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Family Law

Paula Davies

Senior Lecturer in Law, BPP Law School, London

Paven Basuita

Lecturer in Law, BPP Law School, London

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Preface to the ninth edition

Two decades have passed since the publication of the first edition of *Family Law* in 1993. During that time families and family life have undergone considerable change. For instance, cohabitation has become increasingly common and families now take many different forms.

Family law has also undergone many changes, and continues to change at a pace. Proposals for reform also abound. In fact, there was a major review of the family justice system in 2011 (the 'Family Justice Review') by the Norgrove Committee which made important and wide–ranging recommendations for reform, most of which were accepted by the Government and brought into law. These recommendations included, for example, proposals to reduce delays in care and adoption cases, the creation of a new single Family Court and the introduction of a new order (a 'child arrangements order') to replace residence and contact orders.

Since the last edition of *Family Law* in 2013, Government reforms have focused on a range of different issues, for instance the introduction of same sex marriage, and of a new criminal offence of forcing someone to marry. The Law Commission, the Government's law reform body, has also looked at a range of family law issues, including, in particular, the law governing financial relief on divorce and dissolution, and has made recommendations for reform.

Family law never seems to stand still. While this makes it a fascinating subject to study, it means that keeping up to date is a challenge. However, despite the multifarious changes both to family life and family law over the years, the aim of this book remains the same as it was two decades ago, which is to provide a clear and detailed account of family law in England and Wales, including current debates and proposals for reform.

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Family law – an introduction

Chapter 1
Introduction

This chapter provides an introduction to family law in England and Wales by looking at a range of matters, such as legal and social trends and developments, the nature of judicial decision-making, the importance of agreement and the impact of human rights. It starts, however, by considering the nature of family law as a subject to be studied.

1.1 Studying family law

Family law is a fascinating but demanding area of law as it is in a constant state of flux. Keeping up to date with the changes is challenging. A wide range of legal materials also has to be absorbed. Thus, in addition to a wealth of statutory provisions and a substantial body of reported case-law, there are rules of court, detailed practice directions, guidance, Government papers and other materials which have to be digested. Furthermore, there continue to be discussions of reform on a wide range of family law issues.

Although family law is largely codified in the sense that the law is based on statute, it is also an area of law where, because of the infinite variations in family circumstances, cases are decided on their own particular facts. In other words, decisions are largely fact-specific. To do well as a family law student it is therefore necessary to have not only a sound knowledge of the relevant statutory provisions and case-law principles, but also a sense of how to apply them. A practical common-sense approach and an understanding of the human condition are therefore required. This is what family law judges have to show when exercising their various statutory powers and duties. In other words, they have to apply the statutory provisions to the facts of the case. This often requires competing considerations to be balanced, and the discretionary nature of the judicial exercise means that there may be more than one decision which is reasonable in the circumstances of the case.

A distinguishing feature of family law is that there is considerable emphasis on the parties reaching agreement, whether, for example, it is about arrangements for children on family breakdown or about property and financial matters. Agreement and settlement are actively promoted, and increasingly so. Thus, instead of taking their case to court, parties are encouraged to use non-court dispute resolution (formerly known as alternative dispute resolution), such as mediation, collaborative law or arbitration. There has also been recognition by the Supreme Court that pre-marital agreements about property and finance can, in some circumstances, be binding.

Another distinguishing feature of family law is that it involves both private and public law. Private law is the law which applies to disputes between individuals, such as spouses, civil partners or parents. A divorce dispute, for example, is a private law matter, as are a domestic violence case and a parental dispute about arrangements for children on family breakdown. Public law disputes, on the other hand, involve

a public authority, such as a local authority child protection team or a housing authority. Child protection cases and housing cases are therefore public law cases.

It is important when studying family law to understand that a wide range of different people work in the family justice system. Thus, in addition to lawyers and judges, other people, such as mediators, social workers, housing officers, police officers and Cafcass officers, are often involved. In a domestic violence case, for example, the police may be involved, and, if a victim needs accommodation, a local housing officer might also be involved. This may be in addition to a solicitor. In a child protection case, not just lawyers and judges, but the police, social workers and Cafcass officers may be involved, too.

Other distinguishing features of family law are that it is an area of law where children are often involved and also where the emotions of the parties are sometimes highly charged and difficult balancing decisions have to be made. Cases therefore require sensitive handling. In addition, court decisions in family law, unlike decisions in other areas of the law, tend to be forward-looking rather than backward-looking. In other words, they look to the future rather than to the past. The court on divorce, for example, may have to consider what financial provision should be made for a party to the marriage or what future arrangements should be made for children.

Before moving on to consider some of the changes and trends in family law, it is useful to consider the functions which family law performs in order to understand the nature of the subject. Family law can be regarded as performing several functions. Thus, it can create a status, such as the status of spouse, civil partner, guardian or special guardian. It can remove a status, for example by divorce, dissolution or adoption. It can create and, where necessary, enforce the rights and obligations arising from a particular status, such as the obligation to provide financial provision to a spouse or a child. It can adjust the property and financial rights of family members, for example on family breakdown; and it can provide protection for family members, such as for victims of forced marriage, domestic violence or child abuse.

1.2 Family law – changes and trends

Family law is a dynamic area of law which is constantly changing. Thus, over the past 30 to 40 years radical changes have been made which people living in the 1970s or 1980s would not have thought possible. For example, before the 1970s, and even for some years thereafter, divorce was regarded as a social stigma; and cohabitation even more so. Divorces, whether or not defended, were heard in court with a full hearing before a judge; and cohabitation was regarded by some as 'living in sin'. Protection against domestic violence was also restricted to a much narrower group of people than it is today in that only married couples and heterosexual cohabitants could obtain injunctive protection in the family courts. With respect to arrangements for children on family breakdown, different terminology was used (namely 'custody' and 'access', and more recently 'residence' and 'contact'), and it was much more likely that mothers, rather than fathers, would be granted custody of children. Also, unlike today, all child maintenance disputes were heard in the courts. In family law cases, litigation also tended to be the norm, as mediation and other alternatives had not been widely developed.

Today's family law is therefore in many respects almost unrecognisable from what it was 30 or 40 years ago. This is due in part to the fact that a wider range of family forms exist, not just what was once considered to be the stereotypical family, namely a married heterosexual couple with children. Thus, we now have same sex marriage and civil partnership, and transsexual people can marry in their acquired sex. Many couples also now choose to cohabit. Although social changes have had, and continue to have, an impact on family law, family law may itself be partly responsible for changing social attitudes. For example, the ease with which a divorce can now be obtained may have had an impact on removing the stigma that was once attached to it. Due to increasing cohabitation, cohabitants have now been accorded more family law rights than they once had, although some commentators consider that they have not been given enough, particularly on relationship breakdown. There has also been an increasing recognition of the importance of fathers, including unmarried fathers. All of these changes in family law would probably not have been imagined possible 30 or 40 years ago.

(a) Access to family justice – legal aid

Wide-ranging changes were made to the public funding of family law cases following the enactment of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012), which came into force in April 2013. Thus, free legal advice is no longer available for most private family law cases such as divorce or disputes about finances and children unless there is evidence of domestic violence, forced marriage or child abuse, or the applicant is a child who is a party to the proceedings, or there are exceptional circumstances. Legal aid is, however, still available for mediation.

The cut-backs in legal aid mean that fewer people now have access to free legal advice than at any time since legal aid was first introduced in 1949. Many people now represent themselves as they cannot afford to consult a solicitor or to have legal representation. In other words, they are a litigant in person. The following cases demonstrate some of the difficulties which may arise when litigants are not legally represented and how the court has responded to the changes brought about by LASPO 2012.

▶ ***C (A Child) & Anor v KH*** **[2013] EWCA Civ 1412**

This case concerned an appeal by a father against an order prohibiting him from removing his son from the mother, or from his primary school, and which allowed him only indirect contact. The appeal was allowed on the basis of an extensive catalogue of errors and repeated breaches of the Family Procedure Rules 2010 (FPR 2010) and other statutory codes.

Ryder LJ, giving the lead judgment of the Court of Appeal, noted that at various significant points in the proceedings both parties had been litigants in person. His Lordship warned that the case presented 'a salutary lesson to us all to put in place procedures and practices which can accommodate litigants in person who do not know the rules and practice directions of the court'. He added that, since the enactment of LASPO in April 2013, the majority of parents in private law children disputes were litigants in person and the obligation upon the court to identify and implement due process should not be

underestimated. He warned that this would take time and occupy a greater share of the court's limited resources.

▶ *Re H* [2014] EWFC B127

The father, who was legally represented, sought a child arrangements order for the children to live with him. Although it was a private law case, the local authority was involved in the case due to child protection concerns. The mother, who had speech, hearing and learning difficulties, opposed the application and was unrepresented. She had been refused legal aid as the Legal Aid Agency said that she would still have effective access to the court without it.

Although the case between the parents was resolved by agreement, HHJ Hallam gave permission for her judgment to be published in order to show the legal aid situation. She said that the mother was not able to represent herself in such a complex case and was therefore to all intents and purposes prevented from having access to the court. She said that it was difficult to see how the legal aid authorities could have come to the conclusion that the mother's rights under Article 6 (right to a fair trial) and Article 8 (right to family life) of the European Convention on Human Rights (ECHR) were not in jeopardy. Without legal aid, the mother, on her own, would have been facing two advocates pursuing a case against her. On any basis that could not be equality of arms. She was the party with the least ability and the greatest vulnerability; thus, she should have had the benefit of legal representation. It was fortunate that she had the assistance of someone acting pro bono, but it was not right that a legal professional should have had to attend a complex hearing without remuneration. If the case had proceeded to a fully contested hearing with the mother unrepresented, the court would have been put in an impossible situation.

▶ *Re D (Non-Availability of Legal Aid)* [2014] EWFC 39

The case concerned a father who lacked capacity and a mother with learning difficulties. The father sought to discharge a care order made in respect of their child, but legal aid was not available in respect of the applications before the court and so both were unrepresented.

Munby P adjourned the case so that the funding situation could be investigated further. He said that it was the responsibility and duty of the judges in the Family Court to ensure that proceedings before them were conducted justly and in a manner compliant with the requirements of Article 6 and Article 8 of the ECHR. In the circumstances, it would be unconscionable; it would be unjust; it would involve a breach of the parents' rights under Article 6 and Article 8 of the ECHR; and it would be a denial of justice to allow the parents to face the local authority's application without proper representation. The child would also be prejudiced as he would not have a fair trial if his parents did not. Delay in arranging for the parents' representation was also likely to prejudice the child. Munby P was also critical of the State's role in this case.

MUNBY P:

> Thus far the State has simply washed its hands of the problem, leaving the solution to the problem which the State itself has created – for the State has brought the proceedings … – to the goodwill, the charity, of the legal profession. This is, it might be thought, both unprincipled and unconscionable. Why should the State leave it to private individuals to ensure that the State is not in breach of the State's … obligations under the Convention?

▶ *Re K* [2015] EWCA Civ 543

The Lord Chancellor appealed against an order that the court service should pay for the father in the case to be legally represented. The father was seeking contact with his children

in private law proceedings. An allegation had been made by the children's half-sister (Y) that he had sexually abused her and the court had ordered a hearing to establish whether this allegation was true, which would require Y to be cross-examined. As the father was unable to afford legal representation and ineligible for legal aid, the trial judge had ordered the court service to pay for a legal representative to question the witness.

The Court of Appeal allowed the Lord Chancellor's appeal. It held that the trial judge had no power to order the court service to pay for representation which lay outside the statutory legal aid scheme in LASPO 2012. The Court of Appeal did not accept that the only way in which the witness could be fairly and effectively questioned was by a legal representative and outlined other ways in which vulnerable witnesses could be cross-examined, including that the witness could be questioned by the judge or the judge's clerk, or a Children's Guardian could be appointed for the children who could conduct proceedings on their behalf. In this particular case, the trial judge should probably have questioned the witness himself.

The court did acknowledge, however, that in some cases such options might not make up for the absence of a legal representative, which might mean that the proceedings did not comply with Article 6 or Article 8 of the ECHR.

The cut-backs in legal aid have resulted in a dramatic increase in the number of litigants in person. Since April 2013, there has been a 30 per cent year-on-year increase in family court cases in which neither party had legal representation; and 80 per cent of all family court cases starting between January and March 2014 had at least one party who did not have legal representation (see National Audit Office, *Implementing Reforms to Civil Legal Aid*, HC 784, Session 2014–15, 20 November 2014). As Cobb J has pointed out, many litigants in person are some of the most disadvantaged people in society; and family breakdown, or a dispute about money or children, tends not to be their only problem ('Private law reform' [2014] Fam Law 644). For a detailed discussion of the separate but associated challenges litigants in person encounter in seeking advice in other vital areas of their lives, see the Final Report of the Low Commission (chaired by Lord Colin Low) on the future of advice and legal support (*Tackling the Advice Deficit*, January 2014). The experiences of litigants in person, and the challenges that they face, were also explored in research conducted by Trinder and Hunter for the Ministry of Justice ([2015] Fam Law 535).

(b) Legislative developments

There have been many legislative and case-law developments over the last two decades or so. During the 1990s there were many important and radical changes to family law. Of particular importance was the enactment of the Children Act 1989 (CA 1989), which came into force in October 1991 and made far-reaching changes to the law relating to children. The Child Support Act 1991 moved child maintenance from the courts into the Child Support Agency; and in the mid-1990s family law remedies for victims of domestic violence were made available to a wider class of family members by Part IV of the Family Law Act 1996 (FLA 1996). There was also an attempt in the 1990s to introduce a radically new law of divorce, although this was abandoned as the proposals were found to be unworkable in practice.

In the first few years of the new millennium there were further important legislative developments. Of particular importance was the Human Rights Act 1998 (HRA 1998), which came into force in 2000. Pension sharing on divorce was also introduced in 2000 by the Welfare Reform and Pensions Act 1999. In 2003, new provisions were introduced into the CA 1989 to allow unmarried fathers to acquire parental responsibility by birth registration. Another significant development was the introduction of civil partnerships by the Civil Partnership Act 2004; and transsexual people were given the right to enter into a valid marriage in their newly acquired sex by the Gender Recognition Act 2004. There were also changes to the law to give victims of domestic violence greater protection under new provisions introduced by the Domestic Violence, Crime and Victims Act 2004. New civil law remedies for victims of forced marriage were introduced in 2008 by Part 4A of the FLA 1996. Changes to the law governing parenthood in cases of assisted reproduction were made by the Human Fertilisation and Embryology Act 2008. Same sex marriage was introduced in 2014 by the Marriage (Same Sex Couples) Act 2013; and the Immigration Act 2014 introduced a new referral and investigation scheme to tackle sham marriages and civil partnerships in the UK. Part 10 of the Anti-social Behaviour, Crime and Policing Act 2014 introduced changes to the law in order to criminalise forced marriage; and the Inheritance and Trustees' Powers Act 2014 also reformed the law in intestacy and family provision claims on the death of a partner.

Important changes have also been made in the last decade or so to the law relating to children and parents. Radical reforms of adoption were made by the Adoption and Children Act 2002, which also introduced special guardianship and inserted new provisions into the CA 1989 to improve the facilitation and enforcement of contact on family breakdown. The Children Act 2004 (CA 2004) introduced other family law reforms, such as placing restrictions on the use of corporal punishment by parents, changing the structural framework governing the practice of child protection, and creating the office of the Children's Commissioner. Changes to the child support system were also implemented by the Child Maintenance and Other Payments Act 2008. The Children and Families Act 2014 (CFA 2014) has also introduced important and wide-ranging changes to family law, such as new time limits for public law proceedings and provisions regarding post-adoption contact. The CFA 2014 introduced a new presumption of parental involvement into the CA 1989, and replaced contact and residence orders with a new single order called a child arrangements order. It also removed the requirement for the court to consider whether to exercise its powers under the CA 1989 on divorce or dissolution. As a result, it is no longer necessary for parties to complete a Statement of Arrangements Form when filing for divorce or dissolution.

(c) Case-law developments

In addition to the many legislative developments, there have been important case-law developments. These have included decisions dealing with the approach the courts must adopt in proceedings for property and financial orders on divorce, such as the question of whether pre-marital agreements should be binding. There have

been important decisions, for example, on the rights of transsexuals and also on the property rights of cohabitants on relationship breakdown as well as non-disclosure in matrimonial financial proceedings. In addition, there are an increasing number of cases involving matters with an international dimension, such as the question of whether the courts in England and Wales have jurisdiction to grant financial relief after a foreign divorce.

Important decisions have also been handed down on the law governing children, for example on the threshold conditions for making care and supervision orders, on international child abduction and on the importance of the biological bond between parent and child as a consideration in disputes about arrangements for children. Important cases on the voice of the child in family proceedings and the right of a child to refuse or consent to medical treatment have also been heard.

Due to their obligations under the HRA 1998, the family courts in England and Wales are required to exercise their powers in light of the European Convention on Human Rights (ECHR). Human rights arguments play an important part in some cases, particularly those where public authorities are involved, such as in child protection and housing cases. Human rights have also, for example, had an impact on the law regarding the right of a person to succeed to a deceased partner's tenancy and on the law governing the rights of transsexuals. In children's cases, in addition to the protection afforded by the HRA 1998 and the ECHR, the United Nations Convention on the Rights of the Child (UNCRC) gives children another set of rights.

(d) Family law reform

A wide range of family law issues has been the subject of discussion with regard to reform. Some of these discussions have been taken no further (such as proposals to reform the law governing the property rights of cohabitants on relationship breakdown and to introduce compulsory joint birth registration), whereas other proposals may or may not be passed into law. Thus, the Law Commission has reviewed and reported on the law governing finances and property on divorce and dissolution and, at the time of writing, is awaiting a final response from the Government regarding nuptial agreements. It has also reviewed and reported on the various means by which family financial orders made under the Matrimonial Causes Act 1973, the CA 1989 and the CA 2004 are enforced. This project did not look at the basis for claims but instead considered the legal tools available to force a party to comply with an order once it has been made. The Law Commission produced a final report with its recommendations in December 2016 and is awaiting the Government's response. The Law Commission is also reviewing the law governing how and where people can marry in England and Wales. This project looks at whether the current law, which has evolved over a long period of time, provides a fair and coherent legal framework for enabling people to marry. The Law Commission produced a scoping paper setting out its findings in December 2015 and is waiting for the Government to respond to its recommendations for further work. The Family Justice Review (see below) has also recommended a wide range of reforms to the family justice system, and most of its proposals have been accepted by the Government.

With respect to children, there has been ongoing discussion about reforming the law to enable them to have a greater voice in family law proceedings and about child inclusive models of non-court dispute resolution. In June 2014 the President of the Family Division established the Vulnerable Witnesses and Children Working Group, chaired by Mr Justice Hayden and Ms Justice Russell, to look at how children can participate in family proceedings and the provision for the identification of vulnerable witnesses. In March 2015 the Working Group published its Final Report and proposed changes to the FPR 2010, including new Rules and Practice Directions to 'give prominence and emphasis to the treatment of children and parties in family proceedings; to emphasise the importance of the role of the child and the need to identify the necessary support/special measures for vulnerable witnesses and/or parties from the outset of any proceedings, or at the earliest opportunity' (para 35). In August 2015 the Family Procedure Rule Committee published draft amendment rules, many of which already exist for children in criminal proceedings following the introduction of the Youth Justice and Criminal Evidence Act 1999. The new rules, set out in a revised Part 3A, are designed to emphasise the importance of the participation of children and vulnerable people at all stages of family proceedings, in particular during early case management.

(i) The Family Justice Review

In March 2010, the then Labour Government appointed a panel, led by David Norgrove, to carry out a comprehensive independent review of the family justice system in England and Wales. The Coalition Government which took office soon afterwards supported the review. After the publication of an interim report and a consultation period during which evidence was collected, the final report of the Family Justice Review was published in November 2011 (see *Family Justice Review: Final Report*). The recommendations were comprehensive and far-reaching and applied to both private and public family law. The aim of the proposals was to make the family justice system more effective and to reduce the delays inherent in the system. Some of the key recommendations included: the introduction of a single family court; a new single 'child arrangements order' to replace residence and contact orders; and increased mediation provision.

In February 2012 the UK Government published its response to the Family Justice Review (see *The Government Response to the Family Justice Review: A system with children and families at its heart*, Cm 8273, Ministry of Justice and Department of Education). In its response, in which it accepted most of the Family Justice Review's recommendations in full, the Government announced that it would be conducting a major overhaul of the family justice system with the aim, *inter alia*, to help strengthen parenting, reduce the time it takes cases to progress through the courts and simplify the system. It proposed radical changes to both private and public family law, some of which are contained in the CFA 2014. In August 2014 the Government published an update setting out the progress that had been made since the Family Justice Review was first published in 2011 (see *A brighter future for Family Justice: A round up of what has happened since the Family Justice Review*, Ministry of Justice and Department of Education).

(ii) The Children and Families Act 2014

The CFA 2014 received Royal Assent on 13 March 2014. It is part of the Government's response to the final report of the Family Justice Review. Among other things, the Act requires parents engaged in disputes to consider mediation as an alternative means of settling the dispute rather than engaging in litigation and aims to reduce delays in care and adoption cases. It also contains provisions strengthening the powers of the English Children's Commissioner. The Act also introduces a statutory presumption in favour of parental involvement which the Government decided was needed to help ensure that children have a relationship with both parents after family separation where it is safe and in the child's best interests.

(e) Demographic and social changes

There have been important demographic and social changes which have impacted on family law. Fewer people now marry, many people cohabit and family breakdown is common. There are also increasing numbers of single-parent families and many children are born outside marriage. A particularly important change in family law has been the recognition given by legislators and the courts to different forms of family living. The 'traditional' family, a married heterosexual couple with children, is no longer the only family form. There are now same sex families and cohabitating families, for example, and also an increasing number of step-families. The recognition of these increasingly complex family forms has resulted in an increasingly complex set of statutory provisions in family law.

The driving forces behind the changes which have taken place in family life are articulated by Mr Justice Munby in the following extract.

Mr Justice Munby, 'Families old and new – the family and Article 8' [2005] *Child and Family Law Quarterly* 487

There have been very profound changes in family life in recent decades. They have been driven by four major developments. First, there have been enormous changes in the social and religious life of our country. The fact is that we live in a secular and pluralistic society. But we also live in a multi-cultural community of many faiths …. Secondly, there has been an increasing lack of interest in – in some instances a conscious rejection of – marriage as an institution. There is no lack of interest in family life (or at least in intimate relationships) but the figures demonstrate a striking decline in marriage. At the same time, it has never been easier for the married to be divorced. The truth is that, for all practical purposes, we permit divorce on demand. Thirdly, there has been a sea-change in society's attitudes towards same-sex unions …. Fourthly, there have been enormous advances in medical and in particular reproductive science so that reproduction is no longer confined to "natural" methods.

The following extract from the Government Green Paper *Support for All* also lists some of the changes which have had an impact on family life.

▶ ***Support for All*, Department for Children, Schools and Families, Cm 7787, 2010, pp. 5–6**

The very significant economic, social and demographic changes seen in recent decades have had a pronounced effect on family forms, family life and public attitudes. For example:

- in 2008 64 per cent of children were living in families with married couples, 13 per cent with cohabiting couples and 23 per cent with a lone parent;
- most children still live in a married family and marriage remains the most common form of partnership in Britain today. However, marriage rates show an overall decline since their peak in the 1970s;
- divorce rates increased considerably between the 1950s and the mid-1980s but then levelled off. In recent years they have started to fall and in 2007 the divorce rate reached its lowest level since 1981;
- the numbers of step-families are growing;
- in general, women are having fewer children and doing so later in life;
- since the Second World War the proportion of children born outside marriage has increased very significantly, right across Europe;
- about ten per cent of the adult population in England and Wales was cohabiting in 2007; cohabitation covers a wide range of relationships, including a precursor to marriage and an alternative to it;
- there is greater acceptance and recognition of same sex relationships and this is reflected in the introduction of civil partnerships; and
- people are healthier than ever and living longer which means that many more grandparents now see their grandchildren grow up.

The following extract highlights how the high incidence of family breakdown has a direct and profound impact on the private lives of many people.

▶ **Mr Justice Paul Coleridge, 'Lobbing a few pebbles in the pond: the funeral of a dead parrot' [2014] Fam Law 168**

The incidence of family breakdown … is so terribly high now that the way in which family law is shaped and, as importantly, managed and processed, has a direct and profound impact on the private lives of huge numbers of the population …. Here are just a few of the sad and alarming facts and figures:

1. The rate of marriage is at a 100-year low: 241,000 a year at the last count. And, although the number of married couples still exceeds the unmarried, unmarried cohabitation has risen dramatically: 2.1m couples in 2001, 2.9m in 2011. On the present trajectory, by 2030, only 17 years away, it is likely to be well north of 3.7m.
2. The divorce rate has risen steadily since 1970 although it has now levelled off but at a very high level: 117,500 divorces in 2011. In 1983, 22 per cent of marriages ended in divorce within 15 years. By 2010 that same figure had risen to 33 per cent – a 50 per cent increase. The divorce rate is now hovering at around 42 per cent. So again, although the majority of the married still remain together for life, the rate is very high.
3. The real mischief is not to be found there but amongst the unmarried parents. Why? Because cohabitation, however it is defined, is far less stable. Unmarried parents are nearly three times more likely to break up before their first child's seventh birthday. And the chances of a 15-year-old still living with both his parents, if they are unmarried, is very small indeed. About 7 per cent of unmarried parents are still together by the time their children reach 15, whereas 93 per cent are married.

4. Every year 500,000 children and adults get caught up for the first time in our terribly overstretched family justice system. The total is in excess of 3m children in the system as we speak. Because, of course, the children do not come in and go out of the system like aeroplanes landing and taking off at the airport. As we know only too well, they enter and often stay there for years while their parents sort out their own and their children's lives. The financial cost is currently put at £46bn a year; more than the entire defence budget.

(For an interesting critique of Mr Justice Paul Coleridge's views see Sir Nicholas Mostyn, 'Speech to Jordan's Family Law Conference', 8 October 2014.)

1.3 Openness and transparency in family proceedings

The judiciary and the Government remain committed to ensuring that there is openness and transparency in family proceedings.

(a) Practice guidelines

In July 2013 Sir James Munby, President of the Family Division, published a set of draft practice guidelines outlining a new approach to the publication of family judgments. The guidance was intended to bring about an immediate and significant change in practice in relation to the publication of judgments in family courts. The President had previously emphasised his determination to focus on transparency within the family justice system, stating: 'I am determined to take steps to improve access to and reporting of family proceedings. I am determined that the new Family Court should not be saddled, as the family courts are at present, with the charge that we are a system of secret and unaccountable justice' ('View from the President's Chambers: the Process of Reform' [2013] Fam Law 548).

In September 2013 Munby P said that the case of *Re J (A Child)* [2013] EWHC 2694 (Fam) raised important questions about how the court should adapt its practice to the realities of the Internet, and in particular social media. He once again called for more transparency in the family courts in order to restore public confidence in the system. In this case Munby P permitted a father to post online a video of social workers removing his baby. His decision was not, however, welcomed by the social work profession.

In December 2013 in the case of *Re P (A Child)* [2013] EWHC 4048 (Fam), which concerned an application for a reporting restriction order in the case of an Italian mother whose child was delivered by Caesarean section following an order of the Court of Protection, Munby P, giving judgment, said:

> This case must surely stand as final, stark and irrefutable demonstration of the pressing need for radical changes in the way in which both the family courts and the Court of Protection approach what for shorthand I will refer to as transparency. We simply cannot go on as hitherto. Many more judgments must be published.

Subsequently, in January 2014, his Lordship issued new Practice Guidance to promote transparency in the family courts: *Transparency in the Family Courts: Publication of*

Judgments. The Guidance brought about an immediate and significant change in practice in relation to the publication of judgments in the family courts (and also in the Court of Protection). The Guidance states:

> [There] is a need for greater transparency in order to improve public understanding of the court process and confidence in the court system. At present too few judgments are made available to the public, which has a legitimate interest in being able to read what is being done by the judges in its name. The Guidance will have the effect of increasing the number of judgments available for publication (even if they will often need to be published in appropriately anonymised form).

The Guidance provides that permission to publish should always be given 'whenever the judge concludes that publication would be in the public interest' whether or not a request has been made. (For the background to these changes see Jarrett T, *Confidentiality and openness in the family courts: current rules and history of their reform*, House of Commons Library Briefing Paper, Number 07306, 23 September 2015.)

(b) Media attendance

Changes have been made to allow the media, in certain circumstances, to attend some family proceedings. The Government's aim in allowing media attendance is to improve public confidence in the family justice system and to educate the public about the work and decisions of the family courts. In other words, the aim is to promote transparency and eliminate accusations of secrecy and bias. For the background to these changes see *Family Justice in View*, Ministry of Justice, 2008, Cm 7502.

In April 2009 the family courts were opened to accredited members of the media. Thus, media representatives can attend certain proceedings held in private subject to the court's power to exclude them from all or part of the proceedings where it is in the interests of a child, or where it is necessary to do so for the protection of a party to the proceedings or where justice will be impeded or prejudiced (r 27.11(3) Family Procedure Rules 2010 (FPR 2010)). However, the media are not permitted to attend hearings which are conducted for the purpose of, *inter alia*, judicially assisted conciliation or negotiation (r 27.11(1)(a)). There are restrictions on media access to court documents. Courts also have powers to restrict what can be reported to protect the welfare of children and families, or to relax reporting rules in individual cases.

Special restrictions apply to media attendance in children's cases. Cases in family courts involving children are heard in private and there are restrictions on publishing information about the proceedings (s 12 Administration of Justice Act 1960) and about protecting their anonymity (s 97 Children Act 1989). The court may also exclude the media from a case involving adults if such attendance may adversely affect any children involved. Thus, for example, in *Re Child X (Residence and Contact; Rights of Media Attendance; FPR Rule 10.28(4))* [2009] EWHC 1728 (Fam), the media were excluded from residence and contact proceedings involving a father who was a celebrity because of concerns about the child's welfare if the media were admitted.

As the FPR 2010 did not alter the statutory basis for media reporting, Part 2 of the Children, Schools and Families Act 2010 was enacted to give the media even

greater access to family proceedings, including access to documents filed for such proceedings, and to lift some of the restrictions on publication. However, after strong opposition to this new legislation and following the recommendations of the House of Commons Justice Committee in July 2011 and the outcome of the Family Justice Review in November 2011, the Government announced that Part 2 would not be implemented. Concerns were expressed about the protection afforded to children, including their right to privacy under Article 8 of the European Convention on Human Rights; and the fact that they might be less willing to talk to experts or give evidence if they knew the media had access to what they said. For discussion of these concerns see, for example, Wall LJ [2010] Fam Law 40; Macdonald [2010] Fam Law 190; Mole [2010] Fam Law 75; and Bessant [2011] Fam Law 987. There was also a risk that cases might be misreported and sensationalised by the media. Part 2 was repealed by s 17(4) of the Crime and Courts Act 2013 (CCA 2013).

In January 2016 a pilot scheme began which allows, for the first time, the public and media to gain access to Court of Protection hearings across England and Wales. Sir James Munby, President of the Court of Protection, said:

> For the last six years accredited media have been able to attend Family Court cases and have been better informed about the work of the Family Court as a result. It is logical to look at extending this greater transparency to the Court of Protection, provided the right balance can be struck to safeguard the privacy of people who lack capacity to make their own decisions.

A new Practice Direction changes the default position to one where hearings are held in public with reporting restrictions to protect identities. In other words, this means that, when an order has been made under the pilot, both the public and media will be able to attend unless a further order has been made which excludes them. This Practice Direction applies to proceedings issued from 29 January 2016 onwards; and it also applies to proceedings issued before this date where a further hearing is necessary.

(c) The transparency debate

There are two distinct schools of thought driving the transparency debate in the family courts: the approach put forward by Munby P (see above) and Holman J; and that put forward by Mostyn J.

Holman J, a senior High Court judge in the Family Division, is of the view that financial remedy proceedings should be held in open court with a starting point that there should be no reporting restrictions placed on the media. Thus, for example, in the case of *Luckwell v Limata* [2014] EWHC 502 (Fam) he granted full public and media access to what he described as 'an exceptionally bitter' divorce hearing with no restriction on what could be reported; and in the case of *Fields v Fields (Rev 1)* [2015] EWHC 1670 (Fam), which attracted considerable coverage in the national press, he repeated his view that there is a 'pressing need for more openness' and that 'the family courts must be more transparent'.

Mostyn J, on the other hand, made a compelling argument for privacy in financial remedy proceedings in the cases of *DL v SL* [2015] EWHC 2621 (Fam)

and *Appleton & Gallagher v News Group Newspapers and PA* [2015] EWHC 2689 (Fam). He said:

> [T]here are some categories of court business, which are so personal and private that in almost every case where anonymisation is sought the right to privacy will trump the right to unfettered freedom of expression. These cases are those where the subject matter of the proceedings can rightly be categorised as 'private business'.

He concluded:

> [T]he present divergence of approach in the Family Division is very unhelpful and makes the task of advising litigants very difficult. A party may well have a very good case but is simply unprepared to have it litigated in open court. The risk of having it heard in open court may force him or her to settle on unfair terms. In my opinion the matter needs to be considered by the Court of Appeal and a common approach devised and promulgated. Obviously if the view of Holman J is upheld and adopted then the rest of us will have to follow suit.

The divergence of approach in the transparency debate in the family courts needs clarification. This may come from the Court of Appeal, as Mostyn J granted News Group Newspapers permission to appeal his decision in *Appleton & Gallagher v News Group Newspapers and PA* (see above); or it may come from the President's Consultation Paper of August 2014, *Transparency – The Next Steps: A Consultation Paper*, which seeks views on the above developments and on ways to improve transparency in the family courts. The Government's stated position is simply that it 'supports steps to increase openness whilst remaining mindful of the rights to privacy of those involved in such personal proceedings' (see Jarrett T, *Confidentiality and openness in the family courts: current rules and history of their reform*, House of Commons Library Briefing Paper, Number 07306, 23 September 2015).

1.4 The exercise of judicial discretion

A distinguishing feature of family law is that discretion plays a significant part in judicial decision-making. The outcome of cases depends to a large degree on their particular facts. Judicial discretion is essential in family matters because family life is infinitely variable – no two families are the same. The main advantage of discretion is its flexibility, in that an outcome can be decided on for each individual case and set of circumstances. The disadvantages are that it can create unpredictability and the exercise of discretion can be a time-consuming exercise which can increase the cost of litigation. There is also a risk of arbitrariness in that judges may reach different conclusions in cases which are factually similar. The alleged arbitrariness of court decisions about child maintenance was one of the reasons given by the Government for moving most of these types of cases out of the courts and into the Child Support Agency. In some areas of the law a checklist of factors is provided in the legislation to help guide judges when exercising their discretion and in reaching their decision. There are, for example, statutory checklists which must be taken into account in finance and property proceedings on divorce and dissolution, child arrangements cases and in adoption proceedings.

The discretionary nature of family law also has an impact on appeals. Thus, as there may be several possible reasonable decisions when deciding a family law dispute, the appeal courts are unwilling to overturn decisions made by the lower courts unless they are either wrong in law or plainly wrong on their facts.

1.5 The importance of reaching agreement

Most private law family matters, such as those involving divorce or dissolution and arrangements for children, are settled by the parties themselves. Thus, despite the impression given by the number of reported cases, most do not go to court. Furthermore, if family lawyers are consulted, they work within a conciliatory framework.

There is increasing emphasis on the importance of reaching agreement in family law cases. Agreement between the parties can be facilitated by the use of non-court dispute resolution techniques such as mediation, collaborative law or arbitration. In fact, there has been an increasing trend to use, and to promote the use of, non-court dispute resolution in family disputes. It has, for example, been actively promoted by Resolution (an organisation of family lawyers), whose Code of Practice requires its members to 'conduction matters in a constructive and non-confrontational way and to inform clients of the options e.g. counselling, family therapy, round-table negotiations, mediation, collaborative law and court proceedings' (see Resolution's *Guide to Good Practice,* 2014). The principles of the Code also form part of the Law Society's rules of good practice for family law solicitors (see the *Family Law Protocol*, 4th ed., 2015, Appendix 2).

(a) Mediation

Mediation is a form of non-court dispute resolution whereby a mediator helps the parties identify the issues in dispute with the aim of them reaching agreement. The mediator acts as an impartial third party. An agreement is not imposed by the mediator. It is the parties themselves who must endeavour to reach agreement. The mediator's role is merely that of facilitator. In other words, the process is non-coercive. Mediation can take place out of court or in court, and it is available from independent mediation agencies and from some law firms. In financial order proceedings on divorce, the district judge performs a mediatory role by encouraging the parties and their lawyers to reach a settlement.

The final report of the Family Justice Review (see 1.2 above) included a number of proposals to increase the use of mediation. These proposals were accepted by the Government, which wishes mediation to become the norm for parents in dispute. Thus, the Children and Families Act 2014 contained measures to increase the use of mediation, including a requirement in certain cases (such as those involving property and finance and/or children on family breakdown) that the parties must attend a mediation information and assessment meeting before going to court (s 10). The rules regarding the mediation information and assessment requirement are set out in Part 3 of the FPR 2010 and *Practice Direction 3A – Family Mediation Information and Assessment Meetings.* In addition to the mediation information and assessment requirement, the court has a general duty to encourage and facilitate the use of non-court dispute resolution (r 3.2 FPR 2010). This means that it must consider, at every stage in proceedings, whether non-court dispute resolution is appropriate (r 3.3 FPR 2010). If the court thinks that non-court dispute resolution is appropriate, it may decide to adjourn the proceedings and may require the parties to consider and/or to attempt non-court dispute resolution (r 3.4 FPR 2010).

Mediation has many advantages over going to court. For example, reaching agreement by way of mediation is more likely to result in the parties making and maintaining cooperative relationships on family breakdown. It reduces conflict and encourages continuing contact between children and parents. It also avoids the cost, trauma, uncertainty and delay of court proceedings, and helps improve communication between the parties thereby reducing conflict and bitterness. By making disputes less hostile, mediation may make things better for the parties' children. It may also empower the parties and make them better able to deal with disputes in the future. Mediation does, however, have disadvantages. For example, it may work against a party's interests if they have a lack of legal knowledge or it may fail to take sufficient account of the welfare needs of children. It may also be inappropriate if there is a history of domestic violence in the relationship or if either of the parties is particularly vulnerable.

(b) Collaborative family law

Collaborative law, like mediation, is a form of non-court dispute resolution which provides a way of resolving issues about finance and property and/or children on family breakdown. It is a relatively new practice, having first been used in England and Wales in 2003. It is used only by people who agree to use it after having received legal advice about the other options available. With collaborative law, the parties and their lawyers sign a participation agreement in which they agree to a commitment to make a transparent search for fair solutions and not go to court. The parties and their lawyers then conduct round-table negotiations in order to find the best outcome. The process is transparent and written correspondence is actively discouraged. The parties set both the pace and the scope of the negotiations, but with the assistance of their lawyers. The parties can also seek the assistance of mediation and counselling. If a settlement is not reached, and a party decides to go to court, then each party must consult a new lawyer.

Resolution has trained some of its members as collaborative lawyers, who have formed themselves into 'pods' (practice and organisational development groups). These act as support groups to enable lawyers to share experiences and to build trust with fellow lawyers with whom they work collaboratively. Research conducted by Resolution (*Collaborative Law in England and Wales: Early Findings*, 26 February 2009) found that collaborative law was increasingly and successfully being used. Disputes were settled more quickly and, in cases involving cohabitants, more generous settlements were reached than would have been possible if the law relating to cohabitants had been strictly applied. (For other research on collaborative law, see Wright [2011] CFLQ 370.)

(c) Arbitration

Arbitration is a form of non-court dispute resolution whereby disputes are resolved outside the court system by an arbitrator by whose decision the parties agree to be bound. It is beginning to be used for resolving family disputes. Thus, in February 2012 the Institute of Family Law Arbitrators launched a family law arbitration scheme to

enable certain family disputes to be resolved by arbitration. The aim of the scheme is to enable financial disputes to be resolved more quickly, more cheaply and less formally than in court. It has the support of Resolution and the Family Law Bar Association. (For information on the scheme, see www.ifla.org.uk.)

In *S v S (Financial Remedies: Arbitral Award)* [2014] EWHC 7 (Fam), the President of the Family Division, Sir James Munby, affirmed and approved a financial award made by an arbitrator appointed under the Family Law Arbitration Scheme. In his judgment he said: 'There is no conceptual difference between the parties making an agreement and agreeing to give an arbitrator the power to make the decision for them.' In November 2015, following this strong endorsement of the Family Law Arbitration Scheme, the President issued new practice guidance on arbitration in the Family Court to further emphasise its importance.

More recently, the Institute of Family Law Arbitrators has developed a new Family Law Arbitration Children Scheme which allows family law disputes concerning the exercise of parental responsibility and other private law issues about the welfare of children to be resolved by arbitration. The new scheme launched in July 2016.

1.6 The single Family Court administering family law

Prior to April 2014 there were three tiers of court with jurisdiction to hear family cases: magistrates' family proceedings courts; county courts; and the Family Division of the High Court. The final report of the Family Justice Review (see 1.2 above) recommended, *inter alia*, that the three-tier court system should be replaced by a single Family Court with a single point of entry. In its *Report*, the Family Justice Review stated that there were wide variations nationally in how different cases are allocated to courts which caused confusion and uncertainty for families about where cases would be heard. This complexity was particularly difficult for litigants in person to navigate. The Family Justice Review recommended that all levels of the family judiciary (including magistrates) should sit in the Family Court and that work should be allocated according to case complexity. However, it recommended that the Family Division of the High Court should remain, and that it should have exclusive jurisdiction over cases involving the inherent jurisdiction and international issues. All other matters should be heard in the single Family Court, with High Court judges sitting in that court to hear the most complex cases and issues.

The single Family Court subsequently came into being on 22 April 2014 (under section 31A of the Matrimonial and Family Proceedings Act 1984, as amended by section 17 of Part 2 of the Crime and Courts Act 2013). The Family Court has replaced the three tiers of court which used to have jurisdiction to hear family cases with a single point of entry. It deals with all family proceedings (subject to a few limited exceptions) and there is no longer a separate jurisdiction for magistrates' courts and county courts to hear family cases. It is also a national court which sits in magistrates' and county courts in a range of geographical locations across England and Wales. The Principal Registry of the Family Division is now called the Central Family Court, but it still exists as a division of the High Court in the Royal Courts of Justice.

This change is intended to create a simpler court system, allowing cases to be allocated to a judge with the relevant level of seniority to hear the case in accordance

with the Family Court (Composition and Distribution of Business) Rules 2014. The four levels of judges are: lay magistrates; district judges; circuit judges; and High Court judges. A list of the judiciary of the Family Court can be found in section 31C of the Matrimonial and Family Proceedings Act 1984 and Schedule 10 of the Crime and Courts Act 2013.

There is now also a unified system of administration, and so-called 'gatekeepers' allocate cases in accordance with, *inter alia*, the Family Court (Composition and Distribution of Business) Rules 2014 and Practice Guidance issued by the President of the Family Division. Although the Family Court has replaced the three tiers of court which used to have jurisdiction to hear family cases, the Family Division of the High Court retains its exclusive jurisdiction in cases dealing with the inherent jurisdiction and international child abduction. It is hoped that the new court system will also help to reduce delay and ensure judicial continuity.

1.7 Cafcass

Cafcass (the Children and Family Court Advisory and Support Service) was established under section 11 of the Criminal Justice and Court Services Act 2000, and is responsible for looking after the best interests of children involved in family proceedings. The principal functions of Cafcass officers (who are called 'family proceedings officers' in Wales) are: to safeguard and promote the welfare of children in family proceedings; to make provision for children to be represented; and to provide information, advice and other support for children and their families (s 12(1)).

One of Cafcass's main functions is to advise courts on issues such as arrangements for children on family breakdown and placing children in local authority care. It also performs an important reporting function in family proceedings. Cafcass performs other important tasks, including facilitating contact on family breakdown and conducting risk assessments to establish whether children are at risk of abuse or domestic violence. Cafcass provides the following officers for the family courts:

- ***Children and Family Reporters*** are usually appointed when parents cannot agree about arrangements for their children on family breakdown. The court will appoint a Children and Family Reporter who will meet and talk with the family and help and encourage parents to agree about arrangements for their children. The Children and Family Reporter may be asked to prepare a welfare report explaining what enquiries have been made and making recommendations about arrangements for the children. The Children and Family Reporter is also responsible for conveying the child's wishes and feelings to the court.
- ***Children's Guardians*** are responsible for investigating the case and safeguarding and promoting the child's welfare before the court in public law proceedings for care and supervision orders and emergency protection and child assessment orders under the Children Act 1989. They work in tandem with the lawyer who is representing the child. A Children's Guardian may also be appointed in some private law proceedings.
- ***Reporting Officers*** are responsible for ensuring that the required consents to adoption and to placements for adoption have been given.

Cafcass became a part of the Ministry of Justice on 1 April 2014. This follows the Family Justice Review's recommendation that Cafcass should become part of the Ministry of Justice in order to 'bring court social work functions closer to the court process' (see *Family Justice Review: Final Report*, November 2011).

1.8 Family law and the Human Rights Act 1998

The Human Rights Act 1998 (HRA 1998) is relevant to family law, as the family courts and public authorities must abide by its provisions. The effect of the Act is to weave the European Convention on Human Rights (ECHR) into the fabric of UK law. The Act makes Convention rights directly enforceable in the UK. Thus, the HRA 1998 gives people the right to rely on the Convention in proceedings before the domestic courts. However, people who have exhausted all their remedies before the UK courts can take their case to the European Court of Human Rights (ECtHR) in Strasbourg.

(a) The family courts and the Human Rights Act 1998

When deciding any question which has arisen in connection with a Convention right the family courts, like other courts in the UK, must 'take into account' the judgments, decisions and opinions of the ECtHR (s 2). The courts, so far as it is possible to do so, must also read and give effect to primary and secondary legislation in a way which is compatible with Convention rights (s 3). If the High Court, the Court of Appeal or the Supreme Court determines that a UK legislative provision is not compatible with the Convention, and cannot be read to make it compatible, then it may make a 'declaration of incompatibility' to that effect (s 4).

Courts are public authorities for the purposes of the HRA 1998 and must not act in a way which is incompatible with a Convention right (s 6). Thus, in family law cases the court must ensure that it considers and upholds Convention rights; otherwise it may be in breach of the Convention.

(b) Public authorities and the Human Rights Act 1998

It is unlawful for a public authority to act in a way which is incompatible with a Convention right, subject to some exceptions (s 6). There is no definition of 'public authority' in the HRA 1998, but the term includes Government departments, local authorities, the National Health Service, the police and any other body or person exercising a public function. Because of the obligations imposed on public authorities by the Act, the Convention is particularly important in public law family proceedings, for example in child protection and adoption cases.

(c) Asserting a Convention right

A victim of an unlawful act or proposed act of a public authority which is a breach of a Convention right may bring free-standing court proceedings against the public authority under the HRA 1998 or rely on a Convention right in any other legal proceedings (s 7). In practice, most claims in family law are usually brought as supporting arguments in family proceedings, although human rights challenges

against local authorities in child protection cases are usually brought in judicial review proceedings. If an applicant proves that a public authority has acted in breach of a Convention right, the court may grant such relief or remedy or make such order within its powers as it considers just and appropriate, including awards of damages (s 8). When assessing awards of damages the courts take into account the levels of damages set by the ECtHR, which tend to be lower than those awarded under domestic law.

(d) Convention rights

The following Convention rights are those most likely to impact on family law: the right to a fair trial (Art 6); the right to family life (Art 8); the right to marry and found a family (Art 12); the right to an effective remedy (Art 13); and the right to enjoy Convention rights without discrimination (Art 14).

The ECHR and the decisions of the ECtHR have been raised in a wide variety of different situations before the family courts in England and Wales. Thus, for example:

- Transsexuals have argued that the UK's failure to allow them to change their birth certificates and to marry in their newly acquired sex is a breach of their right to family life under Article 8 and the right to marry under Article 12.
- Children and parents have argued that corporal punishment of children by parents and teachers is inhuman and degrading treatment under Article 3.
- Unmarried fathers have argued that their lack of automatic parental responsibility is a breach of the right to family life under Article 8 and is thereby discriminatory under Article 14.
- Parents in contact cases and in relocation applications have argued that there has been a breach of their right to family life under Article 8.
- Parents have argued in child protection cases that local authorities have breached their right to family life under Article 8 and that the procedures have breached their right to a fair trial under Article 6.

(For a useful and informative account of the impact of the HRA 1998 on the family justice system in England and Wales by Moylan J, see [2010] Fam Law 810.)

(e) The right to family life (Article 8)

The right to family life in Article 8 of the ECHR is particularly relevant to family law.

Article 8 of the European Convention for the Protection of Human Rights

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. 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 heath or morals, or for the protection of the rights and freedoms of others.

The aim of Article 8 is to protect the individual against arbitrary interference by public authorities. In addition, national authorities have positive obligations to promote family life under Article 8. However, the right to family life is not an absolute right because of the exceptions laid down in Article 8(2). Thus, interference with the right is permitted, provided it is lawful, necessary and proportionate. The right to family life is also subject to the rights and freedoms of others. For example, the rights of a child might prevail over the rights of parents where that is in the child's best interests. With respect to the right to family life, States Parties enjoy a 'margin of appreciation' (see further below).

(i) What is 'family life' for the purposes of Article 8?

There is no definition of 'family life' in the ECHR. Whether or not there is family life depends on the facts and circumstances of the case. However, the ECtHR has made the following statements about 'family life' for the purposes of Article 8:

- The existence or non-existence of family life is a question of fact depending on the real existence of close personal ties (*Lebbink v The Netherlands (Application No. 45582/99)* [2004] 2 FLR 463; *K and T v Finland* (2000) 31 EHRR 18).
- The bond between natural parents and children is a strong indicator of the existence of family life, and that bond amounting to family life cannot be broken by subsequent events, save in exceptional circumstances (*Ahmut v The Netherlands* (1997) 24 EHRR 62).
- Family life is not just limited to relationships based on marriage or blood. The following can also have a right to family life: cohabitants (*Abdulaziz, Cabales and Balkandali v UK* (1995) 7 EHRR 471), even if they do not live together (*Kroon v The Netherlands* (1995) 19 EHRR 263); same sex couples (*Schalk and Kopf v Austria* [2010] ECHR 995); and relatives, such as a grandparent and grandchild (*Marckx v Belgium* (1979) 2 EHRR 330) or a nephew and uncle (*Boyle v UK* (1995) 19 EHRR 179). Foster-parents and foster-children can also come within the ambit of family life (*Gaskin v UK* (1990) 12 EHRR 36).
- When deciding whether a cohabitation relationship amounts to family life, the following factors are relevant: whether the couple live together; the length of their relationship; and whether they have demonstrated their commitment to each other by having children together or by any other means. Thus, for example, family life was found to exist in *X, Y and Z v UK* (1997) 24 EHRR 143 where a female-to-male transsexual (X) and his female partner (Y) had a child by artificial insemination by donor. X was involved throughout the process and had acted as the child's father in every respect.
- As the ECtHR considers the Convention to be a 'living instrument' which must be interpreted in the light of societal changes (*Selmouni v France* (2000) 29 EHRR 403), courts must adapt to changing social conditions when interpreting family life. This includes, for example, the decline in marriage, the increase in cohabitation, the acceptance of same sex relationships and developments in reproductive science.
- Family life can include the potential for family life, for example the potential relationship which might have developed between an unmarried father and his child.
- For the purpose of Article 8, family life must be viewed in the context of the relevant social, religious and cultural setting.

When deciding whether family life exists, the ECtHR takes into account relevant principles of international law. It interprets Article 8 to be so far as possible in harmony with those principles, including those in the United Nations Convention on the Rights of the Child.

(ii) The European Court of Human Rights' approach to Article 8

The ECtHR has laid down the following propositions in respect of Article 8:

- Although the main aim of Article 8 is to protect the individual against arbitrary action by public authorities (*Kroon v The Netherlands* (1995) 19 EHRR 263), there are also positive obligations inherent in an effective 'respect' for family life.
- As well as a substantive right to respect for family life, there is also a procedural right inherent within Article 8.
- In respect of the substantive and procedural rights under Article 8, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and the State enjoys a certain margin of appreciation (see *Keegan v Ireland* (1994) 18 EHRR 342).
- The right to family life is not an absolute right, but a qualified right. Under Article 8(2) State interference into family life is justifiable if it is: in accordance with the law; in pursuit of a legitimate aim; and necessary in a democratic society. Any intervention must be relevant and sufficient, meet a pressing social need and be proportionate to that need (*Olsson v Sweden (No. 1)* (1988) 11 EHRR 259).
- Under the principle of proportionality, the more serious the intervention into family life, the more compelling must be the justification (*Johansen v Norway* (1997) 23 EHRR 33).
- In respect of a State's obligation to take positive measures, Article 8 includes an obligation on national authorities to take measures to reunite parents with their children (*Ignaccola-Zenide v Romania* (2001) 31 EHRR 7; *Nuutinen v Finland (Application No. 32842/96)* (2000) 34 EHRR 358), unless it is contrary to the interests of those concerned, particularly the best interests of the child.
- When carrying out the balancing exercise under Article 8(2) between the interests of children and parents and/or the wider public, the court takes into account the paramountcy of the best interests of the child.

(f) The margin of appreciation

Claims under the ECHR have sometimes failed because the ECtHR has recognised a 'margin of appreciation' in the State's decision-making process. In other words, States Parties are accorded a reasonable amount of discretion when exercising their powers in accordance with the Convention. For example, the margin of appreciation possessed by the UK meant that for many years transsexuals failed in their claims before the ECtHR.

(g) The principle of proportionality

The principle of proportionality is an important principle in the jurisprudence of the ECtHR which must be applied by courts and public authorities in the UK. This

principle requires any interference with a Convention right to be proportionate to the legitimate aim pursued. The principle of proportionality would be breached, for example, if a care order was made to protect a child from significant harm when an alternative remedy (such as a supervision order) would be adequate and appropriate.

Summary

- Family law is a fascinating but challenging subject which requires a wide range of materials to be digested. A sound knowledge of, and an ability to apply, statutory provisions is very important, as is an understanding that judges have to exercise a considerable degree of discretion when deciding cases. Distinguishing features of family law are that: there is considerable emphasis on promoting agreement and settlement; both private and public law are involved; emotions are sometimes highly charged; court decisions are often forward-looking; and a wide range of personnel are involved. The functions of family law include: conferring a status; removing a status; enforcing and adjusting rights arising from a particular status; and providing protection for family members.
- Family law is radically different today from what it was 30 or 40 years ago. There have been many legislative and case-law developments. There has also been, and continues to be, considerable discussion of reform, such as with respect to giving cohabitants rights on family breakdown, giving children a voice in family law proceedings, increasing the use of non-court dispute resolution, reforming the law governing property and finance on divorce, and changing the law governing how and where people can marry in England and Wales. In 2011 and 2012 there was an important review of the family justice system (the Family Justice Review). Most of its recommendations were taken up by the Government which proposed changes to family law, almost all of which are included in the Children and Families Act 2014. Demographic and social changes have had an impact on family law, which has changed dramatically in recent years to give 'non-traditional' family members rights, in particular same sex couples and transsexual people.
- New legal provisions have been introduced to allow the media to attend court in certain circumstances, in order to make the family justice system more open and transparent and to improve public confidence in the system. However, proposals to give the media even greater access to family proceedings, including those involving children, have met with resistance.
- Judges have considerable discretion in family law cases. The outcome of a case depends on its own facts, as no two family situations are the same. The discretionary nature of family justice also has an impact on appeals.
- The settlement of family law cases outside of court is actively encouraged. Non-court dispute resolution is being increasingly used, such as mediation, collaborative law and, more recently, arbitration. The Family Procedure Rules 2010 contain rules which promote mediation.
- Family cases are now heard in a single Family Court which deals with the vast majority of family proceedings. This has replaced the old three-tier system (magistrates' family proceedings courts, county courts and the Family Division of the High Court). All levels of judge can sit in the Family Court, from magistrates to High Court judges and above. Applications are allocated to the most appropriate level of judge by a 'gate-keeping' team based on, for example, the complexity of the case, judicial continuity, the need to minimise delay and a suitable location for hearings.

Summary cont'd

- Cafcass provides officers to assist the Family Court in cases involving children. In addition to its duty to provide reports (such as welfare reports), it also has other functions, such as facilitating and enforcing contact and conducting risk assessments to establish whether children are at risk of harm.
- The Human Rights Act 1998 is relevant to family law as it requires courts and public authorities to take account of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights. Of particular importance in family law cases is the right to family life (Article 8). However, this is not an absolute right. State Parties have a margin of appreciation, but any interference must be lawful, necessary and proportionate to the legitimate aim pursued.

Further reading and references

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Department for Work and Pensions: www.dwp.gov.uk
Law Commission: www.lawcom.gov.uk
Ministry of Justice: www.justice.gov.uk
Office for National Statistics: www.ons.gov.uk
United Kingdom Parliament: www.parliament.uk

Courts, law reports and legislation

British and Irish Legal Information Institute: www.bailii.org
European Court of Human Rights: www.echr.coe.int
Her Majesty's Courts Service: www.hmcourts-service.gov.uk
Supreme Court: www.supremecourt.gov.uk
UK Legislation: www.legislation.gov.uk

Other websites

Alternative Dispute Resolution Group (ADR): www.adrgroup.co.uk
Cafcass (England): www.cafcass.gov.uk
Cafcass (Wales): www.wales.gov.uk/cafcasscymru
College of Mediators: www.collegeofmediators.co.uk
Family Mediation Council: www.familymediationcouncil.org.uk
Family Mediation Helpline: www.familymediationhelpline.co.uk
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National Family Mediation (NFM): www.nfm.org.uk
Resolution: www.resolution.org.uk

Links to relevant websites can also be found at: www.palgravehighered.com/law/familylaw9e