

Professor Ronald Chester
6 Stonehedge Road
Lincoln, MA 01773

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Supreme Judicial Court
John Adams Courthouse
One Pemberton Square, Suite 2500
Boston, MA 02108

Re: Mulholland et al. vs. Attorney General et al.
Appeals Court No. 2012-P-635

Dear Honorable Justices of the Supreme Judicial Court:

I am writing to support the Interveners' Petition for Direct Appellate Review by the Supreme Judicial Court in the above-referenced matter ("Mulholland").

As a professor of trusts and estates law for nearly four decades, I am troubled by the lack of clarity in Massachusetts law on charitable trust modification, and the resulting errors of the Essex County Probate and Family Court (Sahagian, J.), the Massachusetts Attorney General and the Single Justice of the Appeals Court (Agnes, J.) in modifying the charitable trust which is the subject of this case (the "Paine Trust"). The Probate Court abandoned all meaningful analysis to support its modification of the Paine Trust, converting the oldest charitable land trust in America to a money fund and thereby undermining the specific intent of the testator. The Attorney General, apparently for purposes of convenience and without providing a reasoned legal justification for doing so, sanctioned the conversion. To compound matters, the Single Justice of the Appeals Court issued an opinion conflating the two distinct doctrines which authorize charitable trust modification: deviation (sometimes called "administrative deviation" or "reasonable deviation") and cy pres.

The Massachusetts Legislature recently enacted the Massachusetts Uniform Trust Code ("MUTC"), effective July 8, 2012. As discussed below, under the pre-MUTC law or the existing MUTC law, and under the requirements of either the doctrine of deviation or of cy pres, approval of the settlement modifying the Paine Trust cannot be justified because the modification provides for a charitable purpose far different from that intended by William Paine in his 1660 will.

I respectfully request that the Supreme Judicial Court take direct review of this case in order to clarify Massachusetts law on charitable trust modification, which applies also to Massachusetts charities organized in the corporate form. This Court's direct review would serve the public interest by providing a clear, cohesive and reliable statement of law to govern modification of the many charitable trusts and charitable corporations that exist in Massachusetts. Conversely, allowing the settlement in this case and the modification of the Paine Trust to stand would erode Massachusetts law on charitable trust modification even further.

Background of Amicus

I have written extensively in the field of trusts and estates, particularly with regard to charitable trust law, and have taught at various law schools over four decades. I have degrees from, inter alia, Harvard College and Columbia Law School. I have been a member of the New England School of Law faculty since 1973 and have also taught trusts and estates law locally at Suffolk and Boston College Law Schools. I have served as a visiting professor at Indiana University Law School, Bloomington, Southern Methodist University Law School and the University of California at Davis Law School. I have also been a Fellow in Law and Humanities at Harvard Law School, as well as Parsons Visitor at the University of Sydney, Australia. I am an elected member of the American Law Institute and an Academic Fellow of the American College of Trust and Estate Counsel. I have served as the chair of the Association of American Law School Section on Donative Transfers, Fiduciary and Estate Planning.

I was chosen by West Publishing to write the third edition of the Charities volume of the well-known Bogert Treatise, The Law of Trusts and Trustees. I am the author of From Here to Eternity? Property and the Dead Hand (2007) and the award-winning Inheritance, Wealth and Society (1982). I have also published numerous articles dealing with inheritance and trust law, with a strong emphasis on the law of charities.¹

Background of the Mulholland Case

In 1660, William Paine devised 35 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." In 2009, the "Feoffees," who are the trustees charged with management of the Paine Trust, brought an action in Probate Court seeking deviation from the trust's terms in order to sell the land in contradiction to Paine's express instructions. The Attorney General approved a settlement of the case authorizing that the land be sold and the sale proceeds be placed in a

¹ For a more complete list of my publications and background, please consult the New England School of Law website at www.nesl.edu.

“fund” for the benefit of the Ipswich Public Schools, and this settlement was then approved by the Probate Court and entered as a Judgment.

The purpose of the Paine Trust was to maintain land in trust to avoid waste of that asset and to use the income from the land (rents which could be expected to increase over time) to fund the Ipswich Schools. The settlement turns this charitable land trust into a fund of money for the Ipswich Schools, a charitable purpose far different from that intended by Mr. Paine. It cannot fairly be said that the settlement properly applies the law of charitable trust modification.

A group of Ipswich residents and parents, on behalf of themselves and their children in the Ipswich Schools, moved to intervene in the Probate Court action, but their motion was denied. They appealed the denial and also appealed the merits of the Probate Court Judgment authorizing the settlement modifying the Paine Trust.² The Interveners also moved to stay the Judgment in order to prevent the sale of the land while their appeal was pending. The motion to stay was denied by the Single Justice of the Appeals Court, who stated in his decision that “[t]he judge of the Probate and Family Court Department has the equitable power to change the terms of a charitable trust based on the doctrine of reasonable deviation which is sometimes known as cy pres.” In doing so, the Single Justice conflated the two distinct doctrines for modifying charitable trusts in Massachusetts: deviation and cy pres. The Single Justice then upheld the settlement without further discussion of these doctrines.

The Interveners now seek direct appellate review by this Court. I support their application because the decisions of the Probate Court and the Single Justice underscore the need for clarity on the law of charitable trust modification, particularly in such a charity-rich state as Massachusetts. The decisions of the Probate Court and the Single Justice seem to have been based on nothing more than that the Paine Trust was immersed in a law suit – one that was caused by the Feoffees’ own mismanagement of the trust. This is not a justifiable basis for modification either under the doctrine of deviation or of cy pres.

In order to provide a cohesive and reliable body of law in Massachusetts, this Court should first clarify whether deviation or cy pres is the proper doctrine to be applied in the Mulholland case and others like it, and then clarify which version of each doctrine should apply. The Mulholland decision itself is the best evidence that such clarification is needed. I submit that under either pre-MUTC or current law, no matter which doctrine is applied, the requirements justifying conversion of the trust from a land-based trust to a trust funded with intangible personal property are not met by the settlement in this case. Allowing the Mulholland decision to stand would further erode the doctrines of deviation and cy pres and establish precedent that is

² Subsequently, the Probate Court dismissed the Interveners’ appeal of the judgment; that ruling was itself appealed.

confusing to testators, practitioners, the courts, the Attorney General and those who would benefit from the numerous charitable trusts and corporations in Massachusetts.³

Deviation

Prior to the enactment of the MUTC, the formulation of deviation found in Section 381 of the Restatement (Second) of Trusts, as cited by this Court in Museum of Fine Arts v. Beland, 432 Mass. 540, 544, n.7 (2000), probably applied. As to administrative terms, it allowed trustees to “deviate from the terms of the trust if . . . owing to circumstances not known to the settlor and not anticipated by him, compliance would defeat or substantially impair the purposes of the trust.” In 2003, Section 381 of the Restatement (Second) was superseded by Section 66 of the Restatement (Third) of Trusts, which, inter alia, allows modification of dispositive as well as administrative terms of the trust. In both iterations of the Restatement, “unanticipated circumstances” are required to trigger the doctrine of deviation.⁴

In Mulholland, the Feoffees argued that Little Neck was no longer able to generate reasonable income for the Ipswich Schools, therefore justifying deviation. This alleged “unanticipated circumstance,” however, was caused by the Feoffees’ own mismanagement of the Paine Trust. Modification of a charitable trust is not necessary or appropriate where the circumstance blocking enforcement of the existing trust “has been caused by the trustee and can be removed by proper trust administration.” See Chester, Bogert & Bogert, The Law of Trusts and Trustees (3rd ed. 2005) §439. Thus, under either version of the Restatement as applied to Mulholland, the unanticipated circumstances required to trigger the doctrine of deviation are not present. Further, compliance with the terms of the Paine Trust would not “defeat or substantially impair the purposes of the trust” (Restatement 2d), and the changes proposed in the settlement would not “further the purposes of the trust” (Restatement 3d).

³ This Court should reach the merits of this action, notwithstanding any objections to standing. There are several instances in the common law where “specially interested beneficiaries” of charitable trusts have been permitted to commence a judicial action to enforce the terms of the trust. See, Chester, Bogert & Bogert, Trusts and Trustees, (3rd ed.) §414, at notes 26-30. Where attorney general enforcement is “lax, the number of specially interested beneficiaries granted standing to sue can be expected to increase.” Id., at text following note 30. Similarly, the MUTC permits the court to intervene in the administration of a trust to the extent its jurisdiction is invoked by “an interested person” §201(a), and recognizes “the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.” §105(b)(10). Here, where attorney general enforcement is lax and the interests of justice will be served, this Court has ample justification for addressing the merits.

⁴ The Probate Court incorrectly relied on G.L. c. 214 §10B to justify deviation. This statute, however, deals with certain *procedural* matters in charitable trust modification and is not a statement of the substantive law. G.L. c.214, §10B, outlines *procedural* requirements for cy pres (paragraph 1) and deviation (paragraph 2). It does not contain *any* of the substantive requirements for deviation and only in passing mentions some of the traditional cy pres requirements (which may in fact have been superseded by Restatement (Third) of Trusts §67).

On July 8, 2012, the common law doctrine of deviation was superseded by Section 412 of the MUTC. The MUTC applies:

to judicial proceedings concerning trusts commenced [before July 8, 2012] unless the Court finds that the application of a particular provision of this chapter would substantially interfere with the conduct of judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this act shall not apply and the superseded law shall apply.

G.L. c. 203E, §3.

Since it is uncertain what pre-Code deviation law actually was in Massachusetts, it is difficult to see how this codified, clear statement of law would “substantially interfere with the proceedings” or prejudice the rights of the parties in this case. Therefore, Section 412 of the MUTC should apply.

Deviation under Section 412(a) is authorized as to dispositive provisions of a trust (such as are involved in this case) or as to its administrative provisions where, “because of circumstances not anticipated by the settlor, modification . . . will further the purposes of the trust.” Thus, in Mulholland, the questions under Section 412(a) become 1) whether there were unanticipated circumstances, and 2) whether the proposed deviation “furthers the purposes of the trust.” Moreover, if practicable, Section 412(a) requires that “the modification must be made in accordance with the settlor’s probable intention.” None of these requirements is met in this case. Little Neck’s inability to generate reasonable income for the Ipswich Schools was caused by the Feoffees’ own mismanagement of the Paine Trust, which does not justify modification of the trust. Mr. Paine’s purposes were to provide income for the Ipswich Schools and to have the trustees manage the land over time so that “waste” would not be committed. The proposed sale of the land would allow the new freehold owners to do what they want with it, including waste it. This is clearly not in accord with Mr. Paine’s probable charitable intention.⁵

⁵ Under Section 412(b) administrative terms of a trust may be modified if continuing the trust according to its existing terms is “impracticable or wasteful or impair the trust’s administration.” Because the very purpose of the Paine Trust is being changed by the settlement, one cannot reasonably construe the change as involving merely an administrative term, subordinate to the trust’s purpose. Even were it somehow so construed, continuing the trust on its existing terms hardly seems impracticable or wasteful: all that is required is to replace the current trustees with more professional and less conflicted ones who would charge a fair rent for the land at Little Neck.

Cy Pres

The Massachusetts Legislature expressly declined to adopt the modern law of cy pres, embodied in Section 413 of the Uniform Trust Code, as part of the MUTC – Section 413 of the MUTC is “Reserved.” Accordingly, because Section 413 of the Uniform Trust Code is similar to Section 67 of the Restatement (Third) of Trusts, notably in eliminating the requirement of Section 399 of the Restatement (Second) of Trusts that the settlor have had a “general charitable intent,” it may be that Massachusetts cy pres law is still that expressed by Section 399 of the Restatement (Second):

If property given in trust is to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the Court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.

Applied to the Paine Trust, Massachusetts cy pres law under this section would require that the trust has become impossible or impracticable to carry out, that Mr. Paine had a general charitable intent greater than the one expressed in the trust, and that the new plan is “as close as possible” (cy pres) to the old plan, both plans residing comfortably together within Mr. Paine’s general charitable intent. As demonstrated, the trust is not impossible or impracticable to carry out, because more professional trustees could be chosen to replace the present trustees. Even assuming, however, that the trust had become impossible or impracticable to perform, the question remains: Did Mr. Paine have a general charitable intent to benefit education? Education in Ipswich was clearly not his only goal in creating this trust; he wanted the land managed, not sold or wasted, and thus his real purpose was to provide for the Ipswich Schools through a trust that would also preserve the unique piece of land that is Little Neck from sale, or the non-economic waste that could follow a sale. This charitable trust was designed by one of the most prominent and astute businessmen of his day to educate Ipswich schoolchildren through the specific means of managing over time land with great and increasing income potential.

Finally, the settlement does not come as close as possible to Mr. Paine’s specific intent as expressed in the trust. See Chester, Bogert & Bogert, The Law of Trusts and Trustees (3rd ed. 2005) §442. Cy pres, as opposed to deviation, requires a substitute plan (not just substitute terms). This often takes the form of a new trust either in essence or in actual form. Put another

way, under the doctrine of cy pres, the initial purpose of the trust has failed and a new one must be substituted.⁶

In fact, despite what was argued by counsel and set forth in the Probate Court Judgment, the Probate Court appears to follow a cy pres approach rather than the deviation approach of changing terms subordinate to the trust's purpose. The original purpose of the trust was to fund the Ipswich Schools by managing Little Neck and preserving it from sale or waste. That purpose has been replaced by a purpose of simply funding the schools, and it is not at all clear that the fund obtained from the sale would be as valuable to the schools as would increasing rents over time on this very unique property. Moreover, the settlement not only looks like a new plan, but in essence creates a new trust; the trust res is now intangible personal property, not land.

Conclusion

I believe it would serve the public interest if this Court were to announce a clear path to deciding charitable trust (or corporation) modification cases and, in doing so, void the settlement thus far approved in Mulholland by the lower courts. If the Court deems deviation to apply in this case, then deviation as codified by Section 412 of the MUTC should apply, both under the express terms of the MUTC and because Section 412 is more like common law cy pres than traditional deviation in that it allows modification of dispositive, not merely administrative, terms. (All that it lacks, in essence, is the "general charitable intent" requirement.) Because the modification of the Paine Trust does not "further the purposes of the trust" however, and is not made "in accordance with the settlor's probable intention," the requirements for modification under the MUTC are not met.

If the Court should decide to apply cy pres to the facts of this case (under either Section 399 of the Restatement [Second] or Section 67 of the Restatement [Third] of Trusts), then it is apparent that the purpose of the Paine Trust has not become impossible or impracticable to carry out; a change to trustees charging fair rents for the land will work. Even if the Court were to find impossibility or impracticability here, it cannot fairly be said that the settlement applies the land to a charitable purpose as near as possible to that expressed in the trust. Its purpose was to maintain the land in trust to avoid waste of the asset and to use the rents (expected to increase over time) to fund the schools.

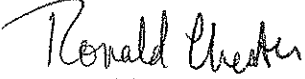
Because the aspects of charitable trust law relevant here also apply to charitable corporations, and because both forms of charity are unusually prevalent in Massachusetts, it is vitally important that the Mulholland case be decided correctly using the proper doctrine.

⁶ In contrast, in deviation the original purpose stays in place with modifications in how this purpose is to be carried out.

The Court should clarify whether deviation or cy pres is the proper doctrine and which version of the applicable doctrine applies to this case and others like it. The Court should carefully examine whether the requirements of the applicable doctrine are met and conclude that the requirements are not met no matter which doctrine the court decides to apply.

Based on the foregoing, I respectfully request that the Court consider the important issues of charitable trust law raised in this letter in deciding whether to take direct appellate review of this case and provide the clarity this field of law so desperately needs in Massachusetts.

Very truly yours,


Ronald Chester
Professor of Law