

“A Unified Family Court”

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“Legal processes themselves should not exacerbate the disruption to the lives of families and children involved in litigation for procedural and jurisdictional convenience. If the interests of children are to be paramount then all remedies and solutions should be considered in the one forum.”¹

INTRODUCTION

The Family Court of Australia (“the FCA”) looks something like a unified family court. It is a free standing court. It deals with divorce; questions of residence, contact and specific issues in relation to children of a marriage and ex-nuptial children; property; spousal maintenance; and, child support. It also has a *parens patriae* jurisdiction. The court offers sophisticated conciliation and mediation services with its own expert counsellors and legal registrars. The judges are specialist judges. It is not immodest to observe that the structure of the FCA is the envy of many US, Canadian and UK courts. But it is not a unified family court.

The fact that Australian families and children are disadvantaged by fragmented court services through Federal and State courts and tribunals, is the focus of this paper.

WHAT IS A UNIFIED FAMILY COURT?

There is great energy and commitment in many American jurisdictions towards the establishment of unified family courts. The American Bar Association (“the ABA”) held a national conference on the topic earlier this year. Its recent *Family Law Quarterly*² was devoted to the topic. In

¹ Seen and Heard: Priority for Children in the Legal Process” ALRC (1997) Report No. 84 at para 15.2.1 (prepared in conjunction with the Human Rights & equal Opportunity Commission).

² Vol. 32 No 1. Spring 1998

addition, the Association of Family and Conciliation Courts held a colloquium for judges prior to its May 1998 conference³.

The ABA has pledged itself to promoting the implementation of unified family courts. It has considered the essential features of such courts, summarised as follows⁴:-

- A comprehensive jurisdiction. The ABA has long endorsed jurisdiction for unified family courts to include:

*“...juvenile law violations; cases of abuse and neglect; cases involving the need for emergency medical treatment; voluntary and involuntary termination of parental rights, proceedings; appointment of legal guardians for juveniles; intra-family criminal offences (including all forms of family violence); proceedings in regard to divorce, annulment, maintenance, custody and child support; proceedings to establish paternity and for enforced child support...”*⁵
- A position as a superior trial court to recognise the importance of the court’s jurisdiction.
- Intake processes by which families will be initially assisted and expeditiously directed to the appropriate entity in the court system to meet their needs.
- Provision and/or integration of comprehensive services and other assistance including legal representation, alternative dispute resolution, children’s representatives, counselling and financial and housing assistance.
- Development and enforcement of time standards for cases involving children.

³ In Washington D.C.

⁴ *Family Law Quarterly* (Vol. 32 No 1. Spring 1998 p. 1.

⁵ Institute of Judicial Administration/American Bar Association Juvenile Justice Standards relating to Court Organisation, Standard 1.1 Part IV (1980).

- An integrated management information system to monitor, track and coordinate all cases to ensure that either one judge should be assigned to handle all matters pertaining to one family or that all judges presiding over matters affecting one family are made aware of the pending cases affecting that family in order to coordinate the efforts for the family.
- The assurance that judges and court personnel who work in the unified family court receive ongoing training in family court issues including amongst other things, family violence and child psychology.
- Adequate oversight of the new court systems' performance and outcomes.
- Adequate resourcing.

The U.S. National Council of Juvenile and Family Court Judges has amplified this definition⁶ by recommending that such courts contain within their ambit **all** matters affecting families and children including delinquency and other criminal offences (where the child is victim or offender); guardianship or mental incompetency; medico-legal issues; and, the emancipation of minors.

Some of the American terminology is foreign to us but we can decipher it well enough to know that what is envisaged is one court encompassing the jurisdiction presently within the FCA, the State juvenile courts (both the protective and criminal jurisdictions); and, State local courts and tribunals.

A SUMMARY OF THE PRESENT POSITION IN AUSTRALIA

With one significant exception, the FCA qualifies as a unified family court, on the basis of the criteria set out above. There may be aspects of our integrated client services which are still in the process of development and

⁶ At its 1990 conference.

there are certainly some services, (eg. housing) over which we do not have control. But the single major feature clearly missing is that the FCA does not have the full range of jurisdiction over family matters. That is not due to a recent, informed decision that fragmented services are “best practice”. It is due to the drafting of the Australian Constitution - a century ago.

The Constitution empowers the Federal Government to legislate in respect of marriage, divorce and related parental rights, custody and guardianship of infants. Prior to 1976 the relevant Federal legislation was the *Matrimonial Causes Act*. It was “primarily a divorce Act” and dealt with questions relating to children only as ancillary to that primary purpose. Cases pursuant to that Act were dealt with in the individual State courts exercising federal jurisdiction. In 1976 the federal Family Court of Australia was established by the *Family Law Act 1975*. It deals with those matters outline above – essentially the **private** aspects of family law. The **public** aspects, in relation to the care and protection of children and criminal offences by and against children, are dealt with in State courts. State trial courts hear any appeals from those courts and handle adoptions (except in Western Australia).

In addition, although the FCA has the power to deal with family violence, (with a full range of restraining and other orders), it is the legislative schemes of the State local courts which provide the most immediate and accessible response (as an off-shoot of the State’s criminal jurisdiction and with the assistance of State police forces.) Otherwise, it is State courts or tribunals which handle other family legal matters, including crimes compensation; guardianship and mental health.

Whilst, as noted, the FCA's essential jurisdiction is one of private law and the State courts' jurisdiction is one of public law, the lives of families do not fit into convenient boxes marked "Private" and "Public". Observation and research inform us that the family breakdown with which the FCA must deal will in many cases be precipitated by the violence or abuse with which the State courts must deal. As the major perpetrators of such behaviour are men and their targets are predominantly women and children, the most vulnerable members of the community may suffer the double jeopardy of abuse at the hands of family and, systems abuse by the duplication, (and sometimes the gaps), in court jurisdictions.

By way of illustration, obviously the Victorian Children's Court can make permanent care orders which vest the guardianship and custody exclusively in third parties with the provision for access by parents - which is precisely what the Family Court is also required to do. The dichotomy of approach therefore impacts on child abuse and protection and the nature of appropriate intervention, as well as the long-term care of children and decisions regarding their parenting.

Also by way of illustration, the situation very frequently arises that family violence orders are made in local courts and contact and residence orders are made in the Family Court. The overlap in the factual situations relating to the orders is obvious. However, the different considerations required as to a party's personal protection in one case, and the children's personal protection and rights to contact in another case, may lead to inconsistencies.

I will deal with the particular difficulties that arise in the child protection jurisdiction and then in the family violence jurisdiction.

THE CHILD PROTECTION JURISDICTION

Inescapably, the present system poses a threat of systems abuse to children and families, and undue expense to the community. One child, the victim of child abuse, may be the focus of court proceedings as follows:-

- (a) as a witness in the lower criminal court in the course of committal proceedings (in most Australian jurisdictions);
- (b) as a witness in the State trial court (a major trial court dealing with criminal and civil trials and virtually no other family law or related matters) in the course of the trial;
- (c) at the centre of juvenile court proceedings, dealing with the child's need for care and protection;
- (d) in either the juvenile court or local adult court as a party to proceedings for a family violence restraining order;
- (e) in the State trial court if there is an appeal from a juvenile court order;
- (f) in the State Administrative Appeals Tribunal in relation to case planning decisions made by the State child welfare authority;
- (g) as the subject of FCA litigation between the parents in relation to residence or contact;
- (h) as an applicant for a crimes compensation payment in a State lower court or tribunal (depending on the State); and
- (i) as a plaintiff for a civil damages claim in the State trial court.

The full impact of this maze of court jurisdictions can only be understood if we note the number of professionals with whom that child is brought into contact:-

- (i) a State welfare authority social worker/investigator (in fact, usually two);

- (ii) a police investigator (in fact, usually two);
- (iii) a doctor (or two, if a local GP refers to a forensic specialist);
- (iv) the child's lawyer in the juvenile court;
- (v) the child's lawyer in the FCA;
- (vi) a prosecutor in the committal proceedings;
- (vii) a different (more senior) prosecutor in the trial;
- (viii) CASA counsellors;
- (ix) an FCA counsellor;
- (x) an expert psychiatrist/psychologist;
- (xi) a different lawyer/lawyers for crimes compensation/civil damages.

The overlap between jurisdictions can arise in a number of ways. A parent whose case is pending in a juvenile court, may commence FCA proceedings in order to determine their own rights in relation to residence or contact. Otherwise, a welfare issue frequently arises in the course of FCA proceedings.

The *Family Law Act* requires court personnel to notify the relevant child welfare authority of any reasonable suspicion that a child has been abused or is at risk of abuse.⁷ A party to proceedings may at any time make a similar notification.⁸ A judge may also make a notification or request the intervention of the State welfare authority.⁹

Once in receipt of a notification, the State child welfare authority is required to investigate the matter. For the legislative provisions to be effective, it is essential that the authority responds to it appropriately and promptly. Unfortunately there is a culture of expectation in some State

⁷ Section 67ZA.

⁸ Section 67Z.

⁹ Section 91B.

welfare authorities that, when an allegation of abuse arises in the course of family law proceedings, it is more likely to be a false allegation raised to gain a tactical advantage. In fact, two recent Australian studies¹⁰ have independently concluded that the false allegation rate in Family Court matters is approximately 9%, which is the same as that for all abuse allegations. But as the case is within the domain of a federal court the parties are sometimes considered less entitled to benefit from the resources of a State welfare agency.

Although the FCA has been able to request the intervention in its proceedings of a State welfare officer since 1983, in practice a State officer rarely accedes to the invitation to intervene in FCA proceedings. As noted, the State welfare authority frequently takes the view that so long as the FCA is seized of the matter, it is unnecessary for the State authority to endure the expense of intervention. Otherwise, the State welfare authority responds by forwarding its file to the FCA or by forwarding some information through a child's legal representative, a party or an FCA counsellor. The difficulty is that there is no guarantee that the FCA is properly informed as to the detail or progress of the State welfare authority investigations and juvenile court proceedings. Sometimes, neither the juvenile court nor the FCA knows the extent of proceedings in the other court. This is one of the glaring deficiencies in the present system, caused by the jurisdictional overlap.

Another difficulty arises in the following context. Section 69ZK¹¹ of the *Family Law Act* recognises an overlap with the child protection jurisdiction of the States. It seeks to avoid the FCA dealing with State

¹⁰ Brown, Frederico, Hewitt and Martyn (1995) and Hume (1997).

¹¹ Introduced in 1995.

matters by preventing it making an order in relation to a child who is under the care of a State welfare law, unless the order is expressed to come into effect when the child ceases to be under that order, or unless the written consent of a relevant child welfare officer has first been obtained. As the Australian Law Reform Commission (“the ALRC”) has observed in its recent report¹² this may inhibit the making of comprehensive and longer term arrangements for children and may thus precipitate further litigation.

The difficulties arising from the overlap in jurisdictions is highlighted by the similarities and differences in the powers of each court. The State juvenile courts can make permanent care orders which vest the guardianship and custody exclusively in third parties with the provision for access by parents and others. These are powers common to the FCA. However, there are distinct differences, and even the differences vary from State to State as that legislation is far from uniform.¹³ By way of illustration, a dilemma frequently referred to relates to the position of grandparents. Grandparents are often the unsung heroes of family life either before or following upon family breakdown. The *Family Law Act* recognises their role and in the FCA they are entitled to initiate proceedings in relation to children. In the State juvenile courts, grandparents may be represented through the State welfare authority and children may be placed in their care or, orders may be made that they have contact with the children. However grandparents cannot be parties to those proceedings. They have no capacity to enforce any contact order made in their favour in the juvenile court, although they may do so in the FCA pursuant to the *Family Law Act*.

¹² Op cit., p.360

¹³ Eg some State juvenile protection statutes do not allow contact orders to be made; others do. In Victoria the Children’s Court cannot make an order with a duration exceeding 2 years.

Another hazard is the opportunity for forum shopping, with parties being able to re-litigate residence or contact issues in the FCA once juvenile court orders have expired. In addition, there is nothing to prevent a State welfare authority, dissatisfied with an FCA outcome, from making an application in the juvenile court rather than pursuing an appeal from the decision in the FCA. Observers note that it is often impossible to determine which law (and therefore which forum) takes precedence.

One case illustrates the difficulty. The parties issued competing applications in relation to the residence of their four young children. The matter came before a Family Court judge who at the end of a five day defended hearing ordered that the children live with their mother. The children had their own legal representative who had supported the mother's application.

On the day the Family Court judge gave judgment, the State welfare authority served the parties with a care and protection application in the Children's Court. It sought an order that the children reside with the father. The children were represented by a lawyer (a different lawyer from the one who had represented them in the Family Court) and at the conclusion of the Children's Court hearing the father was successful in obtaining an order that the children live with him.

The mother then appealed to the County Court. The father again succeeded. The protection orders subsequently expired. The parents then recommenced litigation in the Family Court. By then, the case had been in three different courts for more than four years – a fair “chunk” of the children's childhood!

Finally, whilst FCA orders apply across Australia, the State juvenile court orders are presently applicable only in their State of origin. The States and the Commonwealth have recently agreed to consider mechanisms to increase the portability of care and protection orders.¹⁴ The lack of portability of State orders limits their effectiveness in a country with a highly mobile population. This needs to be remedied as a matter of urgency.

Australia wide, there is a myriad of statutes and courts and an extremely complex legislative maze for family related matters. Moreover, there are fundamental differences across the eight States and Territories in such critical matters as -

- the systems through which abuse notifications are investigated; and
- the level and availability of primary, secondary and tertiary services.

THE FAMILY VIOLENCE JURISDICTION

A second major illustration of the problems of duplication and overlap can be seen in the context of family violence. While the FCA is usually called upon to make residence and contact orders, and although it may make family violence orders, it is commonly the State local courts, with their “tailor-made” family violence legislation, streamlined procedures and local police assistance, which deal with issues of family violence.

Until recent amendments to the *Family Law Act* (to which I will return below) each court frequently operated in total ignorance of the orders of the other court. Whilst the new provisions seek to ensure that each court will know of the orders of the other court, inconsistent orders may still be

¹⁴ This has already occurred in relation to State family violence orders.

made so that effectively one court may order contact while the other court precludes it. The confusion - and the absurdity - are obvious.

In a recent case in Melbourne, a family violence order was made in a Magistrates' Court upon the ex parte application of the wife. The effect of the order was that State police were to immediately seize the young child from his father's care. Simultaneously, a judge in the FCA was making an order on the father's ex parte application that the child reside with him and not be removed overseas by the mother. Neither court was aware of the proceedings in the other court and quite likely neither court obtained a full picture of the family situation.

COPING MECHANISMS IN THE PRESENT SYSTEM

Various mechanisms – both legislative and non-legislative – have been relied upon in an effort to cure the defects of overlapping jurisdictions.

Legislative Measures

The following are examples (as outlined above):-

- Section 69ZK was introduced into the *Family Law Act* to ensure that the FCA did not make conflicting guardianship, custody or access orders during the life of a relevant State juvenile court order.
- In June 1996 a raft of new provisions in the *Family Law Act* were aimed towards consistency between the Family Court's children's orders and the State local court family violence orders. The provisions ensured that each court informed the other court as to its orders and that each court took the other court's orders into account in making orders.

Protocols

In some Australian jurisdictions, protocols have been arrived at between the FCA, the State courts and the relevant State welfare authority. The negotiation of protocols represents a significant initiative of the FCA and assists in coordinating the State welfare authority and the FCA's work in child protection, emphasising the children's need for protection as the paramount consideration.

In July 1996 a protocol was entered in Victoria. It was achieved after full consultation between senior members of the FCA (including the judiciary, counsellors, registrars and administrators), the Children's Court, the Magistrates' Court, the Department of Human Services ("DHS"), various representatives of the legal profession, Legal Aid and the police. It exemplifies what can be achieved and among other things it deals with the following:-

- Timelines - so that once a notification has been made to DHS by the court, court personnel or a party, it will be investigated with an adequate and timely response to the court.
- A proper information exchange between DHS and the FCA with a provision for the inclusion of an FCA counsellor at case conferences convened with all interested parties in the course of a departmental investigation.
- The choice of jurisdiction - this is a vexed issue as in many cases DHS will need to determine whether Children's Court protective proceedings are required or whether the matter can appropriately be dealt with in the FCA. The protocol sets out matters to be considered including:-
 - Is there an appropriate parent or carer prepared to take FCA proceedings?

- Which would be the quickest and most effective solution to secure the welfare of the child?
- Is the need for protection likely to be established or can the child's welfare be more effectively assured through the fullness of FCA orders?
- Which court has jurisdiction to make the orders anticipated to be supported by the participants?
- Can the protective concerns be alleviated by a change in residence or contact?
- Procedures when DHS is unhappy with an FCA decision. As noted above, there had been cases where at the conclusion of a very lengthy FCA hearing, DHS, unhappy with the outcome, had immediately commenced new and equally lengthy Children's Court proceedings. This process, whereby the State court is effectively called upon to review the FCA decision is one which could only lead to great confusion, pain and expense for the family and children. It has been agreed by DHS that the more appropriate course is to proceed in the Full Court of the FCA to appeal the trial Judge's decision.

In addition, in some jurisdictions there is a continuing liaison committee to ensure ongoing cooperation, exchange of information and the dovetailing and simplifying of processes and procedures to ensure a better outcome.

Special Case Management in the FCA

It has become increasingly apparent that, despite the fact that the State courts deal with care and protection, in reality such work has become part of the core business of the FCA. Allegations of abuse and family violence arise in a large number of children's cases and the FCA is consistently

called upon to take into account these protective concerns. Recognising their significance and the need for specific case management considerations, the Chief Justice has established a pilot project in the Melbourne Registry of the FCA – the Magellan project.

The project will include 100 cases to be commenced with a timely and thorough investigation by the State welfare authority. All the children will be legally represented; a full family report will be prepared early in the process; the hearing will be conducted shortly thereafter; and only one or two judges will deal with each case until its conclusion.

The project is now underway and although no cases have yet been heard to conclusion, the early signs are promising. The response and information from DHS has improved and is helpful. Cases appear to be proceeding in a manageable, orderly fashion. The parties know what will happen; that it will happen within a specific timeframe; and, that they will return before the same judge when next at court.

With the assistance of a comprehensive investigation as early as possible after the allegations have arisen, an improved outcome for the children is expected. In addition, it is hoped that the pilot project may demonstrate a saving of expense for legal aid, the parties, DHS and the various courts.

SOLUTIONS RECENTLY CONSIDERED IN AUSTRALIA

The present system, with its inherent fragmentation, arises directly from the separation of State and Commonwealth powers in the Australian Constitution. Measures to ameliorate the fragmentation and duplication, as described above, generally work quite well, but they are really no more than bandaid measures.

In its recent report¹⁵, the ALRC acknowledged that steps had been taken to overcome the problems. But it noted that such measures had still failed to resolve the difficulty of complex jurisdictional arrangements that “may harm many children each year.” The ALRC report then considered options for reform. These can be summarised as follows:-

- An extended cross-vesting scheme. The present cross-vesting arrangements involve only superior courts of record in the States whereas children’s care and protection matters are dealt with at first instance in the juvenile courts, at lower court level. The cross-vesting arrangement could be extended so that the relevant State juvenile courts and the FCA could each exercise the State care and protection jurisdiction as well as dealing with related federal family law matters. The first court to receive a matter relevant to the other jurisdiction would be able to deal with the full range of issues. The proceedings could be transferred to the other court where considerations of justice required that to occur.
- The power to legislate in respect of the care and protection jurisdictions could be transferred from the States to the Commonwealth.
- All State governments could pass consistent legislation across Australia (that is a “harmonisation” approach).

These were the major recommendations. There were many variations, not the least of which is to continue with the present system with improved protocols and work practices.

¹⁵ Op cit., at para. 15.6 at p. 359.

The problem is that each recommendation is accompanied by major drawbacks. The suggestion for an extended cross-vesting scheme may become irrelevant as the present basis for cross-vesting legislation is under threat, following the recent evenly divided High Court decision.¹⁶ In addition, in practical terms, it would require great co-operation and political courage to achieve agreement amongst State and Territory governments to refer all relevant powers to the Commonwealth or ensure a uniform approach to legislation.

THE REAL SOLUTION

In order to secure the best and safest outcome for Australian families and children we must overcome the duplication and fragmentation of the present system. A unified family court is the optimal design. It should be a national court with the integrated services presently existing in the FCA. There is no argument that it should incorporate all care and protection matters, adoption and civil and criminal cases where children are victims. But a unified family court must also include juvenile crime. Otherwise, those children charged with offences would be dealt with as the junior part of an adult criminal justice system. To follow that course would be to marginalise those children, who in reality are mostly indistinguishable from the children who are in need of care and protection or suffering family breakdown, family violence or other family problems.

We can look to parts of the United States with interest – to those jurisdictions which have been operating successful family courts. The State of Hawaii has operated a unified family court for some years. All family-related cases, including those where a child is an offender or a victim in criminal proceedings are dealt with in that court. It means that

¹⁶ Gould v. Brown (1998) 151 ALR 395.

some very serious criminal offences arise. All family violence is dealt with from the granting of orders to the punishing of offenders. Again serious charges arise in that context.

There was great debate when the Hawaiian court was established. There was a concern – a concern shared in the course of various debates in Australia - that for the breach of family violence orders to be heard outside the criminal courts is to devalue or marginalise the criminality of the misconduct. The Hawaiian experience has been to the contrary. Specialist judges, who truly understand the havoc reeked by repeated threats and incidents of family violence, are often better able to sentence appropriately than judges in criminal courts, who may unwittingly compare horrendous acts of public violence with sometimes lesser (but more terrifying) acts of domestic violence.

In September/October 1997 a symposium was held by the National Council of Juvenile and Family Court Judges in Santa Barbara, California to mark the centenary of juvenile courts in the USA. The symposium was called the “Janiculum Project”. It recommended that there be a unified juvenile and family court so that family based legal issues in relation to a single family could be dealt with in a single court. There was unanimity that the unified family court should be at the highest level of trial jurisdiction given the undeniable importance of the work. There was also unanimity that judges should be selected on the basis of their qualifications and professional interest in juvenile and family matters, with an assignment for a substantial number of years to ensure adequate training and experience. The symposium underlined that the unified family court should have the staff and financial resources to effectively accomplish its mission. Otherwise, it shamelessly emphasised that no legal work could

be more important in serving society, than work relating to needy children and families. It was also agreed that there should be an emphasis on training, case management and evaluation; children should be legally represented in most cases; and, the court should offer a number of integrated services and programs and dispute resolution options.

In Australia, a unified family court is achievable. Its realisation would require no more than vision, goodwill and commitment. Its various services and programs are already being offered to Australian families, but in a fragmented and uncoordinated manner. The overlap and duplication can only bring further harm and heartache to the most vulnerable families and children. The damage is immeasurable in personal terms. However, the maintenance and provision of overlapping services and programs; the duplication and protraction of legal proceedings; and, the consequential need for and use of community assistance and support, can in fact be measured in financial terms. This confluence of considerations leads to only one conclusion. A unified family court would provide not only a better outcome for our children and families but ultimately a better outcome for the general community. And there is no area of law in which public respect and confidence is so essential.¹⁷

¹⁷ This paper incorporates some parts of a paper prepared by Margaret Harrison and I at the Association of Family and Conciliation Courts Conference in Washington DC in May 1998.