

Rebecca-Jayne Raynor

The first instance decision in *Marcus v Marcus*¹ and the subsequent appeal² represent a significant development in the interpretation of familial terms within private client law. The case concerned a trust settled by Stuart Marcus (**Stuart**) for a class of beneficiaries which includes “the children and remoter issue of the Settlor”. The central dispute was whether Edward Marcus (**Edward**), who had been raised as Stuart’s son, fell within the definition of “children”, and accordingly, within the class of beneficiaries for the purposes of the trust. During the proceedings, Master Marsh found Edward was not Stuart’s biological child,³ having been conceived as a result of an extra-marital affair of Stuart’s wife, Patricia Marcus (**Patricia**). Notwithstanding this finding, Master Marsh held that “children” meant Edward (and Stuart and Patricia’s son, Jonathan Marcus (**Jonathan**)) for the purposes of the trust,⁴ on the basis that the correct question was what would a reasonable person, with knowledge of the relevant facts conclude “children” to mean in this context.⁵ This conclusion was upheld in the appeal decision, albeit with the distinction that “children” does not mean Edward and Jonathan, rather it “includes Edward”.⁶ This essay will analyse the implications of these decisions: first, it will argue that the case challenges the traditional primacy of biological status in defining “children” within private client law. Secondly, it will show how the decision reinforces the role of contextual interpretation in construing trust instruments and Wills. Thirdly, it will examine whether the court’s finding risks blurring the distinction between construction and rectification, particularly where the clear natural meaning of words is displaced to avoid an unintended outcome.

Per Lewin, in relation to a disposition of property, at common law “children” “is construed *prima facie* as meaning legitimate children”⁷ (noting that The Family Law Reform Act 1987 has modified common law to confer the status of legitimacy on children who were once considered illegitimate under common law).⁸ This principle applies “in relation to all expressions denoting family relationships”.⁹ However, it can be displaced if it is apparent from the language used that the settlor or testator had not intended the gift to be confined to legitimate children.¹⁰ It is, therefore, generally well established that, unless a contrary intention is shown, references to “children” in a trust instrument or Will will not include a child of the settlor’s spouse conceived through an extra-marital affair (as Edward was). Similarly, stepchildren will not ordinarily be treated as children of the stepparent unless formally adopted, nor will other children who are merely part of the family unit.¹¹ Arguably, this reflects a long-standing understanding that the term “children” carries a biological meaning, subject only to clear evidence that the settlor/testator intended otherwise.

However, *Marcus v Marcus*¹² challenges this. The court made a clear finding of biological fact that Edward was not the settlor’s biological son.¹³ Despite this, and notwithstanding the established legal principles outlined above, the court held that Edward fell within the class of “children” because the key question was one of the settlor’s intention, assessed objectively.¹⁴ Specifically, drawing on precedent,¹⁵ Master Marsh observed that the relevant question is “what a reasonable person, having all the background knowledge which would have been available to the settlor at the date of execution, would have understood the words used by the settlor to mean”.¹⁶ Crucially, Stuart had believed Edward to be his biological child throughout his life, and had treated

¹ [2024] EWHC 2086 (Ch), [2025] 2 All E.R. 446

² *Marcus v Marcus* [2025] EWHC 1695 (Ch), [2025] 4 W.L.R. 96

³ *Marcus v Marcus* (n 1) [81]

⁴ *Marcus v Marcus* (n 1) [106]

⁵ *ibid*

⁶ *Marcus v Marcus* (n 2) [23]

⁷ Lynton Tucker, Master Brightwell and Nicholas Le Poidevin KC, *Lewin on Trusts* (20th edn, Sweet & Maxwell 2020) 7-020

⁸ *Lewin on Trusts* (n 7) 7-021

⁹ *Lewin on Trusts* (n 7) 7-020

¹⁰ *ibid*

¹¹ *Lewin on Trusts* (n 7) 7-023

¹² *Marcus v Marcus* (n 1)

¹³ *Marcus v Marcus* (n 1) [81]

¹⁴ *Marcus v Marcus* (n 1) [106]

¹⁵ *ABC Electrification Ltd v Network Rail Infrastructure Ltd* [2020] EWCA Civ 1645 [2020] 12 WLUK 46 [17-19]

¹⁶ *Marcus v Marcus* (n 1) [85]

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him no differently from Jonathan, who was his biological child.¹⁷ The significance of this reasoning is substantial. It demonstrates that actual biological status is not necessarily determinative when construing familial terms in trusts (and assumedly, this would also apply when construing familial terms in Wills). Instead, the court may prioritise the settlor's understanding of the term, even where it is incorrect or mistaken, and the settlor's treatment of an individual over the biological reality.

The departure in *Marcus v Marcus*¹⁸ from traditional chancery doctrine to an approach which reflects family law concepts such as "child of the family"¹⁹ is notable as it introduces flexibility but also uncertainty to private client law. Arguably, the common law interpretation of "children"²⁰ provides certainty, which in turn ensures that classes drafted as "children of X" can be interpreted with predictability. However, the court's approach in *Marcus v Marcus*²¹ indicates that in such circumstances, it will prioritise context over a technical application of legal meaning. Rather than asking what "children" means as a matter of law in the abstract, the court asked what the settlor meant by that word in light of his understanding of the facts. This represents a clear endorsement of contextual interpretation. The broader implication is that *Marcus v Marcus*²² may make it easier for future litigants to rely on contextual evidence when disputing the meaning of words in trust documents or Wills, even where this departs from the natural established legal meaning of the language used. Whilst this approach might promote fairness it risks undermining certainty, as outcomes become increasingly dependent on detailed factual inquiries.

Per Carr LJ in *ABC Electrification Ltd v Network Rail Infrastructure Ltd*,²³ "the mere fact that a contractual arrangement has worked out badly is not a reason to depart from the natural meaning of the language used".²⁴ The decision in *Marcus v Marcus*²⁵ sits uneasily with this principle. From Stuart's perspective, there were two "truths" at the time of the settlement. Firstly, that "children" bore its ordinary meaning; and secondly, Edward fell within that category because Stuart mistakenly believed him to be his biological child. Notably, Stuart did not intend the word "children" to bear an expanded or non-natural meaning. Rather, he intended it to carry its ordinary meaning, albeit on the basis of an incorrect factual assumption. Had he known the truth of Edward's paternity, he may have chosen different language but that counterfactual intention was neither articulated nor reflected in the instrument. Accordingly, by construing "children" so as to include Edward notwithstanding his lack of biological relationship, the court effectively departed from the natural meaning of the term in order to give effect to what it perceived to be Stuart's underlying intention. In substance, this approach closely resembles rectification. Yet rectification is subject to a strict evidential threshold, requiring clear proof of a mistake and of the settlor's true intention as to the wording to be used. The difficulty with *Marcus v Marcus*²⁶ is therefore not merely its outcome, but the route by which that outcome was reached. The court appears to have blurred the boundary between construction and rectification, achieving through interpretation what would ordinarily require rectification. In doing so, it risks undermining the safeguards that constrain judicial intervention in trust instruments and Wills. If courts are prepared to depart from language with a clear natural meaning simply because the settlor did not appreciate the factual consequences of its use, there is a danger that rectification principles will be circumvented under the guise of construction. While such an approach may promote substantively fair outcomes, it does so at the potential cost of doctrinal coherence and legal certainty in private client law.

In conclusion, *Marcus v Marcus*²⁷ is a significant decision in private client law. First, it challenges the traditional primacy of biological status in defining "children", suggesting that context and treatment may be equally, if not more, important. Secondly, it reinforces the modern contextual approach to construction,

¹⁷ *Marcus v Marcus* (n 1) [100]

¹⁸ *Marcus v Marcus* (n 1)

¹⁹ *Lewin on Trusts* (n 7) 7-023

²⁰ *Lewin on Trusts* (n 7) 7-020

²¹ *Marcus v Marcus* (n 1) [106]

²² *Marcus v Marcus* (n 1)

²³ *ABC Electrification Ltd v Network Rail Infrastructure Ltd* (n 15)

²⁴ *ibid* [18]

²⁵ *Marcus v Marcus* (n 1) [106]

²⁶ *Marcus v Marcus* (n 1)

²⁷ *ibid*

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potentially encouraging greater reliance on the factual matrix in future trust and estate disputes. Thirdly, it raises important questions about the boundary between construction and rectification, as the court appears willing to depart from the natural meaning of language to avoid an unintended outcome. Taken together, these developments demonstrate a clear judicial willingness to prioritise substance over form, and to avoid outcomes that would be artificial or unjust in light of the settlor's intentions. While this arguably enhances fairness, it also introduces uncertainty, leaving open important questions about how far the courts are prepared to go in reshaping established principles of interpretation in Wills, trusts and estates disputes.

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