Drafting *Inter Vivos* Trusts and Will Trusts
References to illegitimate beneficiaries

James Kessler QC

The following is the lecture notes for a lecture given by James Kessler to STEP Sydney Branch at the Banco Court, Sydney, 9 July 2008.

Words ... are the wildest, freest, most irresponsible, most unteachable of all things. Of course, you can catch them and sort them and place them in alphabetical order in dictionaries. But words do not live in dictionaries; they live in the mind. ... Thus to lay down any laws for such irreclaimable vagabonds is worse than useless. A few trifling rules of grammar and spelling are all the constraint we can put on them. All we can say about them, as we peer at them over the edge of that deep, dark and only fitfully illuminated cavern in which they live — the mind — all we can say about them is that they seem to like people to think and to feel before they use them, but to think and to feel not about them, but about something different. They are highly sensitive, easily made self conscious. They do not like to have their purity or their impurity discussed. ... Nor do they like being lifted out on the point of a pen and examined separately. They hang together, in sentences, in paragraphs, sometimes for whole pages at a time. They hate being useful; they hate making money; they hate being lectured about in public. In short, they hate anything that stamps them with one meaning or confines them to one attitude, for it is their nature to change.

Virginia Woolf *The Death of the Moth*

I will approach some general issues – how to draft and to understand trust documentation – through a more specific question: do references to children and issue in trust documents include illegitimate children and issue?

19th century common law rule: References to "children" in trust documentation exclude illegitimate children – subject to contrary intent

Hill v. *Crook* (1873) LR 6 HL 265:

> “the term ‘children’ in a will prima facie means legitimate children...”

Gift in standard (awful) 19th century form:

> Upon trust during such part of my term, estate, and interest therein as my daughter Mary, the wife of the said John Crook, shall happen to live, to pay the net rents, issues, and profits of the said last-mentioned hereditaments and premises unto her, my said daughter Mary Crook, … for her sole, separate, and exclusive use and benefit, independent of her present or any after-taken husband ... "and, subject as aforesaid, I direct and declare that from and after the decease of my said daughter Mary Crook, the last-mentioned hereditaments shall go, remain, and be upon such trusts for the benefit of all and every, or such one or more exclusively of the other or others of the children or child of my said daughter Mary Crook upon such conditions, &c., as she, my said daughter Mary Crook shall by her last will and testament in writing" appoint, and in default of appointment "upon trust for the child, if only one, or all the children, if more than one, of my said daughter Mary Crook who being a son," &c., shall attain twenty-one, or being a daughter, &c., "shall either before or after the decease of my said daughter Mary Crook, attain that age or be married," ...

The unfortunately named John Crook had gone through a ceremony of marriage with his deceased wife’s sister Mary. The marriage was void in English law until the Deceased Wife's Sister's Marriage Act, 1907 so the children were illegitimate. (This would not have been the case in Australia.)

Rule of construction gives way to contrary intention in the will. This particular will demonstrated a contrary intention in subtle way:

1. described John Crook as “*my son in law*” and the *husband* of Mary Crook
2. described Mary (nee Hill) as Mary *Crook* and as the *wife* of John Crook

> It appears to me that the terms "husband" and "wife," "father" and "mother," and "children," are all correlative terms. If a father knows that his daughter has children by a connection which he calls a "marriage," with a man whom he calls her "husband," terming the daughter the "wife" of that husband, I am at a loss to understand the meaning of language if you are not to impute to that same person when he speaks of the "children" of his daughter this meaning, that as he has termed his daughter and the man with whom she was living "wife" and "husband," so also he means to term the offspring born of that so-called "marriage" the children according to that nomenclature. That is all that your Lordships have to find. If you find that that is the nomenclature used by the testator, taking his will as the dictionary from which you are to find the meaning of the terms he has used, that is all which the law, as I understand the cases, requires. … I am of opinion that there is clearly upon the face of this will, … a statement by him in his own words that he meant to make a provision for the family already born of that union which he styles a "marriage." (at p. 285)

Still relevant for documents executed where statutory provisions do not take effect.

The reference to dictionaries is sometimes called the dictionary principle, but it should really be called the non-dictionary principle, since the point is that words such as husband, whose dictionary meaning is a man who has undertaken a valid marriage, are used in a different sense. The same point is made more recently in Lord Hoffmann's speech in *Investors Compensation Scheme*:

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax …

(5) The ‘rule’ that words should be given their ‘natural and ordinary meaning’ reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.[1]

See too Virginia Woolf’s comment on dictionaries above.

Rule does not apply for all purposes
Blackstone’s Commentaries Bk 1 chapter 16

Children are of two sorts; legitimate, and spurious, or bastards…
2. LET us next see the duty of parents to their bastard children, by our law; which is principally that of maintenance. For, though bastards are not looked upon as children to any civil purposes, yet the ties of nature, of which maintenance is one, are not so easily dissolved : and they hold indeed as to many other intentions ; as, particularly, that a man shall not marry his bastard sister or daughter.
3. I PROCEED next to the rights and incapacities which appertain to a bastard. The rights are very few, being only such as he can acquire; for he can inherit nothing, being looked upon as the son of nobody, and sometimes called *filius nullius*, sometimes *filius populi*. Yet he may gain a surname by reputation, though he has none by inheritance. … The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for, being *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived.

Social background to statutory reforms:

See table of illegitimacy rates from “Trends in Illegitimacy among five English-speaking populations: 1940-1980, Demography Vol 23 p. 563, November1986.

Another reaction to this social change was to increase the scope of legitimisation (eg UK Legitimacy Act, 1959). However that only reduced and did not solve the problem.

Legislative solution 1:
References to children include illegitimate children – *subject to contrary intent*

England:

Law reform in Family Law Reform Act 1969, now replaced by Family Law Reform Act 1987

Western Australia: still has the wording of the English FLRA 1969
Section 31A Property Law Act 1969 (inserted 1971)

> **31A. Illegitimates to be included in class references**
> (2) This section applies only if and so far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions thereof.
> (3) In this Act, and in any conveyance[2] made after the coming into operation of this section -
> (a) any reference (whether express or implied) to the child or children of any person shall be construed as, or as including, a reference to any illegitimate child of that person; and
> (b) any reference (whether express or implied) to a person or persons related in some other manner to any person shall be construed as, or as including a reference to anyone who would be so related if he, or some other person through whom the relationship is deduced, had been born legitimate.
> (4) Subsection (3) applies only where the reference in question is to a person who is to benefit or to be capable of benefiting under the disposition or, for the purpose of designating such a person, to someone else to or through whom that person is related.

Eg if a will makes a gift to my children and appoints my children as executors, illegitimate children take the gift but are not appointed executors (subject to contrary intent.)

(5) For the purposes of this section, the relationship between a parent and his or her illegitimate child, and any other relationship traced in any degree through that relationship, shall be recognised only if parentage is admitted by or established against the parent in his or her lifetime; and where the purpose for which the relationship is to be determined is a purpose that enures for the benefit of the parent the relationship shall be recognised only if parentage has been so admitted or established in the lifetime of the child.

Section 31 Wills Act 1970 makes similar provision for a will:

31. Determination of relationships

(1) Unless the contrary intention appears by the will, where for the purpose of determining who is entitled to an interest in any property that is the subject of a disposition (whether that disposition is effected under that will or under the provisions of section 27) it is necessary to determine any relationship, the relationship between a child and his or her parents shall be determined irrespective of whether the parents are or have been married to each other, and all other relationships, whether lineal or collateral, shall be construed accordingly.

(2) In any proceedings where a person relies on a matter of fact made relevant by the provisions of subsection (1) -

(a) that fact shall not be taken to be proved unless it is established to the reasonable satisfaction of the Court; and

(b) where the parents are not, or have not been, married to each other, the relationship between a child and his or her parent, and all other lineal or collateral relationships, shall be recognised only -

(i) if parentage is admitted by or established against the parent in his or her lifetime; and

(ii) where the purpose for which the relationship is to be determined enures for the benefit of the parent, if parentage has been so admitted or established in the lifetime of the child.

South Australia Family Relationships Act 1975

6—All children of equal status

(1) Subject to this Act, the relationship of parent and child exists, for the purposes of the law of this State, between a person and his

natural father or mother, and other relationships of consanguinity or affinity shall be traced accordingly.

(2) Subject to subsection (3) of this section, where an instrument contains an expression denoting a relationship of consanguinity or affinity, that expression shall be construed in accordance with the provisions of subsection (1) of this section, *unless the contrary intention appears* either expressly or by implication from the terms of the instrument, or from circumstances that can be properly taken into account in construing the instrument.

How would one show contrary intent? What words could you use?

This was the difficulty which made the 1969 reform controversial in England. The Report of the Committee on the Law of Succession in Relation to Illegitimate Persons (the Russell Committee) in 1967 recommended in favour of *retaining* the common law rule of construction:

"Any change in the present prima facie rule of construction would in our view lead to more problems than it would solve. A father would be faced with the alternative of either benefiting against his wishes bastards who might be born to his daughter, or of extending to her by the terms of his will the gratuitous insult of expressly excluding the possible outcome of her possible immorality. We feel considerable sympathy for the suggestion that in the case of at least a mother's will a reference to her children should include her bastard as well as her legitimate children, as being more likely than otherwise to accord with her intention. But it would be unacceptable to impose on a mother who did not want to include the former the need to reveal in her will that which might not be generally known, either by express exclusion of individuals, or of bastards as such, or by some device which might well reveal the position of those with knowledge of the family. Further it would, we feel, lead to confusion to have different principles of construction of such phrases applied to different documents. Accordingly, we do not recommend any change under this head."

Contrast the Irish Law Reform Commission (1982):

> The rule of construction should not be regarded as being concerned primarily with the interests of children, but rather that it is designed to give effect to the probable intentions of the person who draws up the instrument. We feel, however, the [Russell] Committee's view should not be adopted. It is far from clear that the present rule of construction accurately represents the intentions of those drawing up instruments; and the notion that a father generally would view with distaste the prospect of benefiting "bastards who might be born to his daughter" is by no means widespread. It is possible that some parents would so view matters but, even if the rule of construction were abandoned, they would still be able to exclude "the possible outcome of their daughter's immorality", should they so desire. And even if it is necessary to reveal the existence, or concern about the possible future existence, of a child born outside marriage, the law should not cater for excessive sensitivity in regard to the matter.
>
> On balance, therefore, the Commission are of the view that the present rule of construction should be set aside and that no prima facie inference should be drawn that words such as "children" and "issue" when appearing in written instruments refer to children born within marriage only.

A traditional formula in England is as follows:

> *In this settlement references to family relationships shall be construed as if the Family Law Reform Acts 1969 and 1987 had not been enacted.*

In *Drafting Trusts & Will Trusts in Australia*, Thomson, 2008, we say:

> A traditional formula (assuming that the trust is governed by the laws of New South Wales), is as follows:
> *In this settlement references to family relationships shall be construed as if the Status of Children Act 1996 (NSW) and the Children (Equality of Status) Act 1976 (NSW) had not been enacted.*
>
> The form of wording used has the advantage of seemliness; avoiding the word "illegitimate" let alone any more offensive

synonym. But the wording is unintelligible to the layman and indeed to a lawyer or accountant unfamiliar with finer points of trust law. There is then scope for misunderstanding and the form is not recommended.
The obscurity may be a virtue in a case where a settlor wished to exclude his illegitimate children from the trust without openly admitting their existence: an example of Talleyrand's epigram that *la parole a été donnée à l'homme pour déguiser sa pensée.*

Drafting Trusts & Will Trusts in Australia proposes a more explicit clause for general use:

> *(1) "Children" does not include illegitimate children.*
> *(2) References (however expressed) to any relationship between two persons do not include anything traced through an illegitimate relationship.*

Solution 2: References to children include illegitimate children – *subject to contrary intent but restrictions on what counts as contrary intent*

Tasmania is an example:

> Tasmania Status of Children Act 1974
> **3. All children to be of equal status**
> (1) For all purposes of the law of the State the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other and all other relationships shall be determined accordingly.
> (2) The rule of construction whereby in any instrument words of relationship signify only legitimate relationship in the absence of a contrary expression of intention is abolished.
> (3) For the purpose of construing any instrument the use, with reference to relationship of a person, of the words "legitimate" or "lawful" shall not, *in the absence of intention to the contrary in such instrument,* prevent the relationship from being determined in accordance with the provisions of subsection (1).[3]

Victoria is another example (differently worded – but effect is the same):

Victoria Status of Children Act 1974

4. Determination of relationship

(1) For all purposes of the law of Victoria the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other and all other relationships shall be determined accordingly.

(2) The rule of construction whereby in any instrument, in the absence of expression of any intention to the contrary, words of relationship signify only legitimate relationships, is abolished.

(3) For the purpose of construing any instrument the use, with reference to relationship of a person, of the words "legitimate" or "lawful" *shall not of itself prevent the relationship* from being determined in accordance with the provisions of subsection (1).

Queensland is identical: Queensland Status of Children Act 1978, s. 3.
Northern Territory is identical: Status of Children Act.

This implies (without saying so directly) that:
(1) in the absence of contrary intent, words of relationship include illegitimate relationships;
(2) the rule in (1) is subject to contrary intent; but
(3) the use of the words "legitimate" or "lawful" does not amount to contrary intent.

How would one show contrary intent? What words could you use?

What would be the position if one used either of the forms recommended in *Drafting Trusts & Will Trusts in Australia*?

> *In this settlement references to family relationships shall be construed as if the Status of Children Act 1996 (NSW) and the Children (Equality of Status) Act 1976 (NSW) had not been enacted.*

This is clearly effective. But what about:

> *(1) "Children" does not include illegitimate children.*

> *(2) References (however expressed) to any relationship between two persons do not include anything traced through an illegitimate relationship.*

What is the status of the rule in 3(3): is it a rule of construction (ie intended to ascertain the most likely meaning)? If so the clause is valid. Statute gives a specific meaning to the word "legitimate" but does not govern the word "illegitimate" which has its normal meaning.

Or is the statutory rule a matter of social engineering – based on the view that the use of the word "illegitimate" is "demeaning, offensive and hurtful" – see "Measuring Immorality", Gill Reekie, Cambridge University Press, 1998, p.11. In that case the clause is not valid. It is suggested that this is not the correct view, but it would perhaps be better not to use the clause in these jurisdictions for the avoidance of doubt.

Excusus on terminology

The Russell Committee para 8:

> Partly for the sake of brevity, and partly to avoid confusion in eye or ear between legitimate and illegitimate, we refer to an illegitimate person as a bastard – a correct legal description.

A Bastardy Act was passed in 1923 in the UK, but since then the word bastard ceased to be used in legislation.

Contrast Hansard 21 July 1966 vol 276 cc561-77. LORD ROYLE

> I came across two words in the Bill that caused me some concern…. the two words are "illegitimate children". … My concern is that we continue in our country to use the term "illegitimate child". I have looked up the Oxford Dictionary, and I find that among the definitions of "illegitimate" are "not authorised by law"; "improper"; "abnormal"; "not born in lawful wedlock"; and the last definition, "bastard", has now become a swear word in our ordinary vocabulary. I cannot for the life of me see how, in this enlightened day, we should regard any child in our community as "not authorised by law". It may well be that the actions of the

parents have not been authorised in a lawful way, but to tag this term on to any British child to-day seems to me to be a complete anachronism. I see nothing improper in the existence of a child who might have been born out of lawful wedlock.

…I am concerned about the stigma which is constantly attached to children whom we call alleviate, and I believe that it is wrong that that term should be associated with any child to-day.

I had thought of trying to put down an Amendment to delete these words from the Bill. I confess that I was at a loss to find an alternative. I wondered whether it would be better to use the term, "born out of wedlock". But still that would stick, although I do not think it is nearly so bad as the term, "illegitimate". Because of my failure, which I confess, to find an alternative word, I must content myself, but I would ask Her Majesty's Government whether, in the compilation and the drafting of future legislation, where this term might arise, they could search, through the activities of their learned draftsmen, and use the knowledge of Ministers of the Crown, to find some different term, so that these two words may cease to be part of the vocabulary of our country. Your Lordships will forgive me, but I feel rather strongly on this matter. This term, I think, is completely out of date in the second half of the twentieth century …

Solution 3: further restrictions on what counts as contrary intent

New South Wales is similar but the restriction on what counts as contrary intent is a little harsher:

NSW Status of Children Act 1996

6 Construction of dispositions of property made on or after 1 July 1977

(1) This section applies to the following dispositions only:

(a) dispositions made *inter vivos* on or after 1 July 1977 (being the date on which the *Children (Equality of Status) Act 1976* commenced),

(b) dispositions made by will or codicil executed before, on or after 1 July 1977 by a person who dies after that date.

(2) Unless a contrary intention appears, in any disposition to which this section applies:
(a) a reference (however expressed) to the child or children of a person includes a reference to an exnuptial child of whom that person is a parent, and
(b) a reference (however expressed) to any person or persons related to another person (other than as a parent or child) includes a reference to anyone who is so related in fact regardless that the person related in fact, or some other person through whom the relationship is traced, is or was an exnuptial child.
(3) The use of any of the following words (or of any word or words having the same or a similar meaning) does not of itself indicate a contrary intention for the purposes of subsection (2):
(a) the words "legitimate" or "lawful" when used with reference to the child or children of a person or persons related to another person in some other way,
(b) the words "married", "husband" or "wife" when used with reference to the parent or parents of a person.

Two developments in the legislative technique:
Extended rules of construction: in s. 6(3)(b).

Use of neologism *exnuptial* defined s. 3(2) of the Act:

(2) A reference in this or any other Act:
(a) to an exnuptial child or to a child or person born outside marriage (however expressed) is a reference to a child or person whose father and mother were not married to each other at the time of the conception of the child or person and who have not subsequently married each other …

Thus the legislation has solved the terminological problem raised by Lord Royle in 1966.

Solution 4: References to children include illegitimate children – *notwithstanding contrary intent*

Australian Capital Territory:

Parentage Act 2004 Section 39

Construction of instruments

(1) Subsections (2) and (3) apply to—

(a) an instrument other than a will or codicil that was signed after 24 March 1989; or

(b) an instrument other than a will or codicil that—

(i) was signed before that date; and

(ii) under the law of the place where the instrument was signed, would be interpreted without regard to the illegitimacy of people mentioned in, or taking under, the instrument.

(2) Any rule of law that a disposition in favour of an exnuptial child not conceived or born when an instrument takes effect is void for being contrary to public policy is abolished.

(3) In an instrument other than a will or codicil—

(a) a reference (however expressed) to a child of a person includes a reference to an exnuptial child of the person; and

(b) a reference (however expressed) to a person related to someone else in another way includes a reference to anyone who is related in that way regardless of whether he or she or another person through whom the relationship is traced is or was an exnuptial child.

(4) An instrument (other than an instrument mentioned in subsection (1) or a will or codicil) that was executed before 24 March 1989 must be interpreted as if the Birth (Equality of Status) Act 1988 or this Act had not been made.

(5) The Birth (Equality of Status) Act 1988 , part 3 and part 4 apply in relation to the interpretation of a will or codicil if the testator died on or after 24 March 1989 and before the commencement of this Act, but a will or codicil must otherwise be interpreted as if that Act had not been made.

(6) This Act applies to the interpretation of a will or codicil if the testator died on or after the commencement of this Act, but a will or codicil must otherwise be interpreted as if this Act had not been made.

(7) If an instrument contains a special power of appointment in favour of a class of people, nothing in the Birth (Equality of Status) Act 1988 or this Act extends the class of people in whose favour the appointment may be made or causes the exercise of the power to be interpreted to include anyone who is not a member of that class.

(8) In this section:

> "exnuptial child" means a child whose father and mother were not married to each other when the child was conceived and have not later married each other (other than a child who is a legitimate child, or is taken to be a legitimate child, under the Marriage Act 1961 (Cwlth), part 6).

Could this be excluded by contrary intention? It is suggested that the answer is yes:

(1) Freedom of disposition is a general principle of the common law.[4]
(2) The section does not expressly state that it is intended to override the contrary intention of the settlor or of the testator. If the drafter intended to restrict freedom of disposition, one would expect this to be stated expressly.
(4) The section is headed "construction." This is not appropriate to a compulsory rule because that is not a rule of construction. (I appreciate that only slight weight can be placed on the heading of a statute.)
(5) If the contrary view were right, one could make a gift to ones illegitimate children (excluding the legitimate) but not to legitimate children (excluding the illegitimate), which would be odd.

Same in Bermuda and Prince Edward Islands.

Cases in tax haven jurisdictions

In some jurisdictions there are not statutory provisions, so the question arises whether the common law rule is still applied.

RHB Trust Company v Butlin [1992-93] CILR 219

Class of beneficiaries included "children and remoter issue".
Settlement (date unspecified) made by Lady Sheila Butlin (English settlor).

> "It is a matter of common knowledge that settlors from other parts of the world have established family trusts in the Cayman Islands, and it cannot be assumed that by any means all of those families live under a social system which embodies the approach which England has adopted in the Family Law Reform Act 1969. For this

> court to direct that in the context of a family settlement the words ”children” and “issue” do not under Cayman law have their *prima facie* meaning at common law would in my judgment be wrong. Although the direction asked for is specific to two settlements it must have application in a wider context and place other families in a position which they contemplate with dismay. If that is to be done it is a matter for the legislature.”

The justification for the decision - to avoid a cultural colonialism - seems a valid point.

Philean Trust Co Ltd v. Taylor [2003] JLR 61

The facts

Settlement dated December 11th, 1969.

> “ (d) ‘The beneficiaries’ means and includes all and any of the following persons, namely … the spouse, widow and the issue of the settlor.
> (e) Reference to the issue of any person shall include the children and remoter issue of such persons through all degrees.”
> 3 The settlement under clause 1 declares that, *in the absence of any change as provided,* “the construction and effect of each and every provision hereof shall be subject to the jurisdiction of and construed and regulated only according to the laws of the said Island of Jersey.”
> 4 … When the trust was set up, the settlors had four children, all legitimate, and no grandchildren. Since that date the settlors have died, …. Three of the children named in clause 2(d) have, the court was told, had between them six children, four of whom are illegitimate:

The solution to the problem would have been to change the proper law.

The correct reason for the decision (or at least, a good reason)

19 The settlors had connections with both Australia and South Africa. They had four children, all legitimate, who were named in the settlement.

The settlement is a formal deed, whereby the settlors divested themselves of property on certain trusts. They were drawn up by lawyers who were familiar with legal terms and who certainly, if they were drawing up wills, especially for Mr. and Mrs. Taylor, would have been thinking in legal terms, *i.e.* that children meant legitimate children.

A doubtful reason for the decision: objective principle of interpretation

It is clearly the wish, certainly of the late settlors, that all the grandchildren should be treated as beneficiaries of the trust. [*How did they know that?]*

Citing Lewin on trusts:

> "Lifetime settlements are no different from other documents in that the subjective intentions of their authors are irrelevant. What counts is the one objective meaning that the words of the document convey to the court when considered as a whole in the light of the surrounding circumstances. …
> Jessel M.R. said in construing the after-acquired property covenant in a marriage settlement [Smith v. Lucas (1881), 18 Ch. D. 531, at 542],
> 'The settlement is one which I cannot help thinking was never intended by the framer of it to have the effect I am going to attribute to it; but of course, as I very often say, one must consider the meaning of the words used, not what one may guess to be the intention of the parties.'
> The intention that the court seeks is the intention as expressed, that is, the way in which the document is to be understood, not the purpose or motive, desire or other subjective state of mind of the settlor. The reason for the rule is that otherwise no lawyer would be safe in advising on the construction of a written instrument, nor any party in taking under it.

Oliver Wendell Holmes, writing off the record, put the point more bluntly:

> We don't care a damn for the meaning of the writer, the only question is the meaning of the words.[5]

This approach is criticised in DTWT in Australia:

> However, a less literal and more background-sensitive reading of the kind advocated by Lord Hoffmann can properly be described as a search for the author's subjective meaning. Lord Hoffmann said:
>
> > It is of course true that the law is not concerned with the speaker's subjective intentions. But the notion that the law's concern is therefore with the "meaning of his words" conceals an important ambiguity. The ambiguity lies in a failure to distinguish between the meanings of words and the question of what would be understood as the meaning of a person who uses words. The meaning of words, as they would appear in the dictionary, and the effect of their syntactical arrangement, as it would appear in a grammar, is part of the material which we use to understand a speaker's utterance. But it is only a part; another part is our knowledge of the background against which the utterance was made. It is that background which enables us, not only to choose the intended meaning when a word has more than one dictionary meaning but also, in the ways I have expressed, to understand a speaker's meaning, often without ambiguity, when he has used the wrong words. [6]

Lord Steyn makes this point:

> In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that *a commercial construction is more likely to give effect to the intention of the parties*. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.[7]

Those who sign legal documents have specific intentions in their mind and in principle they want those intentions to be acted on if possible and not any other.

The point is not theoretical. There is a good reason why a court should acknowledge that it is seeking to find the subjective intention of the

parties. Disdain for subjective intention has pernicious consequences. It leads away from subjective intention where such intention does exist and can be found.

The common law rule in Canada

Re Hogbin [1950] 3 DLR 843

Will made 13 Feb 1928, death 21 Feb 1928. Residue to D for life, remainder to children of D. D left an illegitimate granddaughter.

> The law as laid down in *Hill v Crook* was… Judge-made law and doubtless made to meet the social conditions which prevailed in England. The word "child" in its ordinary meaning includes a natural child.
>
> One could point to case upon case where the Courts in the past have deemed themselves coerced to put a construction upon words or phrases in a will quite at variance with what they believed the testator intended, and it did not help matters that the Courts after expressed regret that they felt themselves so coerced. Today it is recognised that the law is a living thing and the Courts more and more shake off the shackles of decisions made in the light of conditions that no longer prevail. Apt illustration is to be found in the decision of Meredith J in Re Jennings [1930] Ir R 196, where the learned Judge after reviewing a long line of authorities held that he word "money" as used in the will under consideration was not to be construed in the strict legal sense of cash in hand or at call in the bank…. "For two centuries the Courts have been endeavouring to force testators to use the word money in the sense of cash. They have signally failed, notwithstanding a number of decisions in which they regretfully held that as a matter of law the testator said what they were convinced he did not mean. It is time to hoist the while flag. Testators evidently prefer to say "cash" when they mean "cash".
>
> And again in Perrin v Morgan [1943] AC 399, where the meaning of the word "money" was considered, Viscount Simon LC at p 414 observed:

"The present question is not, in my opinion one in which this House is required, on the ground of public interest, to maintain a rule which has been constantly applied but which it is convinced

> is erroneous. It is far more important to promote the correct construction of future wills. In this respect than to preserve consistency in misinterpretation…
> Lord Atkin "whole-heartedly" agreed with the opinion of the Lord Chancellor and at p. 415 said: I anticipate with satisfaction that henceforth the group of ghosts of dissatisfied testators who, according to a late Chancery judge, wait on the other bank of the Styx to receive the judicial personages who have misconstrued their wills, may be considerably diminished'."

But contrast Re Horinek (1989) 108 DLR (3d) 84

> Judges are not legislators; from time to time temptation comes to change the law where the result otherwise does not readily square with one's sympathies. The duty of the Court, however, is not to anticipate the will of the Legislature, … it may be taken that the Legislature considered, but rejected, the opportunity to further amend the law … With the greatest respect for those whose opinion is otherwise, Judges do no great service in couching their opinions in terms of public policy…

Likewise the classic example of Denning v. other judges in *Sydall v Castings Ltd* [1967] 1 QB 302:

Employers' Group Life Assurance Scheme trust for "descendents" of employees.
Lord Denning: (dissenting):

> The key words are "relation" and "descendant." They are not technical words. Nor are they terms of art. They should be given their ordinary meaning.
>
> I have no doubt that such an argument would have been acceptable in the nineteenth century. The judges in those days used to think that if they allowed illegitimate children to take a benefit they were encouraging immorality. They laid down narrow pedantic rules such as that stated by Lord Chelmsford in Hill v. Crook: "No gift, however express, to unborn illegitimate children is allowed by

law." In laying down such rules, they acted in accordance with the then contemporary morality. Even the Victorian fathers thought they were doing right when they turned their erring daughters out of the house. They visited the sins of the fathers upon the children - with a vengeance. I think we should throw over those harsh rules of the past. They are not rules of law. They are only guides to the construction of documents. They are quite out of date.

[The trustees] should not be compelled, against their will, to shut out this little girl simply because she is illegitimate. That would be so unfair that I, for one, will not agree with it.

Contrast Lord Diplock:

Documents which are intended to give rise to legally enforceable rights and duties contemplate enforcement by due process of law which involves their being interpreted by courts composed of judges, each one of whom has his personal idiosyncrasies of sentiment and upbringing, not to speak of age. Such documents would fail in their object if the rights and duties which could be enforced depended upon the personal idiosyncrasies of the individual judge or judges upon whom the task of construing them chanced to fall. It is to avoid this that lawyers, whose profession it is to draft and to construe such documents, have been compelled to evolve an English language, of which the constituent words and phrases are more precise in their meaning than they are in the language of Shakespeare or of any of the passengers on the Clapham omnibus this morning. These words and phrases to which a more precise meaning is so ascribed are called by lawyers v. "terms of art" but are in popular parlance known as "legal jargon." We lawyers must not allow this denigratory description to obscure the social justification for the use of "terms of art" in legal documents.

Russell LJ:

The fact that in the present case the alleged descendant is a small child, whom the deceased was no doubt looking after together with the mother as a family unit, cannot affect the question of construction.

I may perhaps be forgiven for saying that it appears to me that Lord Denning M.R. has acceded to the appeal of Bassanio in the Merchant of Venice.
Bassanio: "And, I beseech you,
Wrest once the law to your authority:
To do a great right, do a little wrong."

But Portia retorted:
Portia: "It must not be, there is no power in Venice
Can alter a decree establishéd:
'Twill be recorded for a precedent,

And many an error, by the same example,
Will rush into the State: it cannot be."

I am a Portia man.

The debate, between Lord Denning and his fellow judges, and in Canada, is as old as the common law.

Human rights?

Philean Trust Co Ltd v. Taylor:

1. Fourthly, it does not seem that the European Convention on Human Rights is of as much assistance to Mr. Sinel as he would wish. Article 12[8] is, in the view of the court, at best neutral. Article 14[9] does not really seem to be relevant here.

Human rights aspect also summarily dismissed in Upton v National Westminster Bank Plc & Ors [2005] EWCA Civ 1479 (14 November 2005).

Nevertheless, this may not be the last of the human rights argument.

James Kessler QC
15 Old Square

Lincoln's Inn
London WC2
7 July 2008

1 [1998] 1 WLR 896 pp.912–3

2 Conveyance is widely defined in s. 7: "conveyance" includes a mortgage, charge, lease, assignment, appointment, transfer, assent, vesting declaration, disclaimer, release, surrender, extinguishment and every other assurance of property or of an interest therein by any instrument, except a will…

3 Wording derived from New Zealand Status of Children Act 1969: Section 3
(1) For all purposes of the law of New Zealand the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, and all other relationships shall be determined accordingly…
(3) For the purpose of construing any instrument, the use, with reference to a relationship, of the words legitimate or lawful shall not of itself prevent the relationship from being determined in accordance with subsection (1) of this section.

4 Blathwayt v Baron Cawley [1976] AC 397 at p 426.

5 Holmes–Pollock letters (9th December 1898).

6 *Mannai Investment Co v Eagle Star Life Assurance Society* [1997] AC 749 at 775.

7 *Mannai Investment Co v Eagle Star Life Assurance Society* [1997] AC 749 at 771 (emphasis added).

8 "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

9 "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

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