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Parenting after Separation - The Process of Dispute Resolution in Australia

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PARENTING AFTER SEPARATION - THE PROCESS OF DISPUTE RESOLUTION IN AUSTRALIA

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Abstract

Australian family law has recently gone through the most important procedural revolution in child custody law in many years. This article explains these changes by first describing the division of legislative responsibility in parenting matters, and the language used in Australia in place of "custody." It then explores the procedure for resolving parenting disputes. The changes include new laws dealing with parenting after separation, and new processes for resolving family disputes, in particular, the development of Family Relationship Centres. This paper was given in Kyoto, Japan in January 2010 and published in Japanese.

Keywords: family law – children – parents – dispute resolution.

1. Legislative responsibility in family law

In Australia, more than one parliament has responsibility in family law matters. There is the Parliament for the Federal government, the Commonwealth of Australia. There are also six parliaments for each of the six State governments. In addition, there are two territories that have their own parliaments, the Australian Capital Territory and the Northern Territory. Nonetheless, family law in Australia is governed principally by federal law, and in particular, the Family Law Act 1975. This legislation covers most aspects of family law including

divorce, property, spousal maintenance and the law of parenting. The law of marriage[1] and child support[2] are dealt with in separate enactments.

The extent of federal responsibility for family law is the result of co-operation between state and federal governments. The Federal Constitution gives the Federal Parliament power to make laws in respect of marriage and divorce. That constitutional position meant at one stage that all issues concerning unmarried parents were the responsibility of the States and Territories, and were dealt with in state and territory courts. However the Federal Constitution allows the States to refer legislative power to the Commonwealth.[3] Given the difficulties created by the division of responsibilities between governments based on the marital status of the parents, almost all the State governments referred their legislative power in relation to custody, guardianship, access and child maintenance to the Commonwealth between 1986 and 1990.[4] The exception was Western Australia, which because it has a Family Court exercising both State and Federal jurisdiction, did not need to do so.[5]

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1 Marriage Act 1961 (Cth). All Australian legislation is available at http:/www.austlii.edu.au.

2 Child Support (Registration and Collection) Act 1988; Child Support (Assessment) Act 1989. The FLA also contains some provisions concerning child maintenance. The main application of these now is to children over 18.

3 Paragraph (xxxvii) of s 51 of the Constitution empowers the Commonwealth Parliament to make laws with respect to matters referred to it by the Parliament or Parliaments of any State or States. The Commonwealth also has power to legislate for the Territories.

4 The terms of that referral were similar in all States. Commonwealth Powers (Family Law-Children) Act 1986 (NSW); *Commonwealth Powers (Family Law) Act* 1986 (SA), *Commonwealth Powers (Family Law-Children) Act* 1986 (Vic.), *Commonwealth Powers (Family Law) Act* 1987 (Tas); *Commonwealth Powers (Family Law-Children) Act* 1990 (Qld).

5 In Western Australia, both state and federal family law matters are dealt with in the same court, the Family Court of Western Australia, which is established under state law. The federal and state governments co-operate to have uniform consistent legislation passed by the State Parliament in relation to family law matters. Those matters which are not dealt with under the federal Family Law Act 1975 are dealt with under parallel state legislation, the Family Court Act 1987 (WA).

The consequence is that all matters concerning child custody and child support are in practice uniform throughout Australia. The marital status of the parents makes no difference to the applicable legal principles.[6] However, adoption and the public law of child protection remain matters in the domain of the States and Territories.

2. The language of parenting law

Australian law no longer refers to "custody." The law was amended in 1995 to remove the terminology of "custody" and "access" and to replace it with language that avoids the idea that after separation, the majority of the power and responsibility for the child vests in one parent to the exclusion of the other. Now court orders say that the children should 'live with' one parent and 'spend time' with the other parent, or live with each parent according to a schedule provided in the court orders. Usually, both parents have parental responsibility, or 'guardianship' as it used to be known.

3. The current law on parenting after separation

The current law is governed by the Family Law Amendment (Shared Parental Responsibility) Act 2006. The overall effect of the legislation is to encourage greater involvement by non-resident parents (mostly fathers) unless children need to be protected from violence or abuse.

The legislation was to a large extent the consequence of recommendations made by a Parliamentary Committee, in an important report.[7] The Inquiry was

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6 Parental responsibility depends on biological parenthood (or adoption) and it is irrelevant that the parents are not married: Family Law Act ss. 61B, 61C. Both parents have equal responsibility as soon as the child is born, whether or not they have been married or have ever lived together.

7 The Family and Community Affairs Committee of the House of Representatives, *Every Picture Tells a Story: Report of the Inquiry into Child Custody Arrangements in the Event of Family Separation* (Parliament of Australia, Dec 2003).

initiated by the Prime Minister of the day, John Howard, following pressure from backbench members of Parliament, who had constant complaints from constituents about family law matters. The Family and Community Affairs Committee of the House of Representatives was asked to examine whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted. It was also asked to consider grandparents' rights to contact and whether changes should be made to the formula for calculating child support liabilities.

The Committee reported at the end of 2003 after one of the largest and most intensive public inquiries ever conducted by a parliamentary committee. On the issue of "joint custody" it did not recommend a presumption in favour of equal time. Instead, it recommended in favour of equal parental responsibility. Its recommendations led in due course to the 2006 legislation.

The key changes are new objects for the legislation, the enactment of two 'primary considerations' in determining what arrangements are in the best interests of the child, and requirements to consider particular types of parenting arrangement in allocating the time the children are to spend with each parent.

New Objects for the Legislation

First of all, the objects of the Family Law Act were amended to emphasise the importance of parents having a meaningful involvement in their children's lives and also to protect children from physical or psychological harm. An 'objects clause' is like a guiding light to courts. Section 60B of the Act now provides:

> (1) The objects of this Part are to ensure that the best interests of children are met by:
>
> ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
>
> protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

ensuring that children receive adequate and proper parenting to help them achieve their full potential; and

ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

The Meaningful Involvement of Non-resident Parents

Other provisions in the legislation give effect to one of the objects of the legislation – to promote the meaningful involvement of both parents to the maximum extent that is in the best interests of the child. It requires the court at least to consider certain specified options concerning the allocation of time between the parents.

There is a presumption in favour of equal shared parental responsibility which can be rebutted if there is reason to believe a parent has engaged in child abuse or family violence (s.61DA). If the court is making an order for equal shared parental responsibility, then it must also consider whether it is in the best interests of the child, and reasonably practicable, to make an order that the child spend equal time with both parents (s.65DAA(1)). If that is contra-indicated, then it must consider whether it is in the best interests of the child, and reasonably practicable to make an order that the child spend 'substantial and significant time' with each parent (s.65DAA(2)).

The Full Court of the Family Court of Australia, exercising appellate jurisdiction, has given guidance on what it means to 'consider' something. The Court has said that it "suggests a consideration tending to a result, or the need to consider positively the making of an order" (Goode & Goode (2006) FLC ¶93-286 at para 64). This does not mean there is a *legal presumption* in favour of either equal time or substantial and significant time in the absence of violence or abuse, but the Court is required to give positive and sympathetic consideration to parenting arrangements that meet the relevant description.

The legislation identifies a checklist of factors to examine in determining whether an arrangement for equal time or substantial and significant time is reasonably practicable. Section 65DAA(5) of the Family Law Act provides:

> In determining … whether it is reasonably practicable for a child to spend equal time, or substantial and significant time, with each of the child's parents, the court must have regard to:
>
> how far apart the parents live from each other; and
>
> the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and
>
> the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and
>
> the impact that an arrangement of that kind would have on the child; and
>
> such other matters as the court considers relevant.

An arrangement for 'substantial and significant time' may well be reasonably practicable if the parents live in sufficiently close proximity to one another. The definition of 'substantial and significant time' is particularly important, because it indicates a legislative requirement to consider an arrangement which departs from the patterns of contact only on weekends and in school holidays. The Act (ss.63DA(3) & 65DAA(3)) provides that:

> (3) … a child will be taken to spend substantial and significant time with a parent only if:
>
> the time the child spends with the parent includes both:
>
> days that fall on weekends and holidays; and
>
> days that do not fall on weekends or holidays; and
>
> the time the child spends with the parent allows the parent to be involved in:
>
> the child's daily routine; and
>
> occasions and events that are of particular significance to the child; and
>
> the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.

It is not enough then, even that the time allocated includes some time during the school week. It must also allow for the parent to be involved in the children's daily routine. One judge has spelled out in more detail what 'substantial and significant time' involves. Federal Magistrate Halligan wrote in KML and RAE [2006] FMCAfam 528, para 113:

> "[F]or a parenting arrangement to involve substantial and significant time, one would normally expect to see the amount of mid week time, when taken with weekend, holiday and special occasion time, providing an opportunity for the child to be assisted by the parent with homework, to have the parent take the child to and from sports training and games in which the child is involved, to have the parent take the child to practice for, and to attend performances relating to, the child's other extra curricular activities such as scouts or guides, music and dance, and to experience life as a member of the parent's household with all the mundane reality that entails, including the parent cooking, washing and cleaning for the child, and the child, as may be age appropriate and in accordance with the reasonable wishes of the parent, assuming some household responsibilities in that parent's household."

Duties of Advisers

Lawyers, mediators and counsellors must advise their clients that they should consider the options of equal time, and substantial and significant time (s.63DA). This is an unusual feature of the Australian family law legislation. The typical way in which legislation is drafted in common law countries is for Parliament to instruct judges on how they should determine contested cases, or what factors they should consider, on the basis that the great majority who do not go before a judge will gain some guidance from the outcomes of the decided cases, 'bargaining in the shadow of the law'.[8] This of course, requires legal advice. The Australian legislation addresses not only lawyers but mediators and counsellors,

[8] R Mnookin and L Kornhauser, 'Bargaining in the shadow of the law: the case of divorce', (1979) *88 Yale Law Journal* 950–997.

seeking to reach the majority of families. By imposing requirements on mediators and other advisers as well as judges, the Parliament intended that the content of discussions in mediation would be informed by the types of parenting arrangement being promoted in the statute.

Shared Parental Responsibility

The legislation also defines what is meant by shared parental responsibility. Section 65DAC of the Family Law Act states that where two or more persons share parental responsibility, "the order is taken to require the decision to be made jointly by those persons." The long-term issues are issues about the care, welfare and development of the child of a long-term nature. They include, but are not limited to, issues about:

(a) the child's education (both current and future); and
(b) the child's religious and cultural upbringing; and
(c) the child's health; and
(d) the child's name; and
(e) changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent.

While s.65DAC(2) states that the decision must be made "jointly", s.65DAC(3) and (4) go on to qualify this. Subsection (3) states that

"the order is taken to require each of those persons:

(a) to consult the other person in relation to the decision to be made about that issue; and
(b) to make a genuine effort to come to a joint decision about that issue."

Subsection (4) provides: "To avoid doubt, this section does not require any other person to establish, before acting on a decision about the child communicated by one of those persons, that the decision has been made jointly."

It follows that the Act does not impose paralysis if the parents are not able to agree (for example on where the child will go to school or whether he or she should have certain elective surgery). Third parties may act upon the consent of one parent, and it is open to the other to seek an order from the court if he or she disagrees. In practice, third parties are likely to act on the consent or application of a primary caregiver, leaving the non-resident parent to seek recourse from the courts, by way of injunction or otherwise, if he or she objects to the given course of action.

The best interests of the child

If a judge has to decide the case, then he or she must make the decision that is in the best interests of the child. In deciding what that is, there are two primary considerations. Section 60CC(2) provides:

> The primary considerations are:
>
> (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
>
> (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

The Full Court of the Family Court of Australia, which acts as a specialist appeal court in family law cases, has summarised the effect of the legislative reforms as follows:[9]

> "In our view, it can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their children's lives, both as to parental responsibility and as to time spent with the children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable."

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[9] Goode & Goode (2006) FLC ¶93-286 at para 72.

Violence and abuse

Many cases that result in trials involve allegations of violence or child abuse. Protecting children from violence and abuse is not only a primary consideration, but is a goal supported by other provisions in the legislation. Section 60CG of the Act provides:

> (1) In considering what order to make, the court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order:
>
> (a) is consistent with any family violence order; and
>
> (b) does not expose a person to an unacceptable risk of family violence.

Young children

There are no special provisions in the Family Law Act to deal with young children. There is no preference that the child will live with the mother, but in the great majority of cases, in practice, it is the mother who has primary care. There are a lot of debates in Australia, as in other countries, about whether very young children, for example, those under 3 years old, should stay overnight with the non-resident parent. In general, if the father was involved in looking after the child before the parents separated, there is no reason why the child should not stay overnight with him. However, the position may be different where the mother and father have never lived together or separated before the child was born.

4. The court system for family law disputes

When the Family Law Act was passed in 1975, it did not only introduce no-fault divorce. It also established a new and specialist court to deal with family law matters, the Family Court of Australia. The Family Court has an equivalent status to the Supreme Courts of the States and Territories and the Federal Court of Australia, which deals with a large body of federal law matters other than family law.

It was central to the vision for the Family Court when it was established in 1976 that it should be a "helping court" with a strong emphasis on alternative dispute resolution for both parenting and financial matters.[10] In parenting matters, the Family Court Counselling Service worked to help parents reach an agreement, utilising counselling and conciliation techniques. Now the Family Court counsellors have been renamed Family Consultants.

The workload pressure on the Family Court and Federal Court, but in particular, the Family Court, led in 1999 to the enactment of legislation to establish a Federal Magistrates Court. This commenced operation in 2000. It exercises federal jurisdiction in a range of areas, but the majority of its workload is in family law.

In parenting matters, the Federal Magistrates Court has the same jurisdiction as the Family Court of Australia. The major distinction between them is that trials expected to last longer than about four days will typically be heard in the Family Court, and the Family Court also hears particularly complex cases. The processes utilised in the two courts are very different. Usually, a matter will reach trial more quickly in the Federal Magistrates Court, but the more structured case management system of the Family Court has advantages in helping parties to settle at an early stage of proceedings.

While the two courts cooperate well, having two courts with similar jurisdiction but different processes leads to an undesirable level of complexity and confusion for litigants. The Government announced in 2009 that to streamline the system and to ensure better case management across the courts, it would establish a single court again for family law matters.[11] The details of this remain to be worked out.

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[10] K Enderby, 'The Family Law Act: Background to the Legislation', (1975) 1 *University of NSW Law Journal* 10, 26.

[11] This decision was based on a report: D Semple and the Attorney-General's Department, *Future Governance Options for Federal Family Law in Australia: Striking the Right Balance* (2008).

The Family Court hears appeals from the Federal Magistrates Court. Appeals from trial judges in the Family Court are heard by the Full Court of the Family Court. Leave may be granted to appeal further to the High Court of Australia.

5. The importance of private agreements

Private agreements are strongly encouraged in the Australian family law system. The objects of the Family Law Act include the goal that "parents should agree about the future parenting of their children."[12]

There is no requirement that parents embody their agreement in a court order. Parents may decide to make no formal arrangement at all. If they wish to formalise their agreement, the law provides two options. The first is to enter into a parenting plan. This serves as a record of the agreement that has been reached and, of course, a court will consider the agreement as part of the background information, should a parenting dispute arise subsequently.

The other option is to embody an agreement in a consent order. The Family Court has a procedure by which consent orders can be made with little scrutiny in chambers as long as the application indicates that both parties have received legal advice. While the Federal Magistrates Court has no such procedure, magistrates also encourage parties to reach their own agreement and will frequently make orders by consent once agreement is reached.

Compulsory mediation

Alternative dispute resolution is an important feature of the family law process. Some form of mediation, called 'family dispute resolution', is now a requirement before a person can file an application for parenting orders in court.[13] Some

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12 Family Law Act s. 60B(2)(d).

13 Family Law Act 1975, s.60I.

people may be exempted on application to the Court. The grounds of exemption are:[14]

- there has been abuse of the child by one of the parties to the proceedings or there would be a risk of abuse of the child if there were to be a delay in applying for the order;
- there has been family violence by one of the parties to the proceedings or there is a risk of it;
- the application is being brought for contravention of an order that is less than 12 months old and the court is satisfied that there are reasonable grounds to believe that the person has behaved in a way that shows a serious disregard for his or her obligations under the order;
- the application is made in circumstances of urgency; or
- one or more of the parties to the proceedings is unable to participate effectively in family dispute resolution (whether because of an incapacity of some kind, physical remoteness from dispute resolution services or for some other reason).

In addition to the grounds on which an exemption may be sought from the court, mediators, known as family dispute resolution practitioners, may also decide that a case is not suitable for mediation. The grounds on which this determination may be made is that a party is unable to negotiate freely in the dispute because of any of the following matters:[15]

(a) a history of family violence (if any) among the parties;

(b) the likely safety of the parties;

(c) the equality of bargaining power among the parties;

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14 Family Law Act 1975, s.60I(9).

15 Family Law Regulations 1984, regs. 62(2), 62A).

(d) the risk that a child may suffer abuse;

(e) the emotional, psychological and physical health of the parties;

(f) any other matter that the family dispute resolution practitioner considers relevant to the proposed family dispute resolution.

The discretion that mediators have to certify that a case is not suitable for mediation is of course, essential. There is a need to screen for domestic violence and to address other situations where mediation is inappropriate. A new assessment program has been developed for this purpose.[16]

At the conclusion of a mediation, a certificate is given if the parents have been unable to agree. A certificate may also be given if the mediation did not proceed because the other person was unwilling to participate, or if the family dispute resolution practitioner decided that mediation would not be appropriate in the circumstances. A certificate is required when filing an application in court unless a ground for exemption is claimed.

People can go to any mediation service they choose; but one service is free and readily available. This is the Family Relationship Centre. These Centres are designed to help parents reach agreements about parenting after separation.

6. Family Relationship Centres

The Family Relationship Centres (FRCs) are the most significant innovation in family law since 1975. There are now 65 centres all over the country. The first of them opened in July 2006.

What are Family Relationship Centres?

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16 G Winkworth, & M McArthur, *Framework for screening, assessment and referrals in Family Relationship Centres and the Family Relationship Advice Line*. Canberra: Attorney-General's Department (2008).

FRCs have many roles. First and foremost, they are an early intervention initiative to help parents work out post-separation parenting arrangements in the aftermath of separation, managing the very difficult transition from parenting together to parenting apart. They are also available to help resolve ongoing conflicts and difficulties as circumstances change. They also provide an educational, support and counselling role to parents going through separation with the goal of helping parents to understand and focus upon children's needs, and by giving initial information to them about such matters as child support and welfare benefits. They are not only a resource for parents but for grandparents as well.

One of the aims of the FRCs is to achieve a long-term cultural change in the pathways people take to resolve disputes about parenting arrangements after separation. The concept behind the Government's investment in FRCs is that when parents are having difficulty agreeing on the post-separation parenting arrangements, they have a relationship problem, not necessarily a legal one. If no other solution can be found, the dispute may need to go to an adjudication by someone who can make a binding decision; but it should not be seen as a legal issue from the beginning.

The FRCs do not only have a role in helping parents after separation. They are not 'divorce shops'. They are meant also to play a role in strengthening intact relationships by offering an accessible source for information and referral on marriage and parenting issues, and providing a gateway to other government and non-government services to support families. The potential for a supportive and preventive role in strengthening family life and in helping people whose relationships are beginning to experience significant difficulties was a key rationale for the development of the FRCs. The extent to which Centres do so nonetheless depends on the organisation running the Centre.

The Government's document that explains about FRCs summarises these different roles as follows:[17]

> "The Centres will be a highly visible entry point or gateway to a whole service system. They will assist:
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> - couples about to be married to get information about pre-marriage education
> - families wanting to improve their relationships to get information about family relationship education and other services that can help strengthen relationships
> - families having relationship difficulties to get information and referral to other services that help to prevent separation
> - separated parents to resolve disputes and reach agreement on parenting arrangements outside the court system through child-focused information, advice and family dispute resolution, as well as referral to other services
> - separated parents whose arrangements have broken down or whose court orders have been breached, to resolve the issue outside the court system, through information, advice, referral and family dispute resolution
> - other people who deal with families such as teachers or doctors, and
> - grandparents and other extended family members affected by a family separation through information, advice, referral or family dispute resolution services."

FRCs have been established in all the major population centres and regions. The provision of 65 such Centres across the country equates to approximately one centre for every 300,000 people in the population. The Centres are funded by the Government and operate in accordance with guidelines set by the Government. However, they are actually run by non-government organisations with experience in counselling and mediation, selected on a tender basis, and staffed by professional counsellors and mediators. Although actually run by different service providers in different localities, the FRCs have a common identity and logo for the public.

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[17] Commonwealth of Australia, *Operational framework for Family Relationship Centres*. Canberra: Commonwealth of Australia (2007). p.2.

Family Relationship Centres as gateways

The Family Relationship Centre does not provide all the services that people need in making the difficult adjustment to divorce. The FRCs act as a gateway to other kinds of services. There will be those who may want to attempt reconciliation with the assistance of relationship counselling services; others who will join a program for perpetrators of domestic violence or for gambling addiction; others still who will want to access other kinds of services, such as support programs for separated fathers. The FRCs are thus about much more than organising post-separation parenting. They may be the gateway also to services which will help heal relationships, or to services which will help people deal with the grief associated with relationship breakdown.

How do Family Relationship Centres operate?

While there are some variations in the model around the country, most centres are staffed by a combination of individual advisers and mediators. The centres are intended to be highly visible and accessible. The Government launched the Centres with a major advertising campaign. The Centres were required to find a location that is central for the community being served, being in the places that people go to for their shopping and other business needs. Leaflets about the Centres can be found in such places as doctors' surgeries, out of school care services, and community health centres. The Centres achieved a high level of visibility very quickly indeed.

<u>Individual sessions with advisers</u>

Parents inquiring at the FRC are usually offered an individual session with an adviser to receive initial, basic advice about options and sources of help for dealing with whatever problems might have led them to call into the Centre. Most often, these advisers are called Parenting Advisers, but other names are in use in certain centres. They may advise on sources of help such as drug and alcohol or gambling addiction services, relationship counselling organisations and financial counselling services. They may also offer assistance to parents

having problems in relation to their parenting role, providing referral, for example, to family support services and parent-adolescent mediation services.

Most commonly, people who come into the Centres will recently have separated, or will be contemplating separation. Some may have separated years before, but are coming because of ongoing difficulties with the parenting arrangements. The kinds of issues which might be covered include information about relationship counselling and mediation; initial advice about how to apply for income support payments if needed, and applying for child support; and referral to sources of support for people with personal safety concerns. Of course, the relevant agencies would remain the most appropriate source of detailed advice on such matters as child support or welfare benefits.

The need for this personal session with an adviser arose from a realisation that people need a range of services other than legal advice in the aftermath of separation. Part of the idea of the FRCs was to respond to this need for information and support. The major role of the personal interview, beyond an initial assessment of the person's needs, is to help people access the services and agencies that will be of most help to them. It was integral to the vision for the centres that this service should be a personal one. It would be a lot cheaper to provide free booklets from an information stand, or to put all the relevant information people want to know in a 'frequently asked questions' section on a website, but this is not what people need at times of great difficulty in their lives. They need individual attention and a personal, listening ear, to begin to move forward in addressing their difficulties. Some people need assistance in making links with the appropriate service.

Free Mediation

The FRCs also offer free mediation on parenting issues. Financial matters may also be discussed in mediation as long as the primary focus is on resolving the parenting arrangements. This is because it is often impossible to separate the division of property from the discussion of where the children will live. The free

mediation is for up to 3 hours (excluding the pre-mediation session with each participant). Thereafter, it may be means tested.

The parents may return for a further 3 hours of free mediation on two further occasions in a two year period, as long as the mediation is dealing with new issues. This reflects the new approach being taken to parenting after separation in Australia. The goal of the mediation is not to reach a final resolution of all the issues for the long-term. In the aftermath of separation, often feelings are too raw, and the situation too fluid, to make it possible for parents to commit to long-term parenting arrangements. There will be those who simply are not ready, early on in the separation, to reach a long-term agreement about post-separation parenting because they are still working through the emotional response to the other parent's decision to leave. In any event, children's needs and schedules change as they grow older. Contact arrangements which 'work' when a little boy is five may not work when, a couple of years' later, he becomes a soccer enthusiast and his games need to be accommodated in the parenting schedule. Contact arrangements may also need to be negotiated if a parent's working hours change significantly, or if a parent moves sufficiently far away from the other that regular midweek contact becomes impracticable.

The goal of mediation in FRCs is therefore to help parents work out parenting arrangements for the time being. In an initial mediation, within a few weeks or months of separation, it is hoped that at the very least, short-term parenting arrangements can be put in place that allow both parents to remain involved in caring for the children, and that these will then form the basis of more enduring arrangements. There is ample evidence from the history of counselling in Australia and the experience of other jurisdictions that the earlier parents can be involved in negotiating a compromise to their disputes, the more likely it is that the dispute will be resolved.

Another reason for allowing more than one free mediation in any two year period is to allow for experimentation and reality-testing. Mediators can suggest an arrangement that works for other parents in similar circumstances, and the

parents can just try it for a few weeks or months. The opportunity to come back for further free mediation encourages this kind of experimentation.

The FRCs have a particular role to play in the resolution of disputes about alleged contraventions of court orders. Experience in the courts has shown that at least some contravention disputes concern problems which arise from court orders, frequently made by consent, which are either unworkable or which have become unworkable as circumstances have changed.[18] The FRCs offer an option to help resolve these cases.

Other Roles of the Centres

The Centres have various other roles and offer other kinds of services.

A Resource Centre

It is intended that the FRCs act as a hub for other community organisations to offer programs, taking advantage of the visibility and accessibility of the location, and the public awareness of the Centres in the community. The Government's operational guidelines explain:[19]

> "Many people only need information to help them make decisions about their families but don't know where to get it. Family Relationship Centres will be a community resource, like the local library. The Centres will have information for people at all stages of family relationships. The Centres will encourage families to drop in for information and resources to support their family relationships, whether or not they have any difficulties. Centres may also send information out to families in their local area. Information might be provided through brochures, audiovisual material (such as DVDs) or fact sheets.
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> Centres might hold public information sessions or training seminars on different family relationship issues. These might be run by the operators of the Centre or

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[18] Family Law Council, *Improving post-parenting order processes*. Canberra: Commonwealth of Australia, 2007.

[19] Commonwealth of Australia, *Operational framework for Family Relationship Centres*. Canberra: Commonwealth of Australia (2007). p.2.

other organisations. Family Relationship Centres will be expected to encourage the use of their facilities by other local providers of relevant programs."

Group Sessions

Another important role of the Centres is to offer group sessions for parents experiencing separation. Parenting after separation seminars, required by courts, are an established feature of the landscape in the United States. The information sessions may cover such issues as the way people deal with separation emotionally; the need to separate the parents' conflicts from issues about the children; the value of a parenting plan; what helps children get through the divorce process; what harms them; how parenting arrangements need to take account of the needs of children at different developmental stages; options for structuring post-separation parenting arrangements; shared parenting, and when shared parenting is contra-indicated; the issue of children's participation in decision-making about arrangements; sources of help to deal with domestic violence and child protection issues; and comparing mediation and litigation as options for dealing with disputes about the children.

Success of the Family Relationship Centres

In the first couple of years of their operation, Family Relationship Centres were widely regarded as being highly successful. Fifteen centres were established in the first 12 months from July 2006. Another 25 were opened in July 2007. Almost all the remainder opened in July 2008.

By the end of March 2008, the first 40 Centres had held almost 15,300 family dispute resolution sessions.[20] By the end of June 2008, there had been a drop in filings in family law proceedings over one year of about 18%.[21]

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[20] Robert McLelland, Attorney-General, speech given at Newcastle Gateway Project Family Pathways Conference, June 13, 2008.

[21] Robert McLelland, Attorney-General, speech given at Family Relationship Services Australia Inaugural National Conference, November 5, 2008.

That figure is notable in two respects. Firstly, the fall in court filings has been achieved with only 40 centres open, not the full complement of 65 that are now open. It can be expected that with 65 centres fully operational, the annual decrease in court filings will be greater still. Secondly, the decrease is as a percentage of all filings, many of which are in relation to financial matters and the division of property. The proportion of parenting disputes that have been resolved without the need for a court application is therefore much greater than 18%. However, some of the reduction in filings may have been due to a 'delay effect'. As people have had to go through a dispute resolution process first, they have had to delay filing proceedings until the conclusion of that process. This may have affected numbers of filings in any given year.

The success of FRCs should not only be measured, however, in terms of the extent of reductions in court filings. That is a measurable dimension of their success, but it is only one aspect of their purpose. The extent to which the Centres promote healthier family relationships and act as a helpful resource when relationships are in trouble are also important in evaluating their success. In the long-term, one of the most important measures of their success in relation to parenting after separation will be in the extent to which non-resident parents (mostly fathers) are able to maintain involvement with their children, and the extent to which conflict between parents after separation is reduced.

7. If cases go to trial

Most cases are resolved without a trial. In family law disputes in Australia, generally only 13% of cases reach the stage of commencement of a trial, with 6% of cases being resolved by a formal judgment.[22]

Tthe Family Court has engaged in a significant reform of the traditional adversarial trial in children's cases. It is called the Less Adversarial Trial. This innovative program, aimed at reducing the adversarial nature of children's cases,

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[22] The Family and Community Affairs Committee of the House of Representatives, *Every Picture Tells a Story: Report of the Inquiry into Child Custody Arrangements in the Event of Family Separation* (Parliament of Australia, Dec 2003) pp. 6-7.

contains many features that differentiate the process from a traditional trial. The process involves the judge swearing in the parties at the start of the case so that anything said thereafter is evidence in the case. The parties are each given an opportunity to explain at the beginning of the hearing what the dispute was about. The parties may of course speak through their lawyers, but the normal practice, and one which is encouraged by the court, is for each party to speak directly to the judge. The judge then seeks to resolve the dispute by agreement. If the matter needs to progress to an adjudication, the judge determines what evidence will need to be presented. The Court also uses introductory questionnaires to gain a lot of the basic information about the case.

Division 12A of Pt VII of the Family Law Act provides the statutory basis for the less adversarial trial. This form of trial is mainly used in children's proceedings, but if there are children's and property issues combined in the one proceeding, then the same process can be used for both aspects of the case if the parties agree.[23] The principles for the less adversarial trial are contained in s 69ZN of the FLA.

8. Conclusion

Since 2006, there has been a revolution in the law of parenting after separation and in the processes for resolving disputes. The Japanese family law system is very different, but there may be ideas or principles that have worked in Australia that may also help families in Japan.

In the world of family law, we all have much to learn from each other.

[23] Family Law Act s 69ZM.