TRISTRAM AND COOTE'S PROBATE PRACTICE

THIRTY-THIRD EDITION

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Contents

6.170 *By s 33 of the Administration of Estates Act 1925, the real estate of an intestate is to be held by the personal representative upon trust for sale, so that in cases of death on or after 1 January 1926, the heir-at-law has no interest or right in that character, except as stated in the next paragraph; the real estate is treated in the same manner as personal estate, and the same rules as to distribution apply.*

Exception: person of unsound mind on 1 January 1926

6.171 *Where, however, the intestate was of full age and unsound mind on 1 January 1926, and thereafter died without recovering his testamentary capacity*[1]*, any beneficial interest in real estate*[2]*, other than chattels real, to which he was entitled at the commencement of the Act and at his death, devolves in accordance with the general law in force before 1926*[3]*. These circumstances would, of course, be extremely rare today, but the old law applies equally to an undivided share in real estate held immediately before 1 January 1926 by such a person, his interest being for this purpose a 'beneficial interest in real estate' notwithstanding that on that date it became subject to a trust for sale*[4]*. The personal estate, subject to any settlement by the court, devolves in accordance with the present law. In such circumstances, where there is a preponderance of real estate, the heir-at-law is preferred in an application for a grant. Should such a case still arise, the usual evidence as to heirship (see Forms 20, 21 in the 30th edn of this work) is required, and it is required to be shown in the statement of truth, and is stated in the grant: 'That the intestate was of full age but of unsound mind on 1 January, 1926, and died, without recovering his testamentary capacity, possessed of real estate'. The grant issues to 'A B, the heir-at-law'*[5]*.*

1 *He is not deemed to have recovered his testamentary capacity unless his receiver is discharged (Administration of Estates Act 1925, s 51(2)).*
2 *The term includes, for this purpose, not only freehold land but also heritable estates or interests in copyholds (Re Sirett, Pratt v Burton* [1968] 3 All ER 186, [1969] 1 WLR 60).
3 *Administration of Estates Act 1925, s 51(2), para* **A1.131**.
4 *Re Bradshaw, Bradshaw v Bradshaw* [1950] Ch 582, [1950] 1 All ER 643, CA *disg, Re Donkin, Public Trustee v Cairns* [1948] Ch 74, [1947] 2 All ER 690.
5 *Registrar's Direction (1928) 20 April.*

6.172 *In the case of preponderance of personal estate the grant issues to the person entitled under the present rules, on showing in the statement of truth: 'That the intestate was of full age but of unsound mind on 1 January 1926 and died, without recovering his testamentary capacity, possessed of real estate, and that C D is the heir-at-law'. No consent of or notice to the heir-at-law is necessary.*

Grant to children or other issue

6.173 If the intestate has left no spouse or civil partner, as the case may be, the children or other issue of the intestate are entitled to administration—such other issue being children, living at the death of the intestate, of any child, or more remote issue, who predeceased the intestate, and so taking per stirpes their parent's share in the estate: see NCPR SI 1987/2024 r 22(1)(b). The statement of truth must clear off the spouse or civil partner by completing sections 2 and 3 of the PA1A form to indicate that the intestate died a bachelor or spinster, or

a widower or widow, or (if divorced or civil partnership dissolved) a single man or single woman. As to divorce or dissolution of civil partnership, see also paras 6.133/6.137 ff. Form of title for the application statement of truth, Nos 130 and 131 (**A6.135** and **A6.136**) and adapted to reflect dissolution of marriage or civil partnership, see Nos 142 and 143 (**A6.147** and **A6.148**).

6.174 Where the deceased died before 1 January 1970, the term 'issue' connotes only lawfully born descendants, but there are various statutory provisions which, on an intestacy, give other categories of descendants rights similar to those of the issue, eg legitimated children (see 'Legitimated Persons' paras 6.201 ff) and adopted children (see paras 6.251 ff).

6.175 In the case of death on or after 1 January 1970, illegitimate children are placed on an equality with legitimate children so far as regards their right of succession on intestacy to the estate of either parent[1] (see 'Issue of intestate', para 6.58).

1 Family Law Reform Act 1969, s 14 (para **A1.196**).

6.176 When the intestate died on or after 1 January 1970 but before 4 April 1988 an illegitimate child should be described in the application statement of truth to lead the grant as 'the natural son (*or* daughter) and only person entitled to (*or* one of the persons entitled to share in) the estate', as the case may be. Form of title for application statement of truth, No 130 (**A6.135**), should be adapted accordingly.

6.177 When the intestate died on or after 1 January 1970 but before 4 April 1988, the *lawful* issue of an illegitimate child of the intestate who died in the lifetime of the latter stands in its parent's place as regards succession to the estate of the intestate, but an illegitimate child of such an illegitimate child has no title except to the estate of its own parent.

6.178 Section 18(2) of the Family Law Reform Act 1987 provides:

> '(2) For the purposes of subsection (1) above and that Part of that Act, a person whose father and mother were not married to[, or civil partners of,] each other at the time of his birth shall be presumed not to have been survived by his father, or by any person related to him only through his father, unless the contrary is shown.'

Accordingly when the intestate died on or after 4 April 1988 it does not matter as regards succession whether the parents of any child or other issue were married to each other at any time[1] and it is sufficient to refer to any such child as the 'son (daughter) of the intestate and only person (one of the persons) entitled to (share in) the estate' and any such other issue as the 'son (daughter) of C D the son (daughter) of the said deceased who died before the deceased and only person (one of the persons[2]) entitled to (share in) the estate'[2] or as the case may be. See also s 18(2ZA) as introduced by the Inheritance and Trustees' Powers Act 2014 with effect from 1 October 2016:

> '(2ZA) Subsection (2) does not apply if a person is recorded as the intestate's father, or as a parent (other than the mother) of the intestate—
> (a) in a register of births kept (or having effect as if kept) under the Births and Deaths Registration Act 1953, or

(b) in a record of a birth included in an index kept under section 30(1) of that Act (indexes relating to certain other registers etc).'

1 Family Law Reform Act 1987, s 18 (see para A1.420).
2 Registrar's Direction (1988) 19 April.

6.179 In respect of an intestate dying on or after 1 April 2009 s 18 of the Family Law Reform Act 1987 is amended[1] so as to provide:

'(2A) In the case of a person who has a parent by virtue of section 43 of the Human Fertilisation and Embryology Act 2008 (treatment provided to woman who agrees that second woman be parent), the second and third references in subsection (2) to the person's father are to be read as references to the woman who is a parent of the person by virtue of that section.'

1 Human Fertilisation and Embryology Act 2008 (Commencement No 1 and Transitional Provisions) Order 2009 (SI 2009/479), art 6(1)(d).

6.180 Under s 21 of the Family Law Reform Act 1987[1], for the purpose of determining the person or persons who would in accordance with probate rules be entitled to a grant of probate or administration in respect of the estate of a deceased person dying on or after 4 April 1988, the deceased is presumed, unless the contrary is shown, not to have been survived by any person related to him whose father and mother were not married to each other at the time of his birth or by any person whose relationship with him is deduced through a person whose father and mother were not married to each other at the time of his birth. In this context references to 'father' are to be treated as references to a woman who is a parent by virtue of s 43 of the Human Fertilisation and Embryology Act 2008. The applicant's title, as confirmed in the statement of truth, will be taken as sufficient to rebut any such presumption[2].

1 See para A1.423.
2 Registrar's Direction (1988) 19 April.

6.181 Under s 27 of the Family Law Reform Act 1987, where, on or after 4 April 1988, a child is born in England and Wales as the result of the artificial insemination of a woman who was at the time of the insemination a party to a marriage (being a marriage which had not at that time been dissolved or annulled) and was artificially inseminated with the semen of some person other than the other party to the marriage, then, unless it is proved to the satisfaction of any court by which the matter has to be determined that the other party to that marriage did not consent to the insemination, the child is to be treated in law as the child of the parties to that marriage and is not to be treated as the child of any person other than the parties to that marriage[1]. The section does not affect the succession to any dignity or title of honour or render any person capable of succeeding to or transmitting a right to succeed to any such dignity or title[2].

See para 6.231 for a recent ruling on this subject.

1 See para A1.428.
2 Family Law Reform Act 1987, s 27(3), see para A1.428.

6.182 Where a court has made a 'parental order' under s 30 of the Human Fertilisation and Embryology Act 1990, providing for a child to be treated in law as the child of the parties to a marriage, the Parental Orders (Human Fertilisation and Embryology) Regulations 1994 (SI 1994/2767) apply, as from

1 November 1994. Under these Regulations, relevant provisions of the Adoption Act 1976, as modified by the Regulations, are applied. They may be briefly summarised as placing a child in respect of whom a parental order has been made in the same position as if he had been adopted.

6.183 In order to have an absolutely vested interest in an estate, the issue of an intestate must attain the age of majority or marry under that age; otherwise their interest becomes divested and the estate is divisible as if they had not been born (see Administration of Estates Act 1925, s 47(2)).

6.184 Where the deceased died before 1 October 2014 intestate, a child of his or her intestate who is subsequently adopted would be divested of their contingent interest in the estate by virtue of the adoption. Following implementation of the Law Commission's recommendation in the Inheritance and Trustees' Powers Act 2014 the contingent interest (other than a contingent interest in remainder) which the adopted person has immediately before the adoption in the estate of the deceased parent is preserved. (See para 6.93.)

6.185 Although a child who marries while under the age of majority is entitled to give a valid receipt for the income of his share in the residuary estate[1], he cannot personally apply for administration until of full age.

1 Law of Property Act 1925, s 21.

6.186 Those of the issue who share in the estate are all on an equal footing as regards their right to a grant.

6.187 If any person entitled to share in the estate is a minor, a grant must normally be made to not less than two individuals, or to a trust corporation with or without an individual.

6.188 As to joint grants, see Chapter 7. As to grants where all the persons entitled are under age, see Chapter 11, 'Grants for use of minors'.

6.189 As to a grant to a child on the renunciation of a surviving spouse, see para 6.115.

Evidence of paternity

6.190 Where the intestate died before 4 April 1988 and the applicant's title to letters of administration depends upon the establishing of an illegitimate relationship (except that with his or her mother), evidence in support of the claim to the relationship, normally in the form of affidavits or witness statements, must be lodged at the registry. If a birth certificate is produced which gives the name of the father and shows that the birth was registered on his information or on the authority of a statutory declaration made by him, or if an affiliation order is produced containing a finding of paternity, further evidence as to paternity additionally recited in the application statement of truth is not normally necessary[1]. Where the intestate died on or after 4 April 1988 evidence of paternity will be called for only in exceptional circumstances[2].

1 As from 1 January 1977 a mother may apply for the registration of the father of an illegitimate child on production of an affiliation order naming that person as the putative father (together with the child's consent where he is 16 years or over): Children Act 1975, s 93, amending Births

and Deaths Registration Act 1953, s 10. See also Civil Evidence Act 1968, s 12, as amended by Family Law Reform Act 1987, s 22, from 4 April 1988 which allows an adjudication of paternity made in the course of proceedings brought under the Guardianship of Minors Act 1971 and of proceedings brought by public bodies to constitute prima facie evidence of paternity.

2 Registrar's Direction (1988) 19 April.

Declaration of paternity

6.191 Where necessary it is open to any person who is either domiciled in England and Wales on the date of the application or has been habitually resident[1] in England and Wales throughout the period of one year ending with that date, to apply to the court, under s 56 of the Family Law Act 1986[2] as substituted by s 22 of the Family Law Reform Act 1987, for a declaration that a person named in the application is or was his parent.

1 See fn 1 to para **6.144**.
2 See para **A1.406**.

Personal representative of child

6.192 Unless otherwise directed by a district judge or registrar, any living person beneficially interested in the estate has a right to the grant superior to that of the personal representative of a child who survived but has subsequently died (NCPR SI 1987/2024 r 27(5)).

6.193 If the only child of an intestate dying without a spouse has survived the intestate and died, administration will be granted to his personal representative only if he attained an absolutely vested interest in the estate, ie, if he died after attaining the age of majority, or married under that age: otherwise the grant is made as though the deceased had died without issue.

6.194 See paras **6.11–6.15**, as to the practice in applications by personal representatives.

Right of illegitimate child to succeed to mother's estate (death before 1 January 1970)

6.195 *By s 9(1) of the Legitimacy Act 1926, which came into force on 1 January 1927, it was enacted that:*

> *'where, after the commencement of this Act, the mother of an illegitimate child, such child not being a legitimated person, dies intestate as respects all or any of her real or personal property, and does not leave any legitimate issue her surviving, the illegitimate child, or, if he is dead, his issue, shall be entitled to take any interest therein to which he or such issue would have been entitled if he had been born legitimate.'*

6.196 *The children of the deceased and the issue of any deceased child who died before the deceased are next entitled in order of priority to a grant after clearing off the spouse—NCPR SI 1987/2024 r 22(1).*

6.197 *The right to letters of administration arises only where under the relevant statutes the applicant has a beneficial interest. Thus, if the deceased*

died on or after 1 January 1927, but before 1 January 1970, a spinster (or a widow or divorced woman without any lawful issue) leaving an illegitimate child, a grant may be made to such child. The statement of truth should describe the applicant as the natural son (or daughter) and only person entitled to the estate (or one of the persons entitled to share therein, if the deceased left more than one such child). In the case of a widow or divorced woman it must be stated that she died without lawful issue.

6.198 *The lawful issue of an illegitimate child dying in the lifetime of its mother stands in its parent's place as regards inheritance from the parent's mother, but where the mother of a lawful daughter (who has predeceased her) dies intestate the illegitimate child of such daughter has no claim except to her own (natural) mother's estate.*

6.199 *Where a married woman dies intestate leaving an illegitimate child or children but no lawful issue, the illegitimate children take the same rights under the intestacy (subject to the interest of the husband of the deceased) as if they had been born legitimate*[1].

1 *Legitimacy Act 1926, s 9(1).*

Right of illegitimate child to succeed to parent's estate (death after 31 December 1969)

6.200 In the case of deaths on or after 1 January 1970 and before 4 April 1988, s 9 of the Legitimacy Act 1926 is repealed and replaced by s 14 of the Family Law Reform Act 1969[1]. As regards deaths on or after 4 April 1988, s 14 of the Family Law Reform Act 1969 is repealed by s 33(4) of the Family Law Reform Act 1987[2] but the repeal does not affect any rights arising under the intestacy of a person dying before 4 April 1988: Family Law Reform Act 1987, Sch 3, para 8. In respect of deaths on or after 4 April 1988 s 18 of the Family Law Reform Act 1987 provides that with regard to rights of succession to property on intestacy, illegitimacy is not to be taken into consideration. In relation to deaths on or after 1 January 1970 illegitimate children have, in general, rights of succession on intestacy to the estate of either parent equal to those of lawful children; and this applies whether or not the intestate also left lawful issue (see paras **6.175–6.180**).

1 See para **A1.196**.
2 See para **A1.432**.

Legitimated persons

6.201 The Legitimacy Act 1976[1], which came into force on 22 August 1976, consolidates the enactments relating to legitimacy and legitimation. The earlier enactments, now repealed (subject to certain important savings made by Sch 1 to the 1976 Act), are contained in Sch 2 to the 1976 Act, and include the Legitimacy Acts 1926 and 1959 and those provisions relating to legitimation formerly contained in Sch 1 to the Children Act 1975.

1 See paras **A1.269** ff.

Legitimation on marriage of parents

6.202 The Legitimacy Act 1926, s 1[1] enacted that if the parents of an illegitimate child marry or have married one another, whether before or after the commencement of that Act (1 January 1927), the marriage shall (subject to certain conditions), if the father of such child was, or is, at the date of the marriage domiciled in England or Wales, render such child, if living, legitimate from the commencement of the Act, or from the date of the marriage, whichever last happens. Prior to 1 January 1976, however, such legitimation did not enable a person, his spouse, or children, or remoter issue, to take any interest in property, real or personal, except as was expressly provided for in that Act[2], but, in relation to deaths and other events occurring after 31 December 1975, the effect of the coming into force of Sch 1 to the Children Act 1975 on 1 January 1976 is to place legitimated persons generally in the same position in relation to the devolution of property as if they had been born legitimate: see 'Devolution of property in cases of legitimacy' below.

1 See now Legitimacy Act 1976, s 2 (see para **A1.270**).
2 Legitimacy Act 1926, ss 1(3), 3–5.

6.203 The parents of a legitimated person are under a duty to furnish to the Registrar-General within a specified time information with a view to obtaining the re-registration of birth[1].

1 Legitimacy Act 1926, s 1(4) and Sch which provisions are since repealed and re-enacted by the Legitimacy Act 1976, s 9; see also fn 1 to para **6.239**.

6.204 Section 1(2) of the Legitimacy Act 1926 (which excluded the operation of that Act in the case of an illegitimate person whose father or mother was married to a third person at the time of the birth) was repealed by the Legitimacy Act 1959, which came into force on 29 October 1959. In relation to persons legitimated by virtue of this repeal, the Legitimacy Act 1926 has effect as if for references to the commencement of that Act there were substituted references to the commencement of the Legitimacy Act 1959 (see s 1(2) of the 1959 Act as preserved by paragraph 2(3) of Sch 1 to the Legitimacy Act 1976[1]). Accordingly, an illegitimate person, either of whose parents was, at the date of his birth, married to a third person, is rendered legitimate by the marriage of his parents, but the legitimation takes effect only from 29 October 1959 or from the date of the marriage, whichever is the later.

1 See para **A1.279**.

Requisites for claiming legitimation

6.205 Where it is necessary to establish that the legitimation took place prior to 29 October 1959 (ie by virtue of the Legitimacy Act 1926, as originally enacted), it must be shown that at the date of birth of the person who, it is claimed, was legitimated, neither of his parents was married to a third person.

6.206 It has been held that a child born on the day on which a divorce decree was made absolute was born at a time when the divorced parent was not 'married to a third person' within the meaning of s 1 of the Act of 1926[1].

1 *Kruhlak v Kruhlak (No 2)* [1958] 2 All ER 294, [1958] 1 WLR 606 (this decision is still relevant in cases where it is necessary to establish that the legitimation took place before 29 October 1959 but it was doubted by the Court of Appeal in *Re Seaford, Seaford v Seifert* [1968] P 53, [1968] 1 All ER 482).

6.207 Until 4 April 1988 s 45 of the Matrimonial Causes Act 1973 provided for the method of application to the court for a declaration of legitimation. That section was repealed from 4 April 1988 by s 68(2) of the Family Law Act 1986[1] and was replaced with effect from that date by s 56 of the Family Law Act 1986 as substituted by s 22 of the Family Law Reform Act 1987. Proceedings begun under s 45 of the Matrimonial Causes Act 1973 before 4 April 1988 are not affected by the repeal of s 45—see s 68(3) of the Family Law Act 1986. Such a declaration or a certificate of re-registration of birth under s 9 of the Legitimacy Act 1976[2] is accepted as evidence of legitimation in any particular case (see paras **6.239** ff).

1 See para **A1.410**.
2 See para **A1.275**.

Devolution of property in cases of legitimation

6.208 *Deaths before 1 January 1976.* Under s 3(1) of the Act of 1926, subject to the provisions of that Act, a legitimated person and his spouse, children or more remote issue, are entitled to take any interest:

(a) in the estate of a person dying intestate after the date of the legitimation;
(b) under any disposition coming into operation after the date of the legitimation[1]; or
(c) by descent under an entailed interest created after the date of the legitimation,

in like manner as if the legitimated person had been born legitimate. As to the effective date of legitimation, see paras **6.202** and **6.204**.

1 As to the date on which a disposition 'comes into operation', see para **6.242**.

6.209 Where, however, the right to any property depends on the relative seniority of the children of any person, legitimated children are to rank as if they had been born on the day on which they became legitimated by virtue of the Act; if more than one child became legitimated at the same time, then, as between themselves, they rank in order of seniority (s 3(2)).

6.210 Section 3(3) deals with property devolving with a dignity or title of honour, which devolves as though the Act had not been passed. Section 3(4) restricts the operation of s 3 to cases where no contrary intention is expressed in a disposition.

6.211 Under s 4 of the Act of 1926, where a legitimated person, or a child or remoter issue of a legitimated person, dies intestate as to all or any of his property, the same persons take the same interests therein as they would have been entitled to take if he had been born legitimate.

6.212 Section 5 provides that if an illegitimate person dies after the commencement of the Act of 1926 and before the marriage of his parents, leaving a spouse, children, or remoter issue living at the date of such marriage, then that person, if living at the date of marriage of his parents, would have become a legitimated person. The provisions of the Act shall apply as if he had been a legitimated person and the date of the marriage had been the date of legitimation.

6.213 In cases in which legitimation would be effected only by virtue of s 1 of the Legitimacy Act 1959, ie where either of the parents of the illegitimate person was married to a third person at the date of his birth, the foregoing provision applies only where the death occurs after the commencement of the Act of 1959, ie on or after 29 October 1959 (Legitimacy Act 1959, s 1(2)).

6.214 Nothing in the Legitimacy Act 1926 affects the operation or construction of any disposition coming into operation before the commencement of that Act (ie 1 January 1927), or any rights under the intestacy of a person dying before that date (s 10(2)).

6.215 *Deaths after 31 December 1975*. In relation to deaths occurring on or after 1 January 1976 the provisions of the Legitimacy Act 1926 as to the interest taken by legitimated persons, and those claiming through them, on intestacy or under wills and settlements, were replaced by those of the Children Act 1975, Sch 1 to which contained a complete code replacing earlier provisions as to the treatment of both adopted children and legitimated persons in relation to matters of succession. As regards succession rights arising from legitimation, the relevant provisions of Sch 1 have since been repealed and replaced by the Legitimacy Act 1976[1].

[1] See paras A1.269 ff: the Legitimacy Act 1976, a consolidating measure, came into force on 22 August 1976.

6.216 For the purposes of the Legitimacy Act 1976 a legitimated person means a person legitimated or recognised as legitimated:

(a) under LA 1976, s 2 of the Legitimacy Act 1976 (legitimation by subsequent marriage of parents) or s 3 (legitimation by extraneous law) of the above Act;
(b) under ss 1 or 8 of the Legitimacy Act 1976; or
(c) by a legitimation (whether or not by virtue of the subsequent marriage of his parents) recognised by the law of England and Wales and effected under the law of any other country,

and includes, where the context admits, a person legitimated or recognised as legitimated before the passing of the Children Act 1975 (s 10(1), (2) of the Legitimacy Act 1976).

6.217 Section 1(3) of the Legitimacy Act 1926, which restricted the interests in property taken by a legitimated person to those specified by that Act (see para 6.208), was repealed, save in relation to existing instruments, as from 1 January 1976. Sections 3 to 5 of the Legitimacy Act 1926 were similarly repealed by the Children Act 1975.

6.218 Schedule 1 to the Children Act 1975 (now repealed and re-enacted in relation to legitimated persons' rights of succession by the Legitimacy Act 1976) provided rules of construction which are to apply to any instrument other than an 'existing instrument' (defined as one made before 1 January 1976) so far as the instrument contains a disposition of property (s 5(1) of the 1976 Act). Provisions of the law of intestate succession applicable to the estate of a deceased person are, for this purpose, to be treated as if contained in an instrument executed by the deceased, while of full capacity, immediately before his death (s 5(2)). The new provisions thus apply to deaths intestate on or after 1 January 1976.

6.219 The general rule is that a legitimated person is to be treated as if he had been born legitimate: s 5(3) provides that a legitimated person, and any other person, is entitled to take any interest in property as if the legitimated person had been born legitimate.

6.220 Where a disposition depends on the date of birth of a child or children of a parent or parents, it is to be construed as if:

(a) a legitimated child had been born on the date of its legitimation; and
(b) two or more children legitimated on the same date had been born on that date in the order of their actual births,

but this does not affect any reference to the child's age (s 5(4)). Examples of phrases in wills on which this provision could operate are given in s 5(5).

6.221 Section 5(6) contains a provision similar to s 5 of the Legitimacy Act 1926: it deals with the case where a child would have been legitimated by the marriage of its parents but for the fact that the child died before the marriage took place. So far as regards the taking of interests by, or in succession to, the spouse, children or remoter issue of the deceased child, a disposition is to be construed as if he was legitimated at the date of his parents' marriage. This provision applies also where a child is adopted by one of its natural parents and his parents intermarry after the child's death.

6.222 Section 4 provides that a child may be legitimated under the Act even though it has previously been adopted by one of its natural parents as sole adopter, but preserves the rights of the child under Pt II of Sch 1 to the Children Act 1975 (which deals with adoptions) under any instrument made prior to the legitimation.

6.223 Section 6 contains provisions dealing with the case where a disposition depends on the date of birth of a child who was born illegitimate but was subsequently legitimated or treated as legitimated; and s 7 deals with the protection of trustees and personal representatives who distribute property without notice of a legitimation.

6.224 Paragraph 4(3) of Sch 1 to the 1976 Act provides that, apart from s 1 (legitimacy of children of certain void marriages (as to which, see paras 6.229 ff)), nothing in the Act shall affect the devolution of any property which is limited to devolve along with any dignity or title of honour. And, by s 10(4) of

the Act, it is expressly declared that references in the 1976 Act to dispositions of property include references to a disposition by the creation of an entailed interest.

Dispositions made on or after 1 January 1970: illegitimate and legitimated children

6.225 In relation to dispositions of property made on or after 1 January 1970 references, express or implied, for the purpose of indicating beneficiaries, to the child or children of any person are, unless the contrary intention appears, to be construed as, or as including, references to any illegitimate child of such person, and similarly references to persons related in some other manner to any person are to be construed as, or as including, references to a person who would be so related if he, or another person through whom the relationship is traced, had been born legitimate (Family Law Reform Act 1969, s 15(1)[1]). The provisions in s 15 of the Family Law Reform Act 1969 do not alter the construction of the words 'heir' or 'heirs' or any expression used to create an entailed interest. Section 15 of the Family Law Reform Act 1969 was repealed on 4 April 1988 by s 33(4) of the Family Law Reform Act 1987[2] but the repeal does not affect any disposition by will or codicil executed before that date—Sch 3, para 9 of the Family Law Reform Act 1987.

1 See para A1.197.
2 See para A1.432.

6.226 In respect of dispositions by will or codicil made on or after 4 April 1988 references (whether express or implied) to any relationship between two persons are to be construed, unless the contrary intention appears, without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time and s 19(2) of the 1987 Act declares that the words 'heir' or 'heirs' or any expression which is used to create an entailed interest do not, by themselves, show such a contrary intention. The term 'lawful' may be omitted in the description of any relationship apart from that which is the result of an enactment such as an adoption or legitimation and title through marriage or civil partnership.

6.227 Section 15(4) of the 1969 Act provides that references in the foregoing to an illegitimate child include an illegitimate child who is or who becomes a legitimated person within the meaning of the Legitimacy Act 1926 or a person recognised by virtue of that Act or at common law as having been legitimated. However, s 15(4) is repealed with effect from 1 January 1976, save as respects any instrument passed or made before that date, by the Children Act 1975, Sch 4, Pt II. (As to the interests taken by legitimated persons, see now the Legitimacy Act 1976, ss 5 and 6[1].)

1 See paras A1.271 and A1.272.

Declaration of legitimation

6.228 Any person who is either domiciled in England and Wales on the date of the application or has been habitually resident[1] in England and Wales throughout the period of one year ending with that date may make an application to the

court for a declaration that he is the legitimate child of his parents or that he has or has not become a legitimated person[2].

1 See fn 1 to para 6.144.
2 Family Law Act 1986, s 56, as substituted by Family Law Reform Act 1987, s 22.

Children of void marriages

6.229 Under s 1(1) of the Legitimacy Act 1976[1], a child of a void marriage, whenever born, is to be treated as the legitimate child of its parents if at the time of the act of intercourse resulting in its birth (or at the time of celebration of the marriage, if later) both or either of the parents reasonably believed that the marriage was valid[2]. As from 4 April 1988 for the words 'the act of intercourse resulting in the birth' there were substituted the words 'the insemination resulting in the birth or, where there was no such insemination, the child's conception' and two further subsections were added to s 1 of the Legitimacy Act 1976, as follows:

> '(3) It is hereby declared for the avoidance of doubt that subsection (1) above applies notwithstanding that the belief that the marriage or civil partnership] was valid was due to a mistake as to law.
>
> (4) In relation to a child [of a void marriage] born after the coming into force of section 28 of the Family Law Reform Act 1987, [or a child of a void civil partnership (whenever born),] it shall be presumed for the purposes of subsection (1) above, unless the contrary is shown, that one of the parties to the void marriage [or civil partnership] reasonably believed at the time of the insemination resulting in the birth or, where there was no such insemination, the child's conception (or at the time of the celebration of the marriage[, or the formation of the civil partnership,] if later) that the marriage [or civil partnership] was valid.]'

(Section 28 of the Family Law Reform Act 1987.)

1 See para A1.269; the 1976 Act repeals and replaces, inter alia, s 2 of the Legitimacy Act 1959.
2 See *Sheward v A-G* [1964] 2 All ER 324, [1964] 1 WLR 724 (bigamous marriage: court satisfied from evidence of conversations with the mother (who had since died) that she believed she was being validly married by the void ceremony. Declaration of legitimacy made).

6.230 Under s 27 of the Family Law Reform Act 1987, where, on or after 4 April 1988, a child is born in England and Wales as the result of the artificial insemination of a woman who was at the time of the insemination a party to a marriage (being a marriage which had not at that time been dissolved or annulled) and was artificially inseminated with the semen of some person other than the other party to the marriage, then, unless it is proved to the satisfaction of any court which determines the matter that the other party to that marriage did not consent to the insemination, the child is to be treated in law as the child of the parties to that marriage and is not to be treated as the child of any person other than the parties to that marriage[1]. This applies also to void marriages if at the time of the insemination resulting in the birth of the child both or either of the parties reasonably believed that the marriage was valid, there being a presumption unless the contrary is shown, that one of the parties so believed at that time that the marriage was valid[2]. Section 27 of the Family Law Reform Act 1987 does not affect the succession to any dignity or title of honour or render

any person capable of succeeding to or transmitting a right to succeed to any such dignity or title[3].

1 Family Law Reform Act 1987, s 27(1)—see para **A1.428**.
2 Family Law Reform Act 1987, s 27(2).
3 Family Law Reform Act 1987, s 27(3).

6.231 Where both parties to a purported marriage were female and a child was born by artificial insemination to the 'wife' (C) the Court of Appeal held that the 'husband' (J) was not and never was the child's parent. C was not aware neither at the date of the 'marriage' nor at the date of birth of the child that J was not a male. The marriage had since been declared null and void. Subsequently J obtained recognition under the Gender Recognition Act 2004 that his gender was male and he also obtained a fresh birth certificate giving his sex at birth as male. However, the court in applying the Family Law Reform Act 1987 ruled that at the date of the insemination s 28, Human Fertilization and Embryology Act 1990 was not effective. The fact that he had acted as the child's father did not as a matter of law enable him to claim the status of parenthood (*Re C (children) (parent: purported marriage between two women: artificial insemination by donor) J v C* [2006] EWCA Civ 551, [2007] Fam 1, [2006] 3 WLR 876).

6.232 By sub-s (2), s 1 of the Legitimacy Act 1976 applies only where the father of the child was domiciled in England and Wales at the time of its birth, or, if he died before its birth, immediately before his death.

6.233 So far as it affects succession to a dignity or title of honour or the devolution of property settled therewith, s 1 of the Legitimacy Act 1976 applies only to children born on or after 29 October 1959. The section does not affect any rights under the intestacy of a person dying before 29 October 1959 and, except so far as may be necessary to avoid the severance from a dignity or title of honour of property settled therewith, it does not affect the operation or construction of a disposition coming into operation before that date (Sch 1, paras 3 and 4).

6.234 However, in the case of persons dying intestate on or after 29 October 1959 and in considering the construction of wills, etc coming into operation on or after that date, regard should be had to the terms of s 1 of the 1976 Act in deciding whether or not the deceased left any legitimate issue.

6.235 A child who, by virtue of s 1 of the Legitimacy Act 1976 (formerly s 2 of the Legitimacy Act 1959), is entitled to be treated as the legitimate child of his parents may be described as a lawful child in the application statement of truth[1].

1 Registrar's Circular, 24 April 1967.

Children of voidable marriages

6.236 Section 16 of the Matrimonial Causes Act 1973 provides that a decree of nullity granted after 31 July 1971 in respect of a voidable marriage shall operate to annul the marriage only after the decree has been made absolute, and the marriage shall, notwithstanding the decree, be treated as if it had existed up to that time. Accordingly, any child born during the marriage is the legitimate child of his parents.

6.237 Under s 11 of the Matrimonial Causes Act 1965[1], any child of a voidable marriage (which is annulled before 1 August 1971) who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of being annulled, is deemed to be their legitimate child notwithstanding the annulment.

1 Section 11 of the Matrimonial Causes Act 1965 is repealed by the Matrimonial Causes Act 1973, s 54(1)(b) and Sch 3 thereto, but, in relation to decrees of nullity granted before 1 August 1971, its effect is preserved by the 1973 Act, Sch 1, Pt II, para 12.

6.238 It is proper to describe such a child in the application statement PA1A/PA1P as a child of the deceased and the other parent.

Practice where title depends on legitimation

6.239 In cases where the right of the applicant to a grant depends upon his legitimation, or that of any other person, the following practice should be observed:

(1) If a declaration of legitimation has been obtained from a court of competent jurisdiction, or if the birth has been re-registered under the Legitimacy Act 1926 (since repealed and re-enacted by the Legitimacy Act 1976), the applicant should produce a copy of the declaration or of the amended birth certificate.

(2) If a declaration has not been made or a re-registration effected and it appears that it is open to the applicant to obtain such a declaration or re-registration, he should be required to do so (subject to paragraph 3 below)[1].

(3) If
(a) re-registration is impossible, and
(b) either it is not open to the applicant to obtain a declaration, or to insist on his obtaining a declaration would impose undue hardship,
the evidence in support of the contention of legitimation should be submitted to the district registrar, for his decision as to its sufficiency. Any case of doubt will be referred by a district registrar to a district judge of the Principal Registry or Chancery master (via Newcastle District Probate Registry) in accordance with NCPR SI 1987/2024 r 7(1)(b). If a district judge, master or registrar is not satisfied he may direct that an application be made by summons to a High Court judge in chambers or open court, with notice to the Attorney General, any such reference by a registrar needing to be confirmed by a district judge or master.

(4) In any case in which the Crown is or could be beneficially concerned, notice to the Treasury Solicitor must be given under NCPR SI 1987/2024 r 38.

(5) Where the applicant produces a declaration or certificate of re-registration, the statement of truth must state that the person who it is claimed has been legitimated is the person referred to in the declaration or re-registration[2].

1 The provisions as to re-registration of the births of legitimated persons are contained in s 14 of the Births and Deaths Registration Act 1953, as amended (see para **A1.162**). Re-registration may be effected only where information is furnished by both parents, unless: (a) the name of a person acknowledging himself to be the father has been entered in the register of births; (b) the

parents, is entitled to a share in the estate of an intestate dying domiciled in England[1].

1 *Re Goodman's Trust* (1881) 17 Ch D 266.

6.249 A petitioner (a minor) and his father were both domiciled in Germany. When the petitioner was born his father was married to a woman not his mother. The father was divorced in Germany, and married the mother of the petitioner. By German law the petitioner was legitimate as from the date of such marriage, and it was held that the petitioner should be recognised as legitimated as from that date[1].

1 *Collins v A-G* (1931) 75 Sol Jo 616, (1931) 145 LT 551.

6.250 It should be noted that, with effect from 1 January 1976, the rights to property given to legitimated persons, and persons claiming through such persons, under s 5 of the Legitimacy Act 1976 apply equally to cases of legitimation under s 2 or 3 of that Act, to legitimation under s 1 or 8 of the Legitimacy Act 1926 and to legitimation (whether or not by virtue of the subsequent marriage of the parents) recognised by the law of England and Wales and effected under the law of any other country (Legitimacy Act 1976, s 10(1)).

Adopted persons

6.251 Adoptions were not given effect in English law until the coming into force of the Adoption of Children Act 1926 and it was not until the enactment of the Adoption Act 1950 that rights of succession on intestacy were accorded as between adopters and adopted children.

6.252 In respect of deaths occurring prior to 1 January 1976 the relevant provisions relating to these rights are contained in ss 16 and 17 of the Adoption Act 1958. For deaths occurring on or after 1 January 1976 the status and rights of succession of adopted persons are to be found in Pt IV of the Adoption Act 1976 a consolidating measure which replaced Sch 1 to the Children Act 1975 from 1 January 1988. Except for Chapter 4 and para 2 of Sch 2 the Adoption Act 1976 was repealed and replaced by the Adoption and Children Act 2002 in respect of adoption orders made on and after 30 December 2005.

6.253 It should also be noted that, irrespective of the date of death, succession rights are not conferred in those cases where the adoption order made by the authorised court is merely provisional.

Adoption and Children Act 2002

6.254 The Adoption and Children Act 2002 which received the Royal Assent on 7 November 2002 repeals and replaces the Adoption 1976 except for Pt 4 and para 6 of Sch 2. The 2002 Act came into force on 30 December 2005 and adoptions effected from that day shall mean:[1]

(a) adoption by an adoption order or a Scottish or Northern Irish adoption order;

(b) adoption by an order made in the Isle of Man or any of the Channel Islands;
(c) an adoption effected under the law of a Convention country outside the British Islands, and certified in pursuance of Art 23(1)of the Convention (referred to tin the Act as a Convention adoption);
(d) an overseas adoption; or
(e) an adoption recognised by the law of England and Wales and effected under the law of any other country.

But these references do not include an adoption effected before that day.[2] Such adoption continues to attract the meaning given by the Adoption Act 1976 or earlier legislation.

1 Adoption and Children Act 2002, s 66(1).
2 Adoption and Children Act 2002, s 66(2).

6.255 Section 46(1) of the Children and Adoption Act 2002 (see para A1.501) defines adoption order as an order made by the court on an application under s 50 (application by couple) or 51 (adoption by one person) giving parental responsibility for a child to the adopters or adopter.

6.256 The 'Convention' means the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption concluded at the Hague on 29 May 1993; and 'Convention adoption order' means an adoption order which, by virtue of regulations under section 1 of the Adoption (Intercountry Aspects) Act 1999 (c 18) (regulations giving effect to the Convention), is made as a Convention adoption order[1]. (For a current list of signatories to the Convention, see para 6.273.)

1 Adoption and Children Act 2002, s 144(1): see para A1.501.

6.257 Under s 67 of the Adoption and Children Act 2002:

(1) An adopted person is to be treated in law as if born as a child of the adopters or adopter.
(2) An adopted person is the legitimate child of the adopters or adopter and, if adopted by—
  (a) a couple, or
  (b) one of a couple under section 51(2),
  is to be treated as the child of the relationship of the couple in question.
(3) An adopted person
  (a) if adopted by one of a couple under section 51(2), is to be treated in law as not being the child of any person other than the adopter and the other one of the couple, and
  (b) in any other case, is to be treated in law, subject to subsection (4), as not being the child of any person other than the adopter or adopters;
  but this subsection does not affect any reference in this Act to a person's natural parent or to any other natural relationship.
(4) In the case of a person adopted by one of the person's natural parents as sole adoptive parent, subsection (3)(b) has no effect as respects entitlement to property depending on relationship to that parent, or as respects anything else depending on that relationship.
(5) This section has effect from the date of adoption.