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Introduction to family law

What is family law?

- 1.1 Family law is perhaps the most fascinating of all areas of law because it is the only one in which all of its students have been personally involved from the moment of birth. It is also of interest because of its multi-faceted nature. It includes every aspect of legal intervention into the private or domestic lives of those who are related by blood or affinity, or who have, or have had, emotional ties with each other. The majority of those who come within its sphere of influence tend to occupy, or will have occupied at some time, the same family home.
- 1.2 Over the last 150 years, family law has acquired an evolving, yet discrete, core of its own, which reflects and influences societal views of what constitutes a family, and why, and how, families should be regulated. The majority of those relationships which the State regards as benefiting society as a whole have tended to be labelled as familial. Those who participate in these familial relationships have been granted legal rights and, in return, the adult participants have had legal responsibilities imposed upon them. Both the State's view and society's view of what constitutes familial will, of course, change over time and the two views may come into conflict with each other. This can be seen in the current debate over gay marriage, and whether cohabitants should be given greater legal rights.
- 1.3 Twenty-first century family lawyers require not only a knowledge of, and an expertise in, the core area of family law, they also need, *inter alia*, a knowledge of financial matters, property law (both real and personal), the law of contract and tort, criminal law, the law of wills and trusts, conflict of laws, medical law, immigration law, public law in the context of housing and education, and the ever-increasing law relating to human rights. They must be familiar with the social and biological sciences, in particular human psychology and reproductive technology. They must also be interested in the fascinating stories of family life and the black humour which, so frequently, is to be found in them. Above all, family lawyers must remain optimists in the face of the tragedies which so regularly confront them in the material of family law.

Legal rights and obligations or freedom of contract?

- 1.4 During the latter half of the twentieth century, familial relationships developed in a way which emphasized the fulfilment of individual emotional needs. The idea that the family's major role was to serve the needs of society began to be questioned. Alongside this evolution,

a growing and more general respect for individual rights to self-determination and privacy also gained momentum. The philosophy behind these interrelated developments would appear to demand the freedom for adults to contract with each other, free from State control, about the terms of their relationship, and have those contracts legally enforced. The limited, but growing, enforcement of some private familial contracts can be seen as a natural development of this individualism.

- 1.5 However, privatization of familial relationships and freedom of contract may also be viewed as out of tune with other aspects of current social thought which emphasize, *inter alia*, the importance of the protection of the potentially vulnerable, the imposition of mutual responsibility and redistributive justice for those who commit to caring for each other, all of which benefit society as a whole. There are potential adverse effects which may result from the enforcement of private contracts. One or more family members may be left in a vulnerable economic position and dependent on the State for legal aid, welfare benefits, and medical and psychiatric support. Contracts, which were negotiated at the beginning of a relationship at a time of romantic optimism, may fail to meet the parties' needs when it ends acrimoniously. It is not an easy task for couples, who are embarking on a committed relationship, to contemplate its future breakdown and the associated consequences.
- 1.6 A tension has developed in family law which mirrors the debate between those who espouse individualism and those who are more concerned with the social and economic good of society. Family law appears to vacillate between the enforcement of privately negotiated contracts and the imposition of legal rights and obligations laid down by common law or statute. Where the enforcement of private contracts alleviates State expenditure, they are more likely to be enforced. There are, of course, areas of family law where private contracts will always remain inappropriate; one obvious example is in matters which relate to the needs of children.

Changing definitions of family

- 1.7 The term 'family' in family law is not a term of art; it has no independent generalized legal meaning; it changes over time, and can only be understood within the particular socio-legal context in which it is used. However, it may be helpful to consider some of the ways in which the term 'family' has been historically defined and how its meaning has changed over time.
- 1.8 Historical definitions of the word family encompassed a wide group of people who shared the same household.

For instance, in ***R v Inhabitants of Darlington (1792)***, Lord Kenyon CJ stated that:

In common parlance the family consists of those who live under the same roof with the pater familias: those who form ... his fireside.

Servants were included in this definition; they often lived with a family for the whole of their lives.

In **Blackwell v Bull (1836)**, Lord Langdale said:

It is evident that the word family is capable of so many applications that if any one construction were attributed to it in wills, the intention of the testators would be more frequently defeated than carried into effect. Under different circumstances it means a man's household, consisting of himself, his wife, children and servants; it may mean his wife and children, or his wife; in the absence of wife and children, it may mean his brother and sisters or his next of kin, or it may mean the genealogical stock from which he may have sprung.

- 1.9 By the twentieth century, legal intervention into family life had become more developed and definitions of the family grew narrower. The field of **Rent Act** legislation provides a plentiful supply of illustrations of this trend. Judicial statements, relating to the classification of a person as a member of a deceased tenant's family which would give him or her the right to continue to live in their family home, are tinged with social and moral perceptions of the legitimacy of certain kinds of familial relationship. The following decisions illustrate this approach.

In **Langdon v Horton (1951)**, the Court of Appeal refused **Rent Act** protection to two elderly ladies who had lived for 30 years with their cousin in a house, which she had held on a statutory tenancy prior to her death. The court held that all three had lived together for the sake of personal convenience and not because they were part of the same family.

In **Gammans v Ekins (1950)**, the Court of Appeal rejected the claim of a male cohabitant to remain in the family home on the death of his female partner. Asquith LJ took the view that either the relationship was platonic and the couple were not members of each other's family, or it was not. If the relationship was platonic, Asquith LJ believed that to recognize the cohabitants as members of the same family would also require the court to accord the same status to two old cronies of the same sex innocently sharing a flat. If the relationship were not platonic, Asquith LJ thought it:

... anomalous that a person could acquire a Rent Act protected status by living or having lived in sin, even if the relationship had not been a mere casual encounter but protracted in time and conclusive in character.

He concluded by saying that to accept a same-sex couple, masquerading as husband and wife, as members of the same family was an abuse of the English language.

Evershed MR agreed with Asquith LJ and stated that it:

... may be no bad thing that by this decision it is shown that, in the Christian society in which we live, one, at any rate, of the privileges which may be derived from marriage is not equally enjoyed by those who are living together as man and wife but who are not married.

In **Ross v Collins (1964)**, a woman claimed the right to succeed to a statutory tenancy on the death of her partner. She had lived with the deceased for a substantial period of time. She was 40 years younger than him and had looked after him dutifully, regarding him as a sort of

elder relative, partly father, partly brother. Russell LJ ruled that this platonic, familial relationship was not within the definition of family because there was no kinship between the couple. He maintained that:

... two strangers cannot ever establish artificially a familial nexus by acting as brothers or as sisters, even if they refer to each other as such and consider their relationship to be tantamount to that. Nor can an adult man and woman who establish a platonic relationship establish a familial nexus by acting as a devoted brother and sister or father and daughter would act, even if they address each other as such and regard their association as tantamount to such. Nor would they indeed be recognised as familial links by the ordinary man.

- 1.10** By 1980, the courts had begun to recognize that those living in stable heterosexual cohabiting relationships could be classified as members of each other's families in the context of landlord and tenant disputes.

In **Watson v Lucas (1980)**, it was held that a married man, who had left his wife to live with another woman in a stable and long-term relationship, was a member of her family.

- 1.11** A major change in the concept of family relationships occurred at the beginning of the twenty-first century.

The decision in **Fitzpatrick v Sterling Housing Association (2000)** accepted that homosexuals could be members of each other's families. Lord Slynn, in a most sensitive judgment, viewed the essential hallmarks of a familial relationship as a degree of mutual interdependence, the sharing of lives, the caring and love for each other, and the commitment and support for each other. He explained that:

In respect of legal relationships these are presumed, though evidently they are not always present, as the family law and criminal courts know only too well. In de facto relationships these are capable, if proved, of creating membership of the family.

In **Mendoza v Ghaidan (2004)**, the House of Lords went further and held that the term 'as husband and wife', in **Rent Act** legislation, could be read to mean 'as if they were husband and wife'. It, therefore, included a same-sex partner who had lived with the deceased in a spouse-like manner.

- 1.12** Since these decisions, the concepts of family, and spouse, have been further extended in two other contexts. In accordance with the **Gender Recognition Act 2004 (GRA 2004)**, transgendered persons, who have obtained a gender recognition certificate (see Chapter 3), may marry a member of the opposite sex to that of their newly acquired gender. Prior to the Act, they were restricted to marrying members of the opposite sex to their previous biological gender. The **Civil Partnership Act 2004 (CPA 2004)** has also given a quasi-spousal, and familial, status to same-sex couples who register their partnerships (see Chapter 2).
- 1.13** The Government has recently put forward proposals to allow same-sex couples the right to marry thus reinforcing the view that such couples have as much right to be regarded as a

family as heterosexual couples (see Chapter 2). A Bill is expected to be put before Parliament in 2013.

Excluded relationships

- 1.14** There remain two categories of relationship which, although functionally familial, have only been granted limited legal rights. The first category consists of heterosexual and same-sex cohabitants. Their relationships are often identical to those of married couples and civil partners but have simply not been formalized. The Government asked the Law Commission to undertake a review of the law relating to cohabitants. Its recommendations were published in 2007 but no action has been taken. In 2008, the Labour Government announced that it would wait until research was completed on the cost and effectiveness of the recently implemented Scottish legislation. In 2011, Jonathan Djanogly, the Justice Minister explained that:

The findings of the research into the Scottish legislation do not provide us with a sufficient basis for a change in the law. Furthermore, the family justice system is in a transitional period, with major reforms already on the horizon. We do not therefore intend to take forward the Law Commission's recommendations for reform of cohabitation law in this parliamentary term.

Professor Elizabeth Cooke, the Law Commissioner in charge of the cohabitation project, responded and expressed the hope that there would be reform in the early days of the next Parliament.

- 1.15** The second category of familial relationships has been largely ignored by the legislators, and there are no plans to consider bringing it within the fold of the legal family in the foreseeable future. It consists of those who live together in the same household as members of a family but who have never engaged in sexual relationships with each other. This is either because they are closely related to each other, and they do not wish to have an illegal incestuous relationship, or because they are very close friends who have personally assumed responsibility for each other, but a sexual relationship and a civil partnership is not a desired aspect of their friendship. These relationships also perform a familial function; many of the parties are elderly and would be unable to remain in their own homes were it not for the relationship.

A prime example of one such relationship is to be found in *Joram Developments v Sharratt* (1979).

In *Joram Developments*, Lady Salter was the widow of a High Court judge who had died in 1929. In 1957, when she was aged 75, she suggested to Mr Sharratt, who was aged 24, that he should come to live with her in her flat. They shared similar interests, and enjoyed each other's company for 19 years, until Lady Salter died in 1976, aged 94. Mr Sharratt was with Lady Salter when she died because her family regarded him as her next of kin. Throughout, their relationship was platonic, motivated by kindness and affection. After Lady Salter's death,

Mr Sharratt claimed the right to a statutory tenancy of her flat as a member of her family. The county court judge had concluded that:

Lady Salter and this defendant achieved through their relationship what must surely be regarded in a popular sense, and in common sense, as a familial nexus. That is to say, a nexus as one would find only within a family. I am sure Shakespeare's [base, common, and popular] man would say: 'Yes, it is stranger than fiction, but they established a familial tie'. Everyone linked to her through the blood was remote by comparison with the defendant.

The House of Lords had no difficulty in rejecting this view and held that Mr Sharratt was not a member of Lady Salter's family.

- 1.16** During the passage of the **CPA 2004** through Parliament, the House of Lords tabled amendments to extend the scope of the Act to this second category of familial relationships—siblings, parents and adult children, carers and those they care for, and other home sharers. Estimates suggest that there are 60 times more of these relationships than there are of same-sex relationships. The amendments failed; accusations were made that they had been tabled, in a rather cynical manner, in order to ensure the failure of the Bill rather than to help, and avoid discriminating against, a vulnerable category of persons who regarded themselves as enjoying familial relationships.
- 1.17** It would seem that to date, a sexual relationship or, at least, a potential for it, is often the triggering factor for the legal recognition of adult relationships as familial. This, of course, leaves adult sibling, and parent and adult child relationships, largely without legal protection.

The case of *Burden v UK* (2006 and 2008) in which two elderly sisters were denied the possibility of inheritance tax relief, which is given to married and civil partners, is a perfect example of such a relationship.

The majority in *Burden* remarked that:

... the relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners under the United Kingdom's CPA 2004. The very essence of the connection between siblings is consanguinity, whereas one of the defining characteristics of a marriage or CPA 2004 union is that it is forbidden to close family members ... The fact that the applicants have chosen to live together all their adult lives, as do many married and CPA 2004 couples, does not alter this essential difference between the two types of relationship.

Changing concerns of family law

Children

- 1.18** The increasing emphasis in family law today is centred on the needs, rights, and welfare of children from their conception to adulthood. Parenthood is seen as more concerned with obligations towards children rather than rights over them, and it is no longer dependent on

marital status. The definition of parenthood has evolved to cover new forms of biological and social parent/child relationships. More complex means of medically assisted reproduction present new challenges to legal concepts of parenthood. Multi-parentage, which may involve as many as six or even seven different adults in the process of conceiving, gestating, and socially parenting a child, requires innovative legal responses.

Divorce

- 1.19** Given that almost 1 in 2 marriages end in divorce, it is surprising that no legislation has been proposed to reform a divorce law which has changed remarkably little since the 1970s and which remains primarily fault-based.

Financial matters

- 1.20** Financial and property disputes are at the forefront of the law relating to adult relationships, Equal division of a couple's assets continues to compete with judicial discretion as a fair solution to the determination of financial awards after the legal end of a relationship. Considerable confusion continues to reign in this area of law.
- 1.21** In the absence of legislation relating to home sharing, the acquisition of rights over the family home, by way of informal trusts and proprietary estoppel, continues to tax the creative ingenuity of family lawyers and the judiciary.

The international family

- 1.22** The family no longer remains in one village, city, county, or country. It is a mobile institution; partners marry across international boundaries. They experience problems when the family breaks down and one partner wishes to return to his or her country of origin with the children. The courts are faced with the impossible task of determining in which country a child should live and, thereby, effectively depriving the child of a relationship with one of his, or her, parents.
- 1.23** Families also move from their country of origin because of unemployment, war, famine, terrorism, environmental disasters, or poverty. Society has become multicultural, and family law is faced with disputes in which family members have very different cultural expectations of how family life should be conducted from those which exist in their new society. Family law has to deal with the problem of determining when it is appropriate to take into account these differing cultural expectations and when it is not. Forced marriage in certain cultural groups continues to be a problem.

Human rights

- 1.24** The **Human Rights Act 1998 (HRA 1998)** has had a significant effect on family law; it requires, *inter alia*, that family law must comply with the **European Convention on Human Rights 1950 (ECHR)**. The **HRA 1998, s 3(1)** provides that:

... so far as is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention Rights.

If this is not possible, the **HRA 1998, s 4** allows the High Court, the Court of Appeal, the Supreme Court, and the Judicial Committee of the Privy Council to make a declaration of incompatibility. If remedial action is not taken by the Government after such a declaration, the case has to be dealt with by the European Court of Human Rights (ECtHR). An individual who believes that his or her human rights have been breached may take action against a public authority which acts in a way which is incompatible with any of the Convention rights (see **HRA 1998, s 7(1)**).

- 1.25** Although the **HRA 1998** cannot be used directly by individuals against each other, they may be able to use it indirectly. For instance, where one member of a family refuses to obey a court order in favour of another family member, and that refusal also breaches a Convention right, the court may be forced to take action to ensure that the court order is obeyed in order to prevent a breach of Convention rights.
- 1.26** The most important Articles of the **ECHR** for family lawyers are: **Art 6**, the right to a fair trial; **Art 8**, the right to respect for private and family life; **Art 12**, the right to marry; and **Art 14**, the right to enjoy the Convention rights without discrimination. **Protocol 12 of the ECHR** provides for a self-standing right to freedom from discrimination but the UK Government has not yet ratified the Protocol.
- 1.27** **Article 8** is subject to the very significant proviso that:

... there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of morals, or for the protection of the rights and freedoms of others.

The proviso is an attempt to balance the rights of the individual and the rights of the larger community but it also limits severely the impact of **Art 8** (see eg **Stübing v Germany (2012)**; **Burden v UK (2006 and 2008)**).

- 1.28** Challenges and fears of challenges under the **ECHR** are now a constant theme throughout family case law. They have brought about dramatic changes in legislation to ensure conformity with the **ECHR**. The enactment of the **GRA 2004** and the **CPA 2004** were both products of challenges, and a fear of further challenges, under the **ECHR**.

Organization of the text

- 1.29** The text is divided into two parts: Part I (Chapters 2–8) concerns the law relating to adult relationships and Part II (Chapters 9–16) the law relating to children. Each part is self-contained and may be read in whichever order the reader chooses.

FURTHER READING

All readers may find it helpful to look at *Family Law* on a regular basis; it is a monthly journal published by Jordans. A selective reading of a national daily newspaper should also keep you abreast of family matters, both legal and social.

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- Welstead M, 'The Criminalisation of Consensual Sexual Relationships Between Adult Siblings and Human Rights: *Stübing v Germany*—European Court of Human Rights 13 April 2012 (Application No. 43547/08)' [2012] IFL 402

Welstead M, 'Reshaping Marriage and the Family—The Gender Recognition Act 2004 and the Civil Partnership Act 2004', *International Survey of Family Law 2004* (Jordans)

Welstead M, 'Who Are My Family?' *International Survey of Family Law 2005* (Jordans)

SELF-TEST QUESTIONS

- 1 Consider your own family relationships from birth to the present day, and the extent to which the law has involved itself in them in either a positive or negative way.
- 2 Read **Burden v UK (2006)** and **Burden v UK (2008)**; consider the approaches taken by the judges to the similarities and differences between two sisters who live together in their family home, and spouses or civil partners who live together. Do you share the view of the majority in **Burden** (2006 and 2008) that the decision to deny the sisters the possibility of exemption from inheritance tax was justified? Explain the reasons for your view.
- 3 How would you overcome the supposed difficulties of giving biologically related adult members of the same family who live together similar rights to those given to married couples and civil partners?
- 4 Why do you think the Government has committed itself to future legislation in 2013 to permit same-sex marriage? Will any such legislation be forced to differentiate between same-sex marriage and heterosexual marriage?

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