

# The Art of the Steal

A documentary film by Don Argott

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# The Art of the Steal

Born into a working-class family in Philadelphia, Albert C. Barnes was a man who through hard work and determination became a doctor and medical researcher, founding a successful pharmaceutical firm that made him a multimillionaire. As his fortune grew, Barnes developed a taste for art and in time assembled one of the world's most remarkable private collections, featuring original paintings by Van Gogh, Renoir, Picasso, Cézanne, and many other important artists. Barnes relied on his own instincts rather than the advice of experts when he bought paintings, and he had little use for the pretentious attitudes of Philadelphia's art collectors and high society; the animosity between Barnes and the city's art establishment grew to the point that in 1922 he opened the Barnes Foundation, a private gallery where he kept his collection rather than share it with institutions such as the Philadelphia Museum of Art. The Barnes Foundation was open by invitation only, and the doctor preferred to have his collection seen by students and serious art lovers rather than those he felt didn't appreciate the work. Barnes died in 1951, and made strict provisions in his will that his collection was not to be sold, lent to other museums, or removed from the grounds of the Barnes Foundation. Lincoln University, a traditionally African-American college, was appointed to oversee the foundation's collection. But after the death of Barnes' protégée Violette de Mazia in 1988, Lincoln University's trustees took full control of the collection, now estimated to be worth 25 billion dollars, and a number of individuals and organizations inexperienced in the world of art laid hands upon the Barnes archive. *The Art of the Steal* is a documentary by Don Argott that explores how greed, political power, and good intentions colluded to violate Albert C. Barnes' wishes and scatter his collection across the globe.<sup>1</sup>

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<sup>1</sup> Barnes and Noble film summary

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## I. INTRODUCTION

As the attendees of this presentation come from a wide range of legal practices areas, the author thought it appropriate to provide a broad overview of some of the legal issues highlighted in "Art of the Steal." At its core, the documentary is about a man who accumulated tremendous wealth during his lifetime, who had charitable goals and who pursued the accomplishment of those charitable goals through a carefully crafted and detailed estate plan, and whose plan was ultimately unraveled by interested parties and the courts. The documentary raises a number of fascinating questions about the relationship between honoring donor intent and serving the broader public interest, which is at the core of charitable giving. Can these two goals be aligned, or is there underlying tension between them? Dr. Barnes was driven by philanthropy and a desire to serve the public good, but he was also motivated by other goals, namely the desire to limit access to his art collection and to create an impenetrable barrier between his legacy and those individuals and institutions he despised.

Dr. Barnes created his Foundation and his Indenture of Trust in 1922, and he amended the terms of the trust on a number of occasions between 1922 and 1950 before he passed away in 1951. He had strong feelings and a firm vision about the disposition of his valuable art collection, and the law granted him the right to dispose of his collection as he saw fit. But the charitable vehicles that he employed to accomplish his estate planning goals enjoyed the tax benefits afforded to charitable organizations under our country's tax laws, and as such, the public's interest in those assets was also a relevant consideration.

Dr. Barnes' trust became irrevocable upon his death. As we understand the term, irrevocable means not able to be changed or reversed. But as trusts and estates lawyers know, very few irrevocable trusts are actually truly irrevocable. The law offers many different mechanisms by which irrevocable trusts can be modified. And in many circumstances, the ability to modify irrevocable trusts should be welcome. Circumstances change over time, and flexibility in trust terms and the ability to adapt to unforeseen circumstances might be in the best interests of the donor, the beneficiaries, and the public in the case of charitable arrangements.

These materials will first provide a brief overview of the current transfer tax system. Estate planning for any client, but particularly for a client of Dr. Barnes' wealth, must consider transfer tax implications. These materials will next provide a general overview of estate planning and how charitable goals and strategies can be incorporated into an estate plan. The author hopes that for those readers who do not have much experience with or knowledge about estate planning, this section will highlight the basic considerations in estate planning as well as the importance of estate planning. Next the author discusses general trends and motivations in art collections, special considerations for artwork, and planning opportunities for art collectors, both during life and at death. Art is a unique asset and planning for artwork requires an understanding

of art's distinctive features. While to his great credit Dr. Barnes engaged in extensive planning for his collection during his lifetime, unfortunately the lack of sufficient funding to support his collection and other unforeseen circumstances after his death ultimately led to the modification of his trust and the deviation from his wishes. Finally, these materials turn to a discussion of donor intent, modifications of irrevocable trusts, and how interested parties and the courts modified Dr. Barnes' trust.

The underlying issue raised in the "Art of the Steal" is whether adherence to Dr. Barnes' intent should have been strictly honored, even if honoring his intent was adverse to the broader public interest. His story is both compelling and moving, and it is understandable why such great controversy exists among those who have taken an interest in his story.

## II. OVERVIEW OF THE TRANSFER TAX SYSTEM

### A. Federal Estate, Gift, and Generation-Skipping Transfer Tax

The federal estate, gift, and generation-skipping transfer ("GST") tax exemption amount currently stands at \$12.06 million per person.<sup>2</sup> The exemption amount will be indexed for inflation in calendar years 2023 through 2025 but is scheduled to revert to its 2017 level (indexed for inflation) beginning on January 1, 2026. The 2017 exemption was \$5.49 million per person. The tax rate for all three taxes remains at 40%, and the estate and gift tax remain unified - that is, taxable gifts made during life reduce, dollar for dollar, the exemption available to shelter transfers occurring at death.

A married individual may give an unlimited amount to his or her spouse during life or at death with no transfer tax consequences.<sup>3</sup> Subject to some technical rules, generally gifts and bequests to public charities are free of gift and estate tax. Accordingly, the current \$12.06 million exemption shelters lifetime or testamentary transfers to individuals other than a spouse (e.g. transfers to children, grandchildren, siblings, nieces and nephews, parents, or other unrelated individuals).

The gift tax annual exclusion is currently \$16,000 (indexed for inflation).<sup>4</sup> This is the amount that each donor may give to any number of individual donees each calendar year without using up any of his or her gift and estate tax exemption amount.

Assets included in the estate of a deceased individual (except for those which constitute "income in respect of a decedent" - including, most importantly, tax-deferred retirement plans such as 401(k)s and IRAs) receive a new income tax basis, "stepped-up" (or possibly, although rarely, "stepped-down") to their date of death values. Assets transferred by lifetime gift do not

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<sup>2</sup> Internal Revenue Code (I.R.C.) §2010

<sup>3</sup> I.R.C. § 2523

<sup>4</sup> I.R.C. § 2503

receive any such basis adjustment; rather, the donee's basis remains the same as the donor's, adjusted for any gift tax paid with respect to the appreciation.<sup>5</sup> (In those rare cases where the market value of the gifted assets is less than the donor's basis, the donee's basis is that lower market value.) Stepped-up basis at death has been a part of our tax system for many years, although there have been recent proposals to eliminate it.

"Portability" of the estate tax exemption - i.e., the ability of a surviving spouse to claim the deceased spouse's unused exemption by filing a federal estate tax return (with an extended deadline of two years after date of death when the filing is made solely to elect portability and would not otherwise be required) - remains in effect, and most observers believe that it is likely to be a permanent feature of our transfer tax system. Portability is available only for the federal estate and gift tax exemption, not for the GST tax exemption. The author is not aware of any states that allow portability of their state estate tax exemptions.

#### B. State Estate Tax

In addition to the federal estate tax, 13 states (including the District of Columbia) also have a state estate tax. Virginia currently has no state estate tax, having abolished it several years ago. For calendar year 2022, Maryland's estate tax exemption is \$5 million and the District of Columbia's estate tax exemption is \$4,254,800.

### III. ESTATE PLANNING

#### A. General

Estate planning is one aspect of financial planning. Our clients have lots of different financial goals: they want to provide for their own needs and the needs of those they love, they want to maintain and sometimes even grow their money, they want to make appropriate arrangements for the management of their assets in the event of incapacity, and to provide for the disposition of their assets at death. They want to minimize taxes. And many of them want to do good by supporting charitable causes and organizations that are important to them and that reflect their values.

Estate planning is a process that involves a team of professional advisors who can work together to create a comprehensive financial plan for the client, and that team might consist of a trusts and estates lawyer, a financial advisor, a tax accountant, an insurance agent, a banker and/or broker, and possibly an advisor to add value and knowledge on the charitable component of the financial plan.

Estate planning will dispose of a client's assets at death. Assets include (but are not limited to) real estate, checking and savings accounts, brokerage/investment accounts (including stocks, bonds, and mutual funds), retirement accounts, closely-held business interests, life

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<sup>5</sup> I.R.C. § 1015

insurance, intellectual property, and tangible personal property, including clothing, jewelry, personal effects, cars, household furnishings and furniture, and collections, including art collections.

### B. Wills and Revocable Trusts

The two primary estate planning documents that dispose of a client's assets at death are a Last Will and Testament ("Will") and a Revocable Trust. If a client dies without signing a Will or Revocable Trust, the client has died "intestate" and state law determines how the client's assets are distributed at death. So why do clients need a Will or Revocable Trust?

1. To dispose of assets in a way that differs from the intestate scheme.
2. To name preferred guardians of minor children.
3. To establish trusts to hold children's and grandchildren's shares beyond their eighteenth or twenty-first birthdays.
4. To establish a trust for a spouse to provide management, to preserve the assets, and/or to direct the residue upon the spouse's death.
5. To implement estate tax minimization planning.
6. To protect assets from potential creditors of the beneficiaries.

Once a client determines that she wants to engage in estate planning, she must consider whether her basic estate planning document should be Revocable Trust rather than a Will. Generally, the advantages of a Revocable Trust include:

1. The avoidance of court-supervised probate and probate legal fees.
2. The avoidance of public disclosure of an estate plan, i.e. who gets what and how (may be important if controversial).
3. The avoidance of public disclosure of the nature and extent of assets (may be important if very wealthy).
4. In Virginia, the avoidance of a 1/10th of 1% probate tax.
5. The avoidance of court proceedings to determine incapacity, to appoint guardian of person and conservator of property.
6. Much better mechanism than a general power of attorney for management of assets in the event of long-term incapacity.

As a general rule, the older a client is, the wealthier a client is, and especially if a client is single, the more desirable it is for the client to use a Revocable Trust as her basic estate planning document.

### C. Assets That Pass Outside of Estate Planning Documents

Estate planning documents will control the disposition of assets owned in the decedent's own name or in the name of the decedent's Revocable Trust, and assets that pay on death (via beneficiary designation) to the decedent's estate or Revocable Trust. There are certain assets that pass outside of the decedent's estate planning clients.



1. Anything that is held joint tenants with right of survivorship or tenants by the entirety passes automatically to the survivor on the first death, "outside" of the estate planning documents.
2. Anything that has a beneficiary designation on it, i.e. life insurance, 401(k) plans, IRAs, other sorts of pensions, annuities, passes to the person named as the beneficiary of such asset, "outside" of the estate planning documents.
3. Bank accounts or brokerage accounts which have a pay-on-death (P.O.D.) or transfer-on-death (T.O.D.) designation on them pass to the beneficiary designated on such asset, "outside" of the estate planning documents.

Assets which pass by virtue of joint ownership or beneficiary designation are not part of the probate estate, are not subject to probate tax, and are not controlled by estate planning documents. For many married couples these assets are 90%-100% of what they own. It is extremely important to coordinate how those assets pass with the overall estate plan and with the estate planning documents. The designation of appropriate secondary beneficiaries – not minor children but maybe trusts for them – is often overlooked.

The appropriate titling of assets is vital to the successful implementation of an estate plan. Estate planning is therefore a two-step process: step one is the creation and execution of estate planning documents. Step two is the retitling of assets and the designation of appropriate beneficiaries to coordinate with the estate planning documents.

#### D. Charitable and Philanthropic Components of Estate Planning

Many clients engage in some type of charitable giving. And this interest in philanthropy is not limited to older, high net worth clients. It is also a financial priority for younger clients, and for clients with moderate net worth. Perhaps the first question to be considered is whether the client should make a gift during her lifetime or leave a bequest at her death.

1. Lifetime Gifts. In making lifetime gifts, clients should consider their capacity to give. Gifts are irrevocable, and clients should not undermine their own financial goals, including their long-term spending needs and their desire to transfer wealth to their families or to their preferred charities. An advantage of making a lifetime gift is that the donor gets to see the immediate impact of her gift. The client can negotiate the terms of the gift, and receive recognition for the gift during her lifetime. For tax purposes, the donor takes an income tax deduction the year of the gift. As a further benefit, the gift reduces the size of the donor's taxable estate, thus possibly reducing the amount of estate tax owed at her death.

2. Testamentary Bequests. The benefits of providing for charities at death is that the client retains the financial benefit and security of the asset for her lifetime, and she is able to leave a "legacy" gift at her death. And for tax purposes, her estate is entitled to a charitable estate tax deduction. For clients who want to make testamentary bequests in their estate planning documents at death, there are a couple of ways to approach this. One way is to leave a fixed amount of money to one or more charities in a Will or Revocable



Trust. "At my death, I give \$5,000 to the National Gallery of Art, \$5,000 to the Animal Welfare League, and I give the balance of my estate to my children." This approach is ideal for clients who want to provide relatively nominal, fixed amounts to a few charities.

Alternatively, if a client wants to make larger charitable bequests, it is preferable to use a percentage of the estate rather than a fixed amount of money. "I give 10% of my residuary estate to the National Gallery of Art and 90% to my children." Consider that if the value of a client's estate unexpectedly shrinks dramatically, a large cash gift to a charity could consume most or all of the assets, which could have the perverse effect of unintentionally disinheriting the client's children. So for substantial charitable gifts, using a percentage of the estate is preferable because no matter if the estate grows or shrinks, the client's goal of providing for both loved ones and charities is accomplished.

3. Tax Considerations. While in the author's experience the majority of clients do not give to charity solely for tax reasons, of course clients want their advisors to consider the tax benefits available and to try to maximize tax savings. Congress encourages charitable giving by providing tax deductions for charitable contributions. The two primary types of deductions are income tax deductions and estate tax deductions. An income tax deduction is taken on an income tax return to offset earned income and is generally available to donors who itemize their deductions, within certain limits that are based on a percentage of the donor's adjusted gross income. Estate tax deductions are taken on an estate tax return to minimize any estate taxes due.

Of course, higher income tax rates and lower estate tax exemption amounts make charitable giving more attractive. To use a specific example, in the 37% federal income tax bracket, a donor can give away \$100,000 in a charitable gift and avoid income tax on \$100,000, or a donor can keep \$63,000 and pay \$37,000 of federal income taxes plus more state income taxes. In the 40% estate tax bracket, a donor can give away \$100,000 in a charitable bequest and avoid estate tax on \$100,000, or a donor can pass \$60,000 to her children and pay \$40,000 of estate taxes plus maybe more state death tax.

Quite often clients time making a lifetime charitable gift based on when they are looking for an income tax deduction. So often clients make big charitable gifts in the same year in which they have a bunching of income, say when they have a liquidity event by selling their business.

4. Charitable Planning Strategies. There are lots of different strategies available to clients who wish to incorporate charitable giving into their estate plan, and these strategies need to be tailored to the client's unique family and financial situations and to the client's goals.

a. Direct Transfers to Public Charities. Clients can make charitable bequests to public charities in their estate planning documents, or they can provide for charities through beneficiary designations on retirement accounts, life insurance, and other assets.

b. Use of Retirement Accounts. Retirement accounts are an attractive asset to leave to charity. When individuals withdraw assets from most types of retirement accounts, they pay income tax on the amount withdrawn. However, charities are tax-exempt, so a charity can receive 100 cents on the dollar, vs. a spouse or children who will only receive 60 cents on the dollar. One point of caution about using retirement accounts to provide for charities: retirement accounts will get depleted once the account owner starts taking required minimum distributions (RMDs), so the longer the owner lives, the smaller the account, and the less that will pass to charity upon the owner's death. The point is that when clients use particular assets to provide for specific beneficiaries, estate plans can get skewed based on the growth or reduction of particular assets, so clients need to think holistically about their goals.

c. Tangible Personal Property. Many clients also have specific items of tangible personal property, such as artwork collections, that they want to leave to charity. Clients write memos to their Executors giving them guidance as to what charities the Executor might consider donating particularly valuable tangible personal property to. Clients can negotiate directly with public charities such as museums as to how the artwork will be displayed and maintained and how credit will be given to the client for her generosity. Sometimes clients and charities sign Memorandums of Understanding documenting the terms they agreed to.

d. Private Charitable Foundation. Clients with significant net worth and unique valuable collections such as artwork can establish private charitable foundations. Private charitable foundations are not-for-profit corporations established under state law and recognized as tax-exempt by the IRS. Unlike a public charity which relies on public fundraising, private foundations normally are funded by wealthy individuals and families. One famous example: the Barnes Foundation.

e. Charitable Trust. There are a few different types of charitable trusts. A purely charitable trust is a trust that is made for the benefit of specific charitable purposes. For federal tax purposes, the trust must be organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals.<sup>6</sup> Virginia law recognizes purely charitable trusts. In Virginia, a charitable trust is a trust "created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community."<sup>7</sup> A charitable trust does not have to

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<sup>6</sup> I.R.C. § 170(c)(2)(B)

<sup>7</sup> Va. Code § 64.2-723(A)

indicate a particular charitable purpose or beneficiary; rather the court may select one or more charitable purposes or beneficiaries. Importantly, the selection shall be consistent with the settlor's intention to the extent it can be ascertained.<sup>8</sup> Note here the importance of considering a settlor's intent in establishing a charitable trust. The issue of donor intent is at the core of the controversy in "Art of the Steal." In Virginia, like many states including Pennsylvania where the many Barnes cases were litigated, the Attorney General oversees charitable trusts.<sup>9</sup>

The other common types of charitable trusts are known as split-interest charitable trusts. Some clients want to make large charitable gifts, but they are hesitant to because they want to make sure that they and their loved ones have enough assets to support their needs for their lifetimes. A strategy that might work well for these clients is a split-interest charitable trust. Broadly stated a split-interest charitable trust allows a donor to benefit themselves and their loved ones and benefit a charity.

There are two main types of split-interest charitable trusts: charitable remainder trusts (CRT) and charitable lead trusts (CLT). Both of these can be created during life or they can be created at death. It is worth mentioning that CRTs work better in higher interest rate environments, whereas CLTs work better in lower interest rate environments. These trusts work just like the names suggest they work.

In a Charitable Remainder Trust, the client gives property to an irrevocable trust. The donor receives an income stream from the trust for life or for a term of years, and at the end of the trust term, the charity receives the remaining trust assets. There are two primary tax benefits to a CRT. The first is that the client receives a charitable income tax deduction when she makes the gift to the trust. The second is that CRTs are tax exempt, so if the client gives appreciated property to a trust and then the trust sells the property, the appreciated property is not subject to capital gains tax. Generally, CRTs are a useful strategy for (1) clients who are looking to sell a business, (2) clients looking to diversify a concentrated highly appreciated position in one stock or one piece of real estate, and (3) clients who want to generate liquidity from an illiquid asset. Consider a client who owns a large portfolio of Apple stock and Microsoft stock and she has owned these for a long time so there is significant built-in capital gains in these holdings. If this client gives the stock to a CRT, the CRT can then sell the stock and avoid paying capital gains tax, and the CRT can pay an income stream back to the client for her lifetime. And at the client's death, the remaining assets in the CRT can pass to her Family Foundation or her Family Donor Advised Fund.

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<sup>8</sup> Va. Code § 64.2-723(A)

<sup>9</sup> Va. Code § 64.2-708(D)

Conversely, in a Charitable Lead Trust, the client gives property to an irrevocable trust. The charity receives income from the trust for a term of years, and at the end of the trust term, the client's named beneficiaries, oftentimes the client's children, receive the remaining trust assets. CLTs are one of the most powerful and effective strategies available to high-net-worth clients that have charitable goals. When a client passes away and assets pass into a CLT trust, the estate is entitled to a charitable deduction, and depending on a number of factors, including the interest rates at the time of death, the deduction will greatly reduce, and in some cases even entirely eliminate, the estate tax. Consider the following example: On a recent estate tax return, a client left \$5 million to a 20-year CLT, and the estate received an 88% deduction on the estate tax return. To explain this in real numbers, normally a \$5 million transfer would result in \$2,000,000 of estate tax (40% rate). In this case after the charitable deduction, the estate paid only \$240,000 of estate tax on the \$5 million transfer. One can imagine that the client's children would be quite pleased with this outcome. And the client has accomplished much charitable good by funding a CLT which distributes assets out to public charities.

#### IV. ART COLLECTIONS AS AN ASSET

##### A. General Trends and Motivations in Art Sales and Collections

Global sales of art and antiques reached an estimated \$65.1 billion in 2021. Online sales of art and antiques reached a record high of \$13.3 billion in 2021, doubling in value from 2019. The three major art hubs are the United States, the United Kingdom, and China, and they account for 80% of the value of global sales. The United States is the single largest market worldwide, accounting for 43% of global sale values.<sup>10</sup>

These numbers reflect a decrease in sales from prior years, which of course is the result of the worldwide COVID pandemic. Sales in the United States market fell by 24% in 2020 to \$21.3 billion, which reflect its biggest fall in sales since 2009. However, global online sales have doubled in value between 2020 and 2021.<sup>11</sup>

Clients collect art for a variety of reasons. A survey of high-net-worth buyers by Art Basel UBS reveals that some of the most important motivations for collecting art include:

1. aesthetic/decorative considerations
2. passion/expression of personality
3. pleasure and social reasons
4. portfolio diversification
5. expected return on investment
6. Social contacts/networking

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<sup>10</sup> Art Basel and UBS Global Art Market Report for 2022

<sup>11</sup> Art Basel and UBS Global Art Market Report for 2021

7. Family traditions/legacy
8. Support of artists/philanthropy
9. Status/cultural credibility
10. Alignment with sustainable development goals
11. Hedge against inflation
12. Reflection of political and social views<sup>12</sup>

It is also worth noting that the marketplace for art sales is broadening in large part due to online venues and global art fairs. Many wealth managers are now offering services related to art and collectibles. And millennials are increasingly buying artwork as well, revealing that artwork is not simply an asset class accessed by older high net worth individuals. As we approach the largest transfer of wealth in the history of our country (from baby boomers to their descendants), we must prepare for the transfer of these valuable collections. Financial planning professionals, including trusts and estates lawyers and other lawyers who advise clients on financial matters, must understand the unique issues related to art collections.

### B. Special Considerations for Artwork

Art is a unique asset and has unique financial characteristics. Most clients do not feel passionate about what stocks and bonds they own, but they do feel passionate about their art. They are motivated to collect art for different reasons, and many clients feel emotionally connected to their collections. Most clients will be less inclined to give, donate, loan, or sell art during their lifetimes because of this emotional connection. Art is also not easily divided, unlike cash and other liquid assets. The beneficiaries of an art collector's estate may be interested in the artwork, or they may not. And more than one beneficiary may be interested in inheriting a particular piece of art, which could lead to family disputes. There are many unique features pertaining to art as an asset class, some of which are highlighted below.

1. Understanding the Collection. Clients and their advisors must understand the details of the art collection. This may seem obvious but it is often overlooked. Oftentimes when trusts and estates lawyer conduct basic information gathering about a client's family circumstances and financial circumstances (most often in the form of a questionnaire), they inquire about tangible personal property as a whole. Tangible personal property includes clothing, jewelry, personal effects, automobiles, and household furniture and furnishings, which includes artwork. Advisors would instead be well advised to seek more specific information about tangible personal property to determine if there are collections that warrant special planning considerations.

Clients do not always maintain detailed and extensive records on their art acquisitions. As clients plan how to incorporate gifting, selling, or donating strategies into their estate plan, it is vital that they understand the scope and value of their

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<sup>12</sup> Art Basel and UBS Global Art Market Report for 2021

collection. Robin Kalota of Plan Art, LLC suggests that advisors ask clients the following questions:

- a. Does the collector have an updated inventory of the collectible holdings, including such details as medium, dimensions, signature, date of creation, cost, and more?
- b. Can the collector identify the high value art versus art assets that have more emotional than monetary value?
- c. Has the collector obtained a FMV appraisal within 3 years?
- d. Has the collector kept all her records, receipts, bills of sale, past appraisals, insurance reports and evidence of ownership?<sup>13</sup>

2. Valuation. Clients and their advisors must understand the value of the items in the art collection. Value is important for a number of reasons. First consider that in order to properly insure the collection, insurance companies must understand the value of the items in the collection. Secondly, whenever art is transferred, whether by sale, gift, or donation, the value of the art must be determined. The value determines the capital gains tax owed, the transfer tax owed (or the exemption used for tax-free transfers), and the charitable deduction allowed. Inaccurate valuations can result in assessed tax penalties.

In general, for federal income, estate, and gift tax purposes, property that is transferred should be valued at its fair market value. The fair market value of the art is the “price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.”<sup>14</sup>

Appraisals are required for any taxable transfer. If a collector gives artwork to a family member during her lifetime, the gift of artwork must be reported on a federal gift tax return (Form 709) and an appraisal must be attached to the gift tax return. If a collector gives artwork to a charity during her lifetime and wishes to receive a federal income tax charitable deduction, an appraisal is necessary if the value of the donation exceeds \$5,000. If a collector dies owning artwork, the executor of the collector’s estate must in many circumstances file a federal estate tax return (Form 706) and an appraisal must be attached to the estate tax return. Specifically, for estates, an appraisal is required for art and collectibles worth in excess of \$3,000 each. In addition, the appraisal must be accompanied by a written statement of the executor containing a declaration that is made under the penalties of perjury as to the completeness of the itemized list of such

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<sup>13</sup> “Art and Collectibles: the Missing Piece of the Estate Planning Puzzle” by Robin Kalota. American Bar Association, Real Property, Trust and Estate Section, eReport 2020 Winter Issue.

<sup>14</sup> Treas. Reg. § 20.2031(b)



property and as to the disinterested character and the qualifications of the appraiser or appraisers.<sup>15</sup>

There are a number of requirements as to what information must be included in an appraisal and as to who can serve as an appraiser. These requirements have evolved over time, but in general an appraisal for artwork must include:

1. A complete description of the object, indicating the:
  - a. Size,
  - b. Subject matter,
  - c. Medium,
  - d. Name of the artist (or culture), and
  - e. Approximate date created.
2. The cost, date, and manner of acquisition.
3. A history of the item, including proof of authenticity.
4. A professional quality image of the object.
5. The facts on which the appraisal was based, such as:
  - a. Sales or analyses of similar works by the artist, particularly on or around the valuation date.
  - b. Quoted prices in dealer's catalogs of the artist's works or works of other artists of comparable stature.
  - c. A record of any exhibitions at which the specific art object had been displayed.
  - d. The economic state of the art market at the time of valuation, particularly with respect to the specific property.
  - e. The standing of the artist in his profession and in the particular school or time period.<sup>16</sup>

A qualified appraiser is an individual with verifiable education and experience in valuing the type of property for which the appraisal is performed.

1. The individual:
  - a. Has earned an appraisal designation from a generally recognized professional appraiser organization, or
  - b. Has met certain minimum education requirements and 2 or more years of experience. To meet the minimum education requirement you must have successfully completed professional or college-level coursework obtained from:
    - i. A professional or college-level educational organization,
    - ii. A professional trade or appraiser organization that regularly offers educational programs in valuing the type of property, or

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<sup>15</sup> Treas. Reg. § 20.2031-6(b)

<sup>16</sup> I.R.S. Publication 561 (01/2022), Determining the Value of Donated Property



- iii. An employer as part of an employee apprenticeship or education program similar to professional or college-level courses.
- 2. The individual regularly prepares appraisals for which he or she is paid.
- 3. The individual is not an excluded individual.<sup>17</sup>

Broadly stated, excluded individuals include anyone with an economic interest in the appraised property or transaction such as the donor, donee, an employee of either the donor or donee, any party who transacted with the donor previously on the property, or any party related to any of these individuals.

Interesting, in 1968, Congress created the IRS Art Advisory Panel to assist in the art valuation process. The panel is composed of 25 renowned art experts, all of whom serve without compensation. According to the IRS' website, "The Panel helps IRS review and evaluate property appraisals submitted by taxpayers in support of the fair market value claimed for works of art included in federal income, estate and gift tax cases in accordance with the Internal Revenue Code."<sup>18</sup> The panel helps the IRS in reviewing artwork or other collectible items with an appraised value of \$50,000 or more. Interesting, when making its review, the panel is unaware of whether the appraisals have been submitted as evidence to claim an income tax charitable deduction or an estate or gift tax charitable deduction. In this process, the panel provides reports to the IRS outlining the Panel's recommendations for any adjustments to the fair market value. Taxpayers may request reconsideration of a value if they provide substantial new information or evidence. When serving in this advisory role, the panel's determination as to value is not binding (rather it is advisory), but in practice the IRS relies on its valuation. Collectors who need to determine value for federal income, estate, and gift tax purposes can also seek an advance ruling on valuation from the IRS and the Art Advisory Panel through a procedure outlined in Rev. Proc. 96-15. Any taxpayer that complies with the provisions of the procedure may rely on the Statement of Value in completing the taxpayer's federal income tax, estate tax, or gift tax return that reports the transfer of art.<sup>19</sup>

3. **Risk Management.** Risk management as it pertains to art collections is largely about preventing damage to a valuable collection. Art collections are vulnerable to certain risks. Examples of such risks include but are not limited to:

- a. Theft
- b. Fire and smoke damage
- c. Water or storm damage
- d. Loss

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<sup>17</sup> I.R.S. Publication 561 (01/2022), Determining the Value of Donated Property

<sup>18</sup> <https://www.irs.gov/appeals/art-appraisal-services>

<sup>19</sup> Rev. Proc. 96-15

#### e. Title issues

For the Barnes Foundation, risk management is one of the many factors that the Courts considered in modifying the terms of Albert Barnes' trust. Apparently due to insufficient financial resources, the building structure that housed the art collection was in disarray and needed significant repairs. As reported in the documentary, the building had water leaks, the HVAC system did not work, the windows were rotting, there were conservation problems, and the building needed improved climate control. Richard Glanton, President of the Board of the Foundation, persuaded the court that the building was in such disrepair that the building had to be closed for years to complete the necessary repairs and maintenance. He asked the court to modify the trust to allow the Barnes collection to go on tour, charging the other museums for the privilege of showcasing the collection. He asserted that this would raise sufficient funds to cover the cost of restoration to restore the gallery, thus ensuring the long-term preservation of the collection.

Risks increase whenever an art collection is moved from one location to another. Collectors must be sure that their artwork is properly packed, handled, transported, and stored. Artwork oftentimes needs to be transferred and stored in temperature-controlled facilities. The artwork also should be periodically inspected during the moving process.<sup>20</sup>

Like many other assets, risk can be managed through insurance. Collectors might receive insurance coverage through their standard homeowner's insurance policies. Of course, collectors with highly valuable and unique collections should consult with insurance specialists to explore what type of insurance product is appropriate for the collection. Collectors should make sure that the locations where their collections are displayed or stored are secure, and might conduct background checks on any individuals who routinely have access to the collections. Collectors should also keep current inventories of their art collections as part of the risk management process.

Art theft is also a substantial risk (and the topic of many blockbuster films such as *The Thomas Crown Affair*, *The Monuments Men*, *Entrapment*, *How to Steal a Million*, and *Ocean's Twelve*). Of course, the title of the documentary "Art of the Steal" makes clear the film director's view that what happened to Barnes' famed collection should be characterized as a theft. The FBI estimates that only approximately 5% of stolen art is

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<sup>20</sup> "Practical Planning for Art Collectors and Their Advisors, Part 1: The Ancillaries" by Ramsay H. Slugg, *Probate and Property*, March/April 2016 Vol. 30 No. 2, a Publication of the Real Property, Trust and Estate Law Section of the American Bar Association.

recovered.<sup>21</sup> There are resources available to assist in efforts to locate stolen art. The FBI maintains the National Stolen Art File which is a database of stolen artwork that has been reported to the FBI. The Commission for Art Recovery focuses on items that are still missing from World War II. The Art Loss Register is another international database. According to its website,

“The Art Loss Register is the leading due diligence provider for the art market, and maintains the world’s largest private database of stolen art, antiques and collectables. Experts around the world use our services to check the provenance of items before they buy or handle them. Police, insurers, the trade and the public may record items that have been stolen to maximise their chances of recovery, and to record disputes or items within collections.”<sup>22</sup>

Victims of theft may register stolen items in the database and if the item goes up for sale, they are alerted. Potential buyers may also search the database to see if a particular item has been entered into the database as lost or stolen. Of course, buyers are extremely concerned about the provenance of items and want to insure that the seller has legal authority to sell the item.

4. Title/ Provenance. Title is concept well understood by lawyers. Title proves ownership. Many of the assets that our clients own have title or ownership documentation. Bank, brokerage accounts, and other financial accounts holding securities and mutual funds have title. Real estate has title in the form of real estate deals. Insurance policies have title. Closely held-business interests have title in the form of stock or LLC certificates. Even some tangible personal property such as automobiles and boats have title documentation.

In the world of art, “provenance” refers to the history of the ownership of a particular work of art. Provenance is the documentation that authenticates the work of art. It outlines details such as the work’s creator, history, and value. The word “provenance” stems from the French word “provenir” which means “to come from.” For many art collectors, provenance is sometimes as intriguing as the artwork itself. Provenance tells the story of the art’s history, and collector’s oftentimes love the story behind the work of art.

So why is title important? Anytime artwork is given or loaned to a family member or charity, or anytime artwork is sold, or anytime artwork is used as collateral, it must be

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<sup>21</sup> “Practical Planning for Art Collectors and Their Advisors, Part 1: The Ancillaries” by Ramsay H. Slugg, Probate and Property, March/April 2016 Vol. 30 No. 2, a Publication of the Real Property, Trust and Estate Law Section of the American Bar Association.

<sup>22</sup> <https://www.artloss.com/>

confirmed that the owner actually “owns” the artwork. Quite obviously, a prudent art collector would not purchase a high-priced piece of art without first establishing lawful title. Collectors must therefore complete due diligence prior to buying artwork, especially if the collector believes that she may later sell the artwork, as she must be certain that she has the legal authority to sell the artwork at a later date.

Ownership issues or questions may lower the value of the artwork. Conversely, if provenance can be verified or provided to a buyer, the value of the artwork may increase. When determining the value of artwork, ownership risks are considered.

5. Illiquidity. Quite clearly, art is an illiquid asset. Of course it can be liquidated and converted to cash through a sale, but a sale will trigger capital gain (or loss). Additionally, while liquid assets such as stocks and bonds and even cash can produce an income stream for the owner, art generally does not.

Because artwork is illiquid, sometimes recipients of donated or loaned artwork will request or require an additional gift or donation of cash to accompany the artwork itself. Of course, one of the many reasons that the Barnes Foundation ran into trouble was because there were insufficient liquid assets to cover the carrying costs of the artwork itself.

Buying and selling artwork often incurs significant amount of transaction expenses in the form of commissions by dealers and auction houses. Additionally, there administrative expenses associated with storing, moving, and insuring artwork. As discussed above, the risks associated with the unique nature of artwork must be mitigated, and those mitigation efforts can be costly.

Another challenge with artwork is that the unique character of each individual piece means that the piece has a more limited pool of potential buyers. There market for art sales is more limited than other markets.

Finally, the division and distribution of artwork in a collector’s estate upon her death can be difficult because of the illiquid nature of the artwork. Many clients want to provide equally for their descendants, but artwork cannot be evenly divided. The result may be that some beneficiaries receive more or less artwork, while others receive a greater share of other assets such as cash, investment accounts, and real estate. Quite often, the practical result is that artwork must be sold to generate liquidity to make equalizing gifts to the beneficiaries.

### C. Planning for Artwork

As is the case with so many other aspects of estate planning, succession planning for artwork hinges on the client’s goals. If the client is driven by sharing her passion for art, she may

be more inclined to gift or donate the art. Alternatively, if the client is driven by wealth distribution or tax savings, she may be more inclined to sell the art, either during her life or at her death. Clients may also consider whether their loved ones want the art, or if they would rather receive the monetary value of the art.

In any event, all of the unique characteristics of art make art succession planning extremely important. The collector is the person who knows most about the collection, and it is her goals that the planning should address, so the collector must be actively involved in the planning process. So many clients are motivated to collect art because it is an opportunity to express their personality and to create an artistic legacy that can be passed down generations. Proper planning will help ensure that the collector's legacy is appropriately honored. In addition, active planning should mitigate the risk of disputes over the division of art after the collector's death. As discussed above, it is vital that the collector's advisors and loved ones have information about the cost basis of the artwork and the current fair market value of the artwork. This information will help the interested parties achieve better tax outcomes, both with respect to income tax and estate tax.

Despite the importance of planning for artwork, the reality is that many collectors do no planning. However, for those collectors that do want to plan, there are a number of options available to them.

1. During Life. Broadly stated, a collector has three planning options during her lifetime: she can sell the artwork, she can gift the artwork to family members (or other individuals), or she can donate the artwork to a charitable organization.<sup>23</sup>

a. Sale. There are a number of reasons why a collector may wish to sell artwork during her lifetime. Perhaps she is too heavily invested in art and needs the liquidity that a sale will generate. Or perhaps she wants to sell the artwork and use the sale proceeds to buy different artwork. For a collector who wishes to sell her artwork during her lifetime, perhaps the most significant consideration is the income tax treatment of the sale. The income tax treatment differs depending on whether the taxpayer is a collector, an investor, or a dealer. For collectors and investors, art is a capital asset. Consequently, if the artwork has been owned for a year or less, then gain on the sale is subject to federal income tax at ordinary income tax rates, and if the artwork has been held for over one year, it is a

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<sup>23</sup> "Practical Planning for Art Collectors and Their Advisors, Part 2: Disposition" by Ramsay H. Slugg, Probate and Property, July/August 2016 Vol. 30 No. 4, a Publication of the Real Property, Trust and Estate Law Section of the American Bar Association.

long-term capital asset.<sup>24</sup> Furthermore, a sale might incur significant transaction costs in the form of commissions. Considering the income tax costs and the transaction costs, selling art during a collector's lifetime can be an expensive endeavor.

b. Gift. A primary consideration for a donor contemplating a gift of artwork is whether her family members want to keep the art. Artwork should not be gifted to children who do not want to keep the artwork. As discussed above, art is illiquid and does not product an income stream, so it is a less attractive asset to give to a beneficiary who might want its monetary value but not the artwork itself. Of course any lifetime gift of artwork is subject to the transfer tax laws discussed in Section I.A. Even staying within these limits, donors can still gift a significant value of artwork during her lifetime. From an income tax perspective, the donee (the recipient of the gift) will inherit the donor's cost-basis in the gifted asset. This is known as carry-over basis.

Of course a downside of lifetime gifting is that the donor must relinquish possession and enjoyment of the artwork. After she has given it away, she can no longer hang the artwork in her home and enjoy it on the daily basis. If the donor attempts to maintain possession of the artwork, she runs the risk of the gift being pulled back into her taxable estate under I.R.C. §2036.

It is worth mentioning that there a number of sophisticated gifting strategies available to donors who wish to engage in this type of planning, including gifts to irrevocable trusts and the use of closely held businesses such as family limited partnerships and limited liability companies. Some of these strategies allow for the donor to take discount on the gift for gift tax purposes. Such strategies are beyond the scope of these materials, but there are plenty of resources available to those readers who wish to understand more about these strategies, including the article reference in footnote 20 and 21.

c. Donation. Many collectors choose to donate their collection to charitable organizations during their lifetimes. Collectors may be motivated by the desire to share their collections with the general public, or they may be motivated by the charitable income tax deduction that the donation provides. Or perhaps the collector does not have any family

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<sup>24</sup> "Practical Planning for Art Collectors and Their Advisors, Part 2: Disposition" by Ramsay H. Slugg, Probate and Property, July/August 2016 Vol. 30 No. 4, a Publication of the Real Property, Trust and Estate Law Section of the American Bar Association.

members or loved ones who want to receive the gifted artwork. Collectors can donate to a public charity such as an art museum, or to a charitable trust, or to a private foundation, which is the strategy adopted by Albert Barnes.

Before donating their artwork, collectors must research potential recipients of the gift. Not all museums will accept gifted artwork and not all museums will accept gifts which come with a list of conditions upon which the gift will be made. Many collectors want to engage in extensive and detailed negotiations with the charitable organization regarding the terms of the donation. They care deeply about how the artwork will be displayed and how credit will be given to the donor for her generous gift. Many do not want their artwork to be sold by the museum, and many want their collections to remain intact and not divided and moved to other museums. For some clients wishing to donate their artwork, they may wish to enter into Gift Agreements with the recipient.

There are substantial tax benefits to gifting artwork to charity. Donations of art will earn the donor a current charitable income tax deduction, allow her to avoid capital gains tax on the sale of the artwork, and potentially reduce her estate tax liability by removing the value of the artwork from her taxable estate. For those collectors looking for a charitable income tax deduction, it is crucial that the donor confirm that the gift will entitle her to the deduction. Collectors should take advice from sophisticated tax accountants when contemplating a charitable gift. The income tax rules regarding charitable deductions are complicated and special rules apply to gifts of artwork. Specifically, the IRS's "related use" rule provides that if the use of the art by the recipient charitable organization is deemed related to the organization's exempt purpose, then the donor will be entitled to a federal income tax charitable deduction as the artwork's fair market value. If however the charitable organization does not use the gift as part of its charitable purpose, then the deduction is limited to the lesser of the artwork's cost basis (which is the value at which the donor acquired or inherited the artwork). Using the IRS' own example of how the "related use" rule would work: "If a painting contributed to an educational institution is used by that organization for educational purposes by being placed in its library for display and study by art students, the use isn't an unrelated use. But if the painting is sold and the proceeds are used by the organization for educational purposes, the use is an unrelated use."<sup>25</sup>

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<sup>25</sup> I.R.S. Publication 526 (2021), Charitable Contributions



2. At Death. Similar to a collector's options during life, a collector who holds her collection until death has three options to dispose of her collection: the artwork can be sold, the artwork can be bequeathed to family members (or other individuals), or the artwork can be donated to a charitable organization.<sup>26</sup> Of course, a primary benefit of holding the artwork until death is that the collector can continue to use and enjoy the collection during her entire lifetime.

a. Sale. The sale of artwork at a collector's death is the most common way that artwork is disposed of. A collector can make specific provisions in her estate planning documents that the artwork shall be sold and the proceeds distributed to her beneficiaries. If the collector did not engage in the estate planning process while she was alive, the sale of her artwork at death is the most likely result. As discussed previously, artwork is a unique asset that is not easily divisible, so oftentimes the collection is sold and converted to cash, which is easily divisible. The sale of the collection after the collector's death will be more easily accomplished if the collector left detailed records about the collection.

There are also tax consequences to owning the artwork until death. For estate tax purposes, the value of the artwork is includible in the collector's taxable estate. If a federal estate tax return is owed (because the value of the collector's estate exceeds her available estate tax exemption), then an appraisal of the artwork will be required and must be attached to the federal estate tax return. For income tax purposes, owning artwork until death is tax advantageous. The artwork will receive a step-up in cost basis to date-of-death value, thus eliminating any built-in capital gain. When the estate sells the asset, the cash proceeds from the sale will be free of income tax.

b. Gift. A collector can direct in her estate planning documents (either a Will or a Revocable Trust as discussed in Section II. B.) that the artwork be distributed to one or more specific beneficiaries upon her death. These gifts take the form of a bequest. A collector might direct that certain items be distributed to certain beneficiaries ("item A to spouse, item B to child 1, item C to child 2"), or she might direct that the collection be distributed to a class of beneficiaries (e.g. "to my children in equal shares"). However, given the unique characteristics of artwork and the fact that artwork is not easily divisible, the first approach is likely more

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<sup>26</sup> "Practical Planning for Art Collectors and Their Advisors, Part 2: Disposition" by Ramsay H. Slugg, Probate and Property, July/August 2016 Vol. 30 No. 4, a Publication of the Real Property, Trust and Estate Law Section of the American Bar Association.

appropriate. One of the many goals of estate planning is to provide clear instructions as to the decedent's wishes, with the goal of avoiding disputes after death. With this goal in mind, collectors who engage in proactive estate planning should be detailed and clear in their estate planning documents. No one understands the details of the collection better than the collector, and unfortunately the reality of a transfer upon death is that the collector is no longer available to provide the information about the collection that the beneficiaries may find useful. In these cases, it is particularly important that a collector maintain a detailed inventory of the collection, and to the extent that the collector has provenance for the pieces, she should make sure that the beneficiaries know that these records exist and where to find these records.

Again, for transfer tax purposes, artwork held until death is includible in the decedent's taxable estate, and for income tax purposes, the recipients of the artwork receive the artwork at a new stepped-up basis. Consequently, artwork held for generations and never sold will never be subject to income tax.

c. Donation. Similar to donations made during life, a collector can provide in her estate planning documents that upon her death her artwork be donated to a public charity or to a charitable trust or to a private foundation. Donations at death may be made directly to a charitable organization which is the simplest approach. Donations may also be made through more sophisticated estate planning techniques, including the use of testamentary charitable remainder trusts, testamentary charitable lead trusts (both discussed in Section II., D, 4(e)), loans, and bargain sales.<sup>27</sup>

Again, many collectors will do significant due diligence during their lifetimes to determine how they want to dispose of their collection at death. Collectors oftentimes enter into written agreements such as Memorandums of Understanding or Gift Agreements with the recipient charity. One very important consideration for collectors and their advisors is whether such Memorandums or Agreements are precatory or binding. Legally binding arrangements made during a collector's lifetime may become an enforceable contract against the collector's estate upon death. Oftentimes collectors sign "Statements of Intent" so that the

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<sup>27</sup> "Practical Planning for Art Collectors and Their Advisors, Part 2: Disposition" by Ramsay H. Slugg, Probate and Property, July/August 2016 Vol. 30 No. 4, a Publication of the Real Property, Trust and Estate Law Section of the American Bar Association.

recipient charity has a clear understanding of how the collector intends for the collection to be maintained and displayed. Oftentimes, the donation of artwork at death is accompanied by a gift of cash or other liquid assets to create an endowment for maintaining the collection.

Whereas there are limits for the size of the charitable income tax deduction available for donations made to charities during a donor's lifetime, there is an unlimited estate tax deduction for transfers made to charities at death. The amount of the deduction must be supported by an appraisal which must be attached to a federal estate tax return.

## V. DONOR INTENT

### A. General

The American legal system allows for freedom of testation, which stems from traditions of English common law. Freedom of testation means that individuals can decide who inherits their property at death. Many civil law countries have forced heirship, or legal systems that do not recognize freedom of testation. Examples of these countries include France, Germany, Italy, Spain, Japan, Russia, some Latin American countries.

Freedom of testation and freedom of disposition are at the core of our legal system. The law clearly provides that individuals have nearly unlimited discretion to decide how their property should be distributed upon their death. As the Restatement of Property states, "The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please."<sup>28</sup>

The law facilitates freedom of testation and disposition by providing guidelines by which courts interpret the meaning of Wills and other estate planning documents such as Revocable Trusts. Quite clearly, freedom of disposition would be undermined if a court had the authority to interpret the dispositive provisions of an individual's Will or Trust in a way that does not conform to the donor's intention. Courts therefore focus on the donor's intent when interpreting Wills and Trusts. Again, as the Restatement of Property provides, "The controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law."<sup>29</sup> As one scholar succinctly stated, "Freedom of testation and testator's intent are frequently identified as paramount jurisprudential touchstones in the area of trusts and estates."<sup>30</sup>

When it comes to charitable giving, honoring donor intent is crucial. Our society relies on charitable donations. Charities serve the public good and address needs that are not adequately addressed by the public or private sector. Charitable organizations drive economic growth and

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<sup>28</sup> Restatement (Third) of Property: Wills and Other Donative Transfers § 10.1 cmt. a

<sup>29</sup> Restatement (Third) of Property: Wills and Other Donative Transfers § 10.1

<sup>30</sup> E. Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms through Minority-Culture Arbitration*, 49 Case W. Rsrv. L. Rev. 275 (1999)

foster civil engagement and leadership. As stated earlier in these materials, Congress encourages charitable giving by providing tax deductions for charitable contributions in the form of income tax deductions and estate tax deductions. Donations to charities are irrevocable, and if charities want to solicit donations from individuals, they must assure the donor that the donated funds will be used as intended. There is an underlying trust between the donor and the donee that the donee will use the funds as the donor intends. If donor intent is violated, that trust is broken. Statistics and surveys routinely reveal that the majority of Americans would not give to a charity if the funds were not used for the intended purposes. Consequently, donees and the courts tend to go to great lengths to avoid any subversion of donor intent.

### B. Modifications of Irrevocable Trusts

Of course, life is fluid and circumstances change. There are lots of reasons why the terms of an irrevocable trust may need to be changed. And in many circumstances, such changes will be consistent with the settlor's intent and may further or preserve the material purposes of the trust. A few reasons why the terms of a trust may need to be modified include:

1. unanticipated circumstances
2. changed needs of the beneficiary
3. reduce costs of trust administration
4. correct drafting errors
5. resolve ambiguous trust language
6. inability to administer the trust effectively or without undue waste
7. reformation to achieve tax objectives
8. termination of an uneconomic trust
9. change the trust situs, the governing law, or the trustee provisions
10. enhance the asset protection benefits of a trust

The common law does allow for the terms of an irrevocable trust to be modified in certain circumstances. Under Virginia law, "[t]he court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification shall be made in accordance with the settlor's probable intention."<sup>31</sup>

The underlying theme is that modification is allowable if such modification is consistent with the settlor's intent and if it does not violate a material purpose of the trust. There are a few doctrines which courts use to modify irrevocable trusts.

1. Clafflin Doctrine. The Clafflin doctrine prohibits any modification or termination of the trust if such change contravenes the clear intent of the settlor. The doctrine stems from the 1889 Massachusetts case of *Clafflin v. Clafflin*.<sup>32</sup> In this case, the testator established a trust for the benefit of his son. Under the terms of the trust, the

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<sup>31</sup> Va. Code § 64.2-730

<sup>32</sup> 20 N.E. 454 (Mass. 1889)

principal of the trust was to be distributed to the son at age 30. Before attaining age 30, the son sued to terminate the trust, arguing that he was the sole beneficiary of the trust. The court refused to allow the trust to terminate, arguing that termination would violate the clear intent of the testator. The court held that “a testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and that his intentions ought to be carried out unless they contravene some positive rule of law, or are against public policy.”<sup>33</sup>

2. Doctrine of Deviation. According to Black’s Law Dictionary, the deviation doctrine in wills and trusts is a “principal which permits variation from terms of trust where circumstances are such that purposes of trust would otherwise be defeated.” The doctrine of deviation is summarized in the Restatement (Second) of Trusts:

“[A] court will direct or permit the trustee of a charitable trust to deviate from a term of the trust if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust.”<sup>34</sup>

Deviation enables a court to make changes to the administrative provisions of a trust. The doctrine aims to further donor intent in the sense that courts use deviation to modify a restriction in the trust in circumstances when strict adherence to the restriction will impair accomplishment of trust purposes.

3. Cy-Pres Doctrine. According to Black’s Law Dictionary, cy-pres means “as near as (possible). The rule of cy-pres is a rule for the construction of instruments in equity, by which the intention of the party is carried out *as near as may be*, when it would be impossible or illegal to give it literal effect.

As cy-pres relates to charitable trusts, the doctrine provides that if it becomes unlawful, impossible or impracticable to carry out the purpose of the designated charitable trust or becomes wasteful to apply all the property to the designated purpose, the trust will not fail but instead the court will direct the application of the property (or a portion of the property) to a charitable purpose that reasonably approximates the designated purpose.<sup>35</sup> Practically, the cy-pres doctrine means that a court can rewrite a charitable trust so that it is no longer impossible or impracticable to carry out the trust terms.

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<sup>33</sup> 20 N.E. 454 (Mass. 1889)

<sup>34</sup> Restatement (Second) of Trusts § 381 (1959)

<sup>35</sup> [https://www.law.cornell.edu/wex/cy-pres\\_charitable\\_trusts](https://www.law.cornell.edu/wex/cy-pres_charitable_trusts)

Notably, the Virginia legislature has specifically adopted the “cy-pres” doctrine. As the relevant code provision reads,

“if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful:

1. The trust does not fail, in whole or in part;
2. The trust property does not revert to the settlor or the settlor's successors in interest; and
3. The court may apply cy-pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.”<sup>36</sup>

### C. Modifying the Barnes Trust

The Trustees of the Barnes Foundation repeatedly requested that the court modify the terms of Albert Barnes' Indenture of Trust. On April 1, 1992, the Trustees filed a petition to amend the trust, requesting permission to expand the investment restrictions in the trust, to increase the hours of public admission and increase the admission fee, to hold social functions at the Foundation in order to attract potential donors, and to request that the Foundation be permitted to send some of the Foundation's paintings on an international tour to raise funds to pay for necessary renovations and system upgrades at the facility in Merion.<sup>37</sup>

These modifications kept the Foundation financially afloat for a few years, but the Foundation continued to struggle. Eventually, in 1998, three Philadelphia charities (The Pew Charitable Trusts, The Annenberg Foundation, and The Lenfest Foundation) offered to provide financial assistance to the Foundation, but only if the trust was further modified to lift restrictions on public access and social gatherings, expand the board of trustees to fifteen (with Lincoln University appointing only four of the Trustees, therefore essentially forcing Lincoln to relinquish control of the Foundation), to provide that going forward the bylaws could be amended by the trustees without necessitating court approval, and finally, to move the collection from Merion to downtown Philadelphia. The court ultimately approved all of these modifications to the trust.

In one of the many litigated cases involving the Barnes Foundation, the Supreme Court of Pennsylvania considered application of the cy-pres doctrine. In the ruling, the judge described cy-pres as:

“if the charitable purpose for which an interest shall be conveyed shall be or become indefinite or impossible or impractical of fulfilment, or if it shall not have been carried out for want of a trustee or because of the

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<sup>36</sup> Va. Code § 64.2-731

<sup>37</sup> *In re Barnes*, 684 A.2d 123 (1996)

failure of a trustee to designate such purpose, the court may, on application of the trustee or of any interested person or of the Attorney General of the Commonwealth, after proof of notice to the Attorney General of the Commonwealth when he is not the petitioner, order an administration or distribution of the estate for a charitable purpose in a manner as nearly as possible to fulfill the intention of the conveyor, whether his charitable intent be general or specific.”<sup>38</sup>

Readers might recall in the “Art of the Steal” that Richard Glanton, President of the Board of the Foundation, invokes the doctrine of cy-pres as a means by which Barnes’ trust could be modified. As Glanton describes cy-pres, “you can change a provision of the trust if it necessary to carry out the donor’s intent to the least extent possible.” He argued that cy-pres would allow the court to modify the trust to remove the restriction that the collection could never be loaned or moved.

The doctrine of deviation was also invoked in a number of the litigated cases involving the Barnes Foundation. In *In re Barnes Foundation*, the Superior Court of Pennsylvania considered the applicability of deviation. The Court, citing the Restatement (Second) of Trusts § 381, ruled that

“Deviation from administrative provisions of charitable trust is generally permitted only upon showing of unforeseen and unforeseeable change in circumstances, and frustration of settlor’s main objectives if strict obedience to settlor’s directions were required... Deviation from administrative provisions of charitable trust is permitted only when compliance with terms of trust would defeat or substantially impair accomplishment of trust purposes.... When deviation from administrative provisions of charitable trust is appropriate, court may direct or permit trustee to accomplish acts that are unauthorized or even forbidden by terms of trust.”<sup>39</sup>

In the Barnes matter, the court used the doctrine of deviation to revise the terms of Barnes’ trust. The Trustees of the Foundation argued that there was no financially viable way for the artwork to remain in the building that housed the collection in Merion. Of course, critics of the move of the collection to downtown Philadelphia argued that if the doctrine of deviation aims to further donor intent, strict adherence to the doctrine would not enable the court to approve such modifications to the trust, as the move of the collection was clearly in conflict with Barnes’ intent.

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<sup>38</sup> *Weigand v. Barnes Foundation*, 374 Pa. 149 (1953), 97 A.2d 81

<sup>39</sup> *In re Barnes Foundation*, 453 Pa.Super. 243 (1996), 683 A.2d 894



In another litigated case involving the Barnes Foundation, the judge considered how to honor the purpose of the trust and donor intent while taking into account the present circumstances of the Foundation as they existed 45 years after Barnes' death. The judge held that:

"the 1922 trust agreement provided for no loans of the art and preservation of the art in the building created for that purpose and to educate students. When two purposes of a trust become conflicted and the dominant intent of the trust to preserve the institution created by the trust becomes imperiled, some provisions of the trust, such as a no-loan policy, must give way to the dominant purpose if this can be done reasonably... The role of the Court is to look back to the mind of the settlor of the trust, to determine what he would have done when faced with conditions which were unanticipated at the time of the creation of the trust and nearly as possible to fulfill the intention of the conveyor."<sup>40</sup>

The judge went on to say that:

"It is difficult to believe that a man of Dr. Barnes' erudition would not have anticipated that the day would come when the structure he had created to house his collection would require such fundamental structural repairs and renovations as would make impossible the uninterrupted display of the collection as mandated by the Indenture. If such were his thought and desire, then history should tell us that an inevitable conflict with reality eventually would occur."<sup>41</sup>

Clearly, it was the judge's view that loosening the strict restrictions in Barnes' trust regarding the no-loan policy was necessary in an effort to preserve the collection as a whole. He expressly considered what Barnes would have done and what he would have agreed to if he were aware of the current circumstances, and he surmised that Barnes, being a reasonable and knowledgeable man, would have agreed that such modifications were necessary and appropriate.

#### D. Donor Intent vs. Public Interest

As stated above, the donor's intent is given effect to the maximum extent allowed by law. Freedom of testation and freedom of disposition are core elements of our legal system. Donors are free to favor one child over another child, to disinherit a child entirely, and to leave all of her assets to charitable organizations instead of family

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<sup>40</sup> *In re Barnes Foundation*, 449 Pa.Super. 81 (1996), 672 A.2d 1364

<sup>41</sup> *In re Barnes Foundation*, 449 Pa.Super. 81 (1996), 672 A.2d 1364

members. But in cases when donors gift or bequeath assets to charitable organizations, the donor is receiving both a tax incentive and a tax benefit for the transfer.

Charitable trusts and charitable vehicles such as private foundations and public charities enjoy tax exempt status under I.R.C. § 501(c)(3). Donors are entitled to an income tax deduction for assets donated to charitable entities during her lifetime, and a decedent's estate is entitled to an estate tax deduction for assets donated to charitable entities at death. Additionally, charitable entities do not incur tax liabilities on income earned on the property held by the entity.<sup>42</sup> Quite clearly, charitable entities that enjoy favored tax status have an obligation to the public. They inure the benefit of the paying no taxes, but they must serve the public benefit in exchange for receiving the tax benefits.

Because assets held by a charitable entity must be held for public benefit, the government has a vested interest in how those assets are expended. The administration of charitable trusts is overseen by the state Attorney General who ensures that the trust is fulfilling its duties. It is the job of the Attorney General to protect the public's interest. Looking at the Virginia Code,

“The Attorney General shall have the same authority to act on behalf of the public with respect to such assets as he has with respect to assets held by unincorporated charitable trusts and other charitable entities, including the authority to seek such judicial relief as may be necessary to protect the public interest in such assets.”<sup>43</sup>

In summary, there are two goals which must be accomplished: the first is honoring the donor's intent, and the second is making sure that the donor's assets benefit the broader public interest. Ultimately, the beneficiary of any charitable trust is the public, and it is the Attorney General's responsibility to ensure that the trust's assets sufficiently serve the public good. The Attorney General is the party that has legal authority of standing for the public, and the Attorney General of Pennsylvania played an active role in seeking modification of the terms of Barnes' trust.

There is little ambiguity about Dr. Barnes' intent with the respect to his art collection. As indicated in the Bylaws of the Foundation:

“The objects for which this corporation is formed are as follows: To promote the advancement of education and the appreciation of fine arts; and for this purpose to erect, found and maintain, in the Township of Lower Merion, County of Montgomery, and State of Pennsylvania, an art

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<sup>42</sup> I.R.C. § 501(a), (c)(3), (d)

<sup>43</sup> Va. Code § 2.2-507.1

gallery and other necessary buildings for the exhibition of works of ancient and modern art,”<sup>44</sup>

“During the lifetime of Donor and his said wife the art gallery of Donee shall only be open to the public on not more than two days in each week, except during July, August and September of each year...Donor makes these provisions and stipulations for the reason that said art gallery is founded as an educational experiment under the principals of modern psychology as applied to education, and it is Donor’s desire during his lifetime, and that of his wife, to perfect the plan so that it shall be operative for the spread of the principles of democracy and education after the death of Donor and his wife.”<sup>45</sup>

In the Indenture of Trust, Dr. Barnes provides that:

“Donee has for its corporate purpose the promotion of the advancement of education and the appreciation of the fine arts;...

At the death of Donor the collection shall be closed, and thereafter no change therein shall be made by the purchase, bequest or otherwise obtaining of additional pictures, or other works of art, and other objects of whatsoever description...

After Donor’s death no picture belonging to the collection shall ever be loaned, sold or otherwise disposed of.”<sup>46</sup>

Barnes left detailed and strict instructions as to how the Foundation should be managed after his death and how the Foundation’s assets should be used. Barnes certainly had idiosyncratic views about the disposition of his assets, and while he was alive there was limited opportunity for anyone to challenge his arrangements. But upon his death, as the documentary states, “almost immediately after Barnes’s death, the foundation found itself subject to a frontal assault.”

The first attack focused on the tax exemption issue. The argument was that the Barnes Foundation was violating its tax status as a charity by not letting the broader public into the museum. The court was persuaded by this argument. Below is an excerpt from the court’s ruling:

“Although the Foundation thus assumed indisputable status as tax-exempt public charity, its officers and trustees have consistently refused to the public admission to its gallery. A painting has no value except the pleasure

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<sup>44</sup> Barnes Foundation Bylaws, art. II

<sup>45</sup> Barnes Foundation Bylaws, art. IX, para. 29

<sup>46</sup> Indenture of Trust between Albert C. Barnes, Donor, and the Barnes Foundation, Donee, December 6, 1922, as amended

it imparts to the person who views it....If the Barnes art gallery is to be open only to a selected restricted few, it is not a public institution, and if it is not a public institution, the Foundation is not entitled to tax exemption as a public charity. This proposition is incontestable.”<sup>47</sup>

It was the court’s clear position that if the gallery was not open to the public, it would not qualify as a tax-exempt charity. Barnes’ idiosyncratic wishes about his collection being kept “private” could not cause detriment to the public.

One of the many special considerations in the litigation involving the Barnes Foundation was that its primary assets included artwork. The collection was not only extensive and unique, but also incredibly valuable. Many consider the collection to be greatest collection of post-impressionist art ever assembled. The courts repeatedly found that preserving the collection was of paramount importance. As discussed earlier in these materials, risk management was one of the factors the courts considered in modifying the terms of the trust. The collection had to be stored and displayed in an environment that was secure and safe, where there was little risk to the preservation of the invaluable collection.

Finally, it is worth considering whether the strict terms of Barnes’ Trust ultimately contributed to the unraveling of its terms. Barnes attempted to control the discretion of the Trustees by limiting the types of assets that the Foundation could invest in. From an advisor’s perspective, this might not have been prudent. Ultimately the courts modified this restrictive investment provision by allowing the Trustees broader investment discretion. Should Barnes’ lawyers have encouraged him to be less restrictive in his estate planning documents? Should they have counseled him against limiting the ways in which his artwork could be displayed or used? Was it predictable that the trust might operate during times of financial distress because of insufficient funding or other economic factors? Given that the trust’s most valuable assets were illiquid and irreplaceable, it may have been prudent for Barnes’ estate planning documents to have expressly allowed the trustees broader discretion to adapt to future circumstances. Is it the role of the lawyer to simply draft estate planning documents that reflect the client’s wishes, or is it incumbent upon lawyers to raise potential pitfalls and to counsel clients against such rigid and inflexibility arrangements, especially when such arrangements are anticipated to run in perpetuity for the public good? These questions are some of the many that linger in the minds of those of us who are interested in the legal issues addressed in “Art of the Steal.”

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<sup>47</sup> *Commonwealth of Pennsylvania v. Barnes Foundation*, 398 Pa 458 (1960), 159 A.2d 500

## The Barnes Foundation's Bylaws

The following is a transcription of the By-laws of the Barnes Foundation. The Indenture of Trust (commonly referred to as Dr. Barnes' will) is included in the by-laws as Article IX. All paragraphs shown were contained in the original document, but in the case where Dr. Barnes revised them, the latest revision is shown with the date it was made. Any modifications to Article IX since Dr. Barnes' death in 1951 require Court approval.

This transcription is taken from the copy found in Gilbert M. Cantor's *The Barnes Foundation, Reality vs. Myth*, Consolidated Drake Press, 1963 Philadelphia. It was also verified against a typed version supplied in the Second Amended Petition filed by the Trustees of the Barnes April 1, 1992. Curiously, no signed or notarized copy of this critical document has ever been presented in Court.

### BY-LAWS of the BARNES FOUNDATION

ARTICLE I - Name The name of this corporation shall be "The Barnes Foundation".

ARTICLE II - OBJECTS The objects for which this corporation is formed are as follows:

To promote the advancement of education and the appreciation of the fine arts; and for this purpose to erect, found and maintain, in the Township of Lower Merion, County of Montgomery, and State of Pennsylvania, an art gallery and other necessary buildings for the exhibition of works of ancient and modern art, and the maintenance in connection therewith of an arboretum, wherein shall be cultivated and maintained trees and shrubs for the study and for the encouragement of arboriculture and forestry, together with a laboratory of arboriculture, if the same shall be found necessary, said arboretum and laboratory to be conducted independently or in connection with the department of forestry of any university founded and conducted under the laws of the Commonwealth of Pennsylvania.

### ARTICLE III - MEETINGS

{Section 1 amended on June 1, 1967 } Section 1. Annual Meeting. The annual meeting of the Board of Trustees shall be held on the first Wednesday in December in each and every year. At said meeting the Trustees shall elect a President, a Vice-President, a Secretary and a Treasurer. The President and Vice-President shall be members of the Board. The Secretary and Treasurer may or may not be members of the Board. The officers shall serve until the next annual meeting or until their successors shall be respectively duly elected and qualified. The Secretary shall give at least ten days written notice of said annual meeting by mailing such notice to each Trustee at his or her address as the same shall be registered on the book of the corporation.

Section 2. Special Meetings. Special Meetings of the Board of Trustees may be held at any time at the principal office of the corporation upon forty-eight hours' notice given by mailing such notice to the address of each Trustee as the same shall be upon the records of the corporation.

Section 3. Stated Meetings. Stated meetings of the Board of Trustees may be held at such stated times as the Board may by standing resolution fix.

Section 4. Quorum. Three members of the Board of Trustees shall constitute a quorum for the transaction of business.

Section 5. Meetings without Notice. Any meeting of the Board of Trustees, regular or special, shall be lawful, whether notice thereof shall or shall not have been given in accordance with these by-laws, if held at the principal office of the corporation and attended by all members of the Board of Trustees.

### ARTICLE IV - The BOARD of TRUSTEES

Section 1. Membership. The Board of Trustees shall consist of five persons. Those Trustees chosen for the organization of the corporation, being Albert C. Barnes, Laura L. Barnes, Joseph Lapsley Wilson, Nelle E. Mullen and Mary Mullen, shall serve for the term of five years from the first Wednesday of December, 1922.

Section 2. Succession to Membership in the Board of Trustees. Upon the expiration of his or her term of office, or the resignation or death of any member of the Board of Trustees named in Section 1, his or her successor shall be elected for a term of five years from the date of the annual meeting at which such election shall take place, or should such election take place at a special or stated meeting, then for the term of five years from the date of the annual meeting next succeeding the time of such election. During the lives of Albert C. Barnes and Laura L. Barnes, and the life of the survivor of them, only individual trustees shall be chosen as successor to trustees named in the charter or elected as successors to them, and such individual trustees shall be chosen and selected by the majority vote of the remaining trustees then in office. Should any successor trustee die or resign, his or her successor shall be elected in like manner, and for a term of five years to begin and be calculated as is above provided. After the death of the survivor of Albert C. Barnes and Laura L. Barnes, the first vacancy which may occur in the Board of Trustees shall be filled by election of a person nominated by such trust company or financial institution as may then be treasurer of the corporation. The next vacancy which shall occur shall be filled by the election of a person nominated by the Board of Trustees of the Pennsylvania Academy of the Fine Arts. The next vacancy which shall occur shall be filled by the election of a person nominated by the Board of Trustees of the Pennsylvania Academy of the Fine Arts; it being understood that vacancies above recited are vacancies occurring by the death of individual trustees elected prior to the death of individual trustees elected prior to the death of the survivor of Albert C. Barnes and Laura L. Barnes; it being further the intent that as to vacancies occurring by the expiration of the term, death or resignation of trustees named by the board of directors of such financial institution and the Board of Trustees of the University of Pennsylvania and the Pennsylvania Academy of the Fine Arts, any such vacancy shall be filled by the election of a person nominated to fill such vacancy by the same Board which nominated the retiring or deceased trustee, or trustee whose term

expires. Of the trustees to be elected upon nomination of the University of Pennsylvania one may be one of the professors in the School of Fine Arts connected with said University; but under no circumstances shall any of the trustees be connected with any school or institution of industrial or applied art, with the single and sole exception of architecture. The term of any successor trustee elected subsequent to the death of Albert C. Barnes and Laura L. Barnes shall be three years from the annual meeting at which successor is elected, or if elected at a special meeting, three years from the next succeeding annual meeting after such election.

#### ARTICLE V - MEMBERSHIP

{1922 }

Section 1. The membership of this corporation shall consist perpetually of the five trustees named in the charter and their successors elected as in these bylaws provided, and those only. Upon the death of the survivor of Albert C. Barnes and Laura L. Barnes, a trust company or a corporation having the powers now held by trust companies under the laws of Pennsylvania and doing business in Philadelphia or Montgomery County, shall be selected as Treasurer of the corporation, and thereafter forever the Treasurer of the corporation shall be such trust company which shall be duly elected to said office by the Board of Trustees. No bond shall at any time be required by the Board of Trustees of such corporate Treasurer. The Board of Trustees shall choose as such Treasurer any company nominated in writing to it by Albert C. Barnes during his lifetime, and such Treasurer so chosen shall remain Treasurer until its dissolution or resignation as such.

FURTHER RESOLVED, that the said supplemental Indenture and Agreement this day approved, be and is hereby made a part of the By-Laws of this corporation; Article IX, Section 2 of the By- Laws is hereby amended to accord with and conform to Paragraph numbered 17 of said supplemental Indenture and Agreement. The term of any successor Trustee elected subsequent to the death of Donor and his said wife shall be five years from the annual meeting at which such successor is elected, or, if elected at a special meeting, five years from the next succeeding annual meeting after such election. The Trustees of the Donee shall control both the art gallery and the arboretum of the Donee, both of which are integral parts of the educational resources of the Donee. It is further stipulated that the identity of Donee as an educational institution is to be preserved for all time and Donee is not to be merged in or absorbed by any other institution; its facilities are to be made available, under proper rules and regulations of the Board of Trustees, to all properly qualified educational institutions.

#### ARTICLE VI - OFFICERS

Section 1. General. The officers of the corporation shall be a president, vice-president, a secretary and a treasurer. Any two of said offices except those of president and vice- president may at the pleasure of the Board of Trustees be held by the same person, except that when a corporate treasurer is elected the secretaryship may not be held by said corporate treasurer.

Section 2. The President. The President shall be the presiding officer at the meetings of the Board of Trustees. He shall have general executive control of the affairs of the corporation.

Section 3. The Vice-President. The Vice-President shall perform the duties of the President during his absence or disability.

Section 4. The Secretary. The Secretary shall keep the minutes of the corporation, shall have the custody of its corporate seal, shall affix the same to such documents as may require it, and shall perform such duties as usually appertain to that office. Before entering upon the duties of the office the Secretary shall take an oath to perform the same with fidelity.

Section 5. The Treasurer. The Treasurer shall have general custody of the assets and funds of the corporation and shall disburse them for the purposes of the corporation under the direction of the Board of Trustees. The Treasurer shall, if required by the Board of Trustees, give a bond to the corporation in such amount as the Board of Trustees shall require, the premium for such bond to be paid by the corporation. The Treasurer shall keep or cause to be kept proper and adequate books of account and records showing the receipt and disbursement of the moneys of the corporation. Upon the death of the survivor of Albert C. Barnes and Laura L. Barnes a trust company or a corporation having the powers now held by trust companies under the laws of Pennsylvania and doing business in Philadelphia or Montgomery County, shall be selected as Treasurer of the corporation, and thereafter forever the treasurer of the corporation shall be such trust company which shall be duly elected to said office by the Board of Trustees [sic], No bond shall at any time be required by the Board of Trustees of such corporate treasurer. The Board of Trustees shall choose as such treasurer any company nominated in writing to it by Albert C. Barnes during his lifetime, and such treasurer so chosen shall remain treasurer until its dissolution or resignation as such.

#### ARTICLE VII - FUNDS

{Amended on May 31, 1966 } The funds of the corporation shall be deposited in the name of the corporation in one or more of such banks or trust companies as may be approved from time to time by the Board of Trustees, and shall be withdrawn only upon checks or other orders signed by the treasurer of the corporation or such other officer as the Board of Trustees may from time to time designate; provided, however, that after the death of Albert C. Barnes and Laura L. Barnes the Board of Trustees may in its discretion require that checks or other orders drawn must be signed by both the treasurer and one of the other officers as may from time to time be prescribed by the Board of Trustees. The corporate treasurer hereinabove [sic] provided for may keep on deposit the funds of the corporation in its own deposit department.

ARTICLE VIII - SEAL The seal of the corporation shall consist of two concentric circles, within which shall be the words "The Barnes Foundation," and in the centre (sic) shall appear the word "Penna. 1922."

#### ARTICLE IX - MANAGEMENT of the CORPORATION

Section 1. Preamble. This corporation is organized for the purposes set forth in the charter and in Article II of these by- laws. In order to enable it to carry out its said object it has or is about to receive a certain gift or donation from Dr. Albert C. Barnes, who has



been the moving spirit in its organization and incorporation. Said donation is made by virtue of a certain Indenture and Agreement dated the sixth day of December, 1922. Said Indenture and Agreement contains the conditions and stipulations upon which said donation is made to and received by this corporation. Said Indenture and Agreement is therefore to be made a part of the by-laws of this corporation and binding upon this corporation in the management of the funds and property so donated to it and entrusted to its care.

Section 2. Said Indenture and Agreement is hereby made in its entirety a by-law of this corporation, and is as follows:

INDENTURE AND AGREEMENT made and entered into by and between ALBERT C. BARNES, of Merion, Montgomery County, Pennsylvania, party of the first part, herein after called "Donor"; and THE BARNES FOUNDATION, a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, party of the second part, hereinafter called the "Donee."

WHEREAS, Donee has for its corporate purpose the promotion of the advancement of education and the appreciation of the fine arts; and

WHEREAS, Donor, as Trustee for said corporation, has taken title to a tract of land heretofore owned by Joseph Lapsley Wilson, situate in Lower Merion Township, Montgomery County, Pennsylvania, and has on behalf of Donee proceeded with the preparation of the plans, specifications and contracts for the erection of certain buildings suitable for the purposes of Donee upon said land, and

WHEREAS, Upon the said land there now exists an arboretum created by Joseph Lapsley Wilson; and

WHEREAS, Donor is the owner of a valuable collection of works of art, including paintings, sculpture, drawings, etchings and lithographs which it is intended shall become the property of the Donee and shall be placed in the gallery to be erected upon the said tract of land; and

WHEREAS, Donor desires to endow said art gallery and arboretum to the end that the educational work for which Donee is organized may be adequately accomplished; and

WHEREAS, the said land and improvements thereupon or contemplated immediately to be made thereupon, the said works of art, and the endowment herein provided amount in value to approximately \$6,000,000;

NOW, THEREFORE, In consideration of the premises and in consideration of the mutuality hereof and of the covenants made by Donee herein with Donor, it is mutually covenanted and agreed by and between the parties as follows:

{December 6, 1922} 1. Donor shall forthwith, upon the execution of this Indenture and Agreement by the parties hereto, convey and transfer unto Donee the said tract of land lately owned by Joseph Lapsley Wilson, situate in Lower Merion Township, Montgomery County, Pennsylvania, which premises now stand of record in the name of Donor as Trustee of The Barnes Foundation, together with all the buildings and improvements, fixtures, easements and appurtenances thereon situate or thereunto belonging or appertaining.

{December 6, 1922} 2. Donor will at the same time transfer, assign and convey to Donee any and all plans, specifications and contracts heretofore made and entered into by him for the improvement of said tract of land and for the erection thereon of buildings.

{December 6, 1922} 3. Donor will at the same time convey, assign set over and transfer unto Donee by proper bill of sale all that certain collection of works of art consisting of paintings, sculpture, drawings, etchings and lithographs now owned and possessed by Donor and situate and located in Donor's residence in Lower Merion Township, Montgomery County, Pennsylvania, as said collection of works of art shall exist and be at the time of the execution of such bill of sale or instrument of transfer.

{December 6, 1922} 4. Donor will at the same time by a contract, copy whereof is hereto annexed, marked Exhibit A, and made a part hereof, as fully as if herein at length set forth, which contract shall be executed by both parties hereto, transfer and set over unto Donee 900 shares of the common capital stock of A.C. Barnes Company, a corporation of the Commonwealth of Pennsylvania.

{December 6, 1922} 5. The said conveyances, transfers and contracts so to be made by Donor to and with Donee as in the preceding paragraphs hereof set forth are to be made and the property thereby comprehended and covered is to be taken and held by Donee upon the following express covenants and conditions, and none others; and Donee expressly covenants and agrees that in consideration of the making of this agreement and of the conveyances and contracts in this agreement stipulated to be made by Donor, Donee will take and hold the property so comprehended and covered in conformity with the following express covenants and agreements and will strictly and faithfully observe and perform the same.

{December 6, 1922} 6. The covenants and conditions in the Indenture and Agreement of December 6, 1922, as the same are modified hereby, shall be irrevocably embodied in the by-laws of Donee; and said by-laws shall be revised and amended accordingly. Said by-laws, so amended to embody the provisions the said Indenture of December 6, 1922, as hereby modified, shall be irrevocable, except by and in accordance with the terms of any further supplemental indenture and agreement which may hereafter be executed between Donor and Donee in due form of law.

{October 20, 1950 } 7. During the life of Donor he shall be director of the Art Gallery and in charge of the collection of pictures, but without salary. After the death of Donor, Laura L Barnes, Donor's wife, shall, during the term of her natural life, be the president of Donee and Director of Arboretum at a salary of not less than \$30,000 per annum; Nelle E. Mullen shall be Administrative executive (usually known as general manager) of Donee and Violette de Mazia shall be Director of Education of the Art Department of Donee.

{December 6, 1922} 8. During Donor's life Donor shall have the absolute power and discretion to cause to be sold or exchanged by Donee any of the works of art now contained in said collection, as in the judgement of Donor may be advantageous for improving



said collection. Donor reserves to himself this right, power and discretion for the reason that he has created said collection and best understands what may be necessary in the way of sale or exchange to complete it, perfect it and render it more adequate.

{April 30, 1946 } 9. At the death of Donor the collection shall be closed, and thereafter no change therein shall be made by the purchase, bequest or otherwise obtaining of additional pictures, or other works of art, or other objects of whatsoever description. Furthermore, after the death of Donor and his wife, no buildings, for any purpose whatsoever, shall be built or erected on any part of the property of the Donee.

{December 6, 1922} 10. After Donor's death no picture belonging to the collection shall ever be loaned, sold or otherwise disposed of except that if any picture passes into a state of actual decay so that it no longer is of any value it may be removed for that reason only from the collection.

{December 6, 1922} 11. Should the said collection ever be destroyed, or should it for any other reason become impossible to administer the trust hereby created concerning said collection of pictures, then the property and funds contributed by Donor to Donee shall be applied to an object as nearly within the scope herein indicated and laid down as shall be possible, such application to be in connection with an existing and organized institution then in being and functioning in Philadelphia, Pennsylvania, or its suburbs.

{December 6, 1922} 12. Donor is now making plans and executing contracts for the construction of a gallery and adjacent buildings on the lot of ground hereinabove mentioned; and the scope, character and location of said gallery and adjacent buildings is to be solely in accordance with the desire, judgement and discretion of Donor. The Donor and his wife, Laura L. Barnes, and the survivor of them, shall be entitled to live in the administration buildings adjacent to the gallery during their joint lives and the life of the survivor of them, rent free. This condition and stipulation is necessary in order that Donor and his said wife may during their lives arrange, complete and make as in their discretion they deem best the said collection of paintings adequate to the purposes intended, and may develop and complete the arboretum hereinafter mentioned.

{December 6, 1922} 13. No part or portion of the art gallery nor of the administration buildings adjacent thereto to be occupied by Donor and wife as above provided, shall be occupied as or for a residence after the death of the survivor of the Donor and his wife; except as hereinafter provided. After the death of the Donor and his said wife, the furniture, the rare and valuable collection of rugs, together with the Chinese vases and other objects of art, but exclusive of the paintings, that are located in the administration building, shall be sold as expeditiously as may be found necessary at public auction. All the paintings shall remain in exactly the places they are at the time of the death of Donor and his said wife. It is the intent of the Donor that after his death and the death of his said wife, whichever shall last occur, the administration building is to be used as class rooms and to serve the general purpose of The Barnes Foundation, that is the promotion of the advancement of education and the appreciation of the fine arts. But the details of the particular manner in which the administration building and its contents may best serve the above stated purpose will have to be developed by experience after the Foundation has been in operation for a term of years. It is the intent of this stipulation that no individual, institution, academy, college or university shall use or employ the administration building or its contents for any purpose other than promotion of the advancement of education and the appreciation of the fine arts, and only in connection with the purposes of The Barnes Foundation as stated and implied in the covenants and agreements as set forth in various aspects of this Indenture and Agreement. After the death of Donor and his wife, no part of said administration buildings, except the servants' quarters marked B 107, 108, 109, 110, 111, C 209, 210, 211, 212, 213, 214, on a plan now existing and prepared for Donor marked "Exhibit B" and identified by the signature of Donor and the signatures of the proper officers of Donee, shall be occupied only by the caretaker, whose function shall be to protect the art gallery and the administration building and the contents of each, against fire, theft, vandalism or other untoward acts of any person or persons during such hours of the day and night when officials or other employees of The Barnes Foundation are not on duty at their respective posts. Said caretaker shall not be allowed to use for his or his family's private use or purpose, any of the rooms or contents of the administration buildings, except those rooms marked B 107, 108, 109, 110, 111, C 209, 210, 211, 212, 213, 214 on Exhibit B. The said rooms constitute a comfortable and well-equipped residence which said caretaker shall occupy rent free so long as he shall be employed as caretaker by The Barnes Foundation.

{April 30, 1946 } 14. Donee shall maintain and extend the arboretum now existing; said arboretum shall always be known as the Arboretum of The Barnes Foundation.

{December 6, 1922} 15. After the death of Donor and his said wife the living quarters in the building marked on the said plan, Exhibit B", as a garage and tool house, may be used as living quarters for the caretaker of the grounds of the Donee. If found necessary during Donor's life, but not after his death, there may be erected upon said tract of land a laboratory and lecture hall in connection with said arboretum, at a cost not in excess of \$200,000, including furnishings, which laboratory and lecture hall shall be located in exactly the place designated on the said plan "Exhibit B" hereof and no other place. Said building shall be designated and known as the Joseph Lapsley Wilson Memorial. It shall be of the same style of architecture as the art gallery and administration buildings and of no other style.

{December 6, 1922} 16. All of the buildings and improvements of Donee shall at all times be kept in first-class order and repair.

{October 20, 1950 } 17. During the joint lives of Donor and his wife, Laura L. Barnes, and during the life of the survivor of them, the Board of Trustees of Donee shall consist of individuals, the successor of any Trustee who may resign, become incapacitated, or die, to be elected by the remaining Trustees of Donee. Upon the death of the survivor of Donor and his said wife, the Trustees in office at the death of the survivor of Donor and his wife shall serve out their current terms and each upon completion of their current term shall respectively be elected as Trustee for an additional term and so on from term to term until they respectively resign, become incapacitated or die. The vacancy occurring in the Board of Trustees by the death of the survivor of Albert C. Barnes and Laura L. Barnes - or if no vacancy then occurs - the first vacancy that occurs by reason of the resignation, incapacity or death of a Trustee then in office - shall be filled by the election of a person nominated by the financial institution which shall be Treasurer of Donee, and the next four vacancies which occur by the resignation, incapacity or death of Trustees who were in office at the time of death of

the survivor of Albert C. Barnes and his said wife shall be filled by election of persons nominated by Lincoln University of Lincoln University, Chester County, Pennsylvania. Thereafter vacancies occurring by the expiration of the term, death, incapacity or resignation of the Trustees nominated by the Board of Directors of such financial institution and the Board of Trustees of Lincoln University, shall be filled by the election of a person nominated to fill such vacancy by the Board of Directors or Trustees which nominated the retiring, incapacitated or deceased Trustee, or Trustees, whose term expired. Provided, however, anything to the contrary herein notwithstanding, that no Trustee shall be a member of the faculty or Board of Trustees or Directors of the University of Pennsylvania, Temple University, Bryn Mawr, Haverford or Swarthmore Colleges, or Pennsylvania Academy of the Fine Arts. The term of any successor Trustee elected subsequent to the death of Donor and his said wife shall be five years from the annual meeting at which such successor is elected, or, if elected at a special meeting, five years from the next succeeding annual meeting after such election. The Trustees of the Donee shall control both the art gallery and the arboretum of the Donee, both of which are integral parts of the educational resources of the Donee. It is further stipulated that the identity of the Donee as an educational institution is to be preserved for all time and Donee is not to be merged in or absorbed by any other institution; its facilities are to be made available, under proper rules and regulations of the Board of Trustees, to all properly qualified educational institutions.

{December 4, 1940 } 18. The treasurer of Donee shall from the date of the death of the survivor of Donor and his said wife be the GIRARD TRUST COMPANY of Philadelphia, Pennsylvania.

{January 29, 1941 } 19. The Board of Trustees of Donee shall serve without compensation. The corporate treasurer of Donee which is to take office after the death of the survivor of Donor and his said wife shall receive as its compensation two (2%) per cent on the income administered by it.

{October 20, 1950 } 20. That Nellie E. Mullen shall be employed by and shall receive a compensation from the Barnes Foundation at the rate of Twelve Thousand Dollars (\$12,000) per year for the balance of her life, notwithstanding her possible physical disability in the future which may prevent her from active service; that Mary Mullen shall be employed by and shall receive a compensation from the Barnes Foundation at the rate of Five Thousand Dollars (\$5,000) per year for the balance of her life, notwithstanding her possible physical disability in the future which may prevent her from active service; that Violette de Mazia shall be employed by and shall receive a compensation from the Barnes Foundation at the rate of Ten Thousand Dollars (\$10,000) per year for the balance of her life, notwithstanding her possible physical disability in the future which may prevent her from active service; that Albert Nulty shall be employed by and shall receive a compensation from the Barnes Foundation at the rate of Five Thousand Six Hundred Dollars (\$5,600) per year for the balance of his life, notwithstanding his possible physical disability in the future which may prevent him from active service, and upon his death the same amount per year shall be paid to his wife, if she shall survive him, during her life, or until she should remarry; that James Gray shall be employed by and shall receive a compensation from the Barnes Foundation at the rate of Two Thousand Eight Hundred Dollars (\$2,800) per year for the balance of his life, notwithstanding his possible physical disability in the future which may prevent him from active service, and upon his death the same amount per year shall be paid to his wife, Lillian Gray, during her life, or until she should remarry; that Paul B. Hogans shall be employed by and shall receive a compensation from the Barnes Foundation at the rate of Two Thousand Four Hundred Dollars (\$2,400) per year for the balance of his life, notwithstanding his possible physical disability in the future which may prevent him from active service, and upon his death the same amount per year shall be paid to his wife, Frieda Hogans, during her life or until she should remarry. Angelo Pinto, if employed by the Barnes Foundation, shall receive a compensation at the rate of Four Thousand Eight Hundred Dollars (\$4,800) per year for as long a period of time as he shall remain in the service of the Barnes Foundation and upon his death the amount of Three Thousand Six Hundred Dollars (\$3,600) shall be paid to his wife, Gertrude Pinto, during her life or until she should remarry. Each of the following employees of the Barnes Foundation, viz:- Nicholas Valle, Christopher Naughton, John Mc-Bride, George Boyd, David Aiken, Jr., Thomas Miller, Martin Reilly, William S. Hampel, Harry McNutt, Patrick J. Gallagher, who is in the employ of Barnes Foundation at the time of the death of Donor, shall be employed by the Foundation for such employee's respective life at the same rate of salary he is receiving from the Foundation at the time of death of Donor, provided that if, while in the service of the Foundation, he becomes permanently incapacitated for work he shall thereafter, in lieu of such salary, be paid by the Foundation a pension of Two hundred dollars (\$200) per month during the balance of his life, and in case he dies, while in the service of or on pension by the Foundation, leaving his present wife a widow him surviving, the Foundation shall thereafter pay Two Hundred dollars (\$200) per month to his widow during her life, or until she remarries. In case of dispute as to whether any such employee is permanently incapacitated for work, the decision of the Trustees of the Foundation shall govern.

{October 20, 1950 } 21. Donee shall, after the death of Donor, employ an art director at a salary not to exceed \$5,000 per annum, whose function shall be to supervise the gallery, to see that the paintings are properly cared for and perform such other duties as may be necessary to carry out such educational work as comes within the purview of the Art Department of Donee. The said art director shall devote his full time exclusively to the aforesaid work, except for one month's vacation each year, and shall perform his functions on the premises of the Barnes Foundation and not elsewhere.

{December 4, 1940} 22. Donee may employ a suitable person as a Curator of the Arboretum, at an annual salary not exceeding six thousand (\$6,000) dollars. The work of the said curator shall be done, if feasible, under the auspices of an educational institution chartered under the laws of the Commonwealth of Pennsylvania, located in Philadelphia or its suburbs, subject always, nevertheless, to the control and direction of the Board of Trustees of Donee.

{October 20, 1950 } 23. In connection with the Art Gallery and the art educational work of Donee, Donee shall employ not more than four men as gallery attendants and watchmen at salaries not exceeding \$3,000 per annum, one engineer who shall be in charge of all apparatus for heat and moisture controls, air-conditioning and similar or allied matters, at a salary not to exceed \$3,500 per annum, and one stenographer and clerk at a salary not to exceed \$3,500 per annum, and the administration of salaries paid to the Donor's wife, to the Art Director and the Director of Education, shall in no year exceed a total of \$24,000.

{October 20, 1950 } 24. In connection with the Arboretum and in addition to the superintendent and curator thereof, Donee shall employ sufficient men at a salary not exceeding \$3,500 per annum each, the total expenditure for the salaries of said men, shall not

exceed \$24,000, and may also employ lecturers, not exceeding six (6) in number at a salary not exceeding \$1,500 per annum each. Each lecturer shall give at least one lecture a week from September to May, inclusive.

{December 6, 1922} 25. In addition to the employees above specified, Donee may employ such cleaners and janitors for the art gallery and buildings connected therewith, and if erected, for the Joseph Lapsley Wilson Memorial, as may be necessary, at a gross expenditure per annum of not to exceed \$6,000. No other administrative or executive officers or clerical assistants shall be engaged or employed by Donee except those above specified.

{December 6, 1922} 26. Donor may from time to time add additional funds by way of endowment, by gift of the same to Donee. Any such additional funds when received by Donee shall constitute a part of Donee's endowment fund with the same force and effect as if the same had originally been transferred and paid over to Donee at the time of the making of this Indenture and Agreement, and shall be administered as a part of such endowment upon the same terms and conditions and under the same limitations and stipulations as are in this Indenture and Agreement set forth, and not otherwise.

{January 29, 1941 } 27. During the Donor's lifetime moneys available for investment or reinvestment, whether principal or income, may be invested in any good securities whether legal investments for Trustees or not; but after Donor's death, such moneys may only be invested by Donee in such obligations of the United States of America, obligations of the several States of the United States and obligations of municipal corporations and districts in the several States of the United States which are legal investments for savings banks under the laws of the State of New York.

{April 30, 1946 } 28. After the death of Donor and his said wife, any excess of income of Donee from the endowment contributed by Donor over and above the needs of the Donee for its art gallery and collection of pictures and the extension and administration of its Arboretum shall annually be contributed by Donee for the creation of scholarships and/or otherwise for the promotion of education in the fine arts, horticulture and arboriculture. No part of said income which would be contributed by Donee as herein provided is to be used for prizes given to painters, sculptors or students, for paintings, sculpture, drawings or other concrete works of art produced by said painters, sculptors or students.

{December 6, 1922} 29. During the lifetime of Donor and his said wife the art gallery of Donee shall only be open to the public on not more than two days in each week, except during July, August and September of each year, and only upon cards of admission issued by or under the direction of the Board of Trustees of Donee. During said period students of art shall be admitted by special arrangement under regulations to be prescribed by the Board of Trustees of Donee. Donor makes these provisions and stipulations for the reason that said art gallery is founded as an educational experiment under the principles of modern psychology as applied to education, and it is Donor's desire during his lifetime, and that of his wife, to perfect the plan so that it shall be operative for the spread of the principles of democracy and education after the death of Donor and his wife.

{April 30, 1946} 30. After the death of Donor and his said wife, the gallery and the arboretum shall be open five days in each week, except during the months of July and August of each year- and solely and exclusively for educational purposes- to students and instructors of institutions which conduct courses in art and art appreciation, which are approved by the Trustees of Donee. On Saturday of each week, except during the months of July and August of every year, the gallery and the arboretum shall be open to the public between the hours of ten o'clock in the morning and four o'clock in the afternoon, under such rules and regulations as the Board of Trustees of Donee may make. It will be incumbent upon the Board of Trustees to make such rules and regulations as will ensure that the plain people, that is, men and women who gain their livelihood by daily toil in shops, factories, schools, stores and similar places, shall have free access to the art gallery and the arboretum upon those days when the gallery and the arboretum are to be open to the public, as heretofore provided. On Sunday of each week during the entire year the gallery and the arboretum shall be closed to students and public alike. It shall be incumbent upon the Board of Trustees of the Donee to make such rules and regulations that will protect the works of art in the gallery and the trees, shrubs and plants constituting said arboretum.

{December 6, 1922} 31. Until the gallery to be constructed upon the tract of land above mentioned shall have been completed to such extent as in the judgement of Donor will make it safe and feasible to transfer the said collection of paintings thereto, said collection shall remain in Donor's residence, where now situated, or should it in Donor's judgement become requisite to remove the same from said residence for any reason the same shall be placed and housed in such place and under such conditions as the Donor shall specify. Meantime neither Donor nor Donee shall be under any obligation to keep the same insured in any manner, it being impracticable adequately or properly to insure the same; no insurance moneys being in any sense adequate to replace or repair the same in case of fire or other casualty.

{December 6, 1922} 32. The conveyance of the said real estate, together with the arboretum thereupon situate, the buildings, fixtures and appurtenances thereon or thereunto belonging and appertaining, by Donor to Donee, shall be irrevocable. The establishment of the art gallery is an experiment to determine how much practical good to the public of all classes and stations of life, may be accomplished by means of the plans and principles learned by the Donor from a life-long study of the science of psychology as applied to education and aesthetics. If, at any period during the lifetime of the Donor, the Board of Trustees decide that the experiment is a failure, they may, by appropriate resolution, dispose of the paintings, by gift or otherwise, to any individual, institution, museum, school or college, specified by the Board of Trustees. It may, however, hereafter appear that some one or more of the trusts, conditions and stipulations upon which Donee takes and holds the same as in this Indenture and Agreement set forth are improper or impracticable and should be modified. The same may only be modified by a written agreement between Donor and Donee executed in due form of law, but the right so to modify the same without impairing the objects and purposes in this Indenture and Agreement set forth is reserved to the parties in the manner in this paragraph specified.

{December 6, 1922} 33. The purpose of this gift is democratic and educational in the true meaning of those words, and special privileges are forbidden. It is therefore expressly stipulated by the Donor that at no time after the death of said Donor, shall there be held in any building or buildings any society functions commonly designated receptions, tea parties, dinners, banquets, dances, musicales or similar affairs, whether such functions be given by officials, Trustees or employees of the Barnes Foundation or any



other person or persons whatsoever, or whether such functions be private or public. It is further stipulated that any citizen of the Commonwealth of Pennsylvania who shall present to the courts a petition for injunction based upon what reputable legal counsel consider is sufficient evidence that the above mentioned stipulation has been violated, shall have his total legal expense paid by the Barnes Foundation.

{April 30, 1946 } 34. At no times after the death of the Donor shall the art gallery be used for exhibitions of paintings or other works of art, or of any work whatsoever, that are not the property of the Barnes Foundation. At no time after the death of the Donor shall the art gallery be used for painting, drawing or sculpturing by any person or persons, whether said persons be students or instructors of The Barnes Foundation or from any other institution where students are instructed how to paint, draw or sculpture. This means specifically that The Barnes Foundation is to be maintained perpetually for education in the appreciation of the fine arts and not as a school for instruction in painting, drawing, sculpturing or any other branch of art or craftsmanship. This restriction also prohibits the copying of any of the works of art of The Barnes Foundation by any person whatsoever.

{December 6, 1922} 35. No painter, sculptor or other artist of any description whatsoever will ever be permitted to use any of the buildings, or the contents of those buildings, for the instruction of pupils who pay or ever paid a fee to that artist, sculptor, etc, for private instructions in art or other form of education.

{December 6, 1922} 36. The stock of A.C. Barnes Company constituting a portion of this gift has in great degree acquired its value and its earning capacity through the intelligence and efforts of Nelle E. Mullen, Mary Mullen and Laura V. Geiger. Said persons have, through their long service in said corporation, acquired an experience, knowledge of its policies and of the administration of its affairs which is invaluable. In the interest of The Barnes Foundation Donor therefore requires that for a period of not less than five (5) years after Donor's death, or the death of his wife, whichever shall last occur, all of said persons shall continue the active conduct, including the manufacturing, executive and clerical services, of the business of A.C. Barnes Company, at salaries of the same amount as the books of said company show that they were respectfully receiving at the date of the death of the Donor or his wife, whichever shall last occur, and that said Nelle E. Mullen and Mary Mullen shall continue to be Directors of said A. C. Barnes Company and that Laura V. Geiger shall be elected to the Board of Directors of A.C. Barnes Company. Donee will exercise its rights as a stockholder of said company in such manner as to carry out the provisions of this paragraph. In token of her agreement to the terms and conditions of this Indenture and Agreement, and in token of her agreement to join in any conveyance requisite to carry out the true intent hereof, Donor's wife, Laura L. Barnes, has joined as a party herein. The Barnes Foundation, party of the second part hereto, doth hereby constitute and appoint Joseph Lapsley Wilson to be its attorney for it and in its name and as and for its corporate act and deed to acknowledge this Indenture and Agreement before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgments, to the intent that the same may be duly recorded.

{March 16, 1939 } 37. After the death of the Donor and his wife, there shall not be paid from the Foundation funds more than Five Thousand (\$5,000) Dollars a year to any one teacher, and not more than three (3) teachers shall be employed and paid for with Foundation funds.

{January 24, 1940 } 38. That beginning as of January 1st, 1940, the Barnes Foundation shall pay in equal quarterly installments to John Dewey, the sum of Five thousand dollars (\$5,000) per annum, for the balance of his life.

{April 15, 1942 } 39. That beginning as of June 1, 1947, the Barnes Foundation shall pay in equal monthly installments to Laurence Buermeier, the sum of eighteen hundred dollars (\$1,800) per annum, for the balance of his life. During the lifetime of the Donor, the Donee shall have power and authority, by resolution of a majority of its Board of Trustees, to make any change from time to time in the amount of the compensation herein provided. Such power shall cease upon the death of the Donor.

{October 20, 1950 } ARTICLE X - AMENDMENTS The following by-laws of the corporation are unamendable and shall never be amended in any manner whatsoever, viz: Article I, Article II, Article IV, Article V, Article IX, except that upon the execution of any written agreement between Albert C. Barnes and this corporation modifying, amending or supplementing the original Indenture and Agreement, dated the sixth day of December, A.D. 1922 or any supplement thereto, said Articles of the Bylaws shall be amended to accord with and conform to said written Agreement. All the other articles of these by-laws may be amended at an annual or stated meeting by resolution if notice of the proposed change therein shall have been mailed or handed to each member of the Board of Trustees at least ten days before the date of the meeting at which it is proposed such amendment shall be acted upon, and such amendment shall only be carried by the affirmative vote of a majority of the Trustees then in office.