What is a 21st Century Family?

What is a family? Not so long ago it would have been uncontroversial to reply, "A husband and wife and their children." This conjugal family could be diminished by the death of a member, splintered by divorce, expanded by the co-residence of other relations (a grandmother, for example), an adopted child, or other persons; but the norm of mum, dad and their kids remained almost universally acknowledged.

In the mid-20th century the American anthropologist G. P. Murdoch defined the "nuclear" family as "a social group characterized by common residence, economic cooperation and reproduction. It contains adults of both sexes, at least two of whom maintain a socially approved sexual relationship, and one or more children, own or adopted, of the sexually cohabiting adults." (*Social Structure*, 1949)

Although that definition could be made to fit today's same-sex couple with children, the phrase "socially approved sexual relationship" in 1949 meant "marriage," between a man and a woman.

Seventy years later, after the sexual revolution, the divorce revolution and the reproductive technology revolution, virtually every part of Murdoch's definition can be dispensed with. While officials and courts still use the word "family," they refer to such a variety of relationships and living situations that the term becomes practically meaningless.

The President of the Supreme Court of the United Kingdom, Lady (Brenda) Hale, who has played a significant part in this process (*Prospect* magazine has named her one of the world's top 50 thinkers, and a judge who "nudges things in a progressive direction when she has the opportunity") is quite

frank about its effects.

A month ago she addressed the International Centre for Family Law, Policy and Practice on the subject, What is a 21st Century Family? (PDF) This is an astonishing document in which the progressive vision for an early and painless death of the traditional family becomes clear. She began:

> *Way back in the mists of time when I first studied Family Law, we thought we knew what a family was. It was a group of people linked together by consanguinity [blood relationship, as between a parent and child] or affinity [as between spouses] or a mixture of both.*

She then traced the deconstruction of the British family – aided and abetted by the law – over the past five decades to the present, when it is defined (by the UK Office of National Statistics) "as a married, civil partnered or cohabiting couple with or without children, or a lone parent with at least one child. Children may be dependent or non-dependent."

The same office reported that there were 14 million dependent children living in families in 2017, 15 percent of them living in cohabiting couple families (up from seven percent in 1996), and 21 percent living in lone parent families (compared with 20 percent in 1996). Of the rest, the great majority would have been in opposite sex married couple families.

But, as Lady Hale notes, the ONS definition leaves out something very important:

> *This does not, of course, give us a clue to the relationship between those children and the adults with whom they were living: were they children of the couple, or only one of them, or adopted, or deemed to be their children because of the Human Fertilisation and Embryology Act, or unrelated in any of those ways?*

The HFEA 1990 regularised relationships where couples had children by means of donor eggs or sperm. The Act was amended in 2008 to apply to two women.

To illustrate the "complexity" (damage) this legislation sanctions, the judge describes a family court drama in which (offshore) surrogacy, divorce and remarriage produced a tangle of relationships and legal status that left British twins with a couple in India as their legal parents, their genetic mother as their resident parent, a stepfather as a (resident) "psychological parent," and their estranged genetic father in no-mans-land, accused of abuse. This mess is not another step in the "evolution" of the family; it is a beacon warning us that a revolution in the way children are brought into existence and disposed of is already under way.

Be patient: the drama has a cast of thousands. They are: AB, a wannabee step-father and the new husband of CD; CD is the genetic mother of the child and a commissioning party for the surrogate; EF is the former husband of CD and a commissioning party for the surrogate; GH is one of the twins born of the surrogacy arrangement; IJ is the other infant; KV is the Indian surrogate mother and the legal mother of the twins; and HV is her husband and the legal father of the twins.

Lady Hale's account is worth quoting in full.

> *The complexities of those relationships are well illustrated by the Family Division case of AB v CD, EF, GH and IJ.17 This was about twin children, GH and IJ, who were born in 2010 as a result of a surrogacy agreement entered into in India. The surrogate mother, KV, was married to HV, and in English law they were the twins' legal parents.*
>
> *The commissioning parents, CD and EF, were married to one another. They were also the twins' genetic parents. The twins were handed over to their care in accordance with the surrogacy arrangement. They did not realise that they should*

have applied for a parental order after the birth and did not do so within the six month time limit. In 2014 their relationship broke down and they were subsequently divorced. The twins remained in the care of their genetic mother. She began a relationship with AB who moved in to live with her and the twins in early 2015. Contact between the twins and her former husband, their genetic father, continued for a while but stopped at the end of 2016. This led to several applications before the High Court:

• AB, the commissioning mother's new husband, applied for a parental responsibility order.

• EF, the genetic father, applied for a child arrangements order and the court was requested to consider granting him parental responsibility.

• AB and CD, the genetic mother and her new husband, applied for the children to be made wards of court.

• CD, the genetic mother, applied for a child arrangements order that the children live with her.

• AB, her new husband, applied for a child arrangements order that the children also live with him and an order restricting EF's parental responsibility.

The genetic parents, CD and EF, could not apply for a parental order because they were no longer married to each other and the twins' home was not with both of them. CD, the genetic mother, could not at the time of the judgment make the application on her own (but this would now be possible). AB was not therefore married to a person who was in law a parent of the twins, so he could not acquire parental responsibility as a step-parent.

The court proceeded on the basis that there should be no presumption in favour of a genetic parent (EF) (following King L J's statement in Re E-R (A Child) 18 that 'there is no

> *‘broad natural parent presumption’ in existence in our law’). AB could be treated as a psychological parent of the twins, applying the definition of social and psychological parenthood in In re G (Children)19:*
>
> *‘the relationship which develops through the child demanding and the parent providing for the child’s needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later, at the more sophisticated level of guiding, socialising, educating and protecting.’*
>
> *The court decided to make the children wards of court for the time being, a child arrangement order in favour of AB and CD, no order as to contact or a parental responsibility order for EF (against whom allegations of abuse had been established) and an order restricting the exercise of the parental responsibility of the surrogate mother and her husband. So it found a sensible solution to the arrangements for looking after the children: but it was powerless to do anything to change their legal parenthood (unless and until there was an application to adopt, which would, of course, have excluded the genetic father from parentage, but would not have required his consent because he was not a legal parent).*

Such manipulation of the parent-child relationship does not, of course, leave everyone content. As they grow up, some children want to know their genetic parent/s. Sometimes donors or surrogates don’t want to let go of a child, or do want a role in its life. Laws, regulations and bureaucracy multiply to cover each new complication. The UK Law Commission has just published a long consultation paper, *Building families through surrogacy: a new law*.

And all this comes with a price tag, for the public as well as the individual.

At the beginning of her speech Lady Hale styled the patriarchal family as one mainly concerned with begetting an

heir and passing on wealth, and rather less concerned with the wife and mother once she had "done the business." The state, the judge suggested, had a bigger stake in keeping spouses together because the intact family saved it money. So, when divorce occurred, the state also wanted a hand in the settlement to ensure that the woman was provided for.

> *As I have said before, the conjugal family is its own little social security system, a private space, separate from the public world, within which the parties are expected to look after one another and their children. The more the private family can look after its own, the less the state will have to do so.*

Today, that "little social security system" is maintained by significantly fewer families, and they are beleaguered by a society that taxes them in part to support those more reliant on the state. Current moves in the UK towards a completely no-fault system of divorce and the streamlining of settlements can only take that trend further.

For Lady Hale, this financial penalty seems worth the "respect for individual autonomy in adult decision-making – by both men and women" that the law now has. (It's so much better for women now than under the patriarchy.)

She is also happy that, thanks to the flexibility and inventiveness of the law in finding ways to protect children's "interests in this new and scientific landscape," "children's interests are seen as being individual to them in a way that would have been unthinkable in the past."

However, since children's "interests" (not rights, note) and adult desires may not always coincide in the brave new world of reproductive technology, surrogacy, same-sex parenting and instant divorce, the judge is forced to end her address with questions – ones that she may have to answer before she retires:

> *… is there a tension between these two evolving trends? Can we allow adults their individual autonomy if this conflicts with the best interests of their children? To what extent should the shouldering of child and family care responsibilities be compensated by the family, as its own little social security system, rather than the state? To say nothing of developing responsibilities towards the rapidly ageing population?"*

Since the purpose of family law is to protect the family, Lady Hale asks herself finally, "what are we protecting the 21st century family from? The outside world or the enemy within?"

Surely the answer is, neither. A judiciary that makes concessions to human weakness at every turn, encouraging political and commercial exploitation of it, is no friend of the family, and certainly no protector. It merely helps turn the family into a sociological and scientific project, and ends up not knowing how to answer its own questions.

"What is a 21st Century Family?" The judge has led us all around the subject, but, like the six blind men of Indostan feeling their way around an elephant, we still don't know what it *is*. Maybe it is not a family at all.

—

[Image Credit: Pxhere]