Children and Issue: Some Lingering Growing Pains

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The rules of construction governing references to children and issue as they affect wills executed today operate clearly enough, but in relation to existing wills they can operate in a haphazard manner.

When a testator makes a will giving his estate on trust for the "children" or "issue" of A without more, what categories of children or issue are included? As will be explained below, if the will is made today, the word "children" will include, in addition to the legitimate children of A, his legitimated, adopted and illegitimate children, and the word "issue" will include legitimated, adopted and illegitimate persons claiming descent from A whether through legitimate, legitimated, adopted or illegitimate parents or ancestors. The class of persons who are eligible and through whom others can benefit has now been extended so as to include persons born as a result of artificial insemination or in vitro fertilisation who are not genetically connected with their "parents."'

While the rules operate clearly enough in relation to new wills, in relation to existing wills the position is less clear-cut. The development of the law has been erratic in a number of respects. First, although legitimation and adoption were introduced into English law with effect from the same date,' the introduction of legitimation was accompanied by consequential provisions altering the property rights of legitimated children, whereas adopted children had to wait over 20 years for similar treatment.' Illegitimate children had to wait another 20 years. 4 Secondly, while the new statutory rules of construction have almost all been confined in their operation to instruments made after the coming into force of the relevant statutory provision, there is one minor, but striking, exception.' Thirdly, the earlier legislation relating to the rights of legitimated and adopted children was restricted in the sense that the changes made in the rules applied only to children legitimated or adopted prior to the making of the particular instrument. The rules of construction affecting the rights of illegitimate children were more radical in that such children were prima facie included even though born after the date of the particular instrument. Legitimated children were, of course, able to benefit under this more benevolent rule applicable to illegitimate children, but adopted children were not. Later, however, the rules relating to legitimated and adopted children were further amended so as to accord with the new, more benevolent approach. Finally, there was a particular problem in relation to wills. Was a will to be treated as made on the date of its execution or on the death of the testator for the purpose of determining whether and to whom the new rules of construction were to apply? Under the rules affecting legitimated children the date of the testator's death has always been regarded as decisive. Under the rules affecting adopted children, however, the earlier legislation treated the date of execution of the will as decisive, though this was later changed to the date of the testator's death. As regards illegitimate children, the date of execution of the will was treated as decisive and this remains the rule.

In this article the rather haphazard development of the law relating to the construction of words of relationship is traced with particular reference to wills and the effect of the developing law on existing wills is also considered. (The law as regards inter vivos dispositions is essentially the

same. The only difference is that there is only one date on which such a disposition can be treated as "made" or it coming into operation," namely the date of its execution.)

Legitimacy

At common law a reference to a person described by reference to his relationship with another person is presumed to refer only to someone who is the legitimate relation of that other person. This presumption can be displaced, but only if there is a context in the will or other instrument or there is admissible evidence of surrounding circumstances extending or qualifying the presumption. Thus, a reference in a will to the children of A is presumed at common law to be a reference to the legitimate first generation descendants of A and a reference to the issue of A will be construed as a reference to the issue of A of any degree who claim descent exclusively through persons who are themselves legitimate.

What, then, is a legitimate child? For the purposes of construing written instruments the short answer which English domestic law gives to this question is that a child is legitimate if born in lawful wedlock (whether or not conceived in lawful wedlock). This answer covers the vast majority of persons considered by the law to be legitimate. But the answer is not comprehensive as the presumption of legitimacy (and accordingly the class of persons qualified to take under a written instrument) also extends to

(i) a child conceived before but born after his parents' divorce';

(ii) a child born of a voidable marriage, such marriage being treated as valid until the decree of annulment is pronounced';

(iii) a child born of a void marriage where at the time of the act of intercourse resulting in his birth (or at the time of the celebration of the marriage if later) both or either of his parents reasonably believed that the marriage was valid provided that the father was domiciled in England and Wales at the time of the birth or at the time of his death if earlier;

(iv) a child born to a married couple as a consequence of artificial insemination or in vitro fertilisation even where the parent is not genetically related to the child.'

There are also various categories of children who will be recognised as legitimate children under the conflicts rules, but the basis upon which they are so recognised is a complex subject which would justify an article of its own.

Legitimation

Legitimation was not recognised at common law and is exclusively the creation of legislation. The principal statutes are:

Legitimacy Act 1926 Legitimacy Act 1959 Legitimacy Act 1976.

Legitimation was first introduced, with effect from January 1, 1927, by the Legitimacy Act 1926. Section l(l) of the Act introduced the concept (long established in civil law jurisdictions) of legitimation by the subsequent marriage of the parents of the illegitimate child. Section 1(2), however, contained a bar on legitimation where either of the parents was married to a third party at the time of the birth of the illegitimate child (s. 8 also expressly extended the circumstances in which legitimation under foreign

law would be recognised). The Act made consequential modifications affecting the property rights of children legitimated under section 1, including the introduction by section 3(l)(b) and (4) of a rule of construction to the effect that in dispositions "coming into operation" after the date of legitimation (and subject to any contrary intention expressed in such disposition) a legitimated child and his spouse, children or remoter issue were to be entitled to take any interest as if the legitimated child had been born legitimate This formula allowed for only one legitimated person in the chain of succession. Thus a gift to the grandchildren of A would entitle the legitimated child of a legitimate child of A or a legitimate child of a legitimated child of A to take, but not a legitimated child of a legitimated child. The modification -of the rules of construction contained in section 3(l)(b) operated only on dispositions coming into operation after the date of legitimation. The Act did not in terms state whether a will was deemed to "come into operation" on the date of its execution or the date of the testator's death. This point has never arisen for decision, but it is clear from dicta in Re Hepworth's that it is the latter.

Section I of the Legitimacy Act 1959 repealed section 1(2) of the 1926 Act with effect from April 1, 1959, with the consequence that thereafter the fact that a marriage between either of the parents of the illegitimate child and a third party subsisted at the date of the child's birth was no longer a bar to legitimation. The rule of construction introduced by the 1926 Act was accordingly modified as regards wills coming into operation on or after April 1, 1959. Otherwise the law remained unchanged.

Although there was no further legislation dealing specifically with the rights of legitimated persons until the Children Act 1975 and the Legitimacy Act 1976 the position of legitimated persons was in the meantime much improved by the new rules governing the rights of illegitimate persons introduced by the Family Law Reform Act 1969. Indeed, section 15(4) of that Act restricted the operation of the rules of construction introduced by the Legitimacy Act 1926 to dispositions referring only to persons who were legitimate or whose relationship was

deduced through legitimate persons. (The provisions of the 1969 Act are considered below in the section on illegitimacy.)

The provisions relating to legitimation contained in the 1926 and 1959 Acts were re-enacted with effect from January 1, 1976, by the Legitimacy Act 1976 (replacing with effect from the same date the corresponding provisions of the Children Act 1975). The 1976 Act currently governs the rights of legitimated children. The provisions relating to the property rights of legitimated persons, which are contained in section 5, differ from the earlier rules in important respects. First, section 5(l) provides that subject to any contrary indication the rules of construction contained in the section are to apply to any instrument (other than an existing instrument) so far as containing a disposition of property. This provision is an important development as it has the effect that a person who is legitimated will not be disqualified even if the disposition is made before the date of his legitimation. Secondly, section 5(3) provides that a legitimated person "and any other person" shall be entitled to take any interest as if the legitimated person had been born legitimate. This formulation cures the "one generation" restriction in the earlier legislation. Thus, under the 1976 Act a gift to the grandchildren of A will be construed so as to permit the legitimated child of a legitimated child of A to take. The rules enacted by the 1976 Act do not affect "existing" instruments, i.e. instruments "made" before January 1, 1976: sections 5(l) and 10(l). Wills made" before that date continue to be governed by the earlier legislation." Section 10(3)(a) makes explicit that which was only implicit -in the earlier legislation, namely that the death of the testator is the date at which a will or codicil is to be regarded as made. Thus, a will made before January 1, 1976, of a testator who dies after that date is governed by the new rules.

Adoption

Adoption is also alien to the common law. It was first introduced by the Adoption of Children Act 1926. However, this Act, unlike the Legitimacy Act 1926, did not affect property rights or alter the rules governing the construction of references to children in written instruments. Indeed, section 5(2) expressly preserved existing rights. The principal statutes modifying the rules of construction as they affect adopted children are:

Adoption Act 1950 Adoption Act 1958 Adoption Act 1976.

The Adoption Act 1950, which took effect as from January 1, 1950 (replacing with effect from the same date the similar provisions of the Adoption of Children Act 1949), made the first inroad on property rights. Section 13(2) provided, in effect, that for the purpose of construing references (express or implied) to the child or children of the adopter in any disposition of real or personal property "made" after the date of an adoption order the adopted child was to be treated as the lawful child of the adopter. However, as with the earlier legislation relating to legitimation, section 13(2)(c) appears to have imposed a "one-generation" restriction. The new rules did not operate retrospectively in relation to dispositions made before January 1, 1950. 12 Section 14(2) provided that a disposition by will or codicil executed before the date of an adoption order was not to be treated as made after that date by reason only of a subsequent codicil confirming it. In other words, the Act, unlike the legislation relating to legitimation, did not treat the death of the testator as the decisive event.

The new rules of construction enacted by the 1950 Act were re-enacted in section 16(2) of the Adoption Act 1958. As before, the rules applied only to dispositions made after the date of the adoption order. But there was one significant difference. Section 17(2) of the 1958 Act provided that a disposition by will was to be treated as made on the date of the testator's death, thus reversing the previous rule and in this respect bringing the rules

of construction relating to adopted children into line with the rules then governing the rights of legitimated children. The new rules did not affect wills made before January 1, 1950, which continued to be governed by the former rules." However, a will made before that date which was confirmed by codicil after that date was brought by paragraph 4 within the ambit of section 17(2) and was thus treated as "made" on the testator's death.

The provisions of the earlier legislation were replaced with effect from January 1, 1976, initially by the Children Act 1975, but later by Part IV of the Adoption Act 1976, which is the statute which currently governs the rights of adopted children. Although the later Act was brought into force only on January 1, 1988," it replaces the corresponding provisions of the earlier Act retrospectively from January 1, 1976.

The provisions relating to the property rights of adopted children differ from the earlier rules in important respects. First, the Act significantly extends the types of adoption to which the new rules are to apply so as to include adoptions throughout the British Isles, "overseas adoptions" (i.e. adoptions of a type recognised by H.M. Government) and adoptions recognised by the courts under the conflicts rules. Secondly, the general rule, as laid down by section 39(1), is that an adopted child is to be treated in law as the child of the marriage of his adoptive parents (whether or not he was born after the solemnisation of the marriage) or in the case of an adoption by one person alone as if he had been born to the adopter in wedlock (though not as the child of any actual marriage of the adopter).

Section 42 contains the rules for the construction of writen instruments. Thi section is ill-drafted and does not state in terms that section 39(l) applies for the purposes of construing instruments. However, this is implicit in the reference to section 39(l) in section 42(2). One consequence, similar to that introduced by the Legitimacy Act 1976, is that since an adopted child is treated in law as the lawful child of his adopter,

an adopted person is no longer disqualified merely because his adoption takes place after the disposition has come into operation. Another consequence is that the “one generation” restriction of the earlier legislation Is removed. Thus, a gift to the grandchildren of A will now include the adopted child of an adopted child of A. As with the rules relating to legitimation, the new rules of construction do not affect “existing” instruments, i.e. instruments “made” before January 1, 1976.” Wills “made” before that date continue to be governed by the former rules. “ However, section 46(3) provides, reversing the former rule and bringing the law relating to adoption into line with that relating to legitimation, that the death of the testator is the date on which a will or codicil is to be regarded as made. Thus, a will made before January 1, 1976, of a testator who dies after that date is governed by the new rules.

Illegitimacy

The position of illegitimate persons was the last to be reformed. The principal statutes are:

Family Law Reform Act 1969

Family Law Reform Act 1987

Human Fertilisation and Embryology Act 1990.

Part II of the 1969 Act came into force on January 1, 1970. Prior to that date it had been thought that a gift to illegitimate children not yet in being was void as being against public policy. Any such rule of law was abolished as regards future dispositions by section 15(7). Other provisions of section 15 expressly modified the common law presumption as to the construction of references to children and other relatives in written

instruments. Section 15(l) provided that in any disposition "made" after the coming into force of the section (a) any reference (express or implied) to the child of any person should, unless the contrary intention appeared, be construed as or as including a reference to any illegitimate child of that person and (b) any reference (express or implied) to a person or persons related in some other manner to any person should, unless a contrary intention appeared, be construed as or as including a reference to anyone who would be so related if he, or some person through whom the relationship was deduced, had been born legitimate. Section 15(1) again embodied a "one generation" restriction. Moreover, the new rules of construction applied only where the reference is to a person who is to benefit under the disposition: section 15(2). For the purposes of section 15 a will was treated as "made" on the date it was executed and was not to be treated as made after that date by reason only that it was confirmed by a later codicil: section 15(8).

The provisions of the 1969 Act were superseded by the much more comprehensive Family Law Reform Act 1987, which is the statute currently governing the status and property rights of illegitimate children. This Act, which embodies a number of Law Commission recommendations, was brought into force on April 4, 1988. 17 Section l(l) states what is termed "the general principle." This subsection provides (inter alia) that in instruments made after the coming into force of the Act references to any relationship between two persons shall in the absence of a contrary intention be construed without regard to whether or not the father or mother of either person have or had been married to each other at any time. Subsections (2) and (3) exclude the general principle in relation to any person who is treated as legitimate or is legitimated or adopted, such persons being already catered for by other legislative provisions. Part III of the Act concerns property rights. Section 19 expressly applies the general principle to "dispositions" which are "made" after the coming into force of the section. Section 19(6) defines the term "disposition" so as to include a disposition by will and section 19(7), like section 15(8) of the 1969 Act, implies that a will is to be treated as "made" on the date it is executed and expressly provides that it is not to be treated as made after that date by reason only that it is confirmed by a later codicil.

Artificial insemination and in vitro fertilisation

Section 27 of the 1987 Act contained provisions (now superseded) affecting the status of children born as a result of artificial insemination. This section contained a presumption that where the mother was a party to a marriage (including a void marriage if at the time of the insemination either or both of the parties reasonably believed that the marriage was valid) and was inseminated with the semen of a person other than her husband, the child was to be treated in law as the child of the marriage unless the husband could prove that he did not consent to the insemination. However, this section (which appears in Part VI of the Act) does not apply the provisions of Part III to such a child and is not expressly referred to in Part 111. It sems improbable that this provision was intended to be confined merely to the status of a child born as a result of artificial insemination and not to affect the property rights of such child, but the position is not clear.

The provisions of section 27 of the Family Law Reform Act 1987 have been superseded by sections 27 to 29 of the Human Fert'lisation and Embryology Act 1990: see section 49(3) and (4). Sections 27 to 29 were brought into force on August 1, 1991." By virtue of sections 27(l), 28(2) and 29(l), where a married woman who bears a child as a consequence of artificial insemination or in vitro fertilisation carried out on or after August 1, 1991 with the consent of her husband, the husband and wife are treated as the mother and father of the child for all purposes. Section 29(3) provides inter alia that references to any relationship in any deed or other instrument (wherever made) are to be construed accordingly. It follows, therefore, that the child will be treated as legitimate. These provisions are prospective in the sense that they apply only in relation to children born as a result of artificial insemination or in vitro fertilisation carried out on or after August 1, 1991. However, they are retrospective in the sense that the rules of construction they introduce apply to all instruments "whenever

made" and accordingly apply to instruments made before as well as after that date. Another curious feature of

section 29(3) is that, unlike every preceding statutory provision modifying the rules of construction, it does not in terms provide that the modification is to be subject to a contrary intention. However, it is not thought that a testator can be prevented, if he so wishes, from defining children and issue as to exclude the provisions of the 1990 Act.

Existing instruments

The rules of construction governing the eligibility of legitimated, adopted and illegitimate children as they affect wills executed today are comprehensive and operate in a clear way. But the operation of the rules in relation to wills which have already come into operation or which, though not yet in operation, were executed some years ago can produce some rather random results. Take, for example, a will made in 1958 creating a discretionary trust during a royal lives perpetuity period in favour of the testator's issue. Suppose the testator had four children, an illegitimate child A born in 1966, a further illegitimate child B born in 1967 but legitimated in 1968 on the testator's subsequent marriage to the mother, a child C adopted in 1969 and a legitimate child D born in 1970. In 1944 D's wife as a result of artificial insemination carried out with D's consent has a child E, of which D is not the genetic father. If the testator died in 1972 A will not qualify as an object of the discretionary trust, the will having been "made" for the purposes of the Family Law Reform Act 1969 (i.e. executed) before January 1, 1970. A's issue will also be disqualified. B and his issue, however, will qualify as the will "came into operation" on the testator's death for the purposes of the Legitimacy Act 1926, i. e. after the date of B's legitimation. But C (and his issue) will not be so lucky because under the Adoption Act 1950 (and the saving provisions of the Adoption Act 1958) the will was "made" (i.e. executed) before the date of C's adoption. If the testator had died in 1977, C and his issue would qualify under the Adoption Act 1976, reversing the former rule and treating the

will as “made” on the date of the testator’s death. D, as a legitimate child, will, of course, qualify. But A (and his issue) can never qualify whatever the date of the testator’s death. Paradoxically, D’s child E, though not genetically descended from the testator, will qualify whatever the date of the testator’s death.

The problems and inconsistencies associated with the rules of construction affecting references to relationships are likely to be with us for many years yet. In relation to wills which, though in existence, have not yet come into operation, such problems are largely a thing of the past, as it is only in relation to illegitimate persons that the date of execution rather than the date of the testator’s death is critical in determining whether the old or new rules of construction apply. But the significance of the date of execution in this context should not be overlooked. In certain circumstances it could matter whether a testator executes a fresh will rather than a mere confirmatory codicil.

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