THE NOTION OF 'FAMILY' IN LAW

ANTHONY DICKEY

In light of the prominent place that family law enjoys as a distinct branch of law and legal studies, it may seem strange that there is no clearly defined notion of 'family' known to law in the same way that there is of 'marriage'.[1] The reason for this deficiency is probably not the fact that until comparatively recently the principal focus of attention in family law has been marriage and the consequences of marriage, for in that case one would have expected the law to have developed a notion of 'family' tied to marriage. The reason for the lack of any clearly defined notion of 'family' in law is instead probably due to the fact that until comparatively recently the law has been primarily concerned only with narrow familial relationships, such as husband and wife, and parent and child, and not with any broader relationships such as are involved in the general notion of a family.

The law has nonetheless been required to concern itself with the notion of 'family' from time to time first, on account of the use of the term 'family' in wills, and to a lesser extent also in deeds, and in more recent times by virtue of the use of this term in statutes. The purpose of this article is to examine the way in which this term has been interpreted by the courts and to see whether any legal notion of 'family' has yet emerged, if only in an embryonic state.

'FAMILY' IN WILLS

In keeping with the point already made, that there is no clearly defined notion of 'family' known to law, it has long been accepted by the courts that the word 'family' in wills is to be construed in its popular sense and not as a technical expression.[2] This term has accordingly for long been viewed as 'in itself a word of most loose and flexible descrip-

1 The classic definition of marriage is, of course, that by Wilde J.O. (later Lord Penzance) in Hyde v. Hyde and Woodmansee (1866) L.R. 1 P & D 130, at p. 133. The definition has received statutory recognition in Australia by ss. 46(1) 69(2) of the Marriage Act 1961 (Cth.), by s. 43(a) of the Family Law Act 1975 (Cth.), and by s. 28(1)(a) of the Family Court Act 1975-1982 (W.A.). In respect of the notion of 'marriage' in current English law, see Poulter, 'The Definition of Marriage in English Law', (1979) 42 *Mod. L. Rev.* 409.

2 See, e.g., Burt v. Hellyar (1872) L.R. 14 Eq. 160, at 164.

tion.'[3] As Lord Langdale M.R. put it in *Blackwell* v. *Bull*[4] almost one hundred and fifty years ago: 'It is evident that the word "family" is capable of so many applications that if any one particular construction were attributed to it in wills, the intention of testators would be more frequently defeated than carried into effect. Under different circumstances it may mean a man's household, consisting of himself, his wife, children and servants; it may mean his wife and children, or his children excluding the wife; or in the absence of wife and children, it may mean his brothers and sisters, or his next of kin, or it may mean the genealogical stock from which he may have sprung. All these applications of the word and some others are found in common parlance'.[5] The Master of Rolls then went on: '[W]e must endeavour to ascertain the meaning in which the testator employed the word, by considering the circumstances and situation in which he was placed, the object he had in view, and the context of the will'.[6]

Notwithstanding the foregoing, two guiding principles (if not firm rules) of construction gained wide acceptance by the nineteenth century; the first was that the primary meaning of the word 'family' is children, and the second was that in relation to a devise of realty (though not of mixed realty and personality), 'family' *prima facie* indicates 'heir', apparently on the basis that the heir is the representative of a family.[7] The latter principle, which can in fact be traced back as far as 1573,[8] is almost certainly no longer extent. As one authoritative work states on this matter: '[I]t seems questionable whether there is at the present day any rule of construction that "family" in a devise means "heir". The heir no longer has the importance he had in the seventeenth and eighteenth centuries: he no longer takes on intestacy and it no longer seems natural to regard him as the head or "representative" of a family'.[9]

The former guiding principle, on the other hand, that the primary meaning of the word 'family' is 'children', appears to continue still. It was originally based on the apparent fact that in common parlance the primary meaning of the word 'family' was indeed 'children' and that accordingly this was the meaning ordinarily to be attributed to this term

3 Green v. Marsden (1853) 1 Drew. 646, at 651 (61 E.R. 598, at 600).
4 (1836) 1 Keen 176 (48 E.R. 274).
5 At 181 (E.R., at p. 276).
6 Supra n. 5.
7 For an account of these two principles, with supporting authorities, see e.g. *Jarman on Wills* 8th ed. (1951) vol. 3, 1573-75, *Hawkins and Ryder on the Construction of Wills* (1965) 152-55.
8 Chapman's Case (1573) 3 Dyer 333b (73 E.R. 754).
9 *Hawkins and Ryder on the Construction of Wills* (1965) 54.

in a will unless the circumstances indicated otherwise. As Jessel M.R. put it in 1876 in *Pigg* v. *Clarke*:[10]

> Now, every word which has more than one meaning has a primary meaning; and if it has a primary meaning, you want a context to find another. What then, is the primary meaning of 'family'? It is 'children'; that is clear upon the authorities which have been cited; and, independently of them, I should have come to the same conclusion.

There is some suggestion that one reason why the word 'family' in wills was originally interpreted as *prima facie* meaning just 'children' was to ensure that the bequests involved would not fail for uncertainty.[11] However, be that as it may, the statements of the court in such cases as *Pigg* v. *Clarke, In re Terry's Will*,[12] *Burt* v. *Hellyar*,[13] and others of the same period, indicate that courts did in fact regard the word 'family' as ordinarily meaning 'children', all other things being equal. Later in the same century these statements concerning the basic meaning of the word 'family' seem then to have been accepted as stating a legal rule to the effect that that word should be interpreted as 'children' unless there be some clear indication in the will to the contrary. An example of this latter, more rigid attitude can be found in the 1899 New South Wales case of *In re Thomas McGrath's Will*.[14] There Walker J. said: 'As was laid down by Sir George Jessel, M.R., in *Pigg* v. *Clarke* . . .—the primary meaning of the word 'family' is children. If it be intended by the testator to give the word 'family' some meaning other than its primary meaning, there must be some indication of such intention shewn in the will itself'.[15]

The question of the meaning of the word 'family' in wills does not appear to arise for judicial determination very often today, though when it does, the shade of the old canon of interpretation that 'family' ordinarily means 'children' tends still to appear in the judgments.[16] The courts are, however, clearly now much more willing than they were at the turn of the century to give this word the meaning most obviously intended by the testator where this is apparent from surrounding circumstances.

10 (1876) 3 Ch. D. 672, at 674.
11 *Hawkins and Ryder on the Construction of Wills* (1965) 153.
12 (1854) 19 Beav. 580, at 581 (52 E.R. 476).
13 (1872) L.R. 14 Eq. 160, at 164.
14 (1899) 20 N.S.W.L.R. (B. & P.) 55.
15 At 57-58.
16 See, e.g. Re Barlow's Will Trusts [1979] 1 All E.R. 296, at 301, and esp. Re Nash (1979) Qd.R. 219, at 220.

Cases on wills in which the word 'family' has arisen for interpretation are not, of course, the best source of information on whether there has yet developed any legal concept of 'family', for notwithstanding the adoption by the courts of particular principles of interpretation like those referred to above, the basic rule relating to the construction of wills is to give effect to the testator's expressed intention, and that can naturally vary from one will to another, especially when one takes into account the surrounding circumstances. So, for example, in one very recent English case where a spinster had provided in her will that her paintings might be purchased at a certain price by 'any members of [her] family', the word 'family' was held to mean blood relations.[17] In that case, of course, the testatrix had no children. In another, and this time much older case, 'family' was held to mean 'husband' in the context in which it arose.[18] To pursue the emergence of any legal notion of 'family' further, attention must be directed to areas of the law where the context in which the term 'family' fails to be construed remains constant. Such areas of law are, of course, those concerning the term 'family' in statutes.

THE ENGLISH RENT ACTS

The statutory context in which the notion of 'family' has most often arisen for consideration in Anglo-Australian law is that of the English *Rent Acts*. Since 1920, English legislation has given certain tenancy rights not only to an original tenant but also upon his death to his widow or to a member of his family then living with him. The first Act conferring such rights was the *Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920, and the current one is the *Rent Act* 1977. By Schedule 1, Part 1, para. 3 of the present Act:

> Where . . . a person who was a member of the original tenant's family was residing with him at the time of and for the period of 6 months immediately before his death then, after his death, that person or if there is more than one such person such one of them as may be decided by agreement, or in default of agreement by the county court, shall be statutory tenant if and so long as he occupies the dwelling-house as his residence.

The meaning of the term 'family' in the expression 'member of the original tenant's family', and the similar expressions in the previous

[17] Re Barlow's Will Trusts [1979] 1 All E.R. 296.
[18] MacLeroth v. Bacon (1799) 5 Ves. Jun. 159 (31 E.R. 523).

Acts[19] have so far arisen for consideration in some fifteen reported cases.

Although there are references in some early *Rent Act* cases to the principle (obviously taken from cases concerning wills) that the primary meaning of 'family' is 'children',[20] it was nonetheless accepted right from the beginning that in the context of the *Rent Acts* this word should be given its ordinary, popular meaning.[21] The particular test which has most often been judicially approved as appropriate for deciding whether a particular person is a member of a deceased tenant's family, and which demonstrates clearly that the term 'family' is to be understood in its popular sense, is that first enunciated by Cohen L.J. in *Brock and Ors.* v. *Wollams*[22] namely: 'Would an ordinary man, addressing his mind to the question whether [the person in question] was a member of the family or not, have answered "yes" or "no"?'[23]

There are, of course, obvious objections that can be made against Cohen L.J.'s test. For example, the range of possible replies proffered in the test are not exhaustive. As Lawton L.J. put it in *Joram Developments Ltd.* v. *Sharratt*[24]: 'There are, in my opinion, three possible answers "yes" or "no" (the ones given by Cohen L.J.) and "I am not all that sure but I would say 'yes' (or 'no', as the case might be)"'. Another objection, which was referred to by Viscount Dilhoren in *Carega Properties S.A. (formerly Joram Developments Ltd.)* v. *Sharratt*,[25] is that the person who has in fact to answer the question posed is not a hypothetical 'ordinary man' but the judge who actually hears the case.

These objections are well taken, though as Lord Diplock correctly pointed out in the *Carega Properties* case, Cohen L.J.'s test really does no more than say that the word 'family' in the *Rent Acts* is not a term of

19 See the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 s. 12(1)(g) ('member of the tenant's family'), and the Rent Act 1968, Sched. 1, para. 3 ('member of the original tenant's family').

20 See Price v. Gould (1930) 143 L.T. 333, at 334, Brock v. Wollams [1949] 2 K.B. 388, at 394.

21 See Price v. Gould, supra n. 20, at 334, Brock v. Wollams supra n. 20 at 394, 395. See also Langdon v. Horton [1951] 1 K.B. 666, at 669, 670, and the references in n. 23, *infra*.

22 [1949] 2 K.B. 388.

23 At 395. This test was subsequently adopted in Standingford v. Probert [1950] 1 K.B. 377, at 383; Jones v. Whitehill [1950] 2 K.B. 204, at 206-7; Gammans v. Ekins [1950] 328, at 334; Langdon v. Horton [1951] 1 K.B. 666, at 669, 671, 672; Hawes v. Evenden [1953] 2 All E.R. 737, at 738; Ross v. Collins [1964] 1 All E.R. 861, at 863, 865; Dyson Holdings Ltd v. Fox [1976] Q.B. 503, at 510. See also Darnell v. Millwood [1951] 1 All E.R. 88, at 89; Carega Properties S.A. (formerly Joram Developments Ltd) v. Sharratt [1979] 2 All E.R. 1084, at 1086, 1088, Watson v. Lucas [1980] 3 All E.R. 647, at 650, 657.

24 [1978] 2 All E.R. 948, at 954.

25 [1979] 2 All E.R. 1084, at 1087-88.

art but is used in its ordinary, popular sense.[26] That very fact, however, involves no small number of difficulties concerning interpretation and application, and these in turn centre around two basic problems: first, what is the ordinary, popular meaning of the word 'family', and secondly, to what extent is this meaning susceptible of legal limitation?

The latter problem itself involves two matters. The first is whether the term 'family' should be given the ordinary, popular meaning that it bears today, or whether it should retain that which it had in 1920, the year in which the general formula giving statutory protection to members of a deceased tenant's family was first enacted. The Court of Appeal held in *Dyson Holdings Ltd.* v. *Fox*[27] that it should bear its contemporary meaning, notwithstanding that this may be at variance with the meaning that it bore some time previously.[28] In the more recent case of *Helby* v. *Rafferty*,[29] however, a differently constituted Court of Appeal was of the opinion that the term 'family' in the Rent Acts should strictly be given the meaning that it bore in 1920, following the rule of statutory interpretation that the words of an Act should be understood in the sense which they bore when the Act, or in the case of subsequent common legislation, the original Act, was passed.[30] However, the Court nonetheless held in the latter case that it was bound by *Dyson Holdings Ltd.* v. *Fox* on this particular point. There seems little doubt that the Court of Appeal was correct in the earlier case of *Dyson Holdings Ltd.* v. *Fox* and that the Court in the subsequent case confused a rule applicable at most only to legal terms of art with the rule of interpretation applicable to ordinary words. As the House of Lords made clear in *Brutus* v. *Cozens* in 1972,[31] when a statute uses an ordinary word which does not possess a specific legal meaning (and it is now clearly established that 'family' is just such a word), the meaning to be given to that term is a question of fact, and not of law, to be decided in accordance with popular current usage.[32]

The second question concerning legal limitation on the meaning of the word 'family' is the related matter of the extent to which one court can anyway bind another in the interpretation of an ordinary word. There is no doubt that an appeal court can interfere with the decision of a court of first instance if it finds that the meaning it has attributed to

[26] At 1086.
[27] [1976] 1 Q.B. 503.
[28] See esp. at 512, 513, *per* James and Bridge L.JJ.
[29] [1978] 3 All E.R. 1016.
[30] See at 1018, 1024, 1025-26, 1026.
[31] [1973] A.C. 854.
[32] See on this general matter, Glanville Williams, 'Law and Fact', [1976] *Crim. L R* 472, esp. at 476 ff.

an ordinary word, or the application it has made of such a word to a set of facts, is clearly wrong.[33] What is questionable, however, is the effect of any such interference upon subsequent cases, taking into account the appropriate rules of precedent. For example, when the Court of Appeal held in *Dyson Holdings Ltd.* v. *Fox* that a *de facto* wife who had lived with a man for some twenty-six years was a member of his family, and that the trial judge was wrong in finding that she was not, was it thereby determining both for itself and for lower courts an element of the 'ordinary meaning' of the term 'family', and to that extent making the interpretation of that word a matter of law rather than of fact? A strict view of the rule in *Brutus* v. *Cozens* concerning the interpretation of ordinary words would seem to indicate that one court—even an appeal court—cannot bind another in this regard, for to do so would have the effect of turning ordinary words into legal terms with fixed meanings. However, that was not the approach followed by subsequent English courts with respect to the decision in *Dyson Holdings Ltd.* v. *Fox*, for notwithstanding strong doubts as to the correctness of the interpretation given to the term 'family' in that case, judges of the Court of Appeal in subsequent cases have nonetheless felt bound to follow it.[34] This naturally militates against the very object of the decision in *Brutus* v. *Cozens* as well as in *Dyson Holdings Ltd.* v. *Fox* itself. Such an approach does, on the other hand, at least have the merit that it ensures a degree of consistency in respect of the interpretation of the term concerned.[35]

It follows from what has just been said that whereas the Court of Appeal held in *Dyson Holdings Ltd.* v. *Fox* that the term 'family' should bear its ordinary, contemporary meaning, the effect of subsequent decisions by this same Court in light of that case has paradoxically been to turn the word 'family' at least partly into a fixed legal term. Thus it must remain (especially in light of the firm rule of *stare decisis* laid down for the Court of Appeal in *Davis* v. *Johnson*[36]) until the House of Lords gives further consideration to this particular matter. The starting point for any consideration of the current meaning of the word 'family'

[33] See, e.g., Joram Developments Ltd v. Sharratt [1978] 2 All E.R. 948, at 952 (approved by the House of Lords in Carega Properties S.A. (formerly Joram Developments Ltd) v. Sharratt [1979] 2 All E.R. 1084, at 1086-1087). See also at 954, referring to Brutus v. Cozens [1973] A.C. 854, at 861.

[34] See Joram Developments Ltd v. Sharratt [1978] 2 All E.R. 948, esp. at 953, 954, 956, Helby v. Raffert [1978] 3 All E.R. 1016, esp. at 1018, 1024-26, Watson v. Lucas, [1980] 3 All E.R. 647, esp. at 653, 655, 658.

[35] Note in this connection Lord Denning M.R.'s observation concerning Brutus v. Cozens in Dyson Holdings Ltd v. Fox [1976] 1 Q.B. 503, at 510. See also the comment on this matter by Glanville Williams in 'Law and Fact—2', [1976] *Crim. L R.* 532, at 537-38.

[36] [1979] A.C. 264.

in the *Rent Acts* is nonetheless still the ordinary sense in which this term is used.

The word 'family' derives from the Latin word *'familia'*, meaning a household, which in turn derives from the earlier Latin word *'famulus'*, a servant. This explains why, as part of the English language from at least the sixteenth century until about a hundred years ago, 'family' in its broad sense connoted all persons who lived together as part of a household, including not just parents and their children but also other relatives, lodgers, visitors, and especially servants. It was this wide connotation of the word 'family' that Lord Langdale referred to in his first account of the meaning of that term in *Blackwell* v. *Bull.*[37] The present-day meaning of this term is, of course, much more restricted. The third definition of 'family' in the *Shorter Oxford English Dictionary* probably best indicates the modern meaning of this word, *viz.*:

> The group consisting of parents and their children, whether living together or not; in a wider sense, all those who are nearly connected by blood or affinity.

Not surprisingly, no court has given the term 'family' in the *Rent Acts* its old, wide meaning to include lodgers, visitors and servants. Indeed, Cohen L.J. expressly rejected this meaning in *Brock and Ors.* v. *Wollams* in 1949.[38] Instead, the courts have given this word a more modern, narrower meaning. What this is, however, has never been specified. It is discernible only from the judicial considerations and in particular from the results of particular cases.

The matters which have engaged the courts' attention concerning the scope of the term 'family' in the *Rent Acts* have not unexpectedly tended to concern borderline cases. Some of the resulting decisions from these cases may seem reasonably obvious. So courts have found that the families of particular deceased tenants have included a deceased's brothers and sisters,[39] his *de facto* adopted child[40], and even a niece by marriage.[41] In light of these and related decisions there can be no doubt, for example, that legally adopted children and illegitimate children can be members of a deceased tenant's family as well.[42] On the

[37] (1836) 1 Keen 176, at 181 (48 E.R. 274, at 276).

[38] [1949] 2 K.B. 388, at 394.

[39] Price v. Gould and Ors. (1930) 143 L.T. 333.

[40] Brock v. Wollams [1949] 2 K.B. 388. It should be observed that the child here was 'adopted' before legal adoption was possible in England. Cf. Ross v. Collins [1964] 1 All E.R. 861.

[41] Jones v. Whitehill [1950] 1 K.B. 204. Two daughters-in-law and their husbands were held to be members of a tenant's family for the purposes of s. 3 of the Rent and Mortgage Interest (Amendment) Act 1953, in Standingford v. Probert [1950] 1 K.B. 377.

[42] Concerning legally adopted children, see the dicta in Gammans v. Ekins [1950] 2

other hand, cousins and a housekeeper who lived with a deceased tenant have been held not to be members of the deceased's family.[43] As has already been seen, servants, visitors and lodgers would not normally be included now either.[44]

What, though, is the rationale which led the courts to arrive at such conclusions? Why, for example, should a niece by marriage be held to have been a member of a deceased tenant's family, but not cousins? The answers to these questions, which provide the key to the meaning of the term 'family' in the *Rent Acts*, lie in the general criteria established by the courts for deciding whether a person is or is not a member of a particular deceased tenant's family for the purposes of the *Rent Acts*. In this regard it should first of all be observed that that the courts have consistently viewed the notion of 'family' in the present context quite narrowly. They have gone further than draw a distinction between the specific notion of 'family' on the one hand, and both the wider notion of 'relations'[45] and the related though quite different notion of 'household'[46] on the other. Indeed, they have even gone further than require an obviously familial relationship between the persons concerned for they now require appropriate conduct as well. The courts, in short, treat the notion of 'family', at least for the purposes of the the *Rent Acts*, as concerning particular familial relations who live together and interact as a family unit. As Lawton L.J. put it in *Joram Developments Ltd.* v. *Sharratt*,[47] 'The concept of living as a family is implicit in the statutory words. This cuts down the width of the word "family", for example, as it is used in the phrase "the Royal Family".'[48] It was, indeed, very much because the niece by marriage had lived with the deceased tenant as a member of his family ('lived' here being used in its

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K.B. 328, 331; Ross v. Collins [1964] 1 All E.R. 861, at 864, 866 and esp. Joram Developments Ltd v. Sharratt [1978] 2 All E.R. 948, at 954, 956-57. On illegitimate children, see e.g. Brock v. Wollams [1949] 2 K.B. 388, at 394, 396. See also Re Nash [1979] Qd. R. 219 (a case concerning the term 'family' in wills) and the cases there cited.

43 Langdon v. Horton [1951] 1 K.B. 666 (cousins); Darnell v. Millwood [1951] 1 All E.R. 88 (housekeeper).

44 See n. 37 and text, *supra*. Note, however, the comments concerning the position of lodgers by Cohen L.J. in Standingford v. Probert [1951] 1 K.B. 377, at 385.

45 See, e.g., the statements on this general matter in Langdon v. Horton [1951] 1 K.B. 666, at 670, 672, 673. See also Brock v. Wollams [1949] 2 K.B. 388 at 394-95.

46 See, e.g., the statements on this matter in Brock v. Wollams [1949] 2 K.B. 388 at 394; Carega Properties S.A. (formerly Joram Developments Ltd) v. Sharratt [1979] 2 All E.R. 1084, at 1087. The Court of Appeal also emphasised the distinction between the notions of 'family' and 'household' in a quite different statutory context in Holm v. Royal Borough of Kensington and Chelsea and Ors [1968] 1 Q.B. 646.

47 [1978] 2 All E.R. 948.

48 At 954.

positive and active sense) that she was included within the protection of the *Rent Acts*.[49]

It may appear from some of the cases, as indeed it may appear from what has just been said, that the notion of 'family' here involves two distinct elements, namely an obviously familial relationship and appropriate familial conduct.[50] Such a proposition is, however, without more, too sweeping. To the extent that there are these two elements they should perhaps best be regarded as simply two aspects of one requirement, *viz.* the existence of a functioning family relationship between the persons concerned. It may nonetheless still be assumed that the first and basic question to be asked in any *Rent Act* case involving membership of a deceased tenant's family is whether there was an appropriate family relationship between the persons concerned, and only if there was such a relationship is it necessary to inquire whether it functioned as such at the appropriate time. However, as will be seen, the existence of certain familial conduct can create a familial relationship in appropriate circumstances. This demonstrates the need not to make too bold a distinction between the elements of 'relationship' and 'conduct'.

Judicial decisions in fact lead to the conclusion that in every *Rent Act* case the first question to ask is whether there was an appropriate relationship of consanguinity or affinity between the party and the deceased tenant involved. If there was, the party will be regarded as having been a member of the deceased tenant's family for the purposes of the *Rent Acts* if at the time of the tenant's death each was playing a role consistent with such a relationship. If on the other hand there were no such kin relationship, a party may in certain circumstances nonetheless be regarded as having been a member of the deceased's family if each had nonetheless played a reciprocal role appropriate to such a relationship. Two questions immediately arise in this regard, namely what is an appropriate relationship of consanguinity or affinity for the purposes of the *Rent Acts*, and when can the performance of reciprocal roles in effect create such a relationship for the purposes of this legislation?

It is beyond dispute that a parent-child relationship is such an appropriate relationship. In this connection it has already been observed that not only natural children but also adopted children can come within the ambit of the statutory protection.[51] This is so regardless of whether the adoption involved was effected by a process of law or whether it was

[49] Jones v. Whitehill [1950] 2 K.B. 204, esp. at 207, explained in Ross v. Collins [1964] 1 All E.R. 861, at 865; Langdon v. Horton [1951] 1 K.B. 666, at 669-70.

[50] See, e.g., Ross v. Collins, supra n. 49, at 865, Joram Developments Ltd v. Sharratt [1978] 2 All E.R. 948, at 955.

[51] See n. 40, n.42 and text, *supra*.

simply a *de facto* adoption.[52] If the adoption were a legal adoption, it seems very probable that the courts will regard this as having created a relationship akin to that of consanguinity between the adoptive parents and the adopted child. Such is, of course, the normal effect of a legal adoption. If the adoption were not effected by the process of law, the assumption of appropriate roles (initially, of course, primarily by the adult involved) can nonetheless create a parent-child relationship between an adult and a child and thus make the latter a member of the former's family.[53] In certain circumstances, however, a parent-child relationship can be created without there being any form of adoption provided the persons concerned play reciprocal roles that are appropriate to such a relationship. The case concerning the niece by marriage is indeed almost certainly an instance of a parent-child relationship being created without any form of adoption but simply by virtue of the conduct between the individuals concerned.[54] That case is in any event certainly not one which can without more be taken as extending the category of appropriate relationships to the degree of affinity that existed between the deceased tenant and the defendant in those proceedings.[55] The question now arises, however, whether it is possible for any two people to assume a parent-child relationship for the purposes of the *Rent Acts* if they are not in some way already related to each other. There is a problem here because statements in some cases, and in particular in *Ross and Anor* v. *Collins*[56] cast some doubt on such a possibility. Thus Pearson L.J. said, when giving the principal judgment in that particular case, and having just referred to the case of the niece by marriage: 'It does not in the least follow that you can have . . . protection afforded to a person who stood in no pre-existing relationship at all to a person who was deceased but yet behaved towards him in a filial character or some other family character'.[57] Russell L.J. in that case was even more explicit when he said, with reference to the facts involved, that an adult man and woman who are otherwise unrelated but form a platonic relationship cannot establish a familial nexus by acting as a devoted father and daughter would act; even if they address each other

52 See n. 40 and text, *supra*.

53 See n. 40, *supra*.

54 Jones v. Whitehill [1950] 2 K.B. 204. Note in this regard the observation by Evershed M.R. in Langdon v. Horton [1961] 1 K.B. 666, at 669, that the niece by marriage 'had by her conduct assumed, as it were, a *filial* character', (italics supplied).

55 See the comments on this matter in Jones v. Whitehill [1950] 2 K.B. 204, at 207; Langdon v. Horton [1951] 1 K.B. 666, at 669-670.

56 [1964] 1 All E.R. 861.

57 At 865.

as such, and even if they refer to each other as such and regard their association as tantamount to such.[58]

These statements to the effect that there must always be a pre-existing kin relationship of some kind between 'parent' and 'child' cannot, however, be taken with qualification. As has already been observed, it is now established that adopted children, including *de facto* adopted children, can certainly come within the protection afford by the *Rent Acts*, as both Pearson and Russell L.JJ. themselves recognised.[59] But what if the 'child' involved first assumed that role when an adult person? Some statements by the judges in *Ross and Anor.* v. *Collins* in fact seem to envisage the possibility of such an individual being regarded as a member of the tenant's family, notwithstanding the observations in that same case which have already been referred to, Pearson L.J.'s statement, for example, that the adult female defendant in that case 'was in no sense [the deceased tenant's] daughter, neither *de jure* nor *de facto*, nor in any other way',[60] and that 'no other family relationship [could] be suggested—except (as counsel for the defendant put it) something intermediate between a daughter and a sister, or, on the other side, something intermediate between a father and an elder brother',[61] may perhaps appear to contemplate the possibility that the defendant, who was unrelated in any way to the deceased tenant, could have established a *de facto* familial relationship with the deceased had the facts and general situation involved been somewhat different. The defendant there was found to have been more a housekeeper and close companion to the deceased than a person akin to a member of his family. Some statements by Russell L.J. also indicate that some form of pre-existing relationship is not always necessary. He said that the term 'family' in the *Rent Act* was not limited to cases of a strict, legal familial nexus, though he added that it still requires 'at least a broadly recognisable *de facto* familial nexus',[62] which was not to be found in the case before him.

Perhaps the best reconciliation of these various statements in *Ross and Anor* v. *Collins* is that suggested by Russell L.J. Whilst agreeing that the term 'family' in the *Rent Acts* is not limited to cases of a strict, legal familial nexus, he nonetheless observed that any *de facto* familial nexus must still be capable of being recognised as such by the ordinary man, In that regard he noted that this would involve a link through adoption of a minor, whether *de facto* or *de jure*, through marriage, or

[58] At 866. See also the comments in this statement by Megaw L.J. in Joram Developments Ltd v. Sharratt [1978] 2 All E.R. 948, at 953.
[59] At 864, 866.
[60] At 864.
[61] Supra n. 60.
[62] At 866.

(to cover *de facto* spouses) through marriage had there been one.[63] This part of Russell L.J.'s judgment was cited with approved by Magaw L.J. in *Joram Developments Ltd.* v. *Sharratt*[64] in the Court of Appeal, and by Lord Diplock, who gave the principal judgment in the subsequent appeal in that case, in *Carega Properties S.A. (formerly Joram Developments Ltd.)* v. *Sharratt*[65] in the House of Lords. In the *Sharratt* cases it was unanimously held both by the Court of Appeal and by the House of Lords that a man who had lived for eighteen years in a 'sensitive, loving, intellectual and platonic' relationship with a lady over fifty years his senior was not entitled to the statutory protection of the *Rent Act* on the ground that there had in effect, though not in fact, been a nephew-aunt relationship between them.

Although there is as yet no authority on the matter, it seems reasonable to assume that just as a parent-child relationship is an 'appropriate' relationship for the constitution of a family for the purposes of the *Rent Acts*, so too is a grandparent-grandchild relationship. A sibling relationship is also appropriate; the authority for this is *Price* v. *Gould and Ors.*[66] Although there are no problems here with regard to brother and sisters of the full, or even the half blood,[67] it may possibly appear from later judicial statements that brothers and sisters through adoption cannot be included. Thus, for example, as Russell L.J. said in *Ross and Anor* v. *Collins*:[68]

> But two strangers cannot, it seems to me, ever establish artificially for the purposes of this section a familial nexus by acting as brothers or as sisters, even if they call each other such and consider their relationship to be tantamount to that. Nor, in my view, can an adult man and woman who establish a platonic relationship establish a familial nexus by acting as a devoted brother and sister or father and daughter would act, even if they address each other as such, and even if they refer to each other as such and regard their association as tantamount to such.

In fact however, the purport of this last statement—and of not dissimilar statements elsewhere[69]—is quite clear. It is that two people who

[63] Supra n. 62. See also the not dissimilar statements by Pearson L.J. at 864, cited with approval by Browne L.J. in Joram Developments Ltd v. Sharratt [1978] 2 All E.R. 948, at 956.

[64] Supra n. 63 at 952. See also the similar statement by Lawton L.J. at 954.

[65] [1979] 2 All E.R. 1084, at 1087.

[66] (1930) 143 L.T. 333.

[67] See n. 42, *supra*.

[68] [1964] 1 All E.R. 861, at 866. This statement was cited with approval by Lord Diplock in Carega Properties S.A. (formerly Joram Developments Ltd) v. Sharratt [1979] 2 All E.R. 1084 at 1087.

[69] See, e.g., Gammans v. Ekins [1950] 2 K.B. 328, at 331.

do not have a common ancestor, either actual or assumed within the limits commonly recognised as possible (thus including adoption), cannot assume a familial relationship for the purposes of the *Rent Acts*, even if they regard and treat each other as a familial relation of one kind or another. Although no case has made this particular point in quite such an explicit way, such a conclusion seems clear from the authorities referred to in general, and from *Ross and Anor* v. *Collins* and the two *Sharratt* cases in particular.

Are any relationships wider than those of parent and child and brother and sister 'appropriate' for the constitution of a family under the *Rent Acts?* It has already been observed that nephews and nieces of a tenant are not, without more, members of the tenant's family.[70] And neither are his cousins: *Langdon* v. *Horton and Anor.*[71] As Singleton L.J. put it in that particular case: 'The mere fact of cousinship does not make every cousin a member of another cousin's family'.[72] It accordingly seems clear that more remote relations are similarly excluded unless it can be established that the relationship between any such person and the tenant in question is, or was, in effect that of parent-child, in which case the court may well regard a surviving relation as having been a member of the deceased tenant's family, as it did in *Jones* v. *Whitehill.*

This leaves just one relationship to be considered, namely that of husband and wife, and by extension that of *de facto* husband and *de facto* wife. In respect of husband and wife, the very first *Rent Act* case reported, *Salter* v. *Lask*,[73] held that a female tenant's husband was a member of her family. Because of special statutory provisions relating to the wife of a tenant, the converse situation has never arisen in any *Rent Act* case.[74] It seems evident, however, both by virtue of the decision in *Salter* v. *Lask* and from at least one decision concerning a *de facto* wife,[75] that but for such special provisions a wife would equally be held to be a member of her husband's family. But this conclusion, and indeed the decision in *Salter* v. *Lask*, involves a problem, for surely the 'ordinary man' (to use Cohen L.J.'s test) would not normally regard a person's spouse as a member of his or her family unless there are chil-

70 See n. 55 and text, supra.

71 [1951] 1 K.B. 666.

72 At 672.

73 [1925] 1 K.B. 584. For the human interest involved, it is interesting to note that the wife of the judge in that case was the deceased tenant with whom Mr Sharratt had lived for some eighteen years, which relationship led to the two Sharratt cases under the present Rent Act (see n. 64, n. 65 and text, *supra*.

74 See the Increase of Rent and Mortgage Interest (Restrictions) Act 1968, Sched. 1, para. 2, and the Rent Act 1977, Sched. 1, Part I, para. 2.

75 Dyson Holdings Ltd v. Fox [1976] Q.B. 503.

dren involved. If a person known to be married says that he or she is going home to his or her family, would not a casual bystander normally assume that there are children living with them? Indeed, would not the 'ordinary man' regard it as a misuse of language for a spouse without children to refer to both himself and his partner as forming 'a family'? In fact, in *Salter* v. *Lask*, the couple did have a young daughter at the time of the wife's death, and this may have influenced the judge in his decision. Nonetheless, the judge's broad statement, 'I am quite satisfied that the husband of a deceased statutory tenant is a member of that tenant's family',[76] *prima facie* indicates that the existence or absence of children is irrelevant and that a childless married couple can constitute a family.[77]

The first reported case concerning *de facto* spouses, *Gammans* v. *Ekins*,[78] took a stricter approach than that in *Salter* v. *Lask*. In that case a man who had lived for twenty years 'in a close, but unmarried, association' with the deceased female tenant was held not to have been a member of her family. Although the decision in this case was clearly determined to some extent by the Court of Appeal's disapproval of extra-marital relationships, another important—if not the most important—factor was the absence of any children of the union.[79] Evershed M.R. alluded to the otherwise anomalous position of married husbands in this regard, especially as a result of *Salter* v. *Lask*, when he explained—not wholly convincingly—that the language of the *Rent Act* required that a husband of a female tenant be covered by the word 'family'; otherwise, he went on, 'In the case of a childless marriage, I should certainly not have thought it natural to refer to the husband as a member of the wife's family'.[80] In the subsequent case of *Hawes* v. *Evenden*[81] the fact that an unmarried couple had children of their union was held to bring the surviving *de facto* wife within the protection of the legislation.

Although *Gammans* v. *Ekins* was followed by the Court of Appeal in

[76] [1925] 1 K.B. at 587.

[77] Support for the broad statement by Salter J. may be found in the more modern case of Bowlas v. Bowlas [1965] P. 440, at 447, where Scarman J. said 'For the purpose of this [i.e. matrimonial] jurisdiction, in our view a family comes into being upon marriage'. See also the statements in the ensuing appeal, [1965] P. 450, at 457, 461. These statements should, however, be considered in the context both of the particular statutory provisions under consideration there, and of the peculiar facts involved. Note, however, the observations on this general matter in Watson v. Lucas [1980] 3 All E.R. 647, at 652.

[78] [1950] 2 K.B. 328.

[79] See esp. at 331, 332, 333-334.

[80] At 333.

[81] [1953] 2 All E.R. 737.

Ross and Anor v. *Collins*,[82] it was not followed by that same Court in the more recent case of *Dyson Holdings Ltd* v. *Fox*.[83] In this later case the Court of Appeal had no hesitation in holding that the *de facto* wife of a childless union, who had lived with her *de facto* husband for some twenty-six years; was nonetheless a member of his family.[84] Lord Denning M.R. held that *Gammans* v. *Ekins* had been wrongly decided. The other two judges, however, held that the popular meaning of the word 'family' had changed since 1950 when *Gammans* v. *Ekins* had been decided, and that by 1975 two *de facto* spouses could, without more, be considered members of the same family. As Bridge L.J. put it: 'The ordinary man in 1975 would, in my opinion, certainly say that the parties to [a *de facto*] union, provided it had the appropriate degree of apparent permanence and stability, were members of a single family whether they had children or not'.[85] Stamp L.J. has since commented on the legal consequence of that case as follows:

> I conclude that *Dyson Holdings Ltd* v. *Fox* established two propositions: first, that, notwithstanding *Gammans* v. *Ekins*, a relationship between an unmarried man and an unmarried woman living together over a very long period can constitute the family relationship which is necessary in order to satisfy the section, and second, that on the facts in *Dyson Holdings Ltd* v. *Fox* such a relationship was established. One has to ask: 'has the union such a degree of apparent permanence and stability that the ordinary man would say that the parties were, in the words of Bridge L.J. "members of a single family"'.[86]

The decision in *Dyson Holdings Ltd* v. *Fox* can be criticised on several grounds. First, it is doubtful whether, as a matter of fact, the ordinary meaning of the word 'family' had changed between 1950 and 1975, as the majority of the Court of Appeal had claimed, and it is even more doubtful whether even if the meaning had changed, a childless couple in 1975, whether married or unmarried, would normally have been regarded as constituting a family. Some legal criticisms of *Dyson Holdings Ltd* v. *Fox* have already been referred to. These concern the effect that this case has had on the meaning of the statutory term 'family' and include both the argument (of dubious applicability here) that the terms of a statute should be interpreted according to the meaning they bore at

[82] [1964] 1 All E.R. 861.

[83] [1976] Q.B. 861.

[84] One cannot help feeling that the fact that the *de facto* wife was then aged seventy-five and that she had lived with her *de facto* husband from 1935 until his death in 1961 particularly affected the Court of Appeal's conclusions here.

[85] At 513. See also at 511 per James L.J.

[86] Helby v. Rafferty [1978] 3 All E.R. 1016, at 1020. See also at 1024, *per* Roskill L.J.

the time of their enactment, or, in the case of subsequent common legislation, at the time of the original enactment from which they ultimately derive, and the argument that a statute should be interpreted consistently over the passage of time, with any changes to the ambit of the provisions involved being left to the legislature. Although *Dyson Holdings Ltd* v. *Fox* has been doubted and criticised, both implicitly and explicitly, in subsequent cases,[87] it has nonetheless been accepted as binding authority on the Court of Appeal in light of the strict principles of *stare decisis* enunciated by the House of Lords in *Davis* v. *Johnson* in 1978.[88] For the time being, then, there can be no doubt that unmarried, childless couples can be members of the same family, at least for the purposes of the *Rent Act*, provided always that their relationship is sufficiently permanent to warrant such a result. Any change to this state of the law must now depend upon either fresh legislation or a rejection of *Dyson Holdings Ltd* v. *Fox* by the House of Lords.

'FAMILY' IN AUSTRALIA: THE FAMILY LAW ACT

The term 'family' has arisen for consideration only infrequently in Australian courts, and then mostly in recent years in the context of the *Family Law Act* 1975 (Cth).[89] The principal reference to the family in this Act is in s. 43(b)[90] which requires all courts exercising jurisdiction under the Act to have regard to:

> the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children.

Section 43(b) raises two questions concerning the meaning of the term

[87] See Joram Developments Ltd v. Sharratt [1978] 2 All E.R. 948, at 953, 954, 956; Helby v. Rafferty [1978] 3 All E.R. 1016, at 1018, 1024-26, 1025-26, Watson v. Lucas; [1980] 3 All E.R. 647.

[88] [1978] 1 All E.R. 1132. Dyson Holdings Ltd v. Fox was regarded as binding, though distinguished, in Helby v. Rafferty supra n. 87 and followed in Watson v. Lucas, supra n. 87.

[89] For other instances, see McGuire v. McGuire; State Government Insurance Office (Queensland) Third Party [1977] Qd. R. 303 (adult son who lived and worked in a hotel owned by his mother held to be a member of his employer's family dwelling in her house for the purposes of s. 3(1) of the Workers' Compensation Act, 1916-1974 (Qld)); South Sydney Municipal Council v. James (1977) 35 L.G.R.A. 107, and on appeal, at 432 (ten unrelated people who lived together as a community known as the 'Dempsey Family' held not to be a 'single family' for the purposes of cl. 4 of the City of Sydney Planning Scheme Ordinance); Re Nash [1979] Qd. R. 219 ('family' in a will held to include illegitimate children).

[90] The word also appears in s. 114B(2)(a) in respect of the functions of the Institute of Family Studies.

'family' in this particular provision. The first is whether this term refers only to parents. It may be argued that in light of the context of s. 43(b) it does, for parents alone are normally responsible for the care and education of dependent children, and thus the pronoun 'it', which clearly stands for 'the family' in the clause 'while *it* is responsible for the care and education of dependent children,' would appear to signify no more than the parents of children. Dunn J., however, adopted a wider and probably more reasonable interpretation of this term in *Sylvester* v. *Sylvester*.[91] There he said: 'The "family" of which s. 43(b) of the *Family Law Act* 1975 speaks is, in my opinion, a "father-mother-children" group.'[92] The judge was, however, there dealing simply with the question of whether the term 'family' includes grand-parents (which he held not to be the case) and not with the specific question of whether it properly includes children. In an equally *obiter* statement in *In the Marriage of Lutzke*,[93] Lindenmayer J. was similarly of the opinion that 'family' in s. 43(b) does include children as well as their parents.[94]

The second problem referred to is whether the term 'family' in s. 43(b) should be confined just to married parents and to the children of their marriage. This problem arises from the limitations placed by the High Court on provisions of *The Family Law Act* in light of the scope of the principal heads of constitutional power concerning family law, namely s. 51(xxi) and (xxii) of the *Constitution*. Thus, in *Russell* v. *Russell*; *Farrelly* v. *Farrelly*[95] the High Court struck down certain provisions of the *Family Law Act* which purported to enable proceedings to be brought under this Act between parties other than parties to a marriage, and in respect of children other than children of the marriage involved. In the subsequent case of *In the Marriage of Opperman*,[96] however, the majority of the Full Court of the Family Court was of the opinion that the term 'family' in s. 43(b) could certainly include step-children, who are not otherwise children of the marriage of the parties, *semble* at least when the principal provisions of the *Family Law Act* invoked are those validated by s. 51(xxii) of the Constitution—i.e. the divorce and matrimonial causes power.[97] Lindenmayer J. took an even broader view of this general matter in *In the Marriage of Lutzke* and

91 (1976) 10 A.L.R. 566.
92 At 573.
93 (1979) 5 Fam. L.R. 553.
94 At 567. See also In the Marriage of Opperman (1978) 33 F.L.R. 248, at 257.
95 (1976) 134 C.L.R. 495. See also in this connection Dowal v. Murray (1978) 53 A.L.J.R. 134.
96 (1978) 33 F.L.R. 248.
97 At 257.

would seem prepared to include step-children in any event. He said:[98]

> [I]n my opinion, the word 'family' in s. 43(b) is not intended as a reference only to the group constituted by a husband and wife and the children of their union. In my opinion it includes a group of people constituted by a husband and wife and the children who reside with them and under their care and protection, including the children of either one of them (but not the other) who so resides.

There is good reason for rejecting the suggestion that the word 'family' in s. 43(b) should be subjected to any constitutional limitation, for the terms of para. (b) do not directly affect the exercise of the court's discretion under the Act but are in essence hortatory only.[99] As such, the need for the provision involved to be justified by any of the specific heads of power in s. 51 of the *Constitution* is not apparent. All that is necessary is that the general duty imposed upon the courts by the opening words of s. 43 be justified under the *Constitution*.

A quite different source of limitation on the meaning of the word 'family' in s. 43(b) may, however, be found in para. (a) of this section, which concerns the need to protect the institution of marriage. It may be argued that the 'family' referred to in para. (b) should relate to the institution of marriage as this is defined—in traditional terms—in s. 43(a).[100] There is a hint that such is the case in *In the Marriage of Ostrofski*.[101] If this is correct (and the argument is not entirely convincing), then s. 43(b) concerns only those families which are the product of marriages as defined in s. 43(a).

The four principles set out in s. 43(a)-(d) of the *Family Law Act* are substantially reproduced in s. 281(a)-(d) of the *Family Court Act* 1975-1982, of Western Australia. It may be argued that any provisions of this State Act which clearly follow provisions of the Commonwealth Act should be interpreted the same way, and accordingly that if the term 'family' in s. 43(b) is to be interpreted restrictively, then the same should apply to s. 281(b). Apart from that appeal to consistency, however, there is no other obvious reason for not giving the term 'family' in s. 281(b) anything other than its ordinary, everyday meaning, unless the 'family' referred to in para. (b) is indeed directly related to the institution of marriage referred to in para. (a), as was suggested in respect of

98 (1979) 5 Fam. L.R. 553, at 567.

99 See, e.g., In the Marriage of Opperman (1978) 33 F.L.R. 248, at 266.

100 Cf. the now classic statement by Jacobs J. that marriage is an institution of the family, in Russell v. Russell; Farrelly v. Farrelly (1976) 134 C.L.R. 495, at 548. The definition of marriage in s. 43(a) is, of course, derived from Wilde J.O.'s famous statement in Hyde v. Hyde and Woodmansee (1866) L.R. 1 P. & D. 130, at 133.

101 (1979) 5 Fam. L.R. 685, at 691-92.

the Commonwealth Act by Lambert J. in *In the Marriage of Ostrofski*.[102]

CONCLUSION

One obvious conclusion from the foregoing is that there is indeed still no precise notion of 'family' known to law as there is, for example, of marriage. Subject, however, to the context in which the term 'family' may appear, the courts do nonetheless tend to give this word its ordinary, popular meaning whenever it arises for judicial consideration, and to this extent, the 'legal' meaning of this term is both discernible and consistent. Moreover, where this term has arisen for consideration in a particular context with some frequency, as has occurred in the case of the English *Rent Acts*, a certain refinement of the notion of 'family' in that context is particularly evident.

More interesting, perhaps, is a certain tension that seems apparent from the general case law on this subject. This arises from two discernible forces that appear to be involved in the interpretation of the term 'family'. The first is the traditional inclination of courts to be conservative in their interpretation of words. This has resulted in a tendency for courts to construe the term 'family' narrowly and thus, for example, to exclude, in different contexts, cousins (*Langdon* v. *Horton and Anor*)[103] and even grand-parents (*Sylvester* v. *Sylvester*).[104] On the other hand, there has also been an evident determination on the part of the courts to recognise the fact that times and more changes, and that although the paradigm family is the product of marriage, marriage is not now a necessary condition for a family, if indeed it ever was. The ready recognition given by the courts to illegitimate children as being members of particular families clearly illustrates this fact and requires no further comment. That said, however, the problems which the English courts have had to face over recent years as a result of the decision in *Dyson Holdings Ltd* v. *Fox*,[105] where the Court of Appeal held that an unmarried couple can by themselves constitute a family for the purposes of the *Rent Act*, illustrate the difficulties that can result if courts construe non-technical terms too widely—or at least put themselves in the van of current English usage.

Whether there ever will be a precise, general notion of 'family' known to law is uncertain, especially in Australia where the notion of 'marriage' must, for constitutional reasons, remain for the time being the

[102] Supra n. 101.
[103] [1951] 1 K.B. 666.
[104] (1976) 10 A.L.R. 566.
[105] [1976] Q.B. 503.

dominant concept of family law. Yet the very use of the term 'family' in legislation today—as witness the title not just of the *Family Law Act* 1975 (Cth) but also of the *Family Relationships Act*, 1975 (S.A.) and the *Family Court Act* 1975-1982 (W.A.)—indicates a clear legislative interest at both State and Federal levels in the family as a distinct social unit. Perhaps, then a precise notion of 'family' will yet evolve in the not too distant future.