



Testimony of the Boston Bar Association

Before the Joint Committee on the Judiciary

In Support of H 1291

An Act making corrections to the adopted children's act

June 24, 2015

The Boston Bar Association supports H1291, An Act making corrections to the adopted children's act. This bill would make corrections consistent with the Massachusetts Supreme Judicial Court (SJC) ruling in *Bird v. BNY Mellon*, 463 Mass. 299 (2012) in order effectively to restore the law of 1958, whereby adopted persons covered by pre-1958 instruments are presumed to be excluded from familial trust terms unless they were adopted by the testator or settlor.

This issue dates back to 1958 when the Legislature modernized the law to presume that adopted persons are included in terms like "child," "grandchild" and "issue" unless the instrument plainly states otherwise. It made the new law effective only to instruments executed after its effective date. The old law, which presumed adopted persons to be excluded unless they were adopted by the testator or settlor, continued to apply to pre-1958 instruments. For the next 50 years, families adapted to this presumption for older trusts, making compensating and often irrevocable arrangements for adopted descendants who were not beneficiaries of these old trusts.

However, in 2008, that all changed. Chapter 524 of the Acts of 2008 (which became effective in 2010) reached back to pre-1958 trusts and reversed the legal presumption, providing simply that the 1958 rule of construction (presuming inclusion of adopted people) would now apply to all instruments whenever executed. This shift came as a complete surprise to the trusts and estates bar, banks, and other professional trustees, who knew nothing about the law until after its enactment. Had the bar been aware of the bill before enactment, there would have been strong opposition.

Between 1958 and 2008, relying on the law, lawyers counseled numerous clients about how to provide for adopted children who were not benefited by pre-1958 family trusts. In many cases where such trusts benefitted only biological descendants, parents and grandparents with both biological and adopted descendants adjusted their estate plans to compensate the adopted descendants who were not thought to be beneficiaries under the pre-1958 trusts. In some cases these corrective estate plans can be revised to take into account the 2008 development, but in others the parents or grandparents have died and their estate plans are irrevocable. In those cases, the intentions of those who established such estate plans would be thwarted if their adopted descendants could then also benefit under the pre-1958 trusts.

Not only did the 2008 bill undermine the reasonable expectations of people creating estate plans in the preceding decades, but it has also worked in many cases to take away existing interests in trusts by bringing in adopted beneficiaries to share in the trust benefits. This unexpected inclusion has diluted the interests of the long-standing beneficiaries and resulted in a windfall for adopted beneficiaries, who effectively get double shares where families have made corrective estate plans.

In the 2012 *Bird* case, after one aggrieved beneficiary of a pre-1958 trust filed suit, the SJC found the 2008 reversal of the old, pre-1958 presumption to be unconstitutional. The SJC felt that the 2008 bill violated due process in that case by taking away vested trust interests or other property rights without serving a sufficient public interest to outweigh that loss by trust beneficiaries. However, while the Court indicated generally that its ruling presumably would apply to other situations, it did not rule on the constitutionality of the 2008 bill in all cases. Consequently, the 2008 law is still on the books, and the resulting uncertainty regarding whether under some fact patterns the 2008 law might still be effective presents uncertainty to the estate planning bar and to beneficiaries of these pre-1958 trusts and invites further litigation.

H1291 would clarify the law consistent with the SJC's decision in the *Bird* case, restoring the status quo before the 2008 law and thereby removing this uncertainty.