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Pamela A. Casey O'Brien, Register
Essex Division
Probate and Family Court
36 Federal Street
Salem, MA 01970

January 28, 2011

Re: Alexander B.C. Mullholand Jr. et al. v.
Attorney General of the Commonwealth of Massachusetts, et al.
Docket No. ES 09E0094QC

Dear Ms. O'Brien:

Enclosed for filing please find the following:

1. Attorney General's Submission to the Court in the Plaintiff's Feoffees' Motion for Partial Summary Judgment and the Defendant School Committee's Opposition;
2. Notice of Appearance of Johanna Soris, AAG; and
3. Notice of Appearance of Jed M. Nosal, AAG/CHFB.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Johanna Soris'.

Johanna Soris
Assistant Attorney General
B.B.O. No. 644702
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Public Charities Division
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Enclosures

cc: William H. Sheehan III, Esquire
Donna Brewer, Esquire
George Hall, Esquire
Christine Griffin, Esquire
Mark E. Swirbalus, Esquire

COPY

COMMONWEALTH OF
MASSACHUSETTS 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 FEOFFEEES OF)
THE GRAMMAR SCHOOL IN THE TOWN)
OF IPSWICH)

Plaintiffs,)

v.)

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

Defendants.)

ATTORNEY GENERAL' S SUBMISSION TO THE COURT IN THE
PLAINTIFF FEOFFEEES' MOTION FOR PARTIAL SUMMARY
JUDGMENT AND THE DEFENDANT SCHOOL COMMITTEE'S
OPPOSITION

INTRODUCTION

The Attorney General is a party in all matters implicating her mandate to see to the due application of charitable funds. The Attorney General has the discretion to exercise that mandate to different degrees and to increase or decrease her level of involvement as well. M.G. L. c. 12, §8G. In this case, the Attorney General is a named party defendant and initially exercised her discretion to monitor the litigation because the stakeholders, the School Committee and the Feoffees are ably represented by counsel. Moreover, it is a matter of public record that the School Committee and the Feoffees

have been working toward a mutually satisfactory resolution to the challenges facing the trust and its beneficiaries for several years. Also a matter of public record, the parties ultimately were not able to agree on a negotiated settlement.

Now however, in the context of the plaintiff's motion for partial summary judgment and in consideration of the uniqueness of the trust, the Attorney General offers the Court her views on certain matters at issue in this litigation. More specifically the Attorney General offers the following to assist the Court in this matter: 1) the dominant intent of William Payne's trust to benefit the schools of Ipswich is well established; 2) the doctrine of deviation permits a sale of the land if the dominant intent of the trust has become substantially impaired; and 3) the Feoffees have a fiduciary obligation to seek judicial approval for deviation if they reasonably believe the trust is not fulfilling its purpose.

A. William Payne's Dominant Intent Was to Benefit the Schools of Ipswich

At the heart of this controversy is whether the landlord/tenancy between the Feoffees and the tenants of Little Neck has ceased to be profitable such that the trust should be modified pursuant to the equitable doctrine of deviation to allow for the sale of the land lots to the tenants as set forth in the proposed settlement agreement put forward by the Feoffees and agreed to by the tenants.¹

The starting point for the analysis is the trust language itself. The trust at issue was created by William Payne in 1660. Payne's testamentary trust stated:

¹ The Plaintiff – Feoffees and the Defendant School Committee have submitted summary judgment memoranda containing differing versions of material facts. The Attorney General is not taking a position on the facts adduced by the parties, but believes that the Attorney General's Office has a role to play in the summary judgment by virtue of setting forth for the court's consideration its view of the law of deviation in the context of the sale of this land and the legal duty of the Feoffees with respect to a proposed sale.

“I give unto the free school of Ipswich the little neck of land at Ipswich commonly known by the name of Jeffrey’s neck [which] is to be and remain to the benefit of the said school of Ipswich forever [as I have formerly intended] and therefore the said land not to be sold nor wasted.”

Massachusetts cases consistently adhere to a long-established principle that in construing a will the intention of the testator must be protected and upheld if possible.² *Tucci v. DiGegorio*, 358 Mass. 493 (1970); *Sears v. Childs*, 309 Mass. 337 (1941); *Miller v. Parish of Epiphany*, 302 Mass. 323 (1939); *Bramley v. White*, 381 Mass. 343 (1933).

William Payne’s dominant intent is readily discoverable in the will’s language – “is to be and remain the benefit of the said school of Ipswich forever”. Clearly he intended the land trust to financially benefit the schools of Ipswich. *Sears*, 309 Mass. at 344. No party in this proceeding has presented facts to contradict or contest William Payne’s dominant intent in establishing the testamentary trust.

B. Equitable Deviation is Permissible to Effectuate Payne’s Dominant Intent

The law provides for equitable deviation from the terms of the trust, such that the court could allow for the sale of the land upon the proper showing by the Feoffees that the schools of Ipswich are not benefitted by landlord/tenancy.

In the leading case on deviation, *Trustees of Dartmouth College v. Quincy*, 357 Mass. 521 (1970) (hereafter Quincy Girls’ School), the testator created a trust to found a school for the education of Quincy females exclusively. *Id.* at 523.

The school’s Trustees voted to allow non-Quincy girls to attend the school because of financial difficulties stemming from declining enrollment. The Court upheld the deviation, noting that absent the proposed change in administration the trustees would

² See generally, William J. Bowe & Douglas H. Parker, PAGE ON THE LAW OF WILLS (3d. ed. Supp. 1999) § 30.6, at 26-34 nn. 1-3. (“The sole purpose of the court in construing a will is to ascertain the actual intention of the testator as the same appears from a full and complete consideration of the entire will when read in the light of the surrounding circumstances.”)

not have been able to achieve the primary objective of the trust. Importantly, the Court also noted that the testator could not have foreseen the changes in preparatory education costs and the attendance habits of that population. The Court concluded by stating that the plan before it would carry out the testator's primary charitable trust without violating any of its basic charitable purposes. *Id.* at 357 Mass. 531.

The Restatement (Third) of Trusts §66 (2003), likewise recognizes the doctrine of deviation.³ Subsection (1) states:

“The court may modify an administrative ... provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust.”⁴

William Payne could not foresee that the land he left in trust for the benefit of the Ipswich schools in 1660 would become a summer community with 167 cottages and all the responsibilities and costs that go along with running such a community. Nor could he have anticipated that the trust would be mired in multiple lawsuits, most recently over rental value for these cottages. Early decisions involving the establishment of the trust for the benefit of the Ipswich Schools demonstrate that the Payne knew only that the land would be used in connection with farming activities. *See, Feoffees of Grammar School in*

³ Restatement (Third) of Trusts (2003) reflects several years of extensive input from law professors, practicing attorneys and judges. It reflects the consensus of the American legal community as to what the law is and in some cases, what it should become. *See*, http://www.law.harvard.edu/research/guides/united_states/restatements-of-the-law-.html.

⁴ According to the Comment on Subsection (1), Restatement (Third) offers the following example: “The terms of the trust being administered by T require the retention of a modest-sized apartment complex that the settlor had owned and operated during her lifetime. It has subsequently become clear that this apartment complex cannot be administered efficiently and can be expected to continue to detract from the overall performance of the trust estate, to the disadvantage of all of the beneficiaries. The court may authorize deviation from the terms of the trust, enabling the trustee to sell the apartment complex and reinvest the proceeds.” Restatement (Third) of Trusts §66 (2003), Comment on Subsection (1); Illustration 1.

Ipswich v. Proprietors of Jeffreys' Neck Pasture, 174 Mass. 572 (1899) (The Feoffees received the land in trust in 1660, successor Feoffees brought a right of way action on or about 1899, the Court noted that from 1649 to 1899 the land had been used as pasturage.); *see also, Feoffees v. Andrews*, 49 Mass. 584 (1844) (In action on tax responsibilities of farm tenants on trust property, court notes Payne and others leased property in 1650 for use as a farm to produce revenue for the school.) It was not until the late 1800's that "many cottages have been erected upon it along the shores, which are occupied by summer residents." *Feoffees of Grammar School in Ipswich v. Proprietors of Jeffreys' Neck Pasture*, 174 Mass. at 574.

Equally important to the legal analysis of this case, the terms of the trust from which the court may authorize deviation by the trustee, may be one *expressly forbidding the sale of certain properties*. In *Amory v. Attorney General*, 179 Mass. 89, 105 (1901) the Court authorized the sale of the settlor's home, despite a "no-sale" provision in order to advance her dominant charitable intent stating, "The provision in the will that the trustees shall have no power to sell any part of Seven Oaks hardly would be construed as an attempt to limit the power of the court to authorize a sale...and thus to make specific land inalienable forever); *See, also, Weeks v. Hobson*, 150 Mass. 377, 380 (1890) (Even though contrary to testator's instruction to use his land as site for the hospital, court authorized sale of land found unsuitable for said purpose, and use of proceeds to support hospital, since necessary to carry out the dominant purpose of the testator to provide for a hospital in Haverhill, Massachusetts);

Therefore, to the extent the Feoffees have established that the rental income, ongoing litigation and future expenses related to improvements to and maintenance of the

common land and roads will substantially impair the dominant intent of William Payne to financially benefit the schools of Ipswich, then the Attorney General agrees with the plaintiffs that the concept of sale is permitted under the doctrine of deviation, even to the oldest land trust in the country with the so-called “no-sale” provision.⁵

Museum of Fine Arts v. Beland, 432 Mass. 540 (2000), cited by the Defendant School Committee as authority for denying deviation based upon a so-called “no sale” provision is inapposite. The Defendants have taken *dicta*, *Beland* at 545, and elevated it to the holding of the case.

Reverend Wolcott bequeathed seventeen paintings in trust to the Trustees of the White Fund who came into possession of the collection in 1912. The Trustees were instructed by the will to offer the paintings to the Museum of Fine Arts (MFA) for exhibition thereby carrying out Rev. Wolcott’s dominant intent “to create and gratify a public taste for fine art,” through the auspices of the MFA, with a preference that the people of Lawrence enjoy the paintings.” *Beland* at 544. In or about 1998, the White Fund Trustees approached the MFA about selling the collection and using the proceeds to fund arts projects in Lawrence, claiming that exhibiting a three of the seventeen paintings out of the collection at the MFA no longer fulfilled the purpose of Rev. Wolcott’s charitable trust. The *Beland* Court disagreed, holding that exhibiting some of the art at the MFA matched the provision directing the Trustees to give the paintings to the MFA for display, and therefore there was “no reason for the application of reasonable deviation or cy pres to sell the paintings.” *Id.* at 544.

⁵ One of the earliest corporate charters was granted by act of Massachusetts General Court in 1756 to “Feoffees of the Grammar School of the Town of Ipswich to administer a private bequest in the interest of public education there.” *Marion R. Fremont-Smith, Governing Nonprofit Organizations: Federal and State Law and Regulation*, 50, (2004)

In *dicta* the Court speculated about a different outcome should the Trustees someday show that the unexhibited paintings could never be brought to Lawrence for exhibit [paragraph 4 of Wolcott will allowed for removal of the paintings from the MFA to a “public art gallery” in Lawrence should one ever be built]. The Court concluded that the “MFA seeks only a declaration that the paintings not be sold. On this record, it is entitled to that declaration.” *Beland* at 545. The outcome of the *Beland* case is narrow and based upon a set of facts that have no bearing on the case before the court. *See, Amory v. Attorney General, supra* (permitting sale despite “no-sale” provision in order to carry out testator’s dominant intent.

C. The Feoffees Have A Duty to Seek Judicial Approval for Deviation if they Reasonably Believe the Trust is Not Fulfilling Its Purpose

Based upon the facts presented by the Feoffees, even *if* subject to dispute by the School Committee, the Feoffees have a duty to pursue judicial modification of the trust:

The Restatement (Third) of Trusts §66 (2003) (hereafter Restatement (Third)), Subsection (2) states:

“If the trustee knows or should know of circumstances that justify judicial action Subsection 1⁶ with respect to an administrative provision, and of the potential of those circumstances to cause substantial harm to the trust or its beneficiaries, the trustee has a duty to petition the court for appropriate modification or deviation from the terms of the trust.”

The Restatement (Third) Comment on Subsection (2) recognizes the duty of the trustee to pursue judicial action with respect to an administrative provision if the trustee knows or should know of circumstances that may result in substantial harm to the trust or to its beneficiaries from adhering to the existing terms of the trust. In these

⁶ *See, page 4, infra.*

circumstances the trustee is under a duty to initiate proceedings to seek appropriate deviation from that administrative provision.

Here, the trust has not produced income to the Ipswich schools since 2006. (School Committee's response to Fact 14; Feoffees' Memo at ¶s 33-34.) According to the Feoffees' analysis, the rental income, ongoing litigation and future expenses related to improvements to and maintenance of the common land and roads will prohibit the trust from providing income to the school in the future. Thus, the Feoffees unquestionably had a fiduciary duty to bring the entire matter to the attention of the court for judicial resolution.

Conclusion

In summary, the dominant intent of William Payne's trust is well settled and the law cited by the Feoffees for the proposition that deviation may be applied, even to the oldest land trust in the country with the so-called "no sale" provision, should the facts so warrant is a correct statement of the law. Moreover, given the status of the trust, the Feoffees have a fiduciary obligation to seek judicial approval for deviation if they reasonably believe the trust is not fulfilling its purpose.

In a statement of its overall approach to questions like those presented here, the Supreme Judicial Court has declared:

A donor who brings into existence a charitable institution must recognize that most institutions are likely to change with time, that they will become sterile if they remain static, and that they must be adaptable to new public considerations and unpredictable economic circumstances. ... [P]rovisions no longer appropriate must be tested against the requirements of current public policy concerning the donor's fundamental charitable objectives.

Trustees of Dartmouth College v. Quincy, 357 Mass. 521, 533-534 (1970).

Respectfully Submitted

Martha Coakley
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COMMONWEALTH OF MASSACHUSETTS

Essex

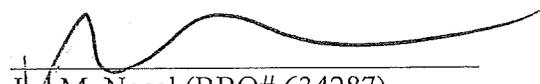
PROBATE & FAMILY COURT
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Alexander B.C. Mulholland, Jr., Peter Foote,)
 Donald Whiston, James Foley, Elizabeth)
 Kilcoyne, Patrick J. McNally, and Ingrid)
 Miles as they are the Feoffees of the Grammar)
 School in the Town of Ipswich)
 Plaintiffs,)
 v.)
 Attorney General of the Commonwealth of)
 Massachusetts, and Richard Korb, as he is)
 Superintendent of Schools in the Town of)
 Ipswich)
 Defendants.)

NOTICE OF APPEARANCE

Please enter my appearance on behalf of the Attorney General, an interested party
in the above matter.

RESPECTFULLY SUBMITTED,
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January 28, 2011

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COMMONWEALTH OF MASSACHUSETTS

Essex

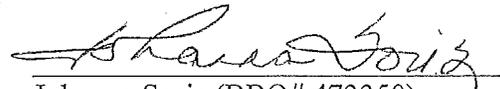
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RESPECTFULLY SUBMITTED,
MARTHA COAKLEY
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January 28, 2011
Date

CERTIFICATE OF SERVICE

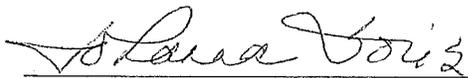
I, Johanna Soris, certify that I have delivered by electronic transmission [with consent of the parties] this 28th of January, 2011 a copy of the within Attorney General's Submission and appearances to:

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