in exchange for a price, fee simple title to and full use of a painting are conveyed together, as one, to the purchaser. The Plan proposes, in a startling departure from art industry convention, that the Foundation would enter into a Tenancy in Common with art collectors by offering for sale at public auction partial, undivided interests in the fee simple titles to selected paintings in the collection while retaining the residual fee interests in them. The purchaser of a partial, undivided interest would acquire a proportional right to possession of the painting for the remainder of his or her life but would also agree that upon his or her death, the partial, undivided interest so owned would be bequeathed back to the Foundation.

The concept of the Plan is rooted in the premise that a painting's fee simple title, no matter how disproportionately divided, and its "utility" (i.e., the economic benefit of "using" or possessing a work of art) are separable and distinct and can therefore be valued, managed and sold as independent assets.

However, the Plan's efficacy derives from the observation that the Internal Revenue Service (the "IRS") assigns no utility value to a painting either in part or in whole. The Plan, therefore, provides that the Foundation, which at the present owns both elements entire, could sell a partial, undivided interest in the former that temporarily confers proportional rights to the latter.<sup>2</sup> Because at the purchaser's death, the partial, undivided interest thus sold eventually reverts in the form of a tax-deductible gift to the Foundation, the Plan would raise funds without prejudice or regard to the Trust Indenture and Agreement of Albert C. Barnes, dated December 6, 1922 (the "Indenture").<sup>3</sup>

The Barnes Foundation's art collection comprises by number approximately 300 American and/or 'secondary' paintings and approximately 900 Modern and/or Post-Impressionist paintings or about 1/1,200 paintings in all. The frequency distribution of values defines a bell-shaped curve typical of any collection: ten percent by numbers, or approximately 100, are of the highest quality and therefore the most valuable pictures<sup>4</sup>; another ten percent are of little or inconsequential value; and the remainder, about 8/900 paintings are in the broad, middle range.

The writers *do not* propose that partial, undivided interests in the Post-Impressionist paintings in the top value range be sold by application of the plan; by the same token they would also argue that there is little, if any, advantage in offering partial, undivided interests in the paintings in the bottom value tier. However, the Plan, while admittedly disruptive to the Foundation's educational mission if applied to the major, Post-Impressionist paintings in the collection, could be applied with varying effect to any portion of the collection in accordance with the Foundation's projected fiscal needs. Because the paintings not on display are arguably ancillary to the Foundation's educational mission and because the true efficacy of the Plan is

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<sup>2</sup> While either party to the Tenancy in Common has the right to possession in proportion to its interest, either party may waive that right.

<sup>3</sup> See "Doctrine of Cy Pres" for a discussion of the Indenture, p. 12. See also "Section 3: Tax Implications of the Plan," p. 14

<sup>4</sup> The world tour Great French Paintings from the Barnes Foundation (1993-94) comprised about 100 paintings presumably among the Foundation's best.

untested, the writers propose that these paintings be candidates for initial, temporary dispersal through the Plan. While the choice of which paintings ultimately to include in the sale and which to exclude is probably best left for a later time, the central object of the exercise, to raise endowment sufficient to generate income for operations while temporarily dispersing the fewest paintings, must be kept plainly in view.<sup>5</sup>

Consequently, given the present market value of the paintings in the Barnes's art collection, variously estimated to be \$12-25 billion, and the writers' contention that the sale of partial, undivided interests under the Plan would raise approximately 10% of the Fair Market Value ("FMV") of each painting so offered, a selection of 10% by numbers of its holdings (100 of its approximately 1/1,200 paintings) with an average value of \$20,000,000 each or (100 x (0.1 x \$20,000,000)) would raise \$200,000,000. Again assuming the validity of our contention that the value of paintings offered by the plan is 10% of their FMV, the sale of partial, undivided interests in the titles to the paintings not on display has alone the potential to raise \$3/5,000,000 without any attenuation whatsoever to the Foundation's central mission. Therefore, if a trial auction at which partial, undivided interests in paintings from the 'ancillary,' American collection is productive, additional paintings can be offered in a similar manner until the Foundation's financial goals are met.

The point is, irrespective of which paintings are selected, the Plan allows the Foundation to offer partial, undivided interests in as few or as many paintings, be they American or French, in order that the sale might raise the amount of proceeds necessary to meet its long-term needs. And the ultimate selection of assets for temporary relocation or sale of a partial interest therein would be the responsibility of the Board of Trustees and would require approval by the Court to ensure that the Foundation's educational mission is not encumbered.

Finally, the writers firmly believe that wealthy individuals, who bid regularly at auction to purchase paintings selling in the range of \$5/10,000,000, would be quite willing to purchase a fractional interest in a painting from the Barnes collection when, for but a tenth of its FMV, they would receive not only its use for life but a tax deduction equal to five times their initial investment into the bargain. For these reasons alone, the Plan will appeal to a broad, public

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<sup>5</sup> The reader should not presuppose a stripping of assets. The size of the collection eliminates the need for a sale that would deprive the Foundation of a noticeable amount of paintings. Thus the educational mission would be assured. If need be, the educational mission could be doubly ensured through our suggestion to require court approval prior to any use of this revenue mechanism.

constituency that for a variety of reasons is now almost entirely inaccessible to the Foundation.

### **Not a Lease or a Rent**

The model is analogous to, but distinct from, a lease or rent, whereby in exchange for a negotiated monthly or annual payment, use of - but not title to - an asset is conveyed for a set period of time. Renters have little or no incentive to care for the assets they use under temporary agreement and, since renters have no investment to protect, typically property is casually used and then just as casually returned. Importantly, at the expiration of a lease or rent agreement, the payments paid in are sunk costs that have lost all value concomitant with the expiration of time allotted to the asset's use.

By contrast, the Plan conveys partial, undivided interest in the title to tangible personal property, which provides for its use plus, at any time during the term of ownership, a tax deduction equal in proportion to the FMV of the whole interest.<sup>6</sup> Moreover, unlike a set lease or rent payment, auction bidders are completely at liberty to revise the value they place upon the partial, undivided interest and the possessory 'use' of a painting, given what are likely to be sanguine predictions of their own life expectancies.

### **Certain of the Mechanics Involved**

The Plan envisions that the Foundation would offer partial, undivided interests of up to 49%<sup>7</sup> of a painting's fee simple title at a well-advertised public auction to be conducted by one of the leading auction houses.<sup>8</sup> Bidding would necessarily be restricted to pre-qualified collectors who had demonstrated sufficient financial and social stability in accordance with standards specified by the Trustees of the Foundation and its consignee.<sup>9</sup> A successful bidder, each of whom would necessarily be further screened, would, upon qualification, enter into a

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<sup>6</sup> The tax implications of the Plan are explicated in Section 3, p. 14

<sup>7</sup> For the sake of clarity, where the assignment of an ownership stake might be interpreted to confer control, we advise that the Foundation retain no less than a 51% share in any painting. However, as a practical matter, any stake sold of any size whatsoever confers the same rights to and obligations upon the purchaser, since that stake ultimately returns to the Foundation at the purchaser's death.

<sup>8</sup> Sotheby's, Christie's and Phillips

<sup>9</sup> Bidders who are not US citizens or who live in foreign countries deemed to be beyond the reach of US laws may have to be excluded.

written agreement (the “Agreement”) with the Foundation, which would convey the partial, undivided interest purchased in the painting along with the right to use, possess and enjoy the painting during such individual’s lifetime along with the reversionary clause, providing that upon his/her death, full title to and possession of the painting would revert to the Foundation not later than by bequest in the collector’s Last Will and Testament. Such an auction would attract world attention and the right to conduct it would undoubtedly become a source of competitive bidding between the three leading auction houses of the world.

Upon execution of the Agreement, the successful purchaser would then immediately pay to the auction house for the Foundation’s account the full amount of his or her bid at the auction, plus applicable fees and/or commissions.

### **Insurance and Security**

The Agreement would also provide that the purchaser is liable for the commission of waste, *i.e.*, damage or destruction, against the property during his/her lifetime, a responsibility for which insurance is available. However, while the purchaser has a financial asset in the painting of which he or she owns but a partial, undivided interest and the Foundation owns the remaining interest in an irreplaceable masterpiece, which as a cultural icon is indivisible, the parties to the Tenancy in Common have separate purposes to protect that conventional insurance may not provide. In case of loss or destruction, it may, therefore, suit the parties for the purchaser to elect insurance to protect his or her financial investment and, in the event of damage that is deemed reparable, to cover the cost of conservation. Because in his Indenture, Dr. Barnes forbade the trustees to purchase insurance for his collection on the grounds that the paintings were irreplaceable, and because paintings temporarily dispersed under the Plan irrespective of where located or how lost were no less so, it may suit the Barnes’s purposes to continue to carry no insurance.<sup>10</sup>

In addition, the Agreement would include guidelines regarding prescribed methods for hanging the painting, parameters for exposure to light, humidity and temperature and would

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<sup>10</sup> To answer concerns regarding the safety of paintings held outside the controlled environment of the Foundation’s premises, the writers, with data supplied by insurance brokers, would undertake to demonstrate that paintings belonging to collectors who can meet the enumerated criteria are no more vulnerable to damage than paintings belonging to and hanging in prominent American museums.

provide for security. The Agreement would also provide for the Foundation's curators or agents to conduct regular, periodic inspections of the facility in which the artwork would be housed while it is in the possession of the purchaser.

The writers will not here address in detail the kinds of protections to be sought for the Foundation in its negotiations with the auction houses other than to suggest the following for consideration by the Trustees: (1) the establishment of a minimum sale total from the sale of partial, undivided interests in a group of paintings before any partial, undivided interest in any picture is actually conveyed, which minimum would be set by consignee and the Trustees at a level that would constitute a fair exchange;<sup>11</sup> (2) the establishment of rules concerning the qualifications of each person allowed to bid at the auction and the provisions that would allow legal entities to participate;<sup>12</sup> and (3) the establishment of rules concerning the maintenance and security of each picture with provisions allowing the Foundation to terminate the Agreement and/or the need to repossess the picture if the conditions were not met.

The writers also fully recognize that security concerns, many of them justifiable, will alarm members of the professional museum community and that creating a Tenancy in Common will raise a host of intricate issues with the potential to inject difficulties between the Foundation and the purchasers. These issues, insurance, alarms, community property laws in different states etc., could be anticipated and dealt with one by one in the Agreement. Or, the Agreement could take a lead from the National Gallery of Art and/or the Museum of Fine Arts, Boston where the standard Deed of Gift for donors who enter into Tenancy in Common with the museum is written on a single page. (See Exhibits 1 & 2, attached. See also Section 3: Tax Implications of the Plan, pp. 13-15.)

## **Ancient Caveats**

With all the attention paid in the press to the fate of Dr. Barnes's art collection, the

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<sup>11</sup> Importantly, the customary establishment of reserves (by agreement between the consignor and consignee a value below which a painting would not be sold) is unnecessary because (a) no precedent values for partial, undivided interests in titles exist and (b) subjecting more paintings to the plan is preferable to arbitrarily holding back individual paintings when it is unknown what the market will actually bear.

<sup>12</sup> While Foundations, like the Barnes, are perpetual, individuals who purchase partial, undivided interests are mortal, thereby assuring that partial, undivided interests held even for extended periods of time will eventually revert. The Plan could be made applicable to participation by Museums, which are also perpetual, if the term for possession and use were limited.

writers wish to stress again that it is not the art collection that insolvency imperils but the Foundation and its Indenture. In drafting this proposal, the writers do suggest dispersing in the short-term certain assets from the art collection in order that the Foundation, which is charged with protecting those assets, may be saved in the long.

In making this proposal, the writers are acutely aware of the abhorrence on the part of museum trustees and professionals generally and of restrictions imposed by the AAMD<sup>13</sup> against selling art assets to meet operating deficits or to retire debt specifically. Presciently, Dr. Barnes expressed similar concerns in 1922, long before the AAMD wrote restrictions against deaccessioning art into its policy manual.

At the root of this aversion are (i) the certain knowledge that such sales are absolute and final and (ii) the association's long-standing prohibition against conversion of art, which was acquired to be held in perpetuity, into liquid assets that are spent for operations in the short term provided only that (iii) cash raised from deaccessioning duplicates or minor works of art must be re-invested in acquisitions. In those instances where even without the approbation of the AAMD there is no realistic alternative to selling (*vis* the \$34 million sale at Sotheby's in 1996 of paintings and bronzes belonging to the Shelburne Museum in Vermont), trustees are faced with a Hobson's choice: disposing of unimportant works will require selling a large volume of the collection to meet the target or; disposing of fewer but important pictures will permanently impair the very purpose of the museum's existence. Although Dr. Barnes could not have imagined that his Foundation would ever be on the verge of bankruptcy,<sup>14</sup> as a way out of that unlikely dilemma Dr. Barnes forbade his trustees to ever deaccession art.

Notwithstanding the Barnes Foundation is not, strictly speaking, a museum but a school and is, therefore, not a member of the AAMD, the Plan elegantly addresses all three ethical concerns. First, because paintings in which partial, undivided interests are offered for sale are *not* gone forever but will eventually return to the Foundation there is no requirement to reinvest in art; and, because the paintings are not "sold" in the ordinary sense, it follows that proceeds from the sale can be used for any purpose. The Plan's revenue mechanism might, therefore, be of service to any art museum that faces the prospect of selling art to raise operating capital,

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<sup>13</sup> The Association of Art Museum Directors. Because it is not a museum, the Barnes Foundation is not a member of the Association.

<sup>14</sup> The Foundation had at Barnes's death in 1951 approximately \$10,000,000 in liquid assets. That principal, if invested even in municipal bonds yielding 4% would today be worth \$76 million.

which is, in the ordinary sense, a violation of the AAMD's policy and perhaps even unethical.

### **Preserving the Vision of Dr. Barnes**

It has recently been proposed that establishing a relationship between the Foundation and the Philadelphia Museum of Art, or perhaps dismantling and transporting the Barnes mansion to Central Philadelphia, is necessary to save the Foundation from financial and physical ruin. See Doreen Carvajal, Quirky Pennsylvania Art Foundation Ponders Radical Move, N.Y. Times, March 6, 2001 and Ralph Blumenthal, Art Museum Outside Philadelphia Plans Move, N.Y. Times, September 25, 2002.

However, these proposals are directly opposed to the founder's wishes. While it may please certain constituencies who have noticed that the institution has illegally opened a gift shop, formed a members' association and extended its visiting hours and is therefore conducting itself as a museum, a move to Central Philadelphia would undoubtedly mean even greater public access to the collection.

In the Indenture, Dr. Barnes made clear that he intended the Foundation as primarily an educational facility for the benefit of art students and secondarily as a gallery to which the public might have free but limited access.<sup>15</sup> Furthermore, when he was alive, Dr. Barnes vehemently resisted any affiliation with and openly expressed his great disdain for the Philadelphia Museum of Art, referring to the institution in extremely unflattering terms. Id. Third, placing the Foundation under the management of main-line establishments such as the Pew Trust and/or the Annenberg and Lenfest<sup>16</sup> Foundations is certain to include a dramatic shift in the organization and redistribution of the Foundation's Board of Trustees and with it, a change of control over the collection's central purpose. In the Indenture, Dr. Barnes made careful provision for the trustees of Lincoln University to nominate those who would serve as Trustees of his Foundation because he felt strongly that African-Americans would best represent his unique interests and his personal vision for the Foundation's mission. Furthermore, acceptance of the Pew, Annenberg

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<sup>15</sup> Originally, the public was to be admitted only one day per week on Saturdays and never on Sundays. These hours, thought by the trustees to be overly restrictive and not conducive to admission revenues, were later expanded to one and a half days per weekend and finally to three days. By agreement with the Township, admission is now limited to 1,200 persons per weekend who pay \$5 per person. By the word "free," Dr. Barnes did not intend free of access but of cost.

<sup>16</sup> Mr. H. F. (Gerry) Lenfest is President of the Board of the Philadelphia Museum of Art

and Lenfest proposal appears from a reading of the report (NYT 9/25/02) to be predicated upon the trustees' willingness to petition the court for permission to move into Philadelphia where the Foundation would operate as a museum open to the public. Last, the gift of \$150 million from Pew/Lenfest *et al* would most probably be nearly consumed in erecting a new building for the Barnes, leaving the Foundation, once again, without support for operations and therefore in the same impecunious condition in which it now finds itself. Moreover, it is unclear how \$50 million in 'endowment' that remained after construction of the new building in Philadelphia could generate sufficient income to support both the new building on the parkway and the old one partially abandoned in Merion. Conversely, were the Pew/Lenfest grants proffered *without* pre-conditions and in philanthropic support of the Barnes's permanent mission in its present location, no such alignment between the Foundation's trustees and the very social entities that Barnes openly disdained would be entailed or required.

In contrast, the sale of partial, undivided interests in paintings would allow the Foundation to remain forever in Merion, to revert to the very letter of the educational precepts and public visitation hours first envisioned by Dr. Barnes. Granted, many -- perhaps, a hundred or more -- of the paintings would leave the Foundation's premises for periods of time that, while impossible to predict, might be in the range of twenty-five years. But it is equally certain that every single painting now in the collection in which a partial, undivided interest is sold would eventually be returned to the Foundation to be preserved there for all time. In the meantime, the Foundation would have received the substantial proceeds of the sale and allocated them for a particular purpose or invested them into its endowment. Therefore, given the situation in which the Foundation finds itself, the Plan would accomplish in the long run everything that Dr. Barnes would have wanted were he alive today with the exception of creating a temporary interruption in the full discharge of the Foundation's programming. We believe that the funds generated through the implementation of the Plan, given that such income will be more than adequate for the Foundation to run in full compliance with its charter, to be fair compensation for the temporary attenuation in the Foundation's mission.

### **Projection of Needs**

In an article by Jeffrey Toobin entitled "Battle for the Barnes" appearing in The New

Yorker, January 21, 2002, the author cites a recent study by the accounting firm of Deloitte & Touche, which found that the Barnes would require an endowment of at least \$85 million to guarantee its long-term survival, \$15 million of which is required “immediately.”

Mr. Toobin’s conclusions highlight the need for innovative fund raising proposals. While cutting back on the operating budget and utilization of traditional fund raising mechanisms could reduce the operating deficit greatly, the writers suggest that only the Plan would close the budget deficit, create a sizable new endowment, and allow the Foundation to operate within the strictures of its Indenture all within the original gallery in Merion. Clearly, further investigation of the Foundation’s finances and the applicability of various fundraising devices are required.

However, if the budget were to include the expensive needs of the Collection Assessment Program (“CAP”), now funded from grants, the awarding of art history scholarships for students from Lincoln University, and if the Foundation were to build the Joseph Lapsley Memorial Auditorium and Lecture Hall that are both contemplated by the Indenture, and if it were to replenish its pension fund (the over-funded portion of which was redeemed in 2001 to cover budget shortfalls), in short: if the Foundation were to revert to the Indenture, operating expenditures could amount to \$8 million/year. An endowment large enough to contribute \$8 million, if invested exclusively in fixed-income, municipal bonds yielding 4% in accordance with the Indenture, would need to total not \$85,000,000 but \$200,000,000.

Moreover, if 100% of the income from endowment were devoted to operating expenses, the Foundation’s endowment would again be subject to erosion and would eventually recreate the dilemma in which the Foundation finds itself today. Therefore, for the Foundation to operate in accordance with its founder’s wishes and to have valid, long-term expectations for a sustained and robust survival, income from endowment must exceed disbursements for operations by as great a margin as possible. Clearly, then, endowment must exceed \$200,000,000.<sup>17</sup> Given the writers’ contention that the sale of partial, undivided interests under the Plan would raise approximately 10% of the FMV of each painting so offered, the Plan has the potential to raise far in excess of \$200,000,000 without a significant attenuation to its mission.<sup>18</sup>

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<sup>17</sup> Assuming, for the moment, that the collection is worth \$25 billion, to raise \$200,000,000 would be to subject \$2 billion at FMV or 8% by value of the collection to the plan. If, in fact, the collection is worth only \$12.5 billion, to raise \$200 million would subject 16% by value of the collection to the plan. Under the suggested Plan, the Board of Trustees would have ultimate discretion to choose which parts of the collection would be subject to the Plan,

<sup>18</sup> Assuming the validity of the writer’s admittedly seat-of-the-pants estimation that the value of partial, undivided interests offered by the plan is 10% of the same paintings’ FMV, a selection of 10% of the Foundation’s art holdings

With income in the range of \$8/10 million annually, the Foundation could provide art education and scholarships in accordance with its own singular precepts, conserve and catalogue its fabulous collections (CAP), maintain and rejuvenate its stately arboretum and catalogue its invaluable archive, even purchase land from adjoining Episcopal, all without outside assistance. More importantly, the Foundation could repudiate the various deviations from the Indenture that have been previously granted but which are antithetical to Barnes's wishes: the gift shop, extended visiting hours, admission charges to the public, membership associations and drives, tea parties, socials, musicales, etc. Furthermore, we contend that it is precisely these deviations that are at once the root of the deterioration of relations with Lower Merion Township and continuously irksome to its neighbors.

## **Section 2: Arguments in Law**

### **Doctrine of Cy Pres**

The Plan takes particular account of the Trust Indenture and Agreement of Albert C. Barnes, dated December 6, 1922 (the "Indenture"), which provides, in relevant part, that "no picture belonging to the collection shall ever be loaned, sold or otherwise disposed of." We would not presume to argue that the sale of a partial, undivided interest is not a "sale" as enjoined in the Indenture, even though it would not be a sale of the entire interest therein.

Rather, we would argue that the Court of Common Pleas of Montgomery County, Pennsylvania, Orphans' Court Division (the "Court"), which has jurisdiction over the Foundation, may deem it reasonable to depart temporarily from strictly enforcing that Indenture provision, and allow the implementation of the Plan, if it is satisfied on two questions: 1) that the Foundation has no reasonable hope of attracting the enormous contributions it needs to sustain itself indefinitely; and 2) the Plan provides the Foundation with a means to raise the amount of money it needs to operate in accordance with the Indenture in the way that does the least damage to the intentions and vision of Dr. Barnes.

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(100 of its approximately 1/1,200 paintings) with an average value of \$20,000,000 or (100 x (0.1 x \$20,000,000)) would raise \$200,000,000.

## **Doctrine of Administrative Deviation**

Pennsylvania courts have also invoked the legal doctrine of Administrative Deviation to permit trustees to act in contradiction to the terms of a trust if such acts, which are not authorized or are forbidden, will accomplish the purpose of the trust. The basic idea is that “[t]he court will direct or permit the trustee of a charitable trust to deviate from a term of the trust if it appears to the court that . . . owing to circumstances not known to the settlor and not anticipated by him[,] compliance would defeat or substantially impair the accomplishment of the purposes of the trust.” Restatement (Second) of Trusts § 381. Applying Administrative Deviation in some cases, Pennsylvania courts have authorized the sale of trust property although such sale is not authorized or is forbidden by the terms of the trust. See e.g., Lehigh University v. Hower, 46 A.2d 516 (Pa. Super. Ct. 1946) (where the court allowed the sale of testator’s real estate even though it was not clear that the trustees had such power).<sup>19</sup>

## **Section 3: Tax Implications of the Plan**

### **Conveyance of Partial, Undivided Interests**

The creation of a Tenancy in Common through the conveyance to museums of partial, undivided interests in paintings belonging to individuals is well established in the art world. Many individuals have donated a partial, undivided interest in a piece or collection of art to a museum or other charitable organization, the Museum of Modern Art, the National Gallery, the Museum of Fine Arts, Boston the Metropolitan Museum and the Los Angeles County Museum all being notable examples. The gift is customarily made with the understanding, arrangement or agreement that the donor reserves the right to use, possess and enjoy the art during his/her lifetime, but that upon his/her death, complete title to and full possession of the art will be vested in the museum or other organization. To assure that full title to the art eventually vests in the

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<sup>19</sup> The Court’s 1992 decision to allow the tour of the Barnes collection follows a line of Pennsylvania cases in which the doctrine of *cy pres* was applied when a stated charitable purpose faced failure due to insufficient funds. See, e.g. Wanamaker’s Estate, 72 A.2d 106 (Pa. 1950) (testator left insufficient funds to carry out testamentary provision for the building of a home for boys, the court granted a petition of the trustees for a *cy pres* award of additional funds); Miller’s Estate, 110 A. 2d 200 (Pa. 1955) (testator left insufficient funds to build a memorial that testator requested, court allowed the trustees discretion to determine size and character of the memorial).

museum, the museum's acceptance of the gift of a partial, undivided interest is predicated upon this important feature of the agreement. This mechanism is practical and beneficial to both donors and museums; to the former, since donors enjoy certain tax benefits from making partial gifts during their lifetimes while they retain the "use" or enjoyment of their art for the remainder of their lives, and to the latter, since the minority stake granted in the art work in the current year will irrevocably vest full ownership in the museum at the donor's death.

The mechanism described above, in use since at least 1958, is typically initiated when an individual, who had previously owned a work of art outright, creates a Tenancy in Common by vesting in an institution a partial, undivided interest in fee simple title to the work while the individual retains the remaining interest. Notwithstanding the donor enjoys certain benefits, the direction of flow is from private individual, whose intent is charitable, to public institution.

The Plan, by reversing the flow at the first stage, creates a perfectly analogous condition in the second and final stages. The Plan provides that the Barnes Foundation, which previously owns a work of art outright, initiates the Tenancy in Common by selling a partial, undivided interest in the title to a work to an individual. From that point onward, the arrangement and its net effect are identical to the conventional gift of a partial, undivided interest just described and long in use.

### **Fully IRS Approved**

Gifts of partial, undivided interests have been used extensively for forty or more years to afford wealthy donors substantial tax benefits on their gifts to charitable, religious or educational institutions (*See* Ralph E. Lerner & Judith Bressler, Art Law: The Guide for Collectors, Investors, Dealers, and Artists (2nd ed. 1997.)) Consequently, the IRS is thoroughly familiar with the practice and even evaluates works of art for tax purposes (IRS Ruling 57-293; Section 170).

By custom long established by museums, collectors and the IRS, an individual, for example, who in the current year donates a 50% interest in a work of art, receives the benefit of a tax deduction for 50% of its present, full FMV in the year in which a partial, undivided interest in the work was given away while retaining for himself the right to the use and enjoyment of the object during his lifetime. In order to qualify for the deduction, the deed of gift "must contain

unequivocal language of present gift and must transfer to the organization rights to possession, dominion, and control of the art object consistent with the creation of a Tenancy in Common as between the donor and the organization. If these conditions are met, the allowable deduction under section 170(a) will be equal to that value which bears the same ratio to the value of the entire interest that the donated, undivided present interest in the art object bears to the entire interest therein.” (IRS Ruling 57-293; Section 170)

Upon his or her death, the donor’s estate receives an additional tax benefit for 50% of the painting’s FMV (either at the date of death or six months later) without deducting value from that portion of its FMV to compensate for its use. Moreover, far from depleting it with use, the value of a painting partially gifted to an institution may be, and often is, greater at the date of death than on the date of the initial partial gift. The donor’s estate, therefore, receives a tax deduction equal to the appreciated FMV of the remaining interest at date of death.

Prominent examples of individuals who have made such gifts include the Partial Gift to the Metropolitan Museum of Art (1993) by Walter & Lenore Annenberg of Paul Gauguin’s The Siesta, 1891-2; and the Partial Gift by Walter & Lenore Annenberg of Paul Gauguin’s Three Tahitian Women, 1896, and Paul Gauguin’s Two Women, 1901-2, both to the Metropolitan Museum of Art (1997).<sup>20</sup>

Notably, because it can never be sold, a partial, undivided interest in a work of art purchased at auction from the Barnes Foundation through the Plan, would be regarded at the time of purchase as encumbered with the result that the price paid would, in all likelihood, be far less than its unencumbered FMV. However, because the Plan, like the IRS, imputes no value to the utility of a painting and ascribes value only to its fee simple title or part thereof, the Plan, again like the IRS, assigns for tax purposes full, FMV proportional to a partial title to a work of art even though the work is likewise encumbered by virtue of the agreement by which partial, undivided interest so held is to be gifted entirely to the institution that owns the residual interest. This convention in the tax code, as it has applied in numerous cases to those making partial gifts of paintings previously owned outright, including the Annenbergs, must apply equally to those who purchase a partial, undivided interest in a painting from the Foundation. As their situation is

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<sup>20</sup> The possessory interests in these paintings were shared by the donor and the Metropolitan Museum; however, as a practical matter, museums are often content to allow donors to enjoy full or disproportional use of the paintings for life.

then identical in all respects to the Annenbergs, the owner of a partial, undivided interest in a painting purchased from the Barnes Foundation, no matter how or when acquired, will receive at the time of his or her death a tax deduction in proportion to the full FMV of the work. Naturally, the owner of a minority stake without impairing his possessory rights may, as is customary, make partial donations back to the museum in any proportion and in any year in which the donor deems a tax deduction to be advantageous.

Nor should there be any undue concern that art collectors, such as the Annenbergs, would act carelessly or negligently toward art in which they have a partial, undivided interest irrespective of whether they retain such interest after making partial gifts to museums or whether they purchased for a sizeable investment in excess of hundreds of thousands or even millions of dollars the same partial, undivided interest from the Barnes Foundation.

## **Conclusion**

The Trustees have known for some time that income from operations was insufficient to sustain educational programs at the Barnes Foundation, most especially when in the early 1990's programs began to exceed in scope those defined in the Indenture. Accordingly, the Trustees have explored diverse ways, including: extending public visiting hours, charging admission to the public, lending art to traveling exhibitions, opening a gift shop, organizing membership societies and holding fund-raisers for its new members, selling paintings outright and finally moving into the City of Philadelphia as a museum open half the week to the public, petitioning the court on each occasion, all in a concerted effort to "save" the Foundation by boosting its revenue stream to match expansive ambitions. However, these initiatives, each expressly forbidden in the Indenture, all entail a radical and permanent redefinition of the institution and its purposes as well as a dangerous and unprecedented assault on the fundamental principles upon which is based all estate and trust law in the United States.

In addition to reverting to the Indenture, we believe the Plan comprises as its most compelling feature the opportunity for the Barnes Foundation to help itself. The only other alternatives imaginable, either (i) private support, which presupposes the appearance of a new benefactor(s) both sufficiently wealthy and completely willing to adopt Dr. Barnes's philosophy as his or her own, or (ii) public support, which, like the Lenfest/Pew proposal, must entail the

virtual dismantling of the Barnes Foundation and all its central precepts, seem either very unlikely or wholly unpalatable. The other proposals of which we are aware all require fundamental, permanent changes in either the location of the art collection, the integrity of the Foundation, its purpose and its administration and/or an effective loss of control by Lincoln University. We believe that the Plan is the best and most reasonable way to protect the Foundation's dominant purpose as well as Lincoln University's stewardship, and would be so found by the Court.

Respectfully submitted,

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Leicester, VT 05733

(802) 236-7431

<mailto:maroney.james@gmail.com>

Exhibit 1

**National Gallery of Art**  
Washington, D.C. 20565 \_\_\_\_\_

**Deed of Partial Gift**

I/We, \_\_\_\_\_, hereby give to the Trustees of the National Gallery of Art ("the Gallery") an undivided \_\_\_\_\_ percent of my/our right, title and interest (including whatever copyright and associated rights I/we have) in the following work of art ("the Work"):  
(medium) (artist) (title)

The Gallery shall be entitled to possession of the Work for a total of \_\_\_\_\_ days out of each calendar year. The undersigned shall be entitled to possession of the Work for the balance of each calendar year. To the best of my/our belief, the Work is free and clear of all encumbrances and restrictions and since 1940 has not been imported or exported into or from any country contrary to its laws.

I/We wish that the Work be identified to the public as a Gift (Partial and Promised) of \_\_\_\_\_.

I/We hereby promise to give the balance of my/our remaining \_\_\_\_\_ percent undivided right, title and interest in the Work to the Gallery not later than by bequest in my/our Last Will and Testament. Until then, while the Work is in my/our possession, I/we will make adequate provision for its care and security and will keep the Gallery apprised of its location. The Gallery will have the right to inspect the Work periodically, at mutually agreeable times, to check on its condition. It is my/our understanding that the Gallery's insurance will cover the fraction of the Work owned by the Gallery while the Work is in my/our possession and will cover the entire value of the Work while the Work is at the Gallery and in transit to and from the Gallery.

Before agreeing to lend the Work or authorize its reproduction, I/we agree to notify the Gallery of my/our intentions and to obtain its concurrence as co-owner of the Work.

**DATE:** \_\_\_\_\_ **DONOR:** \_\_\_\_\_  
**DATE:** \_\_\_\_\_ **DONOR:** \_\_\_\_\_  
**Address of Donor(s):** \_\_\_\_\_  
**Telephone:** \_\_\_\_\_

**Delivery:** Please write or call the Office of the Registrar, National Gallery of Art, Washington, D.C. 20565 (telephone: 202/842-6153, or fax: 202/842-6932) to make arrangements for transportation and insurance of your gift.

**Provenance:** For many reasons it is important that the Gallery have as complete as possible a history of the subject of a gift. To that end, it will be helpful if you will forward any information or documentation which you may have with respect to your ownership, display and restoration, and all prior ownership, display and restoration, of the subject of your gift.

**Valuation:** The Gallery may accept your valuation of your gift for insurance purposes but may not determine value for any purpose.

I certify that a deed of gift and the subject thereof were physically present in the National Gallery of Art prior to the meeting of the Trustees of the National Gallery of Art on \_\_\_\_\_ at which meeting the Trustees accepted the gift as described above.

\_\_\_\_\_  
Secretary  
4/30/02

Rev.

Exhibit 2

**MUSEUM OF FINE ARTS, BOSTON**

465 Huntington Avenue, Boston, Massachusetts 02115-5523 617/267-9300 www.mfa.org

**Deed of Gift for Fractional Interest**

**Donor(s): Telephone Number:**

**Credit Line:** I/We wish the credit line to read as follows:

**Gift of** \_\_\_\_\_

**Donation:** The undersigned Donor, in consideration of Donor's desire to benefit the Museum of Fine Arts, Boston ("MFA"), and of MFA's acceptance of Donor's gift of the Property (subject to the terms set out below), does hereby irrevocably and unconditionally give, grant, donate, assign, convey, and deliver, together with all copyright, proprietary rights, and related interests of Donor therein, to MFA to become its property, **00% undivided fractional interest** in the item(s) described below along with any frames, mats, bases, or other materials delivered to the MFA along with such items (the "Property").

**Description of the Property:**

**Provenance:** The Property was acquired by Donor on (date) \_\_\_\_\_ by (check one):  Gift  Inheritance  Purchase  Debt Satisfaction  Other: from (previous owner):

Please provide any additional history of ownership of which you are aware:

**Terms:**

1. By execution of this DEED OF GIFT Donor(s) expressly represents and warrants to the MFA that he or she is, or they are, the sole lawful owner of title of the Property or that Donor is fully authorized by such owner to enter into this DEED OF GIFT. Donor further represents that the Property is free and clear from any and all encumbrances, that there has been no prior pledge, option, or gift of any part thereof granted to any person, that Donor has the right to give or transfer the Property, and that Donor will warrant and defend the title thereto against lawful claims and demands of all persons.
2. Donor acknowledges that upon execution of this DEED OF GIFT, the MFA shall be entitled to possession and control of the Property for a portion of each calendar year appropriate to its interest in the Property.
3. Donor acknowledges that he/she has given a pledge to MFA promising to transfer all remaining interest in Property during lifetime or, in any event, at death.
4. Donor represents and warrants that no customs laws, tax laws, laws of inheritance, or other laws or regulations applicable to the Property, its export or import, have been broken.
5. Donor represents and warrants that there are no claims, judgments, liens, or other encumbrances of any kind whatsoever against the Property, any portion of the Property, or title to it.
6. The Internal Revenue Service has determined that MFA is organized and operated exclusively for educational purposes and is exempt from federal income tax pursuant to Sections 501(a) and (c)(3) of the Internal Revenue Code. MFA does not advise donors on tax matters and suggests that Donor direct any questions regarding donations as charitable contributions to Donor's tax advisor or an office of the Internal Revenue Service. The MFA does not appraise donations but will make objects available for appraisal upon the request of Donor.
7. Donor will defend, indemnify, and hold MFA harmless from claims or allegations arising from or relating to conduct that would be a breach of Donor's warranties or representations herein if established.
8. This DEED OF GIFT is governed by the law of the State of Massachusetts. All litigation arising from or relating to this DEED OF GIFT will be prosecuted in any court of competent jurisdiction in Boston, Massachusetts, and Donor consents to the jurisdiction of such courts.

**Signature:** \_\_\_\_\_ Date \_\_\_\_\_

Signature of  Donor or  Donor's Authorized Representative Date

Signature of Co-Owner (if any) \_\_\_\_\_ Date \_\_\_\_\_

**Notarization:** Personally appeared before me \_\_\_\_\_ on \_\_\_\_\_, 20 \_\_\_\_\_

And acknowledged the foregoing instrument to be \_\_\_\_\_ free act and deed.

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
My commission expires

The Museum of Fine Arts, Boston hereby accepts the foregoing gift of Property subject to the terms listed above.

\_\_\_\_\_  
Director/Deputy Director

\_\_\_\_\_  
Date