NO: 24-1258

IN THE SUPREME COURT
OF THE UNITED STATES

PETER JUDSON,

Petitioner,

v.

ROBERT I. FRIEDMAN

Respondent.

ORIGINAL

On Petition For A Writ Of Certiorari To The Massachusetts Supreme Judicial Court

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PETITION FOR A WRIT OF CERTIORARI

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May 20, 2025 *Pro se*

QUESTION PRESENTED

At the center of this case is whether a Settlor of an irrevocable trust has a 14th Amendment right to set the terms for their own estate without fear of a fiduciary using future laws to usurp those very terms and whether it is necessary for the Courts to have a national standard in place to determine if the fiduciary has abused his or her discretion. The law at issue, the UNIFORM PRINCIPAL AND INCOME ACT (UPIA), has been adopted in thirty six states plus the District of Columbia and modified versions have been adopted in the remaining fourteen states. As such this is a national issue for state Courts to wrestle with and uniformity has not been the standard to date. The disputes at hand are:

1. Whether the Massachusetts Supreme Judicial Court (MA SJC) erred in its retroactive application of the 2006 Massachusetts' version of the UPIA, the MASSACHUSETTS PRUDENT INVESTOR ACT (MPIA) to two 1992 irrevocable trusts under a 1977 Will and whether that application is an unjustified taking of the Petitioner's property, a usurping of the Settlor's right to set the terms of her own legacy, and as such a violation of the 14th Amendment.

2. Whether the MA SJC erred in requiring the Settlor the insurmountable burden of seeing into the future, mandating the specific words from the 2006 MPIA be included into her 1977 Will executed twenty nine years earlier.

3. Whether the ability to see into the future was a power that the Settlor or her counsel possessed in 1977 or at any time thereafter.

4. Whether the MA SJC erred when they disregarded the clear intent of the Settlor in their application of the MPIA to her trusts.

5. Whether the MA SJC erred when they based their ruling on the validity of the Respondent's conclusory statements in contravention of the submitted evidence.

PARTIES TO THE PROCEEDINGS

The Petitioner is Peter Judson who is one of the Remainder Beneficiaries of the subject trusts of this action.

The Respondent is Robert I. Friedman who is the Co-Trustee and sole Fiduciary of the subject trusts of this action.

Denise Jo Levy is a Co-Trustee and the Income Beneficiary of the subject trusts of this action. The MA SJC and the Massachusetts Lower Court erred when they listed her as an Appellee as she never filed a written NOTICE OF APPEARANCE AND OBJECTION nor an AFFIDAVIT OF OBJECTIONS for this case.

STATEMENT OF RELATED PROCEEDINGS

In The Matter Of The Trusts Under The Will Of Helyn W. Kline
No. SJC-13579
Massachusetts Supreme Judicial Court
Judgment entered November 5, 2024

In Re: Trusts U/W Of Helyn Kline
No. BA22P1993P0
Commonwealth Of Massachusetts The Trial Court Probate And Family Court Department, Barnstable Division
Judgment entered August 3, 2023

In Re: Estate Of Hess Kline, Deceased
No. 1988-X3737
Court Of Common Pleas Of Montgomery County, Pennsylvania Orphans' Court Division
Judgment entered August 22, 2024

In Re: Hess Kline, Deceased
No. 637 EDA 2024
Superior Court of Pennsylvania
Ongoing Appeal

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

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[1] It should be noted that Justice Wendlandt of the MA SJC is citing her own December 13, 2023 case which was less than a year before her opinion in the November 5, 2024 subject case of this Certiorari. On its own initiative the MA SJC transferred both cases from the Appeals Court and both of these cases began in the very same Commonwealth Of Massachusetts The Trial Court Probate And Family Court Department, Barnstable Division. Different Judges oversaw each Lower Court action. It should be further noted that in the *Matter of the Estate of Mason* decision the MA SJC overturned the Lower Court and ruled the law did not apply retroactively.

Statutes

Regulations

Other Authorities

OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court, No. SJC-13579, is reported at 244 N.E.3d 1011 and 495 Mass. 1 and reproduced at App., infra, 1a. The opinion of the Massachusetts Lower Court, No. BA22P1993P0, is unreported and reproduced at App., infra, 43a-54a. The opinion of the Pennsylvania Lower Court, No. 1988-X3737, is unreported and reproduced at App., infra, 20a-42a.

JURISDICTION

The Massachusetts Supreme Judicial Court issued its opinion on November 5, 2024. That judgment became final on December 18, 2024, when the court denied the Appellant's Motion for Reconsideration. This ruling decided an important question of constitutional law that has not been, but should be, settled by this Court and their decision conflicts with the decision of a State Lower Court in Pennsylvania. This Court has jurisdiction under 28 U.S. Code § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 14th Amendment, Section 1 to the U.S. Constitution, "No State shall... deprive any person of life, liberty, or property, without due process of law...", is reproduced at App, infra, 72a, and relevant portions of the Massachusetts and Pennsylvania statutes are reproduced at App, infra, 57a-71a.

STATEMENT

Facts/Procedural History:

Hess Kline died testate, a resident of Cheltenham Township, Montgomery County Pennsylvania on August 7, 1985. In the decedent's Will, dated August 1, 1977, with a codicil dated April 28, 1982, two trusts were established for the benefit of the decedent's wife, Helyn W. Kline, a marital trust and a non-marital trust. Helyn died a resident of Barnstable County, Massachusetts on May 19, 1988, and upon her death executor David J. Kaufman (Kaufman) on January 3, 1989 filed a first and final accounting and petition for adjudication for the estate. In early 1992 six Generation Skipping Trusts were formed under Helyn's August 3, 1977 Will and Hess's August 1, 1977 Will[2] for the benefit of their daughters, Denise Jo Levy (Income Beneficiary) and Barbara Ann Eldridge (Sister), one for each under the Will of Hess Kline (Settlor) in Montgomery, Pennsylvania[3] and two for each under the Will of Helyn W. Kline (Settlor) for each in Barnstable, Massachusetts.[4] Under these separate trusts, each

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[2] These two Wills are virtually identical in their entirety and identical with reference to the issues in this case. Appendix references contained herein will be to the Helyn W. Kline Will.

[3] Subject of the PA action: TRUST UNDER THE WILL OF HESS KLINE FOR DENISE JO LEVY.

[4] Subjects of the MA action: TRUST UNDER THE WILL OF HELYN W KLINE FOR DENISE JO LEVY GST EXEMPT and TRUST UNDER THE WILL OF HELYN W KLINE FOR DENISE JO LEVY GST SUBJECT.

daughter would be entitled to the entirety of the trust's net income for the duration of their lives and upon their deaths, the principal would be granted to their children and the trusts would be dissolved. The Income Beneficiary has two living adult sons, Stephen H. Judson (Other Remainder Beneficiary) and Peter Judson (Petitioner), each of whom are equal contingent beneficiaries of the subject trusts upon her death.[5]

The original trustees named in the Will were Hess Kline, Nathan Silverstein and Kaufman. All but Kaufman predeceased the Settlor. On August 17, 1988, Kaufman designated the Income Beneficiary as successor co-trustee to serve with him, in accordance with Article Ninth of the Will.[6] On March 31, 2009, Robert I. Friedman (Respondent) was appointed successor co-trustee by Kaufman who then resigned, leaving the Respondent and the Income Beneficiary as co-trustees.

The Settlor's Will states:

> [m]y trustees shall distribute to each daughter all of the Net Income of her trust in convenient period installments.

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[5] The Income Beneficiary's third son, William H. Judson, died on 01/02/25.

[6] The Hess Kline successor document was fully executed on 12/24/88 and the the two Helyn W. Kline documents on 08/16/91.

The Will further states:

> [m]y Trustees may also distribute to a daughter or apply for her benefit, from time to time, such portion or portions of the principal of her trust as my Trustees, in their absolute discretion, may deem necessary **for any emergency affecting such daughter, taking into account her income and assets from all other sources. It is my intention that principal distributions be made to a daughter only under the most extraordinary circumstances and I do not anticipate the probability that any principal distributions will be required.** (emphasis added)

The Will further states:

> **...any fiduciary who is also a beneficiary shall not participate in any decision relating to any discretionary distributions of income or principal.**

The Will further states:

> [t]he term "fiduciaries" shall be deemed, where appropriate, to mean executors, trustees or guardians.

The Respondent claims that he has reviewed carefully the Income Beneficiary's "cost of living and her other resources" and taken "into account all of the other relevant factors required by the law" in making excess distributions to the Income Beneficiary but has failed to document this claim.

In 2001, serving as counsel to the Income Beneficiary and eight years before becoming trustee in 2009 of any Kline trust, the Respondent dissolved two other Hess Kline trusts, one for each of the daughters, situated in Philadelphia County, Pennsylvania. The Income Beneficiary had advised the Petitioner that this dissolution was for investment purposes and that the generation skipping clauses would still be in full force and effect.

In 2016, the Respondent attempted to dissolve yet two more Kline trusts in Massachusetts for "tax saving" purposes, deeming the change in tax law "an extraordinary circumstance in keeping with the provisions of the Trust" as justification for the dissolution. The dissolution was successful for the Sister's trust, but the dissolution for the trust for the Income Beneficiary never came to fruition because the Petitioner requested three changes that would not have affected either the tax savings or the income distributed to the Income Beneficiary. Those three changes were rejected by the Income Beneficiary and the Other Remainder Beneficiary.

The Income Beneficiary has not demonstrated that there is or was an emergency warranting the distribution of any principal funds as discussed supra. Further, the Respondent has or is still representing the Income Beneficiary in various capacities while remaining as a trustee in the underlying trusts.

The Petitioner attempted to contact the Respondent about these excess distributions but was informed by the Respondent that this was based on the power to adjust under the MPIA and 20 Pa.C.S. Secs. 8103 & 8104. After the Respondent refused multiple requests to relent in his invasion of the principal of the trusts, the Petitioner filed Petitions in Barnstable County, Massachusetts and in Montgomery County, Pennsylvania.

On August 3, 2023, the Massachusetts Lower Court issued a Memorandum of Decision and a Decree of Dismissal as to the Petitioner's General Trust Petition. On August 18, 2023, the Petitioner filed a Notice of Appeal. During the appellate process the case was transferred to the MA SJC sua sponte on March 15, 2024. In spite of the Lower Court and the Respondent falsifying the facts of the case, the MA SJC affirmed the Lower Court's decision on November 5, 2024. The Petitioner filed a Motion for Reconsideration on November 19, 2024 which the MA SJC denied on December 18, 2024.

On December 6, 2023, the Pennsylvania Lower Court issued an Order denying the Petitioner's

General Trust Petition. The Pennsylvania Lower Court leaned heavily on the Massachusetts Lower Court decision and just like the MA SJC ignored the Massachusetts Lower Court and the Respondent falsifying the facts of the case. On January 5, 2024, the Petitioner filed a Notice of Appeal which is currently underway.

Uniform Principal And Income Act:

The UPIA has been adopted in thirty six states plus the District of Columbia and modified versions have been adopted in the remaining fourteen states. As such this is a national issue for state Courts to wrestle with and uniformity has not been the standard to date with the MA-SJC, the Massachusetts Lower Court, and a Pennsylvania Lower Court[7] having all weighed in, each one delivering differing, sometimes contradictory opinions.

There is no dispute from the MA SJC that the terms of the trusts, written twenty nine years before the 2006 MPIA was enacted, prohibit the Income Beneficiary from receiving any distributions of principal unless there is the extraordinary event of an emergency affecting her and the Settlor did "not anticipate the probability that any principal distributions will be required." The dispute at hand is whether the "power to adjust" is the same as

[7] The Pennsylvania Lower Court decision is under appeal in Montgomery County, PA.

distributing or invading the principal and do those exact words "prohibiting power to adjust", or some form of it, need to be written into a Will that predates the statute.

The comment sections of the UPIA state, 1962 "...the Settlor's intent is the guiding principle which should control the disposition of all receipts", 1995 & 1996 "...provisions in the governing instrument are paramount", 1997, 2000 & 2008 "...provisions in the terms of the trust are paramount." The Courts have weighed in as well "The testator's intent is the polestar in the construction of every Will and that intent, if it is not unlawful, must prevail."[8]

The UPIA is a default act but cannot be applied by default if the governing instrument has different provisions. The Settlor sets the rules for their estate and those rules cannot be usurped or overruled by legislative statutes. The UPIA says as much. This is the very reason that the trusts in question are called TRUST UNDER THE WILL OF HELYN W. KLINE not TRUST UNDER THE FIDUCIARY FRIEDMAN. The UPIA clearly mandates to tread lightly, to remember that the polestar is the Will, and that the Will is paramount, and nothing usurps its supremacy. In their opinion the MA SJC seemed much more concerned with the intent of the Legislature than the intent of the Settlor when they wrote:

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[8] *In re Est. of Cassidy* 2023 Pa. Super 101, 296 A.3d 1219, 1223 (2023) (citing *In re Wilton*, 921 A.2d 509, 513 (Pa. Super. 2007)

> [A] statute *must be interpreted according to the intent of the Legislature* ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated. (emphasis added) (App., infra, 7a)

What the MA SJC failed to understand is that the intent of the legislature is to defer to the intent of the Settlor and that the laws in place at the time of the drafting of the Will inform us to that Settlor's intent which cannot be usurped by a mis-interpreted retroactive application of future laws running counter to it.

The 14th Amendment:

14th Amendment, Section 1: "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, *or property, without due process of law...*" (emphasis added)

The MA SJC's unconstitutional insistence on requiring the 1977 Will to not be "silent as to whether the trustee may adjust between principal

and income" (App., infra, 16a) is hard to reason as that would require the Settlor to see twenty nine years into the future so she could have inserted from a yet to be written law those exact words "prohibiting the power to adjust" into her trust document. How would that be possible? What mechanism could the Settlor have used to execute such a task? The MA SJC never enumerated on that point. As it stands, the retroactive application of the MPIA is an unjustified taking of the Petitioner's property[9] and a usurping of the Settlor's right to set the terms for her own legacy, both of which are enshrined in the 14th Amendment.

The Juliet Rule: A rose by any other name would still be an invasion of principal... the Power to Adjust *is* an Invasion of Principal:

The MA SJC writes:

> The provision of the Will on which Peter relies does not discuss, much less clearly preclude, the power to adjust. Instead, the provision addresses only distributions of principal; it is silent as to whether the trustee may adjust between principal and income... Thus, the Will does not contain a "different provision" that clearly denies the

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[9] One third of the principal of the trusts became the property of the Petitioner when the trusts were formed in 1992.

> trustee the power to adjust conferred by the act. (App., infra, 16a)

But the MA SJC overlooked 203D § 4 (b) (7) which contradicts that assumption:

> In deciding whether to exercise the power conferred by subsection (a), a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant... **(7) whether the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income...** (bold emphasis added) (App., infra, 58a-59a)

Here the law clearly states that the fiduciary shall consider whether the Will permits any invasion of principal for the power to adjust to be permissible and as the Respondent's Attorney Christopher Lindstrom stated in the 09/09/24 MA SJC hearing, distributions are an invasion of principal as well. Whether it be a distribution of principal or the power to adjust *both of these acts require an invasion of principal*, that is the very act that connects them, the very act that must be executed before they themselves are enacted, an act which according to

the Will can only happen in an emergency and as such according to 203D § 4 (b) (7) the law does not apply as the terms of the trust are paramount and take precedence.

The Falsification of the Facts:

The MA SJC knew full well that the Respondent committed an ethics violation, the "falsification of the facts", when he purposely mis-quoted a tax provision of the Will, Article Seventh, smugly calling it "the plain language of the Trusts" in his 03/21/23 Massachusetts Lower Court Brief :

> ...the terms of the Will, Paragraph 2 of Article Seventh, provides for fiduciaries *"in their absolute discretion, to make or not make adjustments or apportionments among the beneficiaries or as between principal and income."* As such, even if the Act did not apply to Friedman's decision to shift income to principal, he was expressly authorized to do so under the plain language of the Trusts. (emphasis added)

Inexplicably the Massachusetts Lower Court did not even take the time to actually read the Will, repeating verbatim the heavily edited version of the trust document in their 08/03/23 decision. (App., infra, 54a)

All of this was brought to the attention of the MA SJC in the Petitioner's appellate brief. Below is the full Article Seventh of the Will:

> **I direct that all inheritance, estate, transfer and succession taxes, federal, state and foreign, of any kind whatsoever, which may be due and payable as a result of my death, together with all interest and penalties thereon, with respect to all property includible for such tax purposes (except with respect to any property over which I may have a general power of appointment, which property shall bear its proportionate share of such taxes, interest and penalties), shall be paid out of the principal of my residuary estate. I authorize my fiduciaries to pay such taxes at such time or times as they, in their absolute discretion, may deem advisable.**
>
> **My fiduciaries,** in their absolute discretion, **shall have the authority to claim items of deduction in either the income tax returns or estate tax return, as they may decide, without the**

> **consent of the beneficiaries, without liability on their part for so doing, and, in their discretion, to make or not** to make adjustments or apportionments among the beneficiaries or as between principal and income.
>
> (bold emphasis added to the Respondent & the Massachusetts Lower Court's omissions)

Instead of being on guard for other areas of mis-information from the Respondent and in contravention of the facts presented to the Court by the Petitioner in his 11/19/24 Motion for Reconsideration (App., infra, 72a-80a), the MA SJC went their own way when according to the Justices themselves they relied solely on "conclusory" statements and a "bare-bones affidavit" from the Respondent which had little basis in fact.

The Smoking Gun of Bias:

The MA SJC's reference to a UPIA comment is designed to purposely mis-lead as they omitted the very last line which negates their premise of requiring the 1977 Will to not be "silent as to whether the trustee may adjust between principal and income". (App., infra, 16a) In other words, the deleted line clearly states that Wills "executed *after the adoption of this Act* should specifically refer to

the power to adjust if the settlor intends to forbid its use", it does not apply this rule to Wills executed *before this Act.* (emphasis added) The MA SJC has based their whole decision on the retroactivity of the 2006 MPIA and their own referenced UPIA comment invalidates that very notion. More importantly the Court can not negate a Will and its intent with language from a law that does not exist at the time of its enactment. Below is the full comment which appears in the 1997, 2000, and 2008 UPIA's:

> **Trust terms that limit a power to adjust. Section 104(f) applies to trust provisions that limit a trustee's power to adjust.** Since the power is intended to enable trustees to employ the prudent investor rule without being constrained by traditional principal and income rules, an instrument executed before the adoption of this Act whose terms describe the amount that may or must be distributed to a beneficiary by referring to the trust's income or that prohibit the invasion of principal or that prohibit equitable adjustments in general should not be construed as forbidding the use of the power to adjust under Section 104(a) if the need for adjustment arises because the trustee is operating under the prudent

> investor rule. **Instruments containing such provisions that are executed after the adoption of this Act should specifically refer to the power to adjust if the settlor intends to forbid its use**. See generally, Joel C. Dobris, Limits on the Doctrine of Equitable Adjustment in Sophisticated Postmortem Tax Planning, 66 Iowa L. Rev. 273 (1981). (bold emphasis added to the MA SJC's omission[10])

The Petitioner has become accustomed for the Lower Courts to mis-lead, mis-quote, mis-paraphrase, and generally be flexible with the facts of this case to the point of falsification, but even so he expected a higher standard from the Supreme Court of Massachusetts. Obviously that expectation was a mistake. For the MA SJC to be so brazen as to omit the sentence that negates their very demand of the 1977 Will to specifically refer to the power to adjust clearly shows a bias from the Court in its advocation for a pre-determined result rather than an adjudication based on the true and complete facts of the case. The MA SJC's omission creates the polar opposite impression of what the comment

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[10] It should be noted that the Respondent in his appellate brief also quoted this UPIA comment with the very same omission. So either the MA SJC ignored this deception from the Respondent and joined in on it or just like the Massachusetts Lower Court they did not even take the time to actually read the original comment.

actually says and the Court very well knew this otherwise that edit would not have been made. Ultimately this 1981 comment has no relevance to the 1977 Will and the intent of the Settlor as she would not have been able to consider it without the ability to see into the future and without violating her 14th Amendment rights and ultimately violating the 14th Amendment rights of the Petitioner.

Intent of the Respondent, the Fox Guarding the Henhouse:

The MA SJC erred in their disregard for the huge red flag of the clear intent of the Respondent and the Income Beneficiary to completely dismantle the Settlor's legacy with multiple trust dissolution attempts, succeeding in dissolving ***three out of eight*** of the Kline trusts in 2001[11] & 2016 with all of the proceeds going to the Income Beneficiary and her Sister who is also an Income Beneficiary of half of the trusts. It is clear that the Respondent's "power to adjust" campaign is just an end run around his failed 2016 dissolution[12] and the MA SJC refused to take note of this.

Actions Speak Louder than Words:

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[11] The Petitioner acquiesced to the 2001 dissolution as the Income Beneficiary advised him that it was for investment purposes only and that the generation skipping clauses would still be in full force and effect which has turned out to be a false assurance.

[12] The Income Beneficiary's dissolution failed while her Sister's succeeded.

The Settlor's intent is crystal clear as can be seen by the facts surrounding the 2001 trust dissolution. Hess Kline executed a Philadelphia County Deed of Trust dated June 8, 1939 for the benefit of the Income Beneficiary and named himself as the original Trustee thereof. The Deed of Trust provided that upon the Income Beneficiary's attaining the age of forty years, the trust would terminate and the balance of principal then remaining would be distributed, outright, to her. At the urging of Hess Kline and prior to attaining the age of forty years, the Income Beneficiary executed an agreement dated March 6, 1972 providing for the continuation of the trust as a Generation Skipping Trust for her lifetime. Five years later Hess Kline and the Settlor executed their wills with the very same Generation Skipping terms including a clear prohibition on the distribution of principal outside of an emergency affecting the Income Beneficiary.

What is crystal clear by Hess Kline's actions in 1972 is that both he and the Settlor did not want the Income Beneficiary to have free access to the principal of the 1939 trust nor the 1992 trusts and the Respondent's violation of their clear intent drafted into their trust documents is an abuse of his fiduciary discretion.

Standard Accounting Rules for Items of Deduction:

In their opinion the MA SJC writes:

> The Will distinguishes between the authority of the trustees to make "distributions" and the trustee's power to make "adjustments." Compare Article Fourth (setting forth limitations on "principal distributions" to Levy [Income Beneficiary]) with Article Seventh (discussing power of trustee to make "adjustments" between principal and income for tax purposes). (App., infra, 17a)

Article Seventh contains two paragraphs and as a whole is about taxes. The MA SJC was referring to Paragraph 2[13] which is about deductions, specifically the claiming of items of deduction in either the estate tax return or items of deduction taken yearly on income tax returns. This Paragraph allows the fiduciary the freedom to take items of deductions such as when he sells an asset and purchases a new asset which could trigger capital gains taxes. Capital gains taxes are considered a deduction and as per standard IRS accounting rules they would lower the net income of the trusts.[14] In this instance the Settlor did not want to prevent the fiduciary from keeping the net income stable for the Income Beneficiary nor did the Settlor want to prevent the

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[13] This is the very same section of the Will that the Respondent and the Massachusetts Lower Court purposely mis-quoted.

[14] Net Income is calculated as such: Net Income = Gross Income - Deductions

fiduciary from managing the investments as he saw fit. So in essence the Settlor has given the fiduciary the flexibility to either apply or not to apply this capital gains deduction to the gross income in any given year *which would not be following standard accounting rules* which is why the Settlor felt the need to put this language into her Will. The Settlor considered this discretion an "adjustments or apportionments" but in no way could she have considered it a free license to distribute principal in violation of Article Fourth, in spite of the MA SJC out of context quotation.

It should be noted that in no circumstance does Article Seventh, Paragraph 2 give the fiduciary the right to exceed the previous year's net income[15] where there may have not been such capital gains tax deductions nor does it give him the right to exceed the trusts' gross income which the Respondent has done in *three out of the last four years.*

Requesting is Participating:

The Will states:

> ...any fiduciary who is also a beneficiary shall not participate in any decision relating to any

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[15] In violation of the Will the Respondent has distributed in excess of net income every year that the Petitioner has received trust account statements, dating back to 2015, perhaps even longer.

> discretionary distributions of income or principal under the terms of my Will.

The MA SJC erred in their interpretation of this section of the Will when in their opinion they write:

> ...although the Will bars a trustee "who is also a beneficiary [from] participat[ing] in any decision relating to any discretionary distributions of income or principal," it neither restricts the other trustee from acting nor prohibits Levy from asking the trustee for distributions. (App., infra, 19a)

This is how the highest Court in Massachusetts decided to conclude their opinion with the most absurd notion that *asking* is not the same as *participating*? A request is the very essence of participation yet the Court want us to believe otherwise? The Courts do not have the discretion to re-write the dictionary, to re-write the meaning of words, and this is exactly what the MA SJC has attempted to do here.

No Different Provision, No Limit to Power to Adjust:

The MA SJC makes an incorrect claim when they state that:

> Importantly, the MPIA [203D § 4 (f)] identifies the type of "different provision" required to preclude a trustee from exercising the power to adjust under the act. (App., infra, 12a)

203D § 4 (f) in full:

> Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection (a). (App., infra, 62a)

As one can see, nowhere in 203D § 4 (f) do the words a "different provision" appear and the MA SJC's attempt to insert them into the statute is one more error on their part. The plain language of the law shows us that 203D § 4 (f) is not about identifying a "different provision" but about identifying words in the terms of the trust that limit the "power to adjust" and nowhere in the trust instrument are those limiting words ever used which would be a necessity for the triggering of this clause, again how would that have been possible for a Will written twenty nine years earlier? While the Will's Article Seventh's allows for the fiduciary "to claim items of deduction in either the income tax returns

or estate tax return"... "and in their discretion, to make or not to make adjustments or apportionments among the beneficiaries or as between principal and income" this allowance is a granting *not a limiting* of that power therefore it would not trigger 203D § 4 (f). Furthermore the MA SJC is not consistent with its own logic when they write:

> ...because the trust instrument, a Will, *does not clearly evince the testator's intent* to deny the trustee the power to adjust, the MPIA permitted the trustee to adjust between principal and income... (emphasis added) (App., infra, 2a)

The MA SJC must use this same logic to show where the trust instrument clearly evince the testator's intent *to limit* the trustee the power to adjust, but they cannot because nowhere does the trust instrument evince such limitation.

And one needs to remember that according to the MA SCJ's own reference to the UPIA comment (App., infra, 13a) the line the Court purposely omitted[16] negates the very notion that 203D § 4 (f) could even be applied to the trusts since the 1977 Will and the 1992 trusts pre-date the enactment of the 2006 law by several years. Again, nowhere in

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[16] "...Instruments containing such provisions [limiting a power to adjust] that are executed after the adoption of this Act should specifically refer to the power to adjust if the settlor intends to forbid its use."

the trust document is the "power to adjust" mentioned. According to this UPIA comment, the MPIA's requirement for the "power to adjust" to be specifically referred to is reserved for instruments executed *after the adoption*" of the act *not before,* reinforcing the notion that Courts can not negate a Will and its intent with language from a law that does not exist at the time of its enactment. The MA SJC very well knew this which is why they attempted to hide the line from plain view.

Burden on the Beneficiary:

In the MA SJC hearing the Respondent's Counsel Lindstrom referenced 203D § 5 (d) when he stated "the burden is on the party objecting to the trustee's action" regarding an abuse of discretion.

203D § 5 (d):

> A trustee may seek Court determination as to whether a proposed exercise or non-exercise by the trustee of a discretionary power *will* result in an abuse of discretion. A beneficiary objecting to the relief sought shall have the burden of establishing that an abuse of discretion *will* result. (emphasis added) (App., infra, 64a)

Counsel Lindstrom goes on to state "Now, the procedural posture considered in that Section 5 is

slightly different than ours..." Actually the procedural posture for this section is the polar opposite as it refers to a *future* event not a *past* one. In other words the trustee may go to the Court prior to enacting the adjustment to avoid the very circumstance that we are in with this case. It would indicate that the Respondent at a minimum should have notified all of the beneficiaries of his intention to use the power to adjust *before it was actually implemented*, giving everyone an opportunity to establish for a Court "that an abuse of discretion *will result*" not that that an abuse of discretion *had resulted*.[17] Unfortunately in 2022 the Respondent continued his long tradition of keeping the Petitioner in the dark as it was four months after the fact that the Petitioner, on his own initiative, discovered the excess distributions to the Income Beneficiary due to the Respondent's covert power to adjust campaign. In essence the Petitioner had no opportunity to exercise his rights contained in 203D § 5 (d) as it was intended.

Novel Arguments:

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[17] In spite of this, the Petitioner attempted to give the MA SJC all of the missing facts of the case in his Motion for Reconsideration (App., infra, 72a-80a) but the Court turned a blind eye, rejecting the motion outright. Shouldn't the MA SJC have been curious to the facts of the case, especially with the submitted Motion for Reconsideration and all of the red flags? With such an important precedent setting case they had an obligation, as Justice Kafker often says "to get it right", which they failed to do.

As arguments used by the MA SJC were novel, had never been presented by the Respondent, and were first known to the Petitioner with the MA SJC's 11/05/24 opinion, as per Massachusetts Superior Court Rule 9D (1), the Petitioner submitted in his Motion for Reconsideration (App., infra, 72a-80a) newly discovered evidence contained in the monthly trust account statements that could not be discovered through the exercise of due diligence.

In the MA SJC hearing Justices Dewar & Wendlant and the Respondent's Counsel Lindstrom stated that when implementing the "power to adjust" the monthly trust account statements would need to reflect the movement of principal to income *then be distributed* to the Income Beneficiary. Unfortunately the monthly statements do not reflect this movement of principal to income. In fact the trust statements show the Respondent had not been using the power to adjust, *he had been distributing principal directly to the Income Beneficiary* otherwise he would not have exceeded net income in every single year.

When the Respondent began his adjustments in February of 2022, the 02/28/22 monthly trust account statements showed transactions in the Disbursement Activity sections as a "Beneficiary Distribution January and February Catch Up For 2022 Increased Distributions". Calling this "Increased Distributions" goes against the very core of the MA SJC's ruling which stated that:

> The provision of the Will on which Peter relies does not discuss, much less clearly preclude, the power to adjust. Instead, the provision addresses only distributions of principal; it is silent as to whether the trustee may adjust between principal and income. (App., infra, 16a)

In these 02/28/22 statements the Respondent himself has labeled this as a distribution not an adjustment, repeating that description in the 07/31/22 statements, calling transactions a "Transfer Principal Cash To Income Distribution". As a result the Respondent had violated the MA SJC's ruling as the Respondent clearly states that he is distributing "Principal Cash" to the Income Beneficiary. After these transactions income never increased in the monthly trust account statements and as such distributions exceeded net income in violation of the term of the trusts.[18]

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[18] There are only three times that the Respondent described his increased distributions and it was not until three years after he began his power to adjust campaign and several months after the MA-SJC's ruling that he finally realized he had to correct himself and reverse engineer his description to match the Court's decision. Unfortunately that still does not negate the plain fact that the Respondent has been distributing principal to the Income Beneficiary in violation of the term of the trusts. From the 01/31/25 statements the Respondent's third description goes as such: "Transfer To Income From Principal For Period Ending 12/31/24 To Reflect Exercise of Power To Adjust Through That Date".

Cherry Picking Synonyms / Distinction without a Difference:

The MA SJC cherry picked language from 203D, § 4 (a) as such:

> See G. L. c. 203D, § 4 (a) ("A trustee may adjust between principal and income if . . . the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income . . .") (App., infra, 16a-17a)

203D, § 4 (a) in full:

> A trustee may adjust between principal and income if **the trustee considers it necessary if the trustee invests and manages trust assets as a prudent investor,** the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, **and the trustee determines, after applying the rules in subsection (a) of section 3, that the trustee is unable to comply with subsection (b) of said section 3.** (bold emphasis added to omissions) (App., infra, 58a)

And here is 203D, § 3 in full:

> (a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of this chapter, a fiduciary:
>
> **(1) shall administer a trust or estate in accordance with the terms of the trust or the Will, even if there is a different provision in this chapter;**
>
> (2) may administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the Will, even if the exercise of the power produces a result different from a result required or permitted by this chapter;
>
> (3) shall administer a trust or estate in accordance with this chapter if the terms of the trust or the Will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and
>
> (4) shall add a receipt or charge a disbursement to principal if the

> terms of the trust and this chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.
>
> (b) In exercising the power to adjust under subsection (a) of section 4 or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a Will, or this chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, **except to the extent that the terms of the trust or the Will clearly manifest an intention that the fiduciary shall or may favor 1 or more of the beneficiaries.**[19] A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries. (bold emphasis added) (App., infra, 57a-58a)

In spite of the MA SJC's attempt to redefine the meaning of words, the 1977 Will does contain "a

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[19] The Will favors the Income Beneficiary with 100% of the trusts' net income and it favors the remainder beneficiaries with 100% of the trusts' principal absent an extraordinary event of an emergency affecting the Income Beneficiary.

different provision" than the 2006 law therefore the Respondent shall administer the trusts in accordance with its terms which prohibit the Income Beneficiary from receiving any distributions of principal unless there is the extraordinary event of an emergency affecting her and in this instance no emergency has been claimed. Once again, whether it be a distribution of principal or the power to adjust *both of these acts require an invasion of principal*, that is the very act that connects them, the very act that must be executed before they themselves are enacted. No amount of word play from the MA SJC can change the actual act which can be described with many synonyms such as a distribution, adjustment, apportionment, re-allocation, etc, etc, etc of principal... ***but in the end they are all an invasion of principal.***

The MA SJC writes in their opinion:

> he [the Petitioner] repeats his mistaken argument relying on the provision of the trust regarding principal distributions to Levy for emergencies only. As set forth supra, that provision concerns distributions of principal and not adjustments between principal and income. Thus, it says nothing about Kline's intent to prohibit adjustments. (App., infra, 17a-18a)

Once again to state the obvious and to negate the MA SJC's insistence on applying a distinction without a difference, as per 203D § 4 (b) (7)[20] and the Respondent's own counsel the distribution of principal or the power to adjust are synonyms for the same underlying act, *an invasion of principal,* and the Court's repeated mandate that the specific words prohibiting the "power to adjust" from the 2006 MPIA be included into the Settlor's 1977 Will[21] executed twenty nine years earlier is an incomprehensible and impossible burden to set, a burden which has no place in such an important Court decision that if left unchanged will set an unconstitutional and error filled precedent for Courts across the nation.

The Myth of Significant Growth:

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[20] 203D § 4 (b) (7): "In deciding whether to exercise the power conferred by subsection (a), a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant... **(7) whether the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income...**" (bold emphasis added) (App., infra, 58a-59a)

[21] A mandate that runs counter to the MA SJC's own quoted UPIA comment once the Court's omitted last line is added back in: ""...Instruments containing such provisions [limiting a power to adjust] that are executed after the adoption of this Act should specifically refer to the power to adjust if the settlor intends to forbid its use."

The Respondent's claim of significant growth is akin to claiming the earth is flat. Saying it's so, does not make it so.

The Respondent has complete discretionary power of administration for the trusts, unfettered control of the investments, yet wants to penalize the remainder beneficiaries for his poor investment strategies. The opposite of significant growth, he has managed the 32 year old trusts, two in Massachusetts and one in Pennsylvania, in a manner that is above inflation by a mere 5.92% by the end of 2024. The Respondent's Counsel Lindstrom agreed as he stated the trusts should be "40 times higher". In other words, the buying power of the trusts has remained *virtually frozen in place* for over three decades. From 1992 to 2024 the value of all the trusts went from just under 1.53 million to just over 3.72 million. During the same period the Dow Jones increased by 1,329%. If the trusts had been invested in a simple Dow Jones Index Fund during the same period they would have had a value of just over 20.29 million. During the same period the S&P 500 increased by 1,410%. If the trusts had been invested in a simple S&P 500 Index Fund during the same period they would have had a value of just over 21.54 million. During the same period the Nasdaq increased by 3,295%. If the trusts had been invested in a simple Nasdaq Index Fund during the same period they would have had a value of just over 50.33 million.

The Base Standard of Growth:

The minimum Base Standard of Growth should have been following the Massachusetts GST Exempt Trust's example. From 1992 to 2024 this trust increased by 433.04%. If the other trusts had followed the Respondent's own investment strategy for the GST Exempt Trust by the end of 2024 they would have had a value of over 6.61 million.

Negative Growth:

From 1992 to 2024 the Massachusetts GST Subject Trust has been frozen in time, only invested in mutual bond funds and only producing tax free income, actually declining by 19.25% from its original value. It should be noted that this is the very trust that the Respondent attempted to dissolve in 2016 at the request of the Income Beneficiary and the Other Remainder Beneficiary.

Exceeding Net Income Every Year:

The MA SJC was aware that this "power to adjust" campaign was not a one time event as the law mandates but an ongoing monthly excess distribution that escalated in 2020. It appears to have been going on ever since the Petitioner began to receive monthly trust account statements in 2015, perhaps even longer. The Respondent appears to have no intention of stopping.

Dividend Bearing Stocks & Tax Free Mutual Funds:

As was noted in the MA SJC hearing and reflected in the monthly trust account statements, the Respondent's investment strategies for the three trusts he manages has not been impartial and have been solely for the benefit of the Income Beneficiary as can be seen from the fact that every single investment in the trust's portfolios are exclusively dividend bearing stocks and tax free interest bearing mutual funds.

Liquidation Campaign:

The law allows for the changing of investments not liquidation. It is intended to allow the Respondent to change how the principal is invested by selling assets and re-investing them in other assets, benefiting both the Income Beneficiary and the remainder beneficiaries. This is primarily how the Respondent used to handle the trusts. From 2018 on he changed his strategy and began his liquidation campaign, selling but not re-investing $525,856 of the trusts' stock assets, distributing a majority of the proceeds to the Income Beneficiary.

Capital Gains Taxes:

In their opinion the MA SJC repeated the trustee's assertion that:

> ...the modified strategy [investments that pay a higher yield] would likely have triggered a tax on the capital

> gains realized following the needed sale of equity assets. (App., infra, 4a)

If only the Court had looked at the submitted evidence in the Petitioner's Motion for Reconsideration (App., infra, 72a-80a) they would have seen the plain fact that the Respondent's liquidation campaign has caused the very issue he falsely claims to have avoided. In other words, from 2020 to 2023 his liquidation campaign *has tripled the average yearly capital gains taxes paid by the trusts* as compare to the previous six years.

Financial Status of the Income Beneficiary:

The Income Beneficiary has written several times to the Petitioner that she has 1 million dollars in a Morgan Stanley portfolio, even going so far as to say at the start of the power to adjust campaign that she had "earned about $250,000" and "invested the money which is doing very well" and that she was not "running debt". This 1 million dollars came from the 2001 trust dissolution orchestrated by the Respondent, the Income Beneficiary, and the Other Remainder Beneficiary so the Respondent should know full well of its existence if he truly considered all sources of income and "other resources" for the Income Beneficiary.

Illegal to Invade Principal:

The Petitioner has received multiple written correspondences where the Income Beneficiary

claims that it would be illegal for her to invade the principal of the trusts. The Respondent may argue that it is not relevant because the Income Beneficiary is not a lawyer and does not know the law. That may be so, but the Income Beneficiary does know the intent of the Settlor as the Settlor was her mother.

REASONS FOR GRANTING THE PETITION

The MA SJC violated the 14th Amendment when they retroactively applied the language from the 2006 MPIA to the Settlors 1992 irrevocable trusts under a 1977 Will, negating the Will and its intent which is a usurping of the Settlor's right to set the terms for her own legacy and an unjustified taking of the Petitioner's property.

The MA SJC considers the intent of the Settlor window dressing, how many times does the law protect it and the Court ignored them all? All three Courts have selectively cited the Will and the law resulting in a mis-representation of both with the MA SJC seeming more concerned with he intent of the legislature over the intent of the Settlor. The law takes great care to protect the Settlor's rights which all of the Courts have trampled upon in pursuit of their pre-determined opinions of the case. Every one of these Courts has chosen to ignore words that are inconvenient for their rulings, believing that they have the discretion to re-write the dictionary, to re-write the meaning of words, to even re-write the Will. Unless the Supreme Court intervenes, these

types of irrevocable trust are now at risk from abuse from rogue fiduciaries & from mis-guided Courts across the nation.

Specific to the MA SJC, the Petitioner believes that they erred in their overlooking of the MPIA which defers to the terms of the trust's rule on the invasion of principal which according to the Will can only occur in an emergency. It is a fact that the power to adjust can not occur without first invading the principal and the law itself equates the power to adjust to invading principal. But even so, if the MA SJC believes that the power to adjust could be applied to the trust it is clear that there has not been significant growth, the remainder beneficiaries not the Income Beneficiary have been harmed, and the Respondent has not been a prudent investor nor has he been impartial.

Ultimately the Courts have a role to impartially adjudicate the cases presented to them based on all the facts not to advocate for a predetermined result based on cherry picked, out of context phrases and self serving conclusory statements. Each Court that has ruled on this matter has chosen the latter path, with one even going so far as to falsify the facts of the case with the other Courts ignoring that indiscretion. Every Court that has ruled on this matter seems to refuse the notion that an abuse of discretion *can and does* occur and that they themselves have a very real role in making sure that it is remedied. The MA SJC has had that opportunity to actually see the facts of the case with

the Petitioner's Motion for Reconsideration (App., infra, 72a-80a) but they clung to the phrase "Justice is Blind", seeing the phrase differently than the rest of us, substituting impartiality for actual blindness to the facts. Unfortunately this is not some Oedipal Greek tragedy played out on a stage but a precedent setting decision that has real world consequences for Settlors who will no longer feel confident that their Wills will be honored and for those that may no longer be able to speak for themselves and for vulnerable beneficiaries whose basic rights will be trampled upon by abusive trustees and their complicit fiduciaries aided by Courts abdicating their oversight responsibilities in favor of protecting an industry's unfettered grasp for unchecked power. By their own admission, the MA SJC based their opinion on a "bare-bones affidavit" and "conclusory" statements from the Respondent. The Petitioner tried his best show them what they were told had little basis in fact. By the MA SJC's standard it is sufficient for a fiduciary to merely say "I am a prudent investor and have created significant growth" to keep a Court satisfied, freeing the trustee from any and all adjudications of abuses of discretion. In fact now, if the MA SJC's precedent setting ruling stands, there may very well be no oversight of any trustee by any Court in any state potentially besmirching the good intentions of every trustee by the bad acts of an unchecked few.

Moreover, this matter has grave implications for the application of the UPIA in every state in which it was adopted. To be specific, thirty six states and the

District of Columbia have adopted UPIA and modified versions have been adopted in the remaining fourteen states. It is unknown how many legacies which were created prior to the adoption of the Power to Adjust are now subjected to this new power, despite the settlors not having had the opportunity to reject the usage of that power when drafting their trust documents. These legacies fund individuals and institutions who rely on the present and future income to plan their objectives and goals. Thus, allowing for a revision to a core statute that governs these legacies is detrimental to the type of planning that occurs based on these trusts and is antithetical to ordered liberty. Without this Court's intervention to prevent such a taking in the instant case, all trusts become vulnerable to takings, legalized under the guise of ex-post-facto legislation.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and allow the Petitioner to address this claim on its merits.

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