

CHAPTER 6

INTERPRETATION OF EXPRESS TRUSTS

1. INTRODUCTION

Scope of chapter

- 6-01** NOTE 1. FOR THE REFERENCE TO *Theobald on Wills*, SEE NOW (17th edn), Chaps 14 to 28. FOR THE REFERENCE TO *Williams on Wills*, SEE NOW (9th edn), Vol.1, Chaps 49 to 101.

2. EVIDENCE TO INTERPRET SETTLEMENTS

The parol evidence rule

- 6-03** AT THE END OF THE SECOND SENTENCE OF THE TEXT ADD A NEW FOOTNOTE 8a: *Rafferty v Philp* [2011] EWHC 709 (Ch) at [23] (statement in text approved).

NOTE 12. AT THE END ADD: See too *Byrnes v Kendle* [2011] HCA 26; (2011-12) 14 I.T.E.L.R. 299 at [13]–[18], [46]–[66] and [115]–[118].

NOTE 14. AT THE END ADD: *Rafferty v Philp*, above, at [24] (statement in text approved).

NOTE 17. FOR THE REFERENCE TO *Snell's Equity*, SEE NOW (32nd edn), § 16–008.

NOTE 20. ADD: *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 A.C. 1101.

Evidence of meaning of words

- 6-07** NOTE 31. FOR THE REFERENCE TO *Theobald on Wills*, SEE NOW (17th edn), § 14–031. FOR THE REFERENCE TO *Williams on Wills*, SEE NOW (9th edn), Vol.1, § 57.18.

Surrounding circumstances

- 6-08** NOTE 33. ADD: See too *I.R.C. v Botnar* [1999] S.T.C. 711 at 721, 734–738, CA; *Canada Trust Co. v Browne* [2010] ONSC 4118; (2010–11) 13 I.T.E.L.R. 648 at [27]–[30] and [44].

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NOTE 36. ADD: See too *Independent Trustee Services Ltd v Knell* [2010] EWHC 650 (Ch); [2010] All E.R. (D) 07 (Apr) at [10].

Ambiguities

Where there is no ambiguity

6–11 NOTE 57. FOR THE REFERENCE TO *Snell's Equity*, SEE NOW (32nd edn), § 16–008.

3. INTERPRETATION OF TRUSTS FOR CHILDREN**Construction of gifts to children at common law**

6–14 NOTE 69. AT THE END ADD: A child is also legitimate at common law if at the time of his birth he is legitimate by the law of the domicile of each of his parents: *Green v Montagu* [2011] EWHC 1856 (Ch); [2011] W.T.L.R 1341.

NOTE 72. FOR THE REFERENCE TO *Theobald on Wills*, SEE NOW (17th edn), § 26–002 to 26–021. FOR THE REFERENCE TO *Williams on Wills*, SEE NOW (9th edn), Vol.1, §§ 72.2 to 72.6.

Human Fertilisation and Embryology Act 1990

AFTER § 6–19 INSERT THE FOLLOWING NEW PARAGRAPHS AND HEADINGS:

Human Fertilisation and Embryology Act 2008

6–19A The Human Fertilisation and Embryology Act 2008, which came into force on April 6, 2009,^{87a} contains new rules concerning parenthood in cases of assisted fertilisation.^{87b} The new rules apply where the assisted fertilisation (as distinct from the birth) takes place after the commencement of the new rules in the 2008 Act.^{87c} Subject to that, the new rules apply to documents whenever made^{87d} and so have a similar retrospective effect to the rules in the Human Fertilisation and Embryology Act 1990.^{87e} The rules in the 1990 Act continue to

^{87a} Human Fertilisation and Embryology Act 2008 (Commencement No.1 and Transitional Provisions) Order 2009 (SI 2009/479).

^{87b} Human Fertilisation and Embryology Act 2008, ss.33 *et seq.*

^{87c} *ibid.*, s.57(1).

^{87d} *ibid.*, s.48(5).

^{87e} See § 6–18.

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apply where the assisted fertilisation (as distinct from the birth) took place before the commencement of the new rules in the 2008 Act.^{87f}

Who is the mother under the 2008 Act

6–19B As in the case of the 1990 Act^{87g} the woman who carries the child as result of the placing in her of an embryo or sperm and eggs, wherever that takes place, and no other woman, is to be treated as the mother, save to the extent that child is not treated as her child by virtue of adoption.^{87h}

Who is the father or other parent under the 2008 Act

6–19C The other parent can be either a man, that is the father, or, in some circumstances, a woman. If the mother is married at the time of the assisted fertilisation, but the fertilisation is not brought about with her husband's sperm, her husband is nonetheless treated as the father wherever the fertilisation takes place, unless it is shown that he did not consent to the assisted fertilisation.⁸⁷ⁱ This rule is the same as that applying under the 1990 Act,^{87j} and is subject to similar exceptions.^{87k} Where this rule does not apply (and a woman is not treated as the other parent under the rules described in § 6–19D (online supplement)), a man whose sperm is not used to bring about the fertilisation is treated as the father if he is alive at the time of the fertilisation, the fertilisation takes place in the course of treatment services provided in the United Kingdom by a licensed person, and he and the mother agree to his being the father in accordance with the agreed fatherhood conditions specified in the 2008 Act.^{87l} Where a person is treated as the father under the above rules, no other person is to be treated as the father.^{87m}

^{87f} Human Fertilisation and Embryology Act 2008, s.57(2).

^{87g} See § 6–16.

^{87h} Human Fertilisation and Embryology Act 2008, s.33.

⁸⁷ⁱ Human Fertilisation and Embryology Act 2008, s.35.

^{87j} See § 6–17.

^{87k} Human Fertilisation and Embryology Act 2008, s.38(2) and (4) The exception in s.38(2) corresponds to the exception in Human Fertilisation and Embryology Act 1990, s.28(5)(a) considered in § 6–17, n.84.

^{87l} Human Fertilisation and Embryology Act 2008, ss.36 and 37, subject to the exceptions in s.38(2) and (4).

^{87m} Human Fertilisation and Embryology Act 2008, s.38(1). See too s.41.

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6–19D We now come to cases where the other parent is a woman. If at the time of the assisted fertilisation, wherever it takes place, the mother is a party to a civil partnership, the other party to the civil partnership is to be treated as a parent of the child unless it is shown that she did not consent to the assisted fertilisation.⁸⁷ⁿ Where this rule does not apply (and a man is not treated as the father parent under the rules described in § 6–19C (online supplement)), a woman is treated as the other parent if she is alive at the time of the fertilisation, the fertilisation takes place in the course of treatment services provided in the United Kingdom by a licensed person, and she and the mother agree to her being the other parent in accordance with the agreed female parenthood conditions described in the 2008 Act.^{87o} Where a woman is treated as a parent of the child under the above rules, no man is to be treated as the father.^{87p} A woman is not to be treated as the other parent merely because of egg donation.^{87q}

Effect of provisions

6–19E Where a person is treated as the mother, father or a parent of the child under the rules described in §§ 6–19B to 6–19D (online supplement), that person is to be treated in law as the mother, father or parent (as the case may be) for all purposes.^{87r} As noted in § 6–19A (online supplement), this applies to any document whenever made, whether before or after the commencement of the 1990 Act or 2008 Act.^{87s} In a case where the mother’s husband is treated as the father, though the fertilisation was not brought about by the use of his sperm, the effect of his being treated as the father is that the child is legitimate. In a case where the mother’s civil partner is treated as the other parent, or where a woman is treated as the other parent under the agreed female parenthood provisions and was the mother’s civil partner at any time between the assisted fertilisation and the birth, the child is legitimate.^{87t} However, the rules under the 2008 Act do not affect the devolution of any property devolving along with any dignity or title.^{87u} There is no provision for exclusion of the rules in the 2008 Act,

⁸⁷ⁿ *ibid.*, s.42, subject to the exceptions in ss.45(2) and (4).

^{87o} *ibid.*, ss.43 and 44, subject to the exceptions in ss.45(2) and (4).

^{87p} *ibid.*, s.45(1).

^{87q} *ibid.*, s.47.

^{87r} *ibid.*, s.48(1).

^{87s} *ibid.*, s.48(5).

^{87t} *ibid.*, s.48(6).

^{87u} *ibid.*, s.48(7).

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and on the question whether and how these rules can be excluded or modified by the terms of a trust, similar considerations apply as in the case of the 1990 Act.^{87v}

Adopted children

1976 to April 3, 1988

6–29 AFTER THE FIRST SENTENCE INSERT: The rules in the Adoption Act 1976 continue to apply in relation to adoptions effected before the Children and Adoption Act 2002 came fully into force on December 30, 2005.^{39a} As regards adoptions made on or after that date, the rules in the 1976 Act are replaced by similar but not identical rules contained in the 2002 Act applicable to the same instruments as those to which the 1976 Act applies.^{39b} There are thus now two sets of rules under different Acts applicable to the same instruments, depending on the date of the relevant adoption rather than the date of the relevant instrument. References in the text below to the 1976 Act include references to the 2002 Act as regards adoptions effected on or after December 30, 2005.

NOTE 40: DELETE AND REPLACE BY: Adoption Act 1976, ss.39(6)(a) and 42(1); Adoption and Children Act 2002, ss.67(6)(a) and 69(1).

NOTE 42: ADD: Adoption and Children Act 2002, s.73(3).

NOTE 43: ADD: repealed by Trusts of Land and Appointment of Trustees Act 1996, s.25(2) and Sch.4 with savings by s.25(4) for entailed interests created before the commencement of that Act; not expressly covered by Adoption and Children Act 2002.

NOTE 44: ADD: Adoption and Children Act 2002, s.67(6)(a), Sch.4, paras.17(1)(a) and 18.

NOTE 45: ADD: Adoption and Children Act 2002, s.73(4).

AFTER THE THIRD SENTENCE INSERT: By section 67(2) of the 2002 Act, an adopted person is the legitimate child of the adopter or adopters and if adopted by a couple (or one of a couple under section 51(2) of the 2002 Act) is to be treated as the child of the relationship of the couple in question.

^{87v} See § 6–19.

^{39a} Adoption and Children Act 2002 (Commencement No.9) Order 2005 (SI 2005/2213).

^{39b} Adoption and Children Act 2002, ss.66 *et seq.*

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NOTES 46 AND 47: ADD: Adoption and Children Act 2002, s.69(2).

NOTE 48: ADD: Adoption and Children Act 2002, s.69(5).

NOTE 49: ADD: Adoption and Children Act 2002, ss.67(3) and (4) and 69(4).

NOTE 50: ADD: Adoption and Children Act 2002, s.69(4). In *Staffordshire County Council v B* [1998] 1 F.L.R. 261 it was held that Adoption Act 1976, s.42(4) preserved, not only a vested interest in possession of an adopted person but also a reversionary interest of an adopted child expectant upon his natural mother's life interest. Under the different wording of Adoption and Children Act 2002, s.69(2) only a vested interest in possession of an adopted person and an interest of another person expectant upon that vested interest is preserved. An application under Variation of Trusts Act 1958 before an adoption order is made may be a suitable method of avoiding the destruction by the 1976 Act and 2002 Act of contingent interests, and by the 2002 Act of all reversionary interests, see *S v TI* [2006] W.T.L.R. 1461 and § 45–52. The Law Commission has proposed that if immediately before adoption a child has in the estate of his or her deceased parent any contingent interest, other than a contingent interest in remainder, that interest will not be affected by the adoption if made on or after the date of the proposed reform: see Law Commission Report on *Intestacy and Family Provision Claims on Death* (Law Com. No. 331, December 14, 2011), para. 4.30 to 4.52 and clause 4 of draft Inheritance and Trustees' Powers Bill in Appendix A to the Report.

NOTE 51: ADD: Adoption and Children Act 2002, s.71.

NOTE 52: ADD: Adoption and Children Act 2002, s.73(2).

NOTE 55: ADD: Adoption and Children Act 2002, s.69(1).

NOTE 56: ADD: Adoption and Children Act 2002, s.67(6)(a), Sch.4, paras.17(1)(a) and 18.

NOTE 58: ADD: Adoption and Children Act 2002, s.73(2).

NOTE 62: ADD: Adoption and Children Act 2002, s.73(3).

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Since April 3, 1988

- 6–30** AT THE END ADD: Similar considerations apply in relation to the Adoption and Children Act 2002, on which see § 6–29.

5. INTERPRETATION OF EXECUTED TRUSTS**Entailed interests**

- 6–47** NOTE 15. FOR THE REFERENCE TO *Theobald on Wills*, SEE NOW (17th edn), § 28–146.

AFTER § 6–52 ADD THE FOLLOWING NEW SECTION:

7. STATUTORY TRUSTS**Generally**

- 6–53** Where a trust is created by statute, the statute may not create a comprehensive set of rules concerning the rights of the beneficiaries or the duties, rights and powers of the trustees. In such a case it is inappropriate to apply the general rule of interpretation which applies to statutory provisions and non-statutory instruments that if provision is not made for some event, the most usual inference to be drawn is that nothing is to happen.³³ Rather, the general rules of trust law and principles of equity, such as rules concerning self-dealing, the duties of a trustee to account, tracing and pooling of assets, so far as not excluded or modified by statute, are applied by default so as to fill the gap left by the terms of the statute; and where the effect of trust law is to take away private property law rights which would otherwise exist or to confer a power not expressly conferred by the statute concerned, the court will not apply any general presumption that the statute was not intended to take away such rights nor confer such a power.³⁴

Application of general statutory provisions concerning trusts

³³ *Att.-Gen. of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 W.L.R. 1998 at [16]–[17].

³⁴ *Re Lehman Brothers International (Europe) CRC Credit Fund Ltd v GLG Investments plc* [2010] EWCA Civ 917; [2010] All E.R. (D) 15 (Aug) at [64]–[74].

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6-54 Similarly, general statutory provisions concerning trusts, such as those contained in the Settled Land Act 1925, Trustee Act 1925, the Variation of Trusts Act 1958 and the Trustee Act 2000 apply to a trust created by statute,³⁵ so far as not excluded by the terms of the general statutory provisions,³⁶ or excluded or modified by the terms of the statute creating the trust.

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³⁵ See e.g. *Hambro v Duke of Marlborough* [1994] Ch. 158 (Settled Land Act 1925, s.64).

³⁶ See e.g. Variation of Trusts Act 1958, s.1(5), on which see § 45-52.