

The Child Custody Issues at the time of Divorce — from the point of view of the Japanese Family Law including International Marriage Breakdown

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1 Introduction — Problems relating to children as a result of international diversity within a family

In late 1990s, the writer attended an international conference in Australia. During the conference, the writer received a criticism concerning a Japanese mother who took away her child back to Japan without the consent of her Australian husband after the divorce proceedings. Since then, the writer has received many more similar criticisms from the international community.

The writer has since attempted to learn the causes of “the international child abduction” and devised possible solutions to prevent further incidents of international child abductions.

The writer has written several academic opinions on the topic upon requests from legal practitioners around the world. The writer

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acknowledges practical difficulties in resolving the disputes involving "international child abductions" as it often involves conflict of laws between jurisdictions. The writer further acknowledges that it is often impossible to resolve the disputes harmoniously as the resolution will always be a "win-lose" situation.

This article will examine some of the differences between Japan and other western industrialised countries that create "the international child abductions". This article will also propose possible solutions to prevent further incidents of "international child abductions".

2 History and the Current Divorce Law

2.1 Western Countries

2.1.1 History

In western countries, the jurisdiction of family matters originally resided with the Christian Church. This jurisdiction was later transferred to the Government; however, the Christian Church retained significant influence over the family matters. Thus, divorces were prohibited.

Gradually, the Governments of the western countries allowed divorces only on certain fault grounds such as adultery and desertion.

2.1.2 Current Law

Most of the western industrialised countries have now abandoned the fault based divorce system and adopted the no fault divorce system, where the only ground to obtain a divorce order is irretrievable

breakdown of marriage.⁽¹⁾

Who may apply for a Divorce Order ?

Most of western industrialised countries allow either party to apply for a divorce order irrespective of fault (e.g. Australia).

Only some western industrialised countries retain the restriction that only the party who the Court considers to be innocent may apply for a divorce order (i.e. if the marriage has broken down irretrievably due to an adultery committed by one party, only the other party may apply for a divorce order).

What is an irretrievable breakdown of marriage ?

A Court may decide that there has been an irretrievable breakdown of marriage between the parties to the marriage:

- (1) where the parties have lived apart and separately for a certain period of time (**set period method**); or
- (2) where in the Court's opinion, after examination of the facts, that there has been irretrievable breakdown of marriage (**substance method**).

Most of the western industrialised countries are currently using the set period method to determine whether there has been irretrievable breakdown of marriage.⁽²⁾

(1) E.g. Australia; s 48(1) of the Family Law Act 1975 (Cth)

(2) E.g. Australia; s 48(2) of the Family Law Act 1975 (Cth)