COLLAS CRILL

Family ties: When trusts, secrets and DNA collide... and when "children" means more

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“When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean — neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master — that’s all.”

(Through the Looking Glass, Lewis Carroll)

There can be no doubt that a trust is a powerful wealth planning tool; through the use of a trust structure, individuals can protect and preserve family assets, transfer wealth in a particular way, mitigate tax liabilities and meet estate planning objectives.

In most cases, the terms on which the settlor and the trustees have agreed that the trust fund will be held and administered is set out in a trust instrument. However, although designed to bring clarity, courts around the world are often tasked with interpreting the provisions of a trust instrument in order to establish the wishes of the settlor, long after they have died.

In the recent case of *Marcus -v- Marcus* [2024] EWHC 2086 (Ch), the English Court was required to determine whether a discretionary trust created in favour of the Settlor's "children and remoter issue" and their spouses could benefit a stepchild, the Settlor during his lifetime never having had reason to doubt the paternity of the beneficiary in question.

On examining the circumstances in which the Settlement was established, the Court felt able to expand the definition of "*children*"; however, far from opening the floodgates to claims by stepchildren, this case serves to highlight the importance of context in understanding the true intention of a settlor.

Background

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The Settlor was a successful entrepreneur who in 1962 established a business manufacturing and selling toys. In 1973, the Settlor married his wife, Patricia, and together they raised two boys, Edward born in March 1978 and Jonathan, born in December 1981.

Over the years the business grew and diversified and in 2017 "demerged" into two groups of companies for tax reasons. In 2003, and on advice from their advisers, the Settlor and his wife each established a discretionary trust in similar terms designed to postpone payment of Capital Gains Tax. The beneficiaries of the trust established by the Settlor (the **Settlement**) were stated to be "the children and remoter issue of the Settlor now in being or born hereafter", their respective spouses, widows and widowers and any charities.

The Settlor believed himself to be the biological father of both Edward and Jonathan and indeed the boys were raised believing themselves to be brothers. However, in 2010, Patricia told Edward that the Settlor was not his biological father. Edward kept his mother's secret and the Settlor died in 2020, unaware of his wife's infidelity.

In 2023 and in the midst of a family fall-out, Jonathan learnt that Edward was, in fact, his half-brother and brought proceedings before the High Court in England disputing Edward's entitlement to the assets of the Settlement on the basis that he was not a "child" of the Settlor. The Court was asked to determine:

1. whether, on the balance of probabilities, Edward was the biological son of the Settlor; and

2. if not, whether the term "*children*" in the trust instrument could include stepchildren such that Edward was entitled to benefit from the Settlement.

As at the date of the hearing in July 2024, the value of the shares held in the Settlement was estimated to be £14.5million.

Family secrets - Edward's legitimacy

The Court noted the rebuttable presumption that a child born during a marriage is the child of the husband, and further accepted that whilst the Settlor being named as Edward's father on his birth certificate was prima facie evidence of paternity, it was not determinative.

In light of the DNA evidence and the witness evidence given, the Court held that on the balance of probabilities, Edward was not the biological son of the Settlor. As a result, the Court was required to determine the proper construction of the word "*children*" as used in the Settlement.

Construction – all a question of context?

Applying the natural and ordinary meaning of the word "*children*", the Court held that the term does not include stepchildren unless the context indicates otherwise.

Turning to consider whether the context provided by the Settlement was enough to displace the natural meaning of the word, the Court described its task as being to ascertain "the objective meaning of the language

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which the parties have chosen to express their agreement". In approaching this task, the Court was required to consider what a reasonable person, in possession of all of the background knowledge which would have been available to the Settlor at the date of execution, would have understood the words used by the Settlor to mean.

The Court concluded that in the circumstances, a reasonable person would have understood "*children*" to have included Edward – the Settlor and his wife appeared to have a stable marriage and Edward and Jonathan were raised in the family unit as brothers. The Settlor believed them both to be his biological children and there was no evidence to suggest that the Settlor would have wanted them to be treated differently from one another.

Noting that Patricia had established a mirror settlement on the same day and for the same reasons, the Court noted the stark inequality that would have arisen had the natural meaning of "*children*" been applied.

The mastery of language

The importance of using clear and precise terms in order to reflect a settlor's true intentions is well known. However the case of Marcus -v- Marcus highlights the need for practitioners to give careful consideration to all possible eventualities and outcomes.

This is particularly important as the use of ancestry services such as 23 and Me becomes more prolific, and as the definition of "family" becomes more fluid - does a settlor wish for adopted children to benefit, or those born via sperm or egg donor to benefit? Is a trust established for the benefit of the "sons of the settlor" intended to benefit those who choose to change their gender by law?

Whilst where the context allows, the courts may look beyond the strict legal definition of family relationships in order to determine a settlor's true intention, practitioners should be aware of family dynamics – and family tensions– looming on the horizon and would do well to address potential issues at an early stage.

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