IS THIS MY CHILD? WHO IS MY PARENT?

LEGAL PARENT-CHILD RELATIONSHIPS IN UK TAX LAW IN AN ERA OF COMPLEX FAMILY NETWORKS

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CONTENTS

INTRODUCTION

In recent years, reform of the tax code in the United Kingdom (UK) has been a matter of public debate and yet, within this debate, the impact of developments in the UK's social landscape has not featured. An example of one of these developments is the changing nature of the family unit. Although the traditional household of heterosexual married parents with children (often referred to as the nuclear family) still reflects the majority of familial arrangements in the UK, "a diversity of complex family structures has flourished" and "parents, children and other family members may experience a number of different family structures over time."[1] There are a variety of factors which account for this narrative of change.

One factor is the reduced importance of marriage in contemporary family structures. Not only are fewer marriages taking place – between 1983 and 2010 the number of marriages in England and Wales per every 1,000 unmarried persons more than halved[2] – but it is estimated that 42 per cent of the marriages that do take place will end in divorce.[3] Figure 1 below shows how the proportion of UK births taking place outside of marriage increased significantly from the 1960s to the 2000s.

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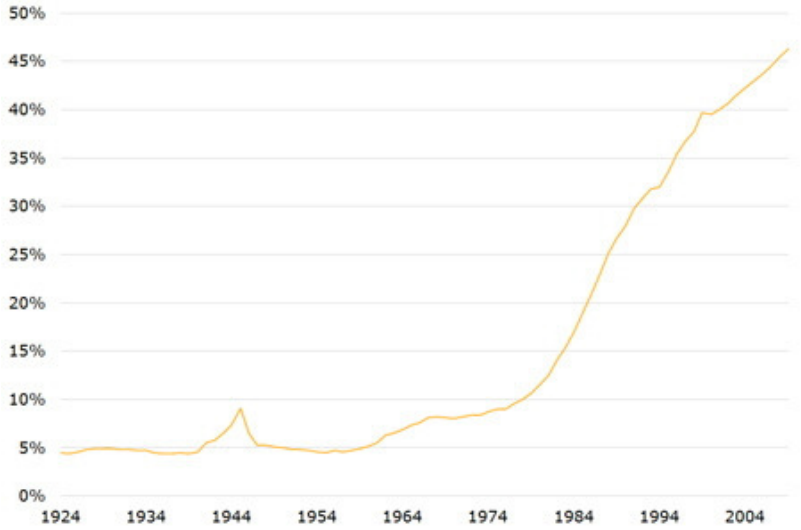
[1] The Social Issues Research Centre, "Childhood and family life: Socio-demographic changes" (SIRC, 2008). *Gov.uk, http://webarchive.nationalarchives.gov.uk/20130401151715/http://www.education.gov.uk/publications/eOrderingDownload/Appendix-G_SIRC-report.pdf* [Accessed November 11, 2017].

[2] Office for National Statistics, "Marriages in England and Wales, 2010" (ONS, 2012). *Gov.uk, http://webarchive.nationalarchives.gov.uk/20160107162435/http://www.ons.gov.uk/ons/dcp171778_258307.pdf* [Accessed November 11, 2017].

[3] Office for National Statistics, "Divorces in England and Wales, 2012" (ONS, 2014). *Gov.uk, http://webarchive.nationalarchives.gov.uk/20160107155056/http://www.ons.gov.uk/ons/dcp171778_351693.pdf* [Accessed November 11, 2017].

Figure 1: Percentage of UK births taking place outside marriage[4]



Changes in attitudes to the institution of marriage, once the centrepiece of the nuclear family, have re-shaped families in the UK as other structures such as single parent families, co-habiting parent families and step families grow in number. By way of example: the proportion of single parent families grew from 8 per cent to 22 per cent from 1971 to 2011[5]; in the same period the number of co-habiting women aged 18-49 tripled[6]; and, in 2011 nearly one in ten dependent children lived in a step family.[7]

Another factor which accounts for the narrative of change to families in the UK is the recognition of same sex couples as part of the family unit. A number of statutes have made this possible; including the Adoption and Children Act 2002 (ACA 2002), the Civil Partnership Act 2004 (CPA 2004), the Human Fertilisation and Embryology Act 2008 (HFEA 2008) and, most recently, the Marriage (Same

[4] Gavin Thompson et al., "Olympic Britain" (House of Commons Library, 2012). *Parliament.uk, http://www.parliament.uk/documents/commons/lib/research/olympic-britain/olympicbritain.pdf#page=41* [Accessed November 11, 2017].
[5] Office for National Statistics, "Chapter 3 – Households, families and people (General Lifestyle Survey Overview – a report on the 2011 General Lifestyle Survey)" (ONS, 2013). *Gov.uk, http://www.ons.gov.uk/ons/dcp171776_302210.pdf* [Accessed November 11, 2017].
[6] Office for National Statistics, "Chapter 3 – Households, families and people".
[7] Office for National Statistics, "Stepfamilies in 2011" (ONS, 2014). *Gov.uk, http://www.ons.gov.uk/ons/dcp171776_360784.pdf* [Accessed November 11, 2017].

Sex Couples) Act 2013 (MSSCA 2013). The Government estimates that in 2016 around 20,000 dependent children were living in a same sex couple family.[8]

A further factor accounting for changes to family structures in the UK is the advances made in the science of reproduction. As well as enabling persons to have children where they would otherwise be unable to conceive, these reproductive techniques can, in some circumstances, involve a third party (i.e. a gamete or embryo donor or a surrogate mother) – thus adding another person into the familial arrangement. In 2013, roughly 1,000 babies were born as a result of donated sperm, 600 from donated eggs, and 80 from donated embryos,[9] whilst in 2015/16 the minimum number of children born as a result of a surrogacy arrangement was 295.[10] Despite representing a small proportion of families in the UK, these arrangements require a legal framework to facilitate and govern them.

Having described some of the factors that account for the changing nature of the family unit in the UK, it is worth making one other observation; that is, that attitudes towards the nuclear family have also changed significantly in recent decades. Only 42 per cent of people in 2012 agreed or strongly agreed that persons who want children ought to get married (down from 71 per cent in

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[8] Catherine Fairbairn et al., "'Common law marriage' and cohabitation" (House of Commons Library, 2017). *Parliament.uk, http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN03372#fullreport* [Accessed November 11, 2017].

[9] Human Fertilisation and Embryology Authority, "Donor conception – births and children" (HFEA, 2015). *Gov.uk, http://www.hfea.gov.uk/donor-conception-births.html* [Accessed October 28, 2015].

[10] The total figure is unknown as not all arrangements will be formalised by the courts (Children and Family Court Advisory Support Service, "Law Commission consultation on the law governing surrogacy – Cafcass response". *Gov.uk, https://www.cafcass.gov.uk/media/297989/law_commission_surrogacy_consultation_-_cafcass_response.pdf* [Accessed September 12, 2017]).

1989)[11] and only 2 per cent of people in 2012 thought that mothers should stay at home once their youngest child has started school.[12]

Irrespective of one's personal view on these changes, a tax advisor is required to understand how the law applies to individuals whose circumstances do not conform to traditional patterns. The objective of this thesis is to investigate what it means to be a child and a parent in UK tax law and then apply these findings to particular aspects of that law. As Munby P suggests in *Re Human Fertilisation and Embryology Act 2008 (Cases A-H)*[13]:

> "What, after all, to any child, to any parent, never mind to future generations and indeed to society at large, can be more important, emotionally, psychologically, socially and legally, than the answer to the question: Who is my parent? Is this my child?"

[11] British Social Attitudes, "Marriage Matters?" (BSA, 2012). *Natcen.ac.uk, http://www.bsa.natcen.ac.uk/latest-report/british-social-attitudes-30/personal-relationships/marriage-matters.aspx* [Accessed October 28, 2015].
[12] British Social Attitudes, "Marriage Matters?".
[13] *Re Human Fertilisation and Embryology Act 2008 (Cases A-H)* [2015] EWHC 2602 (Fam) at [3].

PART A

Is this my child?

CHAPTER 1

1. INTRODUCTION

1.1. The word “child” is encountered throughout UK tax legislation. The purpose of this chapter is to establish the general meaning of that word in that context. The development of complex family structures in the UK makes it important to understand who is legally recognised as being a child of another person for the purposes of a UK tax statute.

1.2. UK tax statutes are, generally, applicable to the jurisdictions of England and Wales, Scotland and Northern Ireland. Family law, however, is a matter for each jurisdiction individually. Whilst the word “child” is used in UK tax legislation, this chapter will, where appropriate, focus on how it is to be construed in relation to individuals who are governed by the laws of England and Wales.

1.3. The meaning of the word “child” will be established in the context of the family tie of the statutory residence test. By extension, this chapter will then set out the general rule for answering the question “is this my child?” within all UK tax legislation.

2. THE FAMILY TIE OF THE STATUTORY RESIDENCE TEST

2.1. The statutory residence test is used to determine whether an individual is resident, or not resident, in the UK for a tax year for UK income tax and capital gains tax purposes. Where an individual is neither automatically UK resident nor automatically non-UK resident under the appropriate sub-tests of the statutory residence test, their UK residency status is determined by the sufficient ties test.

Broadly, the sufficient ties test provides for the number of days on which an individual may be present in the UK before they are regarded as UK resident, based on the number of ties they have with the UK.[1] One of these ties is the family tie and it is here that the word "child" is encountered. Sch.45 para.32(1) and (2) FA 2013 states:

> "(1) P has a family tie for year X if—
>
> (a) in year X, a relevant relationship exists at any time between P and another person, and
>
> (b) that other person is someone who is resident in the UK for year X.
>
> (2) A relevant relationship exists at any time between P and another person if at the time— …
>
> (c) the other person is a child of P's and is under the age of 18."

Comment

2.2. Before the meaning of the word "child" is discussed in the context of the family tie, two preliminary observations may be made. Firstly, FA 2013 does not itself define the word "child" and so its meaning must be determined by using the common law rules of statutory interpretation. This entails the application of the interpretative criteria governing the construction of an Act as found in the common law (subject to any intervention by Parliament).[2] Since the purpose of statutory interpretation is to ascertain the legal meaning of an enactment, the objective of the current exercise is to find the

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[1] The more ties an individual has with the UK the fewer days they can be present in the UK for a tax year without becoming UK resident.

[2] Francois Bennion, *Statutory Interpretation,* 4th edn (London: Butterworths, 2002), p.6. Indeed, achieving the objective of establishing the meaning of the word "child" in UK tax legislation generally is solely an exercise in statutory interpretation and the principles found in that area of the law alone will be determinative of the answer to the question posed, namely "is this my child?".

legal definition of the word "child", or, to put it another way, to determine who is a "legal child" of another person.[3]

2.3. Secondly, it will be observed in the context of the legislation cited above that a child is a party to a relationship with another person "P" and that relationship is viewed from the perspective of P; it is they who have the relationship with the child in the family tie and it is they who ask the question "is this my child?". Although, in this context, P must necessarily be a person who is alive, this is not essential for the relationship to be established in general terms. It is quite possible that in UK tax legislation the necessary relationship can be established from the perspective of a deceased person.[4]

3. THE DICTIONARY MEANING OF THE WORD "CHILD"

3.1. Recourse to an authoritative dictionary is a legitimate approach to discovering the legal meaning of a legislative term.[5] Such is the complexity of the English language that the Oxford English Dictionary (OED) gives a number of definitions of the word "child", two of which are relevant in the context of the phrase "child of P".

3.2. First, it states that a child is "a son or daughter (at any age) of a parent."[6] The second definition is "an offspring of human parents."[7] The first definition is fairly widely drawn and it signifies that a child

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[3] *A-G v Sillem* (1864) 2 H & C 431, as discussed by Bennion, *Statutory Interpretation* (2002), pp.14-15.
[4] For example, see the relationship between a child and their deceased parent (where that parent is the grandchild of a common grandparent) as described in s.71(2)(b)(ii) of the Inheritance Tax Act 1984 (IHTA 1984).
[5] *R v Peters* (1886) 16 QBD 636 at 641; *Camden (Marquess) v IRC* [1914] 1 KB 641 at 647.
[6] William Trumble and Angus Stevenson (eds), *Shorter Oxford English Dictionary*, 5th edn (Oxford: Oxford University press, 2002), Vol.1, p.393.
[7] William Trumble and Angus Stevenson (eds), *Shorter Oxford English Dictionary* (2002), p.393.

might be a son or daughter of a parent in colloquial, moral, social or emotional terms without a biological or legal relationship necessarily existing between them. The second definition, however, does intimate a biological connection as a requirement and so narrows the group of individuals that might be classed as a "child of P" within the context of the family tie.

3.3. By relying purely on the dictionary meaning, there is an argument for concluding that a person's legal child is whomsoever they regard as their child. It could be their biological child or the biological child of another person, such as a step-child. However, the dictionary meaning of a word must, as a matter of statutory interpretation, yield to any interpretation of that word by the courts (i.e. its judicial interpretation).[8] Therefore, the legal meaning of a word cannot be taken to be its dictionary meaning if the courts have interpreted that word in a particular way.

4. JUDICIAL INTERPRETATION OF THE WORD "CHILD"

4.1. The courts have imposed strict boundaries on the class of individuals whom a person is permitted to regard as their legal child. Although the word "child", as used in the context of the family tie, has not been specifically considered in case law, it is a well-established proposition set down by the courts that when interpreting the word in the context of statutes and wills generally a

[8] *Midland Rly Co v Robinson* (1889) 15 App Cas 19 at 34; *Kerr v Kennedy* [1942] 1 KB 409 at 413.

child is taken to refer to a legitimate child. In *Wilkinson v Adam*[9] Lord Eldon LC held:

> "The rule cannot be stated too broadly, that the description, 'child, son, issue', every word of that species, must be taken prima facie to mean legitimate child, son or issue."[10]

4.2. By contrast, illegitimate children are not included within the meaning of the word "child"; at common law they are *filius nullius* (the child of no-one).[11]

4.3. The judicially determined definition of the word "child" as being a legitimate child only will be referred to as the "conventional statutory meaning" of the word. However, to know which children are encompassed by the conventional statutory meaning of the word "child" one must then ask what it means to be a legitimate child. The answer to this question can be broken down into two categories: children that are legitimate as a matter of the common law and children that are legitimate by virtue of statute.

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[9] *Wilkinson v Adam* (1813) 1 Ves & B 422 at 462.

[10] This proposition has been reiterated in numerous cases, see: *R v Wyke* (1746) Burr SC 264 at 265; *R v Maude* (1842) 6 Jur 646; *R v Birmingham Inhabitants* (1846) 8 QB 410 at 426; and, *Re Makein, Makein v Makein* [1955] 1 All ER 57 as summarised by Halsbury's Laws of England, *Children and Young Persons* (London: Butterworths, 2017), Vol.9, at [142]. In *R v Totley Inhabitants* (1845) 7 QB 596 at 598, Lord Denman CJ said "the law does not contemplate illegitimacy. The proper description of a legitimate child is "child"." Similarly in *Dickinson v North Eastern Rly Co* (1863) 2 H & C 735 at 736, Pollock CB said "the word "child" in an Act of Parliament always applies exclusively to a legitimate child." The same applies to the interpretation of the word as found in wills and trust instruments, see *Sydall v Castings Ltd* (1967) 1 QB 302. However, some cases also make it clear that this construction is a prima facie meaning of the word and a wider interpretation may be given where it is consonant with the object of the statute (see, for example, *Woolwich Union v Fulham Union* (1906) 2 KB 240).

[11] William Blackstone, *Commentaries* (Philadelphia: J. B. Lippincott Company, 1893), Vol. 2, pp. 458-9. At p.459 he comments, "The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for being *nullius filius*, he is therefore of kin to no-body, and has no ancestor from whom any inheritable blood can be derived." See also, for example, *Barnardo v McHugh* [1891] AC 388 at 399. In their seminal report on the subject of illegitimacy, the Law Commission note at p.98, "An illegitimate person was treated by the common law as nobody's child. He was accordingly not entitled to succeed on the intestacy of ascendant or collateral relations; and if an illegitimate person died intestate only his wife and issue could succeed to his estate" (The Law Commission, *Family Law: Illegitimacy* (HMSO 1982), Law Com.118).

4.4. **Children that are legitimate at common law**

4.4.1. The concept of legitimacy was described by Lord Simon of Glaisdale in *The Ampthill Peerage*[12] in the following way:

> "Legitimacy is a status: it is the condition of belonging to a class in society the members of which are regarded as having been begotten in lawful matrimony by the men whom the law regards as their fathers."

4.4.2. Using this description, it is apparent that there are two requirements for a child to be legitimate at common law: that the child is begotten in lawful matrimony and that the child is begotten in that lawful matrimony by the men whom the law regards as their father.

4.4.3. "…begotten in lawful matrimony"

4.4.3.1. It has been established in case law that this requirement will be satisfied where a child's parents divorce or die prior to their birth,[13] and, crucially, where a child is conceived outside of, but born within, lawful matrimony.[14] Therefore, "begotten in lawful matrimony" can be read as "born or conceived in lawful matrimony". For this purpose it is not necessary to consider whether the child has been conceived by natural means or through a form of fertility treatment.

4.4.3.2. A lawful marriage exists between two persons where they have complied with the requirements of the Marriage Act 1949 (MA

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[12] *The Ampthill Peerage* [1976] 2 All ER 411 at 424.
[13] See *Knowles v Knowles* [1962] 1 All ER 659.
[14] See *Birtwhistle v Vardill* (1840) 7 Cl & Fin 895, HL., *Gardner v Gardner* (1877) 2 APP Cas 723 and *Poulett Peerage Case* [1903] AC 395 HL as summarised by Halsbury's Laws of England, *Children and Young Persons* (2017), at 142. The rationale is that the act of marriage is recognition by the husband that the child is his own.

1949).[15] A marriage that does not meet these requirements is considered void (although the law will presume that a valid marriage has taken place wherever possible).[16] Prima facie, a child of a void marriage is, therefore, illegitimate.[17]

4.4.3.3. A marriage may also be voidable rather than void. As a voidable marriage is valid until it is annulled by the court,[18] a child born or conceived into such a marriage is legitimate.[19] If the marriage ceremony is so far from being a marriage that it constitutes a non-event, the marriage may be ignored by the law.[20]

4.4.4. <u>"…by the men whom the law regards as their fathers"</u>

4.4.4.1. The marriage into which a child is born or conceived must exist between the child's mother and the man who is, in law, its father.

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[15] According to MA 1949, the requisites of a valid marriage are: that each of the parties should as regards age and mental and physical capacity be capable of contracting marriage; that they should not by reason of kindred or affinity be prohibited from marrying one another; that, except where a second or subsequent polygamous marriage has been entered into under a law that permits polygamy, there should not be a valid subsisting marriage or civil partnership of either of the parties with any other person; that the parties, understanding the nature of the contract, should freely consent to marry one another; and, that certain forms and ceremonies should be observed (see Halsbury's Laws of England, *Matrimonial and Civil Partnership Law* (London: Butterworths, 2015), Vol.72, at [4]). MA 1949 governs England and Wales only. In Scotland and Northern Ireland the relevant legislation can be found in the Marriage (Scotland) Act 1977 (MSA 1977) and the Marriage (Northern Ireland) Order 2003 (SI 2003/413) respectively. For a foreign marriage to be valid in the law of England and Wales there are three broad conditions that must be fulfilled. Firstly, the marriage ceremony must be recognised as a valid form of marriage by the law of the place of celebration. Secondly, each of the parties to the marriage must have the capacity, under the law of the place where he or she is domiciled at the time of the marriage, to marry the other party in the manner proposed. Finally, any previous marriage of either party must first have been validly terminated in the eyes of English law ("Marriage", *Gov.uk, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/268020/marriage.pdf* [Accessed October 26, 2016]).

[16] The Hon. Mr Justice Wall et al., *Rayden and Jackson's Law and Practice in Divorce and Family Matters*, 17th edn (London: Butterworth and co, 1997), Vol.1. Certain religious marriages, such as a *Nikah* contract for example, that do not meet the requirements will be void.

[17] As discussed in Part 4.5.2 below, this position is altered in certain circumstances.

[18] The marriage may be voidable for a number of reasons including because the marriage has not been consummated (either through incapacity or willful refusal), and because either party did not validly consent to the marriage.

[19] Halsbury's Laws of England, *Matrimonial and Civil Partnership Law* (2015), at [381].

[20] Flora Harragin, "When is a marriage not a marriage?" (Issue 162, 2013), *The Review*, *http://www.farrer.co.uk/Global/1/When_is_marriage_not_a_marriage.pdf* [Accessed October 26, 2016]. See, for example, *Hudson v Leigh* [2009] EWHC 1306 (Fam).

The common law regards the husband of a married woman to be the father of any children born or conceived during the subsistence of their marriage. This rule is known as the "presumption of legitimacy" and, prima facie, it applies to all children that are born or conceived in lawful marriage, even in the case where a child is conceived as a result of an extra-marital affair. However, the husband can rebut the presumption if sufficient evidence is provided to prove that he is not the biological father of the child. Where the husband rebuts the presumption of legitimacy, the second requirement for a child to be legitimate at common law is not met and therefore the child is illegitimate.[21]

4.4.4.2. At the time of Lord Simon's judgment, a man could only be recognised in law as a child's father if he were identified as such by the common law. In recent decades family law has evolved such that statute may be engaged to satisfy the second requirement of legitimacy where a child is conceived using sperm provided by a sperm donor.[22] It is submitted that Parliament clearly intends that a husband satisfies this requirement in these circumstances – because he is the man whom the *law* regards as being the child's father – even though he has not himself begotten his wife's child.[23]

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[21] The second requirement is not met because the child is not begotten by a man who is its lawful father (in fact the child, being illegitimate, is treated as having no lawful father at common law (see Paragraph 4.3 of Chapter 3)).

[22] The statutory identification of legal parenthood is discussed in detail in Chapter 3. It is also shown in that chapter that a child's legal mother may be identified by statute too, however, this does not disturb the requirements for a child to be legitimate at common law (because statute identifies the same woman as being the child's mother as the common law).

[23] Parliament has not labelled such a child as legitimate because the common law already attributes that status to the child in these circumstances.

4.4.4.3. In summary, therefore, an individual may be regarded as a legitimate child at common law, and hence the legal child of another person for the purposes of the family tie of the statutory residence test, if they are born or conceived during the subsistence of a lawful marriage (i.e. a valid or voidable marriage) between their mother and the person whom the law regards as their father. Therefore, a child that is conceived and born outside of a lawful marriage, a child with same sex legal parents, or a child that is born into a lawful heterosexual marriage where the husband successfully rebuts the presumption of legitimacy, is an illegitimate child and hence not a legal child at common law.[24]

4.5. Children that are legitimate by virtue of statute

4.5.1. A number of statutes have extended membership of the class of legitimate children beyond its determination at common law. The effect of this extension is not to abolish the class of legitimate children as defined by the common law (that class remains intact and unaffected); it is simply the case that Parliament has determined that other categories of children are to be treated as being legitimate and, as such, encompassed within the conventional statutory meaning of the word "child". There are five categories of children who are treated as being legitimate in this way and they will be discussed in turn. They are:

- children of certain void marriages;
- legitimated children;

[24] A child born to a same sex married couple is therefore an illegitimate child at common law (see fn.53, p.21 below for a discussion on this point).

- certain children with two women as parents;
- adopted children; and,
- children that are subject to a parental order (in the context of a surrogacy arrangement).

4.5.2. Children of certain void marriages

4.5.2.1. A child of a void marriage is, on first principles, an illegitimate child because the marriage between its parents is regarded as never having taken place. Section 1 Legitimacy Act 1976 (LA 1976)[25] ameliorates this position somewhat by providing that a child of a void marriage is to be treated as legitimate if two conditions are met. Firstly, the child's father must have been domiciled in England and Wales at the time of the child's birth (or at the time of the father's death if earlier), and secondly both or either of the parties to the void marriage must have believed that the marriage was valid at the time of the child's conception[26] or, if later, at the time of the void marriage itself.[27] For children born on or after April 4, 1988 it is

[25] s.1 LA 1976 took effect on August 22, 1976 (see s.12(2) LA 1976) and governs all children born into a void marriage whether born before or after the commencement date of the Act. The legitimacy status of children born into a void marriage was previously governed by s.2 Legitimacy Act 1959 (LA 1959), which was the first Act of Parliament to deem children of certain void marriages to be legitimate. However, Sch.2 to LA 1976 repeals s.2 LA 1959 without any savings provisions for children previously governed by that Act.

[26] Where the child is conceived via artificial insemination, the time of the child's conception is to be read as the time of the insemination (s.1(1) LA 1976). It is submitted that the reference to the time of conception is sufficient to cover other types of fertility treatment.

[27] LA 1976 applies to England and Wales only. In Northern Ireland, s.2 Legitimacy Act (Northern Ireland) 1961 (LANI 1961) applies in the same way as s.1 LA 1976, except that the child's father must be domiciled in Northern Ireland at the time of the birth. In Scotland, s.21 Family Law (Scotland) Act 2006 (FLSA 2006), which amended s.1 Law Reform (Parent and Child) (Scotland) Act 1986 (LRSA 1986), abolished the status of illegitimacy in Scots law with effect from 4 May 2006 (i.e. the commencement date of the Act, see art.2 Family Law (Scotland) Act 2006 (Commencement, Transitional Provisions and Savings) Order 2006 (SI 2006/212)). As such, a child of another individual may, in Scots law, be a legitimate or an illegitimate child. Insofar as the following sections describe the legitimacy status of a child they will not, therefore, be applicable to Scots law.

presumed that one of the parties to the void marriage did indeed believe that the marriage was valid at the relevant time.[28]

4.5.2.2. By providing that children of certain void marriages are legitimate children, s.1 LA 1976 brings those children within the conventional statutory meaning of the word "child" for the purposes of the family tie of the statutory residence test.

Comment – same sex couples

4.5.2.3. The application of s.1 LA 1976 is not limited to children of certain void marriages between heterosexual couples. HFEA 2008 and MSSCA 2013 extend the provision to children of certain void marriages between two women.

4.5.2.4. HFEA 2008[29] is the Act that governs legal parenthood in the context of children that are conceived using assisted reproduction techniques (otherwise known as fertility treatment).[30] It has provided that in certain circumstances a child may identify its legal parents from birth as a legal mother and a "legal female parent".[31] It is not possible for a child two have two male parents from birth.[32] Legal parenthood is discussed in detail in Chapter 3.

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[28] s.1(4) LA 1976 as inserted by s.28 FLRA 1987.
[29] HFEA 2008 applies to England and Wales, Scotland and Northern Ireland (except in very limited circumstances per s.67 HFEA 2008). References made to HFEA 2008 will therefore apply to these jurisdictions.
[30] From this point onwards the term fertility treatment will be used in preference to the term assisted reproduction techniques. For these purposes fertility treatment encompasses the practices envisaged by HFEA 2008 when legal parenthood is identified by the Act: namely where a woman has carried the child as a result of the placing in her of an embryo; sperm and eggs together; or of donor sperm via artificial insemination.
[31] It is important for a number of reasons that this parent is not called a mother of the child (indeed she is not called a mother in the legislation) and so the term "legal female parent" is used instead.
[32] In every case involving fertility treatment the person who gave birth to the child is identified as the child's legal mother (see Paragraph 5.4.3 of Chapter 3). Therefore, it is not possible for a

4.5.2.5. Section 1 MSSCA 2013,[33] on the other hand, provides that two persons of the same sex may lawfully marry each other. Therefore, since s.1 MSSCA 2013 came into force (i.e. on March 13, 2014)[34] two women who are identified as a child's legal parents may be lawfully married.

4.5.2.6. Following the enactment of MSSCA 2013, the effect of s.1 LA 1976 was extended to children of certain void marriages between two women. There are two conditions that must be met for children of these void marriages to be treated as legitimate. Firstly, the woman who did not give birth to the child must be domiciled in England and Wales at the time of the child's birth (or at the time of her death if earlier).[35] Secondly, both or either of the women must have believed that the marriage was valid at the time of the child's conception, the insemination resulting in the conception or, if later, at the time of the void marriage itself.[36]

4.5.3. Legitimated children

4.5.3.1. According to the common law of England and Wales, an illegitimate child is not legitimated by the subsequent marriage of its parents

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child to have two men as parents from birth because at least one of the parents must be a legal mother (being the person who gave birth to the child). A child can only have two male parents if they are identified as such during the child's lifetime via an adoption order or a parental order in the context of a surrogacy arrangement (and this is discussed in detail in Part 4.5.5 and 4.5.6 below).

[33] MSSCA 2013 applies to England and Wales. Same sex marriage was legalised in Scotland by the Marriage and Civil Partnership (Scotland) Act 2014 (MCPSA 2014). However, same sex marriage has not been legalised in Northern Ireland and therefore references to the marriage between two people of the same sex in this thesis will not apply to that jurisdiction.

[34] Marriage (Same Sex Couples) Act 2013 (Consequential and Contrary Provisions and Scotland) Order 2014 (SI 2014/560).

[35] s.1(2)(b) LA 1976, as substituted by Sch.1 para.15(1) and (2) SI 2014/560.

[36] s.1(1) LA 1976. If the two women converted a civil partnership into a void marriage, the time of the marriage is the date of the purported conversion (s.1(5) LA 1976). Incidentally, there are no provisions regarding the legitimacy status of children of void civil partnerships in LA 1976.

after its birth.[37] However, Parliament has amended this position to make provision for a child's legitimation in such circumstances so that the child is placed in the position of a legitimate child from the date of that marriage.

4.5.3.2. The Act currently governing legitimation is LA 1976. Section 2 LA 1976[38] provides for a child to be treated as legitimated by the subsequent marriage[39] of the child's parents after its birth if, at the time of the marriage, the child's father is domiciled in England and Wales or, in accordance with s.3 LA 1976,[40] domiciled in a country that recognises the legitimation of a child through marriage.[41] The child is legitimated from the date of the marriage and therefore the legitimation does not apply retrospectively.[42]

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[37] *Birtwhistle v Vardill* (1840) 7 Cl & Fin 895 (see also Halsbury's Laws of England, *Children and Young Persons* (2017), at [142]). The common law of Scotland, by contrast, does contemplate legitimation *per subsequens matrimonium* (see *Munro v Munro* (1840) 1 Rob. App.).

[38] s.2 LA 1976 came into effect on August 22, 1976. Legitimation by subsequent marriage was previously governed by s.1(1) and (2) of the Legitimacy Act 1926 (LA 1926) but these provisions were repealed by LA 1959 and Sch.2 LA 1976 respectively. However, Sch.1 LA 1976 preserves the status of children who had been legitimated by s.1(1) and (2) LA 1926.

[39] A child cannot be legitimated by a void marriage therefore a reference to a marriage in the context of legitimation is to a valid or voidable marriage.

[40] s.3(1) LA 1976, which replaces s.8 LA 1926, provides for the legitimation of a child where the father is domiciled in a country other than England and Wales at the time of the marriage. Although s.8 LA 1926 was repealed by Sch.2 LA 1976, the status of children who had been legitimated by it is preserved by Sch.1 LA 1976.

[41] LA 1976 does not apply to Northern Ireland or Scotland. In Northern Ireland, a child is legitimated by the subsequent marriage of its parents where the child's father is domiciled in Northern Ireland at the time of the marriage (s.1 LANI 1961 as read with s.1 of the Legitimacy Act (Northern Ireland) 1928 (LANI 1928)), or he is domiciled in a country that recognises legitimation by subsequent marriage (s.1 LANI 1961 as read with s.8 LANI 1928). In Scotland, legitimation by subsequent marriage was written into statute by the Legitimation (Scotland) Act 1968. However, the concept of legitimation became irrelevant following the abolition of the status of illegitimacy in Scots law from May 4, 2006.

[42] This is the distinction between a legitimate and a legitimated child: the former is legitimate from birth whereas the latter is only legitimate from the date of its parents' marriage. The difference may be subtle but it will be shown in Chapter 4 that this has an impact on the child's domicile of origin. In the unusual circumstance where a child is born illegitimate, is then adopted by one of its natural parents, and the child's natural parents subsequently marry each other at a time when the father is domiciled in England and Wales or in a country that recognises legitimation through marriage, the child is no longer treated as legitimate from birth by virtue of s.67 ACA 2002 (see Part 4.5.5 below) but is instead treated as legitimated by virtue of s.4 LA 1976 from the date of the marriage.

4.5.3.3. By providing that a legitimated child is, from the date of its parents' marriage, placed in the position of a legitimate child, Parliament thereby brings those children within the conventional statutory meaning of the word "child" for the purposes of the family tie of the statutory residence test.

Comment – same sex couples

4.5.3.4. Following the enactment of HFEA 2008, ss.2A and 3(2) LA 1976 were inserted[43] to extend the legitimation of illegitimate children to those children whose legal mother and legal female parent form a civil partnership after their birth. Furthermore, following the enactment of MSSCA 2013 these provisions were amended to include illegitimate children whose legal mother and legal female parent marry after their birth.[44] Such children are legitimated from the date of the civil partnership or marriage if, at that time, the woman who did not give birth to the child was domiciled in England and Wales, or in a country that recognises legitimation by civil partnership or marriage respectively.[45]

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[43] The provisions were inserted by Sch.6 paras 16 and 17 HFEA 2008.

[44] As inserted by Sch.1 para.15 SI 2014/560. It will be shown in Part 4.5.4 below that where the civil partnership/marriage is entered into prior to the birth the child is treated as being legitimate by virtue of s.48(6) HFEA 2008.

[45] As previously noted, the status of illegitimacy has been abolished in Scots law and therefore there are no corresponding provisions regarding the legitimation of children in Scotland. In Northern Ireland, s.1 LANI 1961, as read with s.1(1A) LANI 1928, provides for the legitimation of a child whose legal mother and legal female parent form a civil partnership after the child's birth. The child is legitimated if, at the time of the birth, the legal female parent (i.e. the parent that did not give birth to the child) was domiciled in Northern Ireland or, according to s.1 LANI 1961, as read with s.8(1A) LANI 1928, she was domiciled in a country other than Northern Ireland whose law would have legitimated the child by virtue of the civil partnership. Same sex marriage is not lawful in Northern Ireland and therefore the child's legitimation cannot take place in this way.

4.5.4. Certain children with two women as parents

4.5.4.1. As noted already, HFEA 2008[46] provides for two women to be treated as a child's legal parents in certain circumstances. HFEA 2008, the relevant provisions of which came into force on April 6, 2009,[47] was the first Act to enable a child to have (at law) two women as its parents from birth.[48]

4.5.4.2. Where a woman carries a child that was conceived using a form of fertility treatment,[49] as must be the case in this context, she is the child's legal mother (whether by reason of common law or by statute). In such circumstances another woman may be identified as the child's legal female parent by s.42 or s.43 HFEA 2008: s.42 HFEA 2008 deals with cases where the two women are married or civil partners at the time of the fertility treatment,[50] and s.43 HFEA 2008 where they are not.

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[46] HFEA 2008 applies to all of the UK; however, because the status of illegitimacy has been abolished in Scots law the provisions regarding the legitimacy status of certain children with two women as parents are not relevant in that jurisdiction. In Northern Ireland the provisions may apply; however, because same sex marriage has not been legalised they can only apply in the context of civil partnerships.

[47] The Human Fertilisation and Embryology Act 2008 (Commencement No.1 and Transitional Provisions) Order 2009 (SI 2009/479).

[48] A foetus does not have a legal personality and therefore the legal consequences of a parent-child relationship are not formed until the child is born (*Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276, cf. *A-G's Reference (No. 3 of 1994)* [1998] AC 245, HL (as summarised in Andrew Burrows, *English Private Law,* 3rd edn (Oxford: Oxford University Press, 2013), p.39). The two women are hence legal parents of their child from its birth. Previously such an arrangement could only exist by virtue of an adoption order or a parental order made during a child's lifetime (see Part 4.5.5 and 4.5.6 below).

[49] I.e. where sperm, eggs and sperm, or an embryo is placed in a woman (see fn.30, p.16 above).

[50] The references to a marriage or a civil partnership in s.42 HFEA 2008 are defined by s.49(1) and s.50(1) HFEA 2008 respectively. At any particular time they refer to a marriage/civil partnership where there is no judicial separation or separation order in place and include void marriages/civil partnerships if both or either of the parties reasonably believed at that time that the marriage/civil partnership was valid. According to s.49(1)(b) and s.50(2) HFEA 2008, it is to be presumed, unless proven otherwise, that one of the parties reasonably believed at that time that the marriage/civil partnership was valid.

4.5.4.3. Section 48(6) HFEA 2008 provides for children with two women as parents to be treated as legitimate in two circumstances: in subs.(6)(a) where a child has a legal female parent by virtue of s.42 HFEA 2008; and in subs.(6)(b) where a child has a legal female parent by virtue of s.43 HFEA 2008 who forms a civil partnership with the child's mother in the period between the fertility treatment and the child's birth.

4.5.4.4. After the legalisation of same sex marriages a number of changes were made to HFEA 2008; however, no amendment was made to s.48(6) HFEA 2008. The application of subs.(6)(a) was, though, indirectly extended by an amendment to s.42 HFEA 2008 so as to include children that are conceived using a fertility treatment at a time when the child's legal mother is married to the legal female parent.[51] By contrast, the application of subs.(6)(b) continues to be limited to children with a legal mother and a legal female parent who enter into a civil partnership in the period between the fertility treatment and the child's birth. It is submitted that this was an accidental error on the part of the draftsman because it means that a child is placed in a stronger position where the two women enter into a civil partnership (or even a void marriage)[52] in that period, than if they had entered into a valid marriage instead.[53]

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[51] The amendment extended the section to identify, as the legal female parent, a woman who was *married* to the legal mother at the time of the treatment.

[52] See Paragraph 4.5.2.6 above. The void marriage can take place after the child's conception but before the child's birth.

[53] It could be argued that s.48(6)(b) HFEA 2008 was intentionally left unchanged because the draftsman considered that a child who is born or conceived in a lawful marriage between two women is legitimate at common law and therefore it was unnecessary to extend the application of that subsection to marriages in the period identified. To make this argument, it would have to be shown that the common law definition of a legitimate child (see Part 4.4 above) has been widened in its scope to include a child that is begotten in lawful matrimony by a legal female

4.5.4.5. In summary, by providing that certain children with two women as parents are legitimate, s.48(6) HFEA 2008 brings such children within the conventional statutory meaning of the word “child” in the context of the family tie of the statutory residence test.

4.5.5. Adopted children

4.5.5.1. The concept of adoption is not recognised by the common law. However, since the introduction of the Adoption of Children Act 1926 (ACA 1926) statute has conferred on adopted children the status of legitimacy.

4.5.5.2. ACA 2002 is the current statute governing adoption.[54] Broadly, an adopted child is one who is subject to an adoption order made in England and Wales, Scotland, Northern Ireland, the Isle of Man, any of the Channel Islands, or is the subject of an overseas adoption.[55] A valid adoption order can only be made in respect of a child that has not reached the age of 18 at the date of the

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parent as well as the man whom the law regards as its father. However, such an argument appears to stretch the common law definition of legitimacy too far; not least when considering Sch.4 para.2 MSSCA 2013 which states that the presumption of legitimacy is not altered by the legalisation of same sex marriages.

[54] ACA 2002 applies to England and Wales only. The Adoption (Northern Ireland) Order 1987 (SI 1987/2203) is the statutory instrument currently governing adoption in Northern Ireland and the Adoption and Children (Scotland) Act 2007 (ACSA 2007) is the Act currently governing adoption in Scots Law. In Northern Ireland, art.40(1) SI 1987/2203 provides that an adopted child shall be treated in law as if born to the adoptive parent(s) as their legitimate child. In Scotland, s.40(1) ACSA 2007 provides that an adopted child is to be treated in law as the child of the adoptive parent(s); however no provision is necessary regarding the child’s legitimacy as the status of illegitimacy has been abolished in Scots law.

[55] s.66 ACA 2002. An overseas adoption is defined in s.87 ACA 2002 as one validly made in a country listed in the Schedule to the Adoption (Recognition of Overseas Adoptions) Order 2013 (SI 2013/1801), previously The Adoption (Designation of Overseas Adoptions) Order 1973 (SI 1973/19), but does not include a Convention adoption.

application.[56] A child may be adopted by a couple (whether married or living in an enduring family relationship)[57] or by one person only.

4.5.5.3. Section 67(1) and (3) ACA 2002[58] provides that an adopted child is treated in law as having been born to its adoptive parent or parents and no other person. Section 67(2) ACA 2002 provides that the adopted child is their legitimate child.[59] These rules take effect from the date of the child's adoption[60] (which means that the child joins the class of legitimate children from that date only) but they apply retrospectively so that the adopted child is the legitimate child of the adoptive parents from birth (both for the interpretation of enactments passed before as well as after the adoption).[61]

4.5.5.4. Interestingly, the statute ensures that an adopted child is a legitimate child regardless of the marital status of its biological parents or adoptive parents and regardless of whether the child is adopted by one person or two people.

4.5.5.5. By providing that an adopted child is a legitimate child, s.67(2) ACA 2002 brings adopted children within the conventional statutory meaning of the word "child" for the purposes of the family tie of the statutory residence test.

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[56] s.49(4) ACA 2002.
[57] A couple is defined in s.144(4) ACA 2002.
[58] s.67 ACA 2002 took effect on December 30, 2005 (see art.2 Adoption and Children Act 2002 (Commencement No. 9) Order 2005 (SI 2005/2213)). The status of children adopted under s.39 Adoption Act 1976 (AA 1976) – i.e. the legislation that applied before s.67 ACA 2002 commenced and which is to the same effect as s.67 ACA 2002 – is preserved by Sch.5 ACA 2002. AA 1976 also made provision for the preservation of the effectiveness of adoptions under the relevant statutes that it replaced, i.e. ACA 1926, Adoption of Children Act 1949 (ACA 1949), Adoption Act 1950 (AA 1950) and the Adoption Act 1958 (AA 1958) (see Sch.2 para.5 AA 1976).
[59] An illegitimate child's parents may adopt their child to alter its status as illegitimate.
[60] s.67(5) ACA 2002.
[61] s.67(6)(a) ACA 2002.

Comment – same sex couples

4.5.5.6. Prior to the enactment of MSSCA 2013, s.50 ACA 2002 (as read with s.144(4) ACA 2002) had already made it possible for same sex couples, whether two men or two women, to adopt if they were two persons living together in an enduring family relationship.[62] The effect of MSSCA 2013 is to enable a same sex couple to adopt by virtue of being a married couple instead. An adoption order overrides the identification of legal parenthood in HFEA 2008.[63]

4.5.6. Children that are subject to a parental order (surrogacy arrangements)

4.5.6.1. In terms of s.1(3) of the Surrogacy Arrangements Act 1985 (SAA 1985),[64] a surrogacy arrangement is one where the woman who carries a child under the arrangement is a surrogate mother.[65] The arrangement she entered into must have been made with a view to any child carried in pursuance of it being handed over to, and parental responsibility being met (so far as practicable), by other persons (the "commissioning parents"). In short, a surrogacy arrangement is an arrangement whereby a woman conceives a child on behalf of commissioning parents and agrees to hand the child over to them after its birth.[66]

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[62] Same sex adoption was made possible for the first time by ACA 2002.
[63] ss.33(2), 38(4), 45(4), and 47 HFEA 2008.
[64] s.1 SAA 1985 applies to England and Wales, Scotland and Northern Ireland.
[65] s.1(2) SAA 1985 defines a surrogate mother as a woman who entered into the arrangement before she began to carry the child.
[66] Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (HMSO 1984), p.42. This agreement is not legally enforceable.

4.5.6.2. Parental orders are used to identify legal parenthood in surrogacy arrangements because the arrangements themselves are not determinative of parenthood. The making of parental orders in this context is currently governed by s.54 HFEA 2008 which, from its commencement on April 6, 2010,[67] replaced s.30 of the Human Fertilisation and Embryology Act 1990 (HFEA 1990). HFEA 1990 was the first Act to make parental orders possible.[68] For a parental order to be effective in the UK it must have been granted by a UK family court.[69]

4.5.6.3. The status of a child subject to a parental order is provided for in reg.2 of The Human Fertilisation and Embryology (Parental Orders) Regulations 2010 (SI 2010/985) which extends the status of an adopted child to that child. Therefore a child subject to a parental order is retrospectively treated as if born to the commissioning parents as their legitimate child from the date of that order.[70]

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[67] Human Fertilisation and Embryology Act 2008 (Commencement No. 3) Order 2010 (SI 2010/987).

[68] s.30(9)(10) HFEA 1990 came into force on July 5, 1994, although the remaining subsections of s.30 HFEA 1990 came into force on November 1, 1994 (The Human Fertilisation and Embryology Act 1990 (Commencement No. 5) Order 1994 (SI 1994/1776)). The effectiveness of parental orders made during its currency is preserved after April 6, 2010 by s.57(4) HFEA 2008. Surrogacy arrangements were made legal from July 16, 1985 with the royal assent of SAA 1985. Prior to November 1, 1994, the transfer of legal parenthood to the intended parents in a surrogacy arrangement was not possible. Therefore, the status of a child born before this date, and indeed any child who is born as a result of a surrogacy arrangement but to whom a parental order has not been made, will be determined with reference to the child's legal parents as identified at its birth (or the child's adoptive parent(s) as the case may be). As a transitional provision, the intended parents of a child subject to a surrogacy arrangement governed by SAA 1985 but born before the commencement of s.30 HFEA 1990 on November 1, 1994 could apply for a parental order under that section within six months from that date (s.30(2) HFEA 1990). Those commissioning parents must have been a husband and wife.

[69] Foreign parental orders are not recognised in UK law. Mrs Justice Theis, in *J v G* (2013) EWHC 1432, said: "[t]he legal relationship between children born as a result of surrogacy arrangements and their intended parents is not on a secure legal footing without [a UK parental order] being made." See Natalie Gamble Associates, "Parenthood and Parental Orders (Surrogacy Law)". *NGA Law, http://www.nataliegambleassociates.co.uk/knowledge-centre/parenthood-and-parental-orders-surrogacy-law* [Accessed November 15, 2017].

[70] Any existing legal parents are therefore treated as not being the legal parents of the child from this date. In respect of parental orders made before April 6, 2010 under s.30 HFEA 1990,

4.5.6.4. As with an adopted child, a child that is subject to a parental order is a legitimate child regardless of the marital status of the commissioning parents. However, unlike an adoption order, a parental order cannot currently be granted to a single person; instead the commissioning parents must be a husband and wife, civil partners, or two persons who are living as partners in an enduring family relationship.[71]

4.5.6.5. By providing that children who are subject to a parental order are legitimate children, Parliament thereby brings those children within the conventional statutory meaning of the word "child" in the context of the family tie of the statutory residence test.

Comment – same sex couples

4.5.6.6. MSSCA 2013 did not make any amendments to s.54 HFEA 2008, presumably because same sex couples, whether two men or two women, were already able to apply for a parental order as civil partners or as partners living together in an enduring family relationship.

4.6. **Summary**

4.6.1. Thus far, it has been shown that the conventional statutory meaning of the word "child" contemplates only a legitimate child. A child may

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The Human Fertilisation and Embryology (Parental Orders) Regulations 1994 (SI 1994/2767) extend the application of the Adoption Act in force at the time – being AA 1976 – so that the child who is subject to the parental order is, from the date of the order, treated as if born to the commissioning parents only as their legitimate child.

[71] s.54(2) HFEA 2008. However, following the decision in *Re Z (A Child)* [2016] EWHC 1191 (Fam), where it was decided that s.54 HFEA 2008 was not compatible with the Human Rights Act 1998 (HRA 1988) because it discriminated against single people, the government is reviewing how it can amend the law to remedy the position.

be legitimate at common law or as a result of statutory intervention. Such children are therefore legal children for the purpose of the family tie of the statutory residence test. By contrast, illegitimate children are not legal children according to the conventional statutory meaning of the word “child”.

4.6.2. However, the judicially determined meaning of a word must, as a matter of statutory interpretation, yield to any interpretation of that word by an Act of Parliament. It will now be shown that Parliament has extended the boundaries of the class of individuals whom a person may regard as their legal child beyond legitimate children for the purposes of the family tie of the statutory residence test.

5. INTERPRETATION OF THE WORD “CHILD” BY ACT OF PARLIAMENT

5.1. The interpretation of a statutory word is determined by an Act of Parliament where provision for its meaning is found either in an Act that applies to enactments generally (i.e. an Act in the nature of an Interpretation Act) or in the Act in which the word itself is found (e.g. FA 2013) (so called intrinsic aids to construction). This statutory intervention does not set aside the judicially determined meaning of the word “child” but instead has the effect of modifying it in certain cases.

5.2. These two types of statutory intervention are now considered in relation to the word “child” as it appears in the family tie of the statutory residence test.

5.3. **Interpretation Acts**

5.3.1. A UK Act in the nature of an Interpretation Act is one that makes provision for the definition of words that are commonly used throughout UK legislation.[72] The Act that currently provides a number of definitions for statutory terms used in UK legislation is the Interpretation Act 1978 (IA 1978). However, it does not provide for a general definition of the word "child".[73]

5.3.2. IA 1978, though, is not the only UK statute that operates as an Interpretation Act. The Family Law Reform Act 1987 (FLRA 1987)[74] performs a like function in the present context. Section 1(1) FLRA 1987 states:

> "In this Act and enactments[75] passed and instruments made after the coming into force of this section, references to any relationship between two persons[76] shall, unless the contrary intention appears, be construed 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."[77]

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[72] An Interpretation Act obviates the need for the draftsman of each Act to define commonly used words and so shortens the language that needs to be used in the legislation (Bennion, *Statutory Interpretation* (2002), p.491).

[73] It does, though, make provision for FLRA 1987 to be taken into account in construing the meaning of the word "child".

[74] FLRA 1987 applies to England and Wales. In Scotland, s.1 LRSA 1986 made a similar provision regarding the interpretation of the word "child" as s.1 FLRA 1987 before it was amended by s.21 FLSA 2006 to abolish the status of illegitimacy in Scots law. In Northern Ireland, art.155 of The Children (Northern Ireland) Order 1995 (SI 1995/755) applies in the same way as s.1 FLRA 1987.

[75] This term refers to both primary and secondary legislation.

[76] In the context of the family tie of the statutory residence test, this is the relationship between a person ("P") and a child.

[77] Although s.1(1) FLRA 1987 refers only to a father and mother, it must also include an illegitimate child whose legal parents are two women because s.48(5) HFEA 2008 directs the interpreter of an enactment to read any reference to a relationship between two people in accordance with the provisions that enable a child to have two women as parents. S.1(1) FLRA 1987 is therefore to be read as if the reference to a father and mother is a reference to a mother and a legal female parent. Furthermore, Sch.3 para.1(1) MSSCA 2013 states that the reference to a marriage, such as that in s.1(1) FLRA 1987, is to be read as including a same sex

5.3.3. This provision is clearly aimed at children who according to the conventional statutory meaning of the word "child" are illegitimate. By providing that the marital status of a child's parents is to be disregarded when establishing the legal relationship between that child and those parents, s.1(1) FLRA 1987 has the effect of bringing illegitimate children within the class of individuals that may be called the legal child of another person. Importantly, s.1(1) FLRA 1987 does not abolish the status of illegitimacy[78]; instead the Act merely ensures that both legitimate and illegitimate children are treated equally under the law.[79] The provision applies to all enactments passed on or after April 4, 1988.

5.3.4. However, FLRA 1987 is not of universal application in the construction of legislation. Firstly, the Act does not apply retrospectively and, secondly, it only applies insofar as no contrary intention appears in the particular statute under construction. Consequently, a child's legitimacy status is not necessarily irrelevant in the reading of statutory provisions. Nevertheless, and subject to this caveat, it may be said that in general terms, the word "child" in the context of the family tie of the statutory residence test is a reference to a legitimate or an illegitimate child.

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marriage. The effect of bringing illegitimate children within the class of legal children is thus accorded to such illegitimate children with two women as parents. Prior to the enactment of MSSCA 2013, the reference to a marriage in s.1(1) FLRA 1987 could not have contemplated a same sex marriage however it is thought that this would not prejudice the section applying to an illegitimate child with two unmarried female parents.

[78] This is clearly the case as Acts of Parliament passed since April 4, 1988 still make provision for children to be treated as legitimate children (for example, s.48(6) HFEA 2008).

[79] By contrast, in Scots law, s.21 FLSA 2006 does abolish the status of illegitimacy as well as providing that the marital status of a person's parents shall be disregarded in determining their legal status.

Comment – the general rule

5.3.5. At this juncture it is worth reflecting on the conclusion made above that, as a matter of statutory interpretation, the class of individuals whom a person may regard as their legal child for the purposes of the family tie of the statutory residence test comprises both legitimate children (whether at common law or by virtue of statute) and illegitimate children. This conclusion will be referred to as the "general rule" for determining the legal child of another person as a matter of statutory interpretation.

5.3.6. The following list sets out the categories of children that are contemplated by the general rule and can therefore be called legal children:

- children that are legitimate at common law;
- children born of certain void marriages;
- legitimated children;
- certain children with two women as parents;
- adopted children;
- children that are subject to a parental order; and,
- illegitimate children.

5.3.7. The general rule certainly identifies who is regarded as the legal child of another person for the purposes of the family tie of the statutory residence test. The rule, however, goes further in that it may be applied to identify who is regarded as the legal child of another person in UK tax legislation generally. Therefore, subject to the caveat noted in Paragraph 5.3.4 above (regarding the

restricted operation of s.1(1) FLRA 1987), in UK tax legislation generally the word "child" can be said to mean a legitimate or illegitimate child.

5.3.8. In accordance with the general rule, the following children are not, as a matter of statutory interpretation, to be regarded as the legal child of another person for the purposes of the family tie of the statutory residence test (or indeed in UK tax legislation generally):

- step-children[80] as regards their step-parent(s);
- adopted children as regards their pre-adoption parent(s)[81];
- children that are subject to a parental order as regards the surrogate mother;
- children of individuals who have only parental responsibility[82] for them, as regards those individuals;
- foster children as regards their foster parents; and,
- children of a guardian or special guardian, as regards that guardian or special guardian.[83]

5.3.9. A child within one of these categories may be considered colloquially, socially, morally or emotionally to be a child of that other person; however, this is not sufficient for the child to be considered to be their legal child under the general rule.

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[80] A step-child is the child of a person's husband or wife from a previous relationship. According to s.246 CPA 2004 a step-child includes a child of a person's civil partner from a previous relationship.
[81] Unless, of course, the child is adopted by its pre-adoption parents.
[82] According to s.3 of the Children Act 1989 (CA 1989), parental responsibility means "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property" and "it also includes the rights, powers and duties which a guardian of the child's estate … would have had in relation to the child and his property."
[83] As defined by ss.5 and 14A CA 1989 respectively, or under corresponding provisions that have effect in Scotland or Northern Ireland or any country or territory outside the UK.

5.4. **Intrinsic aids to construction**

5.4.1. The general rule must, as a matter of statutory interpretation, yield to any direction provided by an intrinsic aid in the particular Act under construction. An intrinsic aid will attach a particular meaning to a particular word in the Act in which the word is used.[84]

5.4.2. FA 2013 itself offers an example. The general rule does not require the age of a child to be taken into account in ascertaining whether they are the legal child of another person. In fact every person is a child of someone (whether living or dead) for the purposes of the general rule. However, Sch.45 para.32(2)(c) FA 2013 introduces the additional condition that in the context of the family tie of the statutory residence test, the child must be under the age of 18.[85] Intrinsic aids of this type do not alter the constitution of the class of legal children; rather they limit, in the given context, the application of the general rule to certain children in the class.

5.4.3. Other intrinsic aids do alter the constitution of the class of legal children either by excluding members of the class[86] or by extending the class to encompass persons who are not otherwise within it. Multiple examples of this abound throughout UK tax legislation, two of which can be found in IHTA 1984. Firstly, s.71(8) IHTA 1984 modifies the general rule by extending, in the context of an

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[84] Bennion, *Statutory Interpretation* (2002), p.479. The aid will apply to that Act as a whole unless it is stated to apply only to certain parts of it.
[85] In some legislative contexts a child's age is relevant, in others it is not. For example, in the context of capital gains tax, a child of any age can be the legal child of a settlor in Sch.5 para.2(3) Taxation of Chargeable Gains Act 1992 (TCGA 1992), but only a child under the age of 18 can be a dependent child in s.169F(3A) TCGA 1992.
[86] See, for example, s.721(6)(b) ITEPA 2003 which excludes illegitimate children.

accumulation and maintenance trust, the class of legal children to include step-children and illegitimate children. This reference to illegitimate children is necessary because IHTA 1984 does not benefit from the effect of s.1(1) FLRA 1987 (it being passed before the commencement of FLRA 1987 on April 4, 1988).[87] Secondly, s.8K(1) IHTA 1984 includes step-children, foster children and children of a guardian as being a direct descendant of another person for the purpose of the residence nil-rate band. As s.8K IHTA 1984 was inserted after the enactment of FLRA 1987 it does not need to expressly extend the class of legal children to illegitimate children.[88]

5.4.4. To summarise, the general rule for determining who is a legal child of another person in a UK taxing statute may be modified in the context of the particular Act being interpreted by an express intrinsic aid to construction.

6. EVALUATION OF THE GENERAL RULE

6.1. In searching for the legal meaning of a statutory word, the general interpretative criteria that are relevant to the construction of the word are identified and applied so that a conclusion is reached as to

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[87] This example provides a salutary warning that the date of commencement of the Tax Act under consideration is important in the application of the general rule. An Act that came into force before any of one of the provisions that affect the class of legal children needs to be considered with care when determining who is a legal child of another person. S.71(8) IHTA 1984 also makes reference to the inclusion of adopted children. This is puzzling because at the time of the enactment of IHTA 1984 on January 1, 1985, adopted children were already treated as legitimate children and hence they were legal children. It can only be surmised that the reference to adopted children is included from an abundance of caution. Such provisions are said to be included *ex abundante cautela*: "an item may have been singled out for mention by the drafter ... from abundance of caution … here the ruling maxim is *abundans cautela non nocet* (abundance of caution does no harm)" (Bennion, *Statutory Interpretation* (2002), p.1079).

[88] s.8K(1) IHTA 1984 is unusual in that it extends the class of legal children to a number of the categories of children who are ordinarily outside that class (other provisions tend to be more prescriptive).

its meaning. However, the task is not complete until due consideration is given to any criteria that lead to a contrary interpretation. In this chapter it has been suggested that the legal meaning of the word "child" is to be determined according to the general rule set out in Paragraph 5.3.5 above. It must now be asked whether there are any indications that the general rule established may be wrong, and if there are, whether on balance the general rule is to prevail.[89]

6.2. That the general rule may not prevail is alluded to in both case law and statute. In case law, the construction of the word "child" as a legitimate child is but a prima facie construction.[90] In statute, the inclusion of illegitimate children in the general rule by virtue of s.1(1) FLRA 1987 applies subject to any intention to the contrary. However, it is not considered that the general rule is capable of being displaced by some other interpretation of the word "child" in UK tax legislation generally. The validity of this assertion is evidenced by the many intrinsic aids to construction of the word. Parliament would not have taken the trouble to make provision for specific definitions of the word if the general rule was not valid.

7. CONCLUSION

7.1. Using the family tie of the statutory residence test as its context, this chapter has addressed the question "is this my child?" in order to

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[89] As Bennion puts it: "[f]rom the interpretative criteria we extract, in the light of the facts of the instant case and the wording of the enactment, the relevant interpretative factors. The two bundles of factors respectively favouring each of the opposing constructions are figuratively weighed against the other. Whichever, all things considered, comes out heavier in the juristic scales is preferred" (Bennion, *Statutory Interpretation* (2002), p.9).

[90] *Woolwich Union v Fulham Union* (1906) 2 KB 240.

determine the class of individuals that are considered, as a matter of statutory interpretation, to be a legal child of another person in UK tax legislation generally. It has been shown that a legal child is a legitimate or illegitimate child. This is the general rule.

7.2. Legitimate children are contemplated by the general rule by virtue of the conventional statutory meaning of the word “child”, as determined by the courts. Children are legitimate at common law if they are born or conceived during the subsistence of a lawful marriage (i.e. a valid or voidable marriage) between their mother and the person whom the law regards as their father. Statute has extended the scope of the conventional statutory meaning by stating that other children may be regarded as being legitimate; namely, children of certain void marriages, legitimated children, certain children with two women as parents, adopted children, and children that are subject to a parental order.

7.3. Illegitimate children, on the other hand, are contemplated by the general rule by virtue of s.1 FLRA 1987. This statutory intervention has the effect of bringing illegitimate children within the class of individuals that a person can call their legal child for the purposes of enactments passed after April 4, 1988 (subject to any contrary intention in the Act under construction).

7.4. The general rule is exclusive. Therefore, children that are not included within the general rule, such as those listed in Paragraph 5.3.8 above, are not considered to be legal children in UK tax law. However, the general rule applies subject to one major exception -

that is where an intrinsic aid provides for the word “child” to bear a restricted or extended meaning in the context of the particular Act under construction.

7.5. Chapter 2 will now consider how the application of the general rule is affected by an intrinsic aid found in the Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003), and will compare that with the application of the general rule in the Corporation Tax Act 2010 (CTA 2010) and the Income Tax (Trading and Other Income) Act 2005 (ITTOIA 2005).

CHAPTER 2

1. INTRODUCTION

1.1. In Chapter 1 it was established, as a matter of statutory interpretation, and as a general rule, that a child is the legal child of another person if it is their legitimate or illegitimate child. This chapter will discuss the application of the general rule to the benefits code in ITEPA 2003 and the treatment of certain distributions from UK resident companies in ITTOIA 2005 (as read with CTA 2010).

1.2. ITEPA 2003, ITTOIA 2005, and CTA 2010 are "Re-write" Acts. They are products of the Tax Law Re-write Project which aimed to simplify the existing tax code by drafting it in plainer language.[1] All three Acts were born out of the Income and Corporation Taxes Act 1988 (ICTA 1988). ICTA 1988 contained an intrinsic aid for the interpretation of the word "child". In s.831(4) ICTA 1988 the effect of s.1 FLRA 1987 was dis-applied for the purposes of the Act as a whole, thereby modifying the general rule. Therefore, for the purposes of ICTA 1988, illegitimate children were not regarded as legal children.[2]

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[1] "The Tax Law Re-write Project was set up in 1996, with the aim of making the UK's direct tax legislation clearer and easier to use. The project intended to make the language of tax law simpler, while preserving the effect of the existing law, subject to some minor changes. It aimed to reorder legislation, use modern language and shorter sentences, and provide consistent definitions and clearer signposting. Its remit did not cover changing the law except in minor, well-defined ways" (Ipsos Mori, "Review of Income Tax Legislation" (Social Research Institute, 2011). *Gov.uk, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/344921/report104.pdf* [Accessed November 17, 2017].

[2] I.e. the judicially determined meaning of the word "child" was restored.

1.3. It will be shown that three remarkable outcomes arise because s.831(4) ICTA 1988 has been incorporated inconsistently in the three aforementioned Re-write Acts.

2. EXAMPLE

2.1. Mr X is an employee and a shareholder of a UK resident company, Z Ltd. There is one other shareholder and he owns the majority of the shares. Mr X and his unmarried partner, Ms Y, have a son aged 30 who is employed but not by Z Ltd. The son and his wife are looking for a new home and so, on Mr X's suggestion and in recognition of his long-standing employment, the directors of Z Ltd agree to let one of their residential properties rent-free to Mr X's son. Does a benefit in kind or a distribution arise to Mr X or his son as a result of the company letting the property rent-free to his son? These issues will be discussed in turn.

3. DISCUSSION: BENEFIT IN KIND

3.1. If a benefit in kind arises under Pt 3 ITEPA 2003, its cash equivalent is charged to tax on the employee to whom the benefit relates (in this case Mr X).[3] One such benefit in kind is the provision of living accommodation. Section 97(1) ITEPA 2003 describes the type of living accommodation to which the charge applies:

> "(1) This Chapter applies to living accommodation provided for—
>
> (a) an employee, or
>
> (b) a member of an employee's family or household,
>
> by reason of the employment."

[3] s.13(1) and (2) ITEPA 2003.

3.2. It is clear from the facts of the example that living accommodation has been provided to the son by reason of Mr X's employment.[4] As the living accommodation has not been provided for Mr X (an employee), the question is whether it has been provided for a member of his family or household.

3.3. According to s.721(4) and (5) ITEPA 2003, which applies to the Act as a whole, an individual is a member of a person's family if they are the person's spouse, parent, child (or that child's spouse) or the person's dependant. An individual is a member of a person's household if he is the person's domestic staff or guest.[5] Taking the relevant options only, the accommodation in question will be within the scope of s.97 ITEPA 2003 if Mr X's son is his child or dependant. These possibilities will be considered in reverse order.

3.4. **Is the son a dependant of Mr X?**

3.4.1. The OED defines a dependant as a person who depends upon another for maintenance or position.[6] For a number of children this will bring them within an employee's family or household in s.97(1)(b) ITEPA 2003, even if they are not a legal child of the

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[4] Lord Oliver summarised the meaning of the phrase "by reason of employment" in *Wicks v Firth* [1983] STC 25 when he said it involves: "no more than asking the question 'what is it that enables the person concerned to enjoy the benefit?' without the necessity for too sophisticated an analysis of the operative reasons why that person may have been prompted to apply for the benefit or to avail himself of it." The example of Mr X falls firmly within this test.

[5] There is no definition given in ITEPA 2003 for "domestic staff" or "guest". The OED defines "staff" as the body of people employed in a business or establishment (William Trumble and Angus Stevenson (eds), *Shorter Oxford English Dictionary* (2002), p.2992) and there is nothing to suggest that this is the case vis-à-vis the son and his father. The OED defines "guest" in various ways: as a person staying in another's house at his invitation; as a person who is a stranger; and, as a person having temporary accommodation in an hotel or inn (William Trumble and Angus Stevenson (eds), *Shorter Oxford English Dictionary* (2002), p.1166). None of these definitions can be said to apply to the son although in both cases this will be a question of fact.

[6] William Trumble and Angus Stevenson (eds), *Shorter Oxford English Dictionary* (2002), p.644.

employee. A step-daughter, for instance, would be within her step-father's family or household for this purpose if she were a dependant of his.

3.4.2. However, if a person is of independent financial means it can be argued, as a question of fact, that he is not dependent on either of his parents for maintenance or position. Due to the age, employment and marital status of the son in this example it is likely that he will not be a dependant of Mr X for this purpose.

3.5. **Is the son a child of Mr X?**

3.5.1. The general rule is that the son will be a child of Mr X if he is his legitimate or illegitimate child. However, s.721(6) ITEPA 2003 re-enacts the intrinsic aid for interpreting the meaning of the word "child" found in s.831(4) ICTA 1988. It states that:

> "The following provisions (which relate to the legal equality of illegitimate children) are to be disregarded in interpreting references in this Act to a child or children—
>
> (a) section 1 [FLRA] 1987 … "

3.5.2. This provision modifies the general rule so that in the context in which it applies a legal child is a legitimate child only. Illegitimate children are therefore excluded from the meaning of the word "child" in ITEPA 2003 unless otherwise stated.

3.5.3. There is no contrary intention in the Act. The general dis-application of s.1 FLRA 1987 appears strongly to dictate against an oblique interpretation that would preserve the general rule in ITEPA

2003.[7] This is reinforced by the observation that where the Act wishes to include illegitimate children it expressly states so in the relevant provision.[8] This would not be necessary if the draftsman considered that the general rule applied to the interpretation of ITEPA 2003 as a whole.

3.5.4. Therefore, Mr X's son will only be a member of Mr X's family or household if he is his legitimate child. Being the child of two unmarried persons, the son is illegitimate and therefore not a child of Mr X in this context. As a result, the provision of rent-free living accommodation by Z Ltd for Mr X's son will not result in a benefit in kind arising to Mr X. This would not be the case if the general rule had applied.

Comment

3.5.5. The above analysis is not limited to the provision of living accommodation within the benefits code. The benefit of the use of company cars and vans, and the residual benefit provisions, also apply where they are provided to a member of an employee's family or household,[9] whilst the provision of cash vouchers, non-cash vouchers and credit tokens apply where they are provided to a member of an employee's family.[10]

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[7] It seems that the only possible argument for preserving such equality in ITEPA 2003 is to invoke the European Convention on Human Rights, in particular art.14 which applies to a person who has been discriminated against in relation to one of the other Articles. It is not within the scope of this thesis to consider such an argument in detail but it is submitted that it is unlikely to apply in this case.

[8] For example, s.242(2) ITEPA 2003 (exemption for the benefit in kind of works transport services) and s.371(7) ITEPA 2003 (deduction from earnings in respect of travel costs and expenses where duties performed abroad) expressly include illegitimate children – and step-children – within the meaning of the word "children" in their respective provisions.

[9] See ss.114 and 201 ITEPA 2003.

[10] See ss.74, 83 and 91 ITEPA 2003.

3.5.6. Similarly, the provision of an employment related loan is a taxable benefit where the loan is provided to an employee's relative and a relative includes a child or remoter relation in the direct line.[11] As Mr X's son is not a member of his family or household in this context, it can be said that the son could have been provided with any of these different benefits by Z Ltd without a benefit in kind charge arising to Mr X.[12] The same conclusion would have been reached had ICTA 1988 governed the above example. It is not unexpected therefore that ITEPA 2003 applies in the same way.

3.5.7. A number of illegitimate children, in particular minor children, will be a member of their parents' family or household by virtue of being a dependant of theirs. However, given the number of illegitimate children in the UK, many of whom will never be legitimated by the marriage of their parents and may grow to be independent of them, the dis-application of s.1 FLRA 1987 in ITEPA 2003 is relevant in everyday practice.

3.5.8. Having established that Mr X will not be subject to a benefit in kind charge under ITEPA 2003, it must be asked if a deemed distribution arises out of the arrangement between Z Ltd and his son.

4. DISCUSSION: DISTRIBUTION FROM Z LTD

4.1. Income tax is charged on the recipient of a dividend and other types of distributions of a UK resident company by virtue of s.383 ITTOIA

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[11] s.174 ITEPA 2003.

[12] It is thought that an illegitimate child will not be a remoter relation in the direct line even though s.721(6) ITEPA 2003 applies when interpreting the word "child" or "children".

2005. Clearly, a dividend has not been paid as a result of the arrangement between Z Ltd and Mr X's son; however, it must be considered whether the arrangement creates a deemed distribution by virtue of s.1064 CTA 2010, which states that:

> "(1) This section applies if a close company incurs an expense in, or in connection with, the provision for any participator of—
>
> (a) living or other accommodation,
>
> …
>
> (2) The company is treated for the purposes of the Corporation Tax Acts as making a distribution to the participator ... "

4.2. Living accommodation has been provided by Z Ltd to Mr X's son. Section 1064 CTA 2010 will therefore apply to deem a distribution to have been made to the participator[13] if the following conditions are met: Z Ltd is a close company; it has incurred an expense; and, it has incurred the expense in providing the living accommodation to a participator. These matters will be discussed in turn.

4.3. **Is Z Ltd a close company?**

4.3.1. Broadly, a company is a close company if it is a UK resident company controlled by 5 or fewer participators.[14] A company's participators include its shareholders.[15] Control of a company is established if, inter alia, a shareholder possesses the greater part its share capital.[16] As Z Ltd is a UK resident company with only two shareholders it is a close company.

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[13] The charge to tax falls on the participator (or in this case the associate of the participator by virtue of s.1069 CTA 2010, see Paragraph 4.5 below), i.e. the person to whom the deemed distribution is made (s.385(1) ITTOIA 2005).
[14] s.439 CTA 2010.
[15] s.454 CTA 2010.
[16] s.450 CTA 2010.

4.4. **Has Z Ltd incurred an expense?**

4.4.1. Z Ltd, in allowing Mr X's son to live rent-free in a property that it owns, has not actually spent any money. However, the OED's definition of "expense" is wide and includes a disbursement, consumption and, most importantly, loss.[17] The fact that the arrangement between Z Ltd and Mr X's son enables the son to live in the accommodation rent-free is a loss to the company as it forgoes the rent that would otherwise be payable if the accommodation were let out on the open market. Z Ltd has therefore incurred an expense.

4.5. **Has living accommodation been provided to a participator?**

4.5.1. For the purposes of s.1064 CTA 2010, the meaning of participator (which, as a shareholder of Z Ltd, includes Mr X) is extended by s.1069 CTA 2010 to include an associate of a participator. According to s.448 CTA 2010, an associate of another person includes his or her relatives. The definition of relative for this purpose includes a child.[18] Therefore, in the present example, a distribution by Z Ltd to Mr X's son is deemed to be made by virtue of s.1064 CTA 2010 if Z Ltd has provided living accommodation for a child of Mr X. Again, the question is whether the son is a child of Mr X for this purpose.

4.5.2. Unlike ITEPA 2003, the dis-application of s.1 FLRA 1987 was not re-enacted into CTA 2010. In the absence of any intrinsic aid within

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[17] William Trumble and Angus Stevenson (eds), *Shorter Oxford English Dictionary* (2002), p.894.
[18] s.448(2)(c) CTA 2010.

CTA 2010 itself, the word "child" in that Act, being an enactment passed on or after April 4, 1988, is defined by the general rule as a legitimate or illegitimate child. As a result, Mr X's son, though illegitimate, will be a child of Mr X for the purpose of s.448 CTA 2010 and hence an associate of Mr X. This brings the son within the extended definition of a participator in s.1069 CTA 2010. As a close company has incurred an expense in providing living accommodation for an associate of a participator, there is a deemed distribution by Z Ltd to the son by virtue of s.1064 CTA 2010.[19]

4.6. **The relationship between CTA 2010 and ICTA 1988**

4.6.1. Prior to the commencement of CTA 2010 on March 3, 2010, the arrangement between Z Ltd and Mr X's son would not have given rise to a deemed distribution by Z Ltd to the son. The deemed distribution would have been governed by ICTA 1988 and the dis-application of s.1 FLRA 1987 by that Act would have meant that the son was not a child of Mr X and therefore not an associate of his father (a participator).

4.6.2. Remarkably, therefore, the absence of the dis-application of s.1 FLRA 1987 in CTA 2010 means that the law has changed in this

[19] There are three possible exceptions to s.1064 CTA 2010 that are found in s.1065 CTA 2010, one of which is relevant to the arrangement between Z Ltd and Mr X's son. It states that a deemed distribution will not arise where living accommodation is provided for "any person" and it is "provided by reason of the person's employment" (see the table set out in s.1065 CTA 2010). Although the exception relates to living accommodation provided for any person, the subsequent use of the definite article suggests that the person for whom the accommodation is provided must be the same person by reason of whose employment that provision is made. In other words, the exception only applies to accommodation provided to employees themselves and no-one else, not even their associates. Therefore, the exception cannot apply to the son because he is not an employee of Z Ltd (the accommodation as been provided for him by reason of his father's employment). This view is supported by Malcolm Gammie, *Tax Strategy for Directors, Executives and Employees*, 2nd edn (London: Longman, 1985), p.110.

regard as a result of the re-write of ICTA 1988. There is no indication in the explanatory notes to CTA 2010 or in Hansard to suggest that this change in the law was intentional. The Government, on releasing CTA 2010, the final Act of the Re-write Project, wrote:

> "Re-write Bills are not intended to change the effect of legislation in any significant way, although Bills may include a number of minor changes: say, to legislate an extra statutory concession or to discard provisions which are now obsolete."[20]

4.6.3. Nevertheless it is clear that a change in the law has occurred. The only feasible rebuttal to this conclusion is that the dis-application of s.1 FLRA 1987 can be implied into CTA 2010. In *Philip Shirley v The Commissioners for HMRC*[21] it was observed that in construing a Re-write Act one must first:

> "[E]xamine the actual language used in the Act itself without reference to any of the statutes which it has replaced … Only when there is a real and substantial difficulty in interpreting the provisions, or there is an ambiguity which classical methods of construction cannot resolve, can the recourse be had to the antecedent legislation."

4.6.4. It cannot be said that there is such difficultly or ambiguity in this case and so the word "child" cannot be interpreted by reference to the antecedent legislation (especially since this involves implying the whole of s.831(4) ICTA 1988 into CTA 2010). Therefore, it is

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[20] Anthony Seely, "The Tax Law Rewrite: The Final Bills" (House of Commons Library, April 2010). *Parliament.uk, http://researchbriefings.files.parliament.uk/documents/SN05239/SN05239.pdf* [Accessed November 16, 2017].

[21] *Philip Shirley v The Commissioners for HMRC* (2014) UKFTT 1023 (TC) at [56].

not possible to infer from ICTA 1988 that illegitimate children are excluded from the meaning of the word “child” in CTA 2010.

4.6.5. It is considered that this change in the law is significant. CTA 2010 no longer excludes illegitimate children from the meaning of the word “child” when used in that Act. Prior to March 3, 2010, arrangements involving the provision of rent-free living accommodation by a close company to an illegitimate child of a participator could have been made without a deemed distribution arising. Such arrangements will now result in a deemed distribution under s.1064 CTA 2010 from the company being made to the illegitimate child which is taxable on that child by virtue of s.383 ITTOIA 2005.

5. CONCLUSION

5.1. This chapter has shown that the general rule for determining who is a legal child of another person is modified to exclude illegitimate children in respect of the benefits code in ITEPA 2003 but is not modified in respect of the deemed distribution created by s.1064 CTA 2010. Three remarkable outcomes follow from this conclusion.

5.2. Firstly, it is remarkable that illegitimate children continue to be treated differently from legitimate children in ITEPA 2003. Social attitudes towards illegitimate children have changed significantly over the past few decades and the legal equality between legitimate and illegitimate children brought about by s.1 FLRA 1987 is a reflection of this. By excluding illegitimate children from the meaning of the word “child” in ITEPA 2003, numerous benefits may

be provided to a non-dependant illegitimate child of an employee without a benefit in kind arising on the employee. This conclusion applies irrespective of whether the employer is a close company or not (it could be an LLP for example). It may be said that in practice the outcome is not actually remarkable because most illegitimate children will be dependants of their parents. Yet multiple practical examples of the application of a rule of law do not of themselves mean that the law itself can be ignored.

5.3. The second remarkable outcome is that by omitting the dis-application of s.1 FLRA 1987, CTA 2010 has brought about a change in the law. Prior to March 3, 2010, a close company such as Z Ltd could have provided living accommodation rent-free to an illegitimate child of a participator without making a deemed distribution under s.1064 CTA 2007 because the illegitimate child would not have been an associate of the participator. Although the Tax Law Re-write Project was not meant to bring about any significant change in the law, in this case a tax liability has been created by CTA 2010 where one did not exist before.

5.4. The third remarkable outcome is that there is an inconsistency between the meaning of the word “child” in ITEPA 2003 and CTA 2010 even though they were born out of the same legislation.

5.5. Tables 1 and 2 below summarise these findings by showing the tax treatment of an employee and their child on the provision of living accommodation to the child by the employee’s employer pre and post March 3, 2010.

5.6. **Table 1: Pre March 3, 2010 provision of living accommodation to the child of an employee**

	Legitimate child		Illegitimate child	
	Taxation of the parent	**Taxation of the child**	**Taxation of the parent**	**Taxation of the child**
Close Company Employer	Benefit in kind*	Deemed distribution if parent is a participator	N/A**	N/A
Non-Close Company Employer	Benefit in kind	N/A	N/A	N/A

* If a benefit in kind and a deemed distribution arise in respect of the same benefit, s.716A ITEPA 2003 gives priority to the deemed distribution.

** Unless the illegitimate child is the dependant of the parent.

5.7. **Table 2: Post-3 March 2010 provision of living accommodation to a child of an employee**

	Legitimate child		Illegitimate child	
	Taxation of the parent	**Taxation of the child**	**Taxation of the parent**	**Taxation of the child**
Close Company Employer	Benefit in kind*	Deemed distribution if parent is a participator	N/A**	Deemed distribution if parent is a participator
Non-Close Company Employer	Benefit in kind	N/A	N/A	N/A

* If a benefit in kind and a deemed distribution arise in respect of the same benefit, s.716A ITEPA 2003 gives priority to the deemed distribution to the child.

** Unless the illegitimate child is the dependant of the parent (although, if so, s.716A ITEPA 2003 would again give priority to the deemed distribution to the child).

5.8. Prior to March 3, 2010, the tax outcome of providing rent-free living accommodation to the child of an employee and participator was affected by both the legitimacy status of the child and whether the employer was a close company or not. Since March 3, 2010, and as a result of the priority rule in s.716A ITEPA 2003, the tax outcome of a close company providing rent-free living accommodation to the child of an employee and participator is not affected by the child's legitimacy status. In both cases the child is charged to tax on a deemed distribution and the parent is not charged to tax at all. However, if the employer is not a close company the tax outcome is still affected by the legitimacy status of the child because a benefit in kind is not charged on the employee where the child is illegitimate and of independent means.

PART B

Who is my parent?

CHAPTER 3

1. INTRODUCTION

1.1. Chapter 1 of this thesis addressed the question "is this my child?" and established the general rule for determining the class of individuals that are considered, as a matter of statutory interpretation, to be the legal child of another person in UK tax law. The focus now turns to the other question posed by this thesis, namely, "who is my parent?".[1]

1.2. The answer to this question depends upon the context in which the term "parent" (or other cognate expressions such as father and mother) is used. In this chapter the search for an answer is conducted exclusively in the context of s.835BA ITA 2007[2] which uses the term "domicile of origin". The meaning of that term is the one attributed to it by the common law and that in turn requires the identification of an individual's parents. Consequently, the object of this chapter is to identify the persons that are considered, for the purpose of determining an individual's domicile of origin, to be a parent of that individual. These persons will be called legal parents.

1.3. Domicile of origin is not a statutory concept and therefore the identification of an individual's legal parents is not an exercise in statutory interpretation; instead the exercise is one of identifying the legal parents of an individual for the purpose of a common law rule. In this chapter, the rules on legal parenthood will be applied to the

[1] In contrast to Chapter 1, in this chapter the parent-child relationship is being looked at from the perspective of the child rather than the parent.
[2] s.835BA ITA 2007 was inserted by s.29 Finance (No. 2) Act 2017 (F(No.2)A 2017) and took effect from 6 April 2017.

categories of legal children identified in Chapter 1.[3] No child is thereby excluded from the discussion as every individual is the legal child of someone (whether that someone is living or dead).[4]

1.4. As in Chapter 1, where the discussion interacts with an area of family law, its primary focus will be that law as it applies in England and Wales.

2. THE LEGISLATION

2.1. Section 835BA ITA 2007, which provides for an individual to have a deemed UK domicile for UK income tax (and by extension UK capital gains tax) purposes, states at subss.2 and 3:

> "(2) An individual not domiciled in the United Kingdom at a time in a tax year is to be regarded as domiciled in the United Kingdom at that time if—
>
> (a) condition A is met, or
>
> …[5]
>
> (3) Condition A is that—
>
> (a) the individual was born in the United Kingdom,
>
> (b) the individual's domicile of origin was in the United Kingdom, and
>
> (c) the individual is resident in the United Kingdom for the tax year referred to in subsection (2)."

2.2. Although there is no direct reference to the term "parent" in this provision, such a reference is inherent to the term domicile of origin in s.835BA(3)(b) ITA 2007. In this statutory context, domicile of

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[3] See the list in Paragraph 5.3.6 of Chapter 1.
[4] See Paragraph 5.4.2 of Chapter 1. Although a step-son (for example) is not the legal child of his step-parent, he will still be the legal child of someone else.
[5] Condition B is not relevant to this discussion.

origin is a free-standing legal term which carries a technical meaning that exists for all legal purposes independent of the context in which it is used. Where a statute uses such a free-standing legal term, its meaning in that particular statute corresponds to the legal meaning assigned to it generally.[6] That meaning is ascertained by reference to the common law[7] (as modified by statute) and it is to this that the discussion now turns.

3. DOMICILE OF ORIGIN

3.1. Domicile is a concept which the law uses to attach an individual to one particular country, and with it that country's laws. It is a common law concept that is employed in both tax law and general law. A fundamental principle of the law of domicile is that every individual must have a domicile in one particular jurisdiction at any time.[8] There are three types of domicile: domicile of origin, domicile of choice and domicile of dependency. In the present context the subject matter is domicile of origin.

3.2. At birth, every individual is, by operation of law, ascribed a domicile of origin.[9] An individual's domicile of origin can be displaced by acquiring a domicile of choice[10] in another country and it revives whenever a domicile of choice is abandoned.[11]

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[6] *Bennion on Statutory Interpretation,* edited by Oliver Jones, 6th edn (London: Lexis Nexis, 2013), pp.1075-1076.
[7] *Kelly v Purvis* [1983] QB 663 at 668.
[8] For an individual to be domiciled in the UK they must be domiciled in the jurisdiction of England and Wales, Scotland or Northern Ireland. The following discussion of domicile of origin deals with that concept as it is found in the common law of England and Wales.
[9] *Udny v Udny* (1869) LR 1 SC & D 441.
[10] Broadly, a domicile of choice displaces a domicile of origin where an individual resides in another country with an intention to remain there indefinitely. This is abandoned where both the residence and intention are lost. It is therefore easier to abandon a domicile of choice than a

3.3. The common law rules for determining an individual's domicile of origin are summarised in Dicey, Morris and Collins[12] (the leading authority on domicile and hereafter referred to as "*Dicey*") as follows:

> "**RULE 9:**
>
> 1) Every person receives at birth a domicile of origin:
>
> a) A legitimate child born during the lifetime of his father has his domicile of origin in the country in which his father was domiciled at the time of his birth.
>
> b) A legitimate child not born during the lifetime of his father, or an illegitimate child, has his domicile of origin in the country in which his mother was domiciled at the time of his birth.
>
> c) …
>
> 2) A domicile of origin may be changed as a result of adoption or by issue of a parental order under [HFEA 2008], but not otherwise."[13]

3.4. It is clear that the question of parenthood is embedded within these rules. Indeed, the rules are predicated on a prior knowledge of who an individual's mother or father is. To identify an individual's legal mother and legal father it is necessary to find the meaning of these terms as attributed to them in law – whether that is the common law

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domicile of origin as the requirements for abandoning a domicile of choice are in negative terms rather than positive.

[11] The domicile of origin revives regardless of the individual's ties to the country of their domicile of origin at that time. This is sometimes described as giving domicile of origin tenacity.

[12] A. Dicey, J. Morris and Lord Collins of Mapesbury, *The Conflict of Laws,* 15th edn (London: Sweet and Maxwell, 2012).

[13] A. Dicey, J. Morris and Lord Collins of Mapesbury, *The Conflict of Laws* (2012), p.140.

or statutory law.[14] The discussion therefore turns to identifying legal parenthood at common law and legal parenthood in statutory law.

4. LEGAL PARENTHOOD AT COMMON LAW

4.1. The common law identification of a child's legal parents is dependent on whether that child is legitimate or illegitimate and so these possibilities are considered separately below.

4.2. **Legitimate children**

4.2.1. In general, where a child is legitimate, the common law identifies the child's genetic parents as its legal parents.[15] The child's legal mother is identified as the woman who gives birth to it (parturition is considered by the common law to be proof of genetic motherhood).[16] The common law deals with the problem of proving genetic paternity[17] by identifying the child's legal father as the husband of its legal mother (as noted in Paragraph 4.4.4.1 of Chapter 1, this is called the "presumption of legitimacy").[18] The

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[14] See, for example, Sir Rupert Cross, *Statutory Interpretation,* 2nd edn (London: Butterworths, 1987), pp.72-75 and *Bennion on Statutory Interpretation,* edited by Oliver Jones (2013), pp.168-174.

[15] Rebecca Probert, *Family law in England and Wales* (Netherlands: Wolters Kluwer, 2011), p.122. See also *Cretney and Probert's Family Law,* edited by Rebecca Probert, 9th edn (London: Sweet & Maxwell, 2015), p.240.

[16] *The Ampthill Peerage* [1976] 2 All ER 411. See also *Cretney and Probert's Family Law* (2015), p.240.

[17] Despite scientific advances in this area it is thought that as many as four per cent of birth certificates in the UK are still misleading in respect of the paternal parent (M Bellis et al., "Measuring paternal discrepancy and its public health consequences" (September, 2005) J*ournal of Epidemiology and Community Health,* Vol.59(9), p.749). Contested paternal parenthood was the subject of, for instance, *T (H) v T (E)* [1971] 1 All ER 590 and *Re F (a minor) (blood tests: parental rights)* [1993] Fam 314, [1993] 3 All ER 596, CA.

[18] Rebecca Probert, *Family law in England and Wales* (2011), p.122. The presumption of legitimacy is a complex area of law. Notable rules established by case law include: the father of a child born less than nine months from the end of one marriage and during a second marriage is presumed to be the husband of the first marriage (*Re Overbury (Deceased)* [1954] 2 All ER 308); the husband to a marriage is presumed to be the father where the child is born within the possible period of gestation after that husband's death (*Knowles v Knowles* [1962] 1 All ER 659) or is born after a final decree of divorce in respect of that marriage (*Re Leman's Will Trusts, Public Trustee v Leman* (1945) 115 LJCh 89); and, the presumption of legitimacy does not apply to identify a husband as a father where he is living apart from his wife under a decree of

presumption may be rebutted by the husband if it can be shown that he is not the child's genetic parent; however, if he is successful in this rebuttal, the child is not legitimate because the second requirement for legitimacy is not met.[19]

4.3. **Illegitimate children**

4.3.1. In general, an illegitimate child is, at common law, *filius nullius* (i.e. the child of no-one). No legal relationship is created between such a child and its genetic mother or father (or any other relative for that matter) and therefore the child has no legal parents.[20]

4.3.2. However, this general proposition must be re-appraised in the context of determining an individual's domicile of origin. Rule 9(1)(b) for making such a determination, as set out in Paragraph 3.3 above, states that an illegitimate child is to take its mother's domicile at the time of its birth. It appears that this is a contradiction in terms because, being *filius nullius*, an illegitimate child does not have a mother by which to make this reference. Yet a fundamental principle of the concept of domicile is that every individual must have one. The common law is forced, therefore, to ascribe a domicile to an illegitimate child at its birth by some method and it choses to do so by reference to the only clearly identifiable genetic

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judicial separation (*Parishes of St George's v St Margaret's, Westminster* (1706) 1 Salk 123) (as summarised in Halsbury's Laws of England, *Children and Young Persons* (2017), at [93]). It does not, however, apply to same sex marriages (Sch.4 para.2 MSSCA 2013) or to civil partnerships.

[19] See Part 4.4.4 of Chapter 1 above. In effect, the presumption of legitimacy imposes the status of legal fatherhood on the husband until such a time as it is proven that he is not the genetic father of the child.

[20] William Blackstone, *Commentaries* (1893), pp. 458-459. See also fn.11, p.10.

parent of that child; i.e. the woman who gave birth to it – the child's mother.

4.3.3. The question that arises is whether this reference to an illegitimate child's mother is sufficient to make her a legal parent. It will be recalled that a legal parent is defined in this chapter in Paragraph 1.2 above as being a person that is identified as a parent for the purpose of determining an individual's domicile of origin. By this definition, it is self-evident from Rule 9(1)(b) that an illegitimate child has a mother and therefore she must be a legal parent.

4.3.4. This case therefore represents an exception to the general proposition that an illegitimate child has no legal parents and stands alongside other such exceptions.[21] Using the definition given in Paragraph 1.2 above, and in the context of the present discussion regarding the determination of an individual's domicile of origin, it is true to say that an illegitimate child may identify the person who gave birth to it as a legal mother.

4.3.5. This exceptional status of an illegitimate child's mother in this context is also alluded to in case law. Lord Denning, in *Re M, (An Infant),*[22] commented that:

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[21] There are numerous examples that illustrate this point. One example is statutory interpretation post s.1 FLRA 1987 where a legal parent would include, subject to any express provision to state otherwise, an illegitimate child's genetic mother and father. In *Re M (Child Support Act: Parentage)* [1997] 2 FLR 90 it was held that the person who donated the sperm for a woman's artificial insemination was the child's legal father. Another example is the law of custody where, at common law, an illegitimate child's mother has certain rights to custody such that she could be considered a legal parent in that context (see The Law Commission, *Family Law: Illegitimacy* (1982), p.8).

[22] *Re M, (An Infant)* [1955] 2 Q.B. 479.

> "The law of England has from time immemorial looked upon a bastard as the child of nobody, that is to say, as the child of no known body except its mother" (emphasis added).

4.3.6. In a similar vein Lady Hale, in *R (on the application of Johnson) v Secretary of State for the Home Department,*[23] makes an oblique reference to the limited recognition of an illegitimate child's mother at common law. She states:

> "At common law, a child of parents who were not married to one another at the time of his birth was *filius nullius* ... The law scarcely recognised his relationship with his mother, let alone with his father" (emphasis added).

4.3.7. These judgments also confirm that an illegitimate child's genetic father cannot be identified as a legal parent by the common law.

4.3.8. The common law does not contemplate establishing legal parenthood in any way other than that described in Parts 4.2 and 4.3 above. It does not have separate rules for cases involving children that are conceived in the context of fertility treatment or involving adoption or parental orders, and it does not contemplate that a child may have same sex parents).

5. LEGAL PARENTHOOD IN STATUTE

5.1. Statute operates to determine legal parenthood in three scenarios: firstly, at a child's birth[24] where that child has been conceived using a form of fertility treatment; secondly, during a child's lifetime in the

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[23] *R (on the application of Johnson) v Secretary of State for the Home Department* [2016] EWCA Civ 22, at [14].

[24] A foetus does not have a legal personality and therefore the legal consequences of a parent-child relationship are not formed until the child is born (see fn.48, p.20).

context of adoption; and, thirdly, during the child's lifetime in the context of a parental order. This Part is concerned with the first of these three scenarios, whilst Part 7 of this Chapter deals with the other two.

5.2. Statute has intervened to determine legal parenthood in the context of fertility treatment – which is defined for these purposes as being a treatment that involves the placing in a woman of: sperm only; both sperm and eggs; or an embryo. It has done so because the techniques used to conceive a child in that context are unknown to the common law. The relevant provisions are found in HFEA 2008, HFEA 1990 and FLRA 1987. The following discussion will focus on HFEA 2008,[25] it being the Act in force at present, although the other Acts are dealt with in Part 5.6 below.

5.3. Where a statute identifies the legal parent of a child it supersedes the common law rules set out above.[26] However, where statute identifies one legal parent only (as it does in a number of circumstances) the common law operates to identify the child's other legal parent. Unlike the rules at common law, the statutory

[25] HFEA 2008 applies to England and Wales, Scotland and Northern Ireland (except in very limited circumstances per s.67 HFEA 2008).

[26] The one exception to this is where a man is identified as the child's legal father by virtue of the presumption of legitimacy at common law. In such circumstances the common law identification of the legal father is taken in priority to the statutory provisions (ss.38(2) and 45(2) HFEA 2008). Therefore, a child that is conceived using a form of fertility treatment and that is prima facie legitimate at common law will identify its legal father as the husband to the marriage by which it is legitimate unless that husband successfully rebuts the presumption of legitimacy. The explanatory notes to s.38(2) HFEA 2008 give an example: where the legal mother of a child that is conceived using donor sperm marries a man after the treatment takes place but before the child's birth, it will be presumed at common law that her husband is the legal father of the child and this presumption is taken in priority to any statutory provisions which identify another person as the second legal parent. However, because the husband is not the genetic father of the child, he may rebut the presumption of legitimacy. In that case, any statutory provisions that would have applied to identify the child's second legal parent (but for the presumption of legitimacy) are thus re-engaged.

provisions regarding legal parenthood in HFEA 2008 are not reliant on a child's legitimacy status. The legal parents that may be identified by the Act at a child's birth, and to which the discussion now turns, are a legal mother and a second legal parent.

5.4. Legal mother

5.4.1. The operative provision for identifying a child's legal mother in statute is s.33 HFEA 2008. At subs.(1) it states:

> "The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child."

5.4.2. By providing that the woman who carried a child is its legal mother in the circumstances mentioned, s.33 HFEA 2008 identifies as the child's legal mother the same person that would be identified by the common law.[27] All children must be carried by a woman and therefore all children are born with a legal mother (whether identified by statute or by the common law).

5.4.3. There are a couple of observations that can be made regarding this provision. Firstly, it applies where the fertility treatment involves the placing in a woman of both sperm and eggs, or an embryo (and not, therefore, where it involves the placing in her of sperm only as is the case with artificial insemination). In cases involving artificial

[27] The common law position is, though, subtly different because it considers that parturition is proof of genetic parenthood (and it is in being a genetic parent that the woman is identified as the legal mother). Where a woman carries a child that is conceived using a donor egg or a donated embryo, parturition is not proof of genetic parenthood but in such circumstances s.33 HFEA 2008 intervenes to clarify the identity of the child's legal mother (see the discussion in fn.94, p.83 below).

insemination the woman who gives birth to the child is identified as the child's legal mother by the common law instead.[28]

5.4.4. Secondly, s.33 HFEA 2008 applies whether a woman's own eggs or those of a donor are used in the course of the treatment by which she conceives of a child. So, for example, a child that is conceived via in-vitro fertilisation using the genetic material of a husband and wife will identify its legal mother under s.33 HFEA 2008 even though no donors have been used.

5.4.5. Finally, HFEA 2008 also provides that certain persons are <u>not</u> a child's legal parent and in this case s.33(3) HFEA 2008 states that no person, other than the woman who carried the child, can be its legal mother. As such, where a child has been conceived using a donor egg, the donor is not the child's legal mother.[29]

5.5. <u>The second legal parent</u>

5.5.1. A child's second legal parent may be identified by HFEA 2008 as being either a legal father or a legal female parent. The rules for identifying these two types of second legal parent are considered below and they apply independently from the identification of a child's legal mother in s.33 HFEA 2008. Therefore references below to a child's legal mother are to one identified either by statute or by the common law.

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[28] Unless the treatment involved the artificial insemination of a married woman using donor sperm before August 1, 1991, but on or after April 4,1988, in which case legal parenthood is determined by s.27 FLRA 1987. See Paragraph 5.6.2 below.

[29] This is confirmed by s.47 HFEA 2008 which excludes the egg donor from being a legal parent of the child unless she is identified as its legal female parent (as explained in Part 5.5.3 below) or legal parenthood is transferred to her during the child's lifetime by an adoption order (see Part 7.3 below). The effect of parental orders is discussed in fn.10 of Appendix 2).

5.5.2. Legal father

5.5.2.1. Sections 35 and 36 HFEA 2008 identify a man as the legal father of a child but only where the child has been conceived in the context of a fertility treatment[30] involving donor sperm (i.e. where the man is not the child's genetic father). Where the child's legal mother was married[31] to a man at the time of the treatment, s.35 HFEA 2008 identifies that man as the child's legal father unless it is shown that he did not consent to the treatment.[32]

5.5.2.2. Where a child's legal mother was not married at the time of the fertility treatment involving donor sperm, s.36 HFEA 2008 identifies a man as the legal father if:

- the fertility treatment was provided by a UK licensed clinic[33]; and,
- the treatment was provided at a time when he was alive and met the agreed fatherhood conditions.

5.5.2.3. The agreed fatherhood conditions are satisfied where a man, along with the woman who is to carry the child, gives notice in the form of signed written consent (that has not been withdrawn or superseded) to a clinic stating that he is to be the child's legal father.[34] In

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[30] As defined in Paragraph 5.2 above.
[31] A marriage is defined for this purpose by s.49(1) HFEA 2008 (see fn.50, p.20).
[32] As noted in fn.26, p.60, strictly the presumption of legitimacy would apply first to identify the husband as the child's father because s.38(2) HFEA 2008 provides that this presumption is unaffected by the rules for identifying the legal father in statute. In effect, therefore, s.35 HFEA 2008 (and s.36 HFEA 2008 to the extent that the presumption of legitimacy applies to men who are identified as the legal father by that provision) prevents a man from denying legal fatherhood by rebutting the presumption of legitimacy. Despite this technicality, where s.35 or s.36 HFEA 2008 apply, a man will be taken to be identified as the legal father by virtue of statute rather than the common law.
[33] By contrast ss.33 and 35 HFEA 2008 can apply regardless of whether the fertility treatment takes place inside or outside the UK (ss.33(3) and 35(2) HFEA 2008).
[34] This requirement has resulted in a number of applications to the court for declarations of parenthood, or declarations of non-parenthood, under s.55A Family Law Act 1986 (FLA 1986)

addition, that man and woman cannot be within the prohibited degrees of relationship[35] in relation to each other.[36]

5.5.2.4. Again, HFEA 2008 also provides that certain persons are not identified as a child's legal parent and in s.41 HFEA 2008 it is provided that a sperm donor cannot be the child's legal father if he gave consent for his sperm to be used for treatment services[37] and his sperm is used for such a purpose.[38]

5.5.3. Legal female parent

5.5.3.1. The provisions for identifying the legal female parent are very similar to those for identifying the legal father. Section 42 HFEA 2008 provides that where a child is conceived using a form of fertility treatment[39] and at that time its legal mother is married[40] to, or in a civil partnership[41] with, another woman, that other woman is identified as the child's legal female parent unless it is shown that she did not consent to the treatment.

5.5.3.2. Section 43 HFEA 2008 provides that where a woman is not married or in a civil partnership at the time of the fertility treatment, another

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to confirm the status of an individual as a child's legal parent (see *AB v CD & Z Fertility Clinic* [2013] EWHC 1418 (Fam), *Re Human Fertilisation and Embryology Act 2008 (Cases A, B, C, D, E, F, G and H)* [2015] EWHC 2602 (Fam), [2015] All ER (D) 57 (Sep), and *X v Y (St Bartholomew's Hospital Centre for Reproductive Medicine Intervening)* [2015] EWFC 13).

[35] As defined in s.58(2) HFEA 2008. They include a parent, grandparent, sister, brother, aunt or uncle.

[36] s.37 HFEA 2008.

[37] As defined by s.2(1) HFEA 1990 and as is required by Sch.3 para.5 HFEA 1990.

[38] This provision is necessary because, in a context where FLRA 1987 applies, a genetic father could be recognised as a legal parent (see Part 6.6 below). For example, in *Leeds Teaching Hospitals NHS Trust v Mr & Mrs A & others* [2003] EWHC 259 a man had provided sperm for use by his wife only. It was mistakenly given to another woman. The man was held to be the legal father of the other woman's child (for the purpose of interpreting the relevant statute) because s.41 HFEA 2008 did not apply (he was a genetic parent that had not provided consent for the sperm to be used by a UK licensed clinic in that way).

[39] As defined in Paragraph 5.2 above.

[40] A marriage is defined for this purpose by s.49(1) HFEA 2008 (see fn.50, p.20).

[41] A civil partnership is defined for these purposes by s.50(s) HFEA 2008 (see fn.50, p.20).

woman is identified as the legal female parent if the fertility treatment was provided by a UK licensed clinic[42] and the treatment was provided at a time when that other woman was alive and met the agreed female parenthood conditions.[43]

5.5.3.3. The main difference between ss.42 and 43 HFEA 2008 and ss.35 and 36 HFEA 2008 is that the legal female parent's eggs may have been used in the fertility treatment whereas under ss.35 and 36 HFEA 2008 the legal father's sperm cannot be used in the fertility treatment.[44]

5.6. Legal parenthood in FLRA 1987 and HFEA 1990

5.6.1. The provisions of HFEA 2008 set out above apply to fertility treatments occurring on or after April 6, 2009.[45] Where the treatment took place before that date, but on or after August 1, 1991,[46] legal parenthood is determined by ss.27 and 28 HFEA 1990.[47] These provisions apply in a similar way to ss.33, 35 and 36 HFEA 2008 to identify the woman who carried the child as its legal mother and a man as its legal father.[48] HFEA 1990 does not, though, provide for a woman to be the child's second legal parent.

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[42] By contrast ss.33 and 42 HFEA 2008 can apply regardless of whether the fertility treatment took place inside or outside the UK (ss.33(3) and 42(2) HFEA 2008).
[43] The agreed female parenthood conditions mirror the agreed fatherhood conditions except that the references to a man are to a woman (s.44 HFEA 2008).
[44] See also fn.29, p.62 above which states that a legal female parent is not excluded from being a legal parent by virtue of being an egg donor.
[45] SI 2009/479.
[46] The Human Fertilisation and Embryology Act 1990 (Commencement No. 3 and Transitional Provisions) Order 1991 (SI 1991/1400).
[47] HFEA 1990 applies to England and Wales, Scotland and Northern Ireland (except ss.33(6)(h) and 37 HFEA 1990 which do not apply to Northern Ireland, per s.48 HFEA 1990).
[48] The main difference being that a man had to obtain a license, rather than meet the agreed parenthood conditions, to be the legal father.

5.6.2. Where a married woman conceived a child using donor sperm via artificial insemination before August 1, 1991, but on or after April 4, 1988,[49] s.27 FLRA 1987 identifies that woman as the child's legal mother, and her husband as the child's legal father.[50] For any other types of fertility treatment used in that period, and indeed for any types of fertility treatment used before April 4, 1988, the child conceived by such a treatment identifies its legal parents at birth under the common law only.

5.6.3. A person who is identified as a legal parent by s.27 FLRA 1987, or by s.27 or s.28 HFEA 1990, has their status as a legal parent preserved beyond the operative dates of those Acts by s.49(4) HFEA 1990 and s.57(2) HFEA 2008 respectively.

5.7. **Summary**

5.7.1. This Part has shown that statute may identify one or both of a child's legal parents and the types of parent identified are:

- a legal mother by virtue of s.33 HFEA 2008, s.27 HFEA 1990, or s.27 FLRA 1987;
- a legal father by virtue of s.35 or s.36 HFEA 2008, s.28 HFEA 1990, or s.27 FLRA 1987; or,
- a legal female parent by virtue of s.42 or s.43 HFEA 2008.

5.7.2. In a number of cases, statute identifies as a child's legal parent a person who has not provided any genetic material for its conception. Therefore, statute envisages that there may be a

[49] The Family Law Reform Act 1987 (Commencement No. 1) Order 1988 (SI 1988/425).
[50] s.34(5) FLRA 1987 provides that the Act applies to England and Wales only, although per subs.(4) it extends to Scotland and Northern Ireland in very limited circumstances.

separation between genetic parenthood and legal parenthood.[51] The term "genetic parent" will be used to refer to a person who provided the genetic material necessary for a child's conception but is not identified as a legal parent at its birth.

6. APPLYING THE RULES ON LEGAL PARENTHOOD TO LEGAL CHILDREN AT THEIR BIRTH

6.1. The rules for identifying legal parenthood at common law and in statute law may now be applied to the following categories of legal child established in Chapter 1: namely, children that are legitimate at common law, children of certain void marriages, legitimated children, children with two women as parents, and illegitimate children. The other categories of legal child (i.e. adopted children and children that are subject to a parental order) will, at their birth, fall into one of these five categories. An adoption order or parental order can only be granted during the child's lifetime and therefore these two categories are dealt with separately in Part 7 below.

6.2. <u>Children that are legitimate at common law</u>

6.2.1. Children that are legitimate at common law have, as their legal parents, a legal mother and a legal father. It was concluded in Paragraph 4.4.4.3 of Chapter 1 that a child with same sex parents cannot be legitimate at common law.

6.2.2. The legal mother of a child within this category may be identified by the common law or by statute. In both cases the woman who gave

[51] At common law this can only occur if a husband does not rebut the presumption of legitimacy when he is not, in fact, the child's genetic father.

birth to the child is identified as the child's legal mother. Generally, the common law applies where the child is conceived naturally or via artificial insemination.[52] By contrast, s.33 HFEA 2008 applies where the child is conceived by placing sperm and eggs, or an embryo, in a woman.[53]

6.2.3. The legal father of a child within this category may also be identified by the common law or by statute. At common law, the husband to the marriage by reference to which the child is legitimate will be identified as the legal father unless he rebuts the presumption of legitimacy.[54] If a child is conceived using donor sperm, the husband to the marriage by reference to which the child is legitimate will be identified as the legal father by virtue of s.35 or s.36 HFEA 2008.[55]

6.2.4. Illustration 1 below[56] sets out all of the possible ways that a child within this category can identify its legal parents. For example, box 6 will apply where a husband and wife conceive a child by placing a

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[52] The exception to this rule being a child that is conceived by the artificial insemination of a married woman using donor sperm in the period between April 4, 1988 and August 1, 1991. In such cases the legal mother is identified by s.27 FLRA 1987.

[53] Or s.27 HFEA 1990 if the treatment occurred before April 6, 2009 but on or after August 1, 1991.

[54] Although, if he does rebut the presumption the child will not be legitimate at common law and does not fall within this category.

[55] Or s.28 HFEA 1990 if the treatment occurred before April 6, 2009 but on or after August 1, 1991, or s.27 FLRA 1987 if the treatment involved the artificial insemination of his wife using donor sperm in the period between April 4, 1988 and August 1, 1991. S.36 HFEA 2008 may apply if the marriage by which the child is legitimate at common law takes place after the fertility treatment but before the child's birth (s.35 HFEA 2008 only applies if the husband and wife are married at the time of the treatment). Strictly, the provisions of HFEA 2008 and HFEA 1990 will only apply if the presumption of legitimacy is rebutted (see s.38(2) HFEA 2008 and s.28(5) HFEA 1990), however, as noted in fn.32, p.63, this technicality is being ignored for these purposes.

[56] In this illustration, "C/L" means the common law, and all statutory references are to HFEA 2008 (although it should be noted that depending on when the treatment took place the statutory reference in boxes 3 to 8 could also be a reference to s.27 or s.28 HFEA 1990 whilst the statutory reference in box 4 could also be a reference to s.27 FLRA 1987 if it involved the artificial insemination of a married woman using donor sperm).

donor's egg and the husband's sperm in the wife. In this scenario the child identifies the wife as its legal mother by virtue of s.33 HFEA 2008 and the husband as its legal father by virtue of the common law. Examples are given for all of the remaining boxes in Appendix 2.

6.2.5. *Illustration 1: legal parenthood of children that are legitimate at common law*

	1	2	3
Legal parents	Mother Father	Mother Father	Mother Father
Genetic parents	Mother Father	Mother Another	Mother Father
Authority	C/L C/L	C/L C/L	s.33 C/L

	4	5	6
	Mother Father	Mother Father	Mother Father
	Mother Sperm Donor	Mother Sperm Donor	Egg Donor Father
	C/L s.35/36	s.33 s.35/36	s.33 C/L

	7	8
	Mother Father	Mother Father
	Egg Donor Sperm Donor	Embryo Donor
	s.33 s.35/36	s.33 s.35/36

6.3. Children of certain void marriages

6.3.1. Children of certain void marriages may have, as their legal parents, a legal mother and a legal father. As regards the legal mother, the comments made in Paragraph 6.2.2 above apply equally to children in this category (i.e. the person who gave birth to the child is identified as its legal mother by the common law or by s.33 HFEA 2008).

6.3.2. The husband to the void marriage may be identified as the legal father also by the common law or by statute: it is submitted that the

common law is engaged by s.1 LA 1976,[57] whilst statute may apply by virtue of s.35 or s.36 HFEA 2008.[58]

6.3.3. In addition, it was shown in Paragraph 4.5.2.6 of Chapter 1 that children within this category may be born into a void marriage between two women. It is therefore possible that such children may have, as their legal parents, a legal mother (see above) and a legal female parent. The legal female parent is identified as a legal parent by s.43 HFEA 2008 only.[59]

6.3.4. Illustration 2[60] below sets out all of the possible ways that a child within this category can identify its legal parents. For example, box 11 will apply where a woman is artificially inseminated with donor sperm at a time when she is party to a void marriage with a man. The woman is identified as the child's legal mother by the common

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[57] Although Parliament has expressly provided for the status of a child in this category, it has not gone on to identify its legal parents. As a statute is rebuttably presumed not to alter the common law, it may be argued that children of certain void marriages identify their legal parents on the basis of being illegitimate children. However, as children of certain void marriages are treated by s.1 LA 1976 as being legitimate for all purposes it should follow that the common law rules for identifying the legal parents of a child that is legitimate at common law must also apply to children in this category and therefore the husband to the void marriage is identified as the legal father at common law. It is further submitted that the presumption of legitimacy does not apply here and so if the husband is not the child's genetic father he cannot also be its legal father (in such cases it would be hard to argue that the child is a child *of* a void marriage).

[58] The definition of a marriage in s.35 HFEA 2008 is extended to void marriages by s.49(1) HFEA 2008 (see fn.50, p.20). The man could also be identified as a legal father by s.28 HFEA 1990 if the treatment occurred before April 6, 2009 but on or after August 1, 1991, or s.27 FLRA 1987 if the treatment involved the artificial insemination of his wife using donor sperm in the period between April 4, 1988 and August 1, 1991.

[59] If the void marriage takes place before the treatment, the child's legal female parent is identified by s.42 HFEA 2008 and the child is therefore legitimate by virtue of s.48(6)(a) HFEA 2008 (see the category for children with two women as parents in Part 6.5 below). S.48(6)(b) HFEA 2008 is not relevant here as it only applies to civil partnerships entered into after the treatment but before the child's birth.

[60] In this illustration, "C/L" means the common law, "Female P" means the legal female parent, and all statutory references are to HFEA 2008 (although it should be noted that depending on when the treatment took place the statutory references in boxes 10 to 15 below could also be references to ss.27 and 28 HFEA 1990 whilst the statutory reference in box 11 could also be a reference to s.27 FLRA 1987 if it involved the artificial insemination of a married woman using donor sperm).

law, whereas the man is identified as the child's legal father by virtue of s.35 HFEA 2008.

6.3.5. To take another example, box 18 will apply where a child is carried by a woman, having been conceived in the context of fertility treatment using the eggs of another woman and the sperm of a donor, and both those women enter into a void marriage after the treatment but before the child's birth. In this scenario the child identifies the woman who carried it as its legal mother by virtue of s.33 HFEA 2008 and the other woman as its legal female parent by virtue of s.43 HFEA 2008. Examples are given for all of the remaining boxes in Appendix 2.

6.3.6. *Illustration 2: legal parenthood of children of certain void marriages*

	9	10	11
Legal parents	Mother Father	Mother Father	Mother Father
Genetic parents	Mother Father	Mother Father	Mother Sperm Donor
Authority	C/L C/L	s.33 C/L	C/L s.35/36

	12	13	14
	Mother Father	Mother Father	Mother Father
	Mother Sperm Donor	Egg Donor Father	Egg Donor Sperm Donor
	s.33 s.35/36	s.33 C/L	s.33 s.35/36

	15	16	17
	Mother Father	Mother Female P	Mother Female P
	Embryo Donor	Mother Sperm Donor	Mother Sperm Donor
	s.33 s.35/36	C/L s.43	s.33 s.43

	18	19	20
	Mother Female P	Mother Female P	Mother Female P
	Female P Sperm Donor	Egg Donor Sperm Donor	Embryo Donor
	s.33 s.43	s.33 s.43	s.33 s.43

6.4. Legitimated children

6.4.1. At their birth, and until the marriage of their parents, legitimated children are illegitimate because their legitimation is not

retrospective.[61] A legitimated child will have, as its legal parents, a legal mother and either a legal father or a legal female parent.[62]

6.4.2. As regards the legal mother, the comments made in Paragraph 6.2.2 above apply equally to a legitimated child (i.e. the person who gave birth to the child is identified as its legal mother by the common law or by s.33 HFEA 2008).

6.4.3. The husband may be identified as the legal father also by the common law or by statute: it is submitted that the common law is engaged by s.2 or s.3 LA 1976,[63] whilst statute can only apply by virtue of s.36 HFEA 2008.[64] The legal female parent can only be identified by virtue of statute (the relevant provision being s.43 HFEA 2008).[65]

6.4.4. Illustration 3[66] below sets out all of the possible ways that a child within this category can identify its legal parents. For example, box 27 will apply where a man and woman conceive a child using a donated embryo and they subsequently marry after the child's birth.

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[61] See Paragraph 4.5.3.2 of Chapter 1. Strictly, therefore, the legal father of a legitimated child is not identified at birth but is identified during the child's lifetime. However, a legitimated child's legal mother and, where relevant, a legitimated child's legal female parent are identified at the child's birth. As such, legitimated children have been left in this Part.

[62] ss.2, 2A and 3 LA 1976.

[63] For the reasons stated in fn.57, p.70 above, it should follow that the common law rules for identifying the legal father of a child that is legitimate at common law must also apply to legitimated children except that the presumption of legitimacy does not apply.

[64] Or by s.28 HFEA 1990 if the treatment occurred before April 6, 2009 but on or after August 1, 1991. S.27 FLRA 1987 cannot apply because the husband and wife would have to be married at the time of the treatment.

[65] The second legal parent can only be identified by s.36 or s.43 HFEA 2008 (and not s.35 or s.42 HFEA 2008) because in this context the marriage must necessarily have taken place after the child is born (and therefore also after the time of the fertility treatment).

[66] In this illustration, "C/L" means the common law, "Female P" means the legal female parent, and all statutory references are to HFEA 2008 (although it should be noted that depending on when the treatment took place the statutory references in boxes 22 to 27 below could also be references to ss.27 and 28 HFEA 1990 (s.27 FLRA cannot apply as the man and woman are not married at the time of treatment)).

In this scenario the child identifies the woman as its legal mother, and the man as its legal father, by virtue of ss.33 and 36 HFEA 2008 respectively. Examples are given for all of the remaining boxes in Appendix 2.

6.4.5. *Illustration 3: legal parenthood of legitimated children*

	21	22	23
Legal parents	Mother Father	Mother Father	Mother Father
Genetic parents	Mother Father	Mother Father	Mother Sperm Donor
Authority	C/L C/L	s.33 C/L	C/L s.36

	24	25	26
	Mother Father	Mother Father	Mother Father
	Mother Sperm Donor	Egg Donor Father	Egg Donor Sperm Donor
	s.33 s.36	s.33 C/L	s.33 s.36

	27	28	29
	Mother Father	Mother Female P	Mother Female P
	Embryo Donor	Mother Sperm Donor	Mother Sperm Donor
	s.33 s.36	C/L s.43	s.33 s.43

	30	31	32
	Mother Female P	Mother Female P	Mother Female P
	Female P Sperm Donor	Egg Donor Sperm Donor	Embryo Donor
	s.33 s.43	s.33 s.43	s.33 s.43

6.5. Certain children with two women as parents

6.5.1. It will be recalled from Chapter 1 that children are within this category if statute extends the class of legitimate children to them by virtue of s.48(6) HFEA 2008[67] and that this provision applies in two circumstances only: firstly, where a child has a legal female parent identified by s.42 HFEA 2008; and secondly where a child has a legal female parent identified by s.43 HFEA 2008 who entered into a civil partnership with the child's legal mother in the period between the fertility treatment and the child's birth.

[67] A child could be legitimate by virtue of both s.48(6) HFEA 2008 and s.1 LA 1976 if the conditions regarding the legal female parent's domicile were met in the latter provision. However, it is submitted that s.48(6) HFEA 2008 would take precedence in that scenario.

6.5.2. By definition such children have, as their legal parents, a legal mother and a legal female parent. As regards the legal mother, the comments made in Paragraph 6.2.2 above apply equally here (i.e. the person who gave birth to the child is identified as its legal mother by the common law or by s.33 HFEA 2008). Another woman may be identified as the legal female parent by virtue of s.42 or s.43 HFEA 2008.

6.5.3. Illustration 4[68] below sets out all of the possible ways that a child within this category can identify its legal parents. For example, box 36 will apply where two married women conceive a child using a donor egg and donor sperm (both of which are then placed in one of those women). In this scenario the child identifies the woman who carried it as its legal mother by virtue of s.33 HFEA 2008 and the other woman as its legal female parent by virtue of s.42 HFEA 2008. Examples are given for all of the remaining boxes in Appendix 2.

6.5.4. *Illustration 4: legal parenthood of certain children with two women as parents*

	33	34	35
Legal parents	Mother / Female P	Mother / Female P	Mother / Female P
Genetic parents	Mother / Sperm Donor	Mother / Sperm Donor	Female P / Sperm Donor
Authority	C/L / s.42/43	s.33 / s.42/43	s.33 / s.42/43

	36	37
Legal parents	Mother / Female P	Mother / Female P
Genetic parents	Egg Donor / Sperm Donor	Embryo Donor
Authority	s.33 / s.42/43	s.33 / s.42/43

[68] As before, "C/L" means the common law and "Female P" means the legal female parent. All statutory references are to HFEA 2008.

6.6. **Illegitimate children**

6.6.1. Before discussing their legal parents, it is worth recalling from Chapter 1 that illegitimate children[69] are brought within the class of legal children by virtue of s.1 FLRA 1987. However, s.1(1) FLRA 1987 operates expressly and exclusively as a rule for the interpretation of enactments (that is Acts of Parliament, Statutory Instruments and other forms of delegated legislation) and other legal documents. The context of the discussion in Chapter 1 was Sch.45 para.32 FA 2013 and therefore s.1 FLRA 1987 applied to bring illegitimate children within the class of legal children for that purpose.

6.6.2. The discussion in this chapter is of the common law rule for determining an individual's domicile of origin and in this common law context s.1 FLRA 1987 does not apply. Although the term "domicile of origin" is used in s.835BA ITA 2007, there is no direct reference to a relationship between persons as is required by s.1 FLRA 1987.[70] Therefore, illegitimate children are not legal children for this purpose.

6.6.3. Returning to the issue of legal parenthood, an illegitimate child can still identify its legal parents despite not being a legal child. An illegitimate child will have, as its legal parents, a legal mother and a

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[69] I.e. children that are not treated as being legitimate by virtue of statute and are: conceived and born outside of a lawful marriage; born with same sex legal parents; or born into a lawful heterosexual marriage but the husband successfully rebuts the presumption of legitimacy.

[70] Therefore, the comments made in Part 4.3 above regarding the identification of an illegitimate child's legal parents at common law are unaffected by s.1 FLRA 1987 in this context. The effect of s.1 FLRA 1987 is to put a child in the position of a legitimate child and, where it applies, the common law is forced to identify an illegitimate child's genetic parents as its legal parents (including its genetic father). This explains the need for s.41 HFEA 2008 to exclude a sperm donor from being a child's legal parent (see Paragraph 5.5.2.4 above).

legal father, a legal mother and a legal female parent, or a legal mother only.

6.6.4. As regards the legal mother, the comments made in Paragraph 6.2.2 above apply equally to an illegitimate child (i.e. the person who gave birth to the child is identified as its legal mother by the common law or by s.33 HFEA 2008). A man may be identified as the legal father by statute only (the relevant provision being s.36 HFEA 2008)[71] because the common law cannot identify the legal father of an illegitimate child. The legal female parent may be identified by statute only, the relevant provision being s.43 HFEA 2008.[72] If a legal father or a legal female parent is not identified by statute because the conditions in the respective statutory provisions are not met, the child has only one legal parent, that is its legal mother.

6.6.5. Illustration 5[73] below sets out all of the possible ways that a child within this category can identify its legal parents. For example, box 39 will apply where donor sperm and a single woman's egg are used to create an embryo and that embryo is placed in that woman. The woman is identified as the child's legal mother by virtue of s.33 HFEA 2008 whereas the man (assuming he meets the conditions of

[71] Or s.28 HFEA 1990 if the treatment occurred before April 6, 2009 but on or after August 1, 1991. S.35 HFEA 2008 and s.27 FLRA 1987 cannot apply because the man would have to be married to the legal mother at the time of the fertility treatment and hence the child would be legitimate.

[72] s.42 HFEA 2008 cannot apply because the child would otherwise be legitimate by virtue of s.48(6) HFEA 2008.

[73] As before, "C/L" refers to the common law and "2nd Female" refers to a legal female parent identified by s.43 HFEA 2008. All statutory references are to HFEA 2008 although it should be noted that depending on when the treatment took place the statutory references in boxes 39 to 45 below could also be references to ss.27 and 28 HFEA 1990 (s.27 FLRA cannot apply as the man and woman are not married at the time of treatment).

s.41 HFEA 2008) is excluded from being a legal parent. The child has one legal parent only, being its legal mother.

6.6.6. To take another example, box 46 will apply where a child is born to two women who are neither married nor in a civil partnership and that child is conceived by artificially inseminating one woman with donor sperm. The woman who carried the child is identified by the common law as its legal mother. The other woman may be identified as the legal female parent if she meets the conditions in s.43 HFEA 2008. Examples are given for all of the remaining boxes in Appendix 2.

6.6.7. *Illustration 5: legal parenthood of illegitimate children*

	38	39	40
Legal parents	Mother N/A	Mother N/A	Mother N/A
Genetic parents	Mother Another	Mother Another	Egg Donor Another
Authority	C/L N/A	s.33 N/A	s.33 N/A

	41	42	43
	Mother N/A	Mother Father	Mother Father
	Embryo Donor	Mother Sperm Donor	Mother Sperm Donor
	s.33 N/A	C/L s.36	s.33 s.36

	44	45	46
	Mother Father	Mother Father	Mother Female P
	Egg Donor Sperm Donor	Embryo Donor	Mother Sperm Donor
	s.33 s.36	s.33 s.36	C/L s.43

	47	48	49
	Mother Female P	Mother Female P	Mother Female P
	Mother Sperm Donor	Female P Sperm Donor	Egg Donor Sperm Donor
	s.33 s.43	s.33 s.43	s.33 s.43

	50
	Mother Female P
	Embryo Donor
	s.33 s.43

6.6.8. Having addressed legal parenthood of children at their birth the discussion now turns to the scenarios where a child's legal parents are identified during its lifetime.

7. STATUTORY IDENTIFICATION OF LEGAL PARENTHOOD IN LIFETIME: ADOPTION AND PARENTAL ORDERS

7.1. As noted in Paragraph 6.1, legal parenthood of adopted children and children that are subject to a parental order is determined at their birth in accordance with one of the categories of legal child discussed in Part 6 above. However, the law makes provision for legal parenthood to be transferred from the legal parents of a child at its birth to the applicants of an adoption order (adoptive parents) or a parental order (commissioning parents).

7.2. It will be shown in this Part that an adoptive or commissioning parent may also have had a parental relationship with the child prior to the relevant order being made - either as a legal parent or as a genetic parent.[74] This will be significant to the discussion in Chapter 4.[75]

7.3. **Adopted children**

7.3.1. Where a valid adoption order has been granted under ACA 2002,[76] or one of the earlier Adoption Acts,[77] the adopted child is treated in

[74] I.e. a person who provided the genetic material necessary for a child's conception but who did not acquire the status of a legal parent of that child at its birth (see Paragraph 5.7.2 above).
[75] There is still a transfer of legal parenthood in these cases in the sense that the parent acquires the status of an adoptive or commissioning parent.
[76] ACA 2002 applies to England and Wales only (see fn.54, p.22 for adoption in Scotland and Northern Ireland).
[77] For the application of earlier Adoption Acts see fn.58, p.23.

law as if born as the legitimate child of the adoptive parents.[78] Therefore the adoptive parents[79] are the child's legal parents. This status of legal parenthood is effective from the date of the adoption[80] but applies retrospectively from the date of the child's birth.[81]

7.3.2. A child may be adopted by a couple or by a single person. Adoption by a couple is governed by s.50 ACA 2002. For these purposes a couple is defined as a married couple, civil partners, or two people living as partners in an enduring family relationship.[82] As such, the ability of two persons to adopt a child as a couple is not limited by their marital status or their sexuality.[83]

7.3.3. A number of scenarios are addressed by the statute in relation to adoption by a single person. The starting point, in s.51(1) ACA 2002, is that an adoption order may only be made in respect of a single person if that person is unmarried and not in a civil

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[78] s.67(1),(2) and (3) ACA 2002. An adoption order will also be recognised in the law of England and Wales if made in Scotland, Northern Ireland, the Isle of Man or any of the Channel Islands or is an overseas adoption as defined in fn.55, p.22.

[79] To be eligible as an adoptive parent an individual must be habitually resident in a part of the British Islands for a year or more prior to making the application and domiciled in a part of the British Islands (although where two individuals are adopting as a couple only one of the couple must be domiciled in this way)(s.49(2) and (3) ACA 2002). In general, an application for adoption may only be made in respect of an adoptive parent that is aged 21 or over (ss.50(1) and 51(1) ACA 2002). The exception to this rule is in s.50(2) ACA 2002 which applies where one of the adoptive parents is already the child's mother or father (in which case that parent only must be aged 18 or over). The reference in this section to the child's mother or father must include an illegitimate child's father because it is a statutory provision enacted after the commencement of s.1 FLRA 1987. The reference to a father must also include a legal female parent by virtue of s.48(5) HFEA 2008.

[80] s.67(5) ACA 2002.

[81] The application is retrospective because the child is treated as if it was born to the adoptive parents.

[82] s.144(7) ACA 2002, as read with s.144(4) ACA 2002. S.144(5) and (6) ACA 2002 also states what is not an enduring family relationship for these purposes (for example, a relationship where one person is the other's parent, grandparent, sister, brother, aunt or uncle).

[83] This is a recent development in the law as prior to December 30, 2005 (when the relevant provisions of ACA 2002 came into force (art.2 SI 2005/2213)) it was only possible for two people to adopt a child as a couple if they were married; which, at the time, was not possible for same sex couples.

partnership. However, an adoption order may also be made in respect of a single person that is married to, or in a civil partnership with, another person but only if the court is satisfied that: the other person cannot be found; the other person is by reason of ill-health, whether physical or mental, incapable of making an application for an adoption order; or, the two persons have separated and are living apart and the separation is likely to be permanent.[84]

7.3.4. Furthermore, by virtue of s.51(2) ACA 2002, an adoption order may be made in respect of a single person if that person is not a parent of the child to be adopted but is the partner of an existing parent[85] of that child (i.e. that person is their spouse, civil partner, or a person living together with them in an enduring family relationship).[86] In this scenario, the adopted child becomes the child of the sole adoptive parent and the existing parent.[87] Without this provision the existing parent would have their status as a parent extinguished because the act of adoption results in the child being treated as having been born to the adoptive parent only. So, for example, a step-father may alone adopt the child of his wife under s.51(2) ACA 2002 to become the child's legal parent without extinguishing his wife's status as a legal parent (even though the adoption order would otherwise extinguish the legal parenthood of

[84] s.51(3) and (3A) ACA 2002.
[85] The existing parent may be an existing legal or genetic parent of the child. As the term "parent" in s.51(2) ACA 2002 was enacted after the commencement of s.1 FLRA 1987 it includes the genetic father of an illegitimate child. It is submitted that if the existing parent is a genetic parent but not a legal parent, the adoption of the child by their partner would convert their genetic parenthood into legal parenthood due to the wording of ss.67(2)(b) and 67(3)(a) ACA 2002.
[86] s.144(7) ACA 2002.
[87] Strictly, where a child is adopted by a sole adoptive parent under s.51(2) ACA 2002, the existing legal parent is not an adoptive parent; however, for the sake of convenience the existing legal parent will be called an adoptive parent for the remainder of this thesis.

any other person who was identified as the child's parent at its birth).[88]

7.3.5. In each of these scenarios, s.51(4) ACA 2002 states that an adoption order cannot be made in respect of a single person that is already a genetic parent[89] of the child to be adopted unless: the other natural parent is dead or cannot be found; owing to the provisions of HFEA 2008 or HFEA 1990, there is no other parent; or, there is some other reason justifying the child being adopted by the applicant alone. This provision is necessary to protect the other natural parent from having their status as a parent, in whatever form, extinguished by the adoption order.

7.3.6. In summary, whether an adoption order is granted to a couple or a single person, the adopted child's legal parents are identified as its adoptive parent(s). From the date of the order, no other person can be identified as the legal parent of that child except for the partner of a sole adopter in an application made under s.51(2) ACA 2002.[90] Except for this one case, the child's legal parents at birth therefore have their status as legal parents retrospectively extinguished (unless they are themselves a party to the adoption order).

7.3.7. Illustration 6[91] below sets out all of the possible ways that a child within this category can identify its legal parents. The child's legal

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[88] s.51(2) ACA 2002, as read with s.67(2) ACA 2002.
[89] Although the reference in s.51(4) ACA 2002 is to the mother and father of a child, it must be that they also provided the genetic material necessary for the child's conception because the section goes on to say the other *natural* parent.
[90] s.67(3) ACA 2002.
[91] In Illustration 6 the statutory references are to ACA 2002, however, where the adoptive parents are an adoptive mother and father the authority may also be ss.14 and 15 AA 1976.

parents after the adoption order may be: an adoptive mother and father; two adoptive mothers; two adoptive fathers; a sole adoptive mother; or, a sole adoptive father. The illustration compares the different types of parental relationship the adoptive parents may have had with their adoptive child prior to the adoption order. For example in box 53 both the adoptive mother and the adoptive father were identified by statute as legal parents of their adoptive child at its birth. The rationale for adopting in this circumstance may be to legitimate the child. In box 67 the adoptive parent is a man who was a genetic parent of the adoptive child at its birth. A full explanation of Illustration 6 (including examples of when each box applies) is given in Appendix 2.

7.3.8. *Illustration 6: legal parenthood of adopted children*

7.4. Children that are subject to a parental order

7.4.1. Parental orders apply solely in the context of surrogacy arrangements whereby a woman agrees to carry a child on behalf of commissioning parents[92] with a view to handing over the child to them after it is born.[93] This arrangement is not legally enforceable and prima facie the child's legal parents are those persons that are identified as such at its birth.[94] The commissioning parents become the child's legal parents by applying for a parental order.

7.4.2. A parental order has the effect, from the date of the order, of retrospectively treating the child as being born to the commissioning parents only.[95] Any other person identified as a legal parent at the child's birth thereby has their status as a legal parent retrospectively

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[92] I.e. the persons to whom the parental order is granted.

[93] Surrogacy arrangements are defined by s.1(3) SAA 1985 (see Paragraph 4.5.6.1 of Chapter 1).

[94] It is worth considering the status of the surrogate mother at the child's birth. Where the surrogate mother was artificially inseminated with the sperm of a commissioning parent (as is the case in "straight surrogacy") she may be identified as the child's legal mother at its birth by the common law or, if the child was born on or after April 4, 1988 but before August 1, 1994, by s.27 FLRA 1987 (subject to the necessary conditions of that provision being met). S.27 HFEA 1990 and s.33 HFEA 2008 do not apply where the child is conceived via artificial insemination and cannot therefore apply to identify the legal mother in cases involving straight surrogacy. Where an embryo, or both sperm and eggs, are placed in the surrogate mother (as is the case in "host surrogacy") the surrogate mother is not genetically related to the child she carries. She is, though, identified as the child's legal parent at its birth by s.27 HFEA 1990 (where the fertility treatment took place before April 6, 2009 but after August 1, 1991) or s.33 HFEA 2008 (where the fertility treatment took place on or after April 6, 2009). If these statutory provisions do not apply because the treatment took place before August 1, 1991, the child must identify its legal mother at common law; however, the position at common law is unclear. As the child has been conceived using an egg provided by a woman who did not carry the child, the common law principle established in *The Ampthill Peerage* [1976] 2 All ER 411 that parturition is proof of genetic parenthood is erroneous. The clear intention of Parliament is that the surrogate mother should always be the child's legal mother at its birth and it is submitted that a court would likely follow this rule at common law. However, each case would need to be considered on its own merits with the welfare of the child likely to form a significant part of the decision. In *Re W (Minors) (Surrogacy)* [1991] 1 FLR 385, where prior to the enactment of s.30 HFEA 1990 an embryo containing the genetic material of a husband and wife was placed in a surrogate mother, the husband and wife argued that they were the legal parents of the child at its birth. It was held that the children should remain wards of the court, albeit under the control of the genetic parents, until they were able to apply for a parental order under the soon to be enacted s.30 HFEA 1990. With the introduction of s.27 HFEA 1990 and s.33 HFEA 2008 (as read with s.47 HFEA 2008) the common law uncertainty regarding the child's legal mother in such circumstances will gradually become obsolete.

[95] reg.2 SI 2010/985.

extinguished.[96] A child that is subject to a parental order therefore identifies its legal parents as the commissioning parents.

7.4.3. Parental orders are governed by s.54 HFEA 2008.[97] A number of conditions must be satisfied for a parental order to be made under that provision, the most pertinent to this context being that:

- the surrogate mother cannot herself be a commissioning parent[98];
- the commissioning parents must be two persons that together are a husband and wife,[99] civil partners, or two persons – of the same or opposite sex – who are living together as partners in an enduring family relationship (and not within the prohibited degrees of relationship[100] in relation to each other).[101] As the law stands a person cannot, therefore, apply for a parental order on their own[102];
- at least one of the commissioning parents must be a genetic parent[103] of the child at its birth[104]; and,
- the order is made by a UK court.[105]

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[96] It may be that one of the commissioning parents was identified as a legal parent at the child's birth and therefore it is only other persons (i.e. non-commissioning parents) that have their status extinguished.
[97] s.54 HFEA 2008 applies to England and Wales, Scotland and Northern Ireland.
[98] s.54(1)(a) HFEA 2008.
[99] There are no provisions in MSSCA 2013 that amend s.54 HFEA 2008 to allow same sex couples to apply for a parental order by virtue of their marriage (instead it can only be by virtue of living together as partners in an enduring family relationship).
[100] As defined by s.58(2) HFEA 2008.
[101] s.54(2) HFEA 2008.
[102] As noted in fn.71, p.26 above, the government is reviewing how it can amend this law following the decision in *Re Z (A Child)* [2016] EWHC 1191 (Fam).
[103] It may be that one of the commissioning parents was also a legal parent of the child at its birth.
[104] s.54(1)(b) HFEA 2008. It is noted that a mitochondrial donor is not a genetic parent for these purposes (reg.18 The Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015 (SI 2015/572)). Indeed, an individual can never be a parent by virtue of being a mitochondrial donor; none of the nuclear DNA (i.e. the genetics) of an embryo is provided by a mitochondrial donor.

7.4.4. Between November 1, 1994 and April 6, 2009 the making of parental orders was governed by s.30 HFEA 1990.[106] The legal effect of a parental order made under this section is the same as that of s.54 HFEA 2008 (i.e. from the date of the order the commissioning parents are retrospectively identified as the child's legal parents from its birth). Commissioning parents who were granted a parental order by virtue of s.30 HFEA 1990 have their status as legal parents preserved beyond the application of that Act by s.57(4) HFEA 2008. The conditions in s.30 HFEA 1990 are very similar to those in s.54 HFEA 2008, the main exception being that only a husband and wife could apply for a parental order.

7.4.5. Prior to November 1, 1994 there was no legal mechanism, other than by adoption, by which to identify the commissioning parents of a surrogacy arrangement as the child's legal parents.[107] The identification of the child's legal parents at its birth by the common law or by statute was therefore left unchanged.[108]

7.4.6. In summary, therefore, children that are subject to a parental order by virute of s.30 HFEA 1990 or s.54 HFEA 2008 identify their legal parents as the commissioning parents to the order (who are, from

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[105] s.54(9) HFEA 2008. Foreign parental orders are not recognised in the UK (see Paragraph 4.5.6.2 of Chapter 1). The fertility treatment by which the child was conceived may have taken place inside or outside the UK (s.54(10) HFEA 2008).
[106] Although s.30(9) and (10) HFEA 1990 came into force on July 5, 1994, the remaining subsections of s.30 HFEA 1990 came into force on November 1, 1994 (per SI 1994/1776).
[107] Surrogacy arrangements were made legal from July 16, 1985 with the royal assent of SAA 1985. As a transitional provision, the commissioning parents of a child subject to a surrogacy arrangement governed by SAA 1985, but born before November 1, 1994, could apply for a parental order under s.30 HFEA 1990 within six months of November 1, 1994.
[108] The only option for the intended parents in terms of becoming legal parents of the surrogate child was to apply for an adoption order instead. This remains the case for the intended parents of a surrogacy arrangement where those intended parents are unable to obtain a parental order.

the date of the order, retrospectively treated as having always been the legal parents of that child). Any other person that was identified as a legal parent of the child at its birth, such as the surrogate mother, thereby has their status as a legal parent extinguished.

7.4.7. Illustration 7[109] below sets out all of the possible ways that a child within this category can identify its legal parents. The child's legal parents after the parental order may be: a commissioning mother and father; two commissioning mothers; or, two commissioning fathers. The illustration compares the different types of parental relationship that the commissioning parents may have had with their child prior to the parental order. For example in box 73 the commissioning parents are two men, one of whom provided the sperm necessary for the child's conception but did not acquire the status of a legal parent at its birth (i.e. he was the child's genetic father). A full explanation of Illustration 6 (including examples of when each box applies) is given in Appendix 2.

7.4.8. *Illustration 7: legal parenthood of children subject to a parental order (surrogacy arrangements)*

Legal parents post P.O. Relationship with child Authority	69	70	71
	Mother: None Father: Genetic Father s.54	Mother: Legal Parent Father: Genetic Father s.54	Mother: Legal Parent Father: None s.54
	72	73	74
	Mother 1 / Mother 2 One was a legal parent s.54	Father 1 / Father 2 One was a genetic father s.54	Father 1 / Father 2 One genetic, one legal parent s.54

[109] In Illustration 7 the statutory references are to HFEA 2008, although the statutory references in boxes 69 to 71 could also be s.30 HFEA 1990. It is assumed that neither commissioning parent was married to, or in a civil partnership with, the surrogate mother.

8. CONCLUSION

8.1. The objective of this chapter was to identify the legal parents of those persons who are legal children according to the general rule set out in Chapter 1. The catalyst for this exercise was s.835BA ITA 2007 where the term "domicile of origin" is employed. To determine an individual's domicile of origin it is necessary to establish the persons who are identified as their legal parent(s).

8.2. Part 4 described the types of legal parent that can be identified by the common law; being, a legal mother in respect of legitimate and illegitimate children, and a legal father in respect of legitimate children. Part 5 described the types of legal parent that can be identified by statute at a child's birth; being, a legal mother (s.33 HFEA 2008, s.27 HFEA 1990 or s.27 FLRA 1987), a legal father (s.35 or s.36 HFEA 2008, s.28 HFEA 1990 or s.27 FLRA 1987), and a legal female parent (s.42 or s.43 HFEA 2008). Part 6 applied these findings to the relevant categories of legal children.

8.3. Part 7 described the ways in which legal parenthood is transferred by statute during a child's lifetime so as to identify adoptive parents as the legal parents of adopted children and commissioning parents as the legal parents of children that are subject to a parental order.

8.4. By identifying the legal parents of legal children, it can be said that a legal parent-child relationship has been established between them. Illegitimate children are the exception to this rule; although they are able to identify their legal parent(s), they are not legal children for this purpose because s.1 FLRA 1987 does not apply to

the common law rules for determining an individual's domicile of origin. Illustration 8 in Appendix 1 brings together the illustrations shown in this chapter to set out all the possible types of legal parent-child relationship.[110]

8.5. Based on the rules for identifying legal parenthood stated above, it can be said that the following persons are not legal parents:

- step-parents[111] as regards their step-children;
- the legal parents of an adopted child at its birth whose legal parenthood has been extinguished by an adoption order;
- the surrogate mother of a child that is subject to a parental order;
- persons who have only parental responsibility[112] for another individual as regards that individual;
- foster parents as regards their foster children; and,
- guardians and special guardians as regards the individuals for whom they are a guardian or special guardian.[113]

8.6. Furthermore, a person cannot be considered a child's legal parent if they are only a moral, social or psychological parent of that child.[114]

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[110] The dotted line linking illegitimate children to legal children in Illustration 8 represents the fact that an illegitimate child will only be a legal child where s.1 FLRA 1987 applies.
[111] A step-parent is a person that is married to (or in a civil partnership with) a person that has a child from a previous relationship.
[112] As defined in fn.82, p.31.
[113] As defined in fn.83, p.31.
[114] In *Re G (Children)* [2006] UKHL 43, Baroness Hale of Richmond stated that social and psychological parenthood was a type of natural parenthood. At para.35 she described a psychological parent as "one who, on a continuous, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs." As she notes at para.33, whilst this may equate to natural parenthood it does not equate to legal parenthood (see also *T v B* [2010] EWHC 1444).

8.7. The discussion now turns to the application of the common law rules for determining an individual's domicile of origin in the context of s.835BA ITA 2007.

CHAPTER 4

1. INTRODUCTION

1.1. So far this thesis has established the class of legal children and has described the persons who are identified as the legal parents of those children. Drawing on these findings, this chapter will discuss the application of the common law rules for determining an individual's[1] domicile of origin and it will be shown that some individuals are currently unable to make such a determination. A solution to this problem will then be proposed.

1.2. The context for this discussion is again s.835BA ITA 2007 and, as stated in Paragraph 2.1 of Chapter 3, this section provides for a new deemed UK domicile for UK income tax purposes (and by extension UK capital gains tax) where an individual satisfies certain conditions – including having a domicile of origin in the UK.[2] The effect of this new provision is that an individual may be treated as domiciled in the UK despite actually being domiciled outside the UK for a particular tax year. As a result, it elevates the significance of domicile of origin in the taxation of individuals in the UK.

2. APPLICATION OF THE RULES FOR DETERMINING AN INDIVIDUAL'S DOMICILE OF ORIGIN

2.1. It is worth restating the common law rules for determining an individual's domicile of origin as summarised in *Dicey*:

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[1] Although a domicile of origin is determined at birth, this determination will generally be referenced to individuals rather than to children because a domicile of origin attaches itself to a person throughout their lifetime (i.e. beyond their childhood).

[2] The concept of domicile of origin has ramifications for matters of general law as well as UK tax law – for example, matters of family law and succession law – and therefore the significance of this discussion is not confined to tax law alone.

"**RULE 9:**

1) Every person receives at birth a domicile of origin:
    a) A legitimate child born during the lifetime of his father has his domicile of origin in the country in which his father was domiciled at the time of his birth.
    b) A legitimate child not born during the lifetime of his father, or an illegitimate child, has his domicile of origin in the country in which his mother was domiciled at the time of his birth.
    c) …
2) A domicile of origin may be changed as a result of adoption or by issue of a parental order under [HFEA 2008], but not otherwise."[3]

2.2. Rule 9 will now be applied to the various categories of legal children identified in Chapter 1. As every person is a legal child of someone according to the general rule set out in that chapter, all individuals are thereby included in the discussion.[4]

2.3. **Children that are legitimate at common law**

2.3.1. It was stated in Part 6.2 of Chapter 3 that children who are legitimate at common law have, as their legal parents, a legal mother and a legal father. These children are directed by Rule 9(1)(a) to determine their domicile of origin by reference to their

[3] A. Dicey, J. Morris and Lord Collins of Mapesbury, *The Conflict of Laws* (2012), p.140. Importantly, Rule 9(2) does not mention marriage or divorce because they do not have the power to alter a domicile of origin. Such events may change a child's domicile of dependency though. *Dicey* does acknowledge that it is not clear how a child would determine its domicile of origin where conceived in marriage but born after the divorce of its parents. Although *Dicey* notes that it is arguable that the child would determine its domicile of origin as if they were illegitimate, it is submitted here that the child, being legitimate at common law, would determine its domicile of origin in accordance with Part 2.3 of this chapter (A. Dicey, J. Morris and Lord Collins of Mapesbury, *The Conflict of Laws* (2012), p.141).

[4] There is, though, the practical problem of individuals whose legal parents are unknown ("foundlings"). In these unusual circumstances, it is generally accepted that the individual's domicile of origin is the place where they are found (A. Dicey, J. Morris and Lord Collins of Mapesbury, *The Conflict of Laws* (2012), p.141).

legal father's domicile at the time of their birth. If their legal father is not alive at this time, their domicile of origin is determined in the same way as illegitimate children (see Part 2.7 below).

2.4. **Children of certain void marriages**

2.4.1. Children of certain void marriages are, by virtue of s.1 LA 1976, treated as being legitimate children and therefore they are directed by Rule 9(1)(a) to determine their domicile of origin by reference to their legal father's domicile at the time of their birth.[5] It was stated in Part 6.3 of Chapter 3 that these children have, as their legal parents:

- a legal mother and a legal father; or,
- a legal mother and a legal female parent.

2.4.2. Where the legal parents are a legal mother and a legal female parent, the child is unable to determine its domicile of origin under Rule 9(1)(a) because it does not have a legal father.

2.5. **Legitimated children**

2.5.1. Legitimated children are treated, by virtue of s.2, s.2A or s.3 LA 1976, as legitimated from the date of the marriage between their legal parents. However, legitimated children are not retrospectively treated as being legitimate from the date of their birth and so at the point in time when their domicile of origin is determined they are illegitimate children.[6] Legitimated children therefore determine their

[5] Again, if the legal father is not alive at this time, such children determine their domicile of origin in the same way as illegitimate children (see Part 2.7 below).
[6] See Paragraph 4.5.3.2 of Chapter 1. According to Rule 9(2) a domicile of origin cannot be changed by marriage and therefore a legitimated child's domicile of origin is not changed on the subsequent marriage of its legal parents (*Henderson v Henderson* [1967], p.77).

domicile of origin in the same way as illegitimate children (see Part 2.7 below).

2.6. **Certain children with two women as parents**

2.6.1. Certain children with two women as parents are, by virtue of s.48(6) HFEA 2008, treated as being legitimate children. However, they are unable to determine their domicile of origin under Rule 9(1)(a) because they do not have a legal father.

2.7. **Illegitimate children**

2.7.1. Illegitimate children[7] are directed by Rule 9(1)(b) to determine their domicile of origin by reference to their mother's domicile at the time of their birth. It was stated in Paragraph 6.6.3 of Chapter 3 that illegitimate children have, as their legal parents:

- a legal mother and a legal father;
- a legal mother and a legal female parent; or,
- a legal mother only.

2.7.2. Clearly, illegitimate children with a legal mother and a legal father, or a legal mother only, are able to determine their domicile of origin in accordance with Rule 9(1)(b). It is submitted that illegitimate children with a legal mother and a legal female parent are also able to determine their domicile of origin in accordance with Rule 9(1)(b) because they only have one legal mother; whenever the legal female parent is mentioned in HFEA 2008 the legislation does not refer to her as a mother but rather as a parent.

[7] Including for this purpose: legitimated children; and, children that are legitimate at common law and children of certain void marriages whose fathers have died prior to their birth.

2.8. **Adopted children**

2.8.1. Adopted children are, by virtue of s.67 ACA 2002, treated as having always been the legitimate child of their adoptive parent(s) and therefore they are directed by Rule 9(1)(a) (as engaged by Rule 9(2)) to determine their domicile of origin by reference to their adoptive father's domicile at the time of their birth.[8] It was stated in Paragraph 7.3.7 of Chapter 3 that adopted children have, as their legal parents:

- an adoptive mother and father;
- two adoptive mothers;
- two adoptive fathers;
- a sole adoptive mother; or,
- a sole adoptive father.

2.8.2. Adoptive mother and father

2.8.2.1. Adopted children with an adoptive mother and father determine their domicile of origin under Rule 9(1)(a) by reference to their adoptive father's domicile at the time of their birth.

2.8.3. Two adoptive mothers

2.8.3.1. Adopted children with two adoptive mothers are unable to determine their domicile of origin under Rule 9(1)(a) because they do not have a legal father.

[8] It is generally accepted that whilst an adopted child's domicile of origin is re-determined at the date of the adoption order, it is re-determined by reference to (and takes effect from) the time of the child's birth. Therefore, at the time of the adoption order, an adopted child must look to their adoptive father's domicile at the time of its birth (Stowe Family Law LLP, "Jurisdiction: Children and their domicile of origin" (2014). *Stowe Family Law, http://www.stowefamilylawllp.com/2014/03/11/jurisdiction-children-and-their-domicile-of-origin/* [Accessed November 18, 2017]; Malcolm Finney, *Personal Tax Planning: Principles and Practice 2011/12* (West Sussex: Bloomsbury Professional, 2011), p.43).

2.8.4. Two adoptive fathers

2.8.4.1. Adopted children with two adoptive fathers are unable to determine their domicile of origin under Rule 9(1)(a) because there are two persons to whom they could refer as their legal father.

2.8.5. Sole adoptive mother

2.8.5.1. Adopted children with a sole adoptive mother are unable to determine their domicile of origin under Rule 9(1)(a) because they do not have a legal father.

2.8.6. Sole adoptive father

2.8.6.1. Adopted children with a sole adoptive father determine their domicile of origin under Rule 9(1)(a) by reference to their adoptive father's domicile at the time of their birth.

2.9. **Children that are subject to a parental order**

2.9.1. Children that are subject to a parental order are, by virtue of reg.2 SI 2010/985, treated as having always been the legitimate child of their commissioning parents and therefore they are directed by Rule 9(1)(a) (as engaged by Rule 9(2)) to determine their domicile of origin by reference to their commissioning father's domicile at the time of their birth.[9] It was stated in Paragraph 7.4.7 of Chapter 3 that children who are subject to a parental order have, as their legal parents:

- a commissioning mother and father;

[9] As with an adopted child, the domicile of origin of a child that is subject to a parental order is re-determined at the date of the order but is viewed at the time of the child's birth (see fn.8, p.94),

- two commissioning mothers; or,
- two commissioning fathers.

2.9.2. Commissioning mother and father

2.9.2.1. Children that are subject to a parental order with a commissioning mother and father determine their domicile of origin under Rule 9(1)(a) by reference to their commissioning father's domicile at the time of their birth.

2.9.3. Two commissioning mothers

2.9.3.1. Children that are subject to a parental order with two commissioning mothers are unable to determine their domicile of origin under Rule 9(1)(a) because they do not have a legal father.

2.9.4. Two commissioning fathers

2.9.4.1. Children that are subject to a parental order with two commissioning fathers are unable to determine their domicile of origin under Rule 9(1)(a) because there are two persons to whom they could refer as their legal father.

2.10. **Summary**

2.10.1. Having applied the common law rules for determining an individual's domicile of origin to the various categories of legal children, it is apparent that for most individuals the rules function effectively. Those individuals therefore know *how* to determine their domicile of origin for the purpose of the new deemed UK domicile rule in s.835BA ITA 2007. By extension, it can also be said that those individuals know how to determine their domicile of origin for

general law purposes too as these rules apply equally to other contexts.

2.10.2. However, the common rules as summarised by *Dicey* in Rule 9 do not function in the following cases: children of certain void marriages with two women as parents; certain children with two women as parents; adopted children with two adoptive mothers, two adoptive fathers or a sole adoptive mother; and, children that are subject to a parental order with two commissioning mothers or two commissioning fathers. For the purposes of the following discussion this list can be condensed and ordered into the following four categories:

- legitimate children with two women as parents from birth;
- children that are subject to a parental order with same sex commissioning parents;
- adopted children with a sole adoptive mother; and,
- adopted children with same sex adoptive parents.

2.10.3. The inability of individuals in any one of these four categories to determine their domicile of origin is contrary to the fundamental principle of domicile law that at birth *every* individual is ascribed with a domicile of origin. Furthermore, in order to apply s.835BA ITA 2007 to any individual it is necessary for them to know whether they have a domicile of origin in the UK. This state of affairs will be referred to as the “problem identified” and it is clear that a resolution to this problem is required.

2.10.4. The problem identified is not discussed in *Dicey* although it is indirectly referred to in the context of domicile of dependency (see Paragraphs 4.3.3 and 4.5.8.2 below). HM Revenue and Customs ("HMRC") offer a very brief commentary in their manual RDRM22110[10] which states that:

> "[ACA 2002] provides that an adopted child is regarded as having acquired a new domicile of origin from the relevant adoptive parent; this will be the domicile of his adoptive father or, if there is no adoptive father his adoptive mother, at the time of his adoption.
>
> **Civil Partnerships**
>
> Please refer any cases involving the domicile of an adopted child to a same sex couple within a civil partnership to the Specialist Personal Tax, PTI Advisory, Residence and Domicile Technical Team."[11]

2.10.5. HMRC's manual is undoubtedly insufficient to provide any guidance to individuals who are affected by the problem identified, other than adopted children with a sole adoptive mother. The remainder of this chapter will seek to find a resolution the problem identified.

3. THE RELATIONSHIP BETWEEN STATUTE AND THE COMMON LAW

3.1. Finding a resolution to the problem identified is made possible by addressing the relationship between statute and the common law in this context. It reveals the source of the problem, supports the proposition that - in order to solve the problem - statute can modify common law rules by implication, and shows how statute can

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[10] HM Revenue & Customs, "Residence, Domicile and Remittance Basis Manual" (RDRM22110), *Gov.uk, http://www.hmrc.gov.uk/manuals/rdrmmanual/rdrm22110.htm* [Accessed November 17, 2017].

[11] The Specialist Personal Tax team confirmed in personal correspondence that they have not yet considered the problem identified.

provide guidance as to the content of these modified common law rules.

3.2. Ascertaining the source of the problem identified

3.2.1. At a basic level, the problem identified can be understood as a conflict between the following three areas of law: the rules for determining a domicile of origin (governed by the common law only); the rules for determining a child's legitimacy status (governed by both statute and the common law); and, the rules for identifying a child's legal parents (governed by both statute and the common law). The introduction of statute in the latter two cases has resulted in the common law rules for determining an individual's domicile of origin being unable to function effectively for certain individuals. Understanding the relationship between statute and the common law can therefore reveal the source of the problem.

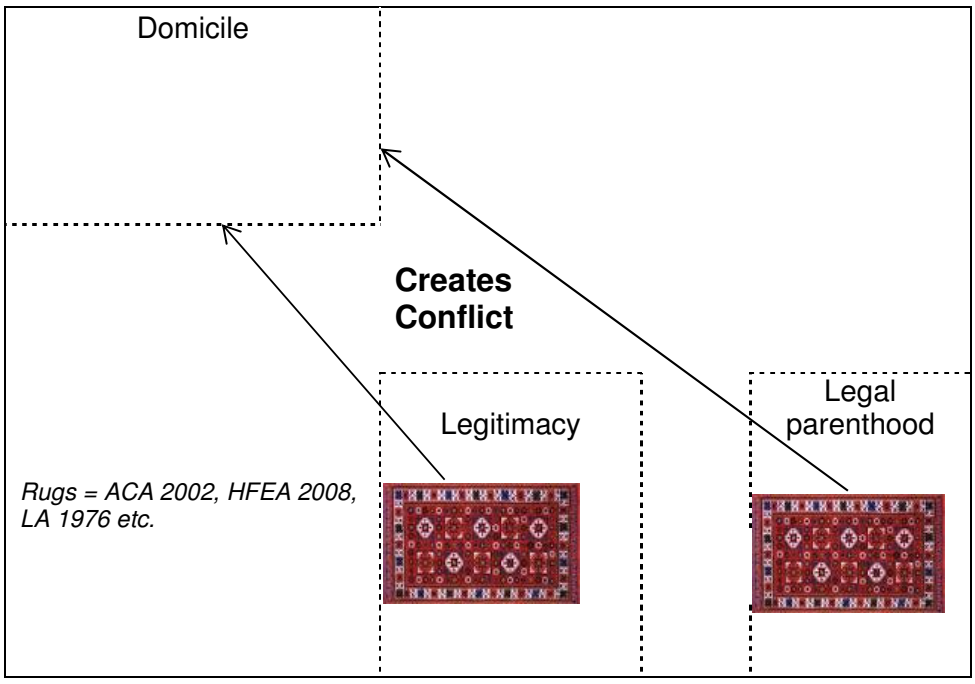
3.2.2. As a matter of statutory interpretation, statute overrides the common law where they both govern the same issue. Bennion describes this process as follows:

> "To describe the way Acts operate on existing law, one can use the image of a floor upon which rugs are spread. The floor consists of unwritten law or lex non scripta, in other words common law, rules of equity, and customary rules. An Act is like a rug laid down on this floor. The Act conceals, for the area it covers, the texture underneath … When later on another rug is put down (that is a further Act on the subject is passed), any portion of existing law it covers is pro tanto blocked out." [12]

[12] *Bennion on Statutory Interpretation,* edited by Oliver Jones (2013), pp.168-169.

3.2.3. Applying this analogy in the present context, it can be said that the statutory provisions regarding legitimacy and legal parenthood operate like a rug over their respective areas of the common law regarding legitimacy and legal parenthood. However, they do not, crucially, operate like a rug over areas of the common law regarding domicile. Rather, they cause a conflict to arise between the common law rules of domicile and the statutory provisions on legitimacy and legal parenthood. Figure 2 illustrates this point.

3.2.4. *Figure 2: The relationship between the statutory provisions regarding legal parenthood and legitimacy and the common law rules for determining a child's domicile of origin*



3.2.5. The source of the problem identified can therefore be summarised as follows: statutory provisions in two separate and distinct areas of law cause a common law rule in a different area to be ineffective in certain circumstances.

3.2.6. Now that the source of the problem has been ascertained, two key observations can be made. Firstly, the statutory provisions regarding legitimacy and legal parenthood that cause the problem to arise[13] (the "offending statutory provisions") do not cause a mischief in the area of law that they govern. Therefore, these provisions do not need to be (and cannot be) construed any differently than they have been in the discussion so far. Secondly, and consequently, if an alternative construction of the offending statutory provisions is not required, a resolution to the problem identified must instead be found by the common law itself.[14] Parliament could of course try to resolve the problem; however, an Act of Parliament would not enable the affected individuals to determine their domicile of origin for the period up to the commencement date of any new legislation unless it applied retrospectively.[15]

3.2.7. The question that must be asked, therefore, is this: can the common law resolve the conflict between the rules for determining an individual's domicile of origin and the offending statutory provisions? It will be able to do so if it can be said that the common law has been modified to make this resolution.

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[13] Provisions such as, for example, ss.42 and 48(6) HFEA 2008 and s.67 ACA 2002.
[14] If the statutory provisions had acted like a metaphorical rug on top of the common law rules of domicile, as is the case with s.1 of the Domicile and Matrimonial Proceedings Act 1973 (DMPA 1973), for example, the resolution to the problem identified would have involved the exercise of statutory interpretation.
[15] Retrospective legislation is usually avoided whenever possible. Furthermore, any attempt to second-guess how Parliament might resolve the problem identified would be a highly speculative exercise.

3.3. **An implied modification of the common law**

3.3.1. Balganesh and Parchomovsky note that a characteristic of the common law is its ability to adapt:

> "The success of the common law – both as a body of law and as a method of lawmaking – can be attributed in large measure to its ability to keep up with changing social values and preferences over extended periods of time."[16]

3.3.2. So has the common law adapted to the changing social values and preferences regarding legitimacy and legal parenthood? It is submitted that the common law rules for determining an individual's domicile of origin have been modified impliedly by the offending statutory provisions themselves.

3.3.3. In *The Royal Wells*[17] it was held that s.18 of the Merchant Shipping Act 1970 (MSA 1970) had by implication modified the common law rule that, on a ship, the sea-men were paid in priority to the ship's master. Section 18 MSA 1970, which placed the master and the sea-men under the same contract of service with the ship owners, superseded the position at common law where the sea-men had their contract of service with the master instead. Although the metaphorical rug of the statutory provision did not cover the

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[16] Shyamkrishna Balganesh and Gideon Parchomovsky argue that "common law concepts have a core jural meaning that remains constant through time and a normative meaning that is adaptable. It is through the interaction between these two meanings, both embodied in legal concepts that the common law's process of incremental change is enabled," and further, that "change in the law can be at the level of legal rules (i.e., doctrinal). This form of change involves the process of modifying the jural content of individual rules, by making alterations at the margins, adding together new rules, or at times eliminating old rules…More frequently seen is the process of change at the normative level" (Shyamkrishna Balganesh and Gideon Parchomovsky, "Structure and value in the common law" (University of Pennsylvania Law School, 2015). *Legal Scholarship Repository, http://scholarship.law.upenn.edu/faculty_scholarship/1441* [Accessed November 17, 2017]).

[17] *The Royal Wells* [1985] QB 86.

common law priority rule, it had by implication modified it so that the master and the sea-men had equal claim over the ship's funds. Bennion summarises the effect that a statutory provision can have on a common law rule as follows:

> "Where an Act alters the basis on which a common law rule is founded, it may be inferred that Parliament intended to modify the rule."[18]

3.3.4. By invoking this principle in the present context it can be inferred that the offending statutory provisions regarding legitimacy and legal parenthood modify the common law rules for determining an individual's domicile of origin. Indeed, that such a modification is possible is demonstrated in Rule 9(2) of *Dicey*; it is widely accepted that s.67(1) and (2) ACA 2002 – which are statutory provisions concerning both legitimacy and legal parenthood – have, by implication, modified the laws of domicile at common law so that Rule 9(2) is able to state that an individual's domicile of origin can be changed by adoption.

3.3.5. So what will the modified common law rules look like? Before addressing this question directly in Part 4, the way in which statute influences the development of the common law is considered first.

3.4. **How statute can guide a common law rule**

3.4.1. Having suggested that the common law is, by implication, modified by the offending statutory provisions, it must now be asked how existing statutes can assist in the formulation of the modified common law rules.

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[18] Bennion, *Statutory Interpretation* (2002), p.433.

3.4.2. The idea that statute is capable of guiding a change in the common law is not free from controversy as many consider that statute and the common law should be kept completely separate from each other. J Beatson, in his article "The role of statute in the development of common law doctrine"[19] calls this the "oil and water" approach, where statute and the common law are viewed as "two bodies of law flowing next to but save in one respect separately from each other in distinct streams."[20]

3.4.3. However, Beatson goes on to critique this approach, noting that as a "shameless snapper-up of well considered trifles of foreign law"[21] it is odd that the common law might not also borrow ideas from its own legislature.[22] In the words of Lord Steyn in *Malik v Bank of Credit & Commerce International S.A.*, "in search for the correct common law principle one is not compelled to ignore the analogical force of the statutory dispensation."[23] Beatson cites numerous examples where the common law has been guided by statute,[24]

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[19] J Beatson, "The role of statute in the development of common law doctrine", L.Q.R. 2001, 117(Apr), 247-272.
[20] J Beatson, "The role of statute in the development of common law doctrine", L.Q.R. 2001, 117(Apr), 247.
[21] J Beatson, "The role of statute in the development of common law doctrine", L.Q.R. 2001, 117(Apr), 250, quoting from Lord Bingham, *The Business of Judging*, 2000 edn (Oxford: Oxford University Press, 2000), p.383.
[22] He also points out that the increasing reach of civil law in the form of statutes will mean that studying the common law will become an exercise in "shining an ever brighter light on an ever shrinking object" (J Beatson, "The role of statute in the development of common law doctrine", L.Q.R. 2001, 117(Apr), 250). There is also an historical basis for the idea that statute can inform a common law rule. Matthew Hale, a 17th century jurist who represented a "significant…line of thought in the classical common law tradition," saw the common law tradition as "embracing legislation as an integral part of the system" (Jeffrey Pojanowski, "Reading statutes in the common law tradition", Virginia L. Rev. 2015, 101(Sept), 1378-9).
[23] *Malik v Bank of Credit & Commerce International S.A.* [1998] A.C. 20, as quoted in J Beatson, "The role of statute in the development of common law doctrine", L.Q.R. 2001, 117(Apr), 254-255.
[24] Such as the common law principle that a person who is absent and unheard of for seven years is presumed to be dead which is based on statute. Beatson does admit though that the

such as *Erven Warnink BV v J Townend & Sons (Hull) Ltd*,[25] where Lord Diplock states, *obiter*:

> "Where over a period of years there can be discerned a steady trend in the legislation which reflects the view of successive Parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed on a parallel rather than a diverging course."

3.4.4. Although there is very little by way of legislation in the field of domicile law, the same cannot be said of family law where successive Parliaments have legislated for persons to be legal parents of children with whom they have no genetic relationship. The rules for determining an individual's domicile of origin, being common law rules, do not currently envisage that they could apply to non-genetic parents (except by virtue of the presumption of legitimacy). By proceeding on a parallel rather than a diverging course with this steady trend in legislation, a modified method for determining an individual's domicile of origin could look to statute for guidance, in particular by contemplating that the rules could refer to a non-genetic parent that is a legal parent by virtue of statute. More generally, both UK statutes and, to an extent, foreign statutes, may offer clues as to how the common law might proceed when resolving the problem identified in respect of each of the four categories of children for whom the rules do not currently function effectively. It is to these four categories of children that the discussion now turns.

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concept of a statute having gravitational pull on the common law is a controversial area with an ad hoc feel about it.

[25] *Erven Warnink BV v J Townend & Sons (Hull) Ltd* [1979] AC 731 at 743.

4. PROPOSED MODIFICATIONS TO THE COMMON LAW RULES FOR DETERMINING AN INDIVIDUAL'S DOMICILE OF ORIGIN

4.1. This Part will speculate about what the modified common law rules for determining an individual's domicile of origin might look like so that the problem identified can be resolved. It will be recalled that the four categories of individuals affected by the problem identified are: legitimate children with two women as parents from birth; children that are subject to a parental order with same sex commissioning parents; adopted children with a sole adoptive mother; and, adopted children with same sex adoptive parents. In each case it is submitted that the offending statutory provisions have impliedly modified the common law rules because they have altered the basis on which those rules are founded.

4.2. Legitimate children with two women as parents from birth

4.2.1. Where a legitimate child has two women as parents from birth, that child is unable to determine its domicile of origin under Rule 9(1)(a) because the child has no legal father to refer to. The offending statutory provisions in this case are ss.42 and 43 HFEA 2008 (which provide that a child may have a legal female parent at birth) and s.1 LA 1976 and s.48(6) HFEA 2008 (which provide that a child with two women as parents may be legitimate in certain circumstances). It is submitted that these provisions, and indeed other provisions within HFEA 2008, guide the common law by referring to the legal female

parent as a parent rather than as a mother.[26] On this basis it is arguable that Rule 9 will be modified for legitimate children in this category to determine their domicile of origin by reference to their legal mother's domicile at the time of their birth.[27]

4.2.2. There are two reasons to support this proposition: firstly, it offers a practical approach in distinguishing between the two legal parents because only one of them can be the legal mother[28]; and secondly, the woman who gave birth to the child is, at common law, assumed to be the child's legal mother so it is likely that the common law would favour her over the legal female parent.[29]

4.3. **Children that are subject to a parental order with same sex commissioning parents**

4.3.1. Where a child has two commissioning mothers or two commissioning fathers and is the subject of a parental order, that child is unable to determine its domicile of origin under Rule 9(1)(a) (as read with Rule 9(2)) because it has more than one legal father, or no legal father, to refer to. The offending statutory provisions in this case are s.54 HFEA 2008 (which provides that the child may

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[26] See, for example, references to the "parent" in ss.42-46 HFEA 2008. By contrast, s.33 HFEA 2008 refers to the legal parent identified by that provision as a mother.

[27] I.e. the woman who gave birth to the child, who is identified as a legal mother by the common law (where the fertility treatment involved artificial insemination) or by s.33 HFEA 2008 (in any other case). The alternative argument to the one submitted is that the child's domicile of origin should be determined by reference to the legal female parent because she has taken the place of the legal father. Although it does not apply in the context of a common law rule, s.53 HFEA 2008 could be used to support this argument. It provides that for the interpretation of any enactment, deed or any other instrument or document (whenever passed or made) any reference (however expressed) to the father of a child should be read as being a reference to the legal female parent identified by the Act.

[28] By contrast, it is possible that neither parent is a genetic parent (the egg having been provided by an egg donor).

[29] Indeed, if the child was conceived by artificially inseminating a woman with donor sperm, she is the legal mother at common law in any case.

have two commissioning parents of the same sex) and reg.2 SI 2010/985 (which provides for the child to be legitimate). The modified common law rule may be guided by s.54(1)(b) HFEA 2008 which provides that one of the commissioning parents to the parental order must be a genetic parent. On this basis, it is arguable that Rule 9 will be modified to determine the child's domicile of origin by reference to the domicile, at the time of the child's birth, of the commissioning parent that is a genetic parent.

4.3.2. Again, there are two reasons to support this proposition: firstly, it is a practical way of distinguishing between the two legal parents because only one of them can be a genetic parent; and, secondly, at common law the child's genetic parents are already identified as its legal parents[30] and therefore it is reasonable to assume that the common law would follow an approach that favours the genetic parent.

4.3.3. Although writing in a section on domicile of dependency, *Dicey* appears to support this proposition when commenting as follows:

> "Technological advances and legal reforms now mean that a child can be recognised in law as being a legitimate child of parents of the same sex. This takes the determination of the domicile of such children into unchartered waters and creates a practical problem where the parents do not share a common domicile. In the case of a child who is the subject of a parental order an objective method of choosing between

[30] Subject to the possibility that the presumption of legitimacy may identify a man as the legal father when he is not a genetic parent of the child.

the two parents would be for the child to take the domicile of the parent whose gametes were used to bring about the creation of the embryo."[31]

4.4. **Adopted children with a sole adoptive mother**

4.4.1. Where a child is adopted by a sole adoptive mother, that child is unable to determine its domicile of origin under Rule 9(1)(a) (as read with Rule 9(2)) because it has no legal father to refer to. The offending statutory provisions in this case are s.51 ACA 2002 (which provides that a child may be adopted by one person only) and s.67(2) ACA 2002 (which provides that an adopted child is a legitimate child). It is submitted that by providing for an adoptive mother to be an adopted child's only legal parent to the exclusion of all other persons, the statute guides the common law to refer the child's domicile of origin to that of the adoptive mother.[32] It is likely therefore that Rule 9 will be modified to determine the adopted child's domicile of origin by reference to the domicile of its sole adoptive mother at the time of its birth. Realistically there seems to be no alternative to this proposition given that the adopted child has only one legal parent.

4.5. **Adopted children with same sex adoptive parents**

4.5.1. Where a child has two adoptive fathers or two adoptive mothers, that child is unable to determine its domicile of origin under Rule 9(1)(a) (as read with Rule 9(2)) because they have more than one legal father, or no legal father, to refer to. The offending statutory

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[31] A. Dicey, J. Morris and Lord Collins of Mapesbury, *The Conflict of Laws* (2012), p.170.
[32] The common law could also draw on a foreign statute such as the Domicile Act 1982 (DA 1982), an Australian Act of Parliament, which states at s.9(2)(b) that the domicile of an adopted child with one adoptive parent is determined by reference to that parent.

provisions in this case are s.50 ACA 2002[33] (which provides that a child may be adopted by two persons of the same sex), s.51(2) ACA 2002 (which provides that one person may adopt a child without extinguishing the legal parenthood of their same sex partner),[34] and s.67(2) ACA 2002 (which provides that an adopted child is a legitimate child). As there are a number of different permutations for an adopted child with same sex adoptive parents, each of the relevant boxes of Illustration 6[35] (i.e. boxes 54, 55, 56, 58, 59, 61 and 62) needs to be considered separately.

4.5.2. *Box 54*

4.5.2.1. In box 54, the adopted child has two adoptive mothers who had no prior parental relationship with the child before the adoption order. Consequently, there is no obvious means of distinguishing between the adoptive parents in determining the child's domicile of origin.

4.5.2.2. It is reasonable to assume that if the two adoptive parents have the same domicile at the time of their adopted child's birth, a court would in all likelihood ascribe this domicile as the child's domicile of origin. The common law could be guided in this respect by the Family Law (Scotland) Act 2006 (FLSA 2006)[36] which states – albeit

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[33] As read with s.144(4) ACA 2002.

[34] As noted in fn.87, p.80, the existing legal parent is not strictly an adoptive parent but has been called one for ease of reference.

[35] See Paragraph 7.3.8 of Chapter 3.

[36] Although s.22 FLSA 2006 is a foreign statutory provision in the context of English law, Beatson argues that the common law can look to statute – both local and foreign – for possible guidance to the problems that it faces (J Beatson, "The role of statute in the development of common law doctrine", L.Q.R. 2001, 117(Apr), 250). Although this cannot be taken too far (as was the case in *Wong Mee Wan v Kwan Kin Travel Services*) it is plausible that the common law of England and Wales could look to a Scottish statute for guidance. It could also look to the law of Manitoba, where a similar rule to s.22 FLSA 2006 can be found in s.9 Domicile and Habitual Residence Act 1983 (DHRA 1983).

in the context of determining a child's domicile generally – at s.22, that:

> "(1) Subsection (2) applies where—
>
> (a) the parents of a child are domiciled in the same country as each other; and
>
> (b) the child has a home with a parent or a home (or homes) with both of them.
>
> (2) The child shall be domiciled in the same country as the child's parents."

4.5.2.3. However, where the adoptive parents do not share a common domicile[37] at the time of the adoptive child's birth, recourse must be had to a different rule altogether. The only accepted method of determining a child's domicile of origin which currently operates independently of the child's parents is that which is applicable to a foundling; such children have their domicile of origin in the place where they are found. This somewhat arbitrary method is unlikely to be appropriate for an adopted child. In Parts 4.5.7 and 4.5.8 below, two new methods are suggested instead, being, the main economic support test and the closest connection test.

4.5.3. *Box 55*

4.5.3.1. In box 55, the adopted child has two adoptive mothers, both of whom were legal parents of their adopted child prior to the adoption order (one being its legal mother and the other being its legal female parent). For the reasons stated in Paragraphs 4.2.1 and 4.2.2 above, it is arguable that the modified rule would determine

[37] Indeed, s.49(2) ACA 2002 envisages that this scenario may occur because it only requires one of the applicants to the adoption order to be domiciled within the British Isles.

the adopted child's domicile of origin by reference to the domicile, at the time of the child's birth, of the adoptive mother that was previously the child's legal mother.

4.5.4. *Box 56*

4.5.4.1. In box 56 the adopted child has two adoptive fathers who had no prior parental relationship with the child before the adoption order. The child is therefore in the same position as a child in box 54 and the comments made in Part 4.5.2 above apply equally here.

4.5.5. *Box 58 and 59*

4.5.5.1. In box 58 the adopted child has two adoptive mothers, one of whom was either a genetic parent or a legal parent of the child at its birth (the other adoptive parent having had no prior parental relationship with the child before the adoption order). In box 59 the same is true except in relation to two adoptive fathers. It is arguable that the modified rule for determining the adopted child's domicile of origin would refer to the domicile, at the time of the child's birth, of the adoptive mother/father who was a genetic or a legal parent of the child at its birth.

4.5.6. *Box 61 and 62*

4.5.6.1. In box 61 the adopted child has two adoptive mothers, both of whom had a prior parental relationship with the child before the adoption order, one as a genetic parent and the other as a legal

parent.[38] One of the women adopts the child as a partner of the other. In this case it is most likely that the woman who adopts the child is the one that was previously a genetic parent, whilst the other woman maintains her status as a legal parent (i.e. it is not extinguished by the order). In box 62 the same is true except in relation to two adoptive fathers.

4.5.6.2. Assuming the adoption is made by the genetic parent as suggested above, it could be said that the common law would favour that person because after the adoption order he/she is both a genetic parent and a legal parent of the adoptive child. On the other hand, the common law could favour the existing parent because he/she has been a legal parent of the adopted child since its birth (indeed, the child may have already determined its domicile of origin by reference to that parent at birth). It is suggested that the modified rule for determining the child's domicile of origin would refer to the domicile, at the time of the child's birth, of the existing parent.

4.5.6.3. Having made suggestions about how the common law rules for determining an individual's domicile of origin may be modified for adopted children in most cases, the subject of boxes 54 and 56 must be revisited as regards adopted children whose same sex adoptive parents have different domiciles at the time of the child's birth. As noted above, there are two tests which could assist in

[38] As the existing legal parent could have been the child's legal mother or legal female parent, the common law cannot favour the existing legal parent on the basis that she is referred to as a mother rather than a parent in HFEA 2008.

determining the domicile of origin of such children, being, the main economic support test and the closest connection test.

4.5.7. *The main economic support test*

4.5.7.1. The main economic support test could be used to distinguish between the two adoptive parents by asking which adoptive parent provides the main economic support to the family. The test is borrowed from the terminology used by The Law Commission and The Scottish Law Commission in their 1985 report ("the 1985 Report") on domicile.[39] It concluded that the economic centre of the family unit, which is indicative of a person's permanent home, is usually with the father:

> "No good case has been made out for changing from reference to the domicile of the father to that of the mother, given that in many cases the father will still provide the main economic support in the family which is likely to be located and have its roots and home where he is."[40]

4.5.7.2. In some cases it will be clear which adoptive parent provides the main economic support to the family. However, the primary

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[39] The Law Commission and The Scottish Law Commission, *Private International Law: The Law of Domicile* (HMSO 1985), Law Com.168 and Scots Law Com.107.

[40] The Law Commission and The Scottish Law Commission, *Private International Law: The Law of Domicile* (1985), pp.17-18. There is an historical basis for this approach. The concept of domicile was devised in Roman law as a way of determining a Roman citizen's legal jurisdiction. Citizenship could be achieved by various means: origo (the place within the Empire that a legitimate child's father, or illegitimate child's mother, was born); election; adoption; and, manumission. If a person was a citizen of nowhere, the appropriate jurisdiction was determined by reference to their domicile. These legal concepts were revived by the post-glossator jurists in the 13th century, refined in the 16th century by French jurists, and in the 17th century by Dutch jurists, before the basic rules of domicile emerged in the common law of England and Wales in the 19th century as understood settled principles of law (as seen in *Somerville v Somerville* [1801] 31 ER 839, *Munro v Munro* (1840) 1 Rob. App., and *Udny v Udny* [1869] LR 1 Sc & Div 441) (Practical Law, "Domicile" (Thomson Reuters). *Practicallaw.com, http://uk.practicallaw.com/books/9781847667670/chapter08#ftn.d65647e403* [Accessed December 1, 2016]). The Roman concept of the paterfamilias is inherent in the origins of the laws of domicile and this has been passed down to the common law of England and Wales. By way of illustration, the domicile of a woman who married before 1 January 1974 follows her husband's domicile as a domicile of dependency.

disadvantage of this test is that many cases will lead to more ambiguous results. For example, how would the test distinguish between an adoptive parent with capital wealth and another who provides the family's annual income? Furthermore, how would the test distinguish between adoptive parents who provide economic support to the family in similar or equal measures? Such a test may have been easier to apply historically, but it is unlikely to be appropriate to the UK now or in the future. Nevertheless, if the courts were asked to determine the domicile of origin of an adopted child within box 54 or 56 above, and it was held that each case should be decided on its own facts taking all of the relevant factors into account, the main economic support test is likely to be one of those factors considered.

4.5.8. *The closest connection test*

4.5.8.1. The closest connection test is also borrowed from the 1985 Report where it was recommended that the test could be applied to children who were unable to determine their domicile using the Law Commission's proposed amendments to the existing laws of domicile.[41] The test determines the child's domicile by considering which jurisdiction the child is most closely connected with, taking into account all the circumstances of the case.[42] The test is useful

[41] The Law Commission and The Scottish Law Commission, *Private International Law: The Law of Domicile* (1985), pp.15-20. The test of closest connection was suggested as a method of determining a child's domicile generally and formed part of their wider recommendation to abolish the concept of domicile of origin altogether.

[42] These circumstances are likely to include: the intentions of the child, if any, and of its parents or of those who have control over him; the child's, and its parents', nationality; the child's residence status; and the child's family background (The Law Commission and The Scottish Law Commission, *Private International Law: The Law of Domicile* (1985), p.16). A presumption of the test as recommended by the 1985 Report is that if the child has a home with one or both of their parents and those parents have a shared domicile, that domicile would be the child's

in this context because it can be applied to a child independently of their parents.

4.5.8.2. The recommendations of the 1985 Report were not implemented in England and Wales; however, FLSA 2006 did enact some of them into Scots Law. Section 22(3) FLSA 2006 applies the closest connection test to determine a child's domicile in circumstances where the child's parents do not share the same domicile or where the child is not living with either of them. However, the Act also abolishes the concept of domicile of origin in Scotland so that the closest connection test is applied for a different purpose than envisaged in this context.[43] Despite this, the common law of England and Wales could look to this legislation – coming as it does from another common law jurisdiction – when responding to the problem identified.[44] Failing this, the common law could simply look to the 1985 Report itself for guidance. *Dicey*, although commenting in the context of domicile of dependency, makes this point:

> "In the absence of any biological link a determination will simply have to be made on the facts of the case. Regard may be paid to the recommendations of the Law Commission … which if implemented would provide a framework for solving such cases."[45]

4.5.8.3. The test is not free of complication. Firstly, it was not recommended by the 1985 Report, or enacted in FLSA 2006, for

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domicile. However, in the present context of determining a child's domicile of origin for adopted children whose same sex parents do not share a common domicile at the time of the birth, this presumption is not relevant.

[43] In particular, the child's domicile as determined by s.22 FLSA 2006 is more akin to a domicile of dependency or choice, neither of which have the tenacity of a domicile of origin.

[44] See fn.36, p.110. The closest connection test has also been used to determine the domicile of children under the law of South Africa (see s.2 Domicile Act 1992 (DA 1992)).

[45] A. Dicey, J. Morris and Lord Collins of Mapesbury, *The Conflict of Laws* (2012), p.170.

use in determining an individual's domicile of origin which could revive at any point in one's life,[46] rather it is for use in determining the domicile of children "for the time being" (i.e. generally).[47] Secondly, it is possible for a child to have its closest connection with a country in which its parents are not domiciled. Of itself this is not necessarily an issue but it does represent a significant departure from the existing rules which are dependent on the domicile of one of the child's parents. Thirdly, in line with the other rules for determining an individual's domicile of origin, the test ought to be applied at the child's birth; however, at this point the adoptive parents have no parental relationship with the child and therefore it is not an appropriate time to apply the test. Instead it would be better to apply the test at the time of the child's adoption. Finally, the 1985 Report suggests that no specific guidance is written into statute regarding the practical application of the test so that it would be for the courts to decide how the test would work in each case.[48] It should not be forgotten that one of the most desirable outcomes to any modification of Rule 9 is greater certainty for individuals who are currently unable to determine their domicile of origin.

4.5.8.4. Notwithstanding these issues, the closest connection test may still be the most appropriate resolution for determining the domicile of

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[46] As the 1985 Report states: "Our conclusion is that a test of closest connection would be more appropriate than any other for determining the domicile of a child under the age of 16, given our decision to recommend the abandonment of the doctrine of dependency" (The Law Commission and The Scottish Law Commission, *Private International Law: The Law of Domicile* (1985), p.16).

[47] The Law Commission and The Scottish Law Commission, *Private International Law: The Law of Domicile* (1985), p.18.

[48] The Law Commission and The Scottish Law Commission, *Private International Law: The Law of Domicile* (1985), p.18.

origin of a child in these circumstances. The initial working paper for the 1985 Report stated that:

> "Though such a closest connection test might have the disadvantage of uncertainty, it would, we think, be better than any other test for the purpose of ascribing a domicile to children … not least because it would not involve attempting to judge between two equally appropriate or inappropriate parental domiciles."[49]

4.5.8.5. Therefore, where box 54 or 56 applies to a child that has been adopted by two persons of the same sex who do not share the same domicile at the time of that child's birth, the modified method for determining that child's domicile of origin could operate by applying the closest connection test to that child at the time of the adoption order.[50]

5. CONCLUSION

5.1. The aim of this chapter was to draw on the findings made in Chapter 1 regarding a child's legitimacy status, and the findings made in Chapter 3 regarding a child's legal parents, to discuss the application of the common law rules for determining an individual's domicile of origin in the context of s.835BA ITA 2007. Part 2 applied these rules to each of the categories of legal children set out in Chapter 1 and it was shown that in most cases the rules function effectively. However, children who fall into one of the four

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[49] The Law Commission and The Scottish Law Commission, *Private International Law: The Law of Domicile* (HMSO 1985), Working Paper No.88 and Consultative Memorandum No.63, p.33.

[50] It should be appreciated that the main economic support test and the closest connection test are not the only methods by which the courts could determine the domicile of origin of an adopted child in these circumstances. Indeed, the 1985 Report does suggest other methods such as one based on habitual residence or nationality. It is submitted that the two tests set out above represent the most plausible options, with the closest connection test being preferable to the main economic support test.

categories listed in Paragraph 2.10.2 above are not able to determine their domicile of origin under the current rules.

5.2. The inability of individuals in any one of these four categories to determine their domicile of origin has been referred to as the problem identified. Part 3 analysed the relationship between statute and the common law in this context and, building on the submissions made therein, Part 4 sought to find resolutions to the problem identified by speculating about what the modified common law rules would look like. The following suggestions were made:

- *Legitimate children with two women as parents from birth:* it is argued that Rule 9 will be modified to determine the child's domicile of origin by reference to its legal mother's domicile at the time of its birth.
- *Children that are subject to a parental order with same sex commissioning parents:* it is argued that Rule 9 will be modified to determine the child's domicile of origin by reference to the domicile, at the time of the child's birth, of the commissioning parent that is also a genetic parent.
- *Adopted children with a sole adoptive mother:* it is likely that Rule 9 will be modified to determine the child's domicile of origin by reference to the domicile, at the time of the child's birth, of the sole adoptive mother.
- *Adopted children with same sex adoptive parents:*

    a) boxes 54 and 56: if the adoptive parents had a shared domicile at the time of the child's birth, it is argued that Rule 9 will be modified to determine the child's domicile

of origin by reference to that shared domicile. However, if the adoptive parents do not share a common domicile at the time of the child's birth, the modified rule will operate by applying the closest connection test to that child at the time of the adoption order.

b) box 55: it is argued that the modified rule will determine the child's domicile of origin by reference to the domicile, at the time of the child's birth, of the adoptive mother that was previously the child's legal mother.

c) boxes 58 and 59: it is argued that the modified rule will determine the child's domicile of origin by reference to the domicile, at the time of the child's birth, of the adoptive mother/father who was previously a genetic or a legal parent.

d) boxes 61 and 62: it is argued that the modified rule will determine the child's domicile of origin by reference to the domicile, at the time of the child's birth, of the existing parent.

5.3. The above discussion exposes the high level of uncertainty caused by the problem identified and the additional complexity it adds to the law of domicile. As the problem identified is not confined to s.835BA ITA 2007, but also affects other areas of UK tax law and general law, this uncertainty and complexity is of great concern. With this in mind, Parliament may wish to intervene and resolve the problem; however, this may involve retrospective legislation or even a complete overhaul of the concept of domicile of origin (as has

been attempted before). As the number of individuals falling within one of the four categories affected is likely to increase, Parliament should consider its approach to the problem identified as a matter of urgency.

CONCLUDING REMARKS

The objective of this thesis is to investigate what it means to be a legal child and a legal parent in UK tax law in an era of complex family networks before applying this to particular aspects of UK tax law.

By finding the meaning of the word “child” as it appears in the family tie of the statutory residence test, Chapter 1 established the general rule for determining whether an individual is the legal child of another person in UK tax law. The general rule, which applies for the purposes of statutory interpretation (and is subject to any intrinsic aid of construction in a statute), is that a legal child is one who is a legitimate or illegitimate child. Legitimate children, whether legitimate at common law or by virtue of statute, are contemplated by the general rule due to the conventional statutory meaning of the word “child” as determined by the courts. Illegitimate children are contemplated by the general rule by virtue of s.1 FLRA 1987. The general rule includes a number of children who are born in to one of the family structures that have replaced the traditional nuclear family structure (for example certain children with two women as parents). However, the general rule remains exclusive. Therefore, a number of persons – such as those listed in Paragraph 5.3.8 of Chapter 1 – who may consider, for whatever reason, that an individual is a child of theirs will not be able to call that individual their legal child unless it is their legitimate or illegitimate child.

In Chapter 2, it was shown that the general rule is modified to exclude illegitimate children in respect of the benefits code in ITEPA 2003 but not in respect of the deemed distribution rule in s.1064 CTA 2010, even though both Acts were born out of ICTA 1988. The position in ITEPA 2003 seems to be

untenable in today's society, whilst the position at CTA 2010 has brought about an unexpected and apparently unintentional change in the law. This disparity between the two Acts should be rectified. Parliament could either bring CTA 2010, and the other Re-write Acts, in line with ITEPA 2003 by excluding illegitimate children from the general rule or, more likely, amend s.721(6) ITEPA 2003 to include illegitimate children within the meaning of the word "child" in that Act.

Chapter 3 identified, for the purpose of determining an individual's domicile of origin in the context of s.835BA ITA 2007, the legal parents of those children who are within the general rule established in Chapter 1. It was shown that at common law a child's legal parents are identified according to genetic parenthood and it is presumed that a legitimate child's legal father is the husband to the marriage by reference to which the child is legitimate. Illegitimate children have only one legal parent at common law; being their legal mother. Legal parenthood at birth can also be determined by statute (irrespective of the child's legitimacy status): a child may have a legal mother identified by s.33 HFEA 2008, s.27 FLRA 1987, or s.27 HFEA 1990; a legal father identified by s.35 or s.36 HFEA 2008, s.28 HFEA 1990, or s.27 FLRA 1987; or, a legal female parent identified by s.42 or s.43 HFEA 2008. Legal parenthood may also be determined by statute during a child's lifetime by identifying the adoptive parents to an adoption order, or the commissioning parents to a parental order, as a child's legal parent(s). Where a legal parent of a legal child has been identified it can be said that a legal parent-child relationship exists between them and a summary of these relationships is shown in Illustration 8 (see Appendix 1). Illustration 8 highlights the level of complexity involved in identifying a child's legal parents. A number of the legal

parents identified will form a family structure that has replaced the traditional nuclear family (for example same sex adoptive parents); however, a legal parent cannot be identified by any other means. Therefore, a number of persons – such as those listed in Paragraph 8.5 of Chapter 3 – who may consider, for whatever reason, that an individual is their parent will not be able to call that individual their legal parent unless identified as such by these rules.

Chapter 4 discussed the application of the common law rules for determining an individual's domicile of origin in the context of s.835BA ITA 2007 (although it was noted that the discussion applies to other areas of UK tax law and general law where the concept of domicile of origin is relevant). It was shown that there are four categories of individuals who are unable to determine their domicile of origin based on the current rules and this was referred to as the problem identified. Suggestions were made as to how the common law might resolve this problem. It was noted that any intervention by Parliament in this regard would have to be retrospective to deal with the present situation of individuals affected. Parliament could follow Scots Law by abolishing the concept of domicile of origin; however, the Scottish experience acts as cautionary tale about the complications of this task.[1] Moreover, Condition A of s.835BA ITA 2007 would become obsolete if this abolition were to occur. As the number of

[1] Sirko Harder notes that having supposedly abolished the concept of domicile of origin in Soctland there are four possible approaches to understanding the relationship between s.22 FLSA 2006 (see Paragraph 4.5.2.2 of Chapter 4 above) and domicile of origin. The first approach is to apply s.22 FLSA 2006 to individuals under the age of 16 but, on reaching that age, the common law rules are restored. The second approach is that a child attains a domicile of origin at birth, and then immediately turns to s.22 FLSA 2006 to determine their domicile, before returning again to the common law rules on reaching the age of 16. The third approach is to determine a child's domicile under s.22 FLSA 2006 at birth, throughout childhood, and then beyond the age of 16. The fourth approach is the one that Harder finds the most satisfactory; it is to determine the domicile of an individual under the age of 16 using s.22 FLSA 2006, and thereafter under the common law rules with the exception of the revival of the domicile of origin (Sirko Harder, "Domicile of children: The new law in Scotland", Edinburgh L. Rev. 2008, 10, 394-5). It is also unclear how an individual in Scotland would determine their domicile of origin (if still required to) given that the concept of illegitimacy has been abolished. Furthermore, and in light of the above comments, Condition A of s.835BA 2007 is not easily construed in relation to an individual governed by Scots Law.

non-nuclear families increase, the population of taxpayers affected by this issue is also likely to grow. If the courts are to be spared dealing with the problem identified through contentious litigation, Parliament must address the issue as a matter of urgency.

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1973 Domicile and Matrimonial Proceedings Act (DMPA 1973)

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1976 Legitimacy Act (LA 1976)

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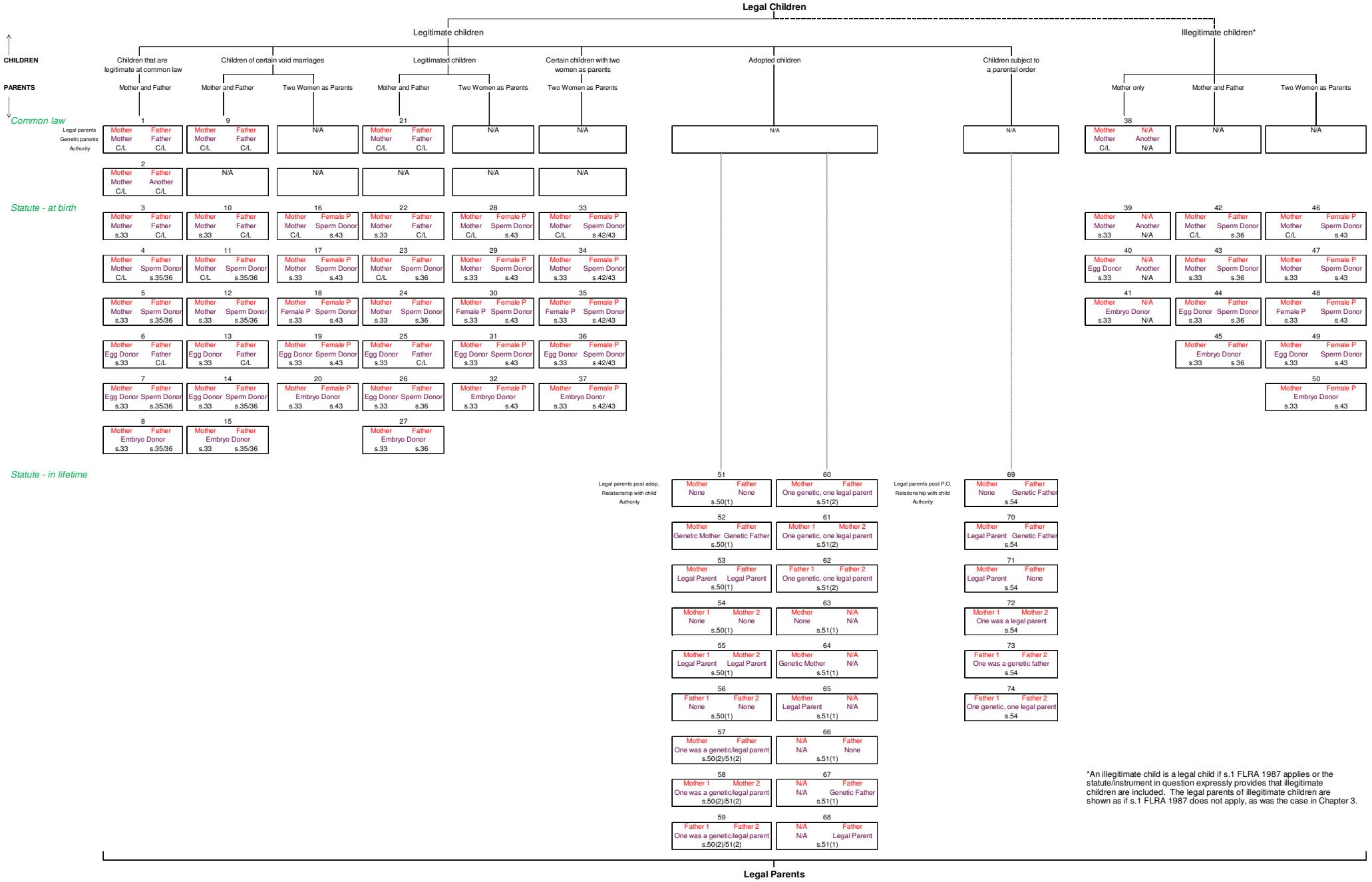
APPENDIX 1


Legal Children
Legitimate children
Illegitimate children*
CHILDREN
PARENTS
Children that are legitimate at common law
Children of certain void marriages
Legitimated children
Certain children with two women as parents
Adopted children
Children subject to a parental order
Mother only
Mother and Father
Two Women as Parents
Common law
Statute - at birth
Statute - in lifetime
Legal parents
Genetic parents
Authority
Legal parents post adop.
Relationship with child
Authority
Legal parents post P.O.
Relationship with child
Authority
Legal Parents
*An illegitimate child is a legal child if s.1 FLRA 1987 applies or the statute/instrument in question expressly provides that illegitimate children are included. The legal parents of illegitimate children are shown as if s.1 FLRA 1987 does not apply, as was the case in Chapter 3.

APPENDIX 2

The comments below provide examples of how legal parents might be identified in accordance with the boxes referred to in Illustrations 1 to 7, as summarised in Illustration 8.

Illustration 1

Boxes 1 to 8 refer to the legal parents of children that are legitimate at common law. For the child to be legitimate at common law, its parents must be a husband and wife (either at the time of conception or at the time of the birth).

Box 1: A husband and wife conceive a child naturally or by artificially inseminating the husband's sperm in the wife.

Box 2: A child is born to a husband and wife, however, the husband is not the genetic father (because, for example, the child was conceived as a result of an extra-marital affair). The husband is identified by the common law as the child's legal father unless and until he rebuts the presumption of legitimacy.

Box 3: A husband and wife conceive a child using their own genetic material but in the context of a fertility treatment that involves placing their sperm and eggs, or their embryo, in the wife.

Box 4: A husband and wife conceive a child by artificially inseminating the wife with donor sperm.

Box 5: A child is born to a husband and wife and that child is conceived in the context of a fertility treatment that involves donor sperm and her eggs, or an embryo created with donor sperm and her eggs, being placed in her.

Box 6: A child is born to a husband and wife and that child is conceived in the context of a fertility treatment that involves his sperm and donor eggs, or an embryo created with his sperm and donor eggs, being placed in the wife.

Box 7: A child is born to a husband and wife and that child is conceived in the context of a fertility treatment that involves donor sperm and donor eggs, or an embryo created with them, being placed in the wife.

Box 8: A husband and wife conceive a child using a donated embryo.

Illustration 2

Boxes 9 to 20 apply to children of certain void marriages. The comments made above regarding box 1 and boxes 3 to 8 apply equally to boxes 9 to 15 respectively, except that the husband and wife are party to a void marriage.

Children of certain void marriages may also have two women as their legal parents where those women enter into a void marriage after the fertility treatment by which the child was conceived but before the child's birth.[1] These children identify their parents according to boxes 16 to 20.

Box 16: A child is conceived by artificially inseminating a woman with donor sperm and she subsequently enters into a void marriage with another woman.

Box 17: A child is conceived in the context of a fertility treatment that involves placing in a woman donor sperm and her eggs, or an embryo created with donor sperm and her eggs, and that woman subsequently enters into a void marriage with another woman.

Box 18: A child is conceived using donor sperm and the eggs of a woman ("woman 1"), in the context of a fertility treatment that involves placing the sperm and eggs, or an embryo created with them, in another woman ("woman 2"), and those women subsequently enter into a void marriage. Woman 1 is the child's legal female parent, and woman 2 is the child's legal mother.

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[1] If the two women are party to a void marriage at the time of the treatment, the child will be in the category for certain children with two women as parents.

Box 19: A child is conceived using donor sperm and donor eggs in the context of a fertility treatment that involves placing the sperm and eggs, or an embryo created with them, in a woman, and that woman subsequently enters into a void marriage with another woman.

Box 20: A child is conceived by placing a donated embryo in a woman, and that woman subsequently enters into a void marriage with another woman.

Illustration 3

Boxes 21 to 32 apply to legitimated children. The comments made above regarding box 1 and boxes 3 to 8 apply equally to boxes 21 to 27 respectively, except that the husband and wife marry after the child's birth. The comments made above regarding boxes 16 to 20 apply equally to boxes 28 to 32 respectively, except that the two women enter into a valid/voidable marriage after the child's birth, rather than a void marriage in the period between the fertility treatment and the child's birth.

Illustration 4

Boxes 33 to 37 apply to certain children with two women as parents. The comments made above regarding boxes 16 to 20 apply equally to boxes 33 to 37 respectively, except that the two women are either married at the time of the fertility treatment or they enter into a civil partnership in the period between the fertility treatment and the child's birth.

Illustration 5

Boxes 38 to 50 apply to illegitimate children. The comments made above regarding boxes 4 to 5 and 7 to 8 apply equally to boxes 42 to 43 and 44 to 45 respectively, except that the husband and wife are instead a man and a woman who are not married. The comments made above regarding boxes 16 to 20

apply equally to boxes 46 to 50 respectively, except that the two women are neither married nor in a civil partnership (or they married in the period between the fertility treatment by which the child was conceived and the child's birth – see Paragraph 4.5.4.4). The other boxes relevant to this category (i.e. boxes 38 to 41) are dealt with below.

Box 38: A child has a legal mother only and she is identified as a legal parent by the common law. For example, an unmarried heterosexual couple conceive a child naturally. In this scenario a legal father cannot be identified because the child is illegitimate. Therefore the child has one legal parent. None of the relevant statutory provisions can apply because the child is conceived naturally and not in the context of a fertility treatment.

Box 39: A child has a legal mother only and she is identified as a legal parent by s.33 HFEA 2008. She has also provided the egg necessary for the child's conception. For example, an unmarried man and woman conceive a child using their own genetic material in the context of a fertility treatment that involves placing their sperm and eggs, or an embryo created with them, in the woman. The man cannot be identified as a legal father by s.35 or s.36 HFEA 2008 because his sperm was used in the course of the treatment and therefore the child has one legal parent.

Box 40: A child has a legal mother only and she is identified as a legal parent by s.33 HFEA 2008. The egg necessary for the child's conception is provided by an egg donor. For example, a single woman conceives a child using donor eggs and donor sperm in the context of a fertility treatment that involves the sperm and eggs, or an embryo created with them, being placed in her. She is the only person who can be identified as a legal parent in this scenario and therefore the child has one legal parent.

Box 41: A child has a legal mother only and she is identified as a legal parent by s.33 HFEA 2008. She has conceived the child using a donated embryo. For example, a woman (who is in a civil partnership) conceives a child using a donated embryo, however, her civil partner has not consented to the treatment. Her civil partner cannot be identified as a legal parent by s.42 HFEA 2008 and therefore the child has one legal parent.

Illustration 6

Boxes 51 to 68 apply to adopted children. In those boxes it is shown that some adoptive parents have a parental relationship (i.e. they were a legal parent or genetic parent) with the adopted child at its birth. In boxes 51 to 56 it is shown how legal parenthood is made possible by s.50(1) ACA 2002 (adoption by a couple where both persons had the same parental relationship with the child at its birth). In boxes 57 to 59 it is shown how legal parenthood is made possible by both s.50(2) ACA 2002 (adoption by a couple where one person was a genetic or legal parent of the child at its birth) and s.51(2) ACA 2002 (adoption by one person as the partner of a child's existing parent). Boxes 60 to 62 can only apply by virtue of s.51(2) ACA 2002. Finally, in boxes 63 to 68 it is shown how legal parenthood is made possible by s.51(1) ACA 2002 (adoption by a sole adoptive parent). Where a child is adopted by one person in the examples below (either under s.51(1) or (2) ACA 2002), it is assumed that the requirements of s.51(4) ACA 2002 are met.[2]

Clearly, where the adoptive parents are a same sex couple, they cannot both have been genetic parents of the adopted child at its birth. Furthermore, where

[2] See Paragraph 7.3.5 above.

the adoptive parents are two men, they cannot both have been legal parents of the adopted child at its birth because this is not possible.

It is worth briefly commenting on some of the reasons for adopting a child where an adoptive parent is the genetic or legal parent of the child at its birth. One reason may be to legitimise an illegitimate child (all adopted children are, from the date of the adoption order, retrospectively treated as having always been the legitimate child of the adoptive parents). Another reason may be to turn a person's status as a child's genetic parent into a child's legal parent. Finally, it may be that a child's genetic or legal parent adopts them so that any other legal parent has their status as a parent extinguished (as is the case in the example given for box 57 below).

Box 51: The adoptive parents are a man and a woman and they have no prior parental relationship with the adopted child.

Box 52: The adoptive parents are a man and a woman and they were both genetic parents of the adopted child at its birth. The only way that a woman can be a genetic parent, but not a legal parent, of a child at its birth is if she provided the eggs necessary for the child's conception but she neither carried the child nor was recognised as its legal female parent by virtue of s.42 or s.43 HFEA 2008.[3] For example, a husband and wife may wish to conceive a child using their genetic material and with the help of a surrogate mother but neither the man nor the woman is identified as the child's legal parent at its birth. If that couple fail to obtain a parental order because they do not meet the conditions in s.54 HFEA 2008, they may instead adopt the child to become its legal parents.

[3] It may be that she simply did not meet the requirements of s.42 or s.43 HFEA 2008.

Box 53: The adoptive parents are a man and a woman and they were both legal parents of the adopted child at its birth. For example, an unmarried man and woman conceive a child using a donated embryo. They may be identified as legal parents by ss.33 and 36 HFEA 2008 respectively. They may adopt the child to alter its status as illegitimate.

Box 54: The adoptive parents are two women and they have no prior parental relationship with the adopted child.

Box 55: The adoptive parents are two women and they were both legal parents of the adopted child at its birth. For example, a woman conceives a child in the context of a fertility treatment involving the artificial insemination of donor sperm. She is identified as the child's legal mother at its birth. Another woman, who is neither married nor in a civil partnership with the legal mother, may be identified as a legal female parent at the child's birth by virtue of s.36 HFEA 2008. The two women may adopt the child to alter its status as illegitimate.

Box 56: The adoptive parents are two men and they have no prior parental relationship with the adopted child.

Box 57: The adoptive parents are a man and a woman, one of whom was a genetic or a legal parent of the adopted child at its birth. For example, a child conceived naturally by a married woman would identify that woman as its legal mother at its birth. If that woman divorces her husband and marries another man, he may adopt the child as the partner of an existing parent so that he and his wife become the child's legal parents. An adoption of this kind would also have the effect of extinguishing the legal parenthood of the wife's first husband.

Box 58: The adoptive parents are two women, one of whom was a genetic or a legal parent of the adopted child at its birth. For example, where a woman conceives a child by artificially inseminating herself with donor sperm. She is

identified as a child's legal mother (and only legal parent) at its birth by the common law. She later marries another woman and together they adopt the child.

Box 59: The adoptive parents are two men, one of whom was a genetic or a legal parent of the adopted child at its birth. For example, where an unmarried man and woman conceive a child naturally, he is not identified as a legal parent of the child at its birth. If he subsequently leaves that woman for a man, that man may adopt the child as the partner of the child's genetic father.

Box 60: The adoptive parents are a man and a woman where, at the birth of the adopted child, one of the adoptive parents was a genetic parent and the other was a legal parent. For example, an unmarried man and woman conceive a child using their own genetic material in the context of a fertility treatment that involves placing their sperm and eggs, or an embryo created with them, in the woman. That woman is identified as the child's legal mother at its birth by virtue of s.33 HFEA 2008. However, her partner is not recognised as the child's legal father at that time. He may adopt the child as the partner of an existing parent (i.e. the child's legal mother).

Box 61: The adoptive parents are two women where, at the birth of the adopted child, one of the adoptive parents was a genetic parent and the other was a legal parent. For example, a woman ("woman 1") carries a child that is conceived using donor sperm and the eggs of another woman ("woman 2"). The two women are not married or in a civil partnership. Woman 1 is identified as the child's legal mother at its birth by virtue of s.33 HFEA 2008; however, if woman 2 does not satisfy the requirements of s.43 HFEA 2008 she is not identified as the child's legal female parent. Woman 2 may then adopt the child as the partner of woman 1.

Box 62: The adoptive parents are two men where, at the birth of the adopted child, one of the adoptive parents was a genetic parent and the other was a legal parent. The most likely context for this scenario is a surrogacy arrangement where the two men are unable to obtain a parental order because they do not meet the conditions in s.54 HFEA 2008. For example, a child is conceived using the sperm of a man ("man 1") and the egg of a surrogate mother. Another man ("man 2") is identified as the child's legal father at its birth by virtue of s.36 HFEA 2008.[4] Man 1 may then adopt the child as the partner of man 2.

Box 63: The adoptive parent is a woman who has no prior parental relationship with the adopted child.

Box 64: The adoptive parent is a woman who was the genetic parent of the adopted child at its birth (i.e. she provided the egg necessary for the child's conception but she neither carried the child nor was she identified as the child's legal female parent by virtue of s.42 or s.43 HFEA 2008).

Box 65: The adoptive parent is woman who was a legal parent of the child at its birth. The reasons for adopting in this circumstance include to alter the child's status as illegitimate and to extinguish the parental status of another person.

Box 66: The adoptive parent is a man who has no prior parental relationship with the adopted child.

Box 67: The adoptive parent is a man who was the genetic father of the adopted child at its birth. For example, a man conceives a child with his girlfriend but she later becomes estranged from the child. He then adopts the child on his own.

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[4] To have completed the necessary administrative requirements of s.36 HFEA 2008 man 2 would have needed the consent of the surrogate mother to become a legal father. Such an arrangement is not uncommon because it provides at least one of the men with the security of being a legal parent at the child's birth. The legal father and genetic father in this case cannot be the same person because as this is a requirement of ss.35 and 36 HFEA 2008.

Box 68: The adoptive parent is a man who was the legal parent of the child at its birth. For example, a single man wishes to be a parent and therefore finds a surrogate mother to carry a child that is conceived in the context of fertility treatment using, for example, his sperm and her egg. If he meets the requirements of s.36 HFEA 2008 at the child's birth, he is identified as its legal parent at that time. However, being single, the man is unable to obtain a parental order and therefore he may adopt the child alone to extinguish the surrogate mother's status as a legal parent and to alter the child's status as illegitimacy.

Illustration 7

Boxes 69 to 74 apply to children who are subject to a parental order. In those boxes it is shown that a commissioning parent may have a parental relationship (i.e. they were a legal parent or genetic parent) with the child at its birth. At present, a parental order can be granted only to two commissioning parents; one of whom must have been a genetic parent of the child at its birth.[5] It is assumed in this illustration that neither of the commissioning parents was married to, or in a civil partnership with, the surrogate mother.

Male commissioning parents can have been a legal parent of the child at its birth only if identified as such by s.36 HFEA 2008.[6] Due to the requirements of this provision, male commissioning parents that were a legal parent of the child at its birth cannot have provided the sperm necessary for its conception. Therefore the other commissioning parent (whether male or female) must be a genetic parent instead (see boxes 69, 70, 73 and 74 below).

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[5] Where the commissioning parents are of the same sex, only one those parents can have been a genetic parent of the child at its birth.

[6] As it has been assumed that neither commissioning parent was married to the surrogate mother at any time, s.35 HFEA 2008 cannot apply and likewise the presumption of legitimacy cannot apply.

There are a couple of restrictions regarding female commissioning parents. Firstly, the surrogate mother cannot apply for a parental order.[7] Therefore, if a female commissioning parent was a legal parent of the child at its birth, it can only be by virtue of s.43 HFEA 2008.[8] Secondly, she can only have been a genetic parent of the child (i.e. she provided the egg necessary for its conception) if she was also identified as the legal female parent of the child at its birth by virtue of s.43 HFEA 2008. This conclusion can be made because s.47 HFEA 2008 provides that a woman cannot be a legal parent of a child whom she does not carry unless: she is identified as the legal female parent by s.42 or s.43 HFEA 2008; she is required by s.46 HFEA 2008 to be one[9]; or, she becomes the child's adoptive mother. Although multiple references to adoption in HFEA 2008 are extended by Sch.4 SI 2010/987 to include parental orders, the reference to adoption in s.47 HFEA 2008 is not included on that list. Therefore, if a female commissioning parent has provided the egg necessary for conceiving a child that is carried by a surrogate mother, she must also be the legal female parent of that child at its birth if she is to be a legal parent after the parental order has been granted.[10]

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[7] s.54(1)(a) HFEA 2008.

[8] As it has been assumed that neither commissioning parent is married to, or in a civil partnership with, the surrogate mother, s.42 HFEA 2008 cannot apply.

[9] This provision deals with the particulars of the register of births and is not relevant to this discussion.

[10] It is arguable that the parental order would have no effect on her status as a legal female parent and she would continue to be identified as a legal female parent by s.43 HFEA 2008. S.45(4) HFEA 2008 states that: "[Ss.42 and 43 HFEA 2008] do not apply to any child to the extent that the child is treated by virtue of adoption as not being the woman's child." This reference to adoption is another one that is not listed in Sch.4 SI 2010/987 as being extended to parental orders. Therefore, s.43 HFEA 2008 would seem to prevail over the making of a parental order. This means, for example, that where a man and woman both provide the genetic material necessary for the conceiving a child that is carried by a surrogate mother (as may be the case in box 70 below), and the surrogate mother agrees to the woman becoming the child's legal female parent at its birth by virtue of s.43 HFEA 2008, it is not clear whether the woman is identified as a legal parent after the parental order by virtue of being a female commissioning parent or a legal female parent. Taking this point one step further, it could also be argued that the commissioning parents can never be two women because one of those women must be a genetic parent (and as noted above she must therefore also have been a

Box 69: The commissioning parents are a man and a woman and the man's sperm is used to conceive a child that is carried by a surrogate mother. The egg may be provided by an egg donor or by the surrogate mother. Due to the requirements of s.36 HFEA 2008, that man cannot be a legal parent of the child at its birth and so he is simply the child's genetic parent. The woman has no parental relationship with the child at its birth.

Box 70: The commissioning parents are a man and a woman and the man's sperm is used to conceive a child that is carried by a surrogate mother. Again, that man cannot be a legal parent of the child at its birth and so he is simply the child's genetic parent. The woman is identified as a legal parent of the child at its birth by virtue of s.43 HFEA 2008. She may also have provided the eggs necessary for the child's conception or they may have come from a donor or the surrogate mother. For example, an embryo is formed using the genetic material of a husband and wife. That embryo is placed in a surrogate mother. With the consent of the surrogate mother, the wife may be identified as the child's legal female parent at its birth by meeting the requirements of s.43 HFEA 2008. The husband and wife then apply for a parental order.

Box 71: The commissioning parents are a man and a woman. A surrogate mother carries a child that is conceived using donor sperm and the woman's egg. The man has no parental relationship with the child at its birth, whereas the woman must be both a genetic and a legal parent of the child at that time. For example, an embryo is formed using the sperm of a donor and the egg of a woman who is living together with a man in an enduring family relationship (they may be boyfriend and girlfriend). That embryo is placed in a surrogate mother.

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legal female parent, whose status is potentially not affected by the parental order). However, there is nothing in s.54 HFEA 2008 to suggest that two women cannot apply for a parental order and it has been assumed in this thesis that such an arrangement is possible (see box 72 below), even if the effect of the order on the legal female parent is unclear.

With the consent of the surrogate mother, the girlfriend may be identified as the child's legal female parent at its birth by meeting the requirements of s.43 HFEA 2008. The boyfriend and girlfriend then apply for a parental order.

Box 72: The commissioning parents are two women and a surrogate mother agrees to carry a child on their behalf. That child is conceived using donor sperm and the egg of one of the female commissioning parents. The woman who provides the egg must also be identified as the child's legal parent at its birth by virtue of s.43 HFEA 2008. The other female commissioning parent has no parental relationship with the child at its birth. The example given in box 71 could apply equally here except that commissioning parents are two women.

Box 73: The commissioning parents are two men. A surrogate mother agrees to carry a child on their behalf. The child is conceived using the sperm of one of the male commissioning parents and the egg of a donor or of the surrogate mother. As the man that provides the sperm cannot be a legal parent of the child at its birth and he is the child's genetic parent only. The other man has no parental relationship with the child at its birth. For example, a man's sperm is artificially inseminated into a surrogate mother. She agrees to carry the child on behalf of that man and his civil partner. After the child's birth, those two men may then apply for a parental order.

Box 74: The commissioning parents are two men. A surrogate mother agrees to carry a child on their behalf. The child is conceived using the sperm of one of the male commissioning parents and the egg of a donor or of the surrogate mother. With the surrogate mother's consent, the man who did not provide the sperm may be identified as the child's legal father at its birth by meeting the requirements of s.36 HFEA 2008. Those two men may then apply for a parental order.