

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 RESPONSE
TO DOUGLAS J. DeANGELIS'S MOTION TO INTERVENE

INTRODUCTION

The Attorney General asks that this court deny Douglas J. DeAngelis's motion to intervene because the Attorney General has exclusive standing to oversee the Feoffee Trust on behalf of the beneficiaries. Mr. DeAngelis's disagreement with the settlement agreement among the parties, including the Attorney General, does not grant him standing. Moreover, Mr. DeAngelis has already presented his opinion to the court in an amicus memorandum filed and accepted by the court on January 27, 2011, and the court may continue to consider the views expressed in that memorandum. Finally, as previous stated in the Attorney General's pleading filed in connection with the Plaintiff's Motion for Summary Judgment, it is well settled that this court may authorize deviation and allow the sale of land even where the terms of the trust in

question prohibit sale of the land, and there are ample grounds to support the deviation plan before the court. Therefore, Mr. DeAngelis' motion to intervene should be denied and this court should approve the settlement agreement offered by the parties ensuring that the Ipswich schools will receive much needed funds consistent with William Payne's dominant intent and that the future governance of the trust will be in the hands of the public.

BACKGROUND

On January 27, 2011 a group self-identified as "a large group of parents and residents of Ipswich (aka *the beneficiary group*)" proclaimed themselves to be the actual beneficiaries of the trust known as the Feoffees of the Grammar School in the Town of Ipswich ("Feoffee Trust") and filed an *amicus* memorandum with the court stating their position as to why the Trust should not be modified. The *amicus* memorandum also discussed at length changes the so-called beneficiary group wanted to see made to the administration of the trust. The Court accepted the memorandum, but did not accept Exhibit A to the memorandum which listed the names of the so-called beneficiary group. Exhibit 1 to this Memorandum, *Amicus Brief In Opposition to Plaintiffs' Motion for Partial Summary Judgment*.

On December 20, 2011, the lawyer for the so-called beneficiary group filed in court a motion to intervene pursuant to MRCP 24(a) on behalf of Douglas DeAngelis. In keeping with the Attorney General's role in the Feoffee Trust equity action, the Attorney General submits this memorandum of law to aid the court in understanding that the putative intervener does not have standing to represent the indefinite public served by the Attorney General. Standing is a substantive rule of law, not to be confused with a rule of civil procedure. As Mr. DeAngelis does not have standing to represent the indefinite public, nor that portion of the indefinite public residing in Ipswich that is the beneficiary of the Feoffee Trust, it follows that he does not have

the right to intervene in this action pursuant to a rule of civil procedure, MRCP 24(a). *See, e.g., Attorney General v. Baylis*, 66 Mass. App. Ct. 1103, (2006) (Plaintiff Yeshiva school lacked standing to sue trustee of scholarship trust for benefit of Yeshiva's students; case dismissed for lack of jurisdiction on standing grounds; trial court allowed substitution of Attorney General for Yeshiva pursuant to MRCP 19(a) and Appeals Court upheld the trial rulings.)

THE ATTORNEY GENERAL HAS EXCLUSIVE STANDING TO REPRESENT THE PUBLIC INTEREST IN THE FEOFFEE TRUST

The generally recognized common law rule is that the Attorney General has exclusive standing to enforce the rights of a charity's beneficiaries to correct abuses in the administration of a public charity. *Weaver v. Wood*, 425 Mass. 270, 275-276 (1997); *see Burbank v. Burbank*, 152 Mass. 254, 256 (1890); *see generally*, Ronald Chester, George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* §411 (rev. 3d ed. Supp.2006); IVA Austin W. Scott & William F. Fratcher, *The Law of Trusts* §391 (4th ed. 1989). A party other than the Attorney General may have standing to make claims against a charity *only* if that party holds interests in the charity "distinct from those of the general public." *Weaver v. Wood*, 425 Mass. at 276; *Lopez v. Medford Community Center, Inc.* 384 Mass. 163, 167 (1981); IVA Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 391 (4th ed. 1989).

The document which governs this case is the Will of William Payne which created a trust for the benefit of the Ipswich schools. That document clearly designates trustees who are the Plaintiffs in this equity action for deviation. The beneficial interest is represented by the school committee.

It is settled law that it is the trustees, as fiduciaries, who have a duty to bring an underutilized trust, such as the Feoffee Trust, to the court's attention through an equity action. Scott & William F. Fratcher, *The Law of Trusts* §379 (4th ed. 1989) (Duties of the Trustee);

Norris v. Loomis, 215 Mass. 344 (1913) (executor had standing to seek instructions because unable to establish home for aged women); *Rogers v. Attorney General*, 347 Mass. 126 (1964) (trustees had standing to petition for instructions where unable to establish home for aged women). Further, it is the Attorney General who has the mandate to oversee the Trustee's actions to protect the interests of the indefinite beneficiaries. M.G.L. c. 12, §8 *et. seq.*

A seminal case on the Attorney General's exclusive standing is *Ames v. Attorney Gen.*, 332 Mass. 246, (1955). The grievances alleged by the *Ames* petitioners are remarkably similar to those alleged by Mr. DeAngelis. In the *Ames* case a group of people designated as visitors¹ to the Arnold Arboretum by Harvard College, which was also the trustee of the Arnold Arboretum, petitioned the Attorney General to use his name to stop Harvard from moving the Arboretum library and other materials from the original West Roxbury site to the Harvard campus. The Attorney General's office declined to allow the visitors to use his name once he had determined that Harvard had not committed a breach of trust by moving the Arboretum. The Attorney General reasoned that "To permit the use of the name of the Attorney General where it is clear to him the trustee is acting in good faith and within the bounds of his reasonable judgment and sound discretion, simply because others, equally in good faith, differ with the decision of the trustee, would open the door to unreasonable and vexatious litigations." *Ames* at 249. Similarly, a difference of opinion as to whether Little Neck should be sold and the proceeds invested and used on behalf of the schools of Ipswich or whether Little Neck should be maintained as a land trust does not confer standing, no matter how heartfelt. *Id.*²

¹ Visitors are similar to advisory committees today. The Ames visitors were appointed by Harvard's Board of Overseers to visit the Arboretum. *Ames* at 249.

² Nor does Mr. DeAngelis have an "interest that is special and distinct from the public." *See, e.g., Lopez v. Medford Community Center*, 384 Mass. 163, 167-168 (1981) (Members claiming unlawful denial of their membership rights conferred by corporation's bylaws had an interest

The *Ames* court denied the visitors' petition stating, "The duty of taking action to protect public charitable trusts and to enforce proper application of their funds rests solely upon the Attorney General as the representative of the public interests. The exclusive character of this duty thus placed upon the highest law officer of the Commonwealth has been repeatedly stated in our decisions, citing *Parker v. May*, 59 Mass. 336, 337 (1850) (a suit by the Attorney General "in the name of the Commonwealth, for establishing and sustaining charitable trusts is . . . a suit to protect public interests"); *See also, Jackson v. Phillips*, 96 Mass. 539, 579 (1867) (the Attorney General represents the indefinite public in a *parens patriae* power role to protect property devoted to charitable uses); *Burbank v. Burbank*, 152 Mass. 254, 256 (1890) ("...the law has provided a suitable officer to represent those entitled to beneficial interests in a public charity...it should not be left to individuals to assume this duty...nor can it be doubted that such a duty can be more satisfactorily carried out by one acting under official responsibility than by individuals, no matter how honorable their character or motives may be."); *Dillaway v. Burton*, 256 Mass. 568, 573, (1926) (it is "the exclusive function of the Attorney General to correct abuses in the administration of a public charity by the institution of proper proceedings.")

Mr. DeAngelis does not have standing to represent the indefinite public in this case. Standing in this case is within the exclusive purview of the Attorney General. *Ames, supra.*

THE ATTORNEY GENERAL HAS CARRIED OUT HER MANDATE TO ENSURE THAT THE OUTCOME IN THIS EQUITY ACTION COMPLIES WITH THE LAW AND IS IN THE PUBLIC INTEREST

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

special and distinct from the public such that they had standing to pursue their membership claims.)

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 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

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.

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 complex 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 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, it is established that the court may authorize deviation to allow a sale of property even where the terms of the trust from which deviation is sought *expressly forbid the sale of the property*. 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, the Feoffees having established that the loss of 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, the Attorney General agrees with the Feoffees and the School Committee that the concept of sale is permitted under the doctrine of deviation, even to one of the oldest land trusts in the country with the so-called "no-sale" provision.⁵

In paragraph 11 of his motion to intervene Mr. DeAngelis states that the settlement agreement defeats his objectives because the "Attorney General and the School Committee are proposing a dismissal of the litigation..." implying that the Attorney General, by assenting to a carefully crafted settlement is abandoning her duties to oversee the Feoffee Trust and to represent the public's interest therein.⁶ Nothing could be further from the truth. The settlement agreement will enable the Feoffee Trust to start making payments immediately to the Ipswich

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)

⁶ The Attorney General "cannot act arbitrarily and capriciously or scandalously," *Secretary of Administration & Finance*, 367 Mass. at 165, absent a finding to the contrary, she is presumed to "carry out [her] duty under the law." *Opinion of the Justices*, 354 Mass. 804, 808(1968). In light of that presumption, Mr. DeAngelis has not produced any evidence to meet his substantial burden to demonstrate that the Attorney General has acted otherwise than consistent with her duty under the law. There is no evidence that the Attorney General acted in a way that favored the Feoffees or the School Committee to the detriment of the interests of the schools and the children who attend them who are the real beneficiaries in this case.

Schools. The schools of Ipswich have not received a distribution from the Feoffee Trust since 2006. This is because the tenants who occupy the cottages at Little Neck have withheld rent since filing their class action lawsuit against the Feoffees in 2006; the Feoffees were ordered to pay for a costly waste water treatment facility; and the Trust is facing further known costs in repairs due to a serious erosion problem on two parts of Little Neck. As a result of the settlement agreement, the tenants will become condominium owners and all of these expenses will be shifted to the new condominium association. For the next three years the Ipswich Schools will receive \$800,000 per year. These distributions are made possible because of the settlement of the tenant litigation. After the three year time period the schools will start receiving distributions based upon the return on the investment of approximately \$24 million.

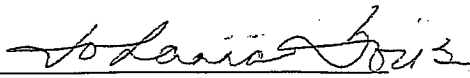
Moreover, the trust administration is being completely overhauled and its public accountability and transparency enhanced. The most important feature will be that the Feoffee Trust corpus and distributions will be in the hands of seven people, six of whom are appointed by elected town officials.

CONCLUSION

For the foregoing reasons, the Attorney General requests that Mr. DeAngelis's motion be denied; that the Court approve the settlement agreement offered by the parties ensuring that Ipswich will receive much needed funds consistent with William Payne's dominant intent, and that the governance of the trust will be in the hands of the public.

RESPECTFULLY SUBMITTED

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Dated: December 22, 2011

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT

ESSEX, ss

Docket No. ES09E0094QC

ALEXANDER B.C. MULHOLLAND, JR.,)
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J. MCNALLY, and INGRID MILES, as they are)
the Feoffees of the Grammar School in the Town)
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RICHARD KORB, as he is Superintendent of)
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**AMICUS BRIEF IN OPPOSITION TO PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT**

The Feoffees of the Grammar School of Ipswich (the "Feoffees") have moved for partial summary judgment, seeking authority to sell Little Neck in deviation from the terms of a centuries-old trust for the benefit of the Ipswich public schools (the "Grammar School Trust" or "Trust"). The Ipswich School Committee and the Superintendent of Schools (the "School Defendants") are opposed the proposed sale of Little Neck, and accordingly they oppose the Feoffees' motion.