

FILED 25
NOV 15 2011
NORFOLK PROBATE COURT

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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

PROBATE AND FAMILY COURT

C.A. NO. 1011E0098-cc1

TOWN OF BRAINTREE,)

Plaintiff)

v.)

MARTHA COAKLEY as she is the ATTORNEY)

GENERAL of the COMMONWEALTH OF)

MASSACHUSETTS,)

Defendant)

_____)

COMPLAINT

INTRODUCTION

Pursuant to G.L c 214, §10B, the Town of Braintree (hereafter "Plaintiff" or "Town") requests that this Honorable Court apply the doctrines of cy pres or deviation to the terms of the charitable trust created by Captain August J. Petersen ("Captain Petersen") under Article Eight of his will filed with the Norfolk County Probate and Family Court as Docket No. 161695 to authorize the Mayor of the Town of Braintree to direct the construction of and approve expenditures from the Petersen Trust for "The Petersen Memorial Pool", as specified in Captain Petersen's will.

Also pursuant to G.L c 214, §10B, the Town requests that this Honorable Court apply the doctrines of cy pres or deviation to the terms of the charitable trust created by Captain Petersen under Article Eight of his will to permit the Town to use income earned by the Captain Petersen Trust ("Petersen Trust") to construct a municipal water play system, commonly known as a "splash pad", at Watson Park in East Braintree, MA and to fund operational and maintenance expenses associated with the water play system, following construction of said system. Further,

the Town requests that this Honorable Court apply the doctrines of cy pres or deviation to the terms of the charitable trust created by Captain Petersen under Article Eight of his will to authorize the Mayor of the Town of Braintree, in conjunction with the Director of Municipal Finance, to direct the construction of and approve expenditures from the Petersen Trust for said water play system.

FACTUAL AND LEGAL BACKGROUND

1. The Town is a body politic and corporate organized and existing under the laws of the Commonwealth of Massachusetts and located in Norfolk County, *with a place of business at One J.F.K. Memorial Drive, Braintree, MA 02124*
2. Defendant Martha Coakley ("Attorney General") is the Attorney General of the Commonwealth of Massachusetts, *with an address of ONE Ashburton Place, Boston, MA 02108* and is named herein in her capacity as representative of the public interest in the administration of charitable trusts, pursuant to G.L c. 12, §8G.
3. Captain Petersen died testate in Braintree on November 28, 1963.
4. Under Article Eight of his will, Captain Petersen bequeathed to the Town the rest and residue of his estate totaling approximately \$64,349.99 in trust, specifying that "[t]he principal and accumulated income is to be used for the construction of a swimming pool and necessary incidental buildings and equipment on Watson Park, with the said swimming pool to be named "THE PETERSEN MEMORIAL POOL." A true copy of the will is attached hereto as Exhibit A.
5. Article Eight of Captain Petersen's will further states: "[I]n the event that the said fund with any addition which the Town may make by appropriation is insufficient for the purpose [of constructing a swimming pool], the income shall be allowed to accumulate and be added to the principal until the fund, together with any such addition, is sufficient for the purpose."

6. Article Eight of Captain Petersen's will also stipulated: "When the Town does proceed under the above provision to construct said Pool and incidental facilities, the work shall be done under the direction of a committee of three members, one of whom shall be George H. Gerrior, Jr. if living, willing and able to serve, with a substitute for him if necessary, and two others to be appointed by the Moderator, but no contract is to be let nor payment made except with the approval of said Gerrior if he serves on said committee."
7. Captain Petersen's will makes no provision for an alternate appointing authority for this three-member committee to oversee the construction and payment of expenses for the pool.
8. The Town of Braintree accepted Captain Petersen's bequest by vote under Article 66 of the March 23, 1964 Annual Town Meeting. A true copy of the Town Meeting vote is attached hereto as Exhibit B.
9. In 1965, the Town, acting through its Moderator, appointed a three member committee called the Petersen Pool Study Committee, whose members included George H. Gerrior, Jr. (See Report of the Petersen Memorial Pool Committee to the 1965 Annual Town Meeting attached hereto as Exhibit C.) George H. Gerrior, Jr., was the Tax Collector for the Town of Braintree from 1934 to 1969. (See Affidavit of Town Clerk attached at Exhibit D.)
10. In November of 2000, the Town, through its Board of Selectmen, established the Peterson Pool Siting Committee to determine if there was a suitable location in Watson Park or immediately adjacent thereto for construction of the pool. On or about March 2002, the Peterson Pool Siting Committee, following an extensive investigation into possible sites at Watson Park, issued its final report in which it concluded that there was no possible or appropriate site available at Watson Park or in the immediate vicinity to locate the pool.

11. Because of the lack of suitable land for construction of the swimming pool in Watson Park, it became impossible or impracticable for the Town to carry out the terms of Captain Petersen's bequest.
12. On or about October 24, 2002, the Town, through its Board of Selectmen, filed a petition requesting that this Honorable Court apply the doctrines of cy pres or deviation to the terms of the charitable trust created by Captain Petersen to permit the Town to construct the "Petersen Memorial Pool" in a location other than Watson Park.
13. On November 26, 2002, this Honorable Court (Harms, J.) entered a judgment allowing the Town to construct the "Petersen Memorial Pool" in a location other than Watson Park. A true copy of the Judgment entered by the Court is attached hereto as Exhibit E.
14. In December 2006, the Town, through its Board of Selectmen, filed a petition requesting that this Honorable Court apply the doctrines of cy pres or deviation to the terms of the charitable trust created by Captain Petersen to permit the Town to use interest earned by the Petersen Trust for the purpose of funding operational and maintenance expenses associated with the "Petersen Memorial Pool", following the construction of said pool.
15. On December 12, 2006, this Honorable Court (Harms, J.) entered a judgment allowing the Town to use interest earned by the Petersen Trust for the purpose of funding operational and maintenance expenses associated with the "Petersen Memorial Pool" A true copy of the Judgment entered by the Court is attached hereto as Exhibit F.
16. In April 2006, the registered voters of the Town elected to change their form of government from a board of selectmen/representative town meeting model to a mayor/town council form of government. An Affidavit of the Town Clerk with a certified copy of this vote is attached hereto as Exhibit G. As a result of this vote, the Town operates pursuant to a special act of

legislation, Chapter 189 of the Acts of 2005 (hereinafter, the "Town Charter"), a copy of which is attached as Exhibit H.

17. The Town's new form of government took effect in January 2008.
18. Pursuant to Section 1-3 the Town Charter: "The administration of the fiscal, prudential and municipal affairs of Braintree, with the government thereof, shall be vested in an executive/administrative branch headed by a mayor and a legislative branch to consist of a town council. The legislative branch shall never exercise any executive/administrative power, and the executive/administrative branch shall never exercise any legislative power."
19. Pursuant to Section 3-2 of the Town Charter: " The executive powers of the town shall be vested solely in the mayor, and may be exercised by the mayor either personally or through the several town agencies under the general supervision and control of the office of the mayor... The mayor shall exercise a general supervision of all town activities and functions placed under the control of the mayor by law, by this charter, by ordinance or otherwise"
20. Under section 5-4, the Town Charter establishes a Department of Municipal Finance, which is "responsible for the performance of all of the fiscal and financial activities of the town" including the duties and responsibilities of the treasurer, collector of taxes, and trust fund commissioners. The Department of Municipal Finance is under the control and supervision of the Director of Municipal Finance, who is appointed by the Mayor.
21. Under the prior form of government, the Town had an elected board of trust fund commissioners.
22. The Town Charter makes no provision for an elected or appointed board of trust fund commissioners, nor has the Town established a board of trust fund commissioners pursuant to G.L. c. 41, § 45.

23. Under the Town's new form of government, the position of moderator was abolished. See Section 9-5(d) of the Town Charter. Further, the Town Charter is silent as to a successor within the new form of government to assume the duties formerly exercised by the moderator.
24. Under the prior form of government, the moderator was elected by the registered voters of the Town.
25. Because of the lack of a moderator within the Town's current form of government, it has become impossible or impracticable for the Town to appoint a committee, in accordance with Captain Petersen's express provisions, to carry out Captain Petersen's bequest.
26. Without a moderator to appoint a committee pursuant to the terms of Captain Petersen's will, it has become impossible for the Town to access the funds in the Petersen Trust.
27. Currently, the Town, acting through its Mayor, is pursuing a public/private partnership plan to construct, operate, maintain and lease of land to locate the Petersen Memorial Pool within a recreational facility housing an indoor swimming pool and skating rink adjacent to Braintree High School.
28. The Town, acting through its Mayor, is also pursuing a plan to construct a municipal water play system, commonly known as a "splash pad", at Watson Park in East Braintree.
29. A "splash pad" is an automatic water device consisting of spray features anchored to concrete foundations and surrounded by slip resistant playing surfaces. The "splash pad" is a less expensive alternative to a conventional swimming pool and is designed in a way to promote safe play among children in a variety of age groups. A copy of the Vortex Splashpad pamphlet and informational materials is attached hereto as Exhibit I. The Vortex Splashpad is representative of the system the Town plans to construct.

30. The Town will incorporate a recirculated water quality management system in the “splash pad”, which minimizes water consumption by capturing the water spray via a drain system, treating the water with chlorine, and recycling the treated water back out to be sprayed in the “splash pad”.
31. By design, the “splash pad” minimizes standing water, as well as the inherent risks and insect breeding grounds associated with standing water.
32. The “splash pad” will comply with the Americans with Disabilities Act.
33. The Town estimates that it will cost approximately \$250,000 to design and construct the “splash pad”.
34. The Town intends to name the “splash pad” after Captain Petersen.
35. As of June 30, 2011, the balance in the Petersen Trust is \$2,097,336.02.

COUNT I- CY PRES

36. The plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 35 above as though fully set forth herein.
37. Because the Town has changed its form of government and no longer has a moderator to appoint a committee to oversee the construction of the Petersen Memorial Pool, it has become impossible for the Town to carry out the specific terms of Captain Petersen’s will with respect to the construction of and payment for the Petersen Memorial Pool.
38. Captain Petersen’s will contain no provisions as to an alternative appointing authority for the committee to oversee the construction of the Petersen Memorial Pool.

39. Under the Town Charter, the decision to locate and construct a pool is an executive function reserved for the Mayor, and the fiscal and financial duties of the collector of taxes and trust fund commissioners are vested in the Director of Municipal Finance.
40. Captain Petersen manifested a general intention to devote the funds to charitable purposes, specifically for the purpose of providing a swimming area for the citizens of Braintree, as well as a general intention to place the payment of funds for said pool under George H. Gerrior, Jr., the Tax Collector for the Town at the time of Captain Petersen's will. Both of these purposes will be served by allowing the construction of the Petersen Memorial Pool to be overseen by the Mayor and the payment of funds earned by the Petersen Trust to be disbursed by the Mayor in conjunction with the Director of Municipal Finance.
41. There is no language in Captain Petersen's will to suggest that placing the construction of the Petersen Memorial Pool under the direction of the Mayor and authorizing the Mayor, in conjunction with the Director of Municipal Finance, to disburse funds from the Petersen Trust for said pool would not serve the public interest in accordance with Captain Petersen's interests.
42. Captain Petersen's will manifests a general intention to devote the funds to charitable purposes, specifically to construct a swimming pool at Watson Park for the residents of Braintree. Because Watson Park did not contain adequate land for the construction of the Petersen Memorial Pool, it became impossible or impracticable for the Town to locate said pool at Watson Park, and therefore, this Honorable Court granted a cy pres petition to locate the Petersen Memorial Pool elsewhere in Town.
43. Captain Petersen's will manifested a general intention to devote the funds to the charitable purpose of providing a water recreational facility for the residents of Braintree at Watson

Park, which purpose will be served by the location of a public “splash pad” at Watson Park, named after Captain Petersen. This “splash pad” would be in addition to the Petersen Memorial Pool which the Mayor plans to construct adjacent to Braintree High School.

44. There is no language in Captain Petersen’s will to suggest that using a portion of the funds from the Petersen Trust to design, construct, operate and maintain a “splash pad” at Watson Park would not serve the public interest in accordance with his wishes.
45. There is no language in Captain Petersen’s will to suggest that the construction of a water recreational facility at Watson Park under the direction of the Mayor and authorizing the Mayor, in conjunction with the Director of Municipal Finance, to disburse funds from the Petersen Trust for said water recreational facility would not serve the public interest in accordance with Captain Petersen’s interests.

COUNT II-DEVIATION

46. The plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 45 above as though fully set forth herein.
47. Owing to circumstances not known or anticipated at the time of the bequest, i.e., that the Town would alter its form of government and eliminate the position of moderator, the Town is unable to carry out the specific items of the Petersen Trust with respect to a committee appointed by the moderator to oversee the construction and expenditure of funds for the Petersen Memorial Pool.
48. Captain Petersen’s will contains no provision for an alternate appointing authority of the committee to oversee the construction and expenditure of funds for the Petersen Memorial

Pool in the event that the appointment of the committee pursuant to the terms of the will should become impossible.

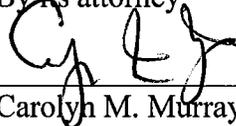
49. Captain Petersen manifested an intent to devote the funds to charitable purposes, specifically for the purpose of providing a swimming pool for the citizens of Braintree, as well as a general intention to place the payment of funds for said pool under George H. Gerrior, Jr., the Tax Collector for the Town at the time of Captain Petersen's will. Both of these purposes will be served by allowing the construction of the Petersen Memorial Pool to be overseen by the Mayor and the payment of funds from the Petersen Trust to be disbursed by the Mayor in conjunction with the Director of Municipal Finance.
50. There is no language in Captain Petersen's will to suggest that transferring the responsibility for the construction of the Petersen Memorial Pool to the Mayor and the payment of funds from the Petersen Trust to the Mayor and Director of Municipal Finance will defeat or substantially impair the purpose for which the trust was created.
51. Owing to the circumstances not known or anticipated at the time of the bequest, i.e., that the location of Watson Park would not be suitable for the Petersen Memorial Pool, the Town is unable to carry out the specific terms of the trust.
52. Captain Petersen manifested a general intention to devote the funds to charitable purposes, specifically for the purpose of providing a swimming area located at Watson Park for the citizens of Braintree, which purpose will be served by allowing the surplus income earned by the Petersen Trust to be used for a similar charitable purpose, i.e., to fund construction, operational and maintenance costs associated with a recreational water facility known as a "splash pad" to be constructed at Watson Park.

53. There is no language in Captain Petersen's will to suggest that the use of the surplus income earned by the Petersen Trust to fund the construction, operational and maintenance costs associated with the "splash pad" would not serve the public interest in accordance with his wishes for a recreational water facility to be located at Watson Park.
54. Requiring the Town to comply with the terms of the trust without provision for the funding of the construction, operational and maintenance costs associated with the "splash pad" would likely defeat or substantially impair the purpose for which the trust was created.
55. Captain Petersen manifested an intent to devote the funds to charitable purposes, specifically for the purpose of providing a swimming pool for the citizens of Braintree, as well as a general intention to place the payment of funds for said pool under George H. Gerrior, Jr., the Tax Collector for the Town at the time of Captain Petersen's will. Both of these purposes will be served by allowing the construction of a public "splash pad", named after Captain Petersen, to be overseen by the Mayor and the payment of funds from the Petersen Trust to be disbursed by the Mayor in conjunction with the Director of Municipal Finance.
56. There is no language in Captain Petersen's will to suggest that allowing said funds to be used to construct a public "splash pad" with the payment of funds for this purpose to be made from the Petersen Trust by the Mayor, in conjunction with the Director of Municipal Finance, will defeat or substantially impair the purpose for which the trust was created.

WHEREFORE, the Plaintiff respectfully requests that this Court order that the terms of the trust created under Article Eight of Captain Petersen's will be administered cy pres or to allow a reasonable deviation from the terms of the charitable trust created by Captain Petersen, pursuant to the Court's general equity powers, to allow:

- a. the construction of the Petersen Memorial Pool to be overseen by the Mayor;
- b. funds from the Petersen Trust for the construction, operation and maintenance of the Petersen Memorial Pool to be expended by the Mayor, in conjunction with the Director of Municipal Finance;
- c. funds from the Petersen Trust to be used for the construction, operation and maintenance of a public “splash pad” at Watson Park to be named after Captain Petersen;
- d. funds from the Petersen Trust for the construction, operation and maintenance of the “splash pad” at Watson Park to be expended by the Mayor, in conjunction with the Director of Municipal Finance.
- e. and grant such other and further relief as this Court deems just and equitable.

Respectfully submitted,
TOWN OF BRAINTREE,
By its attorney



Carolyn M. Murray (BBO#653873)
Town Solicitor
Town of Braintree
One J.F.K. Memorial Drive
Braintree, MA 02184
Tel. 781-794-8153
Fax 781-794-8305