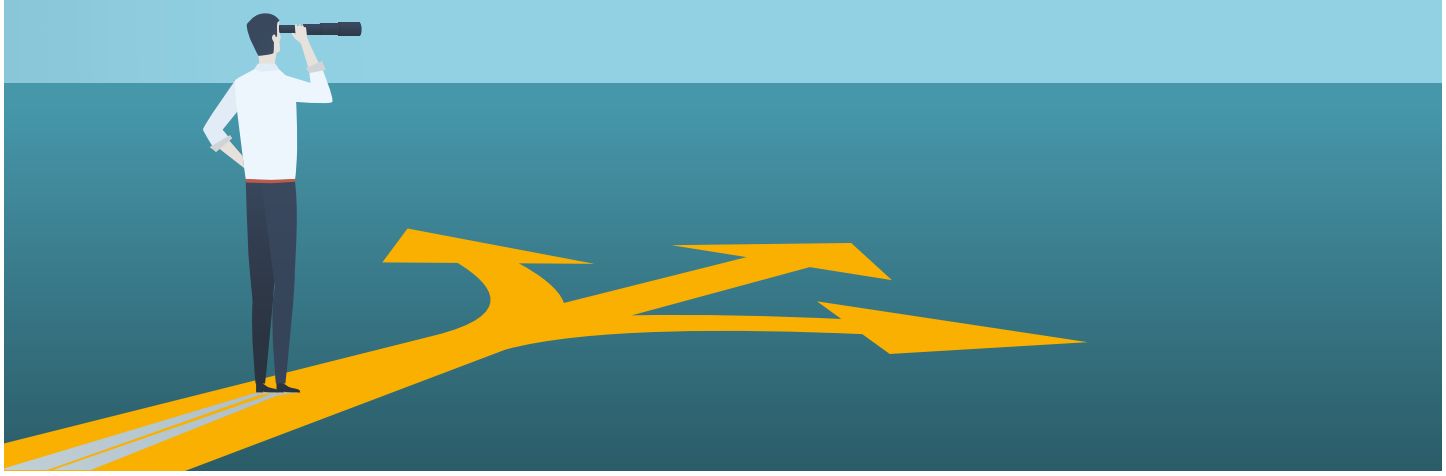
TRUSTS FOR THE NEXT GENERATION:

RESPONDING TO AND PLANNING FOR CHANGES IN FAMILY STRUCTURES



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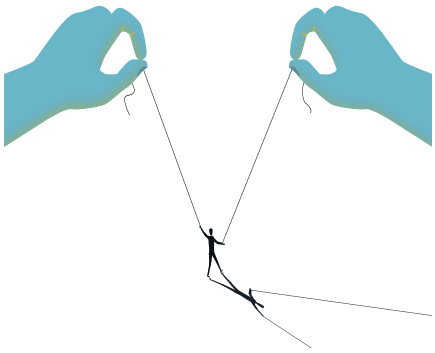
If it were possible to travel back in time 100 years, and to ask the man on the Clapham Omnibus – who had already by then found his way into the Law Reports: see *McQuire v Western Morning News* [1903] 2 K.B. 100 at 109 – to describe a family, he might have said something like: "two parents and their children".

And it would probably have gone without saying that those two parents would have been one (cisgender) man and one (cisgender) woman, rearing their own biological children, who were conceived without any scientific intervention and – perhaps slightly less obviously – born within wedlock.

Only 100 years later, modern society recognises a much richer variety of identities and of family structures. There are unmarried parents and same-sex married or civil-partnered parents; there are single-parent families and "blended" families; there are adopted children, step-children, and children born following assisted conception or surrogacy; there are transgender people and non-binary people.

In England and Wales, those societal changes have to a large extent been reflected – albeit often belatedly and imperfectly – in legislative changes. (For a fuller account of these changes and their limitations, see: *Modern Family: trusts in a time of rapid social change* (2002) 28(4) Trusts & Trustees 265.) The concept of family has been expanded in relation to new private trusts. But in relation to older trusts – particularly those established fifty or more years ago, before the relevant legislation came into force – determining the meaning of, for instance, "spouse" or "child" or "relative" will not necessarily be straightforward.

And inevitably, each individual will have their own understanding of what constitutes "family" for them. So what should our advice be to next-generation clients who wish to ensure that the law will support that understanding—both now, and in the longer term?



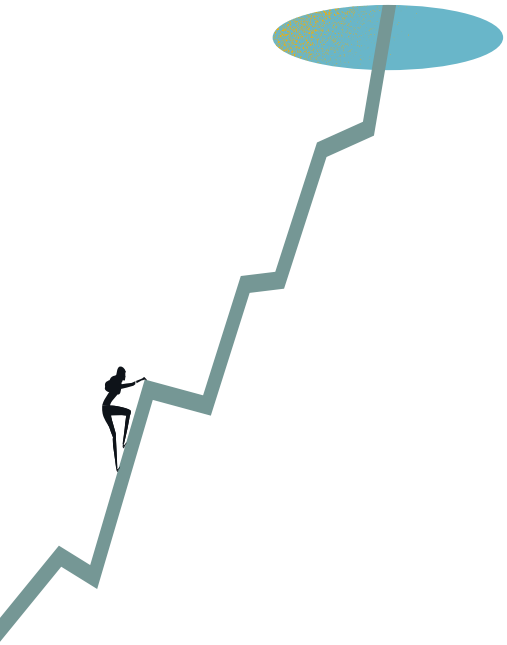
Establishing trusts: the age-old tension between flexibility and control

The legislative changes mentioned above have significantly expanded the restrictive and outdated common law conception of family, providing a "baseline" for new private trusts. So, spouses will include same-sex spouses and children will – in broad terms – include "illegitimate" and adopted children as well as those born as a result of fertility treatment or surrogacy arrangements.

However, by including **definitions of key relationships**, settlors are able to depart from that legislative baseline in either direction—in relation to private trusts, it only applies subject to any contrary intention expressed in the trust instrument. So, for example, it would be possible in principle for a new trust deed to restrict the meaning of the term "spouse" to exclude a same-sex spouse (albeit that future generations might seek to remove that restriction, as discussed below). And on the other hand, it would be possible for a new trust deed to expand the meaning of the term "child" to include a step-child, or to make provision for civil partners and cohabitants, or for partners who have undergone a ceremony which does not meet the requirements to be recognised as marriage in England and Wales.

Flexibility can be provided by including **powers of addition or amendment**, so as to enable future trustees to respond to changing conceptions of the family and developments in the legal recognition of different family structures. To temper the breadth of those powers, albeit in a non-binding manner, the settlor's personal views can be set out in a letter of wishes.

The key – as ever in trust drafting – is **taking care to obtain full instructions** from the settlor. What does family mean to them? If they are creating a trust for successive generations of children, what is it about their relationship with those children which makes them beneficiaries? Is it simple genetics, or something more complex? How do they feel about the trust changing with the times? Are there red lines they would wish to draw?



Changing trusts: the opportunity to bring trusts "up-to-date"

In relation to existing trusts, different considerations arise. Trustees and beneficiaries must work with what they have, and in the case of older trusts this will often mean applying a different legislative baseline or even returning to the restrictive common law. Given the rapid pace of social change in the past few decades, it is advisable for all trustees and beneficiaries to consider whether it would be appropriate to broaden their trusts' conception of the family, and if so how that can be achieved.

The first and most obvious way is through powers in the trust instrument, often in conjunction with a blessing application (examples include Pemberton v Pemberton [2016] WTLR 1817, Edward, Duke of Somerset v Fitzgerald [2019] WTLR 771, and PQ v RS [2019] EWHC 1643 (Ch)).

Powers of amendment, addition or appointment are the obvious candidates, though care needs to be taken – for example – to ensure that there is no "fraud on a power". In considering whether such powers are available, it is worth noting that – at least in England and Wales – a power can be exercised "for the benefit of" a beneficiary without it conferring a direct financial benefit upon them.

The second way is through a **variation** of the trust. Again, the courts have shown themselves to be flexible when answering the question whether a variation would be for the benefit of the beneficiaries. So, in *Re Remnant's Settlement Trusts* [1970] Ch 560 – where a trust instrument expressly discriminated against Roman Catholics – the court considered that it would not be in the interest of the members of the beneficial class to be put in the invidious position of choosing between religious faith and taking benefits under the trust, and that the provisions of the trust discriminating against Roman Catholics could cause dissension and dissatisfaction within the family. It was therefore in the interests of the class for the discriminatory provisions to be removed.

The third way is through a **construction** application. There are several examples of the court being prepared to adopt a broad construction of terms such as "spouse" and "child" even where the legislation in force at the relevant time would not lead to that construction. In some cases – such as *Re Erskine 1948 Trust* [2012] 3 WLR 913 and *Re Hand's Will Trust* [2017] Ch 449, which each concerned whether the term "child" included adopted children – that conclusion was reached by applying human rights law.

But that is not so in the most recent example. In *Goodrich v AB* [2022] EWHC 81 (Ch) – which concerned an employee benefit trust established in 1990 – "spouse" was held to include same-sex spouses simply as a matter of construction and without recourse to human rights law (though it is worth noting that "spouse" was held not to include civil partners, and "child" was held not to include step-children).

Conclusion

Trusts are, by their nature, capable of being long-term institutions. They are also capable of being flexible institutions. Given the possibility – and indeed likelihood – of the social and legal context changing around a trust during its lifetime, the question for those involved in its creation and subsequent administration is how they can and should plan for and respond to such changes. And helping clients reach answers to that question will be a source of interesting advisory and contentious work for the foreseeable future.

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