

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

Synopsis: 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'.

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The England and Wales High Court (EWHC) has approved the Marquess of Bath's request to add his younger child, born via surrogacy in the US, to the class of beneficiaries of his family trusts.

The boy, Henry Thynn, is the genetic progeny of the Marquess and his wife. However, the family trust instruments expressly retain the pre-1970 common law meanings of descriptions of family relationships, such as "child", "grandchild" and "issue".

These expressions are construed to mean persons who are themselves 'legitimate', and so far as necessary, trace their relationship through other persons who are also all legitimate. There is therefore uncertainty as to whether Henry falls into the class of beneficiaries or discretionary objects of those settlements. The question could not have arisen in practice until egg extraction technology was developed in 1978, so it is highly unlikely that there can be any binding authority on the point, according to the EWHC judge.

It is the Marquess and his wife's wish for Henry to be included, but the interests of the existing beneficiaries had to be considered before the court could grant the power to add him. An initial hearing, in February 2026, dealt with the procedural question of appointing a non-beneficiary as representative of the other beneficiaries, in particular Henry's elder brother John, born in 2014, and whether the trustees were bound to join the affected beneficiaries as defendants so to get the protection of the court. The court agreed with this approach.

The proposed method of conferring the power is to exercise the power of advancement in the trusts of the settlement that now holds the remaining assets, of which the Marquess is the life tenant, in a way that mirrors the existing trusts. This includes the power to add Henry and any of his issue and their respective spouses/civil partners, widows, widowers or surviving civil partners, to the class of beneficiaries. At the moment, the intention is simply to confer power to add Henry to the class but not yet to exercise it, to avoid any potential issues with US tax. The most likely outcome is that the power will not be exercised until after Lord Bath's death, according to the EWHC judge.

The judge agreed that the trustees do have the power to make the advancement proposed, at least in circumstances where there is a reasonable doubt as to whether Henry falls within the class of beneficiaries already, and subject to the 'improper purpose' rule.

The trustees' decision was proper and rational...

- because of the perceived unfairness of treating the Marquess's children differently;
- because of the moral benefit to the Marquess in putting his children on as equal a footing as possible; and
- the material benefit of not having to provide for Henry out of his own resources.

The EWHC judge duly approved the proposed exercise of the trustees' power of advancement and made an order that the trustees be at liberty so to do ([Cator v Thynn, \[2026\] EWHC 1045 Ch](#)).

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