

British Conservatism
and the Legal Regulation
of Intimate Relationships

Andrew Gilbert

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Major Change?: Family Law and Policy in the Decade Following the Matrimonial and Family Proceedings Act 1984

Introduction

This chapter aims to provide a broad narrative of some notable developments in family law from the mid-1980s to the mid-1990s, thereby linking the detailed consideration of the Matrimonial and Family Proceedings Act 1984 and the Family Law Act 1996 (FLA 1996) in the chapters immediately before and after it. While I contend that it is chiefly by looking closely at the discourse around particular examples of family law-making that we can best understand the relationship between British conservatism and the legal regulation of intimate relationships, it is my concern that such micro-evaluation does not come at the expense of an attempt at a coherent metanarrative. Before turning to a series of family law vignettes, I will first consider the advent of the premiership of John Major and the character of his leadership regarding family law and policy in the broadest sense. The chapter will conclude by identifying themes and transitions from this decade of change.

The Major Premiership: Thatcherism After Thatcher?

The resignation of Margaret Thatcher on 28 November 1990 was as a result of a confluence of many factors, and much has been written about this landmark in British political history.¹ The loss of heavyweight supporters of the Thatcherite

¹ See, eg, P Riddell, *The Thatcher Era and its Legacy* (Oxford, Basil Blackwell, 1991) 219–21; M Thatcher, *The Downing Street Years* (London, HarperCollins, 1993) ch xxviii; R Blake, *The Conservative Party from Peel to Major* (London, Arrow Books, 1998) ch xiii; J Ramsden, *An Appetite for Power: A History of the Conservative Party since 1830* (London, HarperCollins 1999) ch 17; M Heseltine,

project from her close circle (eg, Norman Fowler,² Geoffrey Howe, Nigel Lawson,³ Cecil Parkinson,⁴ Nicholas Ridley),⁵ the damage inflicted on the Government by its heavy-handed implementation of the poll tax, Thatcher's hubristic attitude to Cabinet government and her distance from many of her backbenchers, and ultimately the Party's slump in the opinion polls, all led to what was the undoing of many a Conservative leader: a growing *mood* that she no longer looked like a winner.⁶ Following Thatcher's resignation, her choice of successor was also to be that of her Party—John Major.⁷ Some regarded what Major offered as 'Thatcherism without Thatcher',⁸ apparent change but with an enduring core of continuity. However, in terms of political ideology Major 'travelled light', and by working within the existing paradigm—rather than changing it as Thatcher had done—he was more conservative than Thatcher.⁹

It was said of John Major's career that 'he rose without trace'.¹⁰ From probably the least privileged background of any British Prime Minister,¹¹ he held the premiership for seven turbulent years. After becoming an MP in 1979, he occupied junior government posts during much of the 1980s before being promoted to the Cabinet as Chief Secretary to the Treasury in 1987. His rise thereafter was meteoric: appointed Foreign Secretary in July 1989; Chancellor from October 1989 to November 1990; then Party leader and Prime Minister until May 1997. His electoral performance is one of extremes: in 1992 the Conservatives polled more votes than any party before or since (Major's Huntingdon constituency majority was a

Life in the Jungle: My Autobiography (London, Hodder & Stoughton, 2000) ch 16; J Campbell, *Margaret Thatcher Volume 2: The Iron Lady* (London, Jonathan Cape, 2003) ch 17; R Harris, *The Conservatives: A History* (London, Bantam Press, 2011) ch 17.

² Norman Fowler (1938–), Conservative Member of Parliament for Nottingham South (1970–74) and Sutton Coldfield (1974–2001), member of the House of Lords since 2001 and Lord Speaker since 2016. He was Secretary of State for Transport (1979–81), Secretary of State for Social Services (1981–87) and Secretary of State for Employment (1987–90) before leaving government to spend more time with his family.

³ Nigel Lawson (1932–), Conservative Member of Parliament for Blaby from 1974 to 1992, member of the House of Lords since 1992. He was Chancellor of the Exchequer from 1983 to 1989.

⁴ Cecil Parkinson (1931–2016), Conservative Member of Parliament from 1970 to 1992, member of the House of Lords from 1992 to 2015. He held various Cabinet posts under Thatcher's premiership, including Secretary of State for Energy (1987–89) and for Transport (1989–90).

⁵ Nicholas Ridley (1929–93), Conservative Member of Parliament for Cirencester and Tewkesbury from 1959 to 1992, member of the House of Lords from 1992 to 1993. He held various Cabinet posts under Thatcher's premiership, including Secretary of State for Transport (1983–86), for the Environment (1986–89) and for Trade and Industry (1989–90).

⁶ Blake (n 1) 383; Ramsden (n 1) 467–69.

⁷ Harris (n 1) 495–96.

⁸ Ramsden (n 1) 471.

⁹ K Hickson, 'John Major and the Evolution of British Conservatism' in K Hickson and B Williams (eds), *John Major: An Unsuccessful Prime Minister?: Reappraising John Major* (London, Biteback Publishing, 2017) 50.

¹⁰ Peter Norman, 'Tory Leader Who Rose Without Trace' *Financial Times* (London, 28 November 1990).

¹¹ S Jenkins, *Thatcher and Sons: A Revolution in Three Acts* (London, Penguin, 2006) 159.

staggering 36,230); but in 1997 their defeat was the heaviest of any governing party in the twentieth century. Major would later reflect that his time in Number 10 was ‘too conservative, too conventional. Too safe, too often. Too defensive. Too reactive’.¹² He believed in ‘a rough-and-ready decency’ but lamented that, to many still wedded to Thatcher’s Manichaean vision, this was not considered enough:

They demand an ideology, intellectual mentors, a political template by which to judge every circumstance. I reject that ... Of course there must be broad principles and recognised values to underpin political decisions, but to believe that decisions can only be in the national interest if they conform to the ideology of some guru [perhaps a veiled reference to Friedrich Hayek and Milton Friedman] must surely be nonsense ... A politician’s responsibility should above all be a readiness to do what is best in all the circumstances to deal with the issue at hand.¹³

The seeds of the Party’s demise were already sown by the time Major took over. Andrew Taylor identifies the Party’s ideological flexibility as one of the main reasons it dominated British politics during the Thatcher years.¹⁴ While there may have been strong ideological narratives at a rhetorical level, he argues that the Conservatives’ principled pragmatism enabled them to adapt successfully to a complex and dynamic political environment. However, Taylor observes that this advantage had been lost by the time Major became leader. Although Major was ideologically agnostic, he inherited a party for which pragmatism had ossified into an often exclusionary ideology.¹⁵ As Major later testifies, ‘The broad tradition of our party *was* tolerant. If a certain shrill and censorious tone had set in, it was that tone which broke faith with our past’.¹⁶

Undoubtedly the Major governments made efforts to counter what was often perceived to be the divisive legacy of Thatcherism, but these efforts were sometimes ill-conceived, disastrously executed, or lacked salience with the public: the ‘classless society’, Citizen’s Charter, and ‘Back to Basics’ all stand as examples. Back to Basics arose from Major’s speech to the Conservative Party conference in October 1993. Major wrote that Back to Basics ‘came from [his] innermost personal beliefs’,¹⁷ which objected that ‘[p]rofessional wisdom had become divorced from public sentiment and from reality’,¹⁸ echoing Burke’s distrust of so-called experts and his trust in the good of the status quo. Back to Basics rested on a belief

¹² J Major, *John Major: The Autobiography* (London, HarperCollins, 1999) xxi.

¹³ *ibid* xxii.

¹⁴ Andrew Taylor writing in the preface to T Heppell, *The Conservative Party Leadership of John Major 1992 to 1997* (New York, Edwin Mellen Press, 2006).

¹⁵ Heppell, *ibid* 16. Heppell elsewhere calls Major ‘ideologically enigmatic’ (252). Heppell’s ch 5 contains a useful overview of the ideological attitudes of the parliamentary Conservative Party in the 1992–97 Parliament, and of its ministers in ch 7 and pp 138–42.

¹⁶ M McManus, *Tory Pride and Prejudice: The Conservative Party and Homosexual Law Reform* (London, Biteback Publishing, 2011) 165.

¹⁷ Major (n 12) 387.

¹⁸ *ibid*.

in ‘personal responsibility and individual values’,¹⁹ and this is what Major saw as the essence of the ‘basics’ to which he wanted to return. As will be seen in the next chapter, this belief chimes with the spirit and letter of Part II of the FLA 1996, although it seems that Back to Basics was primarily aimed at matters of crime, health and education. It is evident, though, that what was intended as the purpose of Back to Basics was lost when it was reinterpreted as a moral crusade against personal behaviour by a hostile media following a parade of high-profile indiscretions by Conservative politicians.²⁰ Yet, provided they did not impact upon the proper performance of public office, Major was tolerant of personal misdemeanours.²¹ However, Back to Basics was so undermined by events, and the attritional effects of press stories about those events, that the policy approach was abandoned in February 1994, and Major subsequently shied away from such broad-brush social policy initiatives for the remainder of his premiership.²²

What was Major’s attitude to matters of the family? Heppell’s assessment is that Major is a social liberal,²³ but he led a party with a majority of socially conservative MPs.²⁴ The Prime Minister’s room for manoeuvre, therefore, was limited because, despite his liberal views of family matters, he owed his success in the party leadership contest in no small part to the right-wing of the party. McManus points to Major’s family background in the music hall and considers him a ‘man without prejudice’;²⁵ and Major himself claims he ‘did not see homosexuality as a social evil’.²⁶ When he met Ian McKellen, the actor and co-founder of Stonewall, at Downing Street in September 1991—something which *The Times* believed Thatcher would never have done and the first time a sitting Prime Minister has met with a gay rights activist—this signified Major’s open-mindedness towards matters of homosexual law and policy.²⁷ There was some reform in this area under Major’s premiership which removed (or ameliorated) discrimination against gay men and lesbians in certain matters (see my chapter six). On the specific matter of the Family Law Bill, Major believed ‘it would help families and work for the benefit of children’.²⁸ However, with effectively no Commons majority during his

¹⁹ *ibid* 388.

²⁰ There is no shortage of examples, but a particularly notorious one was the case of Jerry Hayes, the married MP for Harlow, who was reported to have had an affair with Paul Stone. Stone was under the lawful age for homosexual activity (21) at the time. See, Peter Popham, ‘Back to Basics of Vaudeville’ *The Independent* (7 January 1997): www.independent.co.uk/news/uk/back-to-basics-of-vaudeville-1282058.html.

²¹ Major (n 12) 551. With hindsight, it might be speculated that Major was tolerant because his own closet was not without its skeletons, ie, his affair with Edwina Currie from 1984 to 1988, revealed by Currie in 2002.

²² A Seldon, *Major: A Political Life* (London, Weidenfeld & Nicolson, 1997) 406.

²³ Heppell (n 14) 166.

²⁴ *ibid*, ch 5.

²⁵ McManus (n 16) 165, 183.

²⁶ Major (n 12) 213.

²⁷ Seldon (n 22) 215–18.

²⁸ *ibid* 641.

last year or so in office, it is easy to see why his more modern and inclusive stance on the family did not hold sway in the Party at the time. In the end, it was the Major Government's record on the family (as well as on Europe) that caused the *Daily Mail* to turn lukewarm in its support of the Party in the run-up to the 1997 general election.²⁹

Before considering specific examples of family law from this time, one point of continuity between the Thatcher and Major governments can be observed: Lord Mackay held the office of Lord Chancellor from 1987 to 1997, making him the longest continually serving Lord Chancellor of the twentieth century.³⁰ The significance of this point could be overstated, however. And this is because family law and policy in the United Kingdom is not the preserve of any one government department, but could variously involve, for example, Education, Health, Social Security, as well as Mackay's Lord Chancellor's Department (as it then was). However, Lord Mackay's influence is apparent in the Children Act 1989 (CA 1989), the Human Fertilisation and Embryology Act 1990 (HFEA 1990) and the FLA 1996, for example, although it is merely one of many forces which shaped those statutes.

Family Law and Policy Prior to the Family Law Act 1996

Unsurprisingly, the family law and policy of mid- to late-Thatcherism paints a mixed picture. Developments in housing law lessened the privileged status of married couples and gave greater rights to different-sex cohabitants.³¹ The Housing Act 1985, which governs succession rights of council tenants, states that a person may succeed the tenant under a secure tenancy if they occupied the property as the tenant's spouse or other family member.³² Section 113(1)(a) defines 'family' to include cohabitants (living 'together as husband and wife'). Similarly, section 39 and schedule 4 of the Housing Act 1988 amended the Rent Act 1977 by giving legal equivalence of a person 'living with the original tenant as his or her wife or husband' with that of the original tenant's spouse, thereby removing another legal distinction between married and cohabiting couples. No doubt these provisions chimed with changing social mores, but they were also supportive of neoliberal and Conservative (and probably conservative) views around the privatisation of

²⁹ *ibid* 712.

³⁰ James Mackay (1927–), Lord Advocate (1979–84), Lord of Appeal in Ordinary (1985–87), Lord Chancellor (1987–97), Conservative member of the House of Lords since 1979.

³¹ The later case of *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27 extended it to same-sex couples' tenancies under the Rent Act 1977.

³² See ss 87–89.

caregiving. The Family Law Reform Act 1987 further eroded legal distinctions between married and unmarried couples, this time with regard to the legal status of children born to mothers who were not married to the child's father. The Act effectively abolished the concept of illegitimacy, although not in so many words. Again, this is more in line with a libertarian approach to the regulation of the family, than one which might be considered a return to the traditional Victorian values of late Thatcherism.³³ It is also in line with the pronouncements of the European Court of Human Rights (ECtHR) around this time. The case of *Marckx v Belgium*³⁴ held that Belgium's illegitimacy laws were in breach of the applicants' rights to a private and family life under Article 8 of the European Convention on Human Rights (ECHR). Stephen Cretney, who was a Law Commissioner at the time of its first report on illegitimacy,³⁵ confirms that the *Marckx* case was considered in the discussions which lead to the Family Law Reform Act.³⁶ The apparent influence of the Strasbourg Court stands as evidence that other factors, aside from party political ones, were influencing the development of family law during this period. Other aspects of the Act, however, reinforced distinctions between married and unmarried couples, with for example section 27 remedying the situation where previously a child born to a married couple through 'artificial insemination' using donor sperm would be illegitimate. The section recognised the husband as the father provided he consented to the insemination, thereby restoring order to the traditional married unit.

A couple of technical changes were made to marriage, which could be interpreted as measures to modernise the concept of marriage, specifically who may enter into it and greater recognition of the wife as a separate individual and economic actor within marriage. The former point was covered in the Marriage (Prohibited Degrees of Relationship) Act 1986, which provided that marriage between certain people connected by affinity would no longer be void (eg, a stepchild and his/her step-parent or step-grandparent provided the stepchild was over 21 and had never been treated as a child of the family by the other party). The latter point was addressed by section 32 of the Finance Act 1988, which further eroded the doctrine of unity by abolishing the rule whereby a wife's income is aggregated to her husband's for income tax purposes. This recognised the increased engagement of (married) women in the labour market and their identity as economic actors as well as often being primary caregivers in the domestic context.

³³ G Douglas, 'Family Law under the Thatcher Government' (1990) 17 *Journal of Law and Society* 411, 418.

³⁴ *Marckx v Belgium* (1979) 2 EHRR 330. For a detailed discussion see W Pintens and J Scherpe, 'The *Marckx* Case: A "Whole Code of Family Law"?' in S Gilmore, J Herring and R Probert (eds), *Landmark Cases in Family Law* (Oxford, Hart Publishing, 2011).

³⁵ Law Commission, *Illegitimacy* (Law Com No 118, 1982).

³⁶ S Cretney and J Masson, *Principles of Family Law*, 6th edn (London, Sweet & Maxwell, 1997) 86.

Surrogacy Arrangements Act 1985

The Surrogacy Arrangements Act 1985 came about because of media and popular reaction to the ‘baby Cotton’ surrogacy case.³⁷ It is a short Act which outlaws the practice of commercial surrogacy, but leaves people free to use not-for-profit agencies or enter into private surrogacy arrangements (and these were given a legal framework in the subsequent HFEA 1990, section 30). Gillian Douglas says of the Act that its attempt to uphold traditional family values and counter the forces of the market are ‘an expression of Conservative, rather than far-right libertarian philosophy’.³⁸ This is borne out by the fact that the birth mother cannot be forced to hand over a child born following surrogacy: surrogacy agreements are not enforceable.³⁹ Overall, the Act can be seen as a sensible and proportionate response to a minor social issue, and one which partly followed the recommendations in the *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Warnock Report).⁴⁰

The Warnock Report, however, was about much more than surrogacy. It followed growing concerns about artificial insemination by donor (AID), as well as issues such as in vitro fertilisation and embryo research, which were being raised in Parliament from the late 1970s. Reproductive science had progressed but the law had not kept pace, so that a child born by AID to a married couple would be illegitimate even if the husband had consented to the wife being so treated.⁴¹ The husband in such circumstances would, on the birth’s registration, have to leave blank the space for the father’s name, although it was suggested that this legal requirement was being ignored by many couples.⁴² A Private Member’s Bill was introduced in 1977 to remedy this situation but it fell by the wayside.⁴³ The following year officials in the Department of Health were concerned about the case of a child who had been born to a 19-year-old former prostitute as a result of a private surrogacy arrangement with an unmarried couple.⁴⁴ Media and parliamentary

³⁷ See *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846. Kim Cotton was the first British woman to give birth following a commercial arrangement with a surrogate parenting agency. For an account of events from her perspective, see K Cotton and D Winn, *Baby Cotton: For Love and Money* (London, Dorling Kindersley, 1985).

³⁸ Douglas, ‘Family Law under the Thatcher Government’ (n 33) 417.

³⁹ Surrogacy Arrangements Act 1985, s 1A.

⁴⁰ Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmd 9314, 1984) specifically recommendation 57 on p 86 of the report, which wanted to ban all surrogacy agencies, profit and non-profit. Two members of the Committee (David Davies and Wendy Greengross) dissented and wanted to permit non-profit agencies. Parliamentary debates of the report can be found at HL Deb 31 October 1984, vol 456, cols 524–31, 535–93; HC Deb 23 November 1984, vol 68, cols 528–44, 547–90. The Warnock Report is considered further below.

⁴¹ But see discussion of s 27 of the Family Law Reform Act 1987 above.

⁴² HC Deb 28 June 1977, vol 934, col 276.

⁴³ AID Children (Legal Status) Bill, brought by Labour MP Joan Lestor, *ibid*.

⁴⁴ *Re T (A Minor)* (20 June 1978), a copy of the judgment is in MH152/111 in the National Archives.

pressure continued to grow for a formal inquiry into medical ethics until the then Secretary of State for Social Services, Norman Fowler, set in train the process of establishing the inquiry in early 1982,⁴⁵ with Mary Warnock being the Government's first choice from the outset.⁴⁶ Given the moralising tone of much Thatcherite social policy and the obvious moral and ethical territory which Warnock surveyed, it is perhaps surprising that the Government did not seek to appoint church representatives to the committee, despite requests by Lord Hailsham and Baroness Young.⁴⁷ The Warnock Report was published in July 1984 and the Government deliberately dragged its feet in implementing its recommendations (particularly on embryo experimentation) because of the 'intense feelings on both sides of the issue', with Thatcher being advised to 'lie low and do nothing'.⁴⁸ The issue of commercial surrogacy, however, was one aspect of Warnock which the Government felt compelled to deal with sooner rather than later.

Although it followed Warnock in its substance, the timing of the Surrogacy Arrangements Act 1985 was certainly influenced by the media storm around the Kim Cotton case, which immediately followed the birth of baby Cotton on 4 January 1985. Five days later Norman Fowler circulated a paper to a Cabinet committee which proposed a Bill to deal with surrogacy in that parliamentary session, with a second Bill to deal with the remainder of Warnock in the following session.⁴⁹ The majority of the committee, including the Lord Chancellor and the Solicitor General, were against Fowler, being of the view that the proposal was 'rather hasty' and 'the moral arguments less than clear-cut'.⁵⁰ Thatcher's handwritten response to the news that the committee was going to recommend to Cabinet that there be no surrogacy legislation in this session was an unequivocal 'No no'.⁵¹ A Cabinet paper prepared by Willie Whitelaw,⁵² dated 21 January 1985, confirms that the previous week's meeting of the Home and Social Affairs Committee wanted to resist popular pressure to legislate immediately, but invited Cabinet to consider whether to legislate in the current parliamentary session '[i]n view of the current controversy'.⁵³ In response, Fowler again went on the offensive, setting out his concerns to Thatcher in more detail, including his belief that three more

⁴⁵ Letter from Norman Fowler to William Whitelaw, TNA PREM 19/1855, 4 April 1982.

⁴⁶ Memorandum from Norman Fowler to Margaret Thatcher, TNA PREM 19/1855, 3 June 1982.

⁴⁷ Letter from Quintin Hogg to Margaret Thatcher, TNA PREM 19/1855, 25 February 1982; Letter from Janet Young to Margaret Thatcher, TNA PREM 19/1855, 4 March 1982.

⁴⁸ Memorandum from David Willetts to Margaret Thatcher, TNA PREM 19/2345, 4 November 1986.

⁴⁹ Memorandum from David Barclay (Private Secretary) to Margaret Thatcher, TNA PREM 19/1855, 9 January 1985.

⁵⁰ Memorandum from David Barclay to Margaret Thatcher, TNA PREM 19/1855, 18 January 1985.

⁵¹ *ibid.*

⁵² William Whitelaw (1918–99), held various senior posts in the Heath and Thatcher governments, including Home Secretary (1979–83) and Leader of the House of Lords (1983–88). He was Conservative Member of Parliament for Penrith and The Border from 1955 to 1983, and member of the House of Lords from 1983 to 1999.

⁵³ Memorandum from the Lord President of the Council on Legislation on Commercial Surrogacy, TNA CAB 129/219/2, 21 January 1985.

commercial surrogacy babies were already in utero.⁵⁴ After a brief discussion in Cabinet it was agreed that a draft Bill should be prepared,⁵⁵ and by the end of February it was reported to Cabinet that the Home and Social Affairs Committee had considered and approved the proposed Bill.⁵⁶ In the space of eight weeks, the birth of baby Cotton and the force of will of Fowler and Thatcher resulted in an imminent legislative intervention that was otherwise resisted by the majority of relevant ministers at the time. The Bill received Royal Assent before the summer recess.

The three most significant family law Acts of the late Thatcherite period, however, were the CA 1989, the HFEA 1990 and the Child Support Act 1991 (CSA 1991).⁵⁷ Space does not permit detailed examination of these measures here but I will briefly consider their main provisions and how they relate to the discussion in this chapter.

Children Act 1989

The Children Act 1989 (CA 1989) was a landmark piece of legislation, codifying many of the private and public law provisions concerning children which were considered to be ‘complicated, confusing and unclear’.⁵⁸ Sir Geoffrey Howe, then Deputy Prime Minister and Leader of the House of Commons, described it as ‘the most comprehensive and far-reaching reform of this branch of the law ever introduced’.⁵⁹ The Act was a result of the confluence of two streams, having its origins in the work of the Law Commission and a government interdepartmental working party.⁶⁰ The Law Commission’s work was largely focused on private law issues and it began its review of child law in 1984. Four Working Papers were published and put out for consultation,⁶¹ and they culminated in a full report and draft Bill published in 1988.⁶² The Government review concerned itself with

⁵⁴ Memorandum from Norman Fowler to Margaret Thatcher, TNA PREM 19/1855, 23 January 1985.

⁵⁵ Cabinet Minutes, TNA CAB 128/81/4, 31 January 1985.

⁵⁶ Cabinet Minutes, TNA CAB 128/81/7, 28 February 1985.

⁵⁷ Another significant provision from that period was s 28 of the Local Government Act 1988 which labelled homosexuality as a ‘pretended family relationship’. I consider s 28 as part of the prehistory of the Civil Partnership Act 2004 in ch 6.

⁵⁸ Law Commission, *Review of Child Law: Guardianship and Custody* (Law Com No 172, 1988) para 1.1.

⁵⁹ HC Deb 26 October 1989, vol 158, col 1075.

⁶⁰ The working party was set up following a recommendation contained in the Second Report of the Social Services Committee, *Children in Care* (HC 1983–84, 360-I), also known as the Short Report after its chairperson, Renee Short MP. For an insider’s view of the whole process see M Maclean and J Kurczewski, *Making Family Law* (Oxford, Hart Publishing, 2011) ch 2.

⁶¹ They covered guardianship (Law Commission, *Review of Child Law: Guardianship* (Law Com No 91, 1985)); custody (*Review of Child Law: Custody* (Law Com No 96, 1986)); care, supervision and interim orders in custody proceedings (*Review of Child Law: Care, Supervision and Interim Orders in Custody Proceedings* (Law Com No 100, 1987)); and wards of court (*Review of Child Law: Wards of Court* (Law Com No 101, 1987)).

⁶² Law Commission, *Review of Child Law: Guardianship and Custody* (n 58).

childcare responsibilities of local authorities and interim and final reports were published.⁶³ The call for reform gathered pace following a number of high-profile child abuse cases, most notably in Cleveland, leading to the Bill beginning its parliamentary passage in the House of Lords on 23 November 1988 under the promotion of Lord Mackay.⁶⁴ It has been observed that the Bill was enacted with a high degree of consensus across political parties,⁶⁵ which is perhaps more remarkable given that the policy of the Bill was split between the Department of Health (public law) and the Lord Chancellor's Department (private law).

At the heart of the Act's philosophy is 'the belief that children are best looked after within the family with both parents playing a full part and without recourse to legal proceedings'.⁶⁶ It has been argued that this idea is informed by four approaches to child welfare: *laissez-faire* and patriarchy, state paternalism and child protection, the defence of the birth family and parents' rights, and children's rights and child liberation.⁶⁷ The two central concepts in the Act, of parental responsibility and the child's welfare being the court's paramount consideration, very much flow from these approaches. The notion of parental responsibility could have come straight from the Cabinet-level Family Policy Group (see chapter three), but did in fact emerge from the Law Commission's draft Bill in its Report No 172. Its report also placed child welfare as the guiding star in a court's deliberations, with the Commission's draft Bill proposing that it should be a court's 'only concern'.⁶⁸ The Government's instructions to parliamentary counsel modified this semantically to the court's 'sole consideration',⁶⁹ but this still suggested too much emphasis on the child's interests. The Act has welfare as the court's 'paramount consideration',⁷⁰ meaning that it 'rules upon or determines the course to be followed'⁷¹ by a court.

Smart has written that the CA 1989 might be the first statute to address itself to the idea of the post-divorce family and that that family is not beyond the reach

⁶³ See *Review of Child Care Law* (Report to Ministers of an Interdepartmental Working Party, 1985); Department of Health and Social Security, *The Law on Child Care and Family Services* (White Paper, Cm 62, 1987). Evidence suggests that the Government's position was influenced to some extent by cases decided in the ECtHR (eg, *O v United Kingdom* (1988) 10 EHRR 82), see G Douglas, 'The Family and the State under the European Convention on Human Rights' (1988) 2 *International Journal of Law, Policy and the Family* 76, 98–99; and Cretney and Masson (n 36) 85–86.

⁶⁴ Department of Health and Social Security, *Report of the Inquiry into Child Abuse in Cleveland 1987* (Cm 412, 1988) (the Cleveland Report); Department of Health, *Child Abuse: A Study of Inquiry Reports 1980–89* (HMSO, 1991).

⁶⁵ L Fox Harding, 'The Children Act 1989 in Context: Four Perspectives in Child Care Law and Policy (1)' (1991) 13 *The Journal of Social Welfare & Family Law* 179, 180.

⁶⁶ Cretney and Masson (n 36) 775.

⁶⁷ Fox Harding (n 65).

⁶⁸ Law Commission, *Review of Child Law, Guardianship and Custody* (n 58) 73.

⁶⁹ Instructions on Child Law, TNA LCO 68/32, 15.

⁷⁰ Children Act 1989, s 1(1).

⁷¹ Lord MacDermott in *J v C* [1970] AC 668, 710.

of state regulation.⁷² The Act certainly reorders the balance of power between the triad of parents, children and state, semantically and substantively shifting from parental rights to parental responsibility. Some have seen this as part of the privatisation or deregulation of child law, such that the expectation is that parents look after their children, with the state supporting families in a more diffuse, ecological sense.⁷³ Others have argued that there is no contradiction between the interventionist provisions of the Act and general Thatcherite discourse opposed to state intervention by postulating that the Act is only ‘against the type of intervention that brings into question the “naturalness” of family life.’⁷⁴ This demarcation is consonant with the then Government’s neoliberal views on economic matters and a neo-conservative, or libertarian, stance on the state’s withdrawal from the direct regulation of family life.⁷⁵

A significant part of the shift in the balance of power in the CA 1989 is in terms of a growing discourse around the rights of the child. I considered in chapter two how conservatism is more concerned with the maintenance of authority within society than in the advancement of rights, so was it incongruous for the Thatcher administration to reinforce the rights of children through legislation? I agree with Karen Winter and Paul Connolly’s reading which suggests a mixed response, but on the whole answers in the negative. It is a mixed response in the sense that the Act sets out a child’s rights in relation to the state and towards his or her parents, but it has far more to say about the former than the latter.⁷⁶ And even then, a child’s rights under the Act really boil down to a right to remain within their natural family wherever possible and for the child’s voice to be heard in decision-making about their future, rather than full-blown rights to self-determination. All of which serve to reinforce notions of the naturalness of the nuclear family and the essentially private sphere of family life, consistent with Ferdinand Mount’s Thatcherite thesis and a liberal view of the family generally.⁷⁷

⁷² C Smart, ‘Divorce in England 1950–2000: A Moral Tale?’ in SN Katz, J Eekelaar and M Maclean (eds), *Cross Currents: Family Law and Policy in the United States and England* (Oxford, Oxford University Press, 2000) 384.

⁷³ MDA Freeman, ‘Disputing Children’ in SN Katz, J Eekelaar and M Maclean (eds), *Cross Currents: Family Law and Policy in the United States and England* (Oxford, Oxford University Press, 2000) 446; J Masson, ‘From Curtis to Waterhouse: State Care and Child Protection in the UK 1945–2000’ in SN Katz, J Eekelaar and M Maclean (eds), *Cross Currents: Family Law and Policy in the United States and England* (Oxford, Oxford University Press, 2000) 581. I have borrowed the ‘ecological’ term from Mary Ann Glendon: MA Glendon *The Transformation of Family Law* (Chicago, IL, The University of Chicago Press, 1989) 308.

⁷⁴ K Winter and P Connolly, ‘“Keeping It in the Family”: Thatcherism and the Children Act 1989’ in J Pilcher and S Wagg (eds), *Thatcher’s Children? Politics, Childhood and Society in the 1980s and 1990s* (London, Falmer Press, 1996) 39.

⁷⁵ Douglas, ‘Family Law under the Thatcher Government’ (n 33) 419.

⁷⁶ Winter and Connolly (n 74) 38.

⁷⁷ F Mount, *The Subversive Family: An Alternative History of Love and Marriage* (New York, The Free Press, 1992).

The CA 1989 is also concerned with the redefinition and restriction of social work intervention,⁷⁸—also part of the process of public/private demarcation going on in the Act—which although part of the rational, evidence-based review process, was very much fuelled by the series of moral panics around children and the professionals who work with them during the 1980s. There are similarities here with the attitudes towards marriage counsellors in the next chapter about the FLA 1996. Professionals who work with families are an essential part of the state's apparatus but they were often viewed with suspicion by Conservative legislators, and as an unnatural interference in the 'natural' order of 'the family'.⁷⁹

Human Fertilisation and Embryology Act 1990

Another significant piece of legislation regulating the family was the Human Fertilisation and Embryology Act 1990 (HFEA 1990). This Act arose primarily out of a felt need to address scientific advances in, and widespread fears regarding, fertility treatment and embryo research which had outgrown existing legal frameworks, but also to codify the law on parentage and to clarify exceptions to the common law principle that legal parentage followed genetic parentage.⁸⁰ The thinking behind the Act is drawn from the Warnock Report and the subsequent government White Paper.⁸¹ The Committee began its work in July 1982 and was tasked 'to examine the social, ethical and legal implications of recent, and potential developments in the field of human assisted reproduction'.⁸² The report recommended the establishment of a regulatory body (what became the Human Fertilisation and Embryology Authority), as well as various legal provisions which would determine who would be treated as the parents of a child born following assisted reproduction.

The Bill was introduced into the House of Lords by Lord Mackay on 22 November 1989. It was sponsored in the Commons by the Health Secretary, Kenneth Clarke,⁸³ and had its Second Reading there on 2 April 1990.⁸⁴ Clarke thought it was a 'complex and sensitive Bill that deals with matters that are fundamental to

⁷⁸ Winter and Connolly (n 74) 35.

⁷⁹ eg 'In recent years ... some social workers have exaggerated their expertise and magnified their role, in effect substituting themselves for the parents with insufficient cause'. (Thatcher (n 1) 630.)

⁸⁰ On the origins of the Act see R Deech, 'The Legal Regulation of Infertility Treatment in Britain' in SN Katz, J Eekelaar and M Maclean (eds), *Cross Currents: Family Law and Policy in the United States and England* (Oxford, Oxford University Press, 2000).

⁸¹ Department of Health and Social Security, *Human Fertilisation and Embryology: A Framework for Legislation* (Cm 259, 1987).

⁸² DHSS, *ibid* iv.

⁸³ Kenneth Clarke (1940–), held various senior posts in the Thatcher and Cameron governments, including Secretary of State for Health (1988–90), for Education and Science (1990–92), for the Home Department (1992–93), Chancellor of the Exchequer (1993–97), and Lord Chancellor (2010–12). He has been the Conservative Member of Parliament for Rushcliffe since 1970.

⁸⁴ HC Deb 2 April 1990, vol 170, col 914.