

BEYOND THE COOKIE-CUTTER FAMILY

KEY POINTS

What is the issue?

Traditional family structures are increasingly rare and gender identity is much more fluid in contemporary society.

What does it mean for me?

Practitioners need to consider the terminology used in trust documents and whether it is suitable in a modern social context and reflective of settlor wishes.

What can I take away?

One must be aware of issues generated by the changing nature of family relationships. Advisors are duty-bound to identify and raise these issues with their settlor and trustee clients.

Will Burnell asks whether the law is keeping pace with the modern family unit, with reference to recent England and Wales and Jersey case law

By any measure, the average family is more diverse today than it used to be. Changing social attitudes and norms, an increase in the number of blended families and advances in reproductive technology, together with other factors, are resulting in the notion of a ‘traditional’ family structure (comprising opposite-sex parents who have borne children) becoming a thing of the past. Gender identity issues, which have come to the forefront of social conscience in recent times, may also form part of the idiosyncrasies of each collection of individuals who identify as a family. In the context of trusts, how are the law and courts responding to the ever-more nuanced nature of the family unit? And how should trust and estate practitioners respond?

Describing family relationships

As advisors, it is important to understand and be mindful of how terms that describe family relationships are used in trust documents, especially as the courts’ approach to how these terms are interpreted is constantly evolving. Common examples include ‘spouse’, ‘children’, ‘issue’ and ‘descendants’, but the following comments apply equally to all expressions that describe a familial relationship between two individuals.

The changing landscape

Traditionally, the law could be restrictive. For example, the meaning

of children was confined to legitimate children, while illegitimate, legitimated and adopted children were excluded.

The good news is that, as social values and the concept of the family have changed, more progressive legislation has been introduced in certain countries to widen the meaning of children often to include illegitimate and legitimated¹ children, whether their parents are in same- or opposite-sex marriages, civil partnerships or other relationships. Adopted children and children born via assisted reproduction methods may also now be included. Likewise, statutory changes² have resulted in the term ‘spouse’ being taken to encompass individuals who are in a same-sex marriage but not civil partners.

Despite this, it is still open to settlors to set out in the trust instrument how they wish these terms (and others) to be interpreted. A settlor could, for example, state that references to children should include or exclude illegitimate persons.

The approach of the courts

Human rights legislation and case law have had a significant impact in favour of treating all individuals equally and there have even been instances of the rules being applied retroactively when interpreting trust documents. Although they are exceptional, these cases introduce another dimension to questions around how terms that

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describe family relationships, particularly in older trust documents, should be interpreted.

Over the past few years, there have been a number of instances where the courts in trust-law jurisdictions such as England and Wales and Jersey have had to navigate their way through the issues that arise in this area, particularly where the trusts in question predate the statutory developments noted above. In general, the courts have sought to reflect changing social attitudes and values, and aimed to limit the potentially discriminatory effects of the terminology used in older trusts.

Contemporary court decisions

In *Representation of Y Trust and Z Trust*,³ the class of beneficiaries of a trust was widened to include same-sex relationships and illegitimate and adopted children, on the basis that it would be beneficial to the family concerned through maintaining family harmony. Contemporary public policy considerations were also taken into account and the Royal Court of Jersey decided that these factors superseded the weight it should attach to the settlor’s wishes, which were out of step with modern norms.

More recently, the England and Wales High Court (the High Court) has interpreted the term ‘spouse’ to include same-sex spouses and civil partners. In that case,⁴ which concerned an employee benefit trust, there was not much evidence of the settlor’s intention as to how the relevant terms should be interpreted, so the High Court looked at the commercial purpose of the trust and found that the settlor wished to incentivise and reward the contributions of his employees. He also wanted to provide a mechanism for their dependants to benefit in appropriate circumstances, regardless

of whether those individuals fell within the traditional meaning of the term ‘spouse’.

The High Court was also asked to consider whether the term ‘children’ should include stepchildren but found no basis on which it should. That approach would have marked a significant departure from the common-law position and there was nothing to suggest the settlor had intended for stepchildren to benefit. The High Court was comfortable that its approach on this issue was not discriminatory as children and stepchildren are, in relational terms, fundamentally different.

Gender identity

The burgeoning discussion of gender identity issues, and the resulting shift from a binary approach to gender classification to an understanding that each individual’s gender identity sits somewhere on a spectrum, will surely become reflected in more sophisticated legislation that does not, for example, only permit transition between ‘male’ and ‘female’ or impose rigorous requirements on those individuals who wish to transition. This is happening slowly but as legislators address a wider range of issues and grapple with them at deeper and more complex levels, it is inevitable that approaches will diverge between jurisdictions. This could result in areas of conflict, such as where there are inconsistencies as to the recognition of gender transition between the governing law of the trust, the law where a transitioned beneficiary is resident or domiciled and the law of the jurisdiction where the trust assets are located.

Practitioners must be alive to these challenges. It is, therefore, essential to glean information from the settlor at an early stage as to any non-binary

gender identities among the class of beneficiaries and any specific approach the settlor wishes the trustees to take in respect of such individuals or where the applicable laws conflict. These factors will, in some cases, form part of the discussions about asset location and which law is most appropriate to govern the trust.

Considerations for settlors and trustees

Now more than ever, settlors and trustees need to be aware of issues generated by the changing nature of the family and gender identity, alongside other prevailing values. Indeed, advisors are duty-bound to identify and raise these issues with settlor and trustee clients.

It is important for settlors to be made aware of how the meaning of terms such as spouse, wife, husband, children and issue will be interpreted so they can consider whether to include bespoke definitions that are consistent with their intentions, in place of the default rules. Similarly, there needs to be a greater emphasis on how gender transition might affect a beneficiary's entitlement to ensure that the language used in the trust instrument is consistent with the settlor's wishes. Clearly, unnecessarily restrictive or vague language should be avoided at all costs and particular care should be taken when including any provisions that treat individuals differently on the basis of characteristics such as gender, marital status or consanguinity.

Settlors should also consider recording their views and other relevant context in letters of wishes and equipping their trustees with powers, both dispositive and administrative, that enable the relevant provisions of the trust instrument to be amended in view of any future changes to those wishes, unforeseen developments within the beneficial class and/or the evolving socio-political landscape.

Trustees should maintain a dialogue with their beneficiaries with a view to identifying these issues and dealing with them proactively. They should also keep their trust documents under constant review and consider exercising their powers to tighten or broaden provisions, provided that it is for the benefit of the beneficiaries. Trustees may also need to apply to court for assistance if their powers do not allow them to achieve the desired outcome. This consideration is likely to be more relevant in relation to older trusts, especially those where the manner in which benefit is conferred is linked to the values of the time.

Although good progress is being made towards the language in trust documents becoming more universal and inclusive, and the courts' approach is becoming more progressive, there is still more work to be done by lawmakers and the judiciary. Practitioners can support positive change by identifying and discussing these issues with clients, pointing out any discriminatory provisions that may generate disputes or disharmony among beneficiaries and advocating against discrimination and in favour of equivalence between all beneficiaries, all without abandoning one's duty to act in the best interests of one's clients and in accordance with their instructions.



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¹ Children who were born to unmarried parents, who subsequently marry.

² *Marriage and Civil Status (Amendment No. 4 (Jersey) Law 2018*

³ (2017) JRC 100

⁴ *Goodrich v AB* [2022] EWHC 81 (Ch)