21st CENTURY FAMILY LAW
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You tempt me to speculate about family law in the century ahead. Trying to predict the future is a hazardous enterprise. Forgive me if I therefore start with an account of how we have arrived at where we are today.

Victorian family law was founded on three great pillars.

First, it went without saying that the basis of the family was a marriage that was Christian, or if not Christian, then its secular or other religious equivalent.

Secondly, the relationship of the husband and the wife within that marriage was fundamentally unequal. The principle received its classic formulation in the words of my distinguished predecessor, Sir James Hannen, in 1885, "protection on the part of the man, and submission on the part of the woman", an attitude that lingered on well into the 1950s and even later.

Thirdly, the relationship of parent and child was in large measure left to the unregulated control of the father, parental rights for all practical purposes being vested in the father to the exclusion of the mother.

The corollary of the second and third of these fundamental principles, when taken in combination, was, of course, that the mother's rights in relation to her children were precarious. In striking contrast with the position of the errant father, moral failings were enough to separate a mother forever from her child.

The view of the Court for Divorce and Matrimonial Causes, the ancestor of today's Family Division, was articulated in 1862 by Sir Cresswell Cresswell, the Judge Ordinary of the Court: it would "have a salutary effect in the interests of public morality that it should be known that a woman, if found guilty of adultery, will forfeit, as far as this Court is concerned, all right to the custody of, or access to her children".

Nor was the Chancery view any different, even though the guiding principle was already established as being what the best interests of the child required. In 1878 it was held that the publication by the mother, the redoubtable Annie Besant, of a book condemned by a jury as an obscene libel was, in itself, sufficient grounds for removing her 7-year-old daughter from her custody. The obscene libel which had these terrible consequences for both the mother and her child was nothing worse than a treatise on contraceptive methods. There was nothing at all that we would find obscene in the book; it simply described and recommended methods of birth control. And in 1883, in the shocking case – shocking at least to our eyes – in which the Court of Appeal held that, except in very extreme circumstances, the court could not interfere with what the Master of the Rolls called "the sacred right of a father over his own children", the outcome was, as Lord Upjohn later put it, that the court permitted a monstrously unreasonable father to impose upon his daughter of 17 much unnecessary hardship in the name of his religious faith.

Standing back from the detail, three features of the Victorian approach are striking. First, enthusiastic adherence to the view that the function of the judges was to promote virtue and discourage vice and immorality, secondly, a very narrow view of sexual morality, and, thirdly, the dominant influence wielded by the Christian churches.

Those who embrace the view that a restoration of Victorian values would be of benefit might wish to ponder what I have just been describing.

Now you may think that this is all of no more than historical, indeed perhaps antiquarian, interest, but a surprising amount of all this lingered on into a past which too many amongst us can still remember.

Only a little over a century ago, in 1905, a judge in a family case could confidently opine that the function of the judges was "to promote virtue and morality and to discourage vice and immorality." If this is thought to be the voice of a different age, it is sobering to recall just how long this view retained its vigour. I recall appearing before Megarry J in 1974 in what we would now call a TOLATA claim. He refused to

allow my opponent to amend his pleadings to set up an express agreement between the man and the woman as to the shares in which their home was to be held. They were a most respectable middle-aged couple but they were unmarried. The contract, the judge said, and I have never forgotten his words, was "tainted with vice and immorality." My opponent and I quickly settled the case.

A poet famously suggested that 'Sexual intercourse began / In nineteen sixty-three'. That caustic comment, which Larkin mordantly related to what he called 'the end of the Chatterley ban', conceals an important truth. The simple fact is that in so many matters sexual the modern world – our world – is a world which has come into being during the lifetime of many of us alive today. It is a development of the 1960s.

The moment at which the world changed can, in fact, be identified even more closely than Larkin suggested. The last hurrah of the ancien regime was not so much the failed prosecution of Penguin Books Limited in 1960 for publishing D H Lawrence's Lady Chatterley's Lover but rather the decision in 1961 of the House of Lords in *Shaw v Director of Public Prosecutions,* for it marked the end, even if not recognised at the time, of the ancien regime in matters sexual. Viewed from the perspective of little more than some 50 years, the famous words of Viscount Simonds were no more than the dying fulminations of an age which now seems almost as remote from us as Nineveh or Babylon. All that Viscount Simonds feared very soon came to pass.

For the family lawyer it was surely in 1967, not as Larkin suggested in 1963, that the world changed. In June, Parliament enacted the National Health Service (Family Planning) Act 1967, which swept away the remaining institutional restraints on the provision of contraception for social rather than purely medical reasons and the remaining distinction between the provision under the NHS of contraceptives to the married and the unmarried. In July, Parliament enacted the Sexual Offences Act 1967, decriminalising homosexuality and, on the same day, the Matrimonial Homes Act 1967. In October, there followed the Abortion Act 1967, legalising abortion.

The ready availability of the contraceptive pill, both commercially and legally, removed the fear of unwanted pregnancy. The legalisation of abortion removed the fear of the consequences of contraceptive failure. Sex was now something to be

enjoyed, if one wished, for purposes having nothing to do with procreation. And sex between consenting adults of the same sex was no longer criminal. A fundamental link – the connection between sex and procreation – had been irretrievably broken.

But for all this, much remained still to be done.

As long ago as 1891 the Court of Appeal had rejected the proposition that a husband could lawfully imprison his wife. Yet it took another eighty years for the criminal courts to establish finally, in 1973, that a husband could be guilty of the common law offence of kidnapping his wife. It took a full hundred years until, in 1992, the House of Lords exploded, as the absurd fiction it had always been, the husband's immunity from prosecution for the rape of his wife. Not until 2000 was equality identified as the core principle of ancillary relief. Not until 2004 was the husband's immunity in relation to sexually transmitted infections likewise swept away. And only in the same year, 2004, were the final remnants of the old view of the marriage relationship consigned to history.

As it happened, it fell to me to read the last rites. Rejecting Sir James Hannen's categorisation of the wife's role as one of "submission", I observed that the fact is – the modern view is – that the wife is no longer the weaker partner subservient to the stronger. Today both spouses are the joint, co-equal heads of the family. Each has equal responsibility for the children. Domestic matters of common concern are to be settled by agreement, not determined unilaterally by the husband.

But how recent is even that change? For those of you who are grandparents, consider how the roles within the family of the husband and the wife, the father and the mother, changed between the days when you and your friends were children and the days when you and they in turn became parents. And if you and your friends are ever tempted to draw complacent comparisons with your parents' generation, consider how these roles are now divided up by your children's generation.

What this history surely demonstrates is how distressingly recent some of this change has been. And what it also demonstrates is that some changes in the law are not quite what they seem. By statute the father was dethroned from his privileged position vis-

à-vis the mother almost 90 years ago. The preamble to the Guardianship of Infants Act 1925 read as follows:

> "Whereas Parliament by the Sex Disqualification (Removal) Act, 1919, and various other enactments, has sought to establish equality in law between the sexes, and it is expedient that this principle should obtain with respect to the guardianship of infants and the rights and responsibilities conferred thereby".

The second limb of section 1 was in the following terms:

> "the court … shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, … is superior to that of the mother, or the claim of the mother is superior to that of the father."

So much for the law – but was it reflected until very much more recently in what actually went on within the privacy of the family? I have my doubts.

And if there is now equality of status in law one does not need to be an ardent feminist to believe that we still have no little way to go when it comes to the economic equality of women and, more generally, women's equality in the workplace.

Changes in the nature of marriage are reflected in and reflect great changes in the nature of the family. The family of today is very different from what the family was even in our parents' time. These changes have been driven by five 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 community of many faiths. One of the paradoxes of our lives is that we live in a society which is at one and the same time becoming both increasingly secular but also increasingly diverse in religious affiliation. Secondly, there has been an enormous increase in the number of trans-national families. I am not talking about the international jet-setting mega-rich. When travel was limited by the speed of a horse, most people hardly moved from the locality of their birth, so most found their partners

in that locality. The railways and the steamship broadened people's horizons enormously. But it was only the introduction of the Boeing 747 and its successors, and the enormous reduction in the price of air travel in recent decades, that has made it possible for ordinary people to travel back and forth across the world so easily and so frequently and thus to find partners abroad. Thirdly, there has been an increasing lack of interest in – in some instances a conscious rejection of – marriage as an institution. Fourthly, there has been a sea-change in society's attitudes towards same-sex unions. Within my lifetime we have moved from treating such relationships as perversions to be stamped out by the more or less enthusiastic enforcement of a repressive criminal law to a long-overdue acknowledgment that they are entitled not merely to respect but also to equal protection under the law. Finally, there have been enormous advances in medical, and in particular reproductive, science so that reproduction is no longer confined to 'natural' methods. Many children today are born as a result of 'high-tech' IVF methods almost inconceivable even a few years ago.

The result of all this is that in contemporary Britain the family takes an almost infinite variety of ever-changing forms.

Looking back on what has happened in recent years, the lesson for us is clear: we need to recognise that, whether we like it or not, we live in ever–changing times. And we need to ensure that our family law remains adequate to deal with our modern society.

What are the challenges and how are we to address them?

First we must recognise and respond to the ever changing nature of our world. What are these changes? They come in four different varieties. First, there are changes in our understanding of the natural world. Examples which come readily to the mind of a family lawyer would include our developing understanding of how the brain develops in early infancy – important in shaping the decisions we make about children – and our still imperfect but improving understanding of baby shaking. Secondly, there are technological changes. Perhaps the most significant for the family lawyer over the last fifty years have been the contraceptive pill, the medical technologies which underpin IVF and which have led to our still developing law of surrogacy and, most recent of

all, the emergence on the internet of social media, whose astonishing effects on social attitudes and behaviour it is still too early to evaluate. Thirdly, there are changes in social standards. What might once have been accepted as inevitable squalor is now seen for what it is – something which is preventable and thus unacceptable. Fourthly, and perhaps most important of all, there have been changes in social attitudes. The most obvious, perhaps, for the family lawyer, is the change in attitudes which led to the legalisation of same-sex marriage.

Secondly, we must recognise how very quickly, and even unexpectedly, these changes can happen. Some changes occur only slowly and over long periods. An obvious example is the legal emancipation of women, a process which in the context of family law, as we have seen, took the best part of 120 years. But sometimes fundamental change occurs with almost astonishing rapidity. Obvious examples are the legislative changes of 1967, the accelerating changes in the nature of the family which we have seen over the last 50 and even more the last 20 or 30 years, and the largely uncontroversial enactment last year of legislation in relation to same-sex marriage which even ten years previously would have been thought almost inconceivable.

Recognising, therefore, that we live, and surely can expect to be living for quite some time yet, in what for family lawyers are times of profound and unpredictable change, what are the tools which we must bring to bear?

Once upon a time the answer would have been not too difficult. The perceived function of the judges was to promote virtue and discourage vice and immorality, and by and large everyone knew, or at least thought they knew, what was virtuous and what was not. But the last few years have marked the disappearance in an increasingly secular and pluralistic society of what until comparatively recently was in large measure a commonly accepted package of moral, ethical and religious values. So what is the measure? What is the judicial lodestar?

To the common lawyer the answer might be simple: the view of the man on the Clapham omnibus or the woman on the Northern line tube. I would not differ from that, but suggest that for the family lawyer it is necessary to go somewhat further.

The function of the family judge is to act as what Lord Upjohn once described as "the judicial reasonable parent", emulating the parents whom he invoked in a striking passage:

> "the law and practice in relation to infants … have developed, are developing and must, and no doubt will, continue to develop by reflecting and adopting the changing views, as the years go by, of reasonable men and women, the parents of children, on the proper treatment and methods of bringing up children".

In these words a distinguished Chancery judge captured what I suggest remains, more than forty years on, the fundamental, unchanging, role of the family judge – to develop the law applying the changing views, as the years go by, of reasonable men and women.

Lord Upjohn's reference to changing views is crucial. The concept of welfare is, no doubt, the same today as it was in 1925, but conceptions of that concept, to adopt the terminology of Professor Ronald Dworkin, or the content of the concept, to adopt the corresponding terminology of Lord Hoffmann, have changed and continue to change. A child's welfare is to be judged today by the standards of reasonable men and women in 2014, not by the standards of their parents in 1970, let alone by the standards of the legislators of 1925. And this principle, this approach, I suggest, applies more generally across family law.

So far, so good; but what are the characteristics of this reasonable man or woman? That itself is something which no doubt may change down the years. For the moment I can do no better than to suggest that, in our contemporary society, if the reasonable man or woman is receptive to change, he or she is also broad-minded, tolerant, easy-going and slow to condemn. We live, or strive to live, in a tolerant society increasingly alive to the need to guard against the tyranny which majority opinion may impose on those who, for whatever reason, comprise a small, weak, unpopular or voiceless minority.

Within limits our family law will – must – tolerate things which society as a whole may find undesirable. A child's best interests have to be assessed by reference to general community standards, making due allowance for the entitlement of people, within the limits of what is permissible in accordance with those standards, to entertain very divergent views about the religious, moral, social and secular objectives they wish to pursue for themselves and for their children. We have moreover to have regard to the realities of the human condition, so powerfully described by that wisest of judges, Hedley J:

> "… society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done."

Where precisely the limits are to be drawn is often a matter of controversy. There is no 'bright-line' test that the law can set. The infinite variety of the human condition precludes arbitrary definition. Therein lies the timeless challenge for the family judge.

Some things, of course, are nevertheless beyond the pale: forced marriages (always to be distinguished of course from arranged marriages to which the parties consent), female genital mutilation and so-called, if grotesquely misnamed, 'honour-based' domestic violence. And occasionally, some aspects of even mainstream religious practice may fall foul of public policy or be found to be contrary to a child's welfare. But that is a different debate for another day.

Now at this point you may be thinking, this is all very well for a lecture in abstract jurisprudence, but you have not yet got to the heart of it: What of family law in the years ahead? Where is it going? What changes can we expect to see?

Judges are not seers; they are – or at least this judge is – no better at predicting the future than anyone else, and we are still quite close to the beginning of a century which still has some 85 years still to run. Let me illustrate the point by reference to adoption. Adoption, as a legal process, has existed in this country for less than 90 years. Over that time, indeed even over the last 40 years, our use of adoption and our views of what adoption means for all concerned, have changed out of all recognition. What will our view of adoption be in 2100? The only certainty – but how can I be certain even of this? – is that it will be very different from what it is today. All we can hope for is to do the best we can in the light of the best current understanding of experts in the relevant disciplines, in particular, perhaps, those experts in the various social sciences which inevitably underpin much of family law and practice.

Just 100 years ago a judge in what is now the Family Division of the High Court could say:

> "Some people think that … you must treat men and women on the same footing. But this Court has not taken, and, I hope, never will take, that view. I trust that, in dealing with these cases, it will ever be remembered that the woman is the weaker vessel: that her habits of thought and feminine weaknesses are different from those of the man."

Bargrave Deane J added, "this Court is always willing to recognize the weakness of the sex".

The warning from history is clear, though happily I will no longer be here to hear the President in a hundred years time gently mocking the absurdity of my words today.

I do not propose to predict, or even to look more than a few years into, the future.

Earlier this year we reached a once-in-a-lifetime milestone in the reform of family justice. 22 April 2014 saw the implementation, forty years after it was first proposed, of the new Family Court, the implementation of the revised PLO (public law outline), regulating the conduct of public law children proceedings, and the implementation of CAP (the child arrangements programme), regulating the conduct of private law

children proceedings. Work on MAP (the money arrangements programme), regulating the conduct of financial remedy proceedings, is well advanced. So we can, as I am confident, move forward with a new court and new procedures which will stand us in good stead for many years to come.

But there remain great, even daunting, challenges ahead, especially in the context of private children cases.

In public law cases we have, by and large, though there are some important and concerning exceptions, the support of legal aid for parents most of whom would not be able to pay for their own representation in cases which typically involve the claim by a local authority – in other words by the State – that their parenting is so deficient that their child's welfare demands permanent removal from the family and adoption by others. It is hard to think of any other kind of case, even in the criminal justice system, where the stakes are so high. May I repeat what I said in the very first judgment I gave as President:

> "the ultimate safeguard for the parent faced with the might of the State remains today, as traditionally, the fearless advocate bringing to bear in the sole interests of the lay client all the advocate's skill, experience, expertise, dedication, tenacity and commitment. There are some principles that ring down the centuries, and the efficacy of the adversarial process is one of them … Most family judges will have had the experience of watching a seemingly solid care case brought by a local authority being demolished, crumbling away, at the hands of skilled and determined counsel. So the role of specialist family counsel is vital in ensuring that justice is done and that so far as possible miscarriages of justice are prevented … May there never be wanting an adequate supply of skilled and determined lawyers, barristers and solicitors, willing and able to undertake this vitally important work."

But what, in contrast, of private law? The task here is, if anything, even greater and more challenging than all the changes associated with the revised PLO. The new Child Arrangements Programme requires fundamental changes in our whole approach to private law cases. A system based on the assumption that parties are represented

must be radically re-designed to reflect the reality that parties will no longer be represented in a new world where there is so little legal aid. And the concept of the court's continuing monitoring and review function following the substantive hearing – the legacy of ideas rooted in old wardship practice – will in large measure become a thing of the past. That there can be no room for complacency about our current practices is evident. There is a massive task ahead of us.

In private law we must embrace as enthusiastically as in public law the techniques which we know work: judicial continuity, judicial case management, robust timetabling, and rigorous control of the unnecessary use of experts and proliferation of paper. But there is more to be done. We must encourage and make an effective reality of methods of non-court dispute resolution, mediation in particular. Much time has been lost. There is much to do.

In the courtroom we must adapt our processes to the new world of those who, not through choice, have to act as litigants in person. We need to think anew about the appropriate roles in the court room of McKenzie friends and other lay advisers. We will need to make our judicial processes more inquisitorial. Do not misunderstand me: I am not advocating adoption of the continental inquisitorial system. Our system, and for good reason, is essentially adversarial, even in the Family Court. But it is a system very different from the adversarial system of yore. Then the judge functioned as little more than an umpire, adjudicating on whatever claim the litigant chose to bring, the only limitations being the need for some recognised cause of action and the requirement that the evidence had to be both relevant and admissible. Those days have long since gone. Modern case management imposes on the judge the responsibility of deciding what issues will be argued and what evidence will be permitted. The process before the judge may still be adversarial, but it is a dispute fought in accordance with an agenda set by the judge, not by the parties. But that, of course, assumes that the parties are represented. Where they are not, then the judge must take a more active role. The hearing is more likely to produce the right and just result if the judge adopts a more inquisitorial approach.

Now that assumes that the litigant, especially the litigant in person, does not labour under particular difficulties. But what of the litigant who lacks capacity? What of the

litigant who, though not lacking capacity, is vulnerable? What of the litigant who is, or claims to be, a victim of domestic violence or worse? The issues are legally complex. The challenge – to craft a system which can deliver justice fairly and justly according to law – is daunting. Not enough has yet been done. Much, too much, remains to be done. Do not ask me today what needs to be done by way of remedy, though I hope to be in a position to identify the way forward well before this time next year.

What else of the future?

A vital aspect of this transformation in the family justice system has to be reform of our still creaking rules about access to and reporting of family cases. Nothing short of radical reform will enable us to rid ourselves of the relentlessly repeated and inevitably damaging charge that we operate a system of private – some say secret – justice. The task is massive: the complexity of the law is quite astonishing and the differences of view as to what should be done run deep and in some aspects seem almost unbridgeable. The history of attempts at reform is unpromising. But something must be done. It would be scandalous if in 5 years time we were still trying to muddle along as we do at present. We have made a start. More judgments are being published by the judges and reported in the media then ever before. But that is only a first step. We must continue the process, even if only incrementally.

So much for the institutions and for process: What of the substantive law? I should be very surprised if our law of ancillary relief, as it used to be called, does not undergo more or less radical reform over the coming years. The process has already started, prompted by important re-direction of the law by the Supreme Court and the recent report of the Law Commission. Those of the Law Commission's recommendations which do not require legislation surely require early implementation. We need to reconsider practice and procedure so as to facilitate the use of out-of-court methods of resolving financial disputes, whether by mediation, arbitration or other appropriate techniques, at the same time further reforming the court processes in such cases to bring to bear all the techniques of judicial continuity and case management which have been so successful in children cases. Our aim, as with every aspect of the family

justice system, must be to simplify and streamline the process so as to make it more user-friendly for litigants in person and cheaper for all.

This takes me on to the long-running problem of cohabitant's rights. If a marriage is terminated by divorce the court has power to redistribute the matrimonial assets between the spouses. There is no such relief for cohabitants when their relationship breaks down, however long the relationship has lasted. This is an injustice which has been recognised as long as I have been in the law. Reform is desperately needed – has been desperately needed for at least forty years. The Law Commission has recommended reform. Thus far Governments have failed to act. Reform is inevitable. It is inconceivable that society will not right this injustice in due course. How many more women are to be condemned to injustice in the meantime?

Finally, divorce. Has the time not come to legislate to remove all concepts of fault as a basis for divorce and to leave irretrievable breakdown as the sole ground? Has the time not come to uncouple the process of divorce from the process of adjudicating claims for financial relief following divorce, just as we have finally uncoupled the process of divorce from the process of adjudicating disputes about the children following divorce? Indeed, may the time not come when we should at least consider whether the process of divorce still needs to be subject to judicial supervision?

I am acutely conscious that I am speaking in Wales, indeed at the Legal Wales Conference, yet have thus far said nothing about family law in Wales. About the onward progress of devolution it would be impolitic for me as a judge and impertinent for me as someone who comes from the wrong side of Offa's Dyke to comment. But there is one aspect of this process which, as a family judge, I appreciate and very much welcome: the ever increasing divergence in family law between the two countries – and when I say family law I include, of course, the kind of law which comes before us as judges in court.

You will not, I hope, expect an analysis from me of the details, something that others much better qualified than me provided only a fortnight ago at a seminar in Llandudno. And I apologise if what I do say may appear indelicately autobiographical. But, as it happened, it fell to me to explain in two separate cases the

different legislation governing the children ‘leaving care’ regimes in Wales and in England. If the language of the relevant Statutory Instruments was rather different, the law in substance was not in fact that different. More recently, sitting with Lord Justice Pill, we had to consider the legislative provisions governing the important topic of children serious case reviews. Here there are very different statutory regimes, the Welsh regime being much more developed and, I cannot help admitting, in my opinion much better than the English.

More recently, there is the landmark Social Services and Well-Being (Wales) Act 2014, marking a fundamental break from the law in England both past and as proposed for the future. I can with all due modesty claim some slight responsibility for this, for the Act is in part the consequence of work done by the Law Commission whilst I was Chairman. The pace of change in the Welsh legal landscape is illustrated by the fact that when we issued our Consultation Paper we were minded to recommend a single statute for both England and Wales. Little over a year later, when we published our final Report, we recommended separate statutes. And the very different responses of the English and Welsh governments, which has led to legislation which in many respects is very different indeed, shows very clearly how matters are moving in the realm of family law. Increasingly, and if the quality of the Welsh legislation is maintained I can only say very much to the good, the family judge as he crosses Severn will have to set aside the English statute and take out the Welsh.

That, as it seems to me, is the direction of travel. Where will it end? I do not know. Perhaps my successor when she comes here to address this gathering in 2114 will be able to tell you.