

FAMILY COURT – POSSIBLE FUTURE DIRECTIONS

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The Family Court was established pursuant to the Family Law Act 1975 (Cth) and came into operation on 5 January 1976. So it is virtually a decade now since the commencement of this new Court in Australia. Such an occasion is usually considered an opportune time to assess developments during that period and to make predictions for the next decade. In addition, it needs to be remembered that any decisions which are made now as to the future development of the Family Court are likely to have a dominating influence well into the 1990's. A change of direction or even a change in emphasis in institutions in Australia, particularly court institutions of the size to which the Family Court has developed, take a long time to implement and to show results.

At the threshold of any such discussion is the continued existence of the Court as a separate entity. One of the most significant aspects of the Family Law Act was the establishment of the Family Court of Australia. Prior to 1959 the divorce and ancillary laws in Australia were those of the States and they were administered by the various State courts. The reform which was achieved by the Matrimonial Causes Act 1959 (Cth) was to establish uniform divorce and matrimonial cause laws for the whole of Australia, but it still left the administration of those laws in the hands of the State courts. The Family Law Act in 1975 changed that by in effect transferring the major areas of family law in Australia to the Family Court, leaving only some matters which may also be dealt with by State courts of summary jurisdiction but excluding the various State Supreme Courts from that area. The basic reason for that was to establish uniformity of application of family law in Australia. Those whose memories go back to the situation which existed prior to 1975 will recall the widely disparate practices which had developed from State to State and the criticisms to which that circumstance gave rise.

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In recent times the suggestion has been put forward in some quarters that this ought now be reversed. The Family Law Council has no doubt about the matter and has consistently advocated the retention of the Family Court as a specialised body dealing with a specialised area of law, namely family law. But there are those, particularly within the media, who challenge that, but I think without a careful analysis of what is involved and apparently without any regard to the lessons of the past.

It is I think clear that no critic of the present situation seriously suggests the handing back of this jurisdiction to the State Supreme Courts and this possibility can I think for practical purposes be disregarded. To say the least, it is most unlikely that the States (with the possible exception of Queensland) would be prepared to accept such an invitation and very few serious-minded commentators in this area would now put forward this suggestion.

The alternative which seems to have gained some momentum in recent times is the suggestion that the Family Court should become a division of the Federal Court of Australia.

A preferable course in my view is to direct our energies towards the improvement of the operation of the Family Court itself. It needs to be remembered that the Court has existed for just on a decade, a very short period of time in the lifetime of most courts. It has been highly successful in some areas and unsuccessful in others. It has also attracted a great deal of controversy and criticism. Some judicial tribunal to deal with family law has to exist in our society as in any other society and the only relevant question is the form and substance of that tribunal. Experience both within Australia over the last several decades and in all overseas countries with comparable social backgrounds demonstrates the extreme difficulty of providing universally acceptable family laws within that society, particularly because of the enormous changes in social patterns in the last two decades and the difficulties which confront any tribunal which has to administer such a fluid and difficult area of social relations.

The substance of this Paper is that the Family Court concept is a desirable one in our society, that it needs improvements, and that the energies of its critics would be more usefully directed towards improvements to the system rather than engaging in attempts to destroy the present system without providing any serious alternative.

I propose then to turn to some aspects of the Family Court in its possible development in the future with that purpose in mind, that is to see where the effectiveness of the Family Court may be improved. This is a particularly opportune time to consider these matters because available statistics indicate a significant drop this year in both divorce and other applications, probably mirroring change towards more conservative social values than were apparent in the mid and late seventies. Neither the Family Court nor the Family Law Act create marriage breakdown or divorces. Society and social values do that and the apparent downturn in divorce applications filed in more recent times underlines that view.

It seems to me unlikely that there will be any significant changes in family

law in Australia in the immediate future except in two possible areas. In November 1983 the Family Law Act was significantly amended. That Act brought together a collection of important amendments which had accumulated over a number of years. The then Attorney-General, Senator Gareth Evans, Q.C., achieved what had not apparently been capable of being achieved in the previous years, when he was able to get through the Parliament those important and largely non-controversial amendments. They made significant changes to the workings of the Act and it seems to me unlikely that there will be significant amendments to the legislation in the immediate future. There are two areas of possible exception to that statement and both relate to references which the Australian Law Reform Commission has made in respect of Family Law. The first relates to the possible reform of the law relating to matrimonial property and the second to the difficult area of contempt. As to the first the Commission through its particular Commissioner, Professor Hambly, is coming towards the end of that Reference and it can be anticipated that any proposals for amendment to the property aspects of the Family Law Act will be made to the Attorney-General in 1986. The contempt reference, which is under the individual control of Professor Chesterman, relates primarily to the law of contempt in its general aspect; but a particular aspect which has attracted the attention of the Commission has been the law of contempt as presently administered in the Family Court. This has proved to be a very difficult and arduous area. If the Commission is able to suggest reforms in this area they will be most welcome by all who practise in this field.

Space does not permit a detailed discussion of all the possible areas of improvement or change to family law and I propose to direct my attention for the balance of this Paper to some aspects only of them. These are aspects relating to what may be described as the *administration* of family law in Australia, that is, it is not concerned with legislative problems but with how the law is actually administered in a day to day sense in the various registries of the Family Court. These matters were subject to analysis by the Family Law Council in its Paper entitled *Administration of Family Law in Australia* and reference should be made to the more detailed suggestions contained in that Report. I propose to deal with some aspects of it, namely:

- (a) courts and court formality
- (b) the continued development of the conciliation process
- (c) the continued and increasing recognition of the separation of the conciliation and judicial process
- (d) greater development of marriage counselling at an early stage of marriage crisis
- (e) case management by the Court.

(a) The first and fundamental direction for the Court has to be in the areas of court buildings and court formality. When the Court came into operation in 1976, at least the larger registries were placed in commercial

buildings and the courts were designed to give an air of informality and smallness. These decisions were taken partly for reasons of economy and partly for reasons of principle. As to the former, the government of 1976 was not over-enthusiastic about the development of the Family Court and certainly did not wish to be placed in a position of making large capital outlays for the construction of a number of court buildings across Australia; hence the decision to lease areas in commercial premises. That decision was given philosophic support by a view then widely held that the Family Court ought to be housed in non-court buildings and present an informal, relaxed, non-court atmosphere; hence the very small court rooms and the air of closeness and informality which was a feature of their design. In addition no serious consideration was given to the question of security; indeed it has only been in more recent years that any form of security either by security guards or by police has been provided at the Family Court notwithstanding that the presence of such law officers at other courts has always been taken for granted.

There is no doubt that these decisions have proved most unsuccessful and have had an influence on the negative image which the court has developed. The fact is that people are coming to the court for decisions which are extremely important so far as their future lives are concerned and want and need that decision to be taken in a formal, serious atmosphere. People have a concept of what a court is and a good deal of confusion and disappointment flowed from the circumstance that the Family Court in its adjudications did not conduct its proceedings within that framework. It was seen physically as tatty and second-rate, and its informality was seen as uncaring, and many litigants had difficulty separating the judicial process from the conciliation process and in taking the proceedings with the seriousness that is essential.

These views I think now are widely accepted. The question is how speedily can the remedies be provided. It is ultimately a question of money and it means that the present Government has to make substantial capital outlays to obtain new sites and construct special use buildings, and in the meantime has to commit substantial sums to the basic upgrading of the existing court premises to span the period before the new court buildings become available. This is a particularly acute problem in Sydney.

It is not a question of window dressing. The atmosphere and style of a court goes to the fundamentals of people's appreciation of and acceptance of its decisions. It is heartening to know that steps are now being taken in both of these directions and hopefully within the next few years the larger registries will be housed in more appropriate premises. When one visits registries such as Hobart or Dandenong, for example, one sees the difference. It is not a cosmetic difference, it goes to the heart of the process.

As to (b), namely conciliation, although the Family Court has been criticised in a number of areas it has long been recognised that the Court has been a pioneer in the successful development of early conciliation processes in litigation. The Order 24 Conference (formerly Reg.96 conference) in

financial matters and the confidential conciliation conference in child matters have a very high settlement rate at a very early stage in the proceedings. It has been developed by the Family Court to an art form and has been adopted in more recent times and applied by a number of State courts in other areas of civil litigation. It has long been recognised that in almost any area of civil litigation over 90% of cases which commence in a court will ultimately settle. The only question is the point of time in the process when that settlement will occur; the later in the process, the greater the delay and the greater the expense. If the process does not provide a method for settlement the settlement will occur at the door of the court. The great reform effected by the Family Court in the area of civil litigation in Australia has been the development of a sophisticated and successful network for the settlement of cases at a very early stage.

Whilst it can I think be confidently said that the Family Court leads other courts in this area, it is still capable of improvement and indeed must improve if it is to provide the level of service in this area that is expected of it. The most significant current limitation is that this settlement process, until relatively recent times, came into operation only after litigation had been commenced. Why could not the settlement process be available without the necessity of instituting court proceedings? There is no reason why not. The Court and other organisations have in recent times rapidly moved into this area and are developing and must continue to develop this aspect. To take as an example the child dispute cases, there is no reason why the counselling section of the Court or the conciliation centres which have developed in recent times should not be available to provide that service without the necessity of instituting court proceedings. As we know that most of these cases will settle, there is no reason why they ought not to settle at that stage. Indeed, the climate is such that they would be more likely to do so. These areas have been developed within the Family Court in recent times. Most of the registries now have well established facilities for parties placed in this situation to obtain confidential counselling without the necessity for seeing a lawyer or instituting proceedings. Lawyers themselves are becoming increasingly aware of this facility and increasingly prepared to send their potential clients to this source rather than adopt the reflex of issuing an application and an inflammatory affidavit.

In relation to financial matters there has been a greater resistance to this proposal. This is based understandably upon the feeling that the registrars of the court ought not become involved in presiding over possible settlements of financial matters where there is a risk of the absence of sufficiently detailed financial material or the possibility of an imbalance in bargaining position. This has led up to recent times to courts opting out of this area. However, more recently it has been accepted that there is clearly some middle ground. At least the Family Court or the Legal Aid Offices or the conciliation centres could provide couples with general information sessions and, where couples desire it, perhaps individual conferences. If any agreement is to be formalised then the desirability of their obtaining legal

advice and having the matter completed in a way which would not lead to subsequent difficulty is obvious. But the development and refinement of these areas is a most significant one and they are areas where the court has a positive obligation to continue to develop its skills and effectiveness. Similarly the development of an arbitration process in at least small financial matters has obvious attractions.

But as (c) above is intended to indicate, what goes hand in glove with this is a much greater recognition of the separateness of the conciliation procedure from the judicial procedure. When the Family Court was first established such words as, for example, the 'helping court' were bandied about, and in addition the philosophy of the court sitting in 'non court courts' in commercial premises in very informal circumstances was, wrongly as it turned out, seen as a great social advance. It was not and it led to considerable confusion in the mind of persons resorting to the Court. There is a clear difference between the conciliation process and the judicial process and they need to be kept quite separate; indeed quite physically separate. Parties should be given every opportunity to resolve their differences through mediation and counselling. If they are unable to do so or unwilling to do so, society provides them with a determination of their dispute through a court hearing, and a court hearing is what they are entitled to, not a semi-court hearing. The case should be conducted in accordance with established judicial procedures in a formal but not intimidating atmosphere. It is intended to be a serious and final determination of the process, not yet another attempt to mediate the dispute. All of these matters now sound fairly obvious, but in the early history of the Court they were not obvious and indeed there was a very significant move in the other direction. However, it has become in more recent times increasingly apparent that not only is the Court itself uncomfortable in that ambiguous role but litigants coming to the Court are uncomfortable with that situation and at times find that they are unable to accept either the process of determination or the determination itself.

As to (d), in the early stages of the Court's development there was considerable confusion as to the role to be played by the counselling section, confusion which was heightened by the over-optimistic claims which were made of the Court and of the counselling section at and immediately prior to the Court's establishment. It was wrongly projected as a panacea for all ills. That is most unlikely to occur in a jurisdiction with such a high level of personal and emotional factors. Not only were expectations unduly high but there was a significant degree of confusion within the counselling section itself as to its roles. It is only in recent times that the effective role of the counselling section has become apparent. The counselling section has developed a high level of expertise in the conciliation area, that is in assisting parties who have separated and have a dispute relating to either their personal relationship or their children to reach an amicable solution. The counselling section does not have a high level of expertise in the area of marriage counselling or reconciliation counselling, nor does it have the

manpower to enable it to invest the amount of time that is often involved in those processes. On the other hand, there already existed a very wide network of marriage counselling organisations suited to this task. There was, I think, an unfortunate lack of liaison between the two organisations and a confusion as to what role the counselling section was to play in all of this.

Marriage counselling is a most important aspect of our society; it is fundamental to both the individuals who are caught up in marriage difficulties, to the members of that family unit, and also to society itself. There is too great a percentage of marriage breakdown in the Australian community and it is doubtful whether governments have invested a sufficient amount of money and interest in that field. In addition, at least some of the marriage counselling bodies have been perceived by their potential customers as elitist, middle-class organisations. Both of these problems are in the process of being remedied; it appears to me that the marriage guidance organisations are carefully reassessing their role and approach and Governments are becoming increasingly conscious of the fact that money spent in this area is money very usefully spent in the long term.

It may be possible to so expand the counselling section of the Court as to encompass this area but it would be enormously expensive and an unnecessary duplication of effort. Obviously the counselling section has to deal from time to time with reconciliation situations because many parties who come to the Court are still unresolved about those matters. But by and large the preferable direction for the future is the increased funding and use of marriage guidance organisations to carry out those tasks, the more ready availability of those organisations to a wide cross section of the community, and a ready system of referral between the Court and marriage guidance organisations. On the other hand the counselling section should continue to refine and develop the high level of expertise which it has developed in the area of conciliation counselling.

(e) above is about case management. There has been a remarkable change in attitude by courts to this over the past decade or so. It is not unfair to say that until the commencement of the last decade, courts tended generally to adopt the attitude that they heard cases as they came along and that they had little or no responsibility for the control or passage of cases through the court system. Until comparatively recently there were quite bitter arguments about this as a matter of principle. Suddenly in Australia everybody seems to be of the one accord, namely that a court has a positive obligation to case manage its litigation to the maximum advantage. The establishment of the Australian Institute of Judicial Administration and the multitude of reports on the administration of various courts in each of the States bear testimony to this and the matter is now beyond argument.

Until comparatively recent times in many courts no real statistics were kept on the number of cases instituted in or passing through that court. Courts are public institutions which spend many millions of dollars each year; they are highly labour intensive and highly expensive. No business could possibly operate without up to date statistical information relating to

the flow of work in and out of that business, but courts up to comparatively recent times have operated largely without that basic information. All that seems to have changed in recent times.

If the arguments for strict case management have any validity at all, they clearly have validity in the Family Court. Because of the nature of the litigation and because of the dependence of most of the litigants upon their lawyers, it is essential that that Court exercise strict control over the passage of litigation through its Court. The arguments in favour of case management may not be as strong where one is concerned with, for example, trade practice litigation between powerful multi-national companies; they are perfectly capable of looking after their affairs and controlling their own lawyers. That is a far cry, however, from the impecunious husband and/or wife in a dispute over the custody of their children through solicitors being paid on legal aid.

One of the most remarkable aspects of the Family Law Council's inquiry into the administration of family law was the great disparity from one registry to another in the most simple procedures in this area. The Court is intended to be a national court, and indeed that was one of its selling points leading up to 1975, but the Inquiry clearly showed that each registry conducted its own affairs as if it were an entirely separate fiefdom. No doubt some regard has to be paid to local State practices and no doubt uniformity for its own sake is not necessarily a desirable end, but uniformity does have many virtues, particularly in a court which claims to be a national court. Not only is it desirable that the procedures be the same within whatever registry the application happens to be instituted, but the proper control and development of the Court would obviously be thwarted if this does not exist.

There is every sign that the Court itself recognises these matters. Within the small registries case management has never been a great difficulty; the problem is in the larger registries such as Sydney, Melbourne, Brisbane, Parramatta and to a lesser extent, Adelaide. Brisbane has been a leader in the development of an intelligent procedure for the passage of cases through its registry. That has to be taken up by the other registries, particularly Sydney and Melbourne, which between them represent well over 60% of applications within the Family Court. It is in this area of uniform, intelligible control of court proceedings so as to enable cases to flow in a manageable way that the Court has a positive obligation to direct its attention.

It appears to me that the direction of the Family Court in the next decade should be towards the development and refinement of its conciliation processes, an area in which it has been highly successful but which it can continue to develop and distil, recognition of the different processes of conciliation and adjudication within the court, and the development of proper case management and control of its litigation.

There must be an avoidance of repetitious hearings and of cases passing willy nilly from one Judge to another, and of lawyers controlling cases to their own advantage and convenience, and a recognition that the general run

of cases should pass through a set process and that difficult cases require specialised recognition and attention.

It appears to me that these are the directions in which the Family Court in the next decade should and will go. If it does so it will produce a process which will be intelligible and successful, given the difficulties which bedevil any process in the domestic relations area. This to my mind is a much more constructive and advantageous direction to follow than are the destructive suggestions of dismantling the Court or fundamentally changing its character.