

## **Trends in Family Patterns in UK: The Challenges and the Legal Response.**

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### **ABSTRACT**

*The challenge for the law is to respond to the wide range of family patterns we see in the society today. At times it has been difficult for legal system to develop the necessary breadth of vision, and the law has been used to both endorse and acknowledge changes. This work has critically analyzed the extent to which modern family law in UK has endorsed new family forms. The various forms of families were analyzed in line with their enabling laws as well as show-casing their peculiarities. The work submits that there have been important social changes which impact on family law in UK. People cohabit, fewer people marry and divorce is common. Nowadays married couple and their children are no longer the only family form, and families are also becoming increasingly complex. The work concludes among other things that there are gay and lesbian families, step-families, civil partnership, some parents adopt children and make recommendations.*

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### **1 INTRODUCTION**

Family law can no longer be concerned with marriage alone, as different type of families and relationships are emerging. Society has changed dramatically in recent years, becoming increasingly tolerant of different types of families and relationships. “For many years “family law” could quite simply be defined as the laws affecting the family and the family consisted of a husband and wife and their dependent children” (*Bailey-Harris, Mason & Probert, 2008pg. 1*). Waite L.J in *Fitzpatrick v Sterling Housing Association Ltd [1998] 1 F.L.R. 6, CA* said that “*the question is more what a family does than what a family is. A family unit is a social organization which function through its linking it members closely together, the function may be sexual, sociable, economic, and emotional*”. There have been important social changes which impact on family law. People cohabit, fewer people marry and divorce is common. Nowadays married couple and their children are no longer the only family form, and families are also becoming increasingly complex. There are gay and lesbian families, step-families, civil partnership and some parent adopt children.

### **2 TRENDS IN FAMILY PATTERNS: THE CHALLENGES AND THE LAW STEP - FAMILIES**

Nowadays, step-families are very common; Step-families are the fastest growing family type in the UK, it has been calculated that about one in three of children is involved in a step-family situation. Step-families are created when one person who has children marries, or cohabits; this can happen after a death, but it much more common nowadays after breakdown relationship or divorce. The first and foremost rule for blended families is that parents do not disagree with each

other in front of the children. When spouses have a conflict, it should be discussed behind closed doors. It is very tempting to stand up for one's own child and point a finger at the stepchild.

“During any split between two co-habiting partners, there is often a lot of trauma and bad feeling. And sometimes the adults concerned are so busy with their own upset and grief, that they don't have much time for their children or for explaining things to them” (Webber, 2012). When a stepfamily is formed, the members have no shared family histories or shared ways of doing things, and they may have very different beliefs. Blended families have more complicated sets of relationships to manage. There are likely to be grandparents, uncles, cousins and siblings and a parents living outside the family.

### **Married Couple**

Lord Penzance in *Hyde v Hyde [1866]* L.R. 1 P. & D. 130 defined marriage as “*The voluntary union for life of one man and one woman, to the exclusion of all others*”, this definition has been applied and acted upon by the courts ever since. Marriage could be regarded as either a status or a contract. In law, a status is regarded as a relationship which has a set of legal consequences flowing automatically from that relationship, regardless of the intentions of the parties. Many years ago, families only consist of dad, mum and their children but today families with gay or lesbian parent are increasingly accepted.

### **Cohabitation**

Cohabiting couple will consider themselves as a family through the government continues to maintain the hegemony of marriage, cohabitation and marriage are not the same. The family law Act 1996 s.62 (1) (a) define Cohabitation as “a man and woman who, although not married to each other, but are living together as husband and wife”. Cohabiting can take many forms, for some couple it is a precursor to marriage and with others it is a lifestyle choice freely chosen as an alternative to marriage. “According to the 2001 Census, the number of cohabiting couple households with dependent children doubled from the previous Census with more than 1.25 million children dependent on cohabitants” (Standlee, 2008, pg52). The government Actuary's Department has predicted that by 2031 there will be 3.8 million cohabiting couples living in the UK. The amount of people that cohabit have increase in England, the 2008 national statistics shows that 44% of children were born into no married households. Tyrer J in *Kimber v Kimber [2001] 1 FLR 697*, suggested some factors to be considered when deciding whether there is cohabitation, these are (a) whether the parties were living together under the same roof, (b) whether they share in the tasks and duties and (c) whether the relationship had stability and permanence.

Unmarried couples have no assurance to ownership of each other's property when their relationship ends. If a couple separate, the courts have no authority to overrule the legal ownership of property and divide it as they may do on divorce.

The law relating to cohabitants and property rights is widely seen to be uncertain. In the case of *Oxley v Hiscock [2004] EWCA Civ 546*, the couple lives together as husband and wife until they break up, during their relationship both parties did not expressed how their equitable interest in the property would be divided. “The judge was of the view that they would have decided to share the sale proceeds equally. This decision was deemed to be fair on the basis of parties' conduct but seemed an unfair outcome in light of H's substantial contribution to the purchase price” (Jones, 2012). Hiscock, appealed as a result, and the Court of Appeal took the chance to clarify

the legal thought required in such situation, the Court of Appeal held that, ‘where both partners had contributed to the purchase of a property which was registered in only one name.

In *Stack v Dowden* [2007] UKHL 17, the House of Lords held that ‘the transfer of a property into the joint names of cohabitants gives rise to a presumption that the property is to be held in equal shares unless the contrary is proved by the party claiming to have other than an equal joint beneficial interest and the facts are unusual’. At paragraph 56 of her judgment Baroness Hale states that: “*Just as the starting point where there is sole legal ownership is sole beneficial...the onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership*”

Cohabitants may wish to enter into a cohabitation agreement and this can act as encouragement for them to consider what they would want to happen if the relationship ends. Cohabitation agreements have yet to be fully tested in court and so it is not entirely clear what weight would be given to them. Cohabitants do have some legal protection in several areas, they do not have as many rights and responsibilities as married couples, and there is no specific legal status for what is often referred to as a “common law marriage”. Studies have shown that many cohabiting couples are unaware of this fact.

Cohabitants can either enter into contract to regulate their affairs for example to make arrangement about property and other matters should their relationship does not work out well. “Cohabitation contract were once considered to be contrary to public policy, as they undermined the sanctity of marriage” (*Standley, 2008, pg 56*). However this is not the case, but the contract remains open to challenge in the court and may not be upheld, for instance if there is no intention to create legal relation. In the case of *Sutton v Mishcon de Reya and Gawor & Co* [2003] EWHC 3166 Ch, [2004] 1 FLR 837, Hart J held that “*the cohabitation agreement was not valid as it was an agreement about sexual relation rather than an agreement about property*”.

Cohabitation can sometimes be unfair, for example the court are only interested in trust law where couple have not been married and their relationship breaks down. This has not gone unnoticed, and some judges have questioned the law for example In *James v Thomas* [2007] EWCA Civ 1212 judge Sir John Chadwick said that property disputes resulting from cohabitation must be “*Determined by applying principles of law and equity, which (however inadequate to meet the circumstances in which parties live together in the 21<sup>st</sup> Century) must now be taken to be well established*”. This point was reinforced in *Thompson v Humphrey*[2009] EWHC 3576 (ch) where Mr Justice Warren said: “*Cases of this nature are to do with the application of some quite strict legal principles and not with imposing some standard of fairness*” If these disputes are not considered on the basis of fairness, what are the legal principles that decide them? Cohabiting partners are at an obvious disadvantage when it comes to inheriting the property of a deceased partner. Many problems surrounding the current law on cohabitation, has led to the question whether the Human Rights Act 1998 are being infringed, for example Article 8, ‘The right to respect for private and family life, Article 12, ‘The right to marry and to found family according to the national laws governing the exercise of this right and Article 14, ‘Prohibition of discrimination.’ There have been several cases that have dealt with this issues, this include the case of *Wilkinson v Kitzinger* [2006] EWCHC 2002 (fam).

### **Civil Partnership**

Recent legislation such as Civil Partnership Act 2004 has enabled a new family to appear.

A civil partnership is a legal marriage between couples that are gay or lesbian. Once a civil partnership occurs between these couples, they are entitled to receive similar treatment and benefits as that of any married couple. The president of the family Division in *Wilkinson v Kitzinger* case explained that “Parliament has taken steps by enacting the CPA to accord to same-sex relationship effectively all the rights, responsibilities, benefits and advantages of civil marriage save the name, and thereby to remove the legal, social and economic disadvantages suffered by homosexual who wish to join stable long-term relationship” (*Herring, 2009, pg 67*).

Under Civil Partnership Act 2004 which came into force in 2005, same-sex partners in UK can now register their partnership and by doing so acquire rights and obligation similar to married couples. “However, heterosexual couples cannot become civil partners, and must marry if they wish to formalise their relationship” (*Manches, 2012*). Civil partnerships have been a huge success. Before they were introduced back in 2005, ministers estimated there would be between 11,000 and 22,000 people in civil partnerships by the end of 2010 (*Condou, 2012*). According to the office for National Statistics, 15,672 civil partnerships were registered between December 2005 and September 2006. Even though the government has stress that, civil partnership is not gay marriage, in fact there are few differences between them. In the case of *Wilkinson v Kitzinger and Others (No 2) [2006] EWHC 2022* Sir Mark Potter p said “the 2004 Act had accorded to same-sex partners all the advantages of civil marriage, save name”.

Many people at first see marriage as the key aspect that defines the family unit, now with the introduction of Civil Partnership Act 2004, legal rights akin to martial rights have been given to people that decides to form civil partnership which has supported the idea of the modern family. Andy Wasley, from Stonewall, said: “We're delighted that civil partnerships have proved to be so popular, both with same-sex couples and in wider society. (*Travis, 2012*). A provision of the Civil Partnership Act 2004, that reflects the modern view of family include homosexual couple, according to s.75 (3) state that “when determine parents’ rights, the word ‘family’ includes the ‘two people who are civil partners of each other’”. This shows that nowadays homosexual couples are included in the modern family. The law aim to include and reflect the modern family being that of homosexual couple was noted in the case of *Fitzpatrick v Sterling Housing Association [200] 1 FCR 21*, here the House of Lords accepted that “for the purpose of the Rent Act 1977, a gay person was a member of his partners family”. The Court recognized that a same-sex relationship can embody essential familiar characteristics signifying that evolving social conditions enlarged the number of people who qualified as belonging to the same family under the legislation (*Glennon, 2000*).

### **Same- Sex Couple**

Lord Nicholls in *Secretary of State V M [2006] FCR at para 506* state that “under the law of this country as it has now developed a same-sex couple are as much capable of constituting a family as heterosexual” (*Herring, 2009*). In *Ghaidan v Godin-Mendoza [2004] UKHL 30* “the House of Lords accepted that the phrase ‘a person who was living with the original tenant as his or her wife or husband could include a same-sex couples”

However Lord Slynn states that to be classed as a family one need to fulfill the requirement of family such as love, caring and commitment. Civil Partnership introduction has allowed homosexual couples to commit to each other and therefore allow them to assert one of the main aims of family which is commitment. Civil partnerships will end on the death of the party or on

an order for dissolution (the equivalent of divorce). The law on dissolution of a civil partnership is very similar to the law on divorce.

### **Adoption**

Sometimes we think that a family is created when a woman gives birth, however, adoption is another way families are created, adopted child is considered as a family, and with the introduction of Adoption and Children's Act, unmarried couple and homosexual couples are now allowed to adopt children. The law on adoption is laid down in the Adoption and children Act 2002, which came in to force on 30 December 2005. Adoption means a legal process that allows someone to become the parent of a child, even though the parent and child are not related by blood. There are many homosexual couples who have become parent through adoption for example in Arizona two gay men adopted twelve children, "When the Equality Act became law in April 2007 in England, Wales and Scotland, it banned discrimination against homosexual people in the provision of goods and services, which incorporated adoption agencies" (*bbc, 2009*), so now may homosexual couples can adopt a child in UK without being discriminated.

There are three different types of adoption, first is the adoption of babies who have been abandoned by their parents, secondly the adoption of children by step-parent to cement a new family relationship and lastly is the adoption of children from care.

In UK, adoption is associated with the desire to nurture a child as the natural child of the adopters. "Hence, although adoption has important effects on citizenship, succession and other legal rights, these rights must be incidentals to the factual relationship of dependence between the parent and child" (*Bailey-Harris, Mason & Probert, 2008 pg.818*). In *Re B (Adoption Order: Nationality) [1991] 1 F.L.R. 907, HL*, "adoption was granted to enable grandparents to continue to care for their 16 years-old Jamaican grandchild whose mother lived in poverty and the father had died". In contrast, in some foreign system adoption may be used to confer succession right on the adopted person as in the striking case of *Bedinger v Graybill's Trust [1957] 302 S.W. (2<sup>nd</sup>) 594*, "where the man adopted his wife so that she could succeed to settled property as his child and heir at law".

### **Legal Transplant**

"English law did adopted the model of the "legal transplant": the adoptive parents did not merely have care of the child but became for all legal intents and purpose, the child's parent" (Cretney & Probert, 2009) s.67 of the 2002 Act provides that "the effect of an adoption order is that the child is thenceforth treated as if he or she had been born as the child of the adopters or the adopter". Baroness Hale in *Re P (Adoption: Unmarried Couple) [2008] UKHL 38*, said "it creates ... a new legal relationship, not only between the child and her adoptive parent, but between the child and each of her adoptive families..." in theory therefore, the rights of parent and child should be exactly the same as if this were in fact the case, and this is indeed the general position. Having children is very important when describing the family, and many people see the ability to raise children as a key element when describing a family.

### **Surrogacy**

Each year many children are born through surrogacy, surrogacy is the practice where by one woman carries a child for another with the intention that the child should be handed over after birth. "Full" surrogacy arrangement involve semen and egg donation by the commissioning



parents and use of in vitro fertilization techniques so that the child is genetically related to both of them” (Bailey-Harris, Masson & Probert, 2008, pg 883). There are many couple, who have become parent through the use of surrogacy, for example sir Elton John and his partner David Furnish became parents to a son born to a surrogate mother in California. “Jessica Parker and her actor husband Matthew Broderick had twin girls by a surrogate mother and in 2008, pop star Ricky Martin also used a surrogate to have twin boys” (BBC, 2012).

The Surrogacy Arrangements Act 1985 s.1a provides that “no surrogacy arrangement is enforceable by or against any of the person making it” meaning no action should be brought to enforce payment or its return if the child is not handed over.

### 3 CONCLUSION AND RECOMMENDATIONS

In conclusion, it is clear that the law will give more right to cohabiting couple; the law must be put in good working order to maintain fairness and to accommodate this changing modern society. Greater legal rights are now given to same-sex cohabiting when they enter into a Civil Partnership. However there are some areas of law which do not favor civil partners for example gay or lesbian’s family can give consent to treatment in emergencies, but a partner cannot. While civil partnerships are very similar to marriage they do not completely satisfy the demand for equality, lesbian and gay couple are disadvantaged at present. “Many couples have problems from hostile families, who will be recognized as next-of-kin regardless of the strength of any relationship, this can affect medical treatment” (Randall, 2004). Some commentators believe that the beginning of the twenty-first century we are witnessing some fundamental changes in the nature of families. There is need to strengthen the laws to meet up with the evolving trends and challenges in family patterns in UK. The government, NGOs, Civil Society Organizations and Religious groups should engage in enlightenment campaigns to educate the people on the pros and cons of the nature of family patterns in UK and the laws regulating them. This will reduce the high rate of divorce and relationship breakdown in some families.

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