

# McGREGOR & LEGERE

ATTORNEYS AT LAW, P.C.

15 COURT SQUARE – SUITE 500  
BOSTON, MASSACHUSETTS 02108  
(617) 338-6464  
FAX (617) 338-0737

MICHAEL J. O'NEILL, ESQ.  
E-mail: moneill@mcgregorlaw.com  
(617) 338-6464 ext. 125

August 7, 2015

The Honorable Maura Healey, Attorney General  
Commonwealth of Massachusetts  
McCormack Building  
One Ashburton Place  
Boston, MA 02108

Attention: Mary Beckman, Chief  
Non-Profit Organizations/Public Charities Division

**RE: Prouty Garden/Boston Children's Hospital**

Dear Attorney General Healey:

This Firm represents the Friends of Prouty Garden, a group of individuals dedicated to the preservation of Prouty Garden at Boston Children's Hospital ("BCH"). Prouty Garden was established on the grounds of BCH by a gift from Olive Higgins Prouty (1882-1974). Dedicated in 1956, it has been a precious sanctuary for the children who are patients, their families, and staff ever since. BCH plans to demolish Prouty Garden in order to construct a new building. Based on our review of the evidence, we believe that this would be a violation of the terms of Mrs. Prouty's gift.

BCH has publicly admitted that the terms of the gift were that the Garden was to be maintained in its present location in perpetuity. BCH erected a plaque in the Garden that says: "Mrs. Prouty insisted on perpetually maintaining this location as a haven for patients, parents, and staff...Because of Mrs. Prouty's vision, this Garden will exist as long as Children's Hospital has patients, families, and staff to enjoy it." This plaque remains prominently displayed in the Garden to this day. (Copy attached as Exhibit A).

The intent to maintain the Garden forever is also revealed in an excerpt from a publication about the Prouty Garden issued by the Public Relations Department of BCH: "Ensured perpetuity on Hospital grounds, the Prouty Garden will exist as long as the Hospital has children to enjoy it." (Copy attached as Exhibit B).

Mrs. Prouty left \$150,000.00 in her Will to the Olive Higgins Prouty Foundation, Inc. (the "Foundation") for the benefit of BCH for the care and upkeep of that portion of the BCH property known as the "Prouty Terrace and Garden." She did not give the Foundation discretion



Printed on recycled paper.

to agree to the destruction of the Garden (copy of relevant portion of her Will attached as Exhibit C).

The Attorney General is responsible for ensuring that charitable funds are used in accordance with the donor's wishes. G. L. c. 12, sec. 8, *Weaver v. Wood*, 425 Mass. 270, 275 (1997), cert. den. 522 U.S. 1049. As of this writing 11,528 people have signed an on-line petition to save Prouty Garden.

In our opinion, this is a matter of significant public importance worthy of your attention. We urge you to take such action as is necessary to prevent the destruction of Prouty Garden. This letter supplies a summary of the relevant facts and law.

### **History of Prouty Garden as Gift Requested By Hospital**

Olive Higgins Prouty and her husband, Lewis Prouty, had four children. The two youngest, Anne and Olivia, died in infancy and early childhood. In 1925, Mrs. Prouty donated funds for the rehabilitation of Ward One at BCH in memory of her daughters, which was renamed the Prouty Ward. Mrs. Prouty continued after 1925 to donate funds for the upkeep of Ward One and later for the rehabilitation of Ward Two, which was added to the Prouty Ward.

In 1953, the wards were torn down for the construction of the Farley Building. The then-BCH Director, Dr. Guy Brugler, showed her the space where the Garden now stands, which was planned to be a parking lot, and suggested she fund a garden terrace there instead.

In 1955, Dr. Charles Janeway of BCH wrote to Mrs. Prouty to encourage her to fund the garden: "Our grounds very much needed a fairy godmother, like yourself, who loves growing things...Beauty is as important an element in getting well for the patient, and keeping the staff in a good, constructive frame of mind, as good facilities...Three cheers, and I hope you will go ahead and do it."

A letter dated May 23, 1955 from Mrs. Prouty's attorney to BCH shows that Mrs. Prouty was concerned about the permanence of the Garden: "She questioned the permanence of such a terrace in case the hospital required enlarging." (Copy attached as Exhibit D). The plaque (Exhibit A) shows that BCH satisfied Mrs. Prouty that the Prouty Garden would be maintained in its present location in perpetuity.

Mrs. Prouty was instrumental in all aspects of planning the Garden. She arranged to have the noted landscape architectural firm Olmsted Bros. design the Garden. The Massachusetts Horticultural Society awarded the Garden a gold medal in 1960.

A letter dated December 23, 1957 from William Wolbach, then-President of BCH, to Mrs. Prouty (copy attached as Exhibit E) described the importance of the Garden to the young



pediatric patients and assured her that there should never be a problem with future maintenance of it:

Now a few words about the Garden,--still in a preliminary way. To begin with, I cannot imagine anyone having any opinion other than that the Garden is a great asset. Of course, we can run the Hospital without it—just as we could without paint on the walls, if necessary. However, as you well know a Hospital can be a pretty bleak place, and staying there can be an uncomfortable and unhappy experience for young children, most of whom have never been away from home before.

Your Garden represents beauty, serenity and nature itself and is a wonderful and I believe almost necessary contrast to the institutionalized impersonality of the Hospital bricks and mortar, and the stress of pain and uncertainty. We are most fortunate to have such an attractive complement to our new building, and I hear reports on all sides concerning how much it is appreciated by patients, their parents, and the Staff...

The truth of the matter is, because your garden is so generally appreciated, there should never be any problem in working out the mechanics of its future care.

Carroll B. McNeill, whose father, Dr. Guy W. Brugler, was Director of BCH during the late 1950s and early 1960s, wrote to the BCH Board of Trustees on January 15, 2015. She told the Board that she fondly remembers Olive Prouty as a family friend and said: "The possibility that her bequest, which has clearly benefitted many thousands of people by now, might be destroyed is unthinkable...An on-line commenter who observed that this garden is the 'soul of the hospital' had it right!" (Copy attached hereto as Exhibit F).

### **Hundreds of Testimonials Attest to this Sacred Space**

The Garden plaque's declaration that it is a haven for patients, parents, and staff is an understatement, to say the least. Many parents have chosen the Garden as the place to hold their terminally ill child as he or she passes away.



Attached as Exhibit G are on-line comments by the 11,528 signers of the on-line petition, each providing powerful testimony to the importance of the Garden.

At least one child's ashes are scattered in the garden, based on the family's understanding that the Garden will remain in perpetuity, demonstrating that people have acted on the promise stated in the plaque which BCH now threatens to break.

Attached as Exhibit H is a copy of a letter from D. Elliott B. Martin, who worked as a psychiatrist at BCH, describing how the Garden meets the needs of young psychiatric patients, who are a particularly vulnerable and disenfranchised population, in addition to those who are medically ill.

Prouty Garden is the lead example cited in the article, "How Hospital Gardens Help Patients Heal," *Scientific American*, March 2012 (copy attached as Exhibit I). Prouty Garden is "one of the most successful hospital gardens in the country," according to Clare Cooper Marcus, emeritus professor in landscape architecture at the University of California, Berkeley, quoted in the article.

Professor Marcus further described the Garden in Clare Cooper Marcus and Marni Barnes (Eds.), *Healing Gardens for Children: Therapeutic Benefits and Design Recommendations*. New York, John Wiley and Sons, 1999 (copy of relevant section attached as Exhibit J). She described, among other things, the many small sculptures set into the plantings and on the lawns, including sculptures of a nurse and child and small figures of a goose, a cat, an owl, a boy holding a cat, a bear, a squirrel, two frogs, and a fox, half-hidden in the shrubbery, and small life-size figures of a rabbit and birds set on the lawn. She noted that children taken into the Garden take great delight in finding and naming these figures, more so because they are half-hidden.

### **The Prouty Will Does Not Give the Foundation Discretion to Terminate the Garden**

Mrs. Prouty's Will left \$150,000 to the Olive Higgins Prouty Foundation, Inc. for the benefit of The Children's Hospital Medical Center to be held, managed, invested and reinvested as a separate fund, under the title "The Prouty Terrace and Garden Fund of The Children's Hospital Medical Center," the income to be used for care and upkeep of that portion of Children's Hospital known as "Prouty Terrace and Garden." Exhibit C.

According to the Will, any income not currently used was to be accumulated and added to the fund. The "Prouty Fund" then existing "with" the Hospital was to be added to this fund. If accumulated income exceeds the amount reasonably needed for future needs, said accumulated income could be withdrawn and used as unrestricted funds of said Foundation, but in no event should any principal that does not consist of said accumulated income be withdrawn.



The Will includes a provision that, “notwithstanding anything to the contrary, in the event that said ‘Prouty Terrace and Garden,’ including the real estate and tangible personal property hereinbefore specified, shall for any reason whatsoever cease to exist as a unit or be maintained in a manner substantially comparable to, and not less extensive than the manner in which the same is being managed at the time of my death, then and in such event the ‘Prouty Terrace and Garden Fund of the Children’s Hospital Medical Center,’ including any accumulated income, shall no longer be managed as aforesaid but, in lieu thereof, shall be dealt with as an unrestricted gift to said Foundation for its general purposes.”

It appears that the present President of the Foundation may be mistaken as to the duties of the Foundation. Enclosed as Exhibit K is a copy of a page from BCH’s response to comments included in its Final Environmental Impact Report (“FEIR”), filed under MEPA. It says that “the Foundation has expressed a willingness to work with the Hospital’s planners and designers to incorporate the artifacts and memorabilia now within the garden, into one or more locations within the proposed BCCB [Boston Children’s Clinical Building], in an effort to keep the ‘spirit’ of the garden alive in its new environment.” This implies that the President of the Foundation and BCH believe the President of the Foundation has discretion to accede to a request from BCH to discontinue Prouty Garden.

The “notwithstanding ...” clause in the Will does not give the Foundation discretion or authority to elect to discontinue the Garden or to accede to BCH’s requests to discontinue it. Rather, it contemplates an event in the nature of a “force majeure” occurrence, completely outside of the control of the Foundation and BCH.

Nor does the Will authorize BCH to violate the terms of Mrs. Prouty’s gift. “One may make a conveyance or devise to a charitable corporation and, if accepted, the latter would be bound to use the property for the purpose in accordance with the terms of the trust...[In that case], the property is held by the corporation not as its own but in its capacity as a trustee and as an instrumentality of the settlor or testator in carrying out his directions in its use of the property.” *Animal Rescue League v. Assessors of Bourne*, 310 Mass. 330, 334 (1941).

Mrs. Prouty’s gift creating Prouty Garden was impressed with a charitable trust limited to a specific charitable purpose; it was not a gift with a general charitable intent. See *Hillman v. Roman Catholic Bishop of Fall River*, 24 Mass. App. Ct. 241, 241-243 (1987). Mrs. Prouty’s gift to BCH was for the specific purpose of creating and maintaining Prouty Garden in its present location. It was not a gift to BCH with a general charitable intent for BCH to decide how it sees fit to use.

### **The Hospital’s Proposed Replacements Do Not Come Close To Duplicating Prouty Garden**

Prouty Garden is approximately one-half acre, with an expanse of grass and other natural vegetation, a rare 65-foot Dawn Redwood Tree, flowers and other plantings, walks and pathways, a fountain, and statues. As indicated in BCH’s responses to comments in the FEIR,



## McGREGOR & LEGERE

BCH asserts that it plans to retain the “spirit” of Prouty Garden. It proposes a number of so-called “green spaces” to be scattered throughout the Hospital, some of which appear to be patient lounges, hallway plants, or plants shielding ventilation ducts. BCH’s plans do not retain or come close to retaining the spirit of Prouty Garden.

The “notwithstanding ...” clause in Mrs. Prouty’s Will refers to a circumstance in which Prouty Garden “cease(s) to exist as a unit or be maintained in a manner substantially comparable to, and not less extensive than...” As discussed above, we disagree that this authorizes the Foundation or BCH to discontinue the Garden. However, if BCH may rely on this language, it imposes certain minimum requirements, namely, that the replacement be substantially comparable to and not less extensive than Prouty Garden in its present location.

At minimum, this language requires another garden at least as big as the Prouty Garden. It does not permit fragmented “green” spaces smaller in total or less useful than a unified Garden.

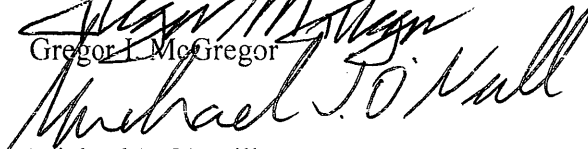
### Conclusion

The Friends of Prouty Garden, on their behalf and as the voice for the thousands of patients, families, staff members, donors, and unity members who have urged that the Garden be preserved, and the public, urge you to prevent BCH from destroying Prouty Garden.

Thank you for your consideration.

Sincerely,

  
Gregor I. McGregor

  
Michael J. O'Neill

