COLLAS CRILL

Trust briefing: When the child was a child

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The beneficial class in many Jersey discretionary trusts will often be defined by reference to the relationship of *'children or remoter issue of X'*. 'X' may be the settlor themselves or perhaps a relative in the settlor's family.

What is 'a child' in a Jersey trust?

Who is to be treated as a child for the purpose of construing how a Jersey law trust or Jersey will is supposed to operate? This is a deceptively simple question – surely we all know what a child is?

This question has been thrown into focus by a recent English case, *Marcus v Marcus* **[1]**, in which the English High Court has held that the phrase *'the children and remoter issue of the Settlor'* in a trust included someone who (unbeknownst to the settlor) was not in fact the settlor's child at all. The question of who is a child – at least according to *Marcus* – is one of interpretation (with the potential to change depending on the particular settlor) rather than being a universal definition for all purposes.

The Hague Trusts convention, when read with Art 9 Trusts (Jersey) Law 1984, provides that the interpretation of a trust governed by Jersey law is a question – exclusively – of Jersey law.

So, when encountering this phrase *'children or remoter issue'*, in the absence of greater specificity in the instrument itself, what does it mean? This is a question of obvious importance to a person claiming to be a 'child' but is also of importance to trustees or executors who may be presented – maybe unexpectedly - with a person claiming to be a beneficiary by reason of that status. That is a complex and hugely sensitive issue for a fiduciary to be expected to navigate.

Modern family structures and Jersey trust structures

The landscape of modern family life has become increasingly complex. with many different permutations of how a parent-child relationship can arise eg blended families with step-parents, children from previous relationships, adopted children, children of same-sex relationships (where only one or potentially neither parent has a biological connection to the child), children conceived by way of surrogacy arrangement or with the assistance of fertility treatment or artificial insemination.

The answer of who is a child can therefore be a complex one to navigate, depending on a combination of:

- when the particular arrangement giving rise to a parent/child relationship arose;
- the date of the relevant Jersey legislation governing that relationship; and
- the date of the instrument describing 'child', 'children' or 'issue'.

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The interpretation of the term 'child' in trust documents

Wills

Under Jersey law, a will 'speaks' (ie is to be interpreted) from the date of the death of the testator or testatrix, not from the date when the will was made.[2] This means that, in the absence of greater specificity, a person whom the testator refers to as a 'child', 'children' or 'issue' in their will, will be interpreted by reference to who a 'child' 'children' or 'issue' was, in law, at the date of death. Importantly, this might well be different to who the testator (and the law) regarded as a 'child' when they made their will. This is one reason why it is a good idea for testators and testatrixes to review their wills.

Trusts

The position with trusts settled under Jersey law is different. A trust speaks from the date on which it is made. This means that a person who the settlor refers to as a 'child', 'children' or 'issue' in a trust is fixed at the date of the settlement. If the definition of 'child' or 'children' changes as a matter of law after that date – subject to the primary legislation that applies that new definition to a date before the legislation came into effect (which is unusual) or requires that the new definition in the legislation is to apply instead – the meaning of 'child', 'children' or 'issue' will be fixed at the date of the trust instrument.

Whether it's a will or a trust, when the document 'speaks from' is significant because there has been a gradual liberalisation and levelling of historic distinctions of who Jersey law will recognise as a child (and their rights as such) and a statutory widening of the paths by which a parent/child relationship can come about as a result of societal developments as well as advances in medical technology. As the recent Jersey litigation in *Mattas* [3] demonstrates, there are potentially many Jersey trusts settled prior to the governing legislation in force today. Phrases used in those trusts will fall to be interpreted according to the law at the time they were settled, in the absence of specific legislation that requires a different interpretation.

Legitimate and illegitimate children in Jersey law

Historically there was an important distinction in Jersey law between legitimate and illegitimate natural children. An illegitimate child in Jersey law was *un étranger à sa famille* - literally 'a stranger to one's family', having no rights to inherit any property from their natural parents, their ascendants or their collateral relatives.

A legitimate child is one born or conceived during the subsistence of a lawful marriage between their biological father and their biological mother (ie legitimate by birth).[4] An illegitimate child is one who is not legitimate by birth or who has not become legitimated. The phrase 'a child born out of wedlock' refers to an illegitimate child. An illegitimate child becomes legitimated, if during the lifetime of the child, the father and the mother become lawfully married to one another and the father acknowledges himself to be the father of the child.[5]

The distinction between legitimate and illegitimate children has been gradually eroded since the 1970s so as to be otiose for nearly all purposes today. However, the legislation that has made inroads into that distinction is prospective only in its effect; it's necessary to check the state of the law against the date of the instrument being interpreted to establish the correct legal definition of 'children', 'child' or 'issue'.

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'Issue' refers to a lineal descendant of a person (eg child, grandchild, great-grandchild, great-great-grandchild etc). Whether a lineal descendant is legitimate or illegitimate, they will still be issue.

The first inroad was Article 11 of the Legitimacy (Jersey) Law 1973 which enabled an illegitimate child to inherit from his or her mother (only), and the mother to inherit from the child should it predecease her.

Part 3A Wills & Succession (Jersey) Law 1993 came into force in 2011. This equalised the Jersey law succession rights between legitimate and illegitimate children (and those claiming through them) allowing an illegitimate child to inherit from the estates of his or her wider family as though he or she was legitimate.**[6]** The Children and Adoption (Amendment) (Jersey) Law 2016 provided that the biological father of a child, who was not married to the child's mother at the time of the child's birth, would acquire parental responsibility by being registered as the child's father in the Register of Births. However, these amendments expressly provided that a child conceived as a result of sperm or egg donation would not automatically be treated as a child of either of the gamete donors (subject to the child subsequently becoming adopted by the donor[(s]).**[7]**

Reform of legitimacy in Jersey law

Jersey is considering new legislation that will abolish the concept of legitimacy altogether.**[8]** The legislation is still in draft. The draft contains several saving provisions that would restrict or limit the application of the draft Law in specific areas, the new Law would not affect:

- successions arising from deaths occurring before the new legislation;
- enactments or court rulings made before the new legislation;
- the construction of a document (other than a will), executed or a disposition made before the new legislation; or
- the *privilèges, amortissements* and *préciputs* which are by custom attached to certain houses and manors in Jersey, nor to a title, coat of arms, honour or dignity transmissible on the death of its holder.

Significantly, the narrowness of these exemptions means that a will executed prior to the commencement of the draft Law but taking effect afterwards (ie upon death), will be required to be construed in accordance with the abolition of legitimacy provision in Article 1 of the draft Law. Preserving any distinction between legitimate and illegitimate children in a will executed before the changes will have to be achieved by specific amendment.

Step-children in Jersey law

There is no legal definition of a step child in Jersey law. A working definition of a step child is a child of one's spouse by a previous relationship. Absent adoption or a parental order, there is no legal connection between a step-child and their step-parent. While a step-child will, in law, be treated as the child of (at least) their legal parent(s) – they will not be a child of their step-parent unless the child is adopted by them or the step-parent is granted a Parental Order in respect of their step child.

Adopted children in Jersey law

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An adopted child is treated in Jersey law, from the date of an adoption order, as if he or she is the natural child (ie issue) of their adoptive parents and not the child of any other person.[9]

Art 23(3) Adoption (Jersey) Law 1961 provides that in any disposition of property whether by *inter vivos* instrument (ie a trust) or by will, after the date of an adoption order:

- any reference to a 'child' or 'children' of an adoptive parent shall be construed as including the adopted child (ie they are legally the child of their adoptive parents).
- any reference to a 'child' or 'children' of the natural parents of the adopted child shall not include an adopted child (ie they are no longer a child of their birth parents).
- Any reference to a person related to an adopted child in any degree shall be construed as a reference to the person who would be related to him in that degree if he were the natural child of the adoptive parent, born in lawful wedlock and not as the child of any other person.

This means that subject to any contrary intention, a Jersey law trust executed after 29 July 1963 that includes 'children' or 'remoter issue' within the beneficial class will automatically include an adopted child or children within the definition of 'child' from the date of any adoption order. This may be a position that a settlor doesn't expect when settling a trust under Jersey law.

Prior to the Children and Civil Status (Amendments) (Jersey) Law 2024, adoption was the legal mechanism in Jersey by which same-sex couples could *both* become the legal parents of a child.

Children of same-sex relationships in Jersey law

There has been a gradual levelling, by legislation, of the material differences in legal treatment and status between mixed- and same-sex relationships when it comes to the children of those relationships in Jersey law.

Unlike a child conceived naturally from a mixed-sex relationship, a child born of a same-sex relationship can only conceivably be the biological child of one parent. Whether a testator or settlor regards children born to parents who are in a same-sex relationship at all is a question that should be covered off when settling trusts or drafting wills.[10] Absent that sort of conscious specificity, the issues connected to the legal status of children in Jersey law born to parents in a same-sex relationship are two-fold:

- Issues of legitimacy (a concept rooted in a historic focus of whether the child is the product of a sexual union between a mother and father who were married to one another), eg can a child of a same sex male-couple be considered a 'legitimate' child of either of them?
- The relevance of a biological connection between the child and their same-sex parents, eg is a child of a same-sex couple conceived by use of a surrogate legally the 'child' of both (or either) of the prospective same-sex parents?

Children resulting from surrogacy arrangements in Jersey law

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In Jersey law, surrogacy describes an arrangement agreed before pregnancy, whereby a woman (the '**Surrogate Mother**') carries and gives birth to a child with a view, pursuant to the arrangement, to the child and parental responsibility for the child being handed over to another person(s) once the child is born.**[11]**

A woman can only be considered a Surrogate Mother if the child is conceived using *in utero* or *in vitro* artificial insemination. A woman who carries a child who is conceived naturally by way of intercourse is not to be treated in law as a Surrogate Mother. A Surrogate Mother can be, but does not need to be, the child's biological mother (the egg and sperm can both be donated with the resulting embryo, to whom she will have no biological connection, being carried by the Surrogate Mother until it is born).

Jersey law and surrogacy

Under Jersey customary law, a woman who gives birth to a child was automatically the child's mother (and automatically the child's legal parent). That includes a Surrogate Mother, whether or not the mother is biologically connected to the child they carry (ie they are carrying an embryo which is the product of a sperm donor and an egg donor).

Whether a man is to be treated as the legal parent and father of a child born to a Surrogate Mother depends upon whether any of the 'conditions for fatherhood' are met under Schedule A1 Children's Law 2002. If the Surrogate Mother is married or in a civil partnership, their spouse or civil partner will be the child's second parent at birth, unless they do not give their permission.

Legal parenthood to a child born of surrogacy can be transferred from a Surrogate Mother by way of a Parental Order under the Children's Law 2002 (or Adoption) after the child is born. This is the mechanism by which a child born from surrogacy can legally become the child of a person who is not their biological parent (eg the mechanism by which same-sex parents of a child born via a Surrogate Mother can both become the child's legal parents).

Art 9I and 9G Children's Law 2002 provide for the conditions under which the Royal Court can make a Parental Order and stipulate its effect. The principal effect of such an order is to confer the legal status of parenthood and parental responsibility for a child on the applicant(s).

Art 9M Children's Law 2002 provides that the effect of a Parental Order is to treat – subject to a contrary intent being expressed – the successful applicant(s) for such an order as the legal parent of the child (and vice versa) for the purposes of:

- intestacy law; and
- the construction of any kind of *inter vivos* (eg a trust) or testamentary (a will or codicil) that refers to a 'child', 'children' or 'remoter issue' of any person.

Art 9M(8) will protect an executor from having to establish whether any Parental Order has been made in respect of a person before distributing property in an estate to a person who is a child by reason of Parental Order. No such statutory protection applies to a trustee in the same position.

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These changes have not yet come into force as the Children and Civil Status (Amendments) (Jersey) Law 2024 have not yet commenced. Prior to this legislation becoming effective the position as regards the legal status of a child born by a surrogacy arrangement is as follows:

- The Surrogate Mother will automatically be the child's legal parent (whether or not the child is biologically related to the Surrogate Mother)
- If the Surrogate Mother is married to or in a civil partnership with a man, there is an automatic statutory presumption that the husband is the legal parent (father) of the child. This is the case even though the father is not biologically related to the child).
- If the Surrogate Mother is married to or in a civil partnership with a woman, no such presumption arises.
- A sperm or egg donor whose gametes have been used to conceive the child which is carried by a Surrogate Mother have no status whatsoever as the legal parents of the resulting child.

Children resulting from fertility treatment or artificial insemination in Jersey law

Jersey does not have an equivalent to the UK's Human Fertilisation and Embryology Act 2008, which provides detailed regulations on assisted reproduction and legal parenthood status for same-sex couples using fertility treatment.

This messy legal position will be overhauled by a new legislative framework. Schedule A1 Children (Jersey) Law 2002 (as by the Children and Civil Status (Amendments) (Jersey) Law 2024 (the **'2024 Law'**) will set out the circumstances in Jersey law in which a person will be treated as a parent of a child who is conceived through fertility treatment or artificial insemination. These statutory rules apply regardless of whether a woman was in Jersey or elsewhere at the time of the relevant fertility treatment or artificial insemination.

The 2024 Law is an omnibus piece of legislation (which is yet to come into full force and effect) and makes various amendments to harmonise disparities in existing Jersey customary law and legislation to

- confer parental status in relation to both same-sex and mixed-sex couples who use fertility treatment or artificial insemination;
- equalise parental status between civil partnership and married couples;
- confer legal parent status as a result of surrogacy; and
- regulate parental status by the use of sperm, eggs or embryos after death.

Before Schedule A1 comes into force the legal position is inadequate to deal seamlessly with the various relationships to which assisted reproduction can give rise. The legal status of parent is centred around the birth mother (and her spouse if she has one). The status of those to whom the child is genetically connected or those who regard themselves as the child's future parents (eg a same-sex couple using fertility treatment) are not adequately catered for by the current legal framework, short of an adoption order.

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There are now many permutations of how a parent-child relationship might come into existence by reason of fertility treatment or artificial insemination, eg a same-sex female couple using both a third-party egg donor and a sperm donor to have a child as part of fertility treatment with a married Surrogate Mother gives rise to the potential for that child to have up to six people who might be considered its 'parent'.

Under the 2024 Law, a child's legal parent (whether or not that person has parental responsibility for a child) can include:

- the child's birth mother;
- the child's biological father;
- a man who is treated as the child's father under Schedule A1 2024 Law;
- a woman who is the child's second parent under Schedule A1 2024 Law;
- a person named in a Parental Order as the child's parent under Art 8 2024 Law;

In summary, the position under the 2024 Law will be:

1. *Birth Mother:* A women who gives birth to a child (the **'Birth Mother'**) whether as a result of intercourse, fertility treatment, artificial insemination or a surrogacy arrangement is, by default, automatically treated as a legal parent of the child.
2. *Female partner (Second Parent) of the Birth Mother:* If a woman gives birth to a child as a result of fertility treatment or artificial insemination, and her female partner (ie spouse or civil partner) consents to the treatment, the female partner will be treated as a legal parent of the child, provided they have agreed to take on this role.[12] If a woman is treated as a child's Second Parent by virtue of Schedule A1, no man is to be treated in law as the child's father for any purpose.
3. *Male partner of the Birth Mother:* If a woman gives birth to a child as a result of fertility treatment or artificial insemination, whether her male partner (ie spouse or civil partner) is be treated as a legal parent of the child depends on:
   - whether the male partner and Birth Mother are married or in a civil partnership;
   - whether the Birth Mother's male partner consents to the fertility treatment or artificial insemination; or
   - the child is treated by virtue of adoption or a Parental Order as not being the male partner's child.

   The legal presumptions that hitherto have applied to deem the male spouse of a Birth Mother as the legal parent of the child are to be abolished.
4. *Male (Sperm Donor):* If a man (who is not the male partner of the Birth Mother) provides sperm for the purpose of artificial insemination, he may be treated as the legal parent of the child only if he consents to being a parent before or at the time of the treatment. However, in cases where a sperm donor has not consented to being a parent of any resulting child, he will not be treated as a resulting child's legal parent.
5. *Female (Egg Donor):* A woman is not to be treated as the mother of a child merely by reason of egg donation unless she is treated as the mother by reasons of other provisions of Schedule A1.[13]

Conclusions

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The broad trend in Jersey law has been towards liberalisation of the rules under which a person is to be regarded as a child of another person.

The principle from *Marcus* is that the trust instrument is the definitive expression of the settlor's intention when settling a trust. Where there is ambiguity in the drafting, the approach is to seek to establish what the settlor intended by using the term 'child or remoter issue'.

In order to avoid a dispute further down the line – for example, when the settlor or wealth creator may have died and is unable to say what they intended – it is important to establish what the settlor or testator's expectations are from the very outset when using the phrase 'child', 'children' or 'issue'. Depending upon the settlor or testator's cultural background, these expectations could differ significantly from the position set out in Jersey law.

One option might be to subject the definitions governing family arrangements used in a trust instrument or a will to definitions is the law of the settlor's domicile (with which they might be more familiar) rather than to Jersey law (a concept known as *dépeçage*).

Whatever the solution alighted upon, it's important to get absolute clarity and to 'stress test' a testator or settlor's views about various parent/child relationships to avoid disputes about entitlement in the future.

How can Collas Crill help?

Collas Crill has decades of experience advising UHNW families from across the world on the structuring of their assets using offshore trusts and on international estate planning.

If you need any guidance or advice when drafting or reviewing your existing structures or estate planning, please do not hesitate to contact us. Our experienced team of lawyers and planning professionals are ready to assist with any questions or concerns you may have regarding this important aspect of intergenerational wealth management.

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[1] [2024] EWHC 2086 (Ch)

[2] Art 23(4) Adoption (Jersey) Law 1961, taking effect on 29 July 1963.

[3] [2024] JRC 068

[4] Art 2 Legitimacy (Jersey) Law 1973

[5] Art 4 Legitimacy (Jersey) Law 1973

[6] 29 January 2011. See Wills and Successions (Amendment) (Jersey) Law 2010

[7] Art 18A Wills & Succession (Jersey) Law 1993, inserted by Wills and Successions (Amendment) (Jersey) Law 2010

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[8] Civil Status (Abolition Of Legitimacy Etc.) (Jersey) Law 202[X]

[9] Art 20 Adoption (Jersey) Law 1961

[10] Which is not to say that the position stipulated for by a settlor cannot later be changed by variation Re Y and Z Trusts [2017 (1) JLR 266]

[11] Art 1B Children (Jersey) Law 2002, introduced by Art 5 Children and Civil Status (Amendments) (Jersey) Law 2024

[12] Para 6 Schedule A1 Children Law 2002, as amended the Children and Civil Status (Amendments) (Jersey) Law 2024.

[13] Para 16 Schedule A1 Children Law 2002, as amended the Children and Civil Status (Amendments) (Jersey) Law 2024.

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