COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

ESSEX, ss.

NO. DAR-21067

ALEXANDER B. C. MULHOLLAND, et al.

Plaintiffs-Appellees
v.

ATTORNEY GENERAL OF THE COMMONWEALTH
OF MASSACHUSETTS, et al.

Defendants-Appellees

ON APPEAL FROM A DECISION AND JUDGMENT ENTERED IN THE PROBATE COURT AND A DECISION OF THE SINGLE JUSTICE

OPPOSITION TO REQUEST FOR DIRECT APPELLATE REVIEW

Brian M. Hurley, BBO No. 245240
Johanna W. Schneider, BBO No. 643744
Rackemann, Sawyer & Brewster, P.C.
160 Federal Street
Boston, Massachusetts 02110
(617) 542-2300
bhurley@rackemann.com
jschneider@rackemann.com

Attorneys for Plaintiffs-Appellees Alexander B. C. Mullholand, et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

Introduction

Plaintiffs/Appellees Alexander B.C. Mulholland, et al. hereby oppose the Request for Direct Appellate Review filed by a group of would-be interveners in the instant action. Although the would-be interveners go to great lengths to manufacture reasons why Direct Appellate Review is warranted here, the reality is that their appeal does not meet any of the standards set forth at Mass. R. App. P. 11(a) and, therefore, their Request should be denied.

Argument

I. The Would-be Interveners' Appeal Fails to Meet the Criteria of Mass. R. App. P. 11(a).

Direct Appellate Review is available only for an appeal that presents: (1) questions of first impression or novel questions of law; (2) questions of law concerning the Constitution of the Commonwealth or questions concerning the Constitution of the United States; or (3) questions of such public interest that justice requires a final determination by the full Supreme Judicial Court. Mass. R. App. P. 11(a).

The would-be interveners endeavor to frame their appeal as implicating novel questions under Massachusetts trust law and matters of public policy

relating to the administration of charitable trusts. However, review of the specific decisions on appeal - and, indeed, the would-be interveners' docketing statement submitted to the Appeals Court - reveals that these arguments are designed to avoid the fact that the only matters here on appeal are straightforward procedural questions, as to which Massachusetts law is well-settled.

A. The Actual Issues on Appeal

The would-be interveners seek review of three actions below: (1) the decision of the Probate Court denying for lack of standing their motion to intervene pursuant to Mass. R. Civ. P. 24(a), the correctness of which was confirmed by a Single Justice of the Appeals Court in denying a stay of judgment; (2) the decision of the Probate Court to strike the would-be interveners' attempt to appeal the Probate Court's judgment approving the settlement agreement between the parties to the Probate Court litigation (the "Judgment"), following determination by the Probate Court and the Single Justice that as non-parties they lacked standing to appeal from the Judgment; and (3) the Single Justice's denial of the would-be interveners' motion to stay the Judgment. In their

docketing statement, the would-be interveners frame the legal issues central to their appeal as follows: "(1) Whether [the] Probate Judge has authority to modify [a] 350 year old testamentary trust without findings of fact and rulings of law to justify modification; (2) Whether [the] Probate Judge has authority to dismiss appeal of interveners on substantive grounds; (3) Whether appellants/ beneficiaries of the trust have a right to intervene."

Each issue on appeal represents a clear-cut question of civil procedure, none of which merits review by this Court under Mass. R. App. P. 11(a).

B. No Issue on Appeal Warrants Direct Appellate Review

1. The Would-be Interveners Have No Standing to Intervene

Though relegated to a few pages at the end of the would-be interveners' Request, the core issue in this appeal is whether both the Probate Court and the Single Justice erred in determining that the would-be interveners lacked standing to intervene.[1] The standard for intervention under Rule 24 is crystal

[1] Indeed, without standing, the would-be interveners are foreclosed from making the substantive claims on which they base their Request to this Court.

clear, as is its application to the would-be interveners in this case. The disappointed intervener group cites no valid facts or legal theories that would justify this Court's Direct Appellate Review of the issue.

a. The would-be interveners' claimed interest in the Trust as members of the public does not give them standing or satisfy the requirements for intervention under Rule 24(a)

The would-be interveners cannot satisfy Rule 24(a)'s required showing of a valid interest in the Paine trust that is not represented by the parties to the Probate Court litigation, as, ultimately, they have neither authority to enforce the terms of the trust nor a legally protectable interest in the trust distinct from any other resident in the Town of Ipswich.

It is undisputed that the Attorney General is the sole and exclusive authority charged with the representation of the public interest in connection with charitable trusts. See, e.g., Ames v. Attorney General, 332 Mass. 246, 249 (1955). See also Mass. Gen. L. ch. 12, § 8. In light of this recognized primacy and the Attorney General's active participation in the litigation, there can be no

serious argument that the would-be interveners have standing to assert the public interest either in place of or in competition with the Attorney General.

Moreover, the would-be interveners are not beneficiaries of the Paine Trust. The only beneficiaries of the Trust are the public schools of Ipswich, acting by and through the Ipswich School Committee and the Superintendent of Schools,[2] which entities already are parties to this action.[3] The would-be interveners are simply a group of residents who happen to disagree with the legal strategy and risk assessment of the officials charged with advancing the interests of the Ipswich public schools. This does not give them a legally protectable

---

[2] See Mass. Gen. L. ch. 71, §§ 37 and 68. See also Molinari v. City of Boston, 333 Mass. 394 (1955); Parents Council, Inc. v. City of Boston, 27 Mass. App. Ct. 739 (1989).

[3] In light of the absence of a legitimate legal interest, the Feoffees will not address the would-be interveners' arguments that any such interests are impaired by alleged collusion between the School Committee and the Attorney General, other than to note that, notwithstanding the inflammatory rhetoric with which these allegations are made, the collusion claim finds no support whatsoever in the record. See, e.g., Single Justice Opinion at 18-19 ("the proposed interveners have offered no credible evidence to support their hypothesis of collusion among the parties").

interest, much less an interest that is particular to them, as opposed to any other resident of Ipswich.[4]

b. The would-be interveners have no other basis for standing

The would-be interveners suggest for the first time on appeal that the recently enacted Massachusetts Uniform Trust Code ("MUTC") provides them with standing to intervene. This argument is incorrect, as the MUTC states that "this act shall apply to all judicial proceedings concerning trusts commenced on or after the effective date." St. 2012, c.142, §66(a). Moreover, "an action taken before the effective date of [the MUTC] shall not be affected by this act." Id. The effective date of the MUTC is July 8, 2012, which postdates all of the relevant acts in this case as well as the commencement of this action. Accordingly, the MUTC does not apply here and provides no grounds

[4] Massachusetts case law is clear that a party asserting standing to intervene must show an interest that is "personal, specific and exist[s] apart from any broader community interest." Maffei v. Roman Catholic Archbishop of Boston, 449 Mass. 235, 245 (2007); see also Bolden v. O'Conner Café of Worcester, Inc., 50 Mass. App. Ct. 56, 62 (2000) (asserted interest must be sufficiently direct and immediate and cannot be remote, contingent, tangential or collateral).

whatsoever for the would-be interveners to have standing.[5]

2. The Probate Court Had Authority to Dismiss the Would-be Interveners' Appeal of the Judgment

On December 23, 2011, the plaintiff Feoffees and the defendant Ipswich School Committee filed with the Probate Court an Agreement for Judgment, which agreement was assented to by the defendant Attorney General. The Agreement for Judgment was incorporated into the Judgment, which was docketed on January 12, 2012. By order dated February 6, 2012, the Probate Court denied a motion by the would-be interveners to intervene; shortly thereafter, the would-be interveners filed a Notice of Appeal, in which they purported to appeal from both the denial of their motion to intervene and the Judgment. Subsequently, the would-be interveners filed a motion to stay the Judgment with the Single Justice session of the

[5] In connection with their misleading argument premised on the MUTC, the would-be interveners assert that the public interest justifies this Court reaching the merits of the case, notwithstanding their lack of standing. In so doing, they improperly rely on Johnson Turf & Golf Mgmt v. Beverly, 60 Mass. App. Ct. 386 (2004). In Johnson, the Court recognized and reaffirmed the intervener's proprietary interest in the contract there at issue, and did not rule that a person without such an interest could challenge a judgment even where public policy issues might be implicated.

Appeals Court; the Single Justice, concluding that the would-be interveners lacked standing, denied the motion to stay. Following the determinations by both the Probate Court and Single Justice that the would-be interveners had no standing to intervene and, therefore, were not parties to the Probate Court litigation, the Probate Court ultimately struck from the would-be interveners' Notice of Appeal their purported appeal of the Judgment. Massachusetts law plainly authorized the Probate Court to do so.

It is well-established that, as a general rule, non-parties cannot appeal from a judgment. See Corbett v. Related Cos. Northeast, Inc., 424 Mass. 714, 718-719 (1997) ("merely commenting on, or objecting to, a proposed settlement … is insufficient to justify an appeal by a nonparty."); Baker v. Bd. of Selectmen of Town of Foxborough, 77 Mass. App. Ct. 1117, *3 (2011)("Because the appellants were not able to intervene and thus are not parties to the underlying case, they lack standing to appeal from the agreement for judgment entered by the Land Court."). See also Worcester Mem. Hosp. v. Attorney Gen., 337 Mass. 769 (1958) (interveners who had no legitimate interest in charitable hospitals merged under doctrine

of cy pres lacked standing to appeal final decree approving merger). It is further undisputed that a trial court is authorized to strike all or a portion of a Notice of Appeal on procedural grounds. See, e.g., Stephens v. Naps Global, 70 Mass. App. Ct. 676, 679 (2007), *review denied*, 450 Mass. 1106 (2007); Reilly v. Local 589, Amalgamated Transit Union, 22 Mass. App. Ct. 558, 565 (1986). Thus, as a matter of procedure, a disappointed would-be intervener, who has been determined by both the Probate Court and the Single Justice to have no standing - and thus no party status - is properly limited to appealing the denial of his motion to intervene. See Rudders v. Bldg. Comm'r of Barnstable, 51 Mass. App. Ct. 108, 110 (2001). To the extent that this issue is even open to debate, it certainly does not present any legal or policy questions that would merit Direct Appellate Review.

3. The Probate Court Had the Authority to Approve the Parties' Agreement for Judgment

Although couched by the would-be interveners as a substantive legal and public policy issue, the final matter the would-be interveners seek to have reviewed is the essentially procedural question of whether the

Probate Court has the authority to approve and enter as a judgment a settlement agreement arrived at by all parties to a case before it. The would-be interveners lack standing to even raise this issue on appeal. Moreover, the law on this question is well-established and does not implicate any of the considerations set forth in Mass. R. App. P. 11(a).

As a preliminary matter, because the parties reached agreement as to the settlement of the case, the Probate Court was not bound by the fact finding requirements of Mass. R. Civ. P. 52(a). U.S. v. Scholnick, 606 F.2d 160, 166 (6th Cir. 1979). Indeed, a court's entry of a judgment incorporating an agreement for judgment by the litigants "is based upon the inherent power of the [...] courts to enforce settlement agreements. Scholnick, 606 F.2d at 166.

Moreover, although not required, the Agreement for Judgment does recite findings with respect to deviation. In particular, the Probate Court notes that, due to the dispute between the Feoffees and the Little Neck tenants then pending in the Superior Court, there had not been a distribution to the School Committee since 2006, and "absent settlement, litigation could be expected to continue for an

additional prolonged period at substantial expense and with the accompanying risks and uncertainties to the Trust, all of which has been and will continue to be a substantial impairment to the accomplishment of the purposes of the Trust." See Agreement for Judgment, Section B.

In the context of reviewing a settlement which the Attorney General, as representative of the public interest, and the School Committee, as the beneficiary of the trust, thought was fair, reasonable and prudent, the Probate Court's approval was appropriate. It is "axiomatic" that courts "look with great favor upon the voluntary resolution of litigation through settlement." Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee, 616 F.2d 305, 312 (7th Cir. 1980), *overruled on other grounds,* Felzen v. Andreas, 134 F.3d 873 (7th Cir. 1998). Because the courts view settlement as "a bargained exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect [...] the interests of the [parties] and the public. Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel." Id. at 315. See also Sniffin v. Prudential

Ins. Co. Am., 395 Mass. 415, 421 (1985) (trial courts have broad discretion to approve settlement agreed to by the parties). The mere fact that the would-be interveners dislike the terms of the settlement does not bestow upon them standing to challenge it, nor deprive the Probate Court of the power to approve it. In much the same manner, such dissatisfaction does not translate into a question of law worthy of Direct Appellate Review.

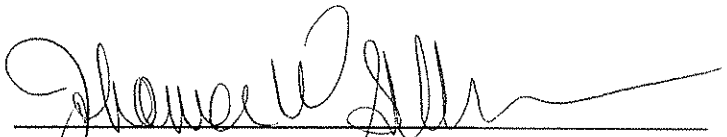
Conclusion

Because the issues here on appeal are straightforward procedural questions which implicate neither novel issues of law nor matters of public policy, the would-be interveners cannot satisfy the requirements of Mass. R. App. P. 11(a). Plaintiff-Appellees Alexander B.C. Mulholland, et al. therefore respectfully request that this Court deny the Request for Direct Appellate Review.

Respectfully submitted,

PLAINTIFFS-APPELLEES, ALEXANDER B.C. MULHOLLAND, JR., PETER FOOTE, DONALD WHISTON, JAMES FOLEY, ELIZABETH KILCOYNE, PATRICK J. MCNALLY, and INGRID MILES, as they are FEOFFEES OF THE GRAMMAR SCHOOL IN THE TOWN OF IPSWICH,

By their attorneys,

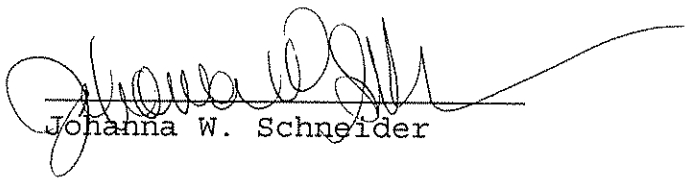


Brian M. Hurley, BBO No. 245240
bhurley@rackemann.com
Johanna W. Schneider, BBO No. 643744
jschneider@rackemann.com
RACKEMANN, SAWYER & BREWSTER, P.C.
160 Federal Street
Boston, Massachusetts 02110
(617) 542-2300

Dated: October 1, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused to be served a true copy of the foregoing document upon all counsel of record by first class mail, postage prepaid.



Johanna W. Schneider

Dated: October 1, 2012