

Article by Sarah Williams, Legal Director and Head of Surrogacy, Adoption, Fertility and Modern Family at Payne Hicks Beach and Edward Bennett of Harcourt Chambers, originally published at Tatler online on 4 March 2021 and reproduced with kind permission
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TATLER



Sarah Williams
Legal Director and Head of Surrogacy,
Adoption, Fertility and Modern Family

Top lawyers explain everything you need to know about surrogacy and peerages

The heir and the spare – or are they? Sarah Williams, Legal Director at Payne Hicks Beach, and Edward Bennett, Barrister at Harcourt Chambers, offer their insights

BY [SARAH WILLIAMS](#)
AND [EDWARD BENNETT](#)
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THE MARCHIONESS OF BATH WITH HER CHILDREN
INSTAGRAM: @EMMAWEYMOUTH

The Marchioness of Bath, glamorous chatelaine of Longleat and former *Strictly Come Dancing* star, featured on *Tatler's* first front cover of 2021. She has spoken publicly and in a deeply personal way about the birth story of her second son, born with the assistance of a gestational surrogate in California. Her openness in speaking about the medical difficulties she faced which led her and her husband on the journey to surrogacy, as well as about her son's birth, is a tale familiar to the many heterosexual, same sex couples and single intended parents who seek such help to have children.

In travelling down the surrogacy route, the Baths, according to the *Daily Mail*, boldly travelled a path that no members of the British aristocracy had previously travelled before. Any couple who have turned to surrogacy or other means of assisted reproduction know firstly, that it is never a first choice; secondly, that it is never an easy choice; and thirdly, that the legal framework can be very complex. Every new parent wants to avoid the nightmare scenario of their child being born into a limbo where their parenthood, and possibly the baby's right to citizenship of their home country, is not legally recognised. Holders of hereditary peerages and baronetcies, however, find themselves subject to further, little-considered pitfalls, which have the potential to have a major impact on their family life and identity many years down the line.

These days, the extent to which a peer or baronet chooses to use their title or ascribe any importance to it in the 21st century is a matter of personal choice. Those who do choose to use them do so for many reasons – a sense of identity or family heritage perhaps: after all, a title can form part of a person's name in English law and HM Passport Office recognises this.

Succeeding to a title, however, isn't always just about identity or a choice about whether to use it. A significant amount of property or other assets can be tied up with a title holder and, for hereditary peers, holding a peerage has constitutional significance, as it still provides the right to stand for election to the House of Lords. Furthermore, given centuries of intermarriage, succession to one title can impact upon succession to others.

The law on titles and dignities is not straightforward. Titles pass on terms set down in their original grant. The right to succeed depends upon a blood connection to the original grantee and each time the succession opens, the right to succeed is traced not from the last holder but from the original grantee. The law on succession depends both on the law of the title itself (i.e. Scottish title, Scottish law) and on the law of the domicile of the claimant or his parents (as this may affect their status as legitimate or illegitimate or the validity of a marriage).

'Legitimacy' or 'illegitimacy' in the 21st Century? If you hold a peerage or a baronetcy, yes. While in the last half a century of family law has seen reforms designed to remove barriers to inheritance or status based on illegitimacy, sex, adoption, donor conception, or being carried by a surrogate, these reforms have mostly excluded succession to titles.

For those who have conceived a child through IVF at a licensed clinic, irrespective of whether both or one parents' gametes have been used, it is accepted without question that the child is the child of both parents – and will be treated in law as such. And as well they should. Likewise with a child born via surrogacy, albeit after the legal process to transfer legal parenthood from the surrogate to the genetic commissioning parents.

Not so for hereditary peers and baronets: the use of donor sperm, donor eggs, or both, will preclude that child from entitlement to inherit the title, even though there will be no other people who could be identified as that child's parents. As the child's genetic progenitors will not have been married, the child will be regarded for title succession purposes as illegitimate, even where his or her parents 'in real life' are married. If a family's wealth has been tied up in the succession to the title, a child born with donor gametes is potentially denied a right of inheritance that he or she would have had if the family were, for want of a better word, commoners.

The disparity is even more striking for a child born via a gestational surrogate, where even when a married heterosexual commissioning couple use their own sperm and egg, the act of carrying and giving birth to the child by a surrogate breaks the chain of succession. The post-

birth transfer of legal parentage from the surrogate to the commissioning parents means the child will, for succession to title purposes, be treated as if they were adopted.

A significant number of the reported legal cases on surrogacy and assisted reproduction concern situations where commissioning couples did not fully appreciate the legal ramifications until something seismic happened, which catapulted their family life into the court arena. As there are approximately 3,000 hereditary peers and baronets collectively entered on their respective Rolls, given the increasing prevalence of surrogacy or assisted reproduction in family building, it is likely that some of those families will be taken by surprise on the ramifications upon their title. It is equally plausible that these ramifications may not be appreciated for some time, perhaps after a number of generations.

Contested peerage and baronetage cases are relatively rare and typically begin with a petition to the Crown, which may result in a referral to the Committee for Privileges and Conduct of the House of Lords (if a peer) or the Judicial Committee of the Privy Council (if a baronet). In 2016, the Privy Council dealt with a contested Scottish baronetcy where DNA evidence was pivotal in denying the adult son of the 10th baronet the right to succeed, as it could be shown that his father, a distinguished Royal Marine General in his own right, was not the legitimate heir of the 8th Baronet. In one fell swoop, the rights of a perceived beneficiary and the long-established expectation of his family disappeared.

When titled families resort to surrogacy and assisted reproduction, there is a real risk that some heirs may well be caught out and displaced by the ‘distant cousin from South Africa’, particularly where scientific evidence may well be conclusive.

The Baths are a model of positive and responsible use of surrogacy. Perhaps the law has to catch up with them.

Sarah Williams is a Legal Director at [Payne Hicks Beach](http://www.phb.co.uk) specialising in surrogacy and fertility law

Edward Bennett is a family law barrister at Harcourt Chambers and a former Research Assistant at the College of Arms

10 New Square, Lincoln's Inn, London WC2A 3QG

DX 40 London/Chancery Lane

Tel: 020 7465 4300 Fax: 020 7465 4400 www.phb.co.uk

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