
# WHAT'S IN A WORD?

**Josh Lewison** considers how a US inheritance dispute centred on the definition of 'grandchild' might have played out in England and Wales

## KEY POINTS

**WHAT IS THE ISSUE?**
A court in California has ruled that 'grandchild' includes a grandchild born out of wedlock as part of that word's ordinary meaning, overriding the trustees' interpretation.

**WHAT DOES IT MEAN FOR ME?**
The article considers the approach of the California court and whether the same result would have been reached in England.

**WHAT CAN I TAKE AWAY?**
When drafting trusts, it can be risky to rely on statutory language to contribute to the interpretation of the document.

CONSTRUCTIONS SUMMONSES ARE always more interesting when celebrities are attached to them. In July 2019, Hon Daniel Juarez gave judgment in *Re Peter S Bing GC-1 Trust*,[1] which came to public attention because one of the petitioners was Damien Hurley, acting by his guardian *ad litem* Elizabeth Hurley.

The central dispute was over the meaning of the word 'grandchild' in a series of trusts established in 1980. The settlor had established six trusts. The first was designated GC-1 and was for the benefit of the settlor's first-born grandchild, the second was designated GC-2 and was for the benefit of the settlor's second-born grandchild, and so on.

The trustees had taken the view that Damien was not entitled to benefit under the language of the trusts. The legal basis for that conclusion came from the California *Probate Code*,[2] which provides a general rule that persons born out of wedlock, among others, are included in terms of class gift or relationship. There is also an exception to the general rule, so that persons born out of wedlock are not included in a transfer made by a transferor who is not the natural parent, unless they lived while a minor as a regular member of the household of the natural parent.

Applying the trustees' construction, Damien would not have been entitled under the relevant trust, because he had not lived as a regular member of his father's household. The trustees' position was reinforced by a clause in the trusts that gave the trustees the power to construe the trust and provided that any reasonable construction adopted after obtaining the advice of counsel would be binding on all persons claiming an interest in the trust estate.

Further fortification of the trustees' stance was provided by the settlor. He offered to give evidence as to his subjective intentions in creating the trusts.

Damien emerged successful. The main pillar of the court's reasoning was that 'grandchild' was not an ambiguous term. As such, it carried its everyday meaning. The court therefore did not have to resort to the *Probate Code* to ascertain the meaning of 'grandchild'. Indeed, the court could have mentioned §21102(b), which provides that the rules of construction, including §21115, apply only where the intention of the transferor is not indicated by the instrument. For similar reasons, the court declined to consider the settlor's present-day statement of his intentions of 40 years ago.

The trustees' reliance on their power to construe the instrument was also swept aside. The court found that their interpretation of the trusts was unreasonable, because there was no ambiguity in the first place. Thus, the court concluded that Damien, as well

as another grandchild born out of wedlock, was entitled to benefit under the trusts.

## A SIMILARLY RESTRICTIVE VIEW?

So, how would the case have played out in England and Wales?

The general rule set out in the California *Probate Code*[3] is replicated in England in relation to adopted children,[4] illegitimate children[5] and children born by assisted reproduction.[6] A reference to a 'grandchild' would therefore normally include an adopted grandchild, an illegitimate grandchild or a grandchild born by sperm or egg donation. There is, however, no equivalent of the exception in relation to minors who did not live as regular members of the household of the settlor.

The courts of England and Wales take a similarly restrictive view of interpretation. The goal is to determine the objective intention of the settlor, rather than their subjective intention. The court would have regard to the matrix of fact, which forms the background against which the trust was drafted. Evidence of the settlor's subjective intention is only admissible in order to resolve latent ambiguities. A latent ambiguity arises where two or more persons or things answer the description in the trust instrument; evidence of the settlor's intention allows the court to decide which one they meant.

In Damien's case, the trusts were established in 1980 and were for the benefit of future-born grandchildren. In England, Damien could have relied on the statutory presumption that the reference to 'grandchildren' included a reference to him; no extrinsic evidence would have been admitted and the court would have reached a similar result.

## LESSONS LEARNED

The questions for trust practitioners are: what other steps could the trustees have taken and what lessons can be learned from the outcome?

If it is right that the settlor intended that adopted children or children born out of wedlock should be excluded, then it is apparent that the trusts fail to reflect that intention. If the trustees had a power to modify the provisions of the trust (in England, this is called a power of amendment), then it might have been open to them to exercise it so as to restrict the beneficial class to children born in wedlock.

Such a power is classed by the editors of *Lewin* as a fiduciary power when conferred on trustees in virtue of their office,[7] in that it must be exercised in good faith, for a proper purpose and other than for the benefit of the donee, and the trustees must consider its exercise from time to time. Similarly, in California, a power that runs with the office of trustee is held in a fiduciary capacity.[8]

In the *Bing* case, the court was sceptical about the purported exercise by the trustees of a power to construe the trust. It is possible that the court would be equally doubtful about the exercise of a power of modification, particularly if prompted by a dispute between settlor and beneficiary.

*'In England, Damien could have relied on the statutory presumption that the reference to "grandchildren" included a reference to him'*

An alternative would be for the settlor to seek reformation of the trust, which is called rectification in England. California recognises the equitable jurisdiction of the court to reform a trust where the written instrument does not accurately reflect the oral understanding that gave rise to it.[9] In England, *Re Butlin's Settlement Trusts*[10] is still the leading case in which rectification was available to correct a unilateral mistake on the part of the settlor in the drafting of the trust.

In both jurisdictions, the party seeking reformation or rectification must prove both the mistake and the settlor's true intentions. In England, the standard of proof is the balance of probabilities. *Scott & Ascher on Trusts*[11] suggests that, in the US, the standard of proof is 'clear and convincing evidence', a higher standard that lies between the balance of probabilities and the criminal standard.

On facts such as those in *Bing*, the challenge would be to persuade the court to accept that the settlor's present-day statements were an accurate reflection of their actual intentions at the time the trust was created. Where only a short time has elapsed, that is likely to be relatively easy. However, in *Bing*, where nearly 40 years have elapsed, the court may well be concerned that the settlor's memory has been tainted by later events and emotions.

The lesson to be learned is that settlors should say what they mean, even if that adds to the verbosity of a trust instrument. An English example is *Hand* v *George*,[12] in which a testator's will referred to 'children' and had been drafted in 1947, when there was a statutory presumption against adopted children being included in such a disposition.[13] The court found that the *Human Rights Act 1998* permitted the court to read the subsequent adoption statutes so as to have retrospective effect, notwithstanding that the will predated even the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. The correctness of the decision has recently been doubted,[14] but it remains a graphic illustration of the pitfalls of relying on statutory language to supplement the terms of wills and trusts.

If it is right that Mr Bing's true intention was to limit his gifts to children born in wedlock, then the case provides a further warning to those drafting trusts not to take anything for granted.

**1** Superior Court of California, 16 July 2019 **2** §21115 **3** §21115 **4** *Adoption Act 1976*, s.42; *Adoption and Children Act 2002*, s.69, depending on the date of adoption. **5** *Family Law Reform Act 1969*, s.15; *Family Law Reform Act 1987*, s.19, depending on the date of the disposition. **6** *Human Fertilisation and Embryology Act 2008*, s.48 **7** *Lewin on Trusts*, 19th edn, at 30–070 **8** *Restatement of Trusts (Third)*, §64 **9** *Getty* v *Getty* 187 Cal App. 3d 1159 **10** [1976] Ch 251 **11** 5th edn, at §4.6.3 **12** [2017] Ch 449 **13** *Adoption of Children Act 1926*, s.5(2) **14** *PQ* v *RS* [2019] EWHC 1643 (Ch)

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