

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

APPEALS COURT NO. 2012-P-0635

ALEXANDER B. C. MULHOLLAND, ET. AL.

PLAINTIFFS/APPELLEES

V.

MARTHA COAKLEY AS SHE IS THE ATTORNEY GENERAL OF THE COMMONWEALTH OF

MASSACHUSETTS, ET. AL.

DEFENDANTS-APPELLEES

DEFENDANT-APPELLEE ATTORNEY GENERAL'S OPPOSITION TO THE
TO APPELLANTS'
APPLICATION FOR DIRECT APPELLATE REVIEW

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Supports the Dominant Intent of the Trust
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EXHIBITS

Session Laws: Chapter 140 of the Acts
Of 2012, Chapter 203E; Massachusetts
Uniform Trust Code, Section 66(a) A

M.G.L. c. 203E, Section 201(a) B

M.G.L. c. 203E, Section 106 C

M.G.L. c. 203E, Section 412(a) D

INTRODUCTION

The Defendant-Appellee Attorney General ("Attorney General") opposes the Application of the Appellants (Applicants), for Direct Appellate Review of the Probate Court's denial of their motion to intervene, dismissal of their appeal from the Order approving the Settlement Agreement, allowance of the motion to strike portions of the their notice of appeal concerning the underlying judgment, and the Single Justice's denial of their motion to stay judgment pending appeal. DAR Application Ex., B, C, D, and E. This appeal presents no novel question, question of first impression, or question of public interest requiring final determination by this Court. Mass. R. App. P. 11.

STATEMENTS OF PRIOR PROCEEDINGS AND OF FACTS

The Application is replete with mischaracterizations of prior proceedings, irrelevant material and factual inaccuracies. The Memorandum and Order of Justice Agnes issued on March 12, 2012, Exhibit D to the Application, includes an accurate summary of relevant facts and prior proceedings.

REASONS WHY THE APPLICATION SHOULD NOT BE GRANTED

- I. Applicants Lacked Standing to Intervene in the Probate Court Action, Because Under Settled Principles, the Attorney General's Standing to Assure the Due Application of Charitable Funds on Behalf of the Public is Exclusive and Paramount.

Under well-settled Massachusetts law, the Attorney General has exclusive standing to enforce the rights of charitable beneficiaries and to prevent abuses in the administration of public charities, including charitable trusts. *Ames v. Attorney General*, 332 Mass. 246, 250 (1955) (Court "appalled" at contention that Attorney General's determinations concerning charities could be "subject to attack in court by self-appointed members of the public"; "It is well established that 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."); *See Weaver v. Wood*, 425 Mass. 270 (1997) (church members lacked standing to challenge church's alleged violation of deeds of trust).

- II. The Applicants Have No Interest Distinct From the Public That Would Merit Special Standing in the Trust Deviation Case.

Parties other than the Attorney General may be heard in judicial proceedings regarding public charities only if they demonstrate an interest separate

and distinct from the public at large. The Feoffees plainly had special standing as fiduciaries of the trust, and properly brought the Complaint for Deviation before the Probate Court to seek modification of the terms of this under-performing trust. *Rogers v. Attorney General*, 347 Mass. 126 (1964) (trustees had standing to petition for instructions where unable to establish home for aged women); See also *Norris v. Loomis*, 215 Mass. 344 (1913). The School Committee was properly a party as representative of the beneficiary Ipswich Schools. IVA Austin W. Scott & William Fratcher, *The Law of Trusts* § 391 (4th ed. 1989).

In contrast, the Applicants do not have an interest in the trust distinct from that of other members of the public and do not fit any of the narrowly-defined exceptions affording parties special standing to bring an action against charities. See *Lopez v. Medford Community Center, Inc.*, 384 Mass. 163, 167-168 (1981) and *Jessie v. Boynton*, 372 Mass. 293, 305 (1977) (members of community center and hospital, respectively, had standing to bring suit alleging infringement of their rights as members pursuant to by-law provisions); *Dartmouth College v. City of Quincy*, 331 Mass. 219, 225 (1954) (charities that would benefit

from a gift-over provision if a charitable trust failed had standing to bring an action asserting the gift-over provision should be triggered); *Wigglesworth v. Cowles*, 38 Mass. App. Ct. 420, 429 (1995) (heirs who would gain if charitable trust's reversionary clause were triggered had standing to bring claim that trustees' actions had triggered clause).

A. Applicants' Baseless Allegations of Misconduct by the Attorney General, Other Parties and the Probate Court Judge Do Not Confer Standing.

The Applicants accuse the Attorney General, the Probate Court, and the School Committee of collusion, and they allege that, as a result, there is no one in the litigation to "advocate for the interests of the Trust, its beneficiaries and Paine's intent." Applicants' Memorandum, at 28. They also allege that the Probate Court judge "prejudged the matter and that she pressured the parties to reach a settlement." *Id.* at 8. These unsupported allegations were appropriately rejected by the Single Justice of the Appeals Court. Application Ex. D at 9-10, 17-18. The Application offers no additional support for these allegations and they should be accorded no weight. See *Opinion of the Justices*, 354 Mass. 804, 808 (1968) Attorney General is

presumed to "carry out [her] duty under the law" absent a finding to the contrary).¹

B. Mass. R. Civ. P. 24(a) (2) Does Not Confer Standing Upon the Applicants to Intervene As Parties in An Equity Action for Deviation.

The Applicants' invocation of Mass. R. Civ. P. 24(a) (2) to support their motion to intervene ignores settled law that standing to assert one's claims is an issue of subject matter jurisdiction--one of "critical significance"--and is a requirement that must be met before the Probate Court could allow intervention. See *Tax Equity Alliance v. Commission of Revenue*, 423 Mass. 708, 715 (1996). Because Applicants lacked standing, they were properly denied leave to intervene.

III. Because the Applicants Lacked Standing To Intervene in the Probate Court Action, They Were Not Parties And Lack Standing to Appeal From the Probate Court Order.

The Applicants wrongly argue that the probate court lacked authority to dismiss their appeal on the merits due to their lack of standing. But the Applicants were never parties to the probate court action, and so their purported appeal from the order approving the settlement agreement was not "permitted

¹ Nor was the Attorney General lax in her oversight of this matter. *E.g.*, Application Ex. F, Docket Entries 32, 66 (memos of law submitted by Attorney General.)

by law."² Absent rare circumstances not present here, non-parties cannot appeal from a judgment. See *Corbett v. Related Companies Northeast, Inc.*, 424 Mass. 714, 718-719 ("[M]erely commenting on, or objecting to, a proposed settlement... generally is insufficient to justify an appeal by a nonparty."). See also *Worcester Memorial Hospital v. Attorney General*, 337 Mass. 769 (1958) (individuals who had been allowed to intervene by trial court nonetheless lacked standing to appeal from court's decree authorizing hospital merger that Attorney General had approved).

IV. The Massachusetts Uniform Trust Code Is Neither Applicable Nor Relevant to This Case.

Applicant's effort to portray this case as presenting a novel question under the Massachusetts Uniform Trust Code is groundless. First, the Code is prospective in effect. It was enacted by St. 2012, c. 140, § 56, on July 8, 2012. The enacting statute specifies that the code does not apply to judicial proceedings concerning trusts commenced prior to its effective date, such as this matter. Applicants state otherwise at fn. 14 of their Memorandum relying on

²Mass. R. App. P. 3 provides, in relevant part that any appeal "permitted by law from a lower court shall be taken by filing a notice of appeal," and that the notice shall specify "the party or parties taking the appeal[.]" *Id.* 3(a), 3(c) (emphasis supplied).

language that is not part of the MUTC as enacted. Ex.,
A. Sec. 66.

Moreover, Applicants misconstrue Section 201 which makes clear that the intent is to free testamentary trusts from on-going court supervision unless invoked by an "interested party." Ex. B, Section 201. Section 106 of the Code states that except as modified by the Code or other statutes, the common law of trusts and principles of equity supplement the Code. Ex. C, Section 106. There are no provisions within the Code which confer "interested party" or "standing" status upon the Applicants. Finally, even if Section 412(a), concerning deviation, were applied retroactively it would not alter the result.³ Ex. D. Section 412 (a).

V. The Deviation Permitted by the Probate Court's Order Is Consistent with Law, Supports the Dominant Intent of the Trust and is The Proper Outcome in this Case.

The Order of the Probate Court is consistent with the law of deviation, will permit the trust to perform once again to benefit the Ipswich Schools as William

³ Section 412 of the MUTC adopts language from The Restatement (Third) of Trusts §66 that permits a court to modify trusts because of unanticipated circumstances or an inability to administer the trust effectively, arguably a more liberal standard than current case law. Given that the MUTC is prospective, the scope of Section 412 should be left for another day for litigants with standing.

Paine intended, and do not present any question of such public interest that justice requires final determination by this Court.

The law provides for equitable deviation from the terms of a trust where necessary in order to achieve the primary objective of the trust, particularly where the testator could not have foreseen the circumstances making the deviation necessary. See *Trustees of Dartmouth College v. Quincy*, 357 Mass. 521 (1970) (trust to establish school for girls from Quincy could be modified to allow non-Quincy girls to attend, where change was necessary in order to achieve trust's primary purpose; testator could not have foreseen changes in preparatory education costs and attendance making the change necessary). The law supports deviation from trust terms that specifically prohibit the sale of land held in trust. See *Amory v. Attorney General*, 179 Mass. 89, 105 (1901) (court authorized sale of settlor's home, despite "no-sale" provision, in order to advance her dominant charitable intent; "[t]he 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); *Weeks v. Hobson*, 150 Mass. 377, 380 (1890) (even though contrary to testator's instruction to use his land as site for hospital, court authorized sale of land found unsuitable for that purpose, and use of proceeds to support hospital, where necessary to carry out testator's dominant purpose: to provide for a hospital in Haverhill).

The dominant intent of the Paine trust is to benefit the Ipswich Schools. Paine could not have foreseen that the land would become a community with 167 cottages with the attendant environmental, financial and other difficulties described in the Probate Court's Order which prevented the trust from yielding any benefit to the Ipswich Schools between 2006 and 2012. Application, Ex., C, page 4.

Although the Applicants fault the Probate Court for not making specific findings of fact supporting deviation, the fact-finding requirements of Mass. R. Civ. P. 52(a) do not apply here, because the parties reached agreement. *U.S. v. Scholnick*, 606 F.2d 160, 166 (6th Cir. 1979); *Hadix v. Johnson*, 947 F. Supp. 1100, 1103 (E.D. Mich. 1996). Accordingly, the judge's role changed from finding facts to reviewing the Agreement to make sure that the terms were acceptable

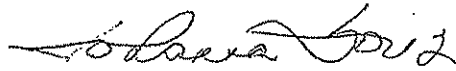
and in the best interest of the beneficiary. That more general finding necessarily includes the finding that the requirements for deviation were met. Also, the Order authorizing deviation recites facts that support deviation. Application, Ex. C, Section B, p. 4. While it might have been clearer if the Probate Court had included separate findings of fact in support of the decision that deviation was permissible, that decision necessarily imports such findings, and a remand for making such findings explicit would be pointless.

CONCLUSION

The Attorney General respectfully requests that the Applicant's Request for Direct Appellate Review be denied for the reasons stated above.

RESPECTFULLY SUBMITTED

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ADDENDUM

EXHIBIT A

SECTION 66. (a) Except as otherwise provided in this act:

(1) this act shall apply to all trusts created before, on or after the effective date of this act;

(2) this act shall apply to all judicial proceedings concerning trusts commenced on or after the effective date;

(3) an action taken before the effective date of this act shall not be affected by this act.

(b) If a right is acquired, extinguished or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of this act, that statute shall continue to apply to the right even if it has been superseded.

Approved, July 8, 2012.

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EXHIBIT B

Massachusetts General Laws Annotated
Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title II. Descent and Distribution, Wills, Estates of Deceased Persons and Absentees, Guardianship,
Conservatorship and Trusts (Ch. 190-206)
Chapter 203E. Massachusetts Uniform Trust Code (Refs & Annos)
Article 2. Judicial Procedures

M.G.L.A. 203E § 201

§ 201. Role of court in administration of trust

Effective: July 8, 2012

Currentness

<[Text of section added by 2012, 140, Sec. 56 effective July 8, 2012 applicable as provided by 2012, 140, Sec. 66.]>

Role of court in administration of trust

- (a) The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law.
- (b) A trust shall not be subject to continuing judicial supervision unless ordered by the court.
- (c) A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights.
- (d) A proceeding brought under this chapter in the probate and family court department of the trial court to appoint or remove a trustee, to approve the resignation of a trustee, to review and settle accounts of a trustee or concerning any other matter relating to the administration of a trust may be initiated by filing a petition and giving notice to interested parties, as provided in section 109. A decree or judgment shall be valid only to those who are given notice of the proceeding.

Credits

Added by St.2012, c. 140, § 56, eff. July 8, 2012.

M.G.L.A. 203E § 201, MA ST 203E § 201

Current through Chapter 223 of the 2012 2nd
Annual SessionEnd of Document

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EXHIBIT C

Massachusetts General Laws Annotated
Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title II. Descent and Distribution, Wills, Estates of Deceased Persons and Absentees, Guardianship,
Conservatorship and Trusts (Ch. 190-206)
Chapter 203E. Massachusetts Uniform Trust Code (Refs & Annos)
Article 1. General Provisions and Definitions

M.G.L.A. 203E § 106

§ 106. Common law of trusts; principles of equity

Effective: July 8, 2012

Currentness

<[Text of section added by 2012, 140, Sec. 56 effective July 8, 2012 applicable as provided by 2012, 140, Sec. 66.]>

Common law of trusts; principles of equity

The common law of trusts and principles of equity shall supplement this chapter, except to the extent modified by this chapter or any other general or special law.

Credits

Added by St.2012, c. 140, § 56, eff. July 8, 2012.

M.G.L.A. 203E § 106, MA ST 203E § 106

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EXHIBIT D

Massachusetts General Laws Annotated
Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title II. Descent and Distribution, Wills, Estates of Deceased Persons and Absentees, Guardianship,
Conservatorship and Trusts (Ch. 190-206)
Chapter 203E. Massachusetts Uniform Trust Code (Refs & Annos)
Article 4. Creation, Validity, Modification and Termination of Trust

M.G.L.A. 203E § 412

§ 412. Modification or termination because of unanticipated circumstances or inability to administer trust effectively

Effective: July 8, 2012

Currentness

<[Text of section added by 2012, 140, Sec. 56 effective July 8, 2012 applicable as provided by 2012, 140, Sec. 66.]>

Modification or termination because of unanticipated circumstances or inability to administer trust effectively

(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification shall be made in accordance with the settlor's probable intent.

(b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.

Credits

Added by St.2012, c. 140, § 56, eff. July 8, 2012.

M.G.L.A. 203E § 412, MA ST 203E § 412

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CERTIFICATE BY COUNSEL

I, Johanna Soris, Assistant Attorney General for the Defendant-Appellee, Martha Coakley, as she is the Attorney General of the Commonwealth of Massachusetts certify pursuant to Rule 16 (k) of the Massachusetts Rules of Appellate Procedure that this brief complies with all rules that pertain to the filing of oppositions to applications for direct appellate review.


A handwritten signature in cursive script, appearing to read "Johanna Soris", written over a horizontal line.

Johanna Soris

Dated: October 1, 2012

CERTIFICATE OF SERVICE

I, Johanna Soris, hereby certify that on this 1st day of October, 2012, I served a copy of the foregoing by first class mail upon the following counsel:



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