

International Centre for Family Law, Policy and Practice 2019

What is a 21st Century Family?

Lady Hale, President of the Supreme Court¹

1 July 2019

Way back in the mists of time when I first studied Family Law, we thought we knew what a family was. It was a group of people linked together by consanguinity or affinity or a mixture of both. Only those gave rise to legal consequences – property, succession, obligations of cohabitation and support. Even then, consanguinity did not count for much if a child was born out of wedlock. She had a limited legal relationship with her mother and an even more limited one with her father but she was not a member of the wider family on either side.

This model of the family was clearly linked to the dynastic needs of the rich and powerful or indeed anyone with any property. As John Eekelaar has explained, ‘Humans need a way to ensure that wealth and power pass from one generation on its demise to the newly born’.² In patrilineal societies like ours, they want to ensure reliable descent through the male line. They also mind about the quality of the line and about forging alliances with other suitable lines. So a marriage with a suitable woman is arranged, after which it is presumed that all the children she has are her husband’s children. This necessarily entails a strong obligation of fidelity in the wife, at least until ‘the heir and the spare’ have been supplied, although not necessarily in the husband. Indeed, Finer and McGregor³ saw a difference in attitudes between the aristocracy and landed gentry, who typically practised a system of primogeniture, and therefore were not too concerned once the succession had been assured, and the middle classes, who typically shared their wealth between their children, and to whom therefore fidelity was more important. Neither approach necessarily entailed a life-long union. If the business is done, the wife can be dispensed with. If the business is not done at all, she can also be dispensed with, as Catherine of Aragon sadly discovered.

¹ With the invaluable help of my Judicial Assistant, Penelope Gorman.

² *Family Law and Personal Life*, 2006, Oxford University Press, p 57.

³ Finer and McGregor, ‘History of the Obligation to Maintain, App 5 to the Report of the Finer Committee on One-Parent Families, Cmnd 5629, 1974.

But, as A V Dicey pointed out more than a century ago,⁴ while the patriarchal family may not have much interest in keeping spouses together, the state undoubtedly does, for reasons similar to those which motivated the Christian church to insist on the indissolubility of marriage. As I have said before, the conjugal family is its own little social security system, a private space, separate from the public world, within which the parties are expected to look after one another and their children. The more the private family can look after its own, the less the state will have to do so. As the first Lord Chancellor Hailsham put it in *Hyman v Hyman*,⁵ the power of the court to secure sufficient provision for a wife when her marriage was dissolved was not only in her interests, but in the interests of the public: hence it was against public policy for the parties to oust the jurisdiction of the court in a private agreement.

Perhaps it was for this reason that the narrow view of family relationships began to expand. An obvious step was to expand consanguinity beyond relationships traced through marriage. But I have always thought it odd that the Family Law Reform Act 1969 recognised the relationships of children to their unmarried parents for the purposes of the law of succession while the rest of the law still treated them differently. But the Family Law Reform Act 1987 put that right. I am still very proud of section 1, which basically got rid of the assumption that ‘child’ did not include a child born to unmarried parents and wider family relationships did not include relationships traced through unmarried parents.

Another step was to expand the consequences of consanguinity beyond genetic relationships. Adoption came first. The common law had refused to recognise this as having legal consequences, so strong was the patrilineal model. Even when it was first introduced by the Adoption Act 1926, an adopted child did not acquire the same succession rights as a natural child. It took until the Children Act 1975 for their position to be entirely assimilated, so that the transfer from one family to the other was complete (except, of course, in relation to peerages and titles of honour where adoption has no effect).

But the Family Law Reform Act 1987 took an even more momentous step. It deemed the husband of a mother who bore a child as a result of artificial insemination from a donor to be

⁴ A V Dicey, ‘Introduction to the Second Edition’, *Law and Public Opinion in England during the Nineteenth Century*, 2nd edn, 1914, London, Macmillan, p *lxxix*.

⁵ [1929] AC 601, 614.

the father of the child for all legal purposes, unless it was proved in court that the husband did not consent to the insemination. (As usual, this did not apply in relation to dignities and titles of honour.) Some of us had reservations about tampering with the genetic record in this way. But the enthusiastic doctors pointed out that the presumption of legitimacy meant that a remarkably high proportion of husbands registered as fathers were not genetically related to their children.

This was, of course, only the beginning. The Human Fertilisation and Embryology Act 1990 took things further. It provided that the carrying mother was always the mother, regardless of her genetic relationship with the child.⁶ It also provided that where an unmarried couple were being treated together (without defining what that meant) the mother's partner was deemed to be the father of the child for all legal purposes (with the usual exception)⁷. And the Human Fertilisation and Embryology Act 2008 took the further step of applying the same principles to two women.⁸

This will not have seemed a radical step by then, as the Adoption and Children Act 2002 had extended adoption in England and Wales to a 'couple', defined as either a married couple or two persons (whether of the same or different sexes) 'living as partners in an enduring family relationship'.⁹ Scotland followed suit in 2007 but Northern Ireland did not. However, in *In Re G (Adoption: Unmarried Couples)*,¹⁰ the House of Lords held that it was unjustified discrimination in the enjoyment of the right to respect for family life for the law in Northern Ireland to exclude unmarried couples from any chance of adoption, even when this was in the best interests of the child concerned.

The 2008 Act also contains the adoption-like procedure (originally contained in the 1990 Act) whereby the commissioning parents in a surrogacy arrangement may apply to become the child's legal parents.¹¹ This was originally limited to couples – married, civil partners or 'living as partners in an enduring family relationship'. But this has recently been extended to allow a single applicant (following a declaration made by the President of the Family Division in *In Re Z (A*

⁶ Section 27.

⁷ Section 28.

⁸ Section 42.

⁹ Section 144(4).

¹⁰ [2008] UKHL 38, [2009] 1 AC 173.

¹¹ Section 54.

Child) (No 2)¹² that excluding them was incompatible with the Convention rights). A single applicant or at least one of joint applicants must be a genetic parent of the child. The legal parents must consent.

Which brings me on to the expansion of affinity. The 2002 Act is example of how unmarried cohabitation is now recognised as conferring some rights which are akin to those of married couples, although by no means all. Attempts are still being made to improve their rights: Lord Marks' Cohabitation Rights Bill¹³ received a second reading in the House of Lords in March, although no date has yet been set for a committee stage. Among other things, this would give the courts power to make financial settlement orders along similar lines to the powers that already exist in Scotland (but more complicated).

Then came the Civil Partnerships Act 2004, conferring a marriage-like status on same sex couples who registered their relationship. This applies throughout the United Kingdom. This was followed in England and Wales in 2013 by the Marriage (Same Sex Couples) Act extending the status of marriage to them. Scotland followed suit in 2014 but Northern Ireland did not.

This instantly created discrimination between same sex couples, who could choose between marriage and civil partnership, and opposite sex couples who could only choose marriage. Some of us wondered why they were still so reluctant to marry. Marriage has lost virtually all the legal trappings associated with the old patriarchal and dynastic system. But pure reason is not to be expected when it comes to personal relationships. The legacy of the olden days is still a powerful one – Rebecca Steinfeld and Charles Keidan saw marriage as symbolic of the old ‘patriarchal and hetero-normative’ days, as their counsel put it to us, and wanted nothing to do with it, but they did want to be legally committed to one another. The Supreme Court held that it was unjustified discrimination in their enjoyment of the right to respect for their private and family life to deny them the same choice that gay couples had (*R (Steinfeld and Keidan) v Secretary of State for International Development*¹⁴).

¹² [2016] EWHC 1191 Fam, [2016] 3 WLR 1369.

¹³ https://publications.parliament.uk/pa/bills/lbill/2017-2019/0034/lbill_2017-20190034_en_1.htm

¹⁴ [2018] UKSC 32, [2018] 3 WLR 415.

The astonishing thing about that case was how hard the Government had fought it at every stage. They successfully claimed in the High Court that this was not sufficiently close to the core values protected by article 8 to engage the duty not to discriminate – but if the right to respect for family life is not about the legal recognition for family relationships what is it about? Anyway, they lost the argument in the Court of Appeal and did not pursue it before us. But they successfully claimed in the Court of Appeal that the difference in treatment was justified by the need to ‘wait and see’ before deciding how to remedy the discrimination – whether by extending civil partnerships to both or by abolishing civil partnerships now that gay marriage is available. A further alternative, not canvassed, would be to abolish marriage as a legal institution, leaving couples who wished to do so to have a separate religious or other ceremony once they had entered into their civil partnership.

Equally astonishing is the speed with which our declaration of incompatibility was remedied: by the Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019, which requires the Secretary of State to make regulations extending civil partnership to opposite sex couples by the end of this year¹⁵. The Scottish Parliament is planning legislation along similar lines.

The most recent ONS statistics¹⁶ give us a picture of what families look like now. A family is defined as a married, civil partnered or cohabiting couple with or without children, or a lone parent with at least one child. Children may be dependent or non-dependent. So they are talking about the so-called nuclear or household family, rather than the wider family or kinship group.

In 2017 there were 19 million families. Nearly 13 million were married or civil partner couple families. Of these, the great majority, 12.8 million, were opposite sex married couple families. There were 35,000 same sex married couples and 55,000 civil partner couples. There were 3.3 million cohabiting couple families, the great majority of whom were opposite sex couples, compared with 1.3 million in 1996. There were 2.8 million lone parent families. Lone parent

¹⁵ Section 2.

¹⁶ Snapshot of Families and Households in 2017 (ONS)

<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2017>

families grew by over 15% from 1996 to 2017 but did decrease from 3m to 2.8m from 2015 to 2017.

There were 14 million dependent children living in families in 2017. 15% of them lived in cohabiting couple families (up from 7% in 1996). 21% lived in lone parent families (compared with 20% in 1996). This does not, of course, give us a clue to the relationship between those children and the adults with whom they were living: were they children of the couple, or only one of them, or adopted, or deemed to be their children because of the Human Fertilisation and Embryology Act, or unrelated in any of those ways?

The complexities of those relationships are well illustrated by the Family Division case of *AB v CD, EF, GH and IJ*.¹⁷ This was about twin children, GH and IJ, who were born in 2010 as a result of a surrogacy agreement entered into in India. The surrogate mother, KV, was married to HV, and in English law they were the twins' legal parents.

The commissioning parents, CD and EF, were married to one another. They were also the twins' genetic parents. The twins were handed over to their care in accordance with the surrogacy arrangement. They did not realise that they should have applied for a parental order after the birth and did not do so within the six month time limit. In 2014 their relationship broke down and they were subsequently divorced. The twins remained in the care of their genetic mother. She began a relationship with AB who moved in to live with her and the twins in early 2015. Contact between the twins and her former husband, their genetic father, continued for a while but stopped at the end of 2016. This led to several applications before the High Court:

- AB, the commissioning mother's new husband, applied for a parental responsibility order.
- EF, the genetic father, applied for a child arrangements order and the court was requested to consider granting him parental responsibility.
- AB and CD, the genetic mother and her new husband, applied for the children to be made wards of court.
- CD, the genetic mother, applied for a child arrangements order that the children live with her.

¹⁷ [2018] EWHC 1590 (Fam).

- AB, her new husband, applied for a child arrangements order that the children also live with him and an order restricting EF's parental responsibility.

The genetic parents, CD and EF, could not apply for a parental order because they were no longer married to each other and the twins' home was not with both of them. CD, the genetic mother, could not at the time of the judgment make the application on her own (but this would now be possible). AB was not therefore married to a person who was in law a parent of the twins, so he could not acquire parental responsibility as a step-parent.

The court proceeded on the basis that there should be no presumption in favour of a genetic parent (EF) (following King LJ's statement in *Re E-R (A Child)*¹⁸ that 'there is no 'broad natural parent presumption' in existence in our law'). AB could be treated as a psychological parent of the twins, applying the definition of social and psychological parenthood in *In re G (Children)*¹⁹:

'the relationship which develops through the child demanding and the parent providing for the child's needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later, at the more sophisticated level of guiding, socialising, educating and protecting.'

The court decided to make the children wards of court for the time being, a child arrangements order in favour of AB and CD, no order as to contact or a parental responsibility order for EF (against whom allegations of abuse had been established) and an order restricting the exercise of the parental responsibility of the surrogate mother and her husband. So it found a sensible solution to the arrangements for looking after the children: but it was powerless to do anything to change their legal parenthood (unless and until there was an application to adopt, which would, of course, have excluded the genetic father from parentage, but would not have required his consent because he was not a legal parent).

Given all these changes in the concept of a family over the last fifty years, have the objects and purposes of family law also changed? What are we protecting them from and why? There are several observations to be made.

¹⁸ [2015] EWCA Civ 405, [2016] 1 FLR 521.

¹⁹ [2006] UKHL 43, [2006] 1 WLR 2305 at [35].

First, there is the continuing importance attached by many people and by the law to genetic relationships. We saw this first in the provision for adopted children to trace their birth parents, acknowledging the importance in establishing their own identity of having some knowledge of their origins. We have seen it again in enabling children born of donated gametes to know the identity of their donors, a hotly contested matter when the 1990 Act was first passed.

A rather different manifestation is in all those reported cases where known donors who have provided the sperm so that a lesbian couple can have children to bring up have tried to assert a father-like involvement with their children (see for example, *JK v HS*,²⁰ *In re G (A Child) (Child Arrangements Order: Third Party)*²¹). Sometimes they have succeeded and sometimes they have not. The precise terms upon which the donation was made are often disputed. If they have succeeded it is because it is in the best interests of the child to know and have some relationship with the father, and not because it is in the best interests of the father to have a relationship with his child. But it is noticeable how strongly some of these donors feel about it, in the face of opposition from the women who are bringing up the child, and the risk of destabilising their family life together. The moral for these women is, of course, to seek treatment from a licensed clinic using an anonymous donor.

A further manifestation is the development of surrogacy and the desire to secure that surrogacy arrangements should be enforceable. When my daughter and I did an ‘in conversation’ together at an ‘Out on the Street’ dinner, on the very day that the Supreme Court had given judgment in the so-called ‘gay cake’ case, there was little outrage at our decision but a great deal of outrage at the present state of our law on surrogacy. The Law Commission has just published a long consultation paper, *Building families through surrogacy: a new law*.²² The key proposals for reform are:

- The creation of a new pathway to legal parenthood in surrogacy, which will allow intended parents to be legal parents from birth
- Requirements and safeguards for the new pathway

²⁰ [2015] EWFC 84, [2016] Fam. Law 155.

²¹ [2018] EWCA Civ 305, [2018] 1 WLR 2769.

²² Joint Consultation Paper, Law Commission Consultation Paper 244, Scottish Law Commission Discussion Paper 167.

- A regulator for surrogacy
- Removal of a requirement of a genetic link between the intended parents and the child where medically necessary (although a genetic link will still be required for international arrangements)
- Creation of a register to allow those born of surrogacy arrangements to access information about their origins
- Unified guidance on nationality and immigration issues, and provision for recognition of legal parenthood across borders

The pathway includes medical and criminal record checks for the intended parents and the surrogate and her spouse or partner, and assessment of the welfare of the child to be born and a written surrogacy agreement before conception. If this is followed the intended parents will be the child’s legal parents from birth although there will be a period after the birth in which the surrogate can object. If this pathway is followed, it is suggested that the current requirement for one of the intended parents to have a genetic link to the child can be removed in domestic cases, though only if the intended parents are medically unable to contribute sperm or eggs. The genetic link requirement should remain for international cases to avoid the risk of surrogacy being abused for the purposes of child-trafficking.

Parental orders would still be possible for other cases. Interestingly, the President of the Family Division stressed, in *Re X (A Child) (Surrogacy: Time Limit)*,²³ the ‘transformative effect’ of a parental order for the child: ‘It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious consequences’, as well as the legal ones. Does the legal deeming have the same effect?

This points to the enduring significance in many people’s lives of symbols and of formal recognition. We have already seen that two thirds of families are married or civil partner couples and of these the vast majority are married. After the surge when civil partnership was first introduced, the figures stabilised at around 6,600 a year in the UK, until the introduction of gay marriage, when it fell to just over 1000 a year.²⁴ It looks as though gay marriage is far more

²³ [2014] EWHC 3135 (Fam), [2015] 2 WLR 745 at [54].

²⁴ England and Wales: ONS, Civil Partnership Formations, Table 1; Scotland: Vital Events Reference Tables 2017, Table 7.10; Northern Ireland: Registrar General Annual Report 2016.

popular than civil partnership, although there are still people, both gay and straight, who reject the symbolism they see in marriage while wanting a legally recognized relationship which is almost identical to marriage. I remember that the International Society on Family Law's conference in Uppsala in Sweden in 1979 was somewhat dismissive of the importance in people's lives of the symbolism involved in marriage - whether for or against – but we see things rather differently now.

Finally, what of the family as its own little social security system? Spouses and civil partners do still have mutual obligations to support one another, although the 'tailor-made' approach of English law to financial provision after divorce is increasingly under attack. But there are still striking illustrations of the view that it is the family, rather than the state, who should be supporting its more vulnerable members. This must be part of the reason for the decision in *Hlott v Blue Cross and others*.²⁵ There a mother had wholly disinherited her estranged grown-up daughter in favour of charities with whom she had had no known previous connection. The court ordered some modest provision for the daughter from the estate – although the decision certainly revealed a fundamental difference of opinion between those who favoured some family solidarity and those who favoured complete freedom of testation, there could be little other reason for giving the daughter anything.

A further (small but vivid) example of the demands which the state makes on the family to support its members was revealed in the Mathieson case (*Cameron Mathieson, a deceased child (by his father Craig Mathieson) v Secretary of State for Work and Pensions*²⁶). Cameron Mathieson was a severely disabled child who needed inpatient care for over a year in hospital. Cameron's parents were expected to be present at the hospital as his primary caregivers throughout his stay. But his disability living allowance ended after 84 days in hospital. We held that this was unjustified discrimination against children in Cameron's position, when there were so many additional personal demands and financial costs for the parents associated with attending the hospital to look after him.

However, the social security system of the family is facing a number of threats. Some might (no doubt will) argue that the moves to adopt a wholly 'no-fault' ground for divorce will weaken the

²⁵ [2017] UKSC 17, [2018] AC 545.

²⁶ [2015] UKSC 47, [2015] 1 WLR 3250.

stability of marriage and civil partnership. The Government launched a consultation exercise at the end of 2018 and published its response to this on 10 June this year.²⁷ The resulting Divorce, Dissolution and Separation Bill is making rapid progress through Parliament.²⁸ This bears a remarkable resemblance to the proposals which the Law Commission made back in 1990: the replacement of the need to prove facts before getting a decree with a waiting period during which the post-divorce arrangements can be agreed. But the idea is to strengthen the system by reducing the acrimony involved in having to prove facts and so create a better climate for making amicable agreements about the financial and child arrangements.

More threatening in my view is Baroness Deech's Bill, which has made its way through the House of Lords and is now before the Commons.²⁹ The main provisions are:

- Pre and post nuptial agreements will be binding provided that certain conditions are met (clause 3). These all relate to the circumstances in which the agreements were entered into rather than the needs of the parties at the time the relationship breaks down: compare the recommendations of the Law Commission, which were that parties should not be able to contract out of making provision for needs.
- Matrimonial property should be divided equally and only departed from if necessary to achieve fairness in certain circumstances (clause 4).
- Spousal maintenance will be limited to 5 years unless the spouse would otherwise suffer 'serious financial hardship' (clause 5).

I can see the attractions of all of this when set against the agony, the uncertainty and the expense of seeking our tailor-made solutions when the parties cannot be helped to agree something sensible. But I question how one size fits all can possibly meet the justice of the case or fulfill the role of the family in shouldering the burdens which it has created rather than placing them upon the state. I fear that it assumes an equality between the spouses which is simply not there in many, perhaps most, cases. It also sits oddly alongside Lord Marks' Bill, which aims to give

²⁷ <https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/>

²⁸ <https://services.parliament.uk/bills/2017-19/divorcedissolutionandseparation.html>.

²⁹ <https://services.parliament.uk/bills/2017-19/divorcefinancialprovision.html>.

unmarried couples a remedy which will redress the economic advantages and disadvantages suffered by each party in the course of their relationship.

In conclusion, three things stand out from the developments of the last 50 years. The first is an increasing desire and respect for individual autonomy in adult decision-making – by both men and women. So we try and facilitate or at least acknowledge the family life created between same sex couples, through informal partnerships, through assisted reproduction, adoption and surrogacy. At the same time, we increasingly respect their decisions to bring their adult relationships to an end and their autonomy in deciding upon the financial consequences of doing so. The pressure to impose some financial obligations between unmarried couples might run counter this were it not for the proposals to allow contracting out.

Secondly, at the same time, the interests of the children involved are increasingly seen as paramount. The law has had to be flexible and inventive to make sure that there are ways of protecting their interests in this new and scientific landscape. Their rights to understand and develop their relationships with their parents – of all sorts – while feeling secure in their care arrangements lie at the heart of this. So children's interests are seen as being individual to them in a way that would have been unthinkable in the past.

But thirdly, therefore, is there a tension between these two evolving trends? Can we allow adults their individual autonomy if this conflicts with the best interests of their children? To what extent should the shouldering of child and family care responsibilities be compensated by the family, as its own little social security system, rather than the state? To say nothing of developing responsibilities towards the rapidly ageing population?

So, I ask myself again, what are we protecting the 21st century family from? The outside world or the enemy within?