COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT

ESSEX, ss

Docket No. ES09E0094QC

ALEXANDER B.C. MULHOLLAND, JR., PETER FOOTE, DONALD WHISTON, JAMES FOLEY, ELIZABETH KILCOYNE, PATRICK J. MCNALLY, and INGRID MILES, as they are the Feoffees of the Grammar School in the Town of Ipswich,

vs.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, IPSWICH SCHOOL COMMITTEE, AND RICHARD KORB, as he is Superintendent of Schools in the Town of Ipswich.

OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE INTERVENERS' NOTICE OF APPEAL

Introduction

Neither the case law they cite nor the rules governing appellate procedure support the extraordinary remedy the Plaintiffs seek by their motion. The Plaintiffs request that this Court determine the propriety of the Interveners' appeal of the entry of the Agreement for Judgment. The Plaintiffs do not—nor can they—point to a single case where a trial court judge has the power to make this determination. It is black letter law that "[q]uestions going to the merits of the claimed appeal are for the appellate court to decide." *Rudders v. Building Commissioner of Barnstable*, 51 Mass. App. Ct. 108, 111

(2001). Faced with the clear precedent of *Rudders*, a case which the Plaintiffs cite on page three of their motion to strike, the Plaintiffs claim that this Court is permitted to dismiss the Interveners' appeal because such a denial would be "procedural" in nature. Once again, the Plaintiffs' assertion fails because there is no "procedural" basis—e.g., failure to give timely notice, failure to docket the appeal, or failure to give a required bond—upon which to strike the appeal. *See id.* at n. 7. For the reasons discussed below, the Plaintiffs' motion to strike ought to be denied.

Background of Interveners' Appeal

On February 15, 2012, the Interveners moved to appeal this Court's order denying their motion to intervene and the Judgment on Complaint for Deviation Pursuant to G.L. c. 214, §10B.[1] The Interveners are entitled to appeal the denial of their motion to intervene as a matter of right. *Massachusetts Federation of Teachers v. School Committee of Chelsea*, 409 Mass. 203, 204 (1991). In moving to intervene in this matter, the Interveners intend to challenge the Agreement for Judgment entered into by the parties, an Agreement that allows the sale of land held in Trust for over 350 years. The Interveners will argue that this Agreement should not have been entered because it violates fundamental principles of trust law. First, an essential term of Payne's will is that the land not be sold. Equitable deviation, which can be permitted only as to the subordinate terms of a charitable gift, is inapplicable here. *See* G.L. c. 214, § 10B (second paragraph); *see also Trustees of Dartmouth College v. City of Quincy*, 357 Mass. 521, 528-30 (1970) (deviation from subordinate terms of will permitted in light of substantial risk of complete failure of the primary charitable gift). There can be no

[1] The Interveners moved to stay the Judgment pending the outcome of their appeal before a Single Justice of the Massachusetts Appeals Court. The Court (Agnes, J.) denied the motion to stay. The Interveners appealed.

"equitable deviation" where sale of the land is the antithesis of Payne's intent. *See Museum of Fine Arts v. Beland*, 432 Mass. 540, 541, 544 (2000) (prohibiting sale of paintings as antithesis of settlor's intent that paintings remain "permanently and inalienably in trust").

Second, even if deviation were appropriate, it is only permissible once there has been a determination that compliance with a subordinate trust term "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." *See id.* at n. 7 citing Restatement (Second) of Trusts § 381 (1959). There have been no findings of fact or judicial determination that the land can no longer be held in Trust.

The Interveners contend that they meet the requirements of Mass. R. Civ. P. 24(a), and therefore, intervention shall be permitted. Even if the Interveners did not meet the criteria for intervention, however, this is a case where the public interest justifies the Court's reaching the merits notwithstanding any objection to standing. *See 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).

Argument

I. The Plaintiffs' Motion to Strike the Interveners Appeal Is Without Precedent and Beyond the Authority of this Court.

"Questions going to the merits of the claimed appeal are for the appellate court to decide." *Rudders*, 51 Mass. App. Ct. at 111. In *Rudders*, the Appeals Court held that "there is no basis for annulling a notice of appeal... for the reason that, in the lower court's view, the appeal would be without merit, whether for the appellant's lack of aggrievement, or for any other ground of substance." *Id.* at 110-11. A lower court can only dismiss an appeal on procedural grounds (e.g. filing notice untimely, *Catalano v. First Essex Savs. Bank*, 37 Mass. App. Ct. 377, 383 (1994); failure to docket appeal, Mass. R.A.P. 10(c); failure to give required bond, *Kargman v. Dustin*, 5 Mass. App. Ct. 101, 106-08, (1977)). None of these circumstances are present in this case.

None of the cases cited by the Plaintiffs for the proposition that non-parties cannot appeal from a judgment —*Corbett v. Related Companies Northeast, Inc.*, 424 Mass. 714 (1997); *Baker v. Board of Selectmen of Town of Foxborough*, 77 Mass. App. Ct. 1117 (2010), or *Worcester Memorial Hospital v. Attorney General*, 337 Mass. 769 (1958)—involve a lower court deciding that the party moving to intervene lacked standing to appeal the judgment. In each case, either the Appeals Court or the Supreme Judicial Court decided whether the agreement for judgment could stand in the face of the intervener's challenge.

The Plaintiffs request this Court to exercise a power that is reserved for an appellate court. Not even a single justice of the Appeals Court can grant the relief sought by the Plaintiffs in their motion. *See* Mass. R.A.P. 15(c) (single justice may not "dismiss or otherwise determine an appeal or other proceeding"); *Albano v. Bonanza International Development Co.*, 5 Mass. App. Ct. 692, 693 n. 1 (1977) ("A single justice of [the Appeals Court] is without power to allow a motion to dismiss an appeal").

II. The Plaintiffs' Motion Wastes Scarce Judicial Resources.

Allowing the Plaintiffs' motion will lead to unnecessary future proceedings and appeals if intervention is ultimately allowed. If either the Appeals Court or the Supreme Judicial Court allows intervention, the Interveners will be permitted to challenge to the Agreement for Judgment. It would be needlessly burdensome and time consuming for the parties and the courts to allow the Interveners' motion to intervene and then require a separate appeal on their challenge to the Agreement for Judgment. *See Kobico, Inc. v. Pipe*, 44 Mass. App. Ct. 103, 104 n. 2 (1997) ("no good reason" for separate appeals where claims raise virtually identical issues; "[t]wo appeals also have a negative impact, to say the least, on judicial economy at the appellate level"). Once again, Plaintiffs cite no cases where the courts have taken the circuitous path they urge.

Conclusion

The Plaintiffs' motion to strike is based on a substantive challenge to the merits of the Interveners' appeal. There is no procedural deficiency with the appeal that would justify this Court exercising its power to strike the notice of appeal. The arguments made by the Plaintiffs are for Appeals Court or the Supreme Judicial Court to decide. It would

be unprecedented for this Court to grant Plaintiffs' request. The Interveners respectfully request that the Court deny the Plaintiffs' motion to strike.

Respectfully Submitted,

DOUGLAS J. DeANGELIS, CATHERINE T.J. HOWE, JACQUELINE PHYPERS, JONATHAN PHYPERS, PETER BULETZA, KENNETH SWENSON, ROBERT WEATHERALL, JR., JOANNE DELANEY, CARA DORAN, ANDREW BRENGLE, SUSAN BRENGLE, MICHELE WERTZ, JASON WERTZ and CLARK ZIEGLER, individually and on behalf of their minor children,

By their attorney,

Catherine J. Savoie, BBO# 544599
csavoie@pbl.com
James E. Kruzer, BBO # 670827
jkruzer@pbl.com
POSTERNAK, BLANKSTEIN & LUND, L.L.P.
The Prudential Tower
800 Boylston Street
Boston, MA 02199
(617) 973-6100

Dated: April 25, 2012

CERTIFICATE OF SERVICE

I, Catherine Savoie, hereby certify that on this 26th day of April, 2012, I served a copy of the foregoing by first-class mail upon the following counsel:

William Sheehan, III
MacLean Holloway Doherty
Ardiffe & Morse
8 Essex Center Drive
Peabody, MA 01960

Johanna Soris
Commonwealth of Massachusetts
Office of the Attorney General
Public Charities Division
One Ashburton Place
Boston, MA 02108

Stephen Perry
Casner & Edwards, LLP
303 Congress Street
Boston, MA 02210

Mark E. Swirbalus,
Day Pitney LLP
One International Place
Boston, MA 02110

Catherine Savoie