

Issues arising in family trusts where a child is born by way of surrogacy

Whether a child born through surrogacy could benefit from trusts, which expressly retain the common-law meanings of descriptions of beneficiaries, such as 'child', 'grandchild' and 'issue'. The England and Wales High Court (EWHC)'s initial ruling in *Cator v Thynn* (2026 EWHC 209 Ch).

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The [case](#) concerns three family trusts connected to the Longleat estate, of which the principal beneficiary and life tenant is Ceawlin Henry Lazlo Thynn, Eighth Marquess of Bath. His younger child, Henry, is the biological child of the Marquess and his wife, but was born by way of surrogacy in the US. This raised the question as to whether he could benefit from the trusts, which expressly retain common-law meanings of descriptions of beneficiaries, such as 'child', 'grandchild' and 'issue'. The common-law position is that the status of a child born by surrogacy would not be considered a legitimate child and so could not benefit from the trust. The relevant case law is *Re M, Child Support Act: Parentage* (1997 2 FLR 90).

The Marquess has accordingly instructed the trustees to apply for court approval of a power of advancement made in his favour, so that he can add Henry to the class of beneficiaries. The proposal is to mirror the existing trust powers, with the ultimate addition of the child and any of his issue and their respective spouses, widows or widowers as beneficiaries.

As this would affect the existing beneficiaries, which include Henry's elder brother, any future legitimate children of the Marquess and more distant relatives, the EWHC had to decide whether their interests in the trust assets would be properly considered.

The judgment at the recent hearing did not address the larger question of the dispute of whether the child could be added to the list of beneficiaries. Rather, it dealt only with the procedural question of appointing a non-beneficiary as representative on behalf of these other beneficiaries, and whether the trustees were bound to join the affected beneficiaries as defendants in order to get the protection of the court.

However, referring to the 2001 case of *Public Trustee v Cooper* and the England and Wales Court of Appeal case of *Denaxe v Cooper* in 2024, the EWHC was satisfied that the legal representative appointed to represent the other beneficiaries would at least be able to argue the case against implementation of the trustees' decision to extend the class of beneficiaries.

'The case raises not only interesting points arising in the context of trust structures – such as how should the class of beneficiaries be construed and possible extra-jurisdictional tax issues – but also explores the ramifications of the *Denaxe* decision and the impact which it has on trustees seeking the approval of the Court', noted law firm Charles Russell Speechlys.

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