

# A chip off the old block: Defining children and descendants properly in Jersey and Guernsey law trusts

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

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

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 and children from previous relationships;
- adopted children;
- a 'child of the family' ie a non-biological child whom the testator or settlor treated as their own;
- children of same-sex relationships (where only one or potentially neither parent has a biological connection to the child); or
- children (of either mixed or same-sex relationships) conceived by way of surrogacy arrangement or with the assistance of fertility treatment or artificial insemination.

Unless the intention of the document is crystal clear, the answer of who counts as a child in wills and trust drafting can be a complex and sensitive one to navigate, depending on a combination of:

- the date on which the particular arrangement giving rise to a parent/child relationship arose;
- the date of enactment of the relevant law governing that relationship; and
- the date of the will or the trust describing 'child', 'children' or 'issue'.

## Why does it matter?

Who counts as a child of any particular person is a question of obvious importance to a person claiming to be a 'child' but also to trustees or executors who may be presented - maybe unexpectedly - with a person claiming to be a beneficiary of an estate or a trust by reason of that status.

Difficulties arise where:

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- the intention in the drafting of a document may be ambiguous or where the intention appears at odds with the family circumstances;
- the intention expressed in the document appears more restrictive than the prevailing social attitudes or the state of the general law (or, in the other direction);
- there is an expectation that a person is a 'child' when legally they are not.

It is unsafe to assume that what a settlor or a testator means by these phrases is the same meaning provided by the general law in jurisdictions where a will or a trust is established.

## Who counts as a child?

### Legitimate or illegitimate children

A child born as a result of a sexual union between a man and a woman is legally the issue of both of them. <sup>[1]</sup> If the child's parents were married when the child was born they are regarded as 'legitimate'. If the child's parents were unmarried, the child is 'illegitimate' or 'born out of wedlock' but could subsequently be 'legitimated' (ie treated as legitimate) if the mother and father married during the child's lifetime.

Jersey and Guernsey have historically given significant weight to the distinction between legitimate and illegitimate children, particularly for succession purposes.

In Guernsey, children born outside of wedlock were unable to inherit their natural parent's property or personal estate for many years.

This did not change until the introduction of the Law of Inheritance, 1954 <sup>[2]</sup> (the **1954 Law**) in respect of real estate and the Law of Inheritance (Guernsey) Law, 1979 <sup>[3]</sup> (the **1979 Law**), which enabled an illegitimate child to be treated for the purposes of succession to personal estate, and in accordance with the 'Loi relative à la portion disponible des biens-meubles des pères et mères' (1930) as a child 'born in lawful wedlock', in both cases only if they were specifically named or included within a will. The distinction in cases of intestate succession, or where a will was silent as to the inclusion of an illegitimate child, was not altered however.

Guernsey finally removed the discrimination which arose from the distinction made between legitimate and illegitimate persons in testamentary and intestate succession for real and personal estate with effect from 8 May 2008 specifically confirming that, *'any reference in any will or relevant instrument, however expressed, to any relationship between two persons shall be construed, unless the contrary intention appears, without regard to whether either of those persons, or any person through whom the relationship is deduced, is legitimate or illegitimate'*<sup>[4]</sup>.

However the alteration of the historical position, to bring the law into line with more modern family arrangements, does not affect the succession to the property of a person who died prior to the commencement of the 1979 Law, nor any directions made in accordance with it<sup>[5]</sup>.

The distinction between legitimate and illegitimate children (and those claiming through them) to inherit from the estates of his or her wider family was abolished in Jersey from 2011 onwards. However, that legislation is prospective only in its effect, namely it has

no impact on the distinction prior to that date. The distinction between legitimate and illegitimate children was completely abolished in Jersey for all purposes from 27 November 2025<sup>[6]</sup>.

In both Jersey and Guernsey it remains necessary to check the position of the law against the date of any will being interpreted, or the relevant date of death in cases of intestacy, to establish the correct legal definition of 'children', 'child' or 'issue'.

In Jersey:

- a will or trust taking effect before November 2025 will preserve a distinction in the general law between legitimate and illegitimate children.
- a will executed before November 2025, but which takes effect upon the death of a testator (ie after the recent changes took effect), is subject to the abolition of the distinction between legitimate and illegitimate children. To preserve this distinction in treatment between legitimate and illegitimate issue will require the will to be amended.
- the definition of a child or issue in a will pre-dating 29 January 2011 won't include an illegitimate child or issue.

In Guernsey:

- a will or trust taking effect before 8 May 2008 will preserve a distinction in the general law between legitimate and illegitimate children (unless the distinction has been removed post November 1979 for personal estate or an illegitimate child has been included as an heir of real estate post May 1954 by way of will).
- a will executed before 8 May 2008 preserves the distinction in treatment between legitimate and illegitimate issue (unless there is specific expression to the contrary within a will made post the relevant dates outlined above depending on the asset class in question).
- the definition of a child or issue in a will pre-dating 8 May 2008 will not include an illegitimate child or issue unless there is specific confirmation of the intention to do so within the document for real estate post May 1954 or November 1979 for personal estate.

In either jurisdiction, a will or a trust executed after these changes took effect, that seeks to preserve a distinction between legitimate and illegitimate children, will require special attention in the drafting to achieve that.

## Issue

'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 considered as issue in any instrument made post November 2025 in Jersey, or 8 May 2008 in Guernsey, unless the instrument specifies only legitimate issue or illegitimate issue are to be counted as such. Thought should be given to providing a definition of legitimate or illegitimate issue in the instrument itself if a distinction is sought to be preserved as it won't be possible to refer to the underlying legal position for reference after these dates.

## Adopted children

An adopted child is treated in both Jersey and Guernsey law, from the date of an adoption order, as if he or she is the natural child (ie issue) of their adoptive parents (born in 'lawful wedlock') and not the child of any other person<sup>[7]</sup>.

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After the date of an adoption order:

- any reference to a 'child' or 'children' of an adoptive parent shall be construed, (unless there is a contrary intention expressed) as including the adopted child (ie the adopted child is 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 any child adopted out of their family (ie the child adopted by another family is no longer considered 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 express intention in the instrument, a trust or will executed after 29 July 1963 in Jersey, or 15 March 1961 in Guernsey, 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 position should be explored with a testator or settlor when executing a will or settling a trust under Jersey or Guernsey law.

### Children of same-sex relationships

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

Whether a testator or settlor regards children born to parents who are in a same-sex relationship as being their 'issue' or their descendants is a question that should be addressed when settling trusts or drafting wills.

Absent that sort of conscious specificity, the issues connected to the legal status of children 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 conceived by way of a fertility treatment or artificial insemination

Jersey's law on the status of children conceived from fertility treatment or artificial insemination (ie assisted reproduction) has been radically modernised by the Children and Civil Status (Amendments) (Jersey) Law 2024 (the **CCS Law 2024**).

That legislation is yet to come into force (it is part of a package of other measures intended to be brought into force together). When it does, regard must be had to the legal position before and after when drafting or interpreting wills and trusts.

These changes were introduced to iron out the potential for legally messy parent/child relationships resulting from a combination of assisted reproduction and surrogacy eg a same-sex female couple using both a third-party egg donor and a third-party sperm

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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 a 'parent'.

The status of children resulting from fertility treatment or artificial insemination is addressed by amendments to the definition of 'parent' and 'child' in the Interpretation (Jersey) Law. When the legislation is in force, a 'parent' and 'child' shall include a person who is a parent or a child by virtue of Schedule A1 Children (Jersey) Law 2002.

Schedule A1 sets out a series of circumstances (A-D) in which a parent/child relationship will arise where a child is conceived from fertility treatment or artificial insemination. These statutory rules will apply regardless of whether a woman was in Jersey or elsewhere at the time of the relevant fertility treatment or artificial insemination.

Those circumstances cover mixed-sex relationships (where the parents are married and unmarried) as well as same-sex relationships.

Under the CCS Law 2024 a child will have only two legal parents, which can include:

- the child's 'Birth Mother' (ie a woman who gives birth to a child whether as a result of intercourse, fertility treatment, artificial insemination or a surrogacy arrangement);
- the child's biological father;
- a man who is treated as the child's father under Schedule A1 CCS Law 2024;
- a woman who is the child's second parent under Schedule A1 CCS Law 2024; or
- a person named in a Parental Order as the child's parent under Art 8 CCS Law 2024.

These new rules will provide the default position vis a vis a parent and child relationship will exist in Jersey law when a child is conceived from fertility treatment or artificial insemination. It's important to be aware of them when considering the drafting of wills and trusts. Unless they are expressly disapplied, these will be the rules that apply to determine whether a person is to be interpreted as a 'child' of another person as a matter of Jersey law when interpreting a will or a trust.

In Guernsey, whilst the Children (Guernsey and Alderney) Law, 2008 (the **2008 Law**) includes the power for Ordinances to be made in relation to assisted reproduction (defined as, 'the use of medical, scientific, or technical procedures or treatment to enhance fertility (including, without limitation, drug therapy, artificial insemination and in vitro fertilisation')<sup>[8]</sup>, at the current time there is no comprehensive equivalent of the CCS Law 2024.

This means that the circumstances of those undergoing assisted reproduction procedures, and how their child may be defined in accordance with Guernsey law, may differ depending on the relevant circumstances in question. The legal position in this area is complex and difficult.

The Assisted Reproduction (Parentage) (Guernsey and Alderney) Ordinance, 2009 (the **Assisted Reproduction Law**) confirms that:

- If the woman in a married opposite-sex couple gives birth to a child, in circumstances where the sperm provided was not her husband's, that child will be considered to be her husband's child if her husband has consented to being regarded as the father and has not withdrawn that consent<sup>[9]</sup>.

- If the woman in an unmarried opposite-sex couple gives birth to a child, in circumstances where the sperm provided was not her partner's, it is possible for her partner to be regarded as the child's father if both he and the woman consent to him being regarded as such, they are not within prohibited degrees of relationship and the man was alive at the time of the child's birth<sup>[10]</sup>.

However the situation is further complicated however by the fact that unmarried fathers do not have automatic Parental Responsibility for a child (ie the rights, powers and duties towards the health, maintenance, education and welfare of a child) and, in order to obtain this, a father would need to be registered as such on the child's birth certificate or make an application for a Parental Responsibility Order.

The Assisted Reproduction Law is also specific for opposite sex couples. This leaves same-sex couples in a thorny area of law.

For female same-sex couples in circumstances where one of the couple has carried and given birth to the child they will be considered as the child's mother under law however the other party will still need to pursue legal action, usually by way of adoption or Parental Responsibility Order, in order to be regarded as the parent of that child.

Further for male same-sex couples, in circumstances where one party may provide sperm with a child born as a result, that donor party may be considered as the father in law, provided they have given their consent to being regarded as such, however both they and their partner may need to pursue legal action in order to be regarded as the parent of that child, whether by way of adoption or Parental Responsibility Orders<sup>[11]</sup>.

### Children conceived by way of surrogacy arrangement

Surrogacy describes an arrangement where a woman (the 'surrogate mother'), becomes pregnant and gives birth to a child for someone else, so that they can become parents (the 'receiving parents'), which includes same-sex parents, mixed-sex parents, and single parents.

In Jersey the CCS Law 2024 puts certain surrogacy arrangements on a statutory footing and prescribes when a person will be treated as a parent of a child who is conceived through a qualifying surrogacy arrangement. For domestic surrogacies, parental status is conferred on the receiving parents by the court by the granting of a Parental Order.

If, at any time after the making of a Parental Order, there is a death, a person's immovable or movable property devolves in all respects as if the child that is the subject of the Parental Order were the child of the applicant.

In Guernsey the 2008 Law defines a surrogacy arrangement as, '*the practice whereby a woman agrees with 2 other persons to carry a child with the intention that any child born in pursuance of the agreement is handed over to, and parental responsibility in respect of the child is exercised by, or vested in, those other persons after the birth of that child*'<sup>[12]</sup>. However there is currently no legislation governing surrogacy arrangements.

This means that any child born to a surrogate mother will be considered to be the child of that surrogate and this does, therefore, create complex and difficult circumstances, likely involving adoption and/or Parental Responsibility proceedings through the Guernsey Courts, for those entering into surrogacy arrangements undertaken outside the jurisdiction and for those preparing or interpreting wills and trust instruments to consider.

The key point for international families is that surrogacy arrangements vary between jurisdictions. Neither Jersey or Guernsey will automatically recognise a foreign surrogacy arrangement (ie a surrogacy arrangement that has occurred outside the islands, under the laws of a different jurisdiction). That gives rise to the clear potential for a child resulting from a surrogacy arrangement in one

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jurisdiction not to be recognised as a child of the receiving parents for the purposes of law in another, without further steps being taken in the receiving jurisdiction.

### Areas of ambiguity

The additional definitions of a child/parent relationship that require special attention in the drafting of wills and trusts are:

- i. step-children; and
- ii. a 'child of the family'.

Under Jersey law there is no definition of a step-child.

In Guernsey, however, the 1979 Law sets out that a step-child means, *'in relation to any person, the child of the spouse or former spouse of that person who is not a child of the marriage of that person and of his spouse or former spouse'*<sup>[13]</sup>.

A step-child is not the product of a sexual union between their natural parent and step-parent (or required in fact to have any biological connection between themselves and either of their parents<sup>[14]</sup>). Absent adoption or a parental order<sup>[15]</sup>, 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 step-child is adopted by them or the step-parent is granted a parental order in respect of their step-child.

A step-child, for example, is not a child for the purposes of légitime rights under Jersey inheritance law, nor in Guernsey under forced heirship rules pre 2 April 2012<sup>[16]</sup> (unless specifically included as such within a will post 1979). In both islands, a 'child of the family' is a term used to describe how a child is regarded and treated by others. Whether a particular person falls within that definition (on which opinion may vary between family members) is therefore highly context specific and calls for a bespoke drafting solution when it comes to wills and trusts.

### Will and succession planning considerations

For international families, who happen to have assets they have located in Jersey or Guernsey, how their property falls to be dealt with upon their death depends on a combination of:

- i. their domicile;
- ii. whether they die testate or intestate; and
- iii. whether their property is deemed movable or immovable under Jersey or Guernsey law.

The question of domicile is particularly important for international testators who may have relocated to Jersey or Guernsey for sound reasons (eg having sold a business or for tax) and have adopted a Jersey or Guernsey domicile of choice.

### Jersey

If a testator is Jersey domiciled, their succession arrangements will be subject to Jersey customary law. This is very different to English inheritance law. In summary:

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- The deceased's movable estate (which will include shares and bank accounts) is subject to forced heirship rules known as *légitime* which reserve specific portions of their movable estate to certain of the deceased's (*de-cujus*) heirs at law.
- Whether any particular person counts as an heir at law of the deceased will be affected by the 2024 changes to Jersey law. Heirs at law will include their issue (whether legitimate or not), adopted children (of the deceased or their issue), children (of the deceased or their issue) qualifying as such by reason of Schedule A1 CCS Law 2024, and surrogate children (of the deceased or their issue) by reason of a surrogacy arrangement recognised under CCS Law 2024.

The 2025 changes significantly widen the scope of those able to bring a *légitime* claim to reduce a will *ad legitimum modum* to conform with their forced heirship entitlements.

For wills made after the CCS Law 2024 and for wills made before the change in law took effect but taking effect (ie upon death) after the CCS Law 2024 came into force, these fall to be interpreted in accordance with the definition of child and parent introduced by the CCS Law 2024.

## Guernsey

If a testator is Guernsey domiciled, then whether, and how, their succession arrangements will be governed by Guernsey's historic laws of forced heirship or testamentary freedom in accordance with the Inheritance (Guernsey) Law, 2011<sup>[17]</sup> (the **2011 Law**), will depend on those factors outlined above (ie, whether there is a will, if so, the date and, if not, the date of death).

Whilst Guernsey's current laws of inheritance do allow for testamentary freedom, they have also introduced the idea of 'financial provision' claims, similar to those which have been established in England since 1 April 1975. A 'child' of the deceased or the family is entitled under the 2011 Law to make such a claim. The 2011 Law expresses that in those circumstances references to a child will include an illegitimate child or other descendant, or descendant whose relationship with the deceased is deduced through an illegitimate person and includes any child or descendant 'en ventre sa mère'<sup>[18]</sup> at the date of the death of the deceased, this later category perhaps raising further questions for consideration depending on the circumstances of their birth<sup>[19]</sup>.

Heirs at law may well, therefore, include issue whether legitimate, illegitimate or adopted however whether any particular person counts as an heir at law of the deceased will have to be considered carefully depending on whether there is a testate or intestate succession and the relevant laws of any applicable years.

For testators who are not Jersey or Guernsey domiciled – which will constitute the vast majority of those who might have some assets in offshore jurisdictions – the succession to those assets should be subject to a local will in either, or both, jurisdictions, in order to achieve certainty.

## Trust drafting considerations

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 will be fixed at the date of the trust instrument.

Phrases in historic 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.

It's worth reviewing existing trusts to establish whether they are sufficiently clear about what the settlor meant at the time they were made.

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## Jersey

For new trusts after November 2025 governed by Jersey law, using a phrase like 'legitimate children or issue' in a trust settled after the recent changes in Jersey's legislation is going to be problematic because there is no longer any distinction between 'legitimate' and 'illegitimate' children. It's possible to create that definition in the trust itself but that has to be as a result of a conscious drafting choice.

## Guernsey

References to children in trusts established pre 8 May 2008 are generally construed to mean legitimate children only unless the instrument evidences a contrary intention. However, where the trust expressly provides that adopted or legitimated persons 'shall be treated as a child,' a person born outside wedlock can still fall within the class if they are legitimate by operation of the law of the father's domicile at birth, or are legitimated by the parents' subsequent marriage under the law of the father's domicile at the time of that marriage, as recognised by Guernsey private international law.

The Trusts (Guernsey) Law, 2007 provides that, subject to the terms of the trust, all questions as to the validity, interpretation or effect of a Guernsey trust, and the distribution of its property, are determined according to the laws of Guernsey without reference to any other system's law. In construing a trust instrument under Guernsey law, the Royal Court will seek the settlor's objective intention from the words used, read in their ordinary meaning at the time of execution and in the instrument's context, taking into account common-law principles of construction for class gifts.

Who may therefore constitute 'issue' or a 'child' when interpreting, or drafting, a trust instrument will require careful consideration of the instrument itself and the relevant laws in place at that time.

## Conclusions

Ultimately, whether it is a will or a trust, the words of the document are the definitive expression of the intention of whoever made it and to which the executors/trustees must give effect.

Where there is ambiguity in the drafting, the approach is to seek to establish what the settlor really intended by using the term 'child', 'children' 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 and 'stress-test' what the settlor or testator's expectations and views are from the very outset when they use phrases 'child', 'children' or 'issue'.

These expectations could differ significantly from the position that exists in the general law.

## 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, international estate planning and in resolving disputes about private wealth offshore.

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 is ready to assist with any questions or concerns you may have regarding this important aspect of intergenerational wealth management.

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