COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. AC-2011-P-1837

RACHEL A. BIRD ANDERSON,

Appellant,

v.

BNY MELLON, N.A., TRUSTEE of the TRUST U/W OF ANNA CHILD BIRD, MARTEN F. BIRD, putative beneficiary of the Trust u/w of Anna Child Bird, MATTHEW G. BIRD, putative beneficiary u/w of Anna Child Bird,

Appellees,

and

DIANA BIRD ROSIQUE, beneficiary of the Trust u/w of Anna Child Bird, JULIEANNE P. BIRD, beneficiary u/w of Anna Child Bird, KRISTINA BIRD, beneficiary u/w of Anna Child Bird, and ZVIA NOELLE BIRD, beneficiary u/w of Anna Child Bird,

Interested Parties

BRIEF OF THE BOSTON BAR ASSOCIATION, AMICUS CURIAE

Lisa C. Goodheart, BBO #552755
President of the Boston Bar Association
Sugarman, Rogers, Barshak & Cohen, P.C.
101 Merrimac Street
Boston, MA 02114
617-227-3030

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

ACTS AND PROPOSED BILLS

I. INTEREST OF AMICUS

The mission of the Boston Bar Association (the "BBA"), founded by John Adams in 1761, is "to advance the highest standards of excellence for the legal profession, to facilitate access to justice, and to serve the community at large." The BBA, calling on the vast pool of legal expertise of its members, serves as a resource for the judiciary, as well as the legislative and executive branches of government.

The Boston Bar Association's Trusts and Estates Section is comprised of attorneys who act as advisors as well as fiduciaries in various disciplines pertaining to wills, trusts, estates, taxation of transfers during lifetime and at death, fiduciary income tax and elder law. The Trusts and Estates Section serves as a resource to the bar, providing continuing education and updates on new developments, and actively supports developments in the law that it deems beneficial to the bar, including, where appropriate, proposing or commenting on new legislation and participation in the preparation of amicus briefs on behalf of the BBA.

The interests of the BBA in this case relate most strongly to the ability of fiduciaries, trust beneficiaries and practitioners to rely on established principles of law in determining property interests and, for fiduciaries, in determining to whom fiduciary duties are owed.

II. STATEMENT OF THE ISSUES

1. Is the retroactive application of Chapter 524 of the Acts of 2008 ("Chapter 524") to instruments executed prior to 1958 constitutional?

2. If not, what are the consequences for actions taken by fiduciaries in reliance on Chapter 524 prior to this Court's determination that such application is unconstitutional?

III. STATEMENT OF THE CASE

The BBA adopts the Statement of the Case set forth in the brief of the Appellant, Rachel A. Bird Anderson.

IV. STATEMENT OF FACTS

The BBA adopts the Statement of the Facts set forth in the brief of the Appellant, Rachel A. Bird Anderson.

V. OVERVIEW

Chapter 524 of the Acts of 2008 ("Chapter 524") extends to pre-1958 trusts the presumption in G.L. c. 210 § 8 that terms such as "issue" shall include adopted descendants. In doing so, the statute upsets the longstanding legal advice lawyers have given their clients as to instruments created prior to 1958, destroys the reasonable expectations of settlors, fiduciaries and beneficiaries, and alters property rights in trust. Chapter 524 has created uncertainty in the law of trusts and estates and has compromised the ability of parties to rely on the law in place at a given time in preparing estate plans, making distributions from trusts, and advising clients with regard to trust administration.

For those reasons, the BBA has promoted and continues to promote House Bill No. 2262, "An Act to repeal the Adopted Children's Act," filed on January 21, 2011, which would repeal Chapter 524, but would not affect the validity of any action taken or any distribution made or obligated to be made pursuant to Chapter 524 during the period of time in which Chapter 524 was in effect (i.e., since July 1, 2010). This proposed legislation would generally support reliance

on the law existing when a trust is established in determining beneficial interests under that trust, while taking into account the fact that fiduciaries may have made mandatory or discretionary distributions in good faith reliance on Chapter 524, consistent with fiduciary authority and duties determined by the law in existence at the time of such distributions.

In the interest of clarifying applicability of Chapter 524, the BBA encourages the Court, in deciding this case, to address as broadly as possible the concerns inherent in legislative actions that undermine such reliance, and to consider also the effects of its decision on beneficiaries, fiduciaries and members of the bar who have acted or declined to act in reliance on the law both prior to and after the effective date of Chapter 524.

VI. RETROACTIVE APPLICATION OF RULES OF CONSTRUCTION DETERMINING PROPERTY RIGHTS UPSETS THE REASONABLE EXPECTATIONS OF SETTLORS, FIDUCIARIES, BENEFICIARIES AND ADVISORS.

As a general matter, the BBA believes that legislation that retroactively alters beneficial interests in trusts is unconstitutional, for the reasons set forth in the briefs of the Appellant and of Appellee John G. Dugan, guardian ad litem for the

biological minor, unborn and unascertained beneficiaries of the ACB Trust.

More broadly, such retroactive changes undermine the ability of trust settlors, fiduciaries, beneficiaries and others to rely on established principles of construction. Settlors and their attorneys may rely on then-effective default presumptions in preparing and settling trusts. Families often rely on such presumptions in making irrevocable alternate arrangements, such as gifts or bequests made in favor of adopted children who were (until the effective date of Chapter 524) not

beneficiaries of certain family trusts.[1] Fiduciaries rely on long-standing rules of construction in considering to whom they owe fiduciary duties and in making dispositions of trust property. This Court has in the past demonstrated its concern for the bar's ability to rely on long-standing rules of construction. See, e.g., Sullivan v. Burkin, 390

[1] Guardian ad litem Podolski argues that the only reliance interests that could be relevant to the questions before the Court are those of the Plaintiff herself, not of the settlor or other family members making subsequent compensatory dispositions for the benefit of adopted descendants. (Podolski Brief at 20ff). Amicus Lee more broadly claims that donors and other family members do not have reliance interests worthy of constitutional protection in rules of construction determining interests in trust. (Lee Brief at 36ff). However, the fact remains that practitioners in Massachusetts have, for many decades, advised clients that, by statute, the term "issue" excluded adopted grandchildren and further descendants for trusts executed before 1958, and have since 1958 given advice that resulted in irrevocable dispositions of property specifically designed to equalize adopted beneficiaries based on this widely understood and long-standing state of the law. Whether or not such practitioners and family members should have appreciated that the Legislature could subsequently reallocate such trust interests among family members by changing the statutory rule of construction on which such planning relied, the BBA urges the Court not to dismiss out-of-hand these very real equitable concerns. See, e.g., State St. Bank & Trust Co. v. D'Amario, 368 Mass. 542 (1975) (decedent could have relied "with perfect reason, at least until 1969" on the rule of construction set forth in G.L. c. 210 § 8 in disposing of her property, including making gifts to her adopted daughters in reliance on the then-existing rule of construction).

Mass. 864, 870-71 (1984) (refusing to apply a new rule of construction retroactively because the bar had been entitled reasonably to rely on the preexisting rule in advising clients, and noting that established principles affecting property interests should be retroactively invalidated only with great caution); see also Powers v. Wilkinson, 399 Mass. 650 (1987)(applying a new construction of the term "issue" prospectively only, and not to the facts of that case, in deference to the bar's reliance interest).

The Attorney General and Amicus Douglas D. Lee, relying on cases from other jurisdictions, argue that G.L. c. 210 § 8 constitutes nothing more than a procedural or evidentiary rule of construction used to determine the intent of the settlor, and thus does not activate due process interests. These amici also rely on Massachusetts cases involving changes in the law of such claims as contributory negligence and workmen's compensation for the proposition that a party to a dispute lacks an interest "in the favorable operation of an evidentiary rule." (AG Brief at 3).

Whether or not other state courts have permitted significant retroactive changes to beneficial interests in irrevocable trusts by characterizing them

as "procedural," this Court has acted with great caution before upsetting settled rules of construction pertaining to property interests. See, e.g., Sullivan, 390 Mass. at 870-71 ("The bar has been entitled reasonably to rely on [the then effective] rule in advising clients. In the area of property law, the retroactive invalidation of an established principle is to be undertaken with great caution."); Powers, 399 Mass. at 654 (Refusing to apply a new rule of construction affecting interests in trusts retroactively because "[t]his [preexisting] rule of construction was operative at the time the trust in question was executed, and it concludes the question of the donor's intent.") In fact, this Court has acknowledged repeatedly that retroactive legislative changes to such rules of construction may indeed be unconstitutional. See, e.g., Boston Safe Deposit & Trust Co. v. Dean, 361 Mass. 244, 249, n.5 (1972) (noting the desirability of clarifying legislation to avoid constitutional difficulties presented by St. 1969 c. 27 § 2, but not reaching the constitutionality of that statute directly because the interests in question were determined to be "vested" and therefore unaffected by the 1969 statute); New England Merchants

National Bank v. Groswold, 387 Mass. 822, 828 n. 10 (1983) ("Construing the 1969 provision as a grant of rights to adopted children in itself involves serious constitutional questions concerning 'the Legislature's power to destroy a long-since executed gift of rights that by the terms of the instrument had become indefeasible' (quoting State Street Bank & Trust Co., 368 Mass. at 553); Billings v. Fowler, 361 Mass. 230, 240-42 (1972) (construing the term "vested" as used in St. 1969 c. 27 § 2 as defining any interest or right in trust which had accrued to its holder, and refusing to further differentiate between technical concepts of 'vested' and 'unvested' interests because "[n]ot only practical difficulties in differentiating such interests, but constitutional doubts (under the due process and equal protection clauses) about the validity of legislative impairment of, or discrimination among, such interests lead us to conclude that the Legislature prescribed no such discrimination."); State Street Bank & Trust Co., 368 Mass at 553 ("if a constitutional question were reached, it would not be about the Legislature's power to curtail in some way the capacity of persons to make future testamentary provisions, but rather the

Legislature's power to destroy [by altering retroactively the rule of construction set forth in G.L. c. 210 § 8] a long-since executed gift of rights that by the terms of the instrument – the declaration of trust – had become indefeasible.")[2]

One reason that changes to procedural and evidentiary rules in tort and similar cases present little constitutional problem is that, as the Attorney General points out, such rules regulate "secondary rather than primary conduct" resulting in "diminished

---

[2] In addition, the Legislature historically has acknowledged that altering rules of construction retroactively to affect property interests in trust under irrevocable instruments is problematic. See, e.g., St. 1969 c. 27 § 2 (declining to extend a new default rule to interests that had vested prior to enactment of the statute); St. 1975 c. 769 § 3 (repealing the 1969 statute); St. 2008, c. 521, § 43(5) (making rules of construction provided under the new Massachusetts Uniform Probate Code retroactive *except with regard to governing instruments which were irrevocable prior to the effective date of the act*, in contrast to UPC 8-101(5) (2008), which includes no such exception); Billings, 361 Mass. at 238-39 (1972) (discussing Tirrell v. Bacon, 3 F. 62 (D.Mass. 1876) and St. 1876, c. 213 § 9 (predecessor to G.L. c. 210 § 8), and noting that the Legislature in enacting that statute had carefully avoided depriving beneficiaries of previously acquired valuable property interests in trust); State Street Bank & Trust Co., 368 Mass. at 552 ("It was the purpose of the 1969 proviso to safeguard a range of reliances on interests and rights created in instruments executed before August 25, 1958.")

reliance interests." (AG Brief at 10, n. 5, citing Landraf v. USI Film Prods., 511 U.S. 244 (1994)). However, as this Court has recognized in the cases cited above, the reliance interests of the bar and of settlors, fiduciaries and beneficiaries in matters pertaining to property interests are significantly more robust than, for example, a party's reliance on a statute of limitation. In short, the retroactive change embodied in Chapter 524 is contrary to the reasonable expectations of settlors, beneficiaries and the bar, is not sound policy, and deprives persons of property interests without due process of law.

VII. A BROAD RULING REGARDING THE CONSTITUTIONALITY OF CHAPTER 524 WILL PROMOTE RELIANCE AND CERTAINTY TO THE BENEFIT OF THE BAR.

Whatever the Court decides regarding the constitutionality of Chapter 524, in the interest of promoting reliance and certainty, the BBA encourages the Court to rule as broadly as possible, to minimize confusion regarding whether Chapter 524 might be constitutional under different scenarios. For example, to the extent possible, the Court should not limit its ruling to the question of whether deprivation of "vested" interests is unconstitutional, but address "unvested" interests as well.

Although the version of G.L. c. 210 § 8 in effect between 1969 and 1975 (which extended the presumption that adopted descendants were included as "issue" to pre-1958 trusts, except with regard to vested interests) required this Court to grapple with the distinction between "vested" and "unvested" interests in the context of that version of the statute, this distinction remains unclear, and would be the subject of future litigation in the event of a narrow ruling. See, e.g., Billings, 361 Mass. 230 (adopting a broad understanding of what constitutes "vested" interests in trust); Boston Safe Deposit & Trust Co., 361 Mass. 244. Although none of the briefs submitted in this action addresses unvested interests expressly, it appears from the facts of the case that, in addition to her current income interest, the Appellant has a contingent remainder interest in that portion of the trust currently designated for benefit of the descendants of Christopher Bird. Regardless of whether the Court would characterize such an interest as vested or unvested, a decision regarding the unconstitutionality of the statute that addresses only vested interests (however defined) in trust would leave unsettled the property rights of more remote or

contingent beneficiaries whose interests might not be considered to be vested, requiring further litigation to clarify the applicability of Chapter 524.

In addition, the parties in this matter address, in their respective briefs, the fact that provisions were made under the estate plan of Julia Child Bird (grandmother of the Appellant and adoptive grandmother of Appellees Marten F. Bird and Matthew G. Bird) for the benefit of Appellees Marten F. Bird and Matthew G. Bird, which distributions may have been intended to compensate (at least in part) the adopted siblings for the fact that they were not, at the time Julia Child Bird made such provisions, potential beneficiaries of the ACB Trust. To avoid uncertainty regarding applicability of this Court's ruling to other cases involving pre-1958 trusts, the BBA urges the Court to make clear, to the extent possible, whether this factor, or any other factor, may affect the constitutionality of Chapter 524.

Ruling as broadly as possible on the constitutionality of Chapter 524 will restore some measure of certainty and predictability to fiduciaries and beneficiaries who must determine to whom they owe fiduciary duties and what their respective property

rights are, and may forestall subsequent litigation by fiduciaries and beneficiaries uncertain to what extent this Court's ruling affects applicability of Chapter 524 to other pre-1958 trusts.

VIII. THE BBA ENCOURAGES THE COURT TO PROVIDE GUIDANCE REGARDING ACTIONS TAKEN OR NOT TAKEN IN RELIANCE ON CHAPTER 524 SINCE ITS EFFECTIVE DATE.

The BBA urges the Court to consider that a decision holding Chapter 524 unconstitutional, while welcome, could create significant problems for fiduciaries who have acted in reliance on Chapter 524 since July 1, 2010, or who have declined to take certain actions pending determination of the constitutionality of Chapter 524. For example, some fiduciaries, in reliance on Chapter 524, have made distributions, whether mandatory or subject to fiduciary discretion, to adopted descendants who are proper beneficiaries under Chapter 524, but improper beneficiaries to the extent that Chapter 524 is retroactively repealed or held unconstitutional. If Chapter 524 is found unconstitutional, such fiduciaries or adopted beneficiaries may face challenges from other trust beneficiaries for having made or received such distributions.

On the other hand, a determination that distributions (especially discretionary distributions) made since July 1, 2010 need not be undone, despite the unconstitutionality of Chapter 524, may invite challenges where fiduciaries chose not to make distributions to adopted beneficiaries during this interim period based on a reasonable view that the statute would not survive scrutiny.

Although it does not appear from the record that distributions have been made to the adopted beneficiaries in the case at bar, the BBA urges the Court to address these concerns, or at least to be sensitive to them in its analysis. The effect of this Court's ruling on distributions made (or not made) from other pre-1958 trusts to adopted beneficiaries since July 1, 2010 is, as a practical matter, inextricable from the questions directly facing this Court. This Court has in the past shown a willingness to address issues not directly before the Court but which follow from its decisions, in order to provide guidance to the bar. See, e.g., Sullivan, 390 Mass. at 867 (stating that, going forward, assets of an inter vivos trust should be considered in determining the portion of the estate of the deceased for purposes

of G.L. c. 191 § 15, because, whether such issue was initially involved in the case at bar, it was an issue "which the executors will have to resolve ultimately, in any event" and which the Court felt compelled to address in order to provide guidance for the future). As in Sullivan, the consequences that a determination of Chapter 524's unconstitutionality will have for actions taken or not taken by fiduciaries when Chapter 524 was in effect flow naturally from the issue directly before the Court, and fiduciaries will have to resolve these questions, in court if necessary, should this Court make such a ruling.

Without such guidance, a finding of unconstitutionality — which we believe is the correct result on the merits — will produce detrimental uncertainty regarding the validity of and potential liability for actions taken or not taken with regard to Chapter 524, continued confusion and controversy regarding the proper beneficiaries of pre-1958 trusts, and proliferation of additional court proceedings to address such questions.

Accordingly, if the Court rules that retroactive application of Chapter 524 is unconstitutional, the

BBA encourages the Court to provide guidance as follows:

- To state that both mandatory and discretionary distributions made, or other actions taken, by a fiduciary in reliance on Chapter 524 since July 1, 2010 are not invalid solely by reason of the statute's unconstitutionality.
- To state that fiduciaries who have so acted or who have, within their discretion, decided not to so act, may not be held liable solely by virtue of the fact that they:
  - Acted in reliance on Chapter 524 as it existed at the time of such action or discretionary decision not to so act; or
  - Declined to take discretionary actions in favor of adopted beneficiaries pending resolution of constitutionality of the retroactive application of Chapter 524.
- To state that an adopted person having received a distribution from a trust in

reliance on the provisions of Chapter 524 is not required to return such distribution to the trust (because, for example, the distributee may have spent or incurred liabilities based on the receipt of such distribution).

By the same token, if the Court upholds Chapter 524, the BBA encourages the Court to provide guidance to validate the actions of fiduciaries who withheld distributions to adopted persons who would become beneficiaries of pre-1958 trusts under the provisions of Chapter 524, pending the outcome of these proceedings and others which raise the same questions, due to the serious constitutional questions at hand, and to further provide that said fiduciaries should not be subject to liability for such actions.

The BBA respectfully suggests that absent such guidance, continued uncertainty will persist regarding the validity of and potential liability for actions taken or not taken since July 1, 2010 with regards to Chapter 524, and litigation concerning such issues will continue to proliferate.

Respectfully Submitted,

THE BOSTON BAR ASSOCIATION

By its attorneys,

Lisa C. Goodheart
(BBO# 552755)
Sugarman, Rogers, Barshak & Cohen, P.C.
101 Merrimac Street
Boston, MA 02114
617-227-3030
President of the Boston Bar Association

April 30, 2012

CERTIFICATION PURSUANT TO MASSACHUSETTS RULE OF APPELLATE PROCEDURE 16

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs, including, without limitation, Rule 16, Rule 18, and Rule 20.

_____

Lisa C. Goodheart
(BBO# 552755)

Dated: April 30, 2012

CERTIFICATE OF SERVICE

I, Lisa C. Goodheart, Esq., hereby certify that on April 30, 2012, I caused true and accurate copies of the attached document to be served upon the following counsel by email and overnight mail:

George L. Cushing, Esq.
Wilbur A. Glahn, III, Esq.
Adam M. Hamel, Esq.
Kimberly Ryan, Esq.
McLane, Graf, Raulerson & Middleton, P.A.
300 TradeCenter, Suite 6400
Woburn, MA 01801

Marc J. Bloostein, Esq.
Kevin J. Willis, Esq.
Ropes & Gray LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199-3600

Steven B. Rosenthal, Esq.
One Post Office Square
Sharon, MA 02067

Maria L. Rockwell, Esq.
John G. Dugan, Esq.
Doherty, Ciechanowski, Dugan & Cannon, P.C.
124 Grove Street, Suite 220
Franklin, MA 02038

William W. Porter, Assistant Attorney General
Office of the Attorney General
One Ashburton Place, Rm. 2019
Administrative Law
Boston, MA 02108-1698

Tori T. Kim, Assistant Attorney General
Government Bureau
One Ashburton Place
Boston, MA 02108-1598

David S. Weiss, Esq.
Laura E. D'Amato, Esq.
Brian P. Thurber, Esq.
Goulston & Storrs, P.C.

400 Atlantic Avenue
Boston, MA 02110-3333

Respectfully Submitted,

_____

Lisa C. Goodheart (BBO#552755)
Sugarman, Rogers, Barshak & Cohen, P.C.
101 Merrimac Street
Boston, MA 02114
617-227-3030
President of the Boston Bar Association