When is a child not a child?

SANDRA DUERDEN AND GRACE CUMMINGS EXAMINE THE LEGAL IMPLICATIONS OF PROPERLY DEFINING CHILDREN AS BENEFICIARIES IN WILLS AND TRUST DEEDS, WITH AN EMPHASIS ON GUERNSEY

As times change and our ideas of identity, family units and inter-generational relationships adapt to the myriad ways that people live, there is a growing tension between how we define people in language and how this relates to the law.

In particular, the ways in which we define beneficiaries in wills and trust deeds must be carefully considered to avoid future confusion. In one such instance we must consider the complexities of the word 'children' and how it is defined, should it be used to describe beneficiaries.

The word 'children' can mean many things, including natural-born children, adopted children, stepchildren, legitimate or illegitimate children, or children born through surrogacy. These are all accepted definitions in many quarters, but what happens when a family or individual's views of what constitutes 'children' differs?

POTENTIAL DIFFICULTIES

Surrogacy is increasingly in the spotlight. Figures from the UK Ministry of Justice state that the number of parental orders (the usual mechanism whereby a parent becomes the legal guardian of a child born via surrogacy) has quadrupled since 2011. The parental order (a court order that transfers legal parentage from the surrogate mother) is essential as, until it is enacted, the surrogate mother is treated by law as the child's mother.

That said, parental law does not always cross international boundaries and there is no equivalent legislation in Guernsey that recognises foreign parentage orders. This has the potential to cause difficulties for those with trusts settled in Guernsey.

The issue comes to a head when considering any trust deed that describes 'children' as the beneficiaries. For example, it may have been settled by a parent with 'my children' as beneficiaries or their named child as a beneficiary but also including a reference to their child's children (their grandchildren) as eventual beneficiaries of the trust.

With children born of surrogacy not wholly protected or defined by the law, this leaves their beneficial interest vulnerable to challenge by another party (a rival beneficiary, for example) that would rather exclude them from the trust. It also creates risk for the trustee as they may be committing a breach of trust if they have previously made a distribution to the beneficiary that is subsequently challenged.

Advisors need to consider this carefully at all steps of the process. It is most easily overcome at the drafting stage with new trusts able to take this into consideration and be worded carefully to include any children required by the settlor, either by naming them specifically or carefully defining what the settlor means by children. It is important for advisors to be able to ask these questions, although, of course, none of us will relish asking people how their children were conceived.

More complicated is reviewing existing trust structures for this issue. Older trusts will not, in all probability, have anticipated this issue and may include references to children that could be challenged.

WHAT OPTIONS ARE AVAILABLE TO TRUSTEES AND ADVISORS?

Potentially, one could use their power as a trustee to vary the trust deed to ensure that it meets the wishes of the settlor. In conflict situations, however, this may not be possible. The trustee would then either approach the court to receive directions or, where possible, seek to resolve the situation through discussions with other beneficiaries. If the trust deeds state that they cannot be varied, there is also the possibility for appointing the trust into a new trust vehicle with more flexible terms that also enable future changes to the definition of children.

Changes are coming that will standardise the way this issue is interpreted, with both the EU and the UK appointing commissions to review parental orders and to harmonise rules across Europe to give children born via surrogacy the same rights under national law as other children.

However, as ever, legislation is struggling to keep pace with changing societal norms and so while we wait for legislation to change, we must be vigilant and stay on the lookout for issues that would affect beneficiaries and inheritance within the wealth-management structures we look after.

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