

In January 1996 the Family Court of Australia announced new, simplified procedures for the negotiation of issues regarding the parenting of children and the settlement of finances. The changes are designed to suit the 95 per cent of divorcing couples who do not end up in Court before a judge, but who by and large work out any disputes in less litigious ways. The Court's new orientation turns away from the traditional business of courts – trials before a Judge – to self-managed, client-driven divorce procedures backed up by alternative dispute resolution services.

The Family Court procedural review may be seen as part of broader changes about to come into effect when the Family Law Reform Bill (1995) is implemented in June 1996. This reform radically changes the section of the law concerning children by altering the language of the law – for example, the notions of ownership implied in terms like custody and access. The new law emphasises the responsibility of parents to make arrangements for children in parenting plans and agreements. It also reinforces the Court's traditional, stated inclination towards non-litigious dispute resolution – Primary Dispute Resolution procedures as they are now called – assisted by counselling, conciliation and mediation.

Reflecting a similar philosophy to that embodied in the Family Law Act reforms, the Family Court's new, simplified procedures emphasise the route to be taken by the majority of

divorcing couples – although more streamlined provisions are also included for managing the exceptional cases that proceed through litigation and into Court.

The main features of the changes to procedures are the use of short, plain-language forms that most people can fill in by hand without legal assistance. Cases requiring assistance in settling disputes are re-routed via counselling, mediation and conciliation. The use of affidavits, subpoenas and the like are discouraged, and the Court will not accept escalating disputes until all other avenues have been tried.

The net results are expected to be a cut in costs, the quicker completion of cases, and a more targeted and appropriate use of the Court's resources to achieve fair, equitable and timely

Simplified Procedures for Settling the Affairs of Divorcing Couples

New Measures Introduced by the Family Court

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outcomes for all cases, including the small minority which proceed before a judge.

Such is the degree of sensitivity about divorce in our society that changes are the subject of intense scrutiny and criticism. At the outset, however, it is important to distinguish what these Court initiated changes do *not* do. They cannot affect the divorce rate in Australia – currently about two in five marriages which last 30 years. By the time people present at the Court to file for divorce they have been separated for at least 12 months. We know from our

Australian Institute of Family Studies interviews with large numbers of divorced men and women that the final separation is frequently preceded by a trial separation and a reconciliation – that is, people have struggled with their difficulties long and hard before they arrive at the door of the Court. There is no argument for making the administration of divorce difficult in order to remedy long-standing marital difficulties.

The changes are a radical departure from previous Court procedures that assumed complexity at the outset and the

need for legal assistance leading to judicial intervention. Now, with information sessions, clear client-friendly language and minimal paper work, people can take matters into their own hands and fill the two pages of the application form themselves. Documents filed at the beginning of procedures will not include the often inflammatory affidavits so loathed by divorcing couples and which in many cases effectively destroyed all middle ground in negotiations.

To achieve the goals of self-managed resolution to disputes and problems, divorcing couples will have access to a trio of alternative dispute resolution services (counselling, mediation and conciliation) at various points in the process towards settlements. To provide the right service at the right time and place, an array of community-based services as well as the Court services are required. A key issue in diversifying services is that of ensuring uniformly high quality services to clients throughout Australia. Much remains to be done in this regard: training, standards and registration of professionals are pressing needs and will require adequate resources if the new procedures are to succeed.

Some funding has been allocated for family law from the \$160 million under the previous Labor Government's Justice Statement. This will be directed to assist couples in finding solutions to difficulties before they reach the point of breakdown, as well as afterwards. The demand for mediation and other services implied by changes to Court procedures and changes to the

Family Law Act regarding children are huge, and appropriately qualified and monitored professionals will be at a premium for some time.

It is almost 20 years since the Family Court of Australia was established and the Family Law Act (1975) made it unnecessary for people seeking a divorce to prove who was at fault (often by means of private investigators in bedrooms). Leaving people with the responsibility for their divorce is consistent with the withdrawal of law from the regulation of adult sexual intimacy – in most western democracies, for example, matters such as homosexual relations are now generally conceded to be the province of personal morality rather than legislation. As two in five marriages end in divorce, it is no longer possible to suggest that couples who divorce are generally psychologically disturbed, morally deficient, or otherwise

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so inept that they need the law to take over the management of their affairs. This is not to deny, however, that most people in crisis need assistance of various sorts.

Although the Court has always offered counselling and conciliation, the law has cast a long and sometimes threatening shadow over the experience of the very large majority of people who in fact do not have intractable legal problems. Under

this shadow, with their lawyers filling out affidavits, people frequently felt the process to be out of their control. They reported being 'taken over' by the law and felt powerless and angry, and they often thought lawyers exacerbated conflicts. The new procedures are an acknowledgment that it was the system that was to blame and had to change, more than the individual lawyers who worked within it. Changes will, however, make big demands on lawyers, not only to adopt new procedures – which legal training makes relatively simple – but also to take the leaps required to empower clients in their own divorces.

In terms of the intended and unintended effects of change, it is essential that the intended effects be evaluated against standards of access and equity in the quality of justice, and to

ensure that the most vulnerable are not damaged. Among the vulnerable are children, members of non-English-speaking and culturally diverse groups, members of violent families and those in which power assertion is a dominant mode of intimacy.

This type of evaluation is not sufficient, however, and it will also be important to look broadly for possible unintended effects, not all of which are necessarily

bad. For example, it may be that managing your own divorce prepares the ground for more stable arrangements for children, for better relationships between children and both parents, and for fewer long-held resentments that come from having held impossible winner-takes-all expectations.

Yet the move towards simplifying divorce as an administrative process may not sit well with the heavy regulatory functions of the Court, and lawyers and other critics draw attention to such difficulties. Lawyers, perhaps resenting an incursion into the realm of their professional endeavours and the demystification of the law, point to the risks of leaving lay people to interpret divorce procedures. Other critics comment on the philosophy of treating one of the most serious and precious of human relationships with administrative disdain, or even disrespect.

When about two in five marriages end in divorce, it can no longer be accepted that the regulatory function and common law practices should dominate the end of a relationship, just as they do not unduly govern its beginning. On balance, in 1996, it is not the law's place to provide rites de passage for people for whom the legal divorce is but a formality in a transit of far larger dimensions.

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