FAMILY JUSTICE COUNCIL 2021: BRIDGET LINDLEY MEMORIAL LECTURE

WHAT DO WE MEAN BY A FAMILY?

I chose this title out of respect for Bridget Lindley, whose work with the Family Rights Group so enriched our idea of what it means to be a family these days. The Office of National Statistics defines a family as a couple, whether of the same or opposite sexes, and with or without children, or a single parent with one or more children. I understand why they have to do this, but if there is one thing that Bridget and the Family Rights Group have taught us, it is that there is far more to family than that. Families consist of a whole web of relationships going far beyond those of adult partners, parents and children. They are, of course, infinitely various, some close, some distant, some acknowledged, some unacknowledged, some loved, some unloved. But you can bet your bottom dollar that, for most children, there will be people other than their parents in their family who are important to them and to whom they are just as important, if not more.

Bridget joined the Family Rights Group in 1988, before the Children Act 1989 was passed. So she knew how badly the law treated the families of children who needed the help of social services in those days. All too often the focus was on taking

children away from their families rather than helping them to stay together. Local authorities could deprive parents of their parental rights simply by passing a resolution to do so, without involving the children, the parents or the wider family. Care proceedings were modelled on criminal proceedings against delinquent children. The parents were not even parties in their own right. Other family members who might want to offer the child a home could not take part. Members of the wider family, such as older brothers and sisters, uncles and aunts, grandmothers and grandparents, were more often seen as part of the problem rather than a possible solution. The aim was to find a permanent home for the child but this was seen in binary terms: either return to the parents or adoption. The possibility of a halfway house, offering much needed safety and long-term security for the child while keeping her a member of her family of birth was not catered for.

The Children Act 1989 provided a solution to most of these problems but it did not provide that half-way house. That had to wait until the Adoption and Children Act 2002 introduced special guardianship. Bridget and FRG were influential in persuading the powers that be that it was needed. And when it was introduced in 2005, she led valuable research with family members, parents, carers and children. This resulted in a pioneering Reader, which she co-edited, entitled *Special*

Guardianship: what does it offer to children who cannot live with their parents? It is some indication of how much it had to offer that these days roughly the same proportion of children leave local authority care through special guardianship as leave it through adoption – roughly 12% each.

Bridget and FRG have championed the wider family in other ways, through family group conferences to try and find a family solution when parents are struggling; through a variety of ways of arranging kinship care; through fighting for better recognition and support for the family as a resource rather than a problem. It is real honour to offer this talk in memory of a beautiful, brainy and brave fighter in the cause of the right to respect for family life.

I want to talk, at a very basic level, about the role of the law in family life. We tend to think of the law as stepping in when things go wrong. But in fact it does much more than that. It does three things:

(1) It defines our relationships, which of them count for legal purposes and which do not. The family court is not involved.

(2) It grants formal recognition, with legal consequences, to some relationships which would otherwise not have them. The family court is sometimes, but not usually, involved.

(3) It provides remedies when things go wrong or the need arises – that is what the family court mainly does.

You could say, however, that by defining and granting formal recognition to certain relationships, family law excludes the others, even though they may have equally familial characteristics. But the developments over the past few decades have largely been in the direction of including rather than excluding.

(1) Defining relationships

The most obvious example of exclusion was the position of the children of unmarried parents. For most of our history, children born to parents who were not married to one another had no legal relationship with their fathers or with their father's families and only a limited one with their mothers. So the most momentous example of inclusion came with the Family Law Reform Act 1987, shortly before the Children Act 1989 was passed. Section 1 of that Act is one of the most important

reforms to stem from my time at the Law Commission. It sounds dry but it means a lot. References to relationships in legislation and legal documents, such as wills and conveyances, are to be construed without reference to whether a person's parents – or the parents of anyone through whom the relationship is traced - were married to one another. A gift 'to my nephews and nieces' includes my sister's children, even if our parents were not married to one another or she was not married to their father. So there is no need to include them expressly (although they can be expressly excluded). And there is no need to have an adjective describing the child – illegitimate should have left the language.

Ironically, the 1987 Act – although designed to do away with the concept of illegitimacy - introduced a rule which discriminated against the children of unmarried parents. The husband of a woman who has a child as a result of donor insemination is automatically deemed to be the father for (almost) all legal purposes, unless it is proved in court that he did not consent (s 27 of the 1987 Act). This is a radical departure from the normal rule that parentage is a genetic rather than a social relationship. The pressure came from doctors who were treating their patients for male infertility and sympathized with the patients' wish to pretend that everything was normal. They pointed out that studies had shown that a remarkable

number of children were not in fact the genetic offspring of their mothers' husbands although registered as his. Others pointed out that there was a difference between the mother concealing the truth and deliberately altering it by law.

Be that as it may, once made, the new rule would have to be extended to the children of unmarried couples, as well as to children resulting from IVF or embryo transfer using donated sperm or eggs. So the first thing the Human Fertilisation and Embryology Act 1990 did was to say that the woman who carried and gave birth to the child was always her legal mother: another break from the genetic truth. It later transpired that a trans man, even with a gender recognition certificate, who nevertheless gave birth to a child, had to be registered as the child's mother and could not be registered as his father or 'gestational parent' (*R (McConnell and YY) v Registrar-General* [2020] EWCA Civ 559, [2020] 3 WLR 683).

But how to include the children of unmarried couples in these rules? The device first chosen was that the couple were being 'treated together'. But that caused problems because it is only the woman who is being treated. Her partner is a much-needed supportive companion, included in any counselling they may have, but not in any medical treatment. In a memorable case which was heard by the first all-

female Court of Appeal, the mother and her partner were together when her eggs were harvested and the embryos created and stored. They signed the forms together. But the first attempt at implantation failed. The couple then separated and the mother pretended that her new partner was the same man who had signed the forms when there was a second attempt at implantation. This time it succeeded and the child was born. The first partner, who had desperately wanted a child, applied for parental responsibility and contact. Everyone assumed that he was the deemed father until we queried it: *In re D (Parental Responsibility: IVF Baby)* [2001] EWCA Civ 230, [2001] 1 FLR 972. When the case came back to the Court of Appeal, we decided that he was not: the Act required them to be treated together at the time of implantation, not at the time when the embryos were created: *In re R (IVF: Paternity of Child)* [2003] EWCA Civ 182, [2003] Fam 129. This was bad news for the first partner; but it would have been good news had he wanted nothing to do with her. It is always a good idea in family cases to think about the counter-factual.

In 2008 the rule was extended to female same sex couples. The opportunity was taken to replace 'being treated together' with a simpler and clearer system of written consents for both opposite and same sex couples. There has to be a valid consent from each partner at the time of the insemination or implantation for the

man to become the father or the other woman to become the second mother of the child.

In this way, the law has quite radically altered the relationships of children born using donated gametes. And it applies for all legal purposes (with the usual exception of the transmission of peerages and other hereditary dignities and any property associated with them). If you leave property to a class of relatives, such as your grandchildren, they will be included.

So the law now recognizes three different types of parenthood: genetic, gestational and social or psychological. These may, of course, be reflected in a court order about the arrangements for a child – as the House of Lords explained in a case about lesbian parents before the 2008 Act *(In re G (Children) (Residence: Same Sex Partner)* [2006] UKHL 43, [2006] 1 WLR 2305). But these rules go further and grant automatic legal recognition in certain circumstances.

(2) Formal recognition and status

The paradigm of a formally recognised status is, of course, marriage: defined in 1866 as the 'voluntary union for life of one man and one of a woman to the exclusion of all others' (*Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130, 133). This ruled out marriages celebrated abroad under a law which allowed polygamy, even if it was validly contracted there and in fact monogamous. Polygamy is still ruled out here, but since 1972 divorce and other matrimonial remedies have been available to the parties to a valid foreign marriage, whether actually or only potentially polygamous, and since 1995, the marriage of a person domiciled here has been recognized provided that it is not actually polygamous.

But since then we have moved on from the notion of one man and one woman. This is perhaps the most surprising of the recent changes in the law's ideas of a family. As late as 1988, the Local Government Act was amended to prohibit the teaching of 'the acceptability of homosexuality as a pretended family relationship'. But in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, the House of Lords held, not only that a same sex couple could indeed be living in a marriage-

like relationship, but also that the words 'living together as husband and wife' could be interpreted to include such a relationship.

Later that year, Parliament passed the Civil Partnership Act 2004, creating a formal status for same sex couples which was almost identical to marriage. At that stage, the lesbian and gay community wanted a distinctive status just for them: partly because they did not want to put off the traditionalists with talk of 'gay marriage' but also because if it was reserved to them it could have almost all the legal consequences of marriage. If opposite sex couples could also choose it, those consequences might well have been watered down, so as to preserve the attractions of hetero-sexual marriage.

But things moved on remarkably quickly. In 2013 Parliament passed the Marriage (Same Sex Couples) Act. Same sex couples could now choose between marriage and civil partnership. Instantly, therefore, opposite sex couples were discriminated against because they could not. Astonishingly, it took until the case brought by Rebecca Steinfeld and Charles Keidan reached the Supreme Court in 2018 for the courts to acknowledge that this was unjustified discrimination in the enjoyment of the right to respect for family life (*R (Steinfeld and Kaidan) v Secretary of State for*

International Development [2018] UKSC 32, [2020] AC). Why the government fought it for so long is a mystery. As with most discrimination, there is a choice between levelling up and levelling down – making both marriage and civil partnership available to all; abolishing civil partnership, making marriage the only choice for all; or (as I think would have been perfectly rational) abolishing marriage, making civil partnership the only choice for all. In fact, Parliament quickly pushed the government into choosing the first option. 167 opposite sex couples registered a civil partnership on 31 December 2019, the first day that it was possible to do so. Figures for 2020 are not yet available but I doubt that demand will be high, if the views of same sex couples are any guide. Now that marriage is available to them, more same sex couples are choosing it than choose civil partnership. It is the fastest growing type of same sex relationship.

Most cohabiting couples, whether opposite or same sex and with or without children, are either married or in a civil partnership. This is despite the fact that both the number of marriages and the rate of marriages per 1000 unmarried people have been falling steadily since their peak in 1972. People are leaving it later and later before they get married. The average age of opposite sex marriage has risen by 11 years since 1970: in 2017 it was 38 for men and 35.7 for women. Nearly

90% had been living together before they married and many had already had children together. Marriage still exercises a tremendous pull: but I would be very surprised if most couples getting married for the first time have a clear idea of its legal consequences.

Marriage and civil partnership are not the only formal recognition of a change in status. There are also adoption and parental orders. Adoption has been with us since 1926, although it was not until 1975 that an adopted child was treated in law in exactly the same way as a birth child. The child now becomes, not just the responsibility of the adoptive parents during her childhood, but also a full member of both their families (peerages and other hereditary dignities excluded). That is why the court has to be satisfied that it will serve the welfare of the child, not only during childhood but also for the rest of his or her life.

In another dramatic change adoption is now open to both opposite and same sex couples, whether or not they are married or in a civil partnership, provided that they are 'living as partners in an enduring family relationship'. This would, of course, have been a great deal more problematic had the Family Law Reform Act 1987 not already recognized relationships traced otherwise than through marriage.

(I am a little sorry that the Adoption and Children Act 2002 says that the child is the legitimate child of the adopter or adopters, because in English law it should not be necessary, but it may be important in other countries.)

Then there parental orders for the commissioning parents of children born as a result of surrogacy arrangements. English law regards the surrogate mother as the mother, whether she is the genetic or, more commonly, simply the gestational mother, and irrespective of where in the world the child was born. It also regards the surrogate mother's husband or civil partner as the father or other mother (or even, in the unlikely event that the conditions are fulfilled, an unmarried partner). Parental orders were introduced to transfer parentage to the commissioning parents without their having to go through the whole adoption process. Orders can be made in favour of opposite or same sex couples, whether or not married or in a civil partnership, or, now, a single applicant. There has to be a genetic connection: a single applicant or one of joint applicants has to have supplied the gametes which created the child.

Attitudes to surrogacy have also changed dramatically in recent years. The courts have proved remarkably sympathetic. In theory, the application must be made

within six months of the child's birth, but the former President of the Family Division held that this could be relaxed, and orders are regularly granted for much older children. In theory also, no money must change hands in return for the surrogacy arrangement, other than reasonable expenses for the surrogate mother. Again, it was held that the court could approve such payments after the event, thus enabling orders to be made after foreign commercial surrogacy arrangements had been completed. Indeed, the Law Commission is not aware of any case in which an order has been refused because of payments amounting to more than reasonable expenses. This is not surprising: the child is here, living with the commissioning parents, may have been born in a place (such as California) which regards them as the legal parents, and so the child would be left parentless, family-less and possibly even stateless if an order were not made. In the last judgment I wrote before my retirement, the Supreme Court decided that commercial surrogacy is no longer contrary to public policy. A woman who has been wrongfully deprived of her child-bearing capacity may claim damages, not only for an altruistic surrogacy arrangement here, but also for a commercial surrogacy arrangement abroad, provided that it is reasonable to choose that option (*XX v Whittington Hospital NHS Trust* [2020] UKSC 14, [2020] 2 WLR 972).

Of course, there are many commissioning parents who would like the law to go further and recognize them as parents without the need for a court order. I realised the strength of feeling about this when my daughter and I took part in a 'conversation' after a dinner arranged by an offshoot of 'Out on the Street', the organization for LGBT+ people in the City. It was the very day that the Supreme Court had decided that a Christian bakery could lawfully refuse to supply a cake iced with the message 'Support Gay Marriage': *Lee v Ashers Baking Company Ltd* [2018] UKSC 49, [2020] AC 413. Everyone there seemed to understand the difference between an objection to the customer and an objection to the message on the cake. But several of the gay men there took me severely to task over the UK's approach to surrogacy. Things may change. The Law Commission has provisionally proposed a pathway which would enable commissioning parents to be recognized as parents immediately the child is born.

But the Law Commission cautioned against a three-parent model, in which the surrogate mother remains a parent, along with the commissioning parents. And of course our model of adoption is a transplant of parenthood rather than an expansion. So, for the time being at least, a child can only have two parents and parental kin: might that be the next frontier?

(3) Remedies when things go wrong

Family court judges like making adoption and parental orders. Whatever the traumas leading up to them, and there may be many, these are happy occasions, of huge significance both to the child and to the parents. They are rites of passage like marriage and civil partnership ceremonies and many judges try to make them special. This is in stark contrast to what the courts spend most of their time doing, which is finding a remedy when things have gone wrong: remedies to protect against domestic violence and abuse; remedies to sort out the arrangements for the children when their parents split up; remedies to protect children from abuse and neglect in their own homes; remedies to sort out what happens to the home, any other property, and the family finances when married couples or civil partners split up.

There is, of course, one big gap. More and more couples are choosing to live together without getting married. Although many of them may eventually decide to tie the knot, this comes much later in the relationship than it used to do, and sometimes it never does. There are several reasons for this. One is the pervasive

belief in the myth of 'common law marriage' – that in some magical way living together for an uncertain length of time gives you the advantages of marriage. Another is the equally pervasive belief that marriage remains a patriarchal institution to which no self-respecting feminist, whether male or female, could subscribe – that was a large part of the motivation for wanting civil partnerships to be extended to opposite sex couples (the Supreme Court was told that Rebecca Steinfeld and Charles Kaidan saw marriage as a 'hetero-normative patriarchal institution' – I had to try to explain to my colleagues what that meant). Another may well be that their children no longer suffer both the legal disadvantages and the social stigma which they used to do. But I believe that another powerful reason must be that it takes two to tango – both parties have to agree to formalise their relationship and one may be a great deal keener to do that than the other. In particular, of course, marriage used to be a distinctly unequal relationship, with the breadwinning husband having much more power than the home-making wife. That may still be the case in practice for some couples, but it has not been the law since at least the package of reforms which came into force in 1971. Does that mean that it is now less attractive to men? I doubt very much whether many people think in those terms: but the increasing popularity of pre-nuptial agreements suggests that at least some of them do.

Increasing cohabitation outside marriage or civil partnership means that there are many couples who have no financial remedy to sort out their home and finances when they break up. Until the House of Lords' decision in *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432, it was not even assumed that, if they bought a home in their joint names, they intended to share it equally (unless a contrary intention could be shown). The same problem might apply to joint bank accounts, until the Privy Council adopted a similar approach in *Whitlock v Moree* [2017] UKPC 44: that case did not involve a cohabiting couple but it might well have done.

But co-ownership does not solve all the problems. It cannot deal with the totality of the couple's assets in a way which fairly represents the economic consequences of their relationship. There is a perfectly simple model available in Scotland – or at least it became rather simpler once the Supreme Court got its hands on it in *Gow v Grant* [2012] UKSC 29, 2013 SC (UKSC) 1 – but the UK government has resolutely refused to adopt it for England and Wales (and it is now under review in Scotland). The unspoken reason for that reluctance is probably that a remedy is so necessary that it would be used, thus placing even more demands on the hard-pressed family

court, albeit in a good cause which should reduce the demands elsewhere in the justice system.

There is another group of people who are currently denied financial remedies when things go wrong. These are the growing numbers of members of religious faiths other than Christianity who celebrate a religious marriage which is not recognized in the law of this country. A comparatively small proportion of mosques, for example, are registered to perform marriage ceremonies. So the couple will have to go through another, civil, ceremony if they want to be validly married in English law. It would not surprise me if many, especially wives, did not realise this. It would also not surprise me if some, especially husbands and their families, made a deliberate choice to avoid the consequences of a valid English marriage. If things go wrong, the wife will be reliant on whatever she is granted by a Shariah Council or Beth Din or other religious body, which may well be less than she could expect if she had a financial remedy in the family court. Some, of course, may believe that they are validly married in English law. Are these couples not equally deserving of a financial remedy?

So it is that our concept of what constitutes a family recognized by the law has changed dramatically in recent decades. The old concepts of affinity – marriage – and consanguinity – blood relationship – are no longer sufficient to define what we mean by a family. And the driving force behind these changes is human need: most people want to form enduring intimate relationships if they can; most people want to have children if they can. The law is now prepared to recognize – even to facilitate – a much greater variety of ways in which to fulfill those human needs than it did in the past.

Bridget Lindley was a great believer in the Universal Declaration of Human Rights. Article 1 declares that 'all human beings are born free and equal in dignity and rights'; article 16.3 that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'. That does, of course, beg the question of what we mean by a family. We have travelled a long way in the past few decades and may even travel further in the future. But I believe that Bridget would have approved of the direction of travel so far.