

**SYMPOSIUM: INTRODUCTION TO INTERNATIONAL
FAMILY LAW
BRISBANE, AUSTRALIA 20 FEBRUARY 2024**

Burning Issues in International Family Law

***Session Materials Pack
What is HOT in Parenting Matters in Cross Border
Disputes?***

- *Recognition of shared parenting?*
- *Acceded to the Hague Convention?*
- *Implications in cross border disputes?*

*Tuesday 20 February 2024
11:45 – 01:15*

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 - Jason Tian

JACKY CAMPBELL

**Forte Family Lawyers
Melbourne
Victoria
Australia**

Telephone: +61 3 9248 5800

Email: jcampbell@fortefamilylawyers.com.au



Jacky Campbell is a founding partner of Forte Family Lawyers in Melbourne, Australia. Jacky's partners are Wendy Kayler-Thomson and IAFL Fellows Jason Walker and Jemma Mackenzie. In 2024 Jacky was recognised by Doyle's Guide as a Leading Family and Divorce Lawyer, a Leading Family Lawyer (High-Value & Complex Property Matters) and a Leading Parenting & Children's Matters Lawyer.

Jacky is the Consultant Editor of the major reference work for Australian family lawyers, Wolters Kluwer/CCH *Australian Family Law and Practice* (updated online and in loose leaf) and Contributing Author to the Property, Spousal Maintenance, Financial Agreements (including pre-nuptial agreements), Procedure and Precedents tabs. For the Wolters Kluwer/CCH *Australian Master Family Law Guide* she writes the property, financial agreements, superannuation and maintenance chapters and the Preface. She writes the Introduction to the Wolters Kluwer/CCH *Australian Family Law Act 1975 with Regulations & Rules*. Jacky also writes the family law chapter of the Wolters Kluwer/CCH *Australian Master Superannuation Guide*.

Jacky presents several times each year primarily for the Law Institute of Victoria, TEN The Education Network, CCH Learning, and the Leo Cussen Institute, usually regarding the financial aspects of family law, but more recently on changes to the parenting laws.

Jacky is on the Pensions Committee of the International Academy of Family Lawyers and an Associate Member of the American Bar Association.

STEVEN YODA

**Walzer Melcher & Yoda LLP
California
U.S.A.**

Email: sky@walzermelcher.com

Website: <https://walzermelcher.com/>



Steven K. Yoda is a partner at Walzer Melcher & Yoda LLP, a premier family law firm in California, where he represents business owners, professional athletes, celebrities, and other high net worth individuals in complex family law disputes. Steve is a graduate of Stanford University, where he received both his bachelor and masters degrees, and the University of California, Berkeley School of Law. From 2004 to 2005, Steve served as a law clerk to the Honorable James Ware, United States District Judge for the Northern District of California. Steve is individually ranked as a leading family lawyer in California by Chambers and Partners and has been named a "Super Lawyer" by the Southern California Super Lawyers Magazine, a "Minority Leader of Influence" by the Los Angeles Business Journal, and a "Best Lawyer Under 40" by the National Asian Pacific American Bar Association. Steve is a certified family law specialist.

MASAMI KITTAKA

Otani & Partners

Tokyo

Japan

Telephone: + 81 3 5357 7521

Email: kittaka@otani-p.com

Website: www.otani-p.com/en



Admitted to Tokyo Bar Association in 2009, specialising in family law with particular focus on international family cases. Education: International Christian University (B.A., 1997), University of Tokyo School of Law (J.D., 2007), Pittsburgh University Law School (LL.M., cum laude, 2008). Membership: International Family Law Section of the Japan Federation of Bar Associations; Hague Convention Committee of Tokyo Bar Association. Other notable positions: Lecturer at Chuo University Law School.

JASON TIAN

Shanghai Landing Law Offices

Hongkou District Shanghai

China

Telephone: +8613816548421

Email: jie.tian@landinglawyer.com

Website:

<http://en.landinglawyer.com/a/zhuanyetuandui/29.html>



Jason Tian is a senior partner at Shanghai Landing Law Offices, with 15+ years of cross-border family law practice helping foreign clients deal with international divorces and cross-border inheritance and estate planning. Well-versed in general family law knowledge of common-law jurisdictions like USA, Singapore, Hong Kong SAR.

RACHAEL KELSEY

SKO Family Law Specialists

**18 George Street
Edinburgh | EH2 2PF**

Telephone: +44 (0)131 322 6669

Direct Dial: +44 (0)131 357 1132

Website: www.sko-family.co.uk



Rachael is President of the IAFL. She is a founding Partner of SKO Family Law Specialists, which is the largest niche family practice in Scotland. She is the only 'Star Individual' in Scotland in Chambers and Partners and the only Scottish lawyer in Band 1 of the UK-wide HNW Guide. She received the 'Private Client Lawyer of the Year 2023' award at the Legal 500 Scottish Law Awards.

Rachael currently sits on the Family Law Committee of the Scottish Civil Justice Council, having been appointed by the Lord President to sit for a third term, and is the only Scot to sit on the UK Ministry of Justice International Family Law Committee. She splits her time between Edinburgh and London.

2024 Asia Pacific Chapter Symposium

Brisbane

20 February 2024

What is HOT in Parenting Matters in Cross Border Disputes?

Australia

Jacky Campbell
Partner
Forte Family Lawyers
Melbourne
Australia
jcampbell@fortefamilylawyers.com.au



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2. Child Abduction Convention

- *The Hague Convention on the Civil Aspects of International Child Abduction*
- *Family Law (Child Abduction Convention) Regulations 1986*
- *Family Law Amendment Act 2023 (Cth) – Commencement Date 6 May 2024 for most provisions*

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2. Child Abduction Convention

- *Family Law (Child Abduction Convention Amendment (Family Violence) Regulations 2022* (amending the 1986 Regs) commenced 10 December 2022.
- Reg 16(3): “A court may refuse to make an order under sub reg (1) or (2) if a person opposing return establishes that: ...

“(b) There is a grave risk that the return of the child under the Convention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;...”

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2. Child Abduction Convention

The following notes were inserted:

“Note 1: In considering whether the matter mentioned in paragraph 3(b) is established:

- (a) *The court may have regard to any risk that the return of the child under the Convention would result in the child being subject to, or exposed to, family violence; and*
- (b) *The court may have regard to the extent to which the child could be protected from any such risk if the child was returned under the Convention; and*

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2. Child Abduction Convention

- (c) *The court may have regard to the matters mentioned in paragraphs (a) and (b) of this note regardless of whether the court is satisfied that family violence has occurred, will occur or is likely to occur.*

*Note 2: For the definition of **family violence**, see section 4AB of the Act.”*

Reg 16 now requires the court to consider imposing conditions proposed by a party or Independent Children’s Lawyer (ICL) to reduce the risk.

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3. Family Law Amendment Act 2023

- Hague Proceedings - removal of requirement that Independent Children’s Lawyers can only be appointed if there are exceptional circumstances
- Changes to parenting orders framework in the *Family Law Act 1975 (Cth)* (FLA) include:
 - Removal of s 60B(2) principles – e.g. child’s rights to know and be cared for and spend time on a regular basis with parents.
 - Repealed the presumption of equal shared parental responsibility, and the related equal time and substantial and significant time pathway

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4.

- Refined list of objects of Pt VII, includes:
 - to ensure that the best interests of children are met, including by ensuring their safety;
 - Give effect to the Convention the rights of the child
- Refined list of s 60CC(2) best interest factors.
- Removed some of the practical aspects — e.g. contributions to financial support, practical difficulties and costs of spending time with both parents, participation in decision making and attitude and approach to responsibilities of parenthood

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4.

- Removed reference to grandparents
- “Safety” from family violence is now emphasized, rather than “protection”

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4. Best interest factors

Areas of uncertainty include:

- Will the “pathway” change in practice?
- What will be caught in the shorter list of s 60CC(2) general considerations of a child’s best interests by:

“anything else that is relevant to the circumstances of the child”?

- Will relocation be easier?
- Will Family Report Writers make different recommendations?
- Will family violence have a greater impact on outcomes?

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HOT TOPICS IN PARENTING MATTERS

California

Steven K. Yoda
Walzer Melcher & Yoda LLP
sky@walzermelcher.com

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DOMESTIC VIOLENCE

 International
Academy of
Family Lawyers
Asia Pacific Chapter

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“DOMESTIC VIOLENCE” DEFINED

In California, “domestic violence” is defined as: “abuse perpetrated against . . . [a] spouse or former spouse[] [or] . . . a person with whom the respondent is having or has had a dating or engagement relationship [among others].”

(Cal. Fam. Code, § 6211.)



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“ABUSE” DEFINED

- To intentionally or recklessly cause or attempt to cause bodily injury
- Sexual assault
- To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another
- Any behavior that has been or could be enjoined pursuant to Section 6320

(Cal. Fam. Code, § 6203.)



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SECTION 6320

- Molesting
- Attacking
- Striking
- Stalking
- Threatening
- Sexually assaulting
- Battering
- Credibly impersonating
- Falsely impersonating
- Telephoning



4

SECTION 6320

- Contacting
- Coming within a specified distance of
- Disturbing the peace of the other party

(Cal. Fam. Code, § 6320(a).)



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DISTURBING THE PEACE

“Disturbing the peace of the other party” refers to conduct that, based on the totality of circumstances, destroys the mental or emotional calm of the other party.

(Cal. Fam. Code, § 6320(c).)



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FAM. CODE, § 3044

“Upon a finding . . . that a party seeking custody of a child has perpetrated domestic violence within the previous five years against the other party [or the child] . . . , there is a rebuttable presumption that an award of sole or joint physical or legal custody . . . to a person who has perpetrated domestic violence is detrimental to the best interest of the child.”

(Cal. Fam. Code, § 3044(a).)



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Family Law Reform in Japan

Joint Custody after divorce

February 20, 2024



Masami Kittaka
kittaka@otani-p.com

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FAMILY LAW

- Current custody law
- Current family in Japan
- Reformed custody law



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CURRENT CUSTODY LAW IN JAPAN

	1947~
Not married	Sole Custody
Married	Joint Custody
Divorced	Sole Custody

2

BIRTHS BORN OUT OF WEDLOCK IN TOTAL LIVE BIRTH

<参考> Reference

出生に占める嫡出でない子の出生割合の国際比較

Proportion of births born out of wedlock in total live births
in selected countries

国 Country	年次 Year	割合(%) Percentage
日本 Japan	2016	2.3
アメリカ合衆国 U.S.A.	2015	40.3
韓国 Korea	2016	1.9
フランス France	2015	59.1
ドイツ Germany	2015	35.0
イタリア Italy	2015	30.0
スウェーデン Sweden	2015	54.7
イギリス United Kingdom	2015	47.9

注：イギリスは暫定値である。

資料：Eurostat [Population and Social Conditions]
 U.S. Department of Health and Human Services [National Vital
 Statistics Reports]
 大韓民国統計庁資料

*Vital statistics in Japan
 Trends up to 2016
 Ministry of Health, Labour and Welfare*

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NOTIFICATION FORM FOR DIVORCE BY CONSENT

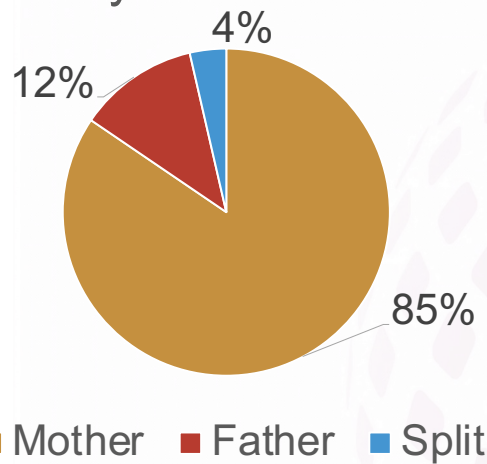
Signature/ Seal by two witnesses

Minor's name | Child over which husband has parental authority | Child over which wife has parental authority

Signature/ Seal by parties

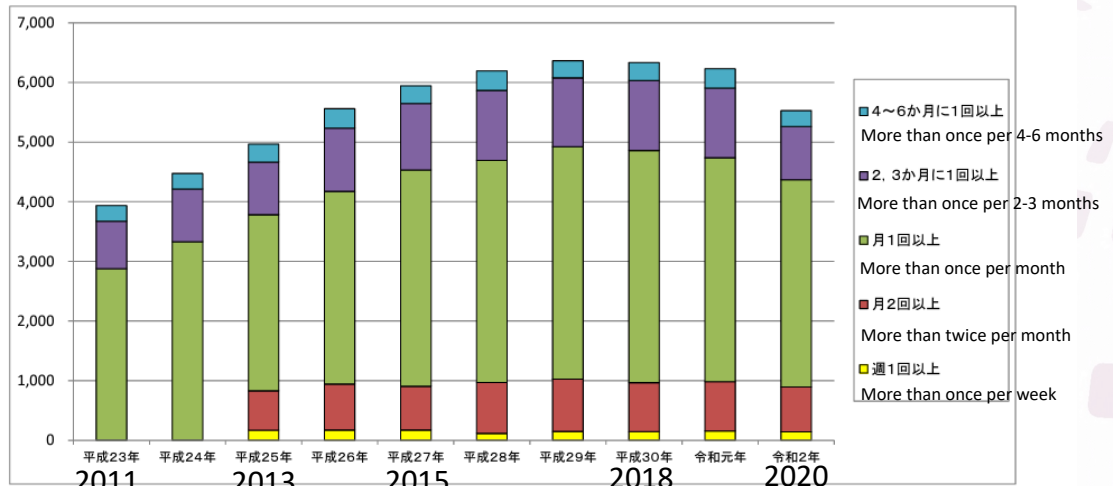
4

Sole custody after divorce in 2019



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Frequency of visitation in Agreement or Decision by the family Court



	平成23年	平成24年	平成25年	平成26年	平成27年	平成28年	平成29年	平成30年	令和元年	令和2年
週1回以上	—	—	171	173	172	118	150	146	157	144
月2回以上	—	—	659	771	735	853	876	820	828	751
月1回以上	2,878	3,329	2,952	3,231	3,626	3,721	3,898	3,894	3,753	3,472
2. 3か月に1回以上	798	885	885	1,061	1,115	1,173	1,155	1,176	1,167	895
4~6か月に1回以上	258	260	299	326	298	330	286	300	326	268

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2019.3 UN CRC RECOMMENDATION (CRC/C/JPN/CO/4-5)

- Family environment
- 27. (b) Revise the legislation regulating parent-child relations after divorce in order to allow for **shared custody** of children when it is in the child's best interests, including for foreign parents, and ensure that the right of the child to **maintain personal relations and direct contact with his or her non-resident parent** can be exercised on a regular basis;

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EUROPEAN PARLIAMENT RESOLUTION

- 2020.7.8 European Parliament resolution on the international and domestic parental abduction of EU children in Japan (2020/2621(RSP))
- 17. Calls, in this respect, on the Japanese authorities to follow international recommendations to introduce the necessary changes to the country's legal system and put in place the possibility for **shared or joint custody after the dissolution of the parents' relationship** in order to bring their domestic laws into line with their international commitments, and to ensure that visiting and access rights reflect their obligations under the UNCRC



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The Sydney Morning Herald

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Exclusive World Asia Abducted in Japan

This was published 10 months ago

Australia urges Japan to reform sole custody law

Eryk Bagshaw and Natalie Clancy
March 22, 2023 – 1:32pm

Save Share A A A 2 View all comments

The Australian government has urged Japan to reform its family law after years of disputes over child abductions that have resulted in dozens of children being separated from their parents under Japan's sole custody system.



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CONSULTATION BY MINISTER OF JUSTICE

- The Minister of Justice requested consultation with the Legislative Assembly in February 2021.
 - How the law regarding divorce and the related systems should be reviewed to secure the child's welfare?
- Research on the legal schemes on custody for 24 countries including G20.
 - The countries where joint custody after divorce is not allowed: Turkey, India and Japan.
- Public consultation from December 2022 to February 18, 2023.
 - More than 8000 comments.



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SUBMISSION TO THE PUBLIC CONSULTATION PROCESS ON FAMILY LAW REFORM IN JAPAN

- The Australian Department of Foreign Affairs and Trade and the Attorney-General's Department welcome the work of the Family Law Subcommittee of the Legislative Assembly on family law reform, including consideration of a **joint custody model**.
- Australia considers both parents taking an active role in parenting is in the best interests of children where it is safe to do so. Australia encourages Japan to introduce family law reform which establishes **shared parenting arrangements** to enable children to benefit from ongoing, meaningful relationships with both parents, and their extended families, after divorce.



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FAMILY LAW REFORM

- The Family Law Subcommittee had 37 meetings between March 2021 to January 2024.
- Response to the Minister of Justice on February 15, 2024
 - A draft bill to allow joint custody after divorce (& without marriage)
- The government will submit a bill during the ongoing ordinary session of parliament.
- Not determined yet when the modified law takes effect.



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CUSTODY LAW IN JAPAN

	1947~	202X~
Not married	Sole Custody	Sole Custody Joint Custody
Married	Joint Custody	Joint Custody
Divorced	Sole Custody	Sole Custody Joint Custody



13

PARENTAL AUTHORITY AND RELOCATION

Civil Code

Article 821 (Determination of Residence)

Residence of a child shall be determined by a person who exercises parental authority.



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DETERMINATION OF RESIDENCE

Current practice during marriage (joint custody)

Determination of Residence



A part of physical custody



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RELOCATION DURING MARRIAGE AFTER MODIFICATION

- Principle
 - Joint exercise
- Exception
 - Sole exercise is allowed in case of “urgent” circumstances
- Court permission
 - The court may decide which parent can solely decide

RELOCATION WITH JOINT CUSTODY AFTER DIVORCE?

	Designation of a Physical Custodian	Relocation
Sole Custody		Yes
Joint Custody	By the court order	Yes?
Joint Custody	Without the court order	Consent, Court permission, Designation of a physical custodian?

THANK YOU FOR YOUR ATTENTION!



Travel/Relocate Out of China Mainland with Your Child

1. Foreign country requirement for consent from non-accompanying parent to permit child travel abroad or sole custody order by local courts;
2. Impasse: divorced parents both remain legal custodians for their child [*Article 1084 of China Civil Code*] despite court order on child care and control (physical custody)



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Travel/Relocate Out of China Mainland with Your Child

3. Reason: China courts don't rule on legal custody over children in divorce proceeding but on care and control only; thus no sole custody order by China courts except that one parent is deprived of right of custody;
4. Ambiguity of laws: silence of law on who has the say over short travel? permanently relocating abroad?
5. Solution? No cause of action for this; negotiate for agreement or other leverage for tradeoff



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