

vention in family life often rests on the freedom of more powerful members (usually husbands in relation to wives and parents in relation to children) to exercise their power without restriction'. (Freeman 1985: 168–69, references omitted)

Certainly in many families mutual respect, affection and nurture prevail. The law no longer permits physical chastisement of a wife by her husband, rape in marriage has been recognised as a crime, and, broadly speaking, the beating of children has come to be called child abuse. We shall explore later in more detail, however, the extent to which the traditional nuclear family lives up to the functional ideal assumed by law, but for our purposes now, we wish to identify the assumption as a problematic one.

III. WHAT IS FAMILY LAW?

Thus far we have suggested that that unit which we know of as the family is not capable of any easy definition. Who is included in the definition of 'family' may differ depending upon whether what is being constructed is a sociological model, an anthropological model or an economic or legal model. Perhaps it depends upon what we want the family to represent or to do. Moreover, people in Britain currently arrange their social, economic and sexual lives in many different ways. Yet, despite this multiplicity of family forms, there is an ideology of the family which relies upon, and in turn reinforces, assumptions which imply that it is possible to construct a single definition of family. Those assumptions centre on the notion of separate spheres and family privacy, on the image of the family unit as a source of affection and protection, and on the belief in the inherent 'naturalness' of the traditional family form. It is, therefore, as much the ideology of the family as families themselves which sets the stage for the study of family law. As US family law scholar, Fran Olsen, states:

[T]he family and roles within the family are constituted by law and state intervention in the family is not an analytical concept but rather an ideological one. Family law is an arena for the ideological struggle over what it means to be a mother, daughter, wife and so forth ... one of the most important questions about any legal decision is how it affects political and ideological struggles. (Olsen 1992: 209)

Family law, then, has to address crucial questions: how and in what situations do institutions of the state become involved in (and in the consequences of) our choice of sexual partners, our decisions whether and with whom to have children, and the manner in which we choose to live, share our money or rear our children? In law, just as in sociology, history or anthropology, the answers to these questions often reflect a judgement about the value of the family unit in question relative to the dominant ideology of the family at any given historical moment. It is an awareness of this judgement that we wish readers to maintain throughout this book. We also wish to underline the relationship between the conditions of families and social conditions as well as that between law and social conditions. Neither families nor law can be conceptually or materially separated from the social and economic context that plays a part in shaping them.

What do these relationships and contingencies mean for the study of family law, especially if, as Katherine O'Donovan suggests, the very 'black box' we construct as 'family

law' is part of the ideology of the family (O'Donovan 1993: 25)? Diduck (2008a) describes some of the history of family law:

Many scholars date the birth of 'family law' as the modern concept we know today in Britain at some time after the Second World War. Before that, the law regulating the family was fragmented into disparate parts and in addition to the law of property and testamentary law, included topics such as the law of husband and wife and the law relating to infants. Blackstone's direct legacy is perceptible here as is the legacy of the common law tradition in which the 'development of the concepts, categories and divisions of the common law is bound with the concrete problems that arise in individual cases'. The law, in other words, was made by the judges, and the 'family law' cases that came before them traditionally were indeed cases about marriage and divorce, about settlement of property and about the liability for contracts and criminal actions of children. And so, despite the broad range of laws that might be seen to 'directly affect' the family, those fragments that were deemed to be family law and that eventually were gathered together under that heading reflected the concerns of those who were able to bring their causes before the courts: the propertied and middle class (usually men) for whom validity of marriage and divorce was profoundly important for establishing the legitimacy of their line and the legitimate passage of property along it. Laws that 'directly affected' the poor were simply not seen as family law at all. These laws were administered by the Magistrates or were contained within and administered as part of the Poor Law and reflected a class based division which arguably has left its mark on family law today. Few family law textbooks even today contain chapters on income support, jobseekers' allowance, tax, employment or public housing.

Probert suggests that a fragmented and segregated body of family law makes sense however, in the context of segregated (middle class) family living historically, in which children and servants were allocated to separate quarters within the household. The Victorian family just did not look like or live like families do now, so Victorian family law should not be expected to look like it looks now. She makes the reasonable point to which I shall return below, that 'the fact that earlier concepts of family law do not always resemble our own should not obscure the fact that they may have been better suited to the law and the families of their own time'. She reminds us that there was in fact a text book published in 1885 entitled *The Law of Domestic Relations* which included a chapter on Master and Servant.

Eventually, around the 1950s, however, a coherent body of law became conceptualized specifically as 'family law'. It was first taught at the London School of Economics by Professor Otto Kahn-Freund whose continental background may have influenced his pursuit of family law as a separate doctrinal discipline. The first textbook with family law in its title was published in 1957 and brought together the black letter law concerning the parties' status as husband and wife and the property entitlements that came with it. There was neither discussion of children's welfare nor of the public law relating to children, nor indeed of many of the public consequences of marriage and divorce. This state of affairs changed over the years, however, until Cretney could say that by the year 2000 'there was in place a system [of family law] constructed on rational principles'.

Among the many reasons for the gathering together in the immediate post-war period of a body of case law under the heading family law may be that the subject of the law—a particular form of family—became politically important at that time, at least ideologically, in a formal, conceptually clear way. (Diduck 2008a: 258–59, references omitted)

[But] if just as changes in the social world—the entrenching of a particular family form at a particular historic time as the subject of family law—was a part of the creation of a coherent notion of 'family law', perhaps contemporary social changes may signal a time now for a challenge to that coherent notion. (ibid: 266)

Others have taken up the challenge. Eekelaar notes the changes in family practices in the twentieth century and asks ‘Do we need to try to bring these [new forms of relationships] under some concept of “family”?’ (Eekelaar 2006: 31). He proposes we abandon the label ‘family law’ in favour of ‘personal law’. Probert (2004b) wonders if a return to the old term ‘domestic relations law’ might be appropriate.

Whatever we call it, family law must cope with subjects who do not act as the rational reasonable men paradigmatic of other areas of law. It ‘engages with areas of social life and feeling—namely love, passion, intimacy, commitment and betrayal—that are ... riven with contradiction or paradox’ (Dewar 1998: 468). Dewar (1998, 2000) suggests that for this and other reasons, family law can be described as ‘chaotic’. He says that family law exhibits normative incoherence or uncertainty and that this stems from uncertainty about its proper role or purpose. Is family law to enforce rights between family members, or to promote their welfare, for example, or is it to maximise utility and pursue an optimal outcome? (Dewar 1998: 490) Is it to enforce rules or exercise discretion?¹⁸ As we shall see, what we call family law does all of these things, but as we said above, its choices at any given moment or in any given case reflects a judgement about the value of the relationship in question relative to its particular social and political context.

Our approach in this book is to open up the study of family law to one which encompasses more than simply the statutes and cases that regulate relations between conjugal partners or parent and child. We seek to identify also those who are not so regulated, and try to understand reasons for both the exclusions and inclusions. Secondly, our approach to family law also acknowledges that regulation occurs at normative and informal levels as well as at the level of formal law. Thirdly, family law in this book is also the law of public support, employment, personal taxation, education, immigration, international human rights, housing and crime. Finally, we suggest that an understanding of the law in each of these areas is incomplete without further understanding of the economic and social policy affecting each. Through this broad meaning of ‘family law’ we hope to undermine to some degree the ideology of the family which keeps O’Donovan’s black box closed.

Let us now examine how our relationships are regulated directly by legal definition of them. Law assumes a certain place in society for something called a family, but like sociology and anthropology, it has difficulty in defining exactly what that entity looks like.

IV. THE LEGAL FAMILY

There is no statutory definition of family, and there is really no common law definition either. How can law, which demands certainty, cope with this lacuna? There are, in reality, only a few situations in which this question is raised in law. In one example, courts were called upon to determine whether a surviving tenant was a member of the deceased’s ‘family’, for if so, that surviving tenant retained statutory rights to the home. In this series of cases, the closest thing to a legal definition the courts created was the statement that a family is what the ordinary man on the street thinks it is. This reliance upon ‘common sense’ or popular perception (or ideology?) is illustrated in the case of *Sefton Holdings v*

¹⁸ But see Diduck (2008a) who sees more normative consistency in family law than Dewar identifies.

Cairns.¹⁹ Here, the Court of Appeal was called upon to determine whether the relationship between two women who lived as sisters for 45 years was a family relationship for the purposes of the Rent Act 1977. Lloyd LJ said:

The question is whether the defendant, Miss Florence Cairns, is entitled to protection under the Rent Acts, that is to say, whether she is a statutory tenant under s 2 of the Rent Act 1977. The answer depends on the meaning to be given to the word 'family' in para 7 of Part I of Sch 1 to that Act.

The facts are that the plaintiffs, Sefton Holdings Ltd, are the landlords of the premises in question. They let it to Mr Richard Gamble some time between 1939 and 1941 when the house was built. Mr Gamble died in 1965. His daughter, Ada, then succeeded to the tenancy. Miss Ada Gamble died in 1986. The defendant came to live with Mr and Mrs Gamble and their daughter Ada in 1941. She was then 23 and single. Both her parents had died. Her boyfriend had just been killed in the war. Miss Ada Gamble asked her parents if they would take the defendant in, which they did. They treated her as their own daughter. She called them 'Mom and Pop'. She has lived in the same house ever since. She is now some 70 years of age.

On 6 June 1986, shortly after Miss Ada Gamble died, the plaintiffs served on the defendant a notice to quit. The defendant claims that she is entitled to remain on in the house as a statutory tenant under para 7 of Part I of the first schedule, which provides as follows:

[The court went on to quote the section which states that a statutory tenancy passes automatically on the death of the first tenant to a member of that tenant's family who was residing with him or her at the time of death.]

... So what we have to decide in this case is whether the defendant is a member of her family who was residing with her at the time of, and for the period of 6 months immediately before, her death. The defendant was clearly residing with Miss Ada Gamble at the time of Miss Ada Gamble's death. But was she a member of Miss Ada Gamble's family? That is the question. The county court judge has decided that she was, and there is now an appeal to this court.

... It has been held over and over again that, in deciding whether a person is a member of another person's family, we must give the word 'family' its ordinary, everyday meaning. We cannot extend that meaning in order to cover what might appear to be a hard case; we must not let affection press upon judgment (109–10)

Various attempts have been made by the courts from time to time to define the word 'family', by identifying various categories within which a person would be a member of another person's family. But Lord Diplock did not embark on that task in *Joram Developments Ltd v Sharratt*, and I do not propose to embark on that task myself. All I would say is that, in approaching this case, I have found it useful to bear two matters in mind. First, there is the distinction drawn by Viscount Dilhorne in *Joram Developments Ltd v Sharratt* ... between being a member of a family and being a member of the household. Secondly, there is the distinction between being a member of the family and living as a member of the family. There is no doubt that the defendant lived as a member of the family, and that may be why the judge decided this case in her favour. But the question we have to ask ourselves is not whether she lived as a member of the family, but whether she was a member of the family. I am clear that she was not, and that the man in the street would take the same view. (112)

Sir Roualeyn Cumming-Bruce agreed.

With some feeling of regret, I agree.

I have been aided by the guidance given by Lord Dilhorne in the speech to which Lloyd LJ

¹⁹ [1988] 2 FLR 109.

has referred. It seems to me clear beyond peradventure that the plaintiff in this case became a member of the household of Mr and Mrs Gamble and, in spite of her age of 23, was offered and accepted a high degree of kindness and support which led the judge to make the finding that she reminded herself that in 1941 young women of 23 did not by and large live in the independent way that so many young women do today. Mr and Mrs Gamble were giving her a home and they took her in as a daughter, and in every way treated her as such

Like Lloyd LJ, it is with diffidence that I am moved to differ from the view of a county court judge familiar with the local circumstances of the Liverpool environment; but the question is a question of law, although, like all questions of law, it involves a nice appreciation of the relevant factors. Through the now mounting line of cases which deal with the meaning of the word 'family' in the context of the relevant schedule it is to be observed that in no case has the court found it possible to identify the necessary ingredient or quality that distinguishes a familial nexus from a nexus less than familial. The approach of the courts has been to look at all the circumstances and to then seek to answer the question: 'What would an ordinary person characterize the relationship as?' For the reasons explained by Lord Dilhorne, I do not myself think that, putting the test in that way (accepting that it has been so frequently), it really adds very much to the question: 'What is the ordinary meaning of someone being a member of somebody else's family?' To be a member of a family is *different* from being treated as a member of the family. (112)

The court here recognises that circumstances in 1941 may have been different from those in 1987 and also recognises that 'the local circumstances of the Liverpool environment' may have been relevant to the County Court judge who first heard the case. An awareness of these specificities is important in formulating definitions of a concept such as 'family' which is so dependent upon social understandings, and yet the court then goes on to say that those specificities must be put aside to determine 'questions of law'. It is possible to criticise this decision on the basis of the court's formal and positivistic separation of law from social conditions, especially as the court then purports to answer the 'legal' question by reference to 'all the circumstances' and 'what an ordinary person would characterise the relationship as'.

Q In your view, could the court have legitimately found that Mrs Cairns was a member of Miss Gamble's family? What about Mr Michalak, who came from Poland and lived with Mr Lul from 1985 to Mr Lul's death in 1998. The judge found that Mr Michalak subsisted on Mr Lul's good graces towards him. They were distantly related, and Mr Michalak addressed Mr Lul by a Polish word which translated to 'Uncle'. M cooked some meals for L, did some of his shopping, and gave him a helping hand with his washing, particularly towards the end of his life when he was sometimes incontinent. The court found that while M was helping to care for L, he was not a full-time carer. It found there was no emotional bond, that theirs was in no sense a loving or caring relationship. Rather, M merely had a relationship of respect for the older man and therefore could not be said to be a part of Mr Lul's family so as to entitle him to remain in the flat on Mr Lul's death. (See *Michalak v LB Wandsworth* [2002] 4 All ER 1136 CA.) Do you agree? How would you characterise their relationship?

O'Donovan has reviewed the *Sefton Holdings* decision and others in which courts have attempted to identify family for different purposes, and finds that 'law privileges certain forms [of family] and denies recognition and benefits to others, while simultaneously

denying that a coherent definition of family exists' (O'Donovan 1993: 39). Let us critically analyse this statement by examining some of the later cases. First, let us contrast two cases in which same-sex conjugal relationships were at issue.

In *Harrogate Borough Council v Simpson*²⁰ the court had to decide whether the defendant, who had lived in a lesbian relationship, was entitled to remain in a council house after her partner, the tenant, had died. The court considered the Housing Act 1980 which provided that a secure tenancy vested in a member of the tenant's family on the death of the tenant, and included as family those who lived together as husband and wife. The question was whether the two women, for this purpose, qualified as 'family'. The court below answered no. Counsel for the respondent argued that cohabitation had become acceptable in society and that, save for the bearing of children, the relationship between the women was characterised by the same factors as heterosexual cohabitation: family values, monogamy and permanence. Watkins LJ said:

That the views of the public have changed with regard to the association of man and woman is to be derived from the judgments in *Dyson Holdings Ltd v Fox* [1976] QB 503. In that case the defendant had lived with the tenant of the house as if she were his wife for 21 years until his death in 1961. They had never married. They had no children. After his death the defendant continued to live in the house, for which she paid rent as if she were his widow. Proceedings were brought to evict her. It was held that the owners of the house were entitled to recover possession of it. On appeal it was held that the question whether the defendant was a member of the tenant's family was to be answered according to the understanding of the ordinary man, using the word 'family' in its popular sense, as at the time of the tenant's death in 1961.

In his judgment Bridge LJ said at 512G:

It is clear, however, that *Gammans v Ekins*, following *Brock v Wollams* [1949] 2 KB 388, proceeded on the basis that the question who is a 'member of the tenant's family' is to be answered according to the understanding of the ordinary man, and this test has been consistently applied in all the other cases decided on this provision. Now, it is, I think, not putting it too high to say between 1950 and 1975 there has been a complete revolution in society's attitude to unmarried partnerships The ordinary man in 1975 would, in my opinion, certainly say that the parties to such a union, provided it had the appropriate degree of apparent permanence and stability, were members of a single family whether they had children or not

... Counsel for the plaintiffs contends that, if Parliament had wished homosexual relationships to be brought into the realm of the lawfully recognized state of a living together of man and wife for the purpose of the relevant legislation, it would plainly have so stated in that legislation, and it has not done so. I am bound to say that I entirely agree with that. I am also firmly of the view that it would be surprising to the extreme to learn that public opinion is such today that it would recognize a homosexual union as being akin to a state of living as husband and wife. The ordinary man and woman, neither of 1975 nor in 1984, would in my opinion not think even remotely of there being a true resemblance between those two very different states of affairs. That is enough, I think, to dispose of this appeal, which, for the reasons I have provided, I would unhesitatingly dismiss. (94-95)

In this case the court refers to two previous cases of heterosexual cohabitation. Between the time of *Gammans v Ekins*, decided in 1950, and *Dyson Holdings v Fox*, decided in 1976, the view of the 'ordinary man' was said to have changed so as to come to accept unmarried heterosexual cohabitants as a family.

²⁰ [1986] 2 FLR 91 (CA).

Q Do you think that the court could have accepted the position argued by counsel for the respondent and adopted the same position with respect to same-sex cohabitants?

Q Who is the 'ordinary person' to whom the court looked?

The second case is *Fitzpatrick v Sterling Housing Association Ltd.*²¹ In this case, F lived for 18 years with T in a 'longstanding, close, loving and faithful, monogamous, homosexual relationship' (47). When T, the tenant, died, F sought to remain in the flat, either as T's surviving spouse or as a surviving member of his family. The court was unanimous that for the purposes of the Rent Act 1977 he did not qualify as a surviving spouse, but the majority found that he was member of T's family. Like the courts before them, the court dealt with the issue as a matter of the interpretation of words.

This expression [family] is not a term of art; that is, it is not a technical term with a specific meaning. It is a word in ordinary usage, with a flexible meaning. The statutory succession provisions have been amended several times, but to this day family has remained unamended, undefined and unparticularised. Parliament has left it to the courts to determine, in any given case, whether a particular individual falls within the description. (41)

I must also mention the 'ordinary person' test enunciated by Cohen LJ in *Brock v Wollams* [1949] 2 KB 388, 395. He suggested that the trial judge should ask himself this question: would an ordinary person, addressing his mind to the question whether the defendant was a member of the family, have answered 'Yes' or 'No'? This oft-quoted test has tended to bedevil this area of the law. It may be useful as a reminder that family is not a term of art. But the test gives uncertain guidance when, as here, the members of the Court of Appeal and also your Lordships are divided on how the question should be answered. Contrary to what seems implicit in this form of question, the expression family does not have a single, readily recognisable meaning. As I have emphasised, the meaning of family depends upon the context in which it is being used. The suggested question does not assist in identifying the essential ingredients of the concept of family in the present context.

The concept of the family has undergone significant development during recent years, both in the United Kingdom and overseas. Whether that is a matter for concern or congratulation is of no relevance to the present case, but it is properly part of the judicial function to endeavour to reflect an understanding of such changes in the reality of social life. Social groupings have come to take a number of different forms. The form of the single parent family has been long recognised. A more open acceptance of differences in sexuality allows a greater recognition of the possibility of domestic groupings of partners of the same sex. The formal bond of marriage is now far from being a significant criterion for the existence of a family unit. While it remains as a particular formalisation of the relationship between heterosexual couples, family units may now be recognised to exist both where the principal members are in a heterosexual relationship and where they are in a homosexual or lesbian relationship. (51–52)

Q Do you agree with the way the court explained the ordinary person test?

The next issue was what the essential elements of family were.

²¹ [2001] 1 AC 27.

The problem in the present case is to determine what, short of blood or marriage, may evidence the common bond in a partnership of two adult persons which may entitle the one to be in the common judgment of society a member of the other's family. It seems to me that essentially the bond must be one of love and affection, not of a casual or transitory nature, but in a relationship which is permanent or at least intended to be so. As a result of that personal attachment to each other, other characteristics will follow, such as a readiness to support each other emotionally and financially, to care for and look after the other in times of need, and to provide a companionship in which mutual interests and activities can be shared and enjoyed together. It would be difficult to establish such a bond unless the couple were living together in the same house. It would also be difficult to establish it without an active sexual relationship between them or at least the potentiality of such a relationship. If they have or are caring for children whom they regard as their own they would make the family designation more immediately obvious, but the existence of children is not a necessary element. Each case will require to depend eventually upon its own facts. (51)

And

The hallmarks of the relationship were essentially that there should be a degree of mutual interdependence, of the sharing of lives, of caring and love, of commitment and support.

And finally,

Where sexual partners are involved, whether heterosexual or homosexual, there is scope for the intimate mutual love and affection and long-term commitment that typically characterise the relationship of husband and wife. This love and affection and commitment can exist in same sex relationships as in heterosexual relationships. In sexual terms a homosexual relationship is different from a heterosexual relationship, but I am unable to see that the difference is material for present purposes. As already emphasised, the concept underlying membership of a family for present purposes is the sharing of lives together in a single family unit living in one house. (44)

Q Can you list the factors required to found a legal family? Why do you suppose conjugality has such central importance? What, in your view are the essential characteristics of the legal family? On this see Cossman and Ryder (2001).

It seems, then, that law's attempts to define the family now follow a functional approach; the common sense of family life is now about what it does, rather than what it is. The functional approach to defining families has been described as progressive—it demands that legal rights and obligations flow from the way a relationship functions rather than from the form that it takes. Millbank²² describes it in these terms:

Functional family approaches accord with a core objective of feminist legal scholarship and law reform projects—to centre 'lived lives' rather than legal doctrine or formal legal categories. Not coincidentally, therefore, many of the proponents of functional family approaches in relationship law are feminist and progressive scholars, who embrace the idea of dynamic change in law to reflect changing social practices. By positing law's role as reflecting and assisting actual families' experiences and needs, rather than as encouraging or mandating a particular family form, functional family approaches run directly counter to normative approaches to law such as the

²² See also Glennon (2008).

so-called ‘channelling’ purpose of family law. The ‘channelling function’ has been expressed as one which ‘supports social institutions which are thought to serve desirable ends’, such as marriage, by ‘channelling’ people towards them. In this competing view, law’s role is to tell people, both individually and collectively, how they should form families (and, to a greater or lesser extent, to provide inducements for those who listen to these messages, and impose punitive consequences on those who do not). Not coincidentally, proponents of the normative or channelling approach to family law are often conservative scholars and religious organisations, who wish to maintain established legal traditions and use them to (attempt to) stem or reverse changing social practices. (Millbank 2008: 156)

The functional approach adopted in the *Fitzpatrick* case allowed Mr Fitzpatrick to remain in his home of many years. But we must also remain aware of the ‘functions’ of family identified by the House of Lords. They remain within an ideal in which conjugality and the privatisation of care and dependency are central. In this way, law’s model is still the private, heterosexual, traditional family. While the range of people who may be allowed into it may have increased, the norms by which they must live remain the same (Diduck 2001a, 2005a). Indeed it is ironic that at the same time as policy seems increasingly to be moving away from the view that marriage should be the only state-sanctioned intimate relationship, the test for others is the degree to which they are ‘marriage-like’ (Cossman and Ryder 2001). Law’s normative vision of ‘the family’, with marriage as the benchmark, is reproduced each time a court is called upon to decide whether a particular living arrangement is ‘familial’ or not, but this vision is said to be that of the ‘ordinary public’ rather than that of the court. It is also reproduced when courts decide matters which appear to be peripheral to defining ‘family’. For example, what vision of family is reproduced in these words from decisions which appeared to be about the living arrangements of children?

I shall take a great deal of convincing that it is right that an adult male should be permanently unemployed in order to look after one small boy.²³

And

[I]n my opinion both Bracewell J and, in the Court of Appeal, Thorpe LJ failed to give the gestational, biological and psychological relationship between CG and the girls the weight that that relationship deserved. Mothers are special.²⁴

Q In the light of all of these cases, consider O’Donovan’s assertion regarding law’s outward denial that a definition of family is possible. Construct arguments for and against her position.

The concept of family is also important in EU law and the law of the European Convention on Human Rights (ECHR), which, by virtue of the Human Rights Act 1998, has direct effect on domestic law. In EU law, the definition of ‘family’ is important because a Member State of the EU must permit the family members of an EU national to enter,

²³ *B v B (Custody of Children)* [1985] FLR 166, 174. The Court of Appeal here was quoting the trial court, and in fact overturned the trial court’s decision by awarding care and control of the child to the father.

²⁴ *Re G (Children) (residence: same-sex partner)* [2006] UKHL 43; [2006] 2 FLR 629, per Lord Scott. The dispute here was between the gestational mother of children and her former same-sex partner.

Disputes about Children and the Application of the Welfare Principle

I. INTRODUCTION

The breakdown of a relationship when there are children involved raises questions concerning the arrangements to be made for their care; these are cases where clearly it is the child's welfare that is foremost. And welfare, it is argued, is interpreted to promote what is perceived as the 'good' post-separation family.

Questions about the arrangements for children can arise irrespective of whether each of the parents has parental responsibility.¹ Indeed disputes about children's residence and who will have contact with them can involve litigants who are not parents, such as grandparents and step-parents. Section 8 of the Children Act 1989 makes provision for residence orders stipulating with whom the child shall live and contact orders specifying who will have contact with the child. There is also provision for the making of specific issue orders and prohibited steps orders to settle single-issue disputes such those concerning where the child should be educated. These are dealt with below.

Most section 8 disputes never reach the courtroom since the majority are resolved by agreement.² Resources have been made available to potential litigants to encourage them to settle. One such resource is a leaflet, *Parenting Plans*, published by Cafcass (Children and Family Court Advisory and Support Service) containing advice and case histories showing how difficulties have been resolved in various cases (Cafcass undated).

Those who wish to litigate but who cannot afford to do so may not get the public funding they need. At the time of writing, parents may be eligible for public funding only if their dispute is deemed not suitable for mediation. If it is suitable, they may obtain funding for mediation.³ However, the coalition government plans to cut public funding for all private law disputes except those with an element of domestic violence or forced marriage (MOJ 2010a).⁴ There is not even provision for cases where mediation fails or where one party refuses to mediate.⁵ Legal aid for mediation will be retained. This may mean

¹ See Chapters 4 and 8 above.

² See MOJ (2010a: paras 4.208–4.209).

³ See Chapter 15 below.

⁴ These limitations are now embodied in the Legal Aid, Sentencing and Punishment of Offenders Bill, Bill 205.

⁵ See House of Commons Committee Debate, Sixth Sitting (19 July 2011) col 202.

that fewer people will have access to the courts. Or it may be that there will simply be more litigants in person. The House of Commons Justice Committee (2011) comments:

224. The removal of legal aid from applicants in most private family law cases will increase the number of litigants in person in the family courts. It is self-evident that parents are unlikely to give up applications for contact, residence or maintenance for their children simply because they have no access to public funding. We are concerned that the Ministry of Justice does not appear to have appreciated that this is the inevitable outcome of the legal aid reforms.

In any event, even if the likelihood of a dispute reaching court is lower, the legal principles developed by courts will form the context in which any mediation or negotiation takes place.

II. THE POWER OF THE COURT TO MAKE SECTION 8 ORDERS

Residence and contact orders, along with prohibited steps and specific issue orders, are designated as section 8 orders under the Children Act 1989.⁶ Section 10 deals with section 8 orders collectively and sets out the circumstances in which a court is empowered to make such an order. The court can make a section 8 order in family proceedings in which a ‘question arises with respect to the welfare of any child’.⁷

Sections 10(4) and (5) provide:

(4) The following persons are entitled to apply to the court for any s 8 order with respect to a child—

- (a) any parent or guardian [guardian or special guardian] of the child;
- (aa) any person who by virtue of s 4A has parental responsibility for the child;
- (b) any person in whose favour a residence order is in force with respect to the child.

(5) The following persons are entitled to apply for a residence or contact order with respect to a child—

- (a) any party to a marriage (whether or not subsisting) in relation to whom the child is a child of the family;
- (aa) any civil partner in a civil partnership (whether or not subsisting) in relation to whom the child is a child of the family.
- (b) any person with whom the child has lived for a period of at least three years;
- (c) any person who—
 - (i) in any case where a residence order is in force with respect to the child, has the consent of each of the persons in whose favour the order was made;
 - (ii) in any case where the child is in the care of a local authority, has the consent of that authority; or
 - (iii) in any other case, has the consent of each of those (if any) who have parental responsibility for the child.

(5A) A local authority foster parent is entitled to apply for a residence order with respect to a child if the child has lived with him for a period of at least one year immediately preceding the application.

⁶ See s 8(2).

⁷ S 10(1) Children Act 1989.

(5B) A relative of a child is entitled to apply for a residence order with respect to the child if the child has lived with the relative for a period of at least one year immediately preceding the application.

A parent is entitled as of right to apply for any section 8 order.⁸ This capacity has been extended to step-parents and to civil partners who have attained parental responsibility under section 4A.⁹ A step-parent, former step-parent,¹⁰ civil partner or former civil partner¹¹ without parental responsibility who has treated the child as a child of the family is permitted to apply for a residence or contact order as of right. Anyone who does not fall within the scope of the definition of a person who is entitled to seek an order is obliged to apply for the permission of the court to make an application.¹² In addition, whether or not a particular person is entitled to seek an order, and irrespective of whether an application has been launched, a court may, on its own initiative in family proceedings,¹³ make an order in favour of any person. Proceedings under the Matrimonial Causes Act 1973 and Civil Partnership Act 2004 are included in the definition of ‘family proceedings’.¹⁴ So, while it is open to a person to institute proceedings for a section 8 order at any time, once divorce or dissolution proceedings commence the court also has the power to make such an order on its own initiative.

Sections 10(8) and (9) deal with capacity and the criteria for permission (leave) to apply for an order:

(8) Where the person applying for leave to make an application for a section 8 order is the child concerned,¹⁵ the court may only grant leave if it is satisfied that he has sufficient understanding to make the proposed application for the section 8 order.

(9) Where the person applying for leave to make an application for a section 8 order is not the child concerned, the court shall, in deciding whether or not to grant leave, have particular regard to—

- (a) the nature of the proposed application for the section 8 order;
- (b) the applicant’s connection with the child;¹⁶
- (c) any risk there might be of that proposed application disrupting the child’s life to such an extent that he would be harmed by it;¹⁷ and
- (d) where the child is being looked after by a local authority—
 - (i) the authority’s plans for the child’s future; and
 - (ii) the wishes and feelings of the child’s parents.

⁸ S 10 (4)(a) Children Act 1989.

⁹ S 10(4)(aa).

¹⁰ S 10(5)(a).

¹¹ S 10(5)(aa).

¹² Ss 10(1)(a)(ii), 10(2)(b). The child concerned may apply for a s 8 order with permission of the court in terms of s 10 of the Children Act 1989.

¹³ S 10(1)(b). For the definition of ‘family proceedings’, see s 8(3)–(4).

¹⁴ S 8(4) of the Children Act 1989.

¹⁵ See, on the European Convention on the Exercise of Children’s Rights 1996, which promotes rights of participation in proceedings for children, Fortin (2009a: 236–38). See also *Sahin v Germany*; *Sommerfeld v Germany* [2003] 2 FLR 671.

¹⁶ The more meaningful and important the connection between the applicant and child, the greater the weight to be given to this factor: *Re M (Care: Contact: Grandmother’s Application for Leave)* [1995] 2 FLR 86, 95.

¹⁷ The court has considered not just the effect of the application but also the consequences if the application were to succeed (*Re A (A Minor) (Residence Order: Leave to Apply)* [1993] 1 FLR 425, 428). However, in *Re H (Children)* [2003] EWCA Civ 369; 2003 WL 1202504, the Court of Appeal stated that it was the risk of disruption caused by the litigation, and not the possible outcome, that should be considered (para 26).

The legislation thus distinguishes between different categories of applicants for section 8 orders: those who are entitled to apply as of right and those who can apply with the permission of the court. This distinction is designed to control access to the courts. It makes it possible to screen out unmeritorious applications or potentially disruptive litigation while at the same time enabling anyone with a genuine interest in the child's welfare to apply for an order. In deciding whether to grant permission, the court should not focus on the merits of the applicant's case; instead it should make its decision on the basis of the checklist in section 10(9).¹⁸ The court must consider all the factors set out in section 10(9) and is entitled also to consider the welfare checklist in section 1(3).¹⁹ Because an application for permission does not fall within section 1(1), however, the child's welfare is not the paramount consideration.²⁰ In the case of an application for leave made by a child, the best interests of the child are a significant consideration²¹ but section 10(9) does not apply.

Section 9 limits the circumstances under which and the duration for which an order may be made:

- 9(5) No court shall exercise its powers to make a specific issue order or prohibited steps order—
- (a) with a view to achieving a result which could be achieved by making a residence or contact order; or
 - (b) in any way which is denied to the High Court (by section 100(2)) in the exercise of its inherent jurisdiction with respect to children.
- (6) No court shall make any section 8 order which is to have effect for a period which will end after the child has reached the age of sixteen unless it is satisfied that the circumstances of the case are exceptional.
- (7) No court shall make any section 8 order, other than one varying or discharging such an order, with respect to a child who has reached the age of sixteen unless it is satisfied that the circumstances of the case are exceptional.

A Settlement Culture

An emphasis on settlement has permeated the family justice system. Where cases do get to court, the aim of the lawyers, the judge and Cafcass is to get the parties to reach an agreement. Negotiation between solicitors, admonishment from the bench, in-court conciliation and reports by Cafcass are all deployed in an effort to make a final hearing avoidable.²² The new Practice Direction issued pursuant to the Revised Private Law Programme maintains this approach and requires the court at the First Hearing Dispute Resolution Appointment (FHDRA) to consider whether issues can be resolved with the

¹⁸ Case law has established that s 10(9) governs the decision whether to grant leave/permission rather than the old test of an arguable case: *Re J (A Child) (Leave to Issue Application for Residence Order)* [2002] EWCA Civ 1346; [2003] 1 FLR 114; *Re H (Children)* [2003] EWCA Civ 369; 2003 WL 1202504.

¹⁹ *North Yorkshire County Council v G* [1993] 2 FLR 732; *Re A (A Minor) (Residence Order: Leave to Apply)* [1993] 1 FLR 425, 428.

²⁰ *Re A and W (Minors) (Residence Order: Leave to Apply)* [1992] 2 FLR 154; *Re A (Minors) (Residence Order)* [1992] 3 All ER 872; *Re SC (A Minor) (Leave to Seek Residence Order)* [1994] 1 FLR 96. (It appears that *Johnson J in Re C (A Minor) (Leave to Seek S 8 Orders)* [1994] 1 FLR 26 erred on this point.)

²¹ Again, the welfare of the child is not of paramount importance. See *Re C (Residence: Child's Application for Leave)* [1995] 1 FLR 927, 931.

²² See Hunt and Macleod (2008: 168ff). See Chapter 15 below.

assistance of a Cafcass officer or a mediator.²³ It is stipulated that a Cafcass Family Court Advisor (FCA), and where possible a mediator, should attend the first hearing.²⁴ The court, 'in collaboration with the Cafcass Officer, and with the assistance of any mediator present, will seek to assist the parties in conciliation and in resolution of all or any of the issues between them'.²⁵ The court must in all cases consider '[w]hat other options there are for resolution eg may the case be suitable for further intervention by Cafcass; mediation by an external provider; collaborative law or use of a parenting plan?'²⁶ It also refers to the requirement that consideration be given to attendance at Parenting Information Programmes (PIPs) or other activities.²⁷ PIPs provide 'advice and support' and 'seek to enable parents to take steps towards their own solutions' (Norgrove 2011a: para 5.14).

Once litigation has begun, even if parents agree on the arrangements for their children, the court has a part to play. In terms of section 41 of the Matrimonial Causes Act 1973, and section 63 of the Civil Partnership Act 2004, it has a duty in divorce and dissolution cases, lest unsatisfactory arrangements be permitted to go by default in the absence of parental opposition, to consider whether the court should exercise any of its powers under the Children Act with respect to any children involved.²⁸

Q Do you think it necessary to give the courts the power to reject the arrangements made by parents on divorce or dissolution? If so, do you think the courts should have similar powers when cohabiting couples separate?

Safety

In recent years concerns about the safety of children and their carers have come to the fore. This has resulted in the drafting of Practice Directions intended to safeguard children and their carers. In terms of the Practice Direction: Revised Private Law Programme,²⁹ once an application is issued under Part II of the Children Act 1989, the court must send the documentation to Cafcass so that any safety issues can be identified. Cafcass may need to do a risk assessment³⁰ and is required to report any safety issues to the court. While the FHDRA is used to try to resolve any issues between the parties, the court and the Cafcass officer have to take any risks into account.³¹ If the parties reach an agreement, a consent order will not be made without scrutiny by the court.³² Finally, there is a Practice Direction dealing specifically with cases where there are allegations or concerns about domestic violence.³³

²³ Practice Direction: Revised Private Law Programme [2010] 2 FLR 717, paras 2.2.and 4.4.

²⁴ Ibid: para 4.1.

²⁵ Ibid: para 4.4. See also para 5.2(a).

²⁶ Ibid: para 5.2(c).

²⁷ Ibid: para 5.2(d).

²⁸ The court may direct that a dissolution, divorce or separation order is not made until the court orders otherwise if it appears that its powers under the Children Act should be exercised; that they cannot be exercised or that further consideration is needed before they are exercised; and that there are exceptional circumstances making it desirable in the interests of the child that such a direction be made (s 41(2) of the Matrimonial Causes Act 1973; s 63(2) of the Civil Partnership Act). Although s 41 has been subject to review (see DCA (2002) Recommendation 13), it remains unchanged.

²⁹ [2010] 2 FLR 717.

³⁰ S 16A Children Act 1989.

³¹ Practice Direction: Revised Private Law Programme [2010] 2 FLR 717, para 4.4.

³² Ibid: para 5.3.

³³ See below.

Restricting Access to the Court

Section 91(14) of the Children Act 1989 makes provision for the restriction of access to the court so that families can be shielded from repeated applications for orders.³⁴ It states that when the court disposes of an application under the Act, whether or not it makes an order as a result of the application, it can make an order that no application at all, or no application of a specified type, can be made by the person named in the order in respect of the child named unless the court gives permission.

The judgment in *Re P (Section 91(14) Guidelines) (Residence and Religious Heritage)*³⁵ sets out guidance for the way in which this provision should be used. Firstly, it should be read in conjunction with section 1(1) which makes the child's welfare paramount. Second, the power to restrict the right of a party to bring proceedings should be used only in exceptional circumstances. It is generally a last resort to be used in cases of 'repeated and unreasonable' applications.³⁶ However the court can impose the restriction if the welfare of the child requires it to do so, even in cases where there is no past history of unreasonable applications.³⁷ There would need to be a serious risk that, without the imposition of the restriction, 'the child or the primary carers will be subject to unacceptable strain'.³⁸ A restriction may be imposed with or without a time limit, but should be proportionate to the harm it is intended to avoid.

The court in *Re P* also considered whether section 91(14) might contravene the Human Rights Act 1998 and the ECHR and concluded that it does not. The applicant is not denied access to the court; the effect of the legislation is to create a partial restriction that prevents the applicant from getting the right to an immediate inter partes hearing.

An order imposing an absolute prohibition does not fall under the section and would have to be made under the court's inherent jurisdiction.³⁹

III. THE WELFARE PRINCIPLE

The Children Act 1989 is cast very firmly in the welfare mould. As we have seen, the welfare of the child is paramount in decisions relating to his or her upbringing.⁴⁰ This principle, as we have observed,⁴¹ is not susceptible of easy application in any particular case. The problem of indeterminacy, as well as all the other difficulties surrounding the welfare test that we have considered, is imported into the legislation.

The 1989 Act seeks to reduce indeterminacy and to make explicit certain values by codifying 'what society considers the most important factors in the welfare of children' (Law Commission 1988b: para 3.19). A checklist of these factors was incorporated into

³⁴ The court has the power to do this on its own initiative. See *Re C (Prohibition on Further Applications)* [2002] EWCA Civ 292; [2002] 1 FLR 1136.

³⁵ [1999] 2 FLR 573, 592–93. See also *Re A (Contact: Section 91(14))* [2009] EWCA Civ 1548; [2010] 2 FLR 151.

³⁶ See also *Re G (Child Case: Parental Involvement)* [1996] 1 FLR 857; *B v B (Residence Order: Restricting Applications)* [1997] 1 FLR 139; *Re A (Contact: Section 91(14))* [2009] EWCA Civ 1548; [2010] 2 FLR 151.

³⁷ See *Re M (S 91(14) Order)* [1999] 2 FLR 553; *Re F (Children) (Restriction on Applications)* [2005] All ER (D) 42 (Apr).

³⁸ *Re P* above at 593.

³⁹ *Re P (S 91(14) Guidelines) (Residence and Religious Heritage)* [1999] 2 FLR 573, 593.

⁴⁰ S 1(1) of the Children Act 1989.

⁴¹ See Chapter 9 above.

the statute in the hope that this would provide greater consistency and clarity and to promote a more systematic approach to decision-making by courts. Cafcass officers, such as the FCA, are also required to give consideration to the checklist when carrying out their duties.⁴² Section 1(3) provides:

- In the circumstances mentioned in subsection (4), a court shall have regard in particular to—
- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
 - (b) his physical, emotional and educational needs;
 - (c) the likely effect on him of any change in his circumstances;
 - (d) his age, sex, background and any characteristics of his which the court considers relevant;
 - (e) any harm which he has suffered or is at risk of suffering;
 - (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
 - (g) the range of powers available to the court under this Act in the proceedings in question.

Q Do you agree that there is a consensus that these are the most important factors? What would you include in such a checklist? Refer back to some of the explicit and unarticulated principles/assumptions discussed in Chapter 9 above.

While the checklist provides some guidance for the courts and furnishes the backdrop for private negotiations, it is of limited use. As Masson et al (2008a: para 19.014) observe, it merely lists the factors to be considered and does not indicate *how* they should be viewed. It does not prioritise the criteria and courts are still obliged to carry out a difficult balancing exercise. Dewar says that ‘the checklist will not eliminate subjective value judgements about parenting and child care arrangements, but may serve to immunise them from challenge on appeal’ (Dewar 1992: 366);⁴³ it may be difficult to overturn a decision reached after consideration of all the criteria (Eekelaar 1991b: 127).

Precisely how the courts are using the checklist is not entirely clear. It appears that something less than meticulous adherence to the checklist is required.⁴⁴ In *Re G (Children)*⁴⁵ Baroness Hale said:

[40] My Lords, it is of course the case that any experienced family judge is well aware of the contents of the statutory checklist and can be assumed to have had regard to it whether or not this is spelled out in a judgment. However, in any difficult or finely balanced case ..., it is a great help to address each of the factors in the list, along with any others which may be relevant, so as to ensure that no particular feature of the case is given more weight than it should properly bear.

As the Law Commission indicated (1988b: para 3.19), the checklist is not intended to be exhaustive. In assessing where the child’s best interests lie, the courts often rely heavily

⁴² FPR 2010/2955 R 16.33.

⁴³ Eekelaar contends that the heavily subjective nature of the power granted to the judge means that, so long as he does not claim to be applying it as a conclusive rule of law, a judge can consider almost any factor which could possibly have a bearing on the child’s welfare and assign to it whatever weight he or she chooses (Eekelaar 1991b: 125).

⁴⁴ *B v B (Minors) (Interviews and Listing Arrangements)* [1994] 2 FLR 489, 500.

⁴⁵ [2006] UKHL 43; [2006] 2 FLR 629. See also *B v B (Residence Order: Reason for Decision)* [1997] 2 FLR 602.

on the opinions of child welfare professionals.⁴⁶ The parents might decide to call their own expert witnesses⁴⁷ and the court itself can call for a welfare report.⁴⁸ This report is compiled by the FCA. The FCA⁴⁹ should normally see all those concerned in the case. The report for the court must include recommendations. A court is not bound to follow the recommendations of the FCA. However, if it does decide to depart from the recommendations, the court should hear evidence from the FCA⁵⁰ and it should give reasons.⁵¹ Failure to consider the FCA's evidence or to give reasons constitute ground for appeal.

IV. THE NO ORDER PRINCIPLE

Section 1(5) of the Children Act 1989 stipulates that the court should not make an order unless there is some positive advantage to doing so. The courts in dissolution or divorce proceedings do not have a general supervisory role in relation to all arrangements for children on divorce; intervention should be limited to those cases where it is thought necessary. The section does not, however, create a presumption against making an order; the court must simply ask itself whether it is 'better for the child to make the order than to make no order at all'.⁵²

Evidently, the intention behind the legislation is to encourage agreement, to limit judicial intervention⁵³ and to foster the perception that recourse to the courts should be a last resort. However, the retreat of the courts⁵⁴ does not mean that the law becomes insignificant. As Mnookin and Kornhauser say, bargaining takes place 'in the shadow of the law' (Mnookin and Kornhauser 1979: 968).

The 'shadow of the law' loomed particularly large over the ill-fated Family Law Act 1996. The statute promoted private settlement and also contained provisions that would have impacted on the negotiating process. While almost nothing remains of the radical new scheme, section 1, setting out the general principles, remains in force. It has no legal effect because it was intended to govern decision-making under Parts II⁵⁵ and III.⁵⁶ Section 1 requires that those involved in proceedings such as judges and Cafcass officers should have regard to the principle that marriages that have irretrievably broken down should be brought to an end in a way that promotes 'as good a continuing relationship' as possible between the parties and their children. This endorsement of continuity in relationships between parents and children, as well as the rejection of conflict, are principles that still permeate government policy, professional practice and legal decision-making

⁴⁶ See Buchanan et al (2001: 1). See, on the use of experts, King and Kaganas (1998). See also Chapter 9 above.

⁴⁷ See Practice Direction: Experts in Family Proceedings Relating to Children [2009] 2 FLR 1383.

⁴⁸ S 7 Children Act 1989. The court is not obliged to request a welfare report.

⁴⁹ For a critique of the practice of Children and Family Reporters (now also FCAs), see James et al (2003).

⁵⁰ *Re A (Children: 1959 UN Declaration)* [1998] 1 FLR 354. If minded to reject the recommendations of a CAFCASS officer, the court should test any misgivings it might have in the witness box with the officer before deciding (para 79): *Re R (Residence Order)* [2009] EWCA 445, para 79.

⁵¹ *W v W (A Minor: Custody Appeal)* [1988] 2 FLR 505; *Re W (Residence)* [1999] 2 FLR 390.

⁵² *G (Children)* [2005] EWCA Civ 1283; [2006] 1 FLR 771, para 10.

⁵³ See Law Commission (1988b: paras 3.3–4).

⁵⁴ Indeed, whether the attempt to reduce litigation has been successful is open to doubt. The statistics show an upward trend since 2005 in the number of children involved in private law disputes (MOJ 2010b: 44). If legal aid is restricted as planned at the time of writing (MOJ 2010a) this could have a dramatic effect, however.

⁵⁵ Never brought into force.

⁵⁶ Repealed.