COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

PROBATE AND FAMILY DEPARTMENT OF THE TRIAL COURT
No. ES09E0094QC

ALEXANDER B.C. MULHOLLAND, JR., et al.
Plaintiffs,
v.
ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, et. al.
Defendants.

APPEALS COURT
SINGLE JUSTICE NO.:

MEMORANDUM IN SUPPORT OF MOTION TO STAY JUDGMENT

Applicants for Intervention[1], individually, and on behalf of their minor children (the "Interveners"), have moved to stay the judgment in this matter to prevent irreparable harm resulting from the sale of the land held in the nation's oldest land trust - a sale that is the product of judicial abuse of discretion and reversible error. The Interveners and their children, beneficiaries of the Trust established by the will of William Payne over 350 years ago to benefit the schoolchildren of Ipswich, seek to defend the express terms of the Trust – that

[1] Douglas J. DeAngelis, Catherine T.J. Howe, Jacqueline and Jonathan Phypers, Peter Buletza, Kenneth Swenson, Robert Weatherall, Jr., Joanne Delaney, Cara Doran, Andrew and Susan Brengle, Michele and Jason Wertz, and Clark Ziegler.

the land at Little Neck in Ipswich be held "forever... not to be sold nor wasted."[2] Defense of the unambiguous terms of the Trust was abandoned by the Ipswich School Committee, who, under pressure from the trial judge, entered into an agreement for judgment allowing the sale of the land. The agreement was incorporated into the final judgment entered by the Probate Court without the required finding that allegiance to Payne's directive is "impossible or illegal," a finding that cannot be made on this record. See Museum of Fine Arts v. Beland, 432 Mass. 540, 544 n. 7 (2000).

Immediately upon learning of the settlement, the Interveners moved to intervene as a matter of right and moved to stay the judgment; both motions were summarily denied without comment. The Interveners timely filed a notice of appeal, as is their right. See Mass. Fed'n of Teachers v. School Comm. of Chelsea, 409 Mass. 203, 204 (1991).

Remarkably, the Probate Court approved the agreement for judgment without making any findings of

[2] It is black-letter law that the reformation of wills is prohibited in Massachusetts. See Flannery v. McNamara, 432 Mass. 665, 673 (2000).

fact, despite having previously denied summary judgment on the issue of reasonable deviation because "there are material facts in dispute." The Interveners have appealed the entry of judgment, as it is the product of multiple abuses of discretion constituting reversible error.[3] The land owned by the Trust risks being sold before the Interveners can exercise their appellate rights. In addition to violating the terms of the will, a sale of Little Neck does not provide the best economic use of the land, which can be accomplished through long-term leasing, thereby preserving the full value of the real estate, a rare and exquisite piece of New England waterfront property. (R. 292-93)[4] Unlike an investment fund, Little Neck is a unique asset that can never be replaced once it is sold.

To avoid an inequitable result, and to protect the public against the unlawful sale of the lots, the Interveners respectfully request this Court to allow

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[3] If Intervention is allowed, it will relate back to the date of the order denying intervention. The interveners' appeal of the judgment is therefore timely.

[4] Citations to the record appendix appear hereafter as (R., Page No.).

their motion to stay the judgment pending the outcome of their appeal. There is no harm to the parties in maintaining the status quo - holding land in trust that has been so held for over 350 years.

OVERVIEW

At stake in this case is the fate of the nation's oldest land trust, established in 1660 by Payne's will. The will bequeathed thirty-five acres of land at Little Neck in Ipswich for the benefit of the free school of Ipswich forever on the condition that the land not be "sold" nor "wasted." The Plaintiffs, who manage the Trust, seek reasonable deviation of the Trust to sell the land, plainly contradicting Payne's express and unambiguous instructions.[5] There has been no judicial decision nor findings to justify the

[5] Plaintiffs contend that they cannot continue to manage the Trust because of a lawsuit filed by the tenants at Little Neck. This reason is unavailing, as the tenants have admitted that they are open to long-term, market-rate leases and willing to pay their fair share of costs for a wastewater system. The material complaints in the tenant's lawsuit are directed less toward rental rates and more toward the history of mismanagement by the Feoffees, which is also documented in the insightful paper by Kathleen Brill, Esq. (R. 208-32).

prohibited equitable deviation from Payne's will.[6] Rather, the Probate Court judge shirked her obligation to ensure the proper administration of the Trust and compelled the resulting sale of the land.[7]

The Interveners are comprised of a representative group of parents of schoolchildren in the Ipswich Public Schools, together with the schoolchildren themselves, who are the true beneficiaries of the Trust. (R. 93-95) The Interveners have always been opposed to the proposed sale of Little Neck. (R. 112) As parents of schoolchildren, they comprise a minority within the voting-age population of Ipswich. (R. 261) Not having the majority-vote needed to elect the School Committee, they are distinctly positioned and committed as the guardians of their children to

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[6] Reasonable deviation is only permissible as to subordinate terms, G.L. c. 214, § 10B (second paragraph), which are not present here.

[7] At a meeting on January 5, 2012 the chairman of the School Committee reported that Judge Sahagian opined on the first day of trial that "she quite frankly saw no reason why she shouldn't order a sale, was inclined to order a sale, and that the only question in her mind was a number." It was clear to the School Committee that a sale was "almost certain," even before any evidence had been received. Affidavit of Jennifer Bauman ("Bauman Aff."), ¶ 7.

enforcing the mandate of the Trust - that Little Neck never be sold - for the benefit of their children. (R. 254)[8]

While the Interveners have been rendered powerless in this litigation through the machinations of the parties and the judge, their position is well supported in the Town and by an independent analysis of the proposed sale. The three Selectman who serve as Feoffees and represent a minority on the board independently opposed the sale of Little Neck at summary judgment. An amicus brief filed in opposition to Plaintiffs' motion for summary judgment was supported by the signatures of more than 680 parents of Ipswich schoolchildren. (R. 132-145) The Town's wide opposition to the sale is backed by the opinion of a CBRE report authored by Webster A. Collins, which confirms that establishing a ground-lease structure for the land is easily attainable and has proven

[8] Two of the Interveners, Jacqueline and Jason Phypers, are representative of non-Ipswich residents whose children attend the Ipswich Public Schools through the School Choice program. (R. 93) Not being residents of Ipswich, they have no voting rights in Ipswich; they did not elect the School Committee and are not represented by it.

successful in similar circumstances, and that the greater benefit to the schools in the short term and the long term is derived from a ground-lease structure, rather than the sale of the land under the terms of the agreement for judgment. (R. 286) There are no findings to the contrary.

The School Committee's capitulation to the sale of Little Neck is directly at odds with its public position taken in open meetings, at Town Meetings, and in the press. (R. 260, 263-68) At the request of the School Committee, the Town of Ipswich spent hundreds of thousands of dollars in legal fees to oppose a sale of Little Neck. (R. 197) As recently as November 15, 2011, the Chairman of the School Committee declared: "There wont [sic] be any settlements that involve sale in any respect." (R. 240) The Interveners reasonably relied upon these numerous public pronouncements that the School Committee would continue to oppose a sale of the land.

However, before the School Committee introduced any evidence at trial, acting under pressure from the trial judge, it negotiated a settlement agreement with the Plaintiffs for the sale of Little Neck and

approved the agreement in an executive session by a vote of 4-3. (R. 278) No notice was given to the Interveners, who had been involved in this matter. Upon learning of this radical departure of the School Committee from its previous position, the Interveners promptly moved to intervene and moved to stay the judgment pending judicial review of the judgment for deviation. Over the objection of the Interveners and without making the required findings justifying equitable deviation, Beland, 432 Mass. at 544 n. 7, the Probate Court (Sahagian, J.) approved the judgment on December 23, 2011. Judgment entered on January 12, 2012. (R. 346) The motion to intervene was denied without comment in an order dated February 6, 2012. The Interveners timely appealed.

The Interveners move this Court to stay the judgment pending the outcome of their appeal of the denial of intervention and their challenge to the judgment allowing deviation from the express terms of the Trust. The Interveners can demonstrate: (1) likelihood of success on the merits of their appeal, concerning both their right to intervene and the Probate Court's error in entering judgment to

eviscerate the nation's oldest land trust without the required showing that equitable deviation from the terms of the Trust is even permissible; (2) irreparable harm if the Plaintiffs are allowed to sell the land to enable privately owned condominiums; (3) an absence of harm in permitting land held in trust for over 350 years to continue in trust while the Appeals Court reviews the challenged deviation; (4) a benefit to the public interest in abiding by the express terms of the will and the proper administration of the Trust. For the reasons discussed below, the Interveners respectfully request this Court to enter an order staying the judgment. A draft order is attached.

ARGUMENT

I. The Interveners Are Likely To Succeed on the Appeal of Their Motion to Intervene.

The Interveners' motion meets the essential criteria of Mass. R. Civ. P. 24(a) - timeliness, interest, inadequacy of representation, and impairment. Because they satisfy these requirements, intervention shall be permitted. Id.

First, there can be no serious dispute as to the timeliness of the Interveners' application. They

filed their motion on December 20, 2011, the same day the agreement to sell Little Neck was announced and just three days following the School Committee's closed-door vote to accept the settlement. (R. 87) The Interveners could not have moved to intervene any sooner, as they previously believed that the School Committee would vigorously oppose any sale.

Second, as actual beneficiaries and the parents of actual beneficiaries of the Trust, the Interveners have an interest in enforcing the express terms of the Trust that is different in both kind and degree from the interests of the named parties. The Interveners' interest is in maximizing the short-term and long-term benefit intended for the Ipswich schoolchildren. Contrary to the facts in Chelsea, 409 Mass. at 207, where the would-be parent interveners "presented no actual disagreement with either the goals or the actions of the school committee," the Interveners and the parties fundamentally differ on how the Trust should be managed. The School Committee's willingness to abandon its opposition to the sale of Little Neck is itself evidence that the Interveners' interest is sufficiently different in degree from that of the

named parties. B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc., 440 F.3d 541, 546 (1st Cir. 2006) citing United Nuclear Corp. v. Cannon, 696 F.2d 141, 144 (1st Cir. 2004); Glancy v. Taubman Ctrs., Inc., 373 F.3d 656, 675 (6th Cir. 2004).

Third, the Interveners' interest is not adequately represented, as evidenced by the proposed settlement itself. Rather, the parties have colluded to accomplish the settlement. Collusion among the parties is a significant factor in showing that an intervener is inadequately represented. Chelsea, 409 Mass. at 207; Kellogg USA; 440 F.3d at 546. The School Committee, the Attorney General, and the Probate Court have all failed to advocate for the interests of the Trust, its beneficiaries, and the intent of Payne.

Fourth, the Interveners' ability to protect their interest would be impaired if intervention were denied, because there would be no party to advocate their position. [9]

[9] The Interveners incorporate their filings in support of their motion to intervene in the trial court. Specifically, they incorporate the argument in their

II. The Interveners Are Likely To Succeed on Their Appeal of the Court's Error in Entering Judgment.

The Probate Court had a duty to ensure the proper administration of the Trust. She neglected that duty by forcing and approving a settlement without finding that compliance with the trust is "impossible or illegal" or that compliance would defeat the purposes of the trust, Beland, 432 Mass. at 544 n. 7, findings that are not supported by the record in any event. The Court's duty in this regard is separate and apart from the Attorney General's. Matter of the Trust Under the Will of Fuller, 418 Mass. 466, 483-84 (1994) (judge not bound by settlement between acting trustees and Attorney General).[10]

The unambiguous terms of Payne's will clearly prohibit the sale of the land. That the Attorney General and School Committee have agreed to such a sale did not relieve the Probate Court of its

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Memorandum in Support of the Motion to Intervene at R. 160-68.

[10] See also Matter of the Trust Under the Will of Crabtree, 440 Mass. 177, 192-93 (2003); In re Wilson, 372 Mass. 325, 330 (1977) (Attorney General's role in connection with public trusts does not "provide[] a basis for displacing the court's traditional discretion" with respect to public trusts).

independent duty to enforce the Trust as written.[11] The Probate Court abandoned its "independent obligation of review", Fuller, 418 Mass. at 472, when it pressured the parties into a settlement and approved the resulting sale without hearing all of the evidence or making findings of fact to justify disregarding the clear provisions of a 350 year-old trust.

The trial court judge abused her discretion when, after denying the Plaintiffs' motion for summary judgment finding "material facts in dispute" concerning the issue of reasonable deviation, R. 6, #39, she announced her intention to force a sale on the first day of trial! She indicated that she would order a sale and that the parties should work out an agreement to determine the price. (Bauman Aff., ¶ 7) Succumbing to the judge's pressure, the School Committee entered into an agreement that allowed for the sale. (R. 335-36) The judge approved the

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[11] The Attorney General's power to enter into settlements, similarly, is not without limits. See MacLean v. State Board of Retirement, 432 Mass. 339, 342 (2000) (Attorney General does not have the power to waive application of the General Laws when entering into settlement agreements).

agreement for judgment without making any findings of fact and over the objection of the Interveners. She also denied the Interveners' motion to intervene and motion to stay the judgment, without comment. Her actions reveal a dereliction of her duty to administer a public trust. The Interveners remain the only party willing to advocate for the Trust where the Attorney General and the judge have abdicated that obligation.

III. The Interveners and The Trust Will Suffer Irreparable Harm if a Stay Is Not Granted.

The Agreement for Judgment allows the Feoffees to create and sell 167 condominium units at Little Neck. The Feoffees have given every indication that they will proceed with a sale absent judicial intervention. Once the land is sold, it is gone forever – the antithesis of Payne's intent that it be held forever. The harm to the Interveners, Payne's intent, and the Trust is irreversible and catastrophic.

IV. The Parties Will Not Be Harmed by a Stay.

The main "harm" cited by the School Committee at the hearing in staying the judgment was that "mischief" could disrupt the plans for a sale. The School Committee attorney specifically explained to the judge that the "mischief" to which he was

referring was "an election." The possibility that the democratic process could disrupt the narrow vote of the School Committee under pressure from the trial judge does not present substantial harm to anyone.

V. The Public Interest Will Not Be Harmed by a Stay.

It is in the public interest to ensure that public trusts are properly administered. This basic principle has been lost on the parties and the judge in this case, but it is not lost on the Interveners. By granting this stay, land held in Trust for over 350 years remains in Trust for at least a few more months while the crucial judicial scrutiny occurs to determine whether the unambiguous instructions of the testator and the mandate of the Trust may be disregarded. Not only is allegiance to the instructions of Payne and the mandate of the Trust feasible, the continued maintenance and leasing of the land provides the best short-term and long-term benefit to the beneficiaries. There is no harm that would result from the issuance of a stay.

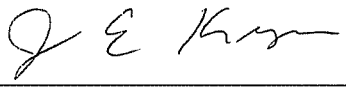
CONCLUSION

The Interveners respectfully request entry of the draft order to stay the judgment.

Respectfully submitted,

Douglas J. DeAngelis, Catherine T.J. Howe, Jacqueline and Jonathan Phypers, Peter Buletza, Kenneth Swenson, Robert Weatherall, Jr., Joanne Delaney, Cara Doran, Andrew and Susan Brengle, Michele and Jason Wertz, and Clark Ziegler

By their attorneys,



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