COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

ESSEX, SS.

APPEALS COURT
SINGLE JUSTICE
NO.:2012-J59

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

PROBATE AND FAMILY DEPARTMENT OF THE TRIAL COURT
No. ES09E0094QC

REPLY MEMORANUM OF INTERVENERS REGARDING MOTION TO STAY

The Proposed Interveners in the above matter submit this brief reply to address the alleged lack of standing raised by the Attorney General, the School Committee and the Feoffees in Opposition to the Interveners' Motion to Stay Judgment and to correct misstatements made by these parties in their filings.

Argument

1. **Standing Objections Aside, This Court, Or The Supreme Judicial Court, Should Reach the Merits Of The Controversy To Provide Guidance To The Lower Court And To Further The Public Interest**

The opposing parties contend that the Interveners have no standing and, therefore, have no chance of success on the merits of their appeal. While the

Interveners maintain that they have demonstrated an interest in the litigation sufficient to permit intervention under Rule 24, this is a case where the public interest justifies this Court's reaching the merits notwithstanding any objection to standing. As the Supreme Judicial Court has commented:

> "We have not hesitated to reach the merits of controversies improperly brought before this Court when necessary to provide practical guidance to lower courts or to further the public interest."

In the matter of a Rhode Island Grand Jury Subpoena, 414 Mass. 104, 111 (1993) (even though plaintiff had no standing to bring an appeal, the Court addressed his argument because the issue presented in the appeal is likely to arise again in future cases.) See, also, Board of Health of Sturbridge v. Board of Health of Southbridge, SJC-10852 (Feb. 22, 2012) (reaching merits of the case even though interveners lacked standing in order to "bring a final resolution to th[e] case"); School Committee of Boston vs. Board of Education, 352 Mass. 693, 697 (1967) (regardless of the plaintiff's standing, the Court exercised its discretion to review "questions of pressing public importance"); Superintendent of Worcester State

Hospital vs. Hagberg, 374 Mass. 271, 274 (1978)(even though an issue has become moot, the Court will reach the merits where issue is of public importance, capable of repetition, yet evading review).

That charitable trusts be properly administered by the Attorney General and the Probate Court is of pressing importance to the public. Payne made a generous gift for public purposes. The sale of the land is the antithesis of his intentions. At the very least it should be the product of a reasoned, judicial analysis under the doctrine of equitable deviation, and not the product of a settlement motivated apparently by convenience and expediency. Public confidence in the government's administration of charitable trusts will be eroded if convenience is permitted to trump a donor's intent. (See, for example, Affidavit of Stoddard Wilson filed in Support of Motion to Stay; see also, Affidavit of Mark E. Dixon (Descendant of William Payne) filed in Support of Motion to Stay Judgment). Here, the Feoffees have blamed the tenant law suit for the alleged "impossibility" of carrying out Payne's mandate and renting the land to the tenants. The tenants

themselves, however, concede that they are willing to pay fair rent for the property[1]. (Supplemental Record Appendix p. 261). There is little or no substance to the claim that the trust is incapable of fulfillment if the land continues to be rented rather than sold.[2] In these circumstances, the public expects and deserves a reasoned basis for avoiding Payne's instructions.

There are thousands of public charities in the Commonwealth of Massachusetts. The Legislature has defined specific circumstances under which a departure from the intention of a charitable bequest may be permitted. None of those circumstances are present here. This case requires judicial review and a reasoned legal justification for deviating from Payne's intent, as opposed to the convenient alternative pursued by the Attorney General and the Probate Court. The Appeals Court or the Supreme Judicial Court, as the case may be, should take

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[1] Even if the tenants were not willing to pay fair market rent, they are certainly not the only tenants in the market for this unique property.

[2] See, Affidavit of Rachel Roesler, ¶¶ 12 to 17 and Exhibits "A" and "B".

jurisdiction and reach the merits of this controversy to give probate courts throughout the Commonwealth guidance on the proper findings and reasons for permitting departure from the stated intentions of a donor of a charitable bequest in order to serve the interests of donors and beneficiaries of such bequests throughout the Commonwealth. Without such guidance, the public will remain unprotected, just as the beneficiaries of the Payne trust were left unprotected in this case.

2. Misstatements Of Fact Should Be Corrected

The misstatements of fact in the opponents' filings are too numerous to be called out in this reply; however, some of the most stark misstatements should be corrected. For example, in their memorandum in opposition, the Feoffees baldly state that "all seven Feoffees, Life Feoffees and Selectmen Feoffees, were in favor of the Agreement for Judgment ultimately reached in the Probate Court." (Memorandum of Feoffees in Opposition to Motion to Stay Judgment n.1). The Interveners submit the Affidavit of Patrick McNally, a Selectmen Feoffee, in which Mr. McNally testifies that he never voted in favor of the

settlement, or the sale. In fact, from the commencement of the Probate Court litigation, he has been opposed to the sale of Little Neck (McNally Affidavit, ¶3) and as a Feoffee, he was never consulted on the Settlement of the Probate Court litigation providing for the sale of Little Neck (Id., ¶4). He was never asked to participate in any discussions concerning the Agreement for Judgment, never voted on the Agreement for Judgment, never expressed a position in favor of the Agreement for Judgment, and played no role in reaching the vote to settle the Probate Court litigation. (Id., ¶7) Mr. McNally also attests to a remarkable example of the Lifetime Feoffees shutting out the Selectmen Feoffees from decision making concerning the litigation. At the Feoffees' meeting of October 31, 2011, called on short notice, the Lifetime Feoffees voted that all decisions regarding the pending court case be made by the Lifetime Foeffees, and not the Selectmen Feoffees (McNally Affidavit, ¶8, Ex. A). While Mr. McNally was authorized to be a Feoffee by a statute in place since 1786 (McNally Affidavit, ¶2; R. 216), he was only permitted to serve as a Selectmen Feoffee since 2007

(McNally Affidavit, ¶2 R. 216 n. 12). This is but one of many examples of self-dealing by the Lifetime Feoffees that have infected the proceedings.

Another misstatement is contained in the Joint Affidavit of Counsel for the Parties, paragraph 6, which states "Any statement that the trial judge in any way applied any 'pressure' or coercion on the parties to settle is false." If this so, then the Chairman of the School Committee, Jeff Loeb, misled the public when he stated "The judge leaned on the parties to have discussions" and when he described the judge's announcement, prior to the trial, during a tour of Little Neck, that her opinion was that Little Neck should be sold and the only question in her mind was a number. (See, Affidavit of Jennifer Baumann, ¶7; Affidavit of Rachel Roesler, ¶7). The public were informed by the School Committee Chairman that the very reason for the settlement taking place was the judge's pre-disposition to order a sale at a price that was far below any that the School Committee had previously considered. The Interveners relied upon this information when filing their Motion to Stay in the Appeals Court. The Interveners did not act in a

scandalous or irresponsible manner in relying in good faith upon the recorded, public statement of the Chairman of the School Committee. There is simply nothing inaccurate, reckless, false, or irresponsible in the interveners' motion which merely seeks to maintain the status quo of a 350 year old trust during whatever time it takes the Appeals Court, or the Supreme Judicial Court, to provide a reasoned careful consideration of a fundamental issue of trust law presented in this case: whether or not there is any lawful justification for a reasonable deviation from the stated intentions of William Payne. The Feoffees filed this action for deviation pursuant to G.L. 214, §10B because they recognized that a sale of Little would be possible only if the doctrine of reasonable deviation applies. Yet, remarkably, the judgment approving the parties' agreement to sell Little Neck fails even to mention the doctrine of reasonable deviation let alone that deviation is necessary to fulfill Payne's charitable intent, as is required. If this judgment is not stayed, then the doctrine of reasonable deviation and a trust settlor's intent will have been rendered meaningless in Massachusetts.

Conclusion

For the above reasons and for all of the reasons stated in the supporting affidavits and the Motion to Stay Judgment and Memorandum filed in Support, the Interveners respectfully request that the situation which has been the status quo for 351 years be permitted to continue until the issues raised in the Appeal filed by the Interveners are finally resolved.

Respectfully submitted,

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Dated: March 1, 2012

CERTIFICATE OF SERVICE

I, Catherine Savoie, attorney for the interveners, hereby certify that on this 1st day of March, 2012, I served a copy of the within U.S. Mail to:

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