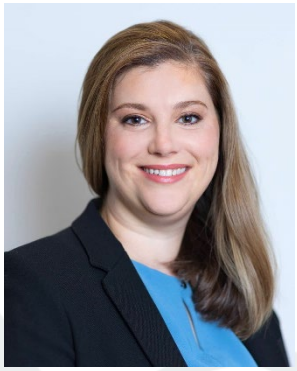
Private Client eBriefing

Marcus v Marcus: can a non-biological child be 'a child of the settlor'?

Article by Elizabeth Houghton, 4th December 2024



In the recent judgment of *Marcus v Marcus* [2024] EWHC 2086, Master Marsh found that the words "*the children and remoter issue of the Settlor*" in a settlement meant the two adult sons of the settlor, even though (unbeknownst to the settlor during his lifetime) one of his sons was not biologically his child. The case raises interesting and difficult questions about how "*terms of art*" should be treated in settlements, wills and contracts. And, how that concept fits with the well-established approach to interpreting documents having regard to the ordinary, natural meaning of words and the intention of the party or parties making the document.

The issue in this case came about in the context of a family feud between two brothers, Edward and Jonathan, and related to a settlement made by their father, Stuart. An equivalent settlement had been made by Edward and Jonathan's mother, Patricia. However, no issue arose in relation to that settlement because Edward and Jonathan were both Patricia's children.

Following Stuart's death in 2020, Edward brought a claim seeking Jonathan's removal as trustee of the settlements. Master Pester decided that claim and ordered that the trustees of the settlements (Edward, Jonathan and a professional trustee) should all resign in favour of independent trustees.

In 2023, Jonathan was told by his mother that Edward was not Stuart's biological child. That led Jonathan to bring the claim seeking a declaration that Edward was not Stuart's child, and accordingly is not a beneficiary under the settlement.

The expert evidence was that there was a very strong likelihood that Jonathan and Edward were half-siblings having one parent in common. However, it was not conclusive on that point because a full sibling relationship could not be excluded based on the genetic testing carried out. The expert evidence concluded that further testing could be carried out to confirm that Edward and Jonathan did not share the same biological father, but neither party sought that further test.

Patricia, their mother, gave evidence in the proceedings in support of Jonathan and to the effect that she was sure that Edward was the product of an affair. She gave evidence about the affair and that it had ended by the time Jonathan was conceived. This evidence was challenged in cross-examination. The Master concluded that Patricia was an imperfect witness.

Ultimately the Master found that Stuart was not Edward's biological father. The question then was what the proper construction of the words "*the children*" in the context of the settlement. The Master commenced his analysis by noting that a document such as a will or settlement has to be construed applying the same principles to those applicable to contracts. However, the unilateral nature of a will or settlement must be borne in mind.

On this legal issue, Jonathan argued that the natural meaning of "*children*" was biological children, and further that "*children*" was a term of art which mean "*biological children*". The Master considered various authorities and commentaries which considered that "*child*" and "*children*" were terms of art which meant "*biological children*", and did not include stepchildren unless the context indicated otherwise. The Master accepted those propositions but went on to find that inquiring whether or not a word is a "*term of art*" may not be a useful exercise to carry out having regard to the current approach to construction. In construing a document the Court is concerned with the ordinary, natural meaning of words having regard to the intention of the settlor. "*Terms of art*" are not necessarily synonymous with an ordinary natural meaning.

The Master noted that it might be correct to say that "*child*" and "*children*" should no longer be treated as a term of art, but it wasn't the appropriate case to determine that question.

The Master therefore sidestepped the question of whether "*children*" was properly regarded as a term of art, and if so what effect that classification would have had on the interpretation of the settlement. In particular, if it were a term of art, was the Court bound to give it that meaning in the absence of words to the contrary.

Rather the Master focused on the test for interpreting a settlement having regard to the ordinary, natural meaning of words and the intention of the settlor. He concluded that at the time Stuart made the settlement, he had two adult sons, and intended to include both of them as beneficiaries.

Accordingly, the words "*my children*" meant "*Edward and Jonathan*" in the context of this settlement. They did not mean "*Edward and Jonathan, provided they are my biological sons*". As Stuart did not know that Edward was not his biological son at the time of making the settlement, the Master found he could not speculate as to what Stuart's reaction to that information might be.

There are two key takeaways from this case. First, words which are commonly regarded as "*terms of art*" might not be given their strict legal meaning if that meaning conflicts with the meaning intended by the settlor.

One could imagine a similar dispute might arise in the case of a "*spouse*" or "*widow/widower*" in circumstances where it transpires that a marriage ceremony was not a valid legal marriage. For example, where a religious ceremony or foreign marriage was believed to give rise to a legal marriage pursuant to English law but did not (as was famously the case with Mick Jagger and Jerry Hall). Similar but not identical considerations would arise in such a case as those the Master considered here. There is arguably a stronger case for "*spouse*" being treated as a term of art than "*children*", and having a fixed meaning which it would be difficult to displace. In such cases, rectification might also have a role to play.

Secondly, the case demonstrates that when drafting wills and declarations it is worth considering whether it is preferable to refer to intended beneficiaries by name rather than by class, if they are known and easily identifiable. That does not mean that the class of beneficiaries needs to remain closed, as words can be included to ensure any future children not yet born are also included. However, it will have the effect of clarifying who the intended beneficiaries are at the time the document was made.

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