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THE SIGNIFICANCE OF STATUS AND GENETICS IN SUCCESSION TO
TITLES, HONOURS, DIGNITIES AND COATS OF ARMS:
MAKING THE CASE FOR REFORM

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Keywords: family law; succession; peerages, titles, honours and dignities; heraldry; illegitimacy; genetics; transgender heirs; *Pringle of Stichill*

Abstract: The significant evolution in family law in the last four decades has seen the breaking down of traditional barriers: illegitimacy has been swept away, and children conceived through assisted reproduction are now recognised as the legal children of their parents, even absent a genetic link. Transgender heirs are also fully recognised in their new gender. Yet fundamental exceptions remain in the case of succession to titles, honours, dignities and coats of arms, discriminating against children born out of marriage, or non-genetic children, or transgender children. The decision of the Privy Council in *Pringle of Stichill* emphasised this divergence, and raised the question of whether law reform is needed. In this article, we explore the rules which govern succession to titles and dignities and the two-tier system which has arisen. By pointing out the inconsistencies and lack of rationale therefore, we make the case for law reform to bring titles and dignities into line with the current understanding of family and succession.

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I. INTRODUCTION

The 2016 decision of the Judicial Committee of the Privy Council *In re the Baronetcy of Pringle of Stichill*¹ (“*Pringle*”) threw into sharp relief the tension between the traditional rules governing succession to titles, honours, dignities, and coats of arms, (hereafter “titles”) and the more inclusive current understanding of a “family” in law. As in *Pringle*, the succession to many titles will typically rely on the bloodline, through legitimacy and genetics, to establish the heir. But while legitimacy, gender and genetics are still pivotal in determining succession in such cases, these factors are no longer of importance in social terms or indeed for most legal purposes. The fundamental reforms in family law over the last four decades has seen the breaking down of traditional constraints: the significance of illegitimacy has either been swept away or substantially reduced, and children conceived through assisted reproduction are recognised as the legal children of their parents, even absent a genetic link. Transgender heirs are also fully recognised in their new gender. Yet fundamental exceptions remain in the case of succession to titles, which discriminate against daughters, all children born out of marriage, non-genetic children, and transgender children. We contend that such distinctions in the succession to titles, which operate to supplant an otherwise legally-recognised heir, are unsatisfactory. Law reform is required to recognise the legal child

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¹ [2016] UKPC 16; 2016 SC (PC) 1.

of the family for *all* purposes, without distinction as to legitimacy, genetics or sex. The succession should follow the now-accepted rules on who is a legal child of the family, so that the title should pass to the eldest child, thereby treating “heir” in its legal, rather than genetic, sense. This should encompass equal rights for all legal heirs to titles whether they be peerages, baronetcies, great Offices of State, like the Earl Marshal of England or Lord High Constable of Scotland, or coats of arms.

In this article, we will set out briefly the facts of *Pringle*, and provide a summary of the current rules on succession to titles. We will then examine the raft of statutory measures which operate to overturn the general rules on succession and exclude certain children from the succession to titles. As will become apparent, the many critical statutory reforms in family and succession law over the last 40 years have been specifically disapplied in the case of titles. Heirs who are (i) illegitimate; (ii) female; (iii) adopted; (iv) donor conceived; (v) carried by a surrogate; or (vi) transgender are all typically excluded – despite the fact they are now legally recognised as children of the family in all other contexts. The final section will therefore propose a number of routes to law reform to address these discriminatory exclusions, and ensure all legal heirs are treated alike.

Before turning to address these issues, it is helpful to set out why they are important. At first blush, it may appear that this is a rather niche area, of limited applicability (and perhaps interest) to the majority of the population. Leaving aside the undeniable fact that *any* state endorsed discrimination, particularly when some hereditary peers have a role in the legislature, is a cause for concern, the numbers of people potentially affected are not insignificant. In the UK, there are about 1520

hereditary and life peers entered on the Roll of the Peerage,² 1249 baronets entered on the Official Roll of the Baronetage³ and many tens of thousands of coats of arms.⁴ While there is no succession to a life peerage, parentage nevertheless affects the right of a child to be called “The Honourable”. Where a coat of arms has been granted by one of the Kings of Arms, all descendants within the destination are entitled to record, or, in Scotland, matriculate, that coat of arms with an appropriate difference. Thus there are a significant number of persons who are potentially affected by any differential treatment in the succession to titles.

Importantly, the rules on succession to titles cannot be circumvented by private settlement or testamentary disposition. The wishes of the current title holder are irrelevant: the legal succession will prevail. In Scotland a coat of arms can be resettled, with the consent of the Lord Lyon, but only within the genetic and legitimate family.⁵ Succession to titles must follow the established rules, discussed below. In the words of Erskine, such titles are granted “as an ornament and support to the patentee and his family, and must therefore go to the representative of the family”.⁶ Since the destination of such titles (except to a limited extent) is beyond the control of the current holder, any steps to remove the current inconsistencies and inequalities must be legislative, rather than private.

² <http://www.college-of-arms.gov.uk/resources/roll-of-the-peerage> (accessed 2 April 2018).

³ <http://www.baronetage.org/official-roll-of-the-baronets/> (accessed 2 April 2018).

⁴ In Scotland there were c.10,000 recorded coats of arms at 1972: Sir James Balfour, Lord Lyon *Ordinary of Scottish Arms* 2nd ed, (1903, Edinburgh); *An Ordinary of Arms Vol II 1902-1973* (1977, Edinburgh).

⁵ There is a very narrow exception for coats of arms, where there may be a “quartering of affection” outside the bloodline.

⁶ J. Erskine, *An Institute of the Law of Scotland*, ed J. Nicholson (Edinburgh, 1871), II.ii. 6. See also section III below.

Reform is now needed, and this article aims to provide a comprehensive and critical review of the current law and the basis of future reform.

II. PRINGLE

The case of *Pringle* puts this debate in context. The Baronetcy of Pringle of Stichill was granted by Charles II in 1683, to Robert Pringle and the male heirs of his body. By 1902, the eighth baronet was Sir Norman. He married in October that year, and his first son, also Norman, was born in May 1903 some seven months later. A second son, Ronald, followed in 1905.⁷ On Sir Norman's death in 1919, Norman succeeded as ninth baronet and, in due course, his eldest son, Sir Steuart, succeeded as tenth baronet in 1968. Sir Steuart's son, Simon, was expected to inherit the title, and succeed as the eleventh baronet, on his father's death. In 2010, however, Sir Steuart's cousin, Murray, the eldest son of Ronald (who had been born to the eighth baronet in 1905), sought DNA samples from a range of males in the Pringle family, as part of research into the Clan Pringle, to determine who had the right to be recognised as clan chief.⁸ As a result of this DNA testing, in which Sir Steuart voluntarily took part, Murray discovered that the family DNA did not match up. Such was the difference that a geneticist, giving evidence in the case, indicated that there was unlikely to be a shared male ancestor between Sir Steuart and Murray at any point in the last 1000 years.⁹ They could not therefore both be descended from the same genetic grandfather, the eighth baronet.

⁷ Other children were subsequently born to Sir Norman and his wife, but the dispute centres on the eldest two sons, Norman and Ronald.

⁸ *Pringle* [2016] UKPC 16, paras [12]-[15].

⁹ *Pringle* [2016] UKPC 16, para [19].

Unfortunately for Sir Steuart and Simon, the rogue DNA was in their line, and not Murray's. This evidence effectively proved that Sir Norman's first *genetic* child was Ronald, born in 1905, and that Norman, born in 1903, must have had a different genetic father.¹⁰

On Sir Steuart's death, the question then arose as to who the heir to the Baronetcy was: Simon, as the descendant of the last holder, or Murray, as the genetic (and legitimate) descendant of the eighth baronet? The Privy Council had no difficulty in answering this: the title was to pass to the male heir of the *first* baronet, which meant Murray and not Simon.¹¹ The law is clear that titles will follow the legitimate successor, both in terms of genetics and marital status of parents: and the question of genetic descent is examined afresh on every succession.¹² It is not relevant (and no safeguard) to establish oneself as the legitimate heir of the *last* holder, if the last holder was not himself the legitimate heir of the first baronet. In reaching this conclusion, the Privy Council dealt with, and dismissed, a range of defences advanced by Simon, based on

¹⁰ Norman's legal (and social) father was Sir Norman, the eighth baronet, by virtue of the *pater est* presumption (i.e. the presumption that the man married to the mother at the time of conception or birth is the father), which was not overturned. The evidence cited in the decision pointed to a loving relationship between father and son: *Pringle* [2016] UKPC 16, paras [21] and [23].

¹¹ Simon was the male heir of the ninth and tenth baronets, but of course had no genetic link to the *first*, let alone the *eighth*, baronet, as a result of the break in the genetic chain between the eighth and ninth baronets. See also B. Hacker, "Honour runs in the blood", (2017) LQR 36, 37.

¹² Discussed below in section IV. See also [note 11](#) above, 37.

prescription, and data protection.¹³ Yet the Privy Council had concerns about the impact of this:

In the past, the absence of scientific evidence meant that the presumption of legitimacy could rarely be rebutted and claims based on assertions that irregular procreations had occurred in the distant past were particularly difficult to establish. Not so now. It is not for the Board to express any view on what social policy should be. It notes the ability of DNA evidence to reopen a family succession many generations into the past. *Whether this is a good thing and whether legal measures are needed to protect property transactions in the past, the rights of the perceived beneficiary of a trust of property, and the long established expectations of a family, are questions for others to consider.*¹⁴

The problem arises from the need for titles to pass to the genetic and legitimate heir: should honour (still) run in the blood? With DNA testing now readily available, there could be many such challenges in future,¹⁵ overturning property transactions, the rights of perceived beneficiaries, and the long established expectations of families. What is the current law on succession to such titles – and what should that law be?

III. THE LEGAL REGULATION OF TITLES

A. The Nature of Titles

¹³ The rules on prescription will be dealt with in section IV. The data protection defence is beyond the scope of this article: see *Pringle* [2016] UKPC 16, paras [69]-[79].

¹⁴ *Pringle* [2016] UKPC 16, para [85], emphasis added.

¹⁵ D. Jenkins, 'Is the Party over for Peers?' *Tatler*, November 2015, 125.

This article is principally concerned with the succession to peerages, baronetcies, dignities, such as heritable Offices of the Crown¹⁶ (such as the Lord High Constable of Scotland), and to coats of arms,¹⁷ which are all considered in Scots law to be incorporeal feudal heritage.¹⁸ In England all such titles are likewise considered “tenements or incorporeal hereditaments, wherein a person might have real estate. And ... they are still classed under the head of ‘real property’”.¹⁹ They include the English Great Offices such as the Earl Marshal of England or the Lord Great Chamberlain of England. The origin of the peerage was territorial: peerage titles became a personal title sometime in the 16th century and separated from the land.²⁰ The title of baronet was instituted for England by King James I on 22 May 1611; then followed the Baronets of Ireland on 30

¹⁶ *Stair Memorial Encyclopaedia*, Vol 7 “The Crown”, (4) Officers of the Crown paras 811 to 831, (Edinburgh 1995); J. Ferguson ‘The Officers of State in Scotland’, (1910/11) *Juridical Review*.

¹⁷ Coats of arms have also been recognised as incorporeal feudal heritage: *Maclean of Ardgour v Maclean* 1941 SC 613 at [683]: ‘Family arms are admittedly feudal heritage’. Arms and names are indivisible: anyone seeking to inherit arms must also bear the family name, unless the coat of arms is quartered. Moreover, while only the heir can take the undifferenced (that is, the original) arms, other children may inherit a right to matriculate the arms, with an appropriate mark of difference.

¹⁸ Erskine’s Institutes, see [note 6](#) above.

¹⁹ F. B. Palmer *Peerage Law in England a Practical Treatise for Lawyers and Laymen*, (London 1907), 5.

²⁰ J. Maidment, Report of Claims preferred to the House of Lords in the cases of *Cassills* etc, Edinburgh 1882, Speech of Lord Mansfield in the *Cassills Peerage Claim* (1760/4), 30-39.

September 1611 and the Baronets of Nova Scotia²¹ instituted in Scotland by King Charles I on 28 May 1625.²²

Peerages and baronetcies are divided into those of England, Ireland, Scotland (Nova Scotia baronetcies) and then of Great Britain (post 1707) and of the United Kingdom (post 1800).

B. The Destination of Titles

The destination or limitation of peerages and baronetcies are varied, although titles are usually granted to “the heirs male of the body” or sometimes to “the heirs male of the body legitimately created” of the grantee. The two key questions are whether the heir must be (i) male or (ii) “legitimately created”, i.e. born within marriage. These two fundamental points impact on who is entitled to succeed, yet sit uncomfortably in a more equal society, where discrimination based on sex or status should not be recognised.

Where a grantee has no male issue, there are examples of special destinations such as the grant of the Earldom of Mountbatten of Burma to the Earl “with remainder to heirs male of his body, and in default of such issue to his eldest daughter Patricia Edwina Victoria and the heirs male of her body; and in default of such issue to every other daughter successively in order of seniority of age and priority of birth, and to the heirs male of their bodies”.²³

²¹ So called because the early Scottish baronets paid 3000 merks to assist with the colonisation of Nova Scotia and were granted 16,000 acres in the province together with the title of baronet.

²² F. W. Pixley, *A History of the Baronetage* (London 1900); D. Laing *Royal Letters, Charters, and Tracts – Relating to the Colonization of New Scotland and the Institution of the Order of Knight Baronets of Nova Scotia, 1621 – 1630* (Edinburgh 1866). The Pringle title was one of these baronetcies.

²³ Debretts Peerage & Baronetage, (London 2015) “Mountbatten of Burma”.

Proportionately more Scottish titles can go through the female line than is the position for English, Great British or United Kingdom peerages and baronetcies, albeit a male heir takes the title before an older female heir. The destinations of the 366 or so Scottish Peerages are: 110 with special or entailed destinations, some of which could go through the female line; 93 descendible to females; 86 destined to heirs male whatsoever; and only 73 to heirs male of the body, of which 18 obtained a re-grant with a wider destination.²⁴ With regard to Baronetcies of Nova Scotia created before 1707, of the 315 creations, 147 were to heirs male whatsoever, 97 to heirs male of the body, 10 had special destinations some of which could pass through the female line and 61 were unknown.²⁵

Palmer lists the limitations that in England are lawful and unlawful.²⁶ Early English baronies created by writ of summons to attend Parliament are destined to the “heir” of the grantee which includes succession through females, but a male succeeds in preference to earlier born females and where the succession opens to daughters the title falls into abeyance equally between the daughters and it is for the crown to call out

²⁴ *Ruthven of Freeland Petitioner* 1977 SLT (Lyon Ct) 2, expert evidence from Sir Iain Moncreiff of that Ilk Bt, Advocate. From discussions with Sir Iain, the first author understands that the evidence was based on doctoral research for *Origins and Background of the Law of Succession to Arms and Dignities in Scotland* Edinburgh University 1958, now published as Sir Iain Moncreiffe of that Ilk Bt, *The Law of Succession* (Edinburgh 2010).

²⁵ Sir Crispin Agnew of Lochnaw Bt *The Baronets of Nova Scotia*, (1979) 1 *The Double Tressure*, Journal of the Heraldry Society of Scotland, 21-43; *Dunbar of Hempriggs, Baronetess* 1966 SLT (Lyon) 2, 7 for a discussion re female succession to Nova Scotia baronetcies, which included reference to the grant of a baronetcy to Dame Mary Bolles in 1635.

²⁶ Palmer, [note 19](#) above, at p74.

the abeyance in favour of one of the daughters, usually the eldest.²⁷ This is in contrast to Scotland where the eldest daughter takes the title.²⁸

The destination or limitation of the Great Offices, whether of Scotland or England, are to be found in their charters of creation.

The destination of coats of arms, if not provided for in the Letters Patent granting the coat of arms, in Scotland is less certain and there are conflicting views as to whether the coat of arms should go to the heir general, which includes a female succession or to the heir male. J H Stevenson favours the right of the heir general,²⁹ but in *Maclean of Ardgour v Maclean*³⁰ the Lord Justice Clerk considered the competing contentions in detail and concluded “there may exist a certain presumption that the succession is to the heir male”. There is also the so called Jeffrey principle enunciated by Lord Jeffrey in *Cuninghame v Cunyngham*³¹ where he said:

In my opinion the common sense rule is, that the chief armorial dignities should follow the more substantial rights and dignities of the family. If the heir male succeed to the title and estates, I think it reasonable that he should also succeed to the armorial bearings of the head of the house. I would think it a very difficult proposition to establish that the heir of line, when denuded of everything else,

²⁷ Report from the Select Committee on Peerages in Abeyance (London 1927).

²⁸ George Joseph Bell *Principles of the Law of Scotland*, 10th Ed rev W. Guthrie (Edinburgh 1899), para 1083.

²⁹ J. H. Stevenson *Heraldry in Scotland*, (Glasgow 1914), 336.

³⁰ 1941 SC 613, 681- 686.

³¹ (1849) 11 D 1139, 1152. Followed recently by the Lord Lyon in *Irving of Bonshaw Petitioner* 2015 SLT (Lyon Ct) 11, [6] & [7].

was still entitled to retain the barren honours of heraldry. But I give no opinion upon that point.

In Scotland, where the succession to a coat of arms opens to daughters then the eldest daughter takes the arms without division, provided she and her descendants retain and continue to use the family name, or adopts again the family name when the succession opens, otherwise the right to succeed can be lost.³² Younger daughters inherit a right to quarter their arms with the arms of the family into which they marry. However, many coats of arms were settled along with the entail of the landed estate under a name and arms clause and so follow the succession to the estate,³³ or can be settled on the person succeeding to the landed estate by deed of nomination or Trust Disposition and Settlement,³⁴ but this is limited to legitimate members of the family.

The situation in England is less clear. Males are favoured over females, although if the succession ends in more than one daughter (and no sons) they all take equally as co-heirs and can transmit the right to quarter their arms with the arms of the family into which they marry.³⁵

IV. SUCCESSION TO TITLES: THE USUAL CASE

Succession to titles will follow the destination when the title was created. The rules for interpreting that destination, in succession, typically follow the blood line in accordance with the *jus sanguinis*.

³² *Gunn Petitioners* 1996 SLT (Lyon Ct) 3.

³³ See discussion by Lord Lyon (Learney) in *Munro-Lucas-Tooth Petitioner* 1965 SLT (Lyon Ct) 2.

³⁴ *Mackintosh of Mackintosh* 1950 SLT (Lyon Ct) 2; *Macpherson of Pitamain* 1977 SLT (Lyon Ct) 18.

³⁵ A. C. Fox-Davies *Complete Guide to Heraldry*, Reprinted 1951 with revisions by Dr C. A. H. Franklyn, (London 1951).

A. Succession iure sanguinis

The right to succeed to a title depends upon a blood connection to the original grantee of the title in terms of the destination or limitation. The right to succeed vests *iure sanguinis* (“by right of blood”), without the requirement for service to take up the right to the title. Each time the succession opens the right to succeed is traced not from the last holder of the title or dignity, but from the original grantee.³⁶ This was accepted in the *Pringle* case:

A title of honour vests *iure sanguinis*, by right of blood, in the heir specified in the grant. The heir needs to take no step to acquire the title. Scots institutional writers are clear on this... In English law the rule is essentially the same. A baronetcy is an incorporeal hereditament which descends in accordance with the terms of the original grant and each successive heir takes under the original grant...³⁷

The same rule applies to the succession to coats of arms, and a son succeeds in preference to a daughter.³⁸ Thus it can be seen that a legitimate blood connection to the grantee in terms of the destination or limitation of the title or dignity is an essential requirement for succession.

In Scotland, the eldest daughter succeeds to a title, unlike England where a barony falls into abeyance between the daughters. In Scotland “where there is a right in

³⁶ *Pringle* [2016] UKPC 16, [27] – [28]; *Dunbar of Kilconzie v Lord Advocate* 1986 SC (HL) 1, 29, per Lord Keith.

³⁷ *Pringle* [2016] UKPC 16, [41].

³⁸ Stevenson, [note 29](#) above, at p336.

its nature, exercise, or use not capable of division, it goes as a *praecipuum* to the eldest, - as a peerage, an office ...”.³⁹ However, where a title can go to a daughter, a younger son succeeds before an older sister.

B. Resignation and Regrant of Titles

Under Scots law the holder of a title could, until the Treaty of Union, resign it into the hands of the Crown for a re-grant to a new series of heirs. This was commonly done if the title was either to be extinguished or to pass to a remote heir and the title holder wanted to keep the title in their nearer family.⁴⁰ Examples include (i) the Earldom of Selkirk⁴¹ and (ii) the Baronetcy of Colquhoun of Luss.⁴²

C. The Proper Law Relating to the Succession to Titles

There are two aspects to the proper law relating to the succession to titles.⁴³ First, the proper law of the title itself, and secondly the law of the domicile of the claimant or his

³⁹ Bell's *Principles*, note 28 above, para 1083.

⁴⁰ Joint Committee on House of Lords Reform [Session 1962-63] Report (London 1962), Appendix 3 Surrender of Scottish Peerages; Memorandum by the Official Group and Appendix 12 Surrender of Scottish Peerages; Memorandum by the Lord Advocate.

⁴¹ “The Earldom of Selkirk” in Sir James Balfour Paul (ed) *The Scots Peerage* Vol VII (Edinburgh 1910); *Earl of Selkirk Petitioner* 1985 SLT (Lyon Ct) 2. Whenever a Duke of Hamilton succeeds to the Earldom it descends immediately to the Duke's younger brother.

⁴² “Colquhoun of Luss”, *Burkes Peerage & Baronetage* 107th Ed (Northamptonshire 2003); *Grant of Grant, Lord Strathspey* 1950 SLT (Lyon Ct) 17 – the first Colquhoun baronetcy passed to the Grant family by resignation and regrant.

⁴³ The law relating to honours and dignities and the functions of the Lord Lyon so far as relating to the granting of arms is reserved under the Scotland Act 1998, Schedule 5, para 2(2).

parents which may affect their status as legitimate or illegitimate or the validity of a marriage. This can lead to different outcomes depending on whether the title is governed by Scottish or English law.

The first is the proper law of the title or dignity itself and this depends on the law relating to the title. In the *Pringle* case the Board stated that as this was a Scottish Baronetcy “Questions as to entitlement to succeed to the baronetcy are governed by Scots Law.”⁴⁴ There is no difficulty in relation to English, Scottish or Irish titles because they will be governed respectively by English, Scottish or Irish law, but it is not clear what law governs Great British or United Kingdom titles. It is considered that if the territorial denomination of the title is in Scotland then Scots law governs the succession to that title.⁴⁵ The issue was raised in respect of Baronetcies, because under the Official Roll of the Baronetage the Secretary of State has to consult with the respective King of Arms or the Attorney General or Lord Advocate. In a series of opinions given by the Law Officers c.1920 they advised that where the baronetcy had a Scottish territorial designation then the Lord Advocate and the Lord Lyon should be consulted, which indicates that they considered that such baronetcies were subject to Scots law.⁴⁶

An interesting example of where differing law has separated titles arises in the case of the Macdonald of Sleat Nova Scotia baronetcy created 14 July 1625 with a destination to heirs male whatsoever⁴⁷ and the Irish Barony of Macdonald of Slate granted to the 9th Baronet on 25 July 1776 with a destination to “the heirs male of his

⁴⁴ *Pringle* [2016] UKPC 16, para [24].

⁴⁵ J. Riddell, *Inquiry into the Law and Practice in Scottish Peerages* (Edinburgh 1842), 843-844.

⁴⁶ Lyon Court papers bound volume “Jurisdiction”.

⁴⁷ G. E. Cokayne, *The Complete Baronetage* (Gloucester, 1983) Vol II, 291.

body lawfully begotten and to be begotten”.⁴⁸ The 11th Baronet and 3rd Lord had a son Alexander by Louisa Maria La Coast whom he subsequently married in England, and they had a further son Godfrey. Following proceedings in the Court of Session in 1910 for declarator of the legitimacy of Alexander, on the basis that the 3rd Lord was domiciled in Scotland and so he was legitimated by the subsequent marriage of his parents, the court found that Alexander was so legitimated.⁴⁹ The consequence of this was that that Alexander had succeeded to the Nova Scotia baronetcy as its succession was governed by Scots law, but that Godfrey, born after the marriage of his parents, was the legitimate heir (“lawfully begotten”) to the Irish title, where Irish law did not recognise legitimation by the subsequent marriage of the parents.⁵⁰

The law of the domicile of the claimant or of their parents is relevant to the legitimacy of that person and whether that legitimacy is recognised for the purpose of succession to the title under private international law rules. The Macdonald case is one example. In the *Strathmore Peerage Claim*⁵¹ Lord Strathmore had an illegitimate child John born in 1811 from Mary Millner whom he married on his deathbed in 1820. John’s claim to the earldom, on the grounds that he was legitimated by the subsequent marriage of his parents, was rejected on the grounds that Lord Strathmore was domiciled in

⁴⁸ Copy Letters Patent dated 25 July 1776 held by Clan Donald Lands Trust; Repository Code 800001, Reference NRAS3273/5509.

⁴⁹ *Bosville v Lord Madonald* 1910 SC 597.

⁵⁰ “Macdonald of Slate, Chief of Macdonald” and “Bosville Macdonald of Sleat, Chief of Macdonald of Sleat”, *Burkes Peerage & Baronetage* 107th Ed (Northamptonshire, 2003). Legitimation is discussed in more detail in section V below.

⁵¹ (1821) 6 Paton 645, speeches reported in full (1830) 4 W & Sh App 89.

England. A more recent example is the *Viscount of Drumlanrig's Tutor*⁵² where Sholto who was the illegitimate son of the Marquis of Queensberry born in England where his parents were domiciled claimed to be recognised as heir to the Marquisate. Sholto was legitimated in England by the Legitimacy Act 1926 which by section 10 provided that “Nothing in this Act shall affect the succession to any dignity or title of honour or render any person capable of succeeding to or transmitting a right to succeed to any such dignity or title.” Nevertheless, the Lord Lyon having regard to the provisions of section 5(1)(a) of the Legitimation (Scotland) Act 1968 held that Scots law recognised the English legitimation for the purposes of succession to the Scottish Marquisate “although incapable of affecting the succession to any dignity or title of honour governed by English law”. The obiter comments by Lord Keith in *Wright's Trs v Callender* – that Scots Law must, for conflict of law purposes, treat limitations in English law as also applicable to instruments governed by Scots Law⁵³ – cast doubt on the correctness of Lyon's decision, which disregarded the limitation in the English Act.

In the *Sinha Peerage Case*⁵⁴ the title of Baron Sinha of Raipur was granted in 1919 with the destination to “the heirs male of his body lawfully begotten and to be begotten”. The question concerned whether or not his son could claim to be the heir male of his body because Lord Sinha belonged to a faith which allowed polygamous marriages. The Committee for Privileges held that he could succeed because there was

⁵² 1977 SLT (Lyon Ct) 16. *cf. Wright's Trs v Callender* 1993 SC (HL) 13, which might require Lyon's decision to be reconsidered.

⁵³ 1993 SC (HL) 13, 19.

⁵⁴ (Note) [1946] 1 All ER 348. See also A.B. Wilkinson and K. McK. Norrie, *The Law of Parent and Child in Scotland* 2nd ed (1999), para 1.75.

in fact no polygamous marriage, but left open the question if there had been a second such marriage.

D. Prescription and Adverse Possession of a Title

The *Pringle* case accepted that the right to claim a title could not be lost by non-use or adverse possession for the long negative prescriptive period of 20 years. The Board “reached the view that the right to succeed to an honour is imprescriptible under para (h) of Sch.3”⁵⁵ to the Prescription and Limitation (Scotland) Act 1973 and also rejected an argument that a claim could be barred by mora, taciturnity and acquiescence.⁵⁶ This is consistent with the long-held view in Scotland:

The principle in law, that the right of blood did not prescribe, was admitted in Scotland in respect to descent in real inheritances, and honours, during the sixteenth and seventeenth centuries⁵⁷

English law is to the same effect:

Neither can a good title to a dignity be barred by so-called adverse possession, however long, for there is no such thing as adverse possession of a peerage.⁵⁸

However, different issues arise if a claimant has obtained a court order as to their legitimate status, in which case such a decree is binding for the purposes of succession to the title or dignity even if later evidence such as DNA might demonstrate that the claimant was not in fact the heir *iure sanguinis*. In the *Amphill Peerage Case*⁵⁹ where

⁵⁵ *Pringle* [2016] UKPC 16, para [59].

⁵⁶ *Pringle* [2016] UKPC 16, para [64].

⁵⁷ Riddell, [note 45](#) above, at p130.

⁵⁸ Palmer, [note 19](#) above, at p167.

⁵⁹ [1977] AC 547.

the son of the late peer had obtained a declarator of legitimacy in 1926 following his father's unsuccessful divorce action on the grounds of his mother's adultery, the Committee for Privileges held that a declaration of legitimacy obtained pursuant to the provisions of the Legitimacy Declaration Act 1858 was "unassailable"⁶⁰ and thus binding for all purposes including peerage claims.

This is a different situation, because the decision is a status decision *in rem*, from the situation where a person matriculates a right to a coat of arms, perhaps with the additaments appropriate to the matriculator as a peer or a baronet. After 20 years the right in the matriculation, being a court decree, prescribes and cannot be challenged. Probably the 20 year prescription is only of benefit to the matriculator, who matriculated the coat of arms in their own name, because on their death the right of succession to the coat of arms is traced from the original grantee and not from the matriculator. In *Fullarton v Hamilton*⁶¹ the Lord President and other judges opined that where a junior line succeeded to the heritable estate a challenge might be prevented by prescription, but that when the succession again opened that the rightful heir could claim the estate. The judges went on to say that:

but we are further of opinion that a retour, though correct and unexceptional *ex facie*, and therefore sufficient to protect the person served as heir, after the vicennial prescription, is only of a personal nature; and though it may protect himself personally, cannot, after his death, affect the right of the true heir, for such was not the meaning of the statute.

As a matriculation in the Public Register of all Arms and Bearings is analogous to a service of heirs, and as a succession to a title or coat of arms is traced each time from

⁶⁰ [1977] AC 547, 601, per Lord Russell.

⁶¹ (1825) 1 W & S 410, 428.

the grantee and not the person last in possession of the coat of arms, the dicta in *Fullarton* probably also applies to a prescription on a matriculation. The matriculation and the benefit of the prescription is only personal to the matriculator and does not bar the succession of the rightful heir, when the succession next opens. The *Fullarton* decision was followed in *Pringle*, where the board said: “The true question on the death of the eighth baronet in 1919 was ‘who was then the male heir of the first baronet of Stichill?’ The question now is the same, substituting only the present for the past tense.”⁶²

V. SUCCESSION TO TITLES: THE EXCLUSIONS

Having established the rules which govern succession to titles, it is clear that succession depends on (i) usually a male heir; (ii) who is genetically descended from his parents; and (iii) who is legitimate. Where a female heir can succeed, a younger male takes precedence in the succession. This is in stark contrast to the general rules of (intestate) succession, where there is no distinction made between heirs based on their legitimacy or sex: any legal child of the parent will be entitled to inherit on the intestacy of their parents.⁶³ Various statutory reforms over the last 40 years have extended the categories of who is legally recognised as a child of their parents, yet exclusions have been built in to disapply these reforms in the case of succession to titles. In four different areas, statutory exclusions maintain and perpetuate this feudal approach to succession: (i) those born outwith marriage; (ii) women; (iii) children who are not genetically related to one or both of their legal parents; and (iv) transgender persons. It is important to

⁶² *Pringle* [2016] UKPC 16, para [27].

⁶³ Administration of Estates Act 1925, s.46; Succession (Scotland) Act 1964, s.2(1)(a).

emphasise that these exceptions affect those who are recognised in law for all other purposes as being the children – and heirs – of the title holder.⁶⁴ The only legal circumstance in which they are treated differently is in the succession to titles. There is therefore a small but critical gap between who is recognised in law as the child of an individual, and who is recognised *for the purpose of succession to titles*. Each of these four situations will be examined in turn.

A. Status: Illegitimacy

The status of illegitimacy is a “distinction which is based solely on the accident of birth outside wedlock, for which the [illegitimate child] is not responsible”.⁶⁵ A child will be illegitimate in the straightforward case where his or her genetic parents are not married.⁶⁶

The legal consequences of illegitimacy were gradually eroded over the 20th century,⁶⁷ culminating, in Scotland, in the Law Reform (Parent and Child) (Scotland) Act 1986, which removed the consequences but left the status. The 1986 Act was amended in 2006, and the revisions were clearly intended to send a powerful message. The title of section 1 was changed from “Legal equality of children” to “Abolition of status of illegitimacy”, and the existing wording of section 1 was preceded by new

⁶⁴ This is therefore a different situation from that of a “social” parent and child relationship, such as a step-parent/ child, where there is no legal parental status at issue.

⁶⁵ *Johnson v Secretary of State for the Home Department* [2016] UKSC 26, at [34] per Lady Hale. This case concerned the adverse impact of illegitimacy in the different context of citizenship and deportation.

⁶⁶ Thus, where the mother has an affair and conceives the child extra-maritally, the child may be brought up as a child of the married “parents” but will be illegitimate in the eyes of the law, even if her husband accepts him as a child of the family – the *Pringle* situation.

⁶⁷ Norrie, [note 54](#) above, ch 1, especially paras 1.04, 1.39-1.43.

introductory wording, underlining this commitment to removing the ‘stain’ of illegitimacy:

Section 1. Abolition of status of illegitimacy

1(1) *No person whose status is governed by Scots law shall be illegitimate; and accordingly the fact that a person’s parents are not or have not been married to each other shall be left out of account in –*

- (a) determining the person’s legal status; or
- (b) establishing the legal relationship between the person and any other person⁶⁸

The 2006 reforms sought to abolish “as far as it is possible and competent, the status of illegitimacy [in] Scots Law”.⁶⁹

Yet this statutory abolition of the status of illegitimacy is not as all-encompassing as first appears. Section 9 of the 1986 Act contains a provision which retrenches on the absolute applicability of section 1:

Nothing in this Act shall –

... (1)(c) apply to any title, coat of arms, honour or dignity transmissible on the death of the holder thereof or affect the succession thereto or the devolution thereof (including, in particular, the competence of bringing an action of declarator of legitimacy, legitimation or illegitimacy in connection with such succession or devolution)

In England and Wales, illegitimacy still subsists, but its impact is modified by section 1 of the Family Law Reform Act 1987, which provides:

⁶⁸ Law Reform (Parent and Child) (Scotland) Act 1986, s1, emphasis added.

⁶⁹ Scottish Parliamentary Corporate Body, “Family Law (Scotland) Bill Revised Explanatory Notes” (2005), para 35.

In this Act and enactments passed and instruments made after the coming into force of this section, references (however expressed) to any relationship between two persons 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.

Thus, the marital status of the parents is generally not relevant, unless specifically provided for. Section 19 however effectively disapplies section 1. It sets out in s19(2) that any reference to “heir” or “heirs” in the creation of an entailed interest of real or personal property does not, by itself, show a contrary intention in terms of section 1. But under s19(4), where the property in question is to devolve along with a dignity or title of honour, then the property shall not be severed, but shall devolve as if this section had not been enacted.

The net effect is that illegitimacy is still a relevant status in Scots and English law in the 21st century in relation to succession to titles.⁷⁰ This runs counter to international Conventions. Article 2 of the UNCRC enjoins state parties to respect the rights of all children “without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other

⁷⁰ This exclusion may be because titles are beyond the legislative competence of the Scottish Parliament, in terms of the Scotland Act 1998: the explanatory notes state that the section removes “as far as it is possible and competent” the status of illegitimacy. This suggests the Scottish Parliament thought it was not possible or competent to remove the exclusion re titles (see [note 69](#), para 35). However, in such cases, it is open to the Scottish Parliament to seek the consent of the Westminster Parliament, through a section 30 order in terms of the Scotland Act 1998: it is not at all clear that this route was considered.

status”.⁷¹ Likewise, article 9 of the European Convention on the Legal Status of Children Born out of Wedlock, provides that “A child born out of wedlock shall have the same right of succession in the estate of its father and its mother and of a member of its father’s or mother’s family, as if it had been born in wedlock”.⁷²

Where a legal distinction based on illegitimacy is to be made, it must be capable of justification.⁷³ As one commentator has noted:

A person born outwith marriage is normally precluded from inheriting or transmitting a title, coat of arms, or other dignity because the terms used in the grant to govern devolution such as “issue”, “heirs”, or “descendants” are deemed to mean legitimate or legitimated persons only.⁷⁴

While this explains the original intention, it does not act as a justification for the ongoing distinction today, if the concept of legitimacy and legitimation has otherwise been done away with. On what basis should “issue”, “heirs” or “descendants” continue to refer only to those born within marriage? In the context of coats of arms, the Lord Lyon responded to a Scottish Law Commission consultation in 1992 to say that the

⁷¹ United Nations Convention on the Rights of the Child, article 2.

⁷² Council of Europe *European Convention on the Legal Status of Children born out of Wedlock* Treaty No. 085 <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/085> (Accessed 2 April 2018).

⁷³ *Johnson v Secretary of State for the Home Department* [2016] UKSC 26, at [34], per Lady Hale.

⁷⁴ Scottish Family Law Legislation, annotations to the 1986 Act, by Dr D. Nichols, page A268/27, para A.711.5.

exclusion was “unreasonable and unnecessary” and that the reference to coats of arms in section 9 should be repealed.⁷⁵ Despite this, the exclusion remains.

A further concern is that, with the removal of the distinction of illegitimacy in all other spheres of law, there has been a corresponding easing of evidential requirements to show blood connections. There was previously a strong presumption of legitimacy,⁷⁶ which could only be rebutted by proof beyond reasonable doubt – a high standard to be met in the days before conclusive DNA proof. Further, *Russell v Russell*,⁷⁷ the precursor to the *Amphill Peerage Case*,⁷⁸ recognised the rule of law “that neither a husband nor a wife is permitted to give evidence of non-intercourse to bastardise a child born in wedlock”.

The relaxation of the heavy onus of proving a child’s illegitimacy is summarised in the *Pringle* case:

That has now changed. ... The presumption of paternity may now be rebutted by proof on a balance of probabilities (s.5(4)). In civil proceedings, a party may be requested to provide a sample of blood or other bodily fluid, or body tissue, for testing. The court may draw such inference, if any, as may be appropriate,

⁷⁵ Scottish Law Commission *Report on Family Law*, 1992, para 17.11. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235744/0004.pdf (accessed 2 April 2018).

⁷⁶ *The Douglas Cause* demonstrates how difficult it could be to overturn a presumption of legitimacy: *Douglas v Duke of Hamilton* (1769) 2 Pat 143, discussed in *Pringle* [2016] UKPC 16, paras [33]-[35]. See also L. B. Macfarlane, ‘A Noise all over Europe: *Douglas v Duke of Hamilton*’, in J. P. Grant and E. E. Sutherland (eds) *Pronounced for Doom* (Edinburgh, 2013).

⁷⁷ [1924] AC 687.

⁷⁸ [1977] AC 547.

if such a request is refused: Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s.70.⁷⁹

Coupled with the advent of highly accurate DNA testing, this means that it is now much easier to disprove a blood connection in a family, thereby rendering the child illegitimate, and consequently ineligible to succeed to titles and indeed to deprive such a child of a title to which they had apparently succeeded. The easing of the evidential requirements regarding legitimacy reflects the general removal of the social and legal consequences of illegitimacy, but fails to take account of the possible detrimental consequences for prospective heirs to titles.

B. Legitimation by Subsequent Marriage of Parents and Void Marriages

While it is currently essential that the heir's genetic parents are married, it is possible for the heir to be legitimated even if conceived and/or born out of wedlock, by the subsequent marriage of the genetic parents. Scotland, unlike England, Wales and Northern Ireland, has always recognised the legitimation of a child by the subsequent marriage of their parents, where there was no impediment to the parents' marriage at the time of conception.⁸⁰ Such a legitimated child was entitled to inherit titles⁸¹. The Legitimation (Scotland) Act 1968 legitimated children by the subsequent marriage of their parents, from the date of the marriage, even if there was an impediment to marriage at the time of conception. Section 8(4) of the 1968 Act applied the Act to "any title,

⁷⁹ *Pringle* [2016] UKPC 16, para [31].

⁸⁰ Norrie, [note 54](#) above, para 1.55.

⁸¹ See *Macdonald of Sleat Baronetcy* [note 50](#) above.

honour or dignity”, so a child legitimated under the 1968 Act can, from 1968, inherit a title.⁸²

In England legitimation by subsequent marriage was never recognised at common law. Section 1(1) of the Legitimacy Act 1926 legitimated a child from the date that Act came into force or the date of the parent’s marriage. Under section 1(2), however, this did not apply where the mother or father were married to a third person when the illegitimate person was born. Section 10 provided that the legitimation did not affect the succession to any dignity or title of honour or render the person capable of succeeding to or transmitting a right to succeed to such a dignity of title. The Legitimacy Act 1959 repealed section 1(2) of the 1926 Act so illegitimate children who were born when their parents were married to another person could also be legitimated. The exception regarding succession to dignities and titles of honour for legitimated children is continued by section 2 and paragraph 4(2) of Schedule 1 to the Legitimacy Act 1976. As noted above a child legitimated in England and barred from succeeding to an English title may have a right to succeed to a Scottish title.⁸³

With regard to children of void marriages in England, where “both or either of the parties reasonably believed that the marriage was valid”, as defined by the circumstances in section 1 of the Legitimacy Act 1976, they now have the right to succeed to a dignity or title of honour if they were born after 28 October 1958, which is the date that the Legitimation Act 1959 came into force, because section 2 of that Act introduced this right of succession for children of a void marriage.

⁸² *Viscount of Drumlanrig’s Tutor* 1977 SLT (Lyon Ct) 16; *Dunbar of Kilconzie v Lord Advocate* 1986 SC (HL) 1, where it was held that where the title had already descended to a junior stirps that the legitimation of a senior stirps did not displace the title holder who had already succeeded to the title.

⁸³ *Viscount of Drumlanrig’s Tutor* 1977 SLT (Lyon Ct) 16.

Unless the appropriate legitimation statute applies, an illegitimate child remains excluded from the succession to titles, contrary to all other succession laws.

C. Sex Discrimination

The succession to titles is typically discriminatory in favour of the male succession,⁸⁴ with most titles destined to either the heirs male of the body or to heirs male whatsoever. Thus, a male will succeed and the succession cannot go to, or through, a female to successive rightful heirs. If the male heirs are extinguished the title dies out, even if there are females through whom the succession might otherwise have passed. Where the destination is either to heirs general, which allows a female succession, or through an entailed succession which can go through the female line then, if there are sons and daughters, the “male issue are preferred before the female. Thus a son excludes a daughter”.⁸⁵ This is of course contrary to the usual rules on intestate succession, where no such distinction is made.⁸⁶ Moreover, women are excluded here, even where they are legitimate: it is not a question of genetics and status, but differential treatment on the basis of sex.

In *de la Cierva Osorio de Moscoso v Spain*⁸⁷ the applicant challenged the fact that the Spanish peerage went to her younger brother, which she maintained was a violation of the principle of non-discrimination proclaimed in Article 14 of the Spanish

⁸⁴ D. Pannick QC, “Hereditary peers must get their house in order and end discrimination”, *The Times*, 29 June 2017.

⁸⁵ Palmer, [note 19](#) above, at 97.

⁸⁶ Succession (Scotland) Act 1964, s2(1)(a); Administration of Estates Act 1925, s46.

⁸⁷ (Applications no. 4127/98, 41503/98, 41717/98 and 45726/98) Judgment of 28 October 1998, unreported.

Constitution. In the Spanish proceedings the State Counsel asked the Constitutional Court to hold that the provisions of historical law according precedence to male heirs be declared unconstitutional since they amounted to discrimination on the ground of sex and were therefore incompatible with the provisions of the Constitution of 1978. The Constitutional court held that relevant provisions were not contrary to the Constitution. On an application to the European Court of Human Rights, the court rejected an argument that preferring males in the succession to peerages infringed Article 8 rights; rejected an argument that Article 8 taken with Article 14 amounted to discrimination, because there was no violation of Article 8; and rejected an argument under Article 1 of the First Protocol because it held “that a nobiliary title cannot, as such, be regarded as amounting to a ‘possession’”.⁸⁸

Although the ECtHR has held that this discrimination is not within the scope of the ECHR, it is nevertheless an anomaly and, in the UK, one no longer recognised in the succession to the Crown. Following the Succession to the Crown Act 2013, male and female heirs can succeed equally to the throne and, accordingly, the oldest child will succeed to the Crown irrespective of gender. A number of private Bills have been introduced into Parliament with a view to extending the same provisions to peerages and baronetcies, but so far none has been successful.⁸⁹ Women therefore remain

⁸⁸ Ibid., per concluding paragraph. Spain subsequently passed a law so that the eldest born child of either sex would succeed: 18869 LLEI 33/2006, de 30 d’octubre, sobre igualtat de l’home i la dona en l’ordre de successió dels títols nobiliaris:

https://www.boe.es/boe_catalan/dias/2006/11/01/pdfs/A02794-02795.pdf (accessed 2 April 2018).

⁸⁹ For example, the Equality (Titles) Bill 2012-13 introduced by Lord Lucas of Crudwell on 14 May 2013; the Honours (Equality of Titles for Partners) Bill 2012-13; and the Succession to Peerages Bill [HL] 2015-16.

excluded from succeeding in the vast majority of cases, regardless of the legitimacy or genetic connection between the daughter and her parents.

D. Genetics

As a result of the increasing variety of family forms and routes to family formation, the parents with legal parental status will not always be the genetic parents of the child. This has been true of adoption, to varying degrees, since the adoption legislation of the 1920s and 30s,⁹⁰ but now also applies where the child has been conceived as a result of assisted reproduction involving donor gametes⁹¹ or surrogacy. The statutory basis for legal parental status in such cases is the Human Fertilisation and Embryology Act 2008 (“HFEA 2008”).⁹² The provisions are complex⁹³ but, in cases of assisted reproduction, legal parenthood can be conferred on the mother⁹⁴ and her husband,⁹⁵ or her male

⁹⁰ Adoption of Children Act 1926; Adoption of Children (Scotland) Act 1930. For a history of adoption in Scots law, see A.B. Wilkinson and K.McK. Norrie, *The Law Relating to Parent and Child in Scotland*, 3rd ed (2013), paras 21.01-21.07, and in particular the comment at para 21.03 that it was not until the Succession (Scotland) Act 1964 that a “total legal transplant” approach was adopted.

⁹¹ Donor sperm, donor eggs, or “double donation” where both eggs and sperm are donated.

⁹² The 2008 Act amends the Human Fertilisation and Embryology Act 1990 in parts, but the relevant sections for this article are contained in the newer Act.

⁹³ For a full account of the legal criteria to be fulfilled in each case, see Norrie, [note 90](#) above, chapter 4.

⁹⁴ HFEA 2008, s.33.

⁹⁵ HFEA 2008, s.35.

partner,⁹⁶ her wife,⁹⁷ her civil partner,⁹⁸ or her same sex partner.⁹⁹ So too for couples who use a surrogate.¹⁰⁰ In all cases, legal parental status is attributed to the woman who carries the baby: gestation (rather than genetics) is the route to motherhood. Once the mother has been identified, in law, the father or second parent will be identified based on his or her relationship with her, rather than genetics.

Where a woman or a couple fulfil the statutory requirements, she or they will be recognised as the legal parent(s), thereby reflecting the social reality of their planned family life. In particular, this attribution of legal parental status reflects the intention, or responsibility, model, which looks to who *intends* to be the parent and have *responsibility* for the child¹⁰¹ – rather than genetics.

Yet three separate statutory distinctions result in differential treatment for children as regards succession to titles, where the child is (i) adopted; (ii) conceived using donor gametes; or (iii) born through surrogacy.

⁹⁶ HFEA 2008, s.36.

⁹⁷ HFEA 2008, s.42.

⁹⁸ HFEA 2008, s.42.

⁹⁹ HFEA 2008, s.43.

¹⁰⁰ HFEA 2008, s.54, which allows a couple to apply for a parental order, transferring legal parental status from the surrogate (and her spouse) to the commissioning couple.

¹⁰¹ See for example, C. Barton and G. Douglas, *Law and Parenthood* (1995), chapter 3; J. Shapiro, “Changing Ways, New Technologies and the Devaluation of the Genetic Connection to Children”, in M. McLean (ed), *Family Law and Family Values* (2005); T. Callus, “A new parenthood paradigm for twenty-first century family law in England and Wales?” (2012) 32 *Legal Studies* 347; M. Vonk, *Children and their parents: a comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch Law* (2007).

1. Genetics: adoption

Section 23 of the Succession (Scotland) Act 1964 states that, for all purposes relating to testate and intestate succession, an adopted person is to be “treated as the child of the adopter and not as the child of any other person”. Section 37(1)(a) of the same Act contains an exception, however, whereby nothing in that Act or in the Adoption and Children (Scotland) Act 2007 shall “apply to any title, coat of arms, honour or dignity transmissible on the death of the holder thereof or affect the succession thereto or the devolution thereof.” Likewise, in England, section 44(1) of the Adoption Act 1976, provides that “adoption does not affect the descent of any peerage or dignity or title of honour”. Thus, adopted children cannot inherit titles from their adoptive parents, but still remain eligible to inherit such titles from their birth parents, if legitimately born¹⁰² (while all other legal relationship with their natural parents is severed). Whether this is legally coherent or even practicable is open to question.

2. Genetics: assisted reproduction

Provisions in the HFEA 2008 also maintain exclusions from the succession for children born as a result of assisted reproduction, whether that is through donor sperm, donor eggs, double donation, or surrogacy.

In the case of children conceived by assisted reproduction, section 48 of HFEA 2008 states: “Where by virtue of sections [33-47] a person is to be treated as the mother,

¹⁰² In the case of coats of arms, the adopted child could only take the birth parents’ arms if he or she also re-took the birth parents’ name, since arms and name are indivisible. Moreover, an adopted child could inherit the right to matriculate arms from their adopted parents, but with a mark of difference – in Scotland, a voided canton.

father or parent of a child, that person is to be treated in law as the mother, father or parent of the child *for all purposes*.”¹⁰³ But what section 48 apparently grants with one hand, it takes away, in part, with the other

(a) those provisions do not apply to any title, coat of arms, honour or dignity transmissible on the death of its holder or affect the succession to any such title, coat of arms or dignity or its devolution, and

(b) where the terms of any deed provide that any property or interest in property is to devolve along with a title, coat of arms, honour or dignity, nothing in those provisions is to prevent that property or interest from so devolving.¹⁰⁴

When the Bill was originally introduced¹⁰⁵ the provision applied to both Scotland and England and provided for the exclusion of “any dignity or title of honour”, but following a campaign by Scottish Clan Chiefs, coats of arms were included in the Scottish exemption and wording was introduced to prevent the separation of “clan chiefships from any associated peerages or other titles or dignities”.¹⁰⁶

Thus, children who are conceived in circumstances regulated by the HFEA 2008 are in law the children of the parents who received treatment – but will typically not be able to inherit titles from their parents. Only where a married couple uses the services of a licensed clinic to conceive using their own gametes (eg through IVF), can the child

¹⁰³ Emphasis added.

¹⁰⁴ HFEA 2008 s.48(8) for Scotland; s.48(7) for comparable provisions for England, Wales and Northern Ireland.

¹⁰⁵ Formerly HFEA 1990 s.29, now HFEA 2008 s.48.

¹⁰⁶ Hansard Vol.513, col.1089, Lady Saltoun of Abernethy in 2nd Reading:

<http://hansard.millbanksystems.com/lords/1989/dec/07/human-fertilisation-and-embryology-bill> -

accessed 18 March 2018. ###

so conceived apparently succeed to titles, being a full genetic child of the married parents. Where the (married¹⁰⁷) parents use donor sperm, donor eggs, or both, the resultant child will not be entitled to inherit titles, by virtue of the HFEA 2008 – and this is so even though there will be no other person who could be identified as his parent.¹⁰⁸ In effect, the child is seen as illegitimate here (even where his legal parents are married), because his *genetic progenitors* are not married.

One anomaly which arises is the differential and unequal treatment between men and women as regards parenthood and genetics. Whereas men can only ever be genetically related to the child, women can be genetically *or* gestationally connected. Succession to titles requires a genetic and a legal¹⁰⁹ connection between the child and both parents yet, under the HFEA 2008, it is impossible for a woman to become the first legal parent of the child based on genetics: it is solely determined by gestation.¹¹⁰ This focus on gestation (whether or not for good reason in itself¹¹¹) is at odds with the emphasis on genetics in succession to titles. The combined effect of the rules on succession to titles, taken with the HFEA 2008, is to require the legal mother to have *both* the gestational and genetic connection to the child, although genetics is sufficient for the legal father. The consequence of this is that, where the wife is the gestational mother only, having conceived using her husband's sperm and a donor egg, there can

¹⁰⁷ If the parents are unmarried, then the child will be illegitimate and thus barred from inheriting titles anyway, as per section V(a) above.

¹⁰⁸ HFEA 2008, s.41 makes it clear that a sperm donor is not the legal father.

¹⁰⁹ A genetic connection alone may not be enough: a sperm donor will have a genetic connection but no legal connection (in terms of HFEA 2008, s.48(1)), and any genetic descendant would not inherit from the donor.

¹¹⁰ HFEA 2008, s.33.

¹¹¹ *In re G* [2006] UKHL 43, at [34], per Lady Hale.

be no succession to titles for the resultant child. This is despite the fact that, for titles which descend down the male line, there is no break in the genetic chain. The use of a donor egg is arguably not relevant, since the identity of the woman who contributes the egg is *never* relevant: the husband could have married any woman, including the woman who donated the egg. To this extent, the genetic mother of the child is fungible. Where the succession is predicated on the male line, there seems no reason to bar a genetic child of that (married) father from succeeding to the relevant titles, even where his wife is the gestational (and legal) mother but not the genetic mother – yet this is the effect of the provisions in HFEA 2008.

An interesting question might arise if the father subsequently married the donor of the egg: would that child then be legitimated by the subsequent marriage of his genetic parents? The apparent need for the mother to be both gestational and genetic would suggest not.

For those titles which pass down the female line, the same applies in reverse: the mother could be the genetic and gestational mother but, if she has used donor sperm to conceive, rather than her husband's sperm then, again, the title will not pass to the child, in terms of the exclusions in section 48 of the HFEA 2008.

3. Genetics: surrogacy

Surrogacy is the final case where legal parental status is recognised for all legal purposes except for succession to titles. Where a child is carried by a surrogate, the court can make a parental order to transfer legal parental status from the surrogate to the applicants.¹¹² Once granted, there is no further restriction or limitation on this: the

¹¹² This is subject to meeting a number of statutory criteria, including that the child is genetically related to at least one of the applicants, i.e. the commissioning couple.

child will be the legal child of the commissioning couple for all purposes. Yet, the familiar exemption for titles does exist, well-hidden in the Human Fertilisation and Embryology (Parental Orders) Regulations 2010.¹¹³ This denies children the right to succeed to titles where their legal relationship with their parents arises through the statutory provisions of HFEA 2008 regulating surrogacy. This will defeat the claim of the child even where he is genetically related to both his legal parents (the commissioning couple in the surrogacy arrangement), and the parents are married to each other: the gestational surrogate is the critical break in the chain, which excludes the child from the succession.

D. Transgender Heirs

Prior to the Gender Recognition Act 2004 (the “2004 Act”) the law recognised a person’s gender as fixed at birth at the latest, and this could not be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means. The only cases where the term “change of sex” was appropriate were those in which a mistake as to sex was made at birth and subsequently revealed by further medical investigation.¹¹⁴ Since the 2004 Act, it is possible for a person to change gender and to

¹¹³ SI 2010/985, Schedule 4, which provides that the Succession (Scotland) Act 1964 s.37(1)(a) shall apply to the Adoption and Children (Scotland) Act 2007 as modified by these Regulations.

¹¹⁴ *Corbett v Corbett* [1971] 83, 104D; *Forbes of Brux* Lyon Court decision unreported Lyon Register Vol 47 folio 87 (Bound Process) following Sheriff Court Interlocutor of 21 August 1952 authorising the Petitioner’s change of name from Elizabeth to Ewan and sex on a birth certificate and recognising him as heir presumptive to the Baronetcy of Forbes of Craigievar to which he subsequently succeeded.

have this acquired gender recognised through the grant of a gender recognition certificate,¹¹⁵ where section 9(1) provides:

Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).

However, discrimination persists in relation to transgender heirs under the 2004 Act. If the eldest child is a daughter who transgenders to a son, he will then be the eldest son – and should in theory then be in line to succeed, as eldest male heir, to the relevant title. Once again, the comprehensive statutory provision seems to support this initially yet, once again, there is an exclusion in the case of titles. Section 16 states that an acquired gender will not “affect the descent of any peerage or dignity or title of honour”. Thus, a daughter who transgenders to a man will be recognised as a son of the family for all purposes, except succession to titles. Similarly, a son who transgenders to a woman will continue to be recognised as the male heir for such succession, notwithstanding being recognised, in law, as a woman for all other purposes. The 2004 Act fails to recognise the acquired gender in *all* cases, and thus perpetuates discrimination, by limiting the rights of women who transgender to men, while preserving the rights of men once they have transgendered to women. Ironically, if it were to uphold the original discrimination equally, it should ensure that men who transgender to women should be excluded from the succession, while women who transgender to men should be recognised.

¹¹⁵ See the 2004 Act, ss.1-4. The consequences of the issue of a gender recognition certificate are set out in ss.9-21.

This dichotomy emphasises the increasing, and increasingly untenable, complexities of maintaining differential standards for succeeding to titles when these interact with other law reforms. A simplified, consistent and non-discriminatory approach must be found.

VI. THE POSITION OF THE CROWN

Succession to the Crown is governed by the Act of Settlement 1700¹¹⁶ which settles the succession to the Crown on Princess Sophie, Electress of Hanover “and the Heirs of her body being Protestants”. Apart from the changes made by the Succession to the Crown Act 2013, all the other discriminations identified above will apply to the right to succeed to the Crown. “The statutory limitation under the Act of Settlement 1700 to the heirs of the body of Princess Sophia means that the common rules of inheritance that recognise the right of primogeniture, as applicable to entailed interests before 1926 currently apply”.¹¹⁷ When HM Queen Elizabeth succeeded in 1952, the first time there were two daughters in line for the succession, the Home Secretary stated to the House of Commons that the government was satisfied that the eldest daughter would succeed and that the Crown would not fall into abeyance on the analogy with English peerage law, following the Scottish principle that a title goes to the eldest daughter when the succession opens to a daughter.¹¹⁸ Thus it is clear that a *Pringle* type challenge could also be made at the time that the succession opens.

¹¹⁶ Incorporated into the law of Scotland by Union with England Act 1707.

¹¹⁷ Halsbury’s Laws of England 5th Ed Robert Blackburn *Crown and Crown Proceedings*, para 10.

¹¹⁸ 319 HC Official Report (5th Series) col 1055.

When the successor has been crowned as King or Queen in the coronation ceremony, a challenge thereafter to that Monarch's succession is probably excluded. The ceremony includes *inter alia* (i) the presentation of the monarch to the people and the recognition of the monarch by the people, (ii) the taking of the coronation oath, (iii) the anointing, investiture etc. and (iv) the crowning etc.¹¹⁹ "According to ancient law every King or Queen for the time being, whether he or she be a usurper or not, it a King or Queen regnant and is therefore protected by the law of treason".¹²⁰ Thus even if the crowned monarch is a usurper, in the *Pringle* sense they would be protected.

However, when the succession next opens, if a defect in the genealogy or other right, had been identified during the Monarch's reign, the correct successor who has to be identified as the heir of the body of Princess Sophie, should be then entitled to inherit the crown, even if that means displacing a child of the late Monarch. The coronation, while protecting the individual, probably is not the equivalent to a declarator of legitimacy as was considered in the *Amphill Peerage Case*.¹²¹

VII. PROPOSALS FOR REFORM

The foregoing sections demonstrate that the straightforward rules which govern succession to either parent's estate are in most cases supplanted in relation to succession to titles. Extensive statutory exceptions create a two-tier system. The net effect is that a child who is legally recognised as a child of the current title holder for all legal and social purposes, and can succeed to the family estate, will nevertheless be excluded

¹¹⁹ Note 117 above, para 22.

¹²⁰ *Ibid.*, para 6, citing Co Inst 7; Abr, Prerogative, A.

¹²¹ [1977] AC 547.

from the succession to titles, based on status, sex, assisted conception, or change of gender. Having established what constitutes the parent/child relationship in law it is inconsistent and potentially discriminatory to maintain a different definition for the purpose of succeeding to titles: yet this is the position in the UK today.

The tradition on which the succession to titles is currently based is not *in itself* a valid reason for maintaining this discriminatory practice. If the status quo is to be upheld, then it will need a stronger justification than pointing to long-established rules. At the most, this can justify only a phased introduction of reform, as we discuss below. This is especially so in relation to the focus on the need for legitimacy and a continuing blood line: as Hacker asks “Why should we still care so much for the blood line?”¹²² The “fetishisation of genetics” is not an immutable part of a legal system: it is a cultural construct, which is as open to challenge as any other aspect of the system and society. While an analysis of the role of genes and genetics is beyond the scope of this article,¹²³ it should at least be noted that the weight accorded to the genetic link in defining parenthood and kinship – at least for legal purposes – is a choice that society makes.¹²⁴

¹²² Hacker, [note 11](#) above, at 41.

¹²³ This is primarily a scientific question, but has been addressed by legal academics, especially in the context of the importance (or otherwise) of knowing genetic origins. See for example J. Herring and C. Foster, “Please Don’t Tell Me”, 21(1) *Cambridge Quarterly of Healthcare Ethics* (2012) 20, 25; R. J. Blauwhoff, “Tracing down the historical development of the legal concept of the right to know one’s origins: Has ‘to know or not to know’ ever been the legal question?”, (2008) Vol 4 *Utrecht Law Review* 99.

¹²⁴ For examples of societies where kinship is viewed very differently, see Barton and Douglas, [note 101](#) above; and I. G. Leon, “Adoption Losses: Naturally Occurring or Socially Constructed?” (Mar-Apr 2002) 73 *Child Development* 52.

Importantly, it is not a choice that each society makes in the same way: even in comparable Western European jurisdictions, there is a range of approaches to identifying the legal parent/child relationship and, critically, when it is open to challenge.¹²⁵

Moreover, this two-tier system produces inconsistencies which are difficult to justify or even to rationalise, except as errors arising from the awkward interplay of legislation and common law rules intended to regulate quite different matters, and further compounded by a lack of comprehensive overview of the system of titles. Examples cited above include the exclusion of a genetic child of married parents simply because there has been no gestational connection, while concurrently excluding a child born to married parents where there *has* been a gestational connection but there is no genetic connection with one parent, even where the succession in question transfers down the other parent's genetic line. Although sex discrimination is typically the norm in this area, it is not carried to its logical conclusion, as women *can* inherit, but typically only where their legal female status is the result of a gender recognition certificate, rather than their birth certificate.

We would therefore propose a straightforward reform to remove these inconsistencies, and provide for one system for *all* succession: legally-recognised

¹²⁵ Challenging legal parental status in France, for example, is limited because there is a prohibition on DNA testing without the prior consent of the court, and it is illegal to buy or use a DNA test without consent: French Penal Code, art. 226-28. German law also limits the class of persons who can challenge paternity (sec 1600 BGB), e.g. when there is an existing person actively filling the role of the father. Further developments are expected in the Netherlands, where a government report has recommended the legal recognition of multi-parent families, i.e. more than 2 legal parents: "Child and Parents in the 21st Century" (2016), para 11.2.5. These all indicate that genetics is not the touchstone for ascribing legal parental status in these jurisdictions.

children, whether illegitimate, adopted, surrogate, donor conceived, or transgender, should be entitled to succeed to titles, in line with their right to inherit in all other instances (including legal rights). In the case of indivisible titles, these should pass to the first born child of the current holder, where that child is legally recognised. Gender, genetics and (il)legitimacy should not be relevant.

Reform could be achieved through repealing the statutory exceptions, coupled with a short statute, similar in terms to the Succession to the Crown Act 2013, so that the eldest born of whatever sex should be entitled to inherit or transmit the title from his or her parent. This would ensure that, where a child is recognised in law as the child of his or her parents, the right to inherit titles would not be prejudiced by any factor which is deemed irrelevant in the general law.

Having advocated the removal of sex, gender, genetics, and legitimacy as relevant factors, it could be queried why a distinction should still be made on the basis of birth order: why should titles pass to the eldest child rather than, for example, the child nominated by the parent?¹²⁶ Since titles are indivisible, they can only pass to one child.¹²⁷ Identifying the eldest child provides clarity and certainty from the outset. It also removes the invidious risk to sibling harmony which may arise from knowing that the parents could (or must) nominate one child in preference to all the others, leading to favouritism and prejudice between siblings and between parents and children.

¹²⁶ Under Scots Law pre-Treaty of Union 1707 the title holder could nominate a different child from the eldest to succeed to the title, with the consent of the Crown; e.g. Earldom of Breadalbane granted 1677 with power to nominate any younger son as successor and title passed to 2nd son as the eldest son was incapax: Sir James Balfour Paul (ed) *The Scots Peerage* (Edinburgh 1905) Vol 2, 203.

¹²⁷ *Contra* the Continental model, which has not been adopted here.

In the event of reform however, we consider that the changes should be prospective only, to respect the position of the current heir apparent¹²⁸ because he cannot be displaced except by death. The existing tradition could operate as a justification for protecting current heirs apparent, who will have been brought up in expectation of succeeding, with the family making appropriate provision for his succession, possibly involving property and other transactions, and we consider it would be reasonable to respect the “long established expectations of a family”¹²⁹ for a generation, rather than displacing such an heir. This is in keeping with the approach in the Succession to the Crown Act 2013, which did not seek to affect the existing succession.

One consequence of these proposed reforms would be, in many cases, to extend the life of titles that might otherwise have gone extinct. It has been estimated that between 15%-17% of peerages and baronetcies go extinct every 50 years.¹³⁰ This rate of attrition is likely to decrease if titles are opened up to a wider range of heirs. We consider this is an acceptable consequence of removing the current discrimination in succession to titles, and any drive to maintain the current rate of extinction should not operate to buttress the current system.

¹²⁸ The heir apparent is a male child whose right of succession cannot be displaced except by death, in contrast to an heir presumptive, where the right of succession can be displaced by the birth of a nearer heir. A daughter is an heir presumptive, because the birth of a later born son displaces the daughter. D.M. Walker *The Oxford Companion to Law* (Oxford 1980) “Heir”.

¹²⁹ *Pringle* [2016] UKPC 16, para [85].

¹³⁰ S. Kershaw, “Fifty Years on: The Hereditary Peerage since 1965”, *Debrett’s Peerage and Baronetage* 2015 Edition pp4-13; Colinp *Baronetage decline since 1965*, Google Groups, Peerage News: <https://groups.google.com/forum/#!topic/peerage-news/NCaywWTirWw> (accessed 2 April 2018).

While our preferred approach is to remove the statutory exclusions and render the law uniform, there is scope to improve matters through an alternative, albeit more limited reform. In that case, we would advocate a two-pronged approach.

First, to address the *Pringle* situation, Parliament should introduce a rule that any potential heir's legitimacy should only be capable of being displaced during a limited period set by Parliament so that, following the succession, the heir's right to the title (and for others to inherit in succession through that heir) should not be capable of challenge beyond that fixed period. Delayed challenges can adversely impact upon the legitimate expectations of the heir, together with family property transactions directed towards the expected succession.¹³¹ Moreover, the European Court of Human Rights has recognised that post mortem questions of paternity are “emotionally and culturally charged”,¹³² especially where any testing will require a body to be exhumed.¹³³ In cases involving post mortem challenges, the “right to know” may be juxtaposed with “right to respect for the dead”. Where both the parent and child in question have passed on, the “right to know” may need to be balanced with the right to respect for both the dead parties and any other surviving relatives. Thus, where there is a legally recognised parent/child relationship, this should not be capable of being displaced generations down the line, on DNA or other evidence.

Second, where a challenge is mounted during this limited period set by Parliament, the category of those who can raise proceedings should be limited. German

¹³¹ Such concerns were noted in *Pringle* [2016] UKPC 16, paras [22] and [85], although it was accepted that a defence framed in terms of mora, taciturnity and acquiescence could not succeed in this case at least: paras [62]-[64].

¹³² Blauwhoff, [note 123](#) above, at 110.

¹³³ *Jaggi v Switzerland* (Application No. 58757/00) [2010] ECHR 1815.

law, for example, restricts those who can challenge an established parental nexus to a limited class.¹³⁴ Thus, a third party could not attempt to challenge a father’s paternity where that father has an existing social and family relationship with the child (defined to mean “actual responsibility” for the child¹³⁵). In particular, we contend that where the parents have recognised the child as a child of the marriage, this acceptance – and corresponding legal and social status – should not be capable of being displaced generations later, on the basis of a biological challenge. This would effectively return the position to that before the recent reforms, when it was almost impossible to prove the illegitimacy of a child who had been recognised by his or her parents as legitimate. This approach preferences an established family relationship over any external challenges,¹³⁶ and would, for example, preclude a challenge from a more remote family member. Moreover, this would bring the UK approach in line with the majority of European countries, where the right to challenge is limited to those most closely involved.¹³⁷

Further we consider that, as part of more limited reforms, Parliament should also enact for the future succession to be to or through the eldest born child of either sex, thus removing at least one of the current discriminations.

These proposed reforms are focused on protecting established legal parental relationships from being challenged as to their *legal* status, but that is not to say that the genetic facts should be suppressed. There can be a right to know one’s genetic

¹³⁴ Bürgerliches Gesetzbuch (BGB), Section 1600, subsection 1.

¹³⁵ BGB, Section 1600, subsection 4.

¹³⁶ Thereby benefiting stability within family relationships: Hacker [note 11](#) above, at 41.

¹³⁷ [Ibid. note 11](#), at 40.

origins, entirely separate from the legal consequences of that knowledge. Denying the *legal* impact of genetic knowledge does not translate into denying that knowledge altogether, and it would be possible to create a “declarator of genetic origin” to address this.¹³⁸

VIII. CONCLUSION

This review has identified a number of areas where the normal understanding of family and succession law does not apply in cases of succession to titles. This differential treatment risks discriminating against heirs based on status, sex, genetics, or gender, and produces a number of (unintended?) inconsistencies. To combat this, and reflect the legally-recognised family form in the 21st century, we propose statutory reform to remove these exceptions and carve-outs, thereby ensuring that children are not excluded from the succession to titles based on factors which have no relevance or significance in any other area of life. Such reform would help ensure that challenges are not raised generations down the line, overthrowing the accepted family life of the parents and heirs. These proposals also address Lord Hodge’s observation regarding the need to consider (and protect) property transactions, the rights of the perceived beneficiary, and the long established expectations of a family. Only when such inconsistencies are

¹³⁸ There is a proposal in Germany for a ‘solely informational’ procedure, whereby either party could seek genetic information without displacing the established parent relationship: Blauwhoff [note 123](#), at 113. A proposal for UK birth certificates to contain information about the genetic parents and the legal parents in cases of assisted reproduction has been advanced by A. Bainham, “Arguments about Parentage” 2008 CLJ 322, 336. See also G. Black, “Identifying the legal parent/child relationship and the biological prerogative: who then is my parent?”, forthcoming, 2018 Juridical Review.

removed, can we be confident that the rights of heirs – the legally recognised children of the title holder – are uniformly protected.