

**IN THE BEST INTERESTS OF THE COURT: WHAT AMERICAN
LAWYERS NEED TO KNOW ABOUT CHILD CUSTODY AND
VISITATION IN JAPAN**

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I. INTRODUCTION

Japan is a haven for parental child abduction.¹ Stories about international abductions appearing occasionally in the Western press typically feature a foreign parent battling a hostile Japanese parent in a legal system that seems indifferent to, or incapable of, addressing the plight of the bicultural children caught in-between.² The shortcomings of Japan's legal system in this area have even drawn comment from the U.S. government,

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A note on sources: Although I do not consider them to be ideal translations, I have used the Eibun-Horei-sha English translations (commercially available from Heibunsha Printing Co. in Tokyo) for citations to Japan's Civil Code [Minpō] and the Law for the Adjudgement [sic] of Domestic Relations (LADR). Translations from the Japanese are by the author, unless otherwise noted (while some of my translations, particularly of court decisions, may seem awkward, this is intended to reflect the complexity of the original language). In addition, many of my observations are based on discussions with mostly Japanese parents of both genders at various stages of their cases. Out of respect for their privacy, I have not cited to these informal discussions as I would have if I had interviewed them "on the record."

¹ See generally Jens Wilkinson & Frans Pau, *Tales from Japan's Abandoned Foreign Parents* (Autumn 2003), <http://www.zmag.org/japanwatch/0303-kidnap.html> ("As several Japanese lawyers have stated publicly, Japan is probably the safest country in the world to abduct/kidnap a child to."). Japan is not a party to the Hague Convention on the Civil Aspects of International Child Abduction. Hague Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter Hague Convention].

² See, e.g., Doug Struck & Sachiko Sakamaki, *Divorced from Their Children: In Japan, Foreign Fathers Have Minimal Rights to Custody or Visitation*, WASH. POST, July 18, 2003, at A09; Daphne Bramhan, *Why We're Powerless to Get Back Abducted Children*, VANCOUVER SUN, Mar. 15, 2005; Rob Perez, *Options Few After Mom Abducts Girl*, HONOLULU STAR BULLETIN, Dec. 6, 2004; Mariko Sugiyama, *Irreconcilable Differences: Kids Held 'Hostage' After International Marriages Fail*, ASAHI HERALD TRIBUNE, Jan. 29, 2005. These and other articles and accounts are available through the Japan Children's Rights Network website at <http://www.crnjapan.com>. See also Gabrielle Kennedy, *When the Honeymoon's Over*, ACCJ JOURNAL, Nov. 2006, at 14.

and are a topic of discussion among the foreign consular corps in Japan.³

Unfortunately, focusing on the problem as a cross-cultural one risks marginalizing it. In reality, parental child abduction and parental alienation are problems for parents and children in Japan, regardless of race or nationality. For every foreign parent who loses contact with their children in Japan, a greater number of Japanese parents suffer the same fate.⁴

The purpose of this article is to make American practitioners aware of the realities of child custody and visitation in Japan. When a case involves a Japanese element (e.g., a custodial parent seeking to relocate to Japan, a non-custodial parent seeking to take a child back to Japan for visitation with relatives, or any parent seeking relief from a Japanese custody or visitation order), American practitioners should know that Japan's legal system cannot be expected to provide the same level of protection of the rights of parents and children in divorce as would be expected in American proceedings. Allowing a child to be taken to Japan as part of a custodial or visitation arrangement entails the risk that, once there, the child may be denied all further contact with the other parent. And, assuming the parent violating the order has no need to ever return to the U.S., few effective remedies will be available.

³ Tommy G. Thompson (U.S. Secretary of Health and Human Services), *Japan Needs International Child Support Law*, ASAHI SHIMBUN, Mar. 26, 2004, at 25. In addition to child support enforcement issues, Secretary Thompson also comments on the inability of Japan's legal system to deal effectively with parental child abduction. The website for the U.S. embassy in Japan also notes that in East Asia, Japan accounts for the largest number of parental abduction cases currently being addressed by the State Department. Press Release, Maura Harty, Asst. Sec., Bureau of Consular Affairs, Harty on Hague Convention on the Civil Aspects of International Child Abduction (Dec. 3, 2005), <http://tokyo.usembassy.gov/e/p/tp-20051203-71.html>.

⁴ See, e.g., Isabel Reynolds, *Divorced Japanese Struggle for Right to See Kids*, REUTERS, Feb. 18, 2004, available at <http://www.crnjapan.com/articles/2004/en/20040218-reuters.html>; Mariko Sugiyama, *Divorce Triggers Furious Battle over Children*, INT'L HERALD TRIBUNE, Mar. 19, 2005, available at <http://www.crnjapan.com/articles/2005/en/20050319-ihd-divorcebattle.html> [hereinafter *Furious Battle*].

This article is intended primarily as an attempt to describe the Japanese system and suggest why it functions as it does in child custody cases. While the California Family Code has been used as a contrast and, for reasons that will be made clear later, this article is not intended as an exercise in academic comparative law. Thus, although a model is offered as to why Japanese courts act the way they do in child custody cases and others are welcome to knock it down or build upon it, it is hoped that the exercise of doing so will not distract from the sad realities of how the system functions in practice.

In summary, the model described in this article is based on Japanese courts being part of a national bureaucracy, with both the judiciary as an institution and its members having an interest in preserving the authority of this bureaucracy. This goal may often be served by ratifying the status quo, particularly in child custody and visitation cases, where courts have few, if any, powers to enforce change. Ratifying the status quo is facilitated by the absence of substantive law defining the best interests of the child in cases of parental separation, and the absence of any need to refer to family values beyond those generated within the judiciary.

Before proceeding, a few caveats are in order. First, I am not a Japanese lawyer and nothing in this article should be relied on as legal advice in any specific case. Second, readers should know that I am writing this article in part because of my own personal experiences with the Japanese family court system and I thus may have more than a slight bias.⁵ However, as one of a few Japanese-speaking Western lawyers with first-hand experience in the Japanese family court system, I feel obliged to share these experiences. Accordingly, I have included references to my own experiences where appropriate, mostly in footnotes. Third, while this account may present a bleak picture for parents seeking to regain or maintain contact with children in Japan, nothing in this

⁵ I spent approximately eighteen months involved in child custody, visitation and related proceedings in Japan, which went all the way to the Supreme Court of Japan (“SCJ”), at the end of which I lost physical custody of my 5 year old son. During this proceeding I was not awarded any visitation with my son and had little or no contact with him for extended periods.

article should be taken as implicitly or explicitly encouraging the unilateral removal of children from that country to avoid the jurisdiction of the Japanese courts. As discussed, such conduct may constitute a criminal offense both in Japan and elsewhere.

This paper begins with a brief overview of the country's legal system, followed by a detailed description of how custody and visitation are determined and enforced within the context of divorce. It concludes with a theoretical synthesis and offers a few observations for American practitioners dealing with Japan-related child custody and visitation.

II. THE JAPANESE LEGAL SYSTEM AND THE JUDICIARY: OVERVIEW

Japan is a civil law jurisdiction. Japan's Civil Code (Minpō) was developed from Prussian and French models during Japan's modernization in the Meiji period (1868-1912).⁶ Japan's post-war Constitution (Kenpō) was drafted under U.S. supervision and adopted during the post-war occupation.⁷ The post-war legal system includes features familiar to American lawyers, including constitutional judicial review and a degree of reliance on judicial precedents.⁸ However, there are no civil juries, and fact-finding is conducted primarily by judges, rather than through adversarial proceedings.⁹ As common in civil law systems, appellate courts may engage in de novo findings of fact.¹⁰

⁶ See JOHN HALEY, *AUTHORITY WITHOUT POWER* 67-77 (1987) (discussing Japan's adoption of European legal models). See also KENNETH PORT & GERALD MCALINN, *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 32-33 (2003).

⁷ See, e.g., PAUL CARRINGTON, *SPREADING AMERICA'S WORD* 262-265 (2005).

⁸ See PORT & MCALINN, *supra* note 6, at 43.

⁹ See, e.g., Craig Wagnild, *Civil Discovery in Japan: A Comparison of Japanese and U.S. Methods of Evidence Collection in Civil Litigation*, 3 *ASIAN-PAC. L. & POL'Y J.* 1, 4 (2002) ("Authority and control over the gathering of evidentiary facts is vested in the court, with the judge assuming the primary responsibility for taking and receiving evidence.").

¹⁰ MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 149 (1981) (noting a common feature of continental European courts

Japan has a three-tier court system comprised of four types of court. The lowest tier consists of 438 summary courts (*kan'i saibansho*), at which a single judge resolves small claims and other petty disputes. The next tier is composed of district courts (*chihō saibansho*). There are at least 50 of these courts of general jurisdiction (with 203 branches), with at least one located in each of Japan's 47 prefectures. In addition, there is a network of 50 family courts (with 203 branches and 77 local offices), which in theory are at the same level in the judicial hierarchy as the district courts.¹¹ Most district court cases are tried by a single judge, although a panel of three judges is used in special cases such as those involving a crime that carries a maximum sentence of death or life imprisonment.¹² Family court cases will also generally be heard by a single judge, though that judge's direct involvement in the actual proceedings may be limited.¹³ Above

is that "appeal is usually trial de novo"). Japanese appellate courts have tremendous leeway to amend judicially-established facts based solely on the trial records, which in the case of family court cases may not be readily available to the litigants. In my case, the Tokyo High Court amended the Tokyo Family Court's findings of fact to conclude that my son's habitual residence was in California, even though he had been born and raised in Tokyo and was by the time of the upper court proceedings known to be residing in a third country. Since findings of fact by a high court may not be appealed, this is now a confirmed judicial fact, despite being patently wrong.

The seemingly Orwellian nature of appellate fact-finding should also be noted. The appellate court opinion actually directs the rewriting, line by line, of the lower court opinion so that it reflects the "correct" facts. In my case, to support her award of physical custody, the initial opinion of the family court included a statement that my son's mother had no intent of removing him to a third country. On appeal, the Tokyo High Court directed that this language be replaced to reflect the new reality that, less than eight weeks after the initial decision, my son and his mother were now in that very third country.

¹¹ There are numerous descriptions of the Japanese judicial system, but in writing this paragraph I have relied upon the Supreme Court of Japan's own English-language publications on the subject: *Outline of Civil Litigation in Japan and Guide to the Family Court of Japan*. SUPREME COURT OF JAPAN, OUTLINE OF CIVIL LITIGATION IN JAPAN (2002); SUPREME COURT OF JAPAN, GUIDE TO THE FAMILY COURT OF JAPAN (2004). See also Percy R. Luney Jr., *The Judiciary: Its Organization and Status in the Parliamentary System*, 53 LAW & CONTEMP. PROBS. 135 (1990).

¹² Saibanshohō [Court Law], Law No. 59 of 1947, art. 26, 31-4.

¹³ Court Law, art. 31-4. See also PORT & MCALINN, *supra* note 6, at 132.

the district and family courts are eight high courts (with six branches) that function as appellate courts and where cases are usually heard by a panel of three judges. At the top of this structure is the Supreme Court of Japan (SCJ), whose fifteen members hear appeals on constitutional matters in full session, or on legal matters in petty benches composed of five justices.

The judiciary is an elite body. Judges, prosecutors and lawyers¹⁴ must pass the notoriously difficult annual bar exam, which in 2002 had a pass rate of approximately 2.5%.¹⁵ Those who pass enter the government Legal Research and Training Institute for one and a half years to receive practical training and experience working with judges, prosecutors, and private attorneys.¹⁶ Although in theory the “elite” of this elite group have the opportunity to become judges or prosecutors, graduates who have already invested a huge amount of time and money studying may find these jobs unattractive.¹⁷ As a result of this

¹⁴ I use the term lawyer (*bengoshi*) to refer to the Japanese who have gone through the process described above, despite the fact that there are many other Japanese legal professionals (e.g., patent and tax attorneys) with different formal qualifications and job titles, but whose corollaries in the United States or Canada would be referred to as “lawyers.”

¹⁵ Curtis Milhaupt & Mark West, *Law’s Dominion and the Market for Legal Elites in Japan*, 34 LAW & POL’Y INT’L BUS. 451, 463 (2003). See also, e.g., PORT & MCALINN, *supra* note 6, at 131-132; Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?* 2 ASIAN-PAC. L. & POL’Y. J. 88, 90 (2001). The number of lawyers will increase as the result of the revised bar examination regime, implemented in conjunction with Japan’s new graduate law school system, and which commenced operation in April 2004. See, e.g., PORT & MCALINN, *supra* note 6, at 124. Since the law school system produced its first graduates in March of 2006, and the first graduating class to pass the bar exam has, at the time of publication, still not completed the one year course at the Legal Research and Training Institute necessary to qualify as a judge or lawyer, it will have no immediate impact on the system as described herein.

¹⁶ See Miyazawa, *supra* note 15, at 90.

¹⁷ See, e.g., *id.* (noting that one motivation for Japan’s Ministry of Justice agreement to gradual increases in the number of bar-passers admitted to the Institute may have been the problem of recruiting enough prosecutors). There are procedures by which experienced lawyers can also act as judges, but this route is seldom used. See PORT & MCALINN, *supra* note 6, at 132.

filtering process, those who enter the legal profession tend to be a certain type: the naturally brilliant, or at least good test-takers, and those who have the means to devote themselves to lengthy, intensive studying, often at the expense of other activities. As one scholar notes, this system “make[s] the practice of law an elite and protected club for a chosen few. This sense of elitism creates a large, capricious and socially dysfunctional gap between lawyers and the people they are licensed to serve.”¹⁸

A key characteristic of the Japanese judiciary which has tremendous significance to understanding the way it functions is that it is a specialized form of bureaucracy, with many administrative functions fulfilled by judges.¹⁹ Indeed, as several observers have pointed out, the true elite within the judiciary, including those who advance to the SCJ, are judges who spend most of their career in administrative positions rather than on the bench.²⁰

¹⁸ *Id.* at 123-124.

¹⁹ *See, e.g.,* Miyazawa, *supra* note 15, at 90.

²⁰ *See, e.g.,* SHINICHI NISHIKAWA, NIHON SHIHŌ NO GYAKUSETSU [THE PARADOX OF JAPANESE JUSTICE] (2005). This book is devoted to the subject of “judges who do not judge” and their predominance within the SCJ and its administration. The author notes that one former SCJ chief justice spent only eight of his 36 year career hearing trials and spent the remainder in administrative posts within the judiciary and postings to other branches of government. *Id.* at 49. *See also* JIRO NOMURA, NIHON NO SAIBANKAN [JAPAN’S JUDGES] 182 (1992) (noting that many of the judges reaching high positions in the SCJ administrative hierarchy actually have limited trial experience). The hierarchy, with the SCJ secretariat at its top, was not intended. Japan’s Constitution states that judges are bound only by the Constitution, the law, and their good conscience. KENPŌ [CONSTITUTION], art. 76, para. 3. While this language excludes even the notion that higher court opinions may have precedential authority, in practice, the SCJ secretariat has used its power over judicial personnel appointments, geographical postings and other administrative authority to exercise tight control over judges at all levels of the system. NIHON MINSHU HŌRITSUKA KYŌKAI & SHIHŌSEIDO I‘INKAI, ZENSAIBANKAN KEIREKI SŌRAN [DIRECTORY OF THE CAREER PATH OF ALL JUDGES] (4th ed. 2004) [hereinafter DIRECTORY] (a directory of the geographical postings and positions held by all judges, by class year). *See also* KAREL VAN WOLFEREN, THE ENIGMA OF JAPANESE POWER 216 (1989) (describing the post-war breakdown of the dividing line between the judiciary and administration, established by occupation authorities). The bureaucratic nature of Japan’s judiciary is not unique. *See* SHAPIRO, *supra* note 10, at 149-150 (describing similar features in European civil law countries).

As is common in other Japanese national bureaucracies, judges may be transferred to new posts and different geographic locations every few years.²¹ Postings may include administrative positions within the judicial bureaucracy or secondment to other branches of the government.²² By statute, judges are free to refuse reassignments, but do so at risk of further career advancement.²³ All judges are subject to annual personnel evaluations by the judicial bureaucracy, a process which has been criticized for its lack of transparency.²⁴ However, at least one factor in advancement, and geographical postings, is how quickly judges process their burgeoning case loads and, according to some accounts, how often their judgments are appealed or overruled.²⁵

²¹ See DIRECTORY, *supra* note 20. As an example of both the geographically unsettled nature of a judge's career and the degree of the SCJ's control over it, Nishikawa reports that the SCJ secretariat frowns on judges who purchase their own homes, and prefers they live in the special government housing provided for them. NISHIKAWA, *supra* note 20, at 197.

²² See, e.g., DIRECTORY, *supra* note 20 (showing the career path of individual judges, including secondments to other branches of the government). Nishikawa also gives details as to judicial seconding to other branches of government. NISHIKAWA, *supra* note 20, at 59-62.

²³ NISHIKAWA, *supra* note 20, at 190 (noting that a judge who refuses a posting based on Article 48 of the Court Law, which guarantees the status of judges, would likely be subject to a punitive posting the following year, and might fear not being reappointed at the end of his or her ten-year term); DIRECTORY, *supra* note 20, at 9 (noting that non-consensual transfers, fear of non-reappointment and discrimination in compensation all exist openly in the judiciary). Cf. Court Law, art. 48 (stating that "[a] judge shall not, against his will, be dismissed, or be transferred from one court to another, or be suspended from exercising his judicial function, or have his salary reduced . . .").

²⁴ NISHIKAWA, *supra* note 20, at 9-10. In response to complaints about the lack of transparency of the personnel evaluations of judges, the SCJ issued a report giving some details of the criteria used, though this seems unlikely to terminate the overall criticism of the system. See MASASHI HAGIYA & YOSHIHIRO MISAKA, NIHON NO SAIBANSHO [JAPAN'S COURTS] 257-261 (2004). For a benign description of Japanese judicial administration, see Takaaki Hattori, *The Role of the Supreme Court of Japan in the Field of Judicial Administration*, 60 WASH. L. REV. 69 (1984).

²⁵ NIHON MINSHU HÖRITSUKA KYÖKAI & SHIHÖSEIDO I'INKAI, ZENSAIBANKAN KEIREKI SÖRAN [DIRECTORY OF THE CAREER PATH OF ALL JUDGES] 10 (3rd ed. 1998) ("[T]he SCJ has virtually complete control over [judicial] personnel matters . . . and it is said that the judge's decisions and even the way she conducts a trial, matters that relate to the judge's autonomy, may be

Some scholars have gone so far as to assert that the SCJ General Secretariat's evaluation and assignment process is used for political purposes – as a means of controlling judges who issue decisions contrary to the interests of the country's governing elite.²⁶

Despite being career bureaucrats, in one respect, judges have less job security than other national civil servants or judges in some common law jurisdictions. Rather than lifetime employment, all judges are subject to reappointment by the Cabinet every ten years,²⁷ and, although rare, the Supreme Court secretariat has at times declined to recommend disfavored judges for reappointment.²⁸ Furthermore, most judges are subject to a statutory retirement age of 65.²⁹ Therefore, as with other Japanese bureaucrats, post-retirement employment (*amakudari*) concerns many judges. Their prospects for such employment may depend on the location and position they hold in the years

used as material for personnel evaluations.”). *See, e.g.*, NISHIKAWA, *supra* note 20, at 183.

²⁶ J. MARK RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN 48-61 (2003) (explaining how “the number of anti-government opinions that a judge wrote in 1975-84 inversely correlates with the odds of receiving a post in an attractive city in the 1980s”). *See generally* Setsuo Miyazawa, *Administrative Control of Japanese Judges*, in LAW AND TECHNOLOGY IN THE PACIFIC COMMUNITY 263-81 (Philip S.C. Lewis ed., 1994) (explaining how judges working in the Supreme Court's General Secretariat control lower-court judges by retaining lucrative administrative positions in the Secretariat for a small group of “elite” judges, indoctrinating judges through assignments to the Ministry of Justice, and holding judicial conferences to instruct judges on how to rule on controversial issues).

²⁷ KENPŌ, art. 80. Justices of the Supreme Court are an exception, being subject to periodic (but largely symbolic) review in national elections. KENPŌ, art. 79.

²⁸ *See, e.g.*, NOMURA, *supra* note 20, at 190-195 (summarizing an incident of a judge not being reappointed for suspected political reasons). More recently, a judge has been told he will not be recommended for reassignment on the grounds that his opinions are “too short.” *Hanketsu Mijikai Hanji ni “Sainin Futekitō”* [Judge's “Reappointment Inappropriate” Because of Short Decisions], CHŪNICHU SHIMBUN, Dec. 10, 2005 [hereinafter Short Decisions].

²⁹ Court Law, art. 50.

preceding retirement, and how they are regarded by the SCJ.³⁰

In essence, therefore, individual judges have limited autonomy, particularly if they hope for a successful career and postings in major cities, as they are subject to rewards and sanctions within the framework of a rigidly bureaucratic hierarchy. That said, the experience of many judges prior to joining the bench may render them amenable to life within this hierarchy.³¹

Japanese judges may also be overworked. By some accounts, judges will typically carry a case load of about 200 at any given time.³² John Haley reports that, as early as 1974, judges dealt with an average load of 1,708 cases annually.³³ The

³⁰ See generally VAN WOLFEREN, *supra* note 20, at 44-45 (discussing *amakudari* and the Japanese bureaucracy). In their exposé -style book on Japanese trials, Yamaguchi and Soejima write of some judges being interested mostly in promotion and post-retirement honors, and speculate that their most likely avenue of post-retirement employment is as public notaries (*kōshōnin*), the allocation of which is also supposedly subject to behind-the-scenes control by the SCJ. HIROSHI YAMAGUCHI & TAKAHIKO SOEJIMA, SAIBAN NO HIMITSU [THE SECRET OF TRIALS] 237-241 (2003).

³¹ As noted by one Japanese scholar:

Judges in Japanese courts were all children of the same type of high-income parents, all studied at the same leading high schools, went to the same bar exam preparatory schools, graduated from the same universities, studied at the same [legal] training institute and, without ever experiencing any other profession, spend most of their lives in court with colleagues who all share the same mode of thinking.

Colin P.A. Jones, *Prospects for Citizen Participation in Criminal Trials in Japan*, 15 PAC. RIM LAW & POLICY J. 363 (2006) (reviewing TAKASHI MARUTA, SAIBANIN SEIDO [THE LAY JUDGE SYSTEM] (2004)). *But see also* JOHN HALEY, THE SPIRIT OF JAPANESE LAW 121 (1998) (“All said, Japanese judges do not walk lock-step together. They do not all think, act, or feel alike. Wide disparities in belief, political preference, social outlook, and basic values exist within the Japanese judiciary as in Japanese society as a whole.”).

³² KAZUFUMI TERANISHI ET AL., SAIBANKAN WO SHINJIRU NA! [DON'T TRUST JUDGES!] 66 (2001). Yamaguchi and Soejima suggest that a typical three judge panel will have a combined docket of 600 cases. YAMAGUCHI & SOEJIMA, *supra* note 30, at 224.

³³ HALEY, *supra* note 6, at 108. If anything, family courts may

current case load is viewed by some observers as an excessive burden that prevents judges from functioning properly and contributes to the trial errors endemic to the Japanese system.³⁴ Furthermore, the emphasis on docket processing may not always be conducive to thorough proceedings.³⁵ As long as judges can record their cases as “resolved,” they may not care whether this result is achieved by judgment, settlement, or the parties simply going away.³⁶

Judges also have limited authority to find parties in contempt or use other equitable powers, and have no court marshals with police-like powers to carry out their orders.³⁷ The police themselves have a long-standing policy (without foundation in any statute) of avoiding involvement in civil matters.³⁸

be even busier. For example, in 2002, the family court system processed 679,338 family affair matters (which includes individual motions for relief, of which there may be many in a single case), as well as taking in 281,638 new juvenile delinquency cases. Supreme Court of Japan, SHIHŌ TŌKEI NENPŌ, 3 KAIJI HEN, HEISEI 15 NEN [ANNUAL REPORT OF JUDICIAL STATISTICS FOR 2003, VOLUME 3 FAMILY CASE], 2 (2004) [hereinafter FAMILY CASE STATISTICS]; GUIDE TO THE FAMILY COURT OF JAPAN, *supra* note 11, at 44. The total number of judges in Japan was 3,266 in 2005. Family, district, and appellate court judges accounted for 2,437 of these. Although statistics for the number of family court judges are not readily available, even ignoring the number of appellate court judges and assuming an equal split between district and family courts, there are, at best, around 1,200 judges handling the aforementioned actions. SAIBANSHO BUKKU [COURT DATA BOOK] 22 (SCJ ed., 2005).

³⁴ See TERANISHI ET AL., *supra* note 32, at 66-67.

³⁵ Yamaguchi and Soejima note that within the judiciary the term “batting average” (*daritsu*) is used, and is calculated using the number of cases a judge has in a year as the denominator, and the number of cases “finished” as the numerator. Judges with a high batting average are reportedly promoted sooner. YAMAGUCHI & SOEJIMA, *supra* note 30, at 28.

³⁶ *Id.* This situation will doubtless be exacerbated by recent legislation mandating that civil trials should be “finished” in two years or less. Saiban no jinsokuka ni kansuru hōritsu [Law for Speedier Trials], Law No. 107 of 2003.

³⁷ HALEY, *supra* note 6, at 118. See also Struck & Sakamaki, *supra* note 2 (quoting a parent unable to see his child: “The court says I have a right to see my son But there’s no method in Japan of enforcement.”). As we will see, this is an oversimplification of the theoretical aspects of the problem, but probably an accurate assessment of the practical realities.

³⁸ See, e.g., TAKASHI HIGAKI, SEKEN NO USO [LIES OF SOCIETY]

Therefore, compared to their American counterparts, judges in Japan may have difficulty compelling litigants to do things necessary to resolve a case.

Japanese bureaucracies are notorious for placing the preservation of their own power and authority above most other concerns.³⁹ Given the centralized control the Supreme Court bureaucracy imposes on judges, preservation of institutional authority (sometimes expressed in terms like “preserving the people’s faith in the judicial system”) is likely an important, if often unstated, goal of the judiciary as well.⁴⁰ Thus, judges’ dual concerns of preserving authority and resolving case loads, with limited tools to do either, may explain a great deal about the way judges decide child custody and visitation in Japan.

III. THE FAMILY COURT SYSTEM

A. Overview

The family court system is the initial forum for disputes relating to the family and children.⁴¹ There is at least one family

115-118 (2004).

³⁹ See, e.g., VAN WOLFEREN, *supra* note 20, at 320 (attributing the dismal behavior of Japanese government agencies in a 1985 air crash as being because “the bureaucrats and their minister do not see themselves as representatives of a responsible government answerable to a general public They see themselves as partisan members of their own group with interests to defend.”). On Japanese bureaucracies generally, see also MASAO MIYAMOTO, STRAIGHTJACKET SOCIETY 14 (1993) (foreword by director Juzo Itami: “As for the bureaucrats themselves, their primary purposes are belonging to that community, maintaining harmony within it, and perpetuating its existence as long as possible.”). Miyamoto, a U.S.-trained psychiatrist, originally published his widely-read insider’s account of the Japanese bureaucracy in Japanese under the title *Oyakusho no Okite* [The Commandments of the Bureaucracy]. He wrote a follow-up untranslated work entitled: *A Japan of Bureaucrats, by Bureaucrats, for Bureaucrats?* MASAO MIYAMOTO, KANRYŌ NO KANRYŌ NI YORU KANRYŌ NO TAME NO NIHON? (1996). Attorney Hiroshi Yamaguchi also writes of the bureaucratic character of courts both in general and the context of family law. HIROSHI YAMAGUCHI, RIKON NO SAHŌ [THE ETIQUETTE OF DIVORCE] 30-31, 33-34 (2003).

⁴⁰ See also HAGIYA & MISAKA, *supra* note 24, at 95-98 (regarding the SCJ’s sensitivity to criticism of and interference in the court system by other branches of government).

⁴¹ By statute, family courts have: (i) authority to issue decrees

court in each of Japan's forty-seven prefectures, as well as smaller branches and local offices in more remote locations. The mandate of the family court is exceptionally broad, and includes not just marital and child custody disputes, but probate matters and juvenile delinquency cases.⁴² According to the SCJ, the family court is "a court in which the principles of law, the conscience of the community, and the social sciences, particularly those dealing with human behavior and personal relationships, work together."⁴³

The Law for Adjudgement [sic] of Domestic Relations (LADR), the principal law setting forth the procedural rules of the family court system, lists almost fifty separate categories of disputes which come under its jurisdiction, including disinheritance cases, appointment of executors, probation of wills, appointment of guardians and matters relating to marital relations, marital property, and child custody.⁴⁴ Even this expansive listing of disputes may understate the scope of matters brought before a family court. Professor Tamie Bryant, who did field work in Japanese family courts in the 1980s and 90s, notes that "the family court will handle the case of a daughter who thinks that her mother calls her too frequently or that of brothers who do not agree about the division of proceeds from the sale of their jointly-owned house."⁴⁵ Nonetheless, this apparently broad mandate may not extend to "non-traditional" family relationships, such as same-sex couples.⁴⁶

and conduct mediation regarding matters specified in the LADR; (ii) initial jurisdiction over matters specified in the Personal Affairs Litigation Code [hereinafter PALC]; (iii) authority to issue decrees for protective matters under the Juvenile Law; (iv) initial decrees under Article 37(1) of the Juvenile Law; and (v) such other authority as granted by specific statutes. Court Law, art. 31-3.

⁴² GUIDE TO THE FAMILY COURT OF JAPAN, *supra* note 11, at 8.

⁴³ *Id.* at 4.

⁴⁴ Kaji shimpanhō [Law for Adjudgement of Domestic Relations], Law No. 152 of 1947, art. 9 [hereinafter LADR].

⁴⁵ Tamie L. Bryant, *Vulnerable Populations in Japan: Family Models, Family Dispute Resolution and Family Law in Japan*, 14 UCLA PAC. BASIN L.J. 1 (1995).

B. *Actors*

The family court's various personnel help resolve the disputes under the court's jurisdiction. Because of the scope of jurisdiction, however, it is important to remember that many of them are effectively generalists, if they have any special training at all. A brief summary of the key actors follows.

1. Family Court Judges

Although the SCJ claims that “[o]nly judges possessing sufficient enthusiasm, ability and understanding to deal with family and juvenile cases are designated as judges of the family court,”⁴⁷ the career path of most judges includes at least one rotation in a family court.⁴⁸ Within the judiciary, prolonged tenure in family court may be taken as a sign of an undistinguished career, and some judges have complained about the inferior status and limited career prospects.⁴⁹ Given the elite

⁴⁶ *Id.* at 7-8. It should be noted that recent legislation empowers family courts to issue decrees changing the legal gender of transsexuals (though only those without children), suggesting the institution is actually perfectly able to deal with “non-traditional” matters so long as it involves an expansion of institutional authority and the court system’s apparent social relevance. *Seidōissei shōgaisha no toriatsukai no tokurei ni kansuru hōritsu* [Law Regarding Special Measures for the Handling of the Gender of Persons with Gender Identity Disorder], Law No. 111 of 2003, art. 3.

⁴⁷ GUIDE TO THE FAMILY COURT OF JAPAN, *supra* note 11, at 12. Indeed, the SCJ seems to contradict its own statements on the “special” nature of family court judges indicated in the quoted language by in the following sentence stating that they are “selected by the same method as district and high court judges.” *Id.*

⁴⁸ For example, of the seventy-six judges from the 40th class of graduates of the Legal Research and Training Institute (the class of 1986), seventy-three had experienced at least one posting to a family court by 1996, a majority of them receiving their first such posting in the third year of their careers. DIRECTORY, *supra* note 20, at 244-46.

⁴⁹ See, e.g., Etsuo Shimosawa, *Kasai no Hito* [People of the Family Court], in NIHON SAIBANKAN NETTOWA-KU [JUDGE NETWORK OF JAPAN], SAIBANKAN WA UTTAERU! WATASHITACHI NO DAIGIMON [JUDGES SPEAK UP! OUR BIG QUESTION] 54, 56-58, 71 (1999). The author, a judge, refers to family court duty as a “the scenic route to career advancement” (*shusse no michikusa*), and complains that family court judges are viewed within the judiciary as being inferior to district court judges. *Id.* at 71. He states that, “if you wish to get promoted as a judge, it is generally not advantageous to serve in a family court.” *Id.* at 57. Nishikawa also refers to postings to

path that virtually all members of the judiciary have followed, the low regard in which family court is held by some is unsurprising. As one judge puts it: “[t]hose of us who graduated from law faculties felt that it was our role to debate the great affairs of the nation. Matters such as those between men and women seemed like trivia, mere trivia.”⁵⁰ While some family court judges undoubtedly live up to the SCJ’s PR and are truly devoted to family matters, others may feel their careers are sidetracked, resent not hearing more “important trials,” or are at least trying to avoid another family court posting.

2. Family Court Mediators

Together with the family court judge, family court mediators (*kaji chōtei i’in*)⁵¹ comprise the panel (*chōtei i’inkai*) overseeing the mediation proceedings required in most family court matters.⁵² In practice, however, the judge may be too busy to attend many mediation sessions, which are typically led by two mediators, one male and one female.⁵³ According to the SCJ, family court mediators are chosen by the SCJ “from among the

family courts as a form of punishment meted out to judges disfavored by the SCJ bureaucracy. NISHIKAWA, *supra* note 20, at 83.

⁵⁰ Shimosawa, *supra* note 49, at 56.

⁵¹ While SCJ English language materials use the English term “councilor,” I prefer “mediator” as I believe it better conveys the role played by these individuals, at least in the context of child custody and visitation proceedings. Similarly, while SCJ materials and the commercially available translation of the LADR use the term “conciliation,” I have used the term “mediation” throughout.

⁵² LADR, art. 3-2; Bryant, *supra* note 45, at 9. In cases where urgent action is needed, a judge may sometimes conduct the mediation alone. TAICHI KAJIMURA, RIKON CHŌTEI GAIDOBUKKU [GUIDEBOOK TO DIVORCE MEDIATIONS] 5 (2004). Since April 2004, a system also exists whereby a member of the bar may be appointed to head a particular mediation panel in lieu of a judge. *Id.*

⁵³ *Id.* During the entire proceedings for my case, which terminated virtually all of my parental rights, I only saw the judge *once* for about a minute when he appeared at the end of the final mediation session to announce that mediation had failed and that he would issue a custody decree (which happened two months later).

general public, usually upon the recommendation of community authorities, bar associations, and other citizens or organizations. The most important criterion for appointment is whether a candidate is a person of broad knowledge and experience, and the appointment is a matter of honor.”⁵⁴ Or, as Bryant puts it, they are “volunteers who need not have training in law, social welfare, or psychology.”⁵⁵ In fact, according to the SCJ rules, mediators need only have “rich knowledge and experience in public life, be of a highly regarded character, have good judgment, and be between the age of 40 and 70.”⁵⁶ Mediators are “selected by the Supreme Court, primarily on the basis of recommendations from people the Supreme Court respects.”⁵⁷ Thus, mediators might have no formal training in a relevant field; additionally, they are unlikely to be the peers of the people whose disputes they mediate.⁵⁸

⁵⁴ GUIDE TO THE FAMILY COURT OF JAPAN, *supra* note 11, at 15.

⁵⁵ Bryant, *supra* note 45, at 9.

⁵⁶ Minji chōtei i’in oyobi kaji chōtei i’in kisoku [Regulations for Civil Mediators and Family Court Mediators], Sup. Ct. Rule No. 5 of 1974. Article 1 of these rules specifies that appointees should be qualified as lawyers, have “specialized knowledge useful in the resolution of domestic disputes,” *or* have the rich knowledge described above. The only absolute requirement for appointment is the designated age range. Also, though not specified in any regulations, the SCJ has unilaterally declared Japanese nationality to be an additional requirement, further narrowing the mediator pool. *Chōtei i’in, shihō i’in, zainichi bengoshi shūnin dekizu, saikōsai: “kōkenryoku no kōshi,” bengoshikai: “hōkitei nai” to hihan* [Supreme Court Excludes Ethnic Korean Attorneys from Becoming Family Court Mediators Because Mediators “Exercise Public Authority”: Bar Association Cries, “No Law for This”], NISHINIPPON SHIMBUN, Sept. 1, 2006, *available at* www.nishinippon.co.jp/news/wordbox/display/4195/ (reporting the SCJ’s refusal to appoint ethnic Korean lawyers as family court mediators and other similar roles on the grounds of ethnicity).

⁵⁷ Bryant, *supra* note 45, at 9-10. If available, one mediator may be a lawyer or other member of the legal community, though this is not a formal requirement.

⁵⁸ As also noted by Bryant, mediators are likely to be considerably older than disputants, as well as more highly educated and financially privileged. *Id.* at 10. Yamaguchi describes mediators as also being “the types of people who are well acquainted with the world of bureaucracy.” YAMAGUCHI, *supra* note 39, at 96.

Given their narrow demographic and lack of formal training, mediators are a source of dissatisfaction for mediation participants. Bryant notes that mediators fail to recommend legal solutions that could lead to a resolution because of their lack of awareness and training.⁵⁹ Complaints about the mediators' gender bias and outdated notions of family are common.⁶⁰ As noted by Bryant, the mediators reinforce "[a] limited number of solutions and family structures."⁶¹ More critically, perhaps, since mediators may be the only ones involved in mediation sessions (with the family court investigator, if one is assigned, and possibly a judicial clerk), they can shape the information provided to judges to achieve the result they consider appropriate. For example, with respect to mediation proceedings involving possible visitation, Bryant reports that:

even though the issue [of visitation] arose, some mediators rarely reported it to judges because mediators convinced clients to drop the matter before concluding sessions with judges. The judge would not know that visitation had become a significant issue by virtue of the number of reported client

⁵⁹ Bryant, *supra* note 45, at 22-23.

⁶⁰ See, e.g., KAJIMURA, *supra* note 52; KURUMI NAKAMURA, RIKON BAIBURU [DIVORCE BIBLE] 287-288 (2005). Both works report anecdotes of gender bias by family court mediators and judges. Note that it is difficult to find attributable commentary on what actually happens in family court proceedings. In part, this may be because family court proceedings are secret (as described below) and because there is no litigation exception to defamation liability. For example, some judges and lawyers have successfully sued publications and other trial participants for comments made during or about litigation. See generally YOICHIRO HAMABE, MEIYO KISON SAIBAN [DEFAMATION LITIGATION] (2005). A review of this book is available in English, Colin P.A. Jones, *Book Review: Watch What You Say: Defamation in Japan: Meiyokison Saiban [Defamation Trials]*, 20 TEMP. INT'L & COMP. L.J. 499 (2006).

⁶¹ Bryant, *supra* note 45, at 10.

proposals. Similarly, no mention of the proposal remained in the record so that subsequent research would not uncover current non-custodial parents' requests for post-divorce contact with their children.⁶²

Finally, the facts that “many mediators did and still do believe that post-divorce contact between non-custodial parents and children is harmful to the children,”⁶³ and may consider a parent requesting visitation “selfish,”⁶⁴ mean that parents seeking to maintain contact with their children may encounter serious informal obstacles before formal legal proceedings have even started.

3. Family Court Investigators

The family court judge may be too busy to participate in individual mediation sessions. Thus, other court employees may play a key role, such as the clerk of court (*saibansho jimukan*), who manages the calendar and prepares necessary documents, and the family court investigator (*katei saibansho chōsakan*), who conducts factual investigations when necessary (e.g., in child custody cases).⁶⁵ The judge and mediators, depending upon “their assessment of the probability of an ultimately positive impact on mediation,” have discretion to assign court investigators.⁶⁶ The involvement of family court investigators

⁶² *Id.* at 19-20.

⁶³ *Id.* Bryant was writing of family court mediators in the 1980s and 90s. It is difficult to assess how much this attitude has changed since that period.

⁶⁴ *Id.*

⁶⁵ DAI-X SHUPPAN HENSHŪBU, NARITAI!!: KASAI CHŌSAKAN, SAIBANSHO JIMUKAN/SHOKIKAN [GUIDE FOR PEOPLE WHO WANT TO BECOME FAMILY COURT INVESTIGATORS, COURT CLERKS, OR COURT REPORTERS] 68-69 [hereinafter GUIDE] (2005). The SCJ uses the term “family court probation officers” in its English language materials, but I have chosen the more direct translation, “family court investigator.”

⁶⁶ Bryant, *supra* note 45, at 14; LADR Regulations, arts. 7-2,

may also depend upon more prosaic issues, such as their limited availability.⁶⁷

From the standpoint of a Western practitioner, it is probably more efficient to first explain what family court investigators are not: they are not child psychologists, psychiatrists, therapists, independent custody evaluators, guardians ad litem, or independent advocates of children or anyone else involved in family court proceedings.⁶⁸ They must deal with the myriad variety of cases (including juvenile criminal matters) before the family court, not just child custody and visitation.⁶⁹

Family court investigators must pass a national exam administered by the SCJ.⁷⁰ To qualify for the exam, applicants must be Japanese nationals between the ages of 21 and 30.⁷¹ No degree in psychology or a related subject, or even a university degree of any type whatsoever is required.⁷² Those who successfully pass the exam enter the SCJ's Court Personnel Training Institute (*Saibansho shokuin sōgō kenshūjo*) (CPTI) for a

7-4. For example, of 22,436 matters relating to child custody (i.e., matters relating to physical custody, visitation, child support, and the handover of children) handled by family courts in 2003, investigations were ordered in only 9,045 instances. FAMILY CASE STATISTICS, *supra* note 33, at 53. This includes 1,311 out of 3,894 visitation cases, and 208 out of 957 custody-designation cases in which no investigation was ordered, in some cases presumably because the parties settled or withdrew before the need arose. *Id.*

⁶⁷ Bryant, *supra* note 45, at 14. (“there are so few of them [family court investigators] that their involvement in family court mediation is necessarily extremely limited.”). As of 2005, the family court system had 1,588 family court investigators. COURT DATA BOOK, *supra* note 33, at 22.

⁶⁸ Indeed, as my Japanese lawyer explained, there is nobody in the Japanese system whose job is to represent the interests of children in custody cases.

⁶⁹ GUIDE TO THE FAMILY COURT OF JAPAN, *supra* note 11, at 12-13. In its own literature, the Supreme Court refers to family court investigators as “family court probation officers,” suggesting their focus is primarily on juvenile crime. *Id.*

⁷⁰ *Id.* at 139-147.

⁷¹ *Id.* at 138.

⁷² *Id.*

two-year program of study and practical training.⁷³

The family court investigator exam covers a range of subjects, including psychology, sociology, law, and general knowledge.⁷⁴ While psychology is one of the subjects, the depth is reportedly no greater than that required by national public service exams for government jobs unrelated to the family court system.⁷⁵ Similarly, while candidates receive formal training at the CPTI in psychology, it is just one subject they must study, together with law and a variety of others.⁷⁶ Thus, while the SCJ claims that family court investigators are “expected to have extensive professional knowledge and skills in medical science, psychology, sociology, pedagogy and other human sciences,”⁷⁷ nothing in their background or initial training renders them equivalent to licensed child psychologists or psychiatrists. However, in most divorce and child custody cases, if family court investigators become involved, they most likely will be the only ones in the entire process with any psychological training.⁷⁸ Ironically, the fact that family court investigators have some training may hinder parents from involving professionals with more formal qualifications.⁷⁹

⁷³ *Id.*

⁷⁴ Supreme Court of Japan, Katei saibansho chōsakan saiyo yō isshu shiken [Family Court Investigator Type 1 Recruitment Exam], http://www.courts.go.jp/saiyo/siken/saiyo_h1_siken.html (last visited Mar. 8, 2007).

⁷⁵ *Id.* at 54.

⁷⁶ GUIDE, *supra* note 65, at 86-87.

⁷⁷ GUIDE TO THE FAMILY COURT OF JAPAN, *supra* note 11, at 13.

⁷⁸ There is no formal way for parties in family court litigation to bring in their own psychologists or psychiatric professional. Indeed, since courts cannot enforce visitation orders, there is no way for a non-custodial parent to make the child available to an outside professional for any sort of medical or psychological evaluation. At best, a non-custodial parent can submit opinion letters from outside psychologists and psychiatrists that express views that are not based on direct interaction with the child.

⁷⁹ A Japanese lawyer explained to me that, since most family court investigators consider themselves as having “expertise” in psychology, not

Furthermore, while most family court investigators are well-meaning individuals with a degree of expertise and experience in family issues, they are, like family court judges, a type of national bureaucrat. Like judges, they are subject to performance reviews and periodically reassigned to courts in different parts of the country.⁸⁰ Family court investigators are chosen, trained, and promoted entirely by the SCJ. Their job is to help resolve family court cases and help judges clear their dockets.⁸¹

Family court investigators (if involved) can and do play a significant, even determinative, role in the proceedings. They may have the most facts and, because of their relative expertise in family matters, their reports to presiding judges (who might not participate substantively in the proceedings) may significantly influence the judges' decisions.⁸²

only is it difficult to convince them of the need to involve a practitioner with more extensive qualifications and experience, but one may insult them in the process of attempting to do so.

⁸⁰ GUIDE, *supra* note 65, at 82-3.

⁸¹ A 1974 internal notice specifies the involvement of family court investigator as being “a preparatory measure to ensure the efficient progress of family court mediation matters, to prevail upon the parties and assist them so that they may participate in the mediation in a rational state of mind.” Masako Wakabayashi, *Kon'in Kankei Jiken no Chōtei no Susumekata* [Procedures for Marital Mediation Cases], in GENDAI KAJI CHŌTEI MANYUARU [A MANUAL FOR MODERN FAMILY MEDIATION], 146-147 (Numabe et al. eds., 2002) [hereinafter MEDIATION MANUAL]. It is not my intent to criticize family court investigators (either as individuals or as a profession), who no doubt are well-meaning and hard-working. Bryant praises them highly while at the same time commenting on their limited availability. Bryant, *supra* note 45, at 14-15.

⁸² In one recent case, a court named the mother sole custodian of her 6 and 4-year-old children, despite the fact that the mother had left the marital home and the children were being raised by their father in an environment acknowledged by the court to be suitable, even superior, to that which the mother could provide. The court's decision was made notwithstanding a psychiatric opinion supporting the father as continuing custodian, and without the parents even being questioned by the court. In fact, it was based solely on the report of the family court investigator who observed the mother's interaction with her children to be “loving.” See Taichi Kajimura, *Kangosha Shitei no Shimpan ni Oite Katei Saibansho Chōsakan no Chōsa to Kangosha Kettei no Kijun ga Mondai to Natta Jirei* [A Case in which the Investigation of a Family Court Investigator and the Standards for Making Physical Custody Determinations in Physical Custody Decrees Became an

C. *Family Court Family Values*

Having examined the principal actors in the family court, it is worth reflecting on an important, yet easily-overlooked aspect of the system: other than the parties and their counsel, every person – from judge to mediator to investigator – who participates in and can affect the outcome of family court proceedings is chosen, trained, and rewarded by the SCJ, based on internally-created criteria and rules. There being no substantive law directly addressing child custody and visitation, the “family values” reflected in such proceedings are thus more likely to be those of the judiciary than representative of the Japanese public.⁸³ In fact, there appears to be no mechanism by which the public’s values can be directly reflected in family court proceedings. As discussed below, family values (gender equality, for example) that are clearly articulated in the Constitution or statutes often do not seem to be reflected in family court practice.

IV. FAMILY COURT PROCEEDINGS

A. *Jurisdictional and Procedural Statutes*

To understand child custody and visitation in Japan, some

Issue], 1154 HANREI TAIMUZU 100-101 (Sept. 25, 2004). The father’s objections to the procedural inadequacies underlying this determination were rejected by the Tokyo High Court. *Id.*

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As family court mediation is practiced and utilized today in Japan, it plays a very limited role in the recognition of family patterns that exist in Japanese society. In fact, family court mediation may actually reduce the patterns available for family dispute resolution. Resolutions reached in the family court reinforce images of the family considered acceptable to those the Supreme Court of Japan has placed in the role of mediators.

Bryant, *supra* note 45, at 27. That the court’s family values may not reflect those of society was recently illustrated by the case of Tetsuro Hirano, a former judge who felt compelled to resign after being ostracized by his colleagues for having taken paternity leave. *Sodateru yorokobi tenki maneku* [*The Joy of Child-Rearing Invites a Turning Point*], ASAHI SHIMBUN, Jan. 27, 2002, at 29.

grasp of the special procedures involved in divorce-related litigation is important. Understanding of the subject is hindered by the fact that, until March 31, 2004, marital disputes were subject to the overlapping jurisdiction of district and family courts, with district courts having jurisdiction over litigated divorces, and family courts having jurisdiction over the wide range of family-related disputes described below, including mediated divorces. This jurisdictional overlap was eliminated by the new Personal Affairs Litigation Code (*Jinji soshohō*) (hereinafter PALC), which came into force on April 1, 2004, and grants family courts exclusive initial jurisdiction over all matters involving family and human relationships, including divorce litigation (previously under the jurisdiction of district courts).⁸⁴

Because of this historical bifurcation, however, overlapping procedural regimes remain. In addition to the PALC, family court litigation is also subject to the Law for Adjudgement of Domestic Relations (LADR), which predates the new PALC by over half a century. Thus, on one hand, the PALC sets forth procedures for family court actions of divorce, annulment, voiding of a consensual divorce, paternity, and termination of adoptive relationship, as well as “other actions for the purpose of creating or confirming the existence or non-existence of a personal status.”⁸⁵ On the other hand, the LADR authorizes family courts to render decrees on an extensive range of matters relating to the family, including adjudications of incompetence, forfeiture of parental power, appointment of guardians, appointment of estate administrators, and designation of custodians of minor children in connection with marital actions under Article 766 of the Civil Code.⁸⁶

The LADR further divides these decrees into two categories: *kō* (“A-type”) and *otsu* (“B-type”).⁸⁷ A-type matters

⁸⁴ Jinji soshōhō [Personal Affairs Litigation Code], Law No. 109 of 2003 [hereinafter PALC].

⁸⁵ PALC, art. 2.

⁸⁶ LADR, art. 9.

can only be resolved by a court determination (e.g., a declaration of legal incompetence and most matters relating to the administration of a decedent's estate). B-type matters, in theory, can be resolved independently between the parties, without court involvement.⁸⁸ Litigants bringing B-type matters before a family court are required to undergo mandatory mediation (conciliation).⁸⁹ Most decrees relating to marital issues and child custody (other than divorce) are B-type, in that, in theory, parties can agree to any arrangement they deem suitable, without any court involvement.⁹⁰

B. *Mediation and Litigation*

Although the PALC treats divorce and related actions, such as child custody and visitation proceedings, as litigation outside the scope of the LADR (reflecting the fact that such matters were previously heard by district courts), it is in practice impossible to proceed directly to divorce litigation without first going through family court-sponsored mediation proceedings reflected in the

⁸⁷ LADR, art. 9.

⁸⁸ See, e.g., GUIDE TO THE FAMILY COURT OF JAPAN, *supra* note 11, at 18.

⁸⁹ LADR, art. 17.

⁹⁰ B-type matters include:

Dispositions relating to cohabitation of husband and wife and to cooperation and aid between them . . . ; Dispositions relating to share of expenses for marriage . . . ; Designation of person taking custody of child and other dispositions relating to custody of child under the Provisions of Article 766 paragraph 1 or paragraph 2 of the Civil Code [Note: as discussed elsewhere, this is the statutory basis for visitation] . . . ; Designation of a person who should become the person having parental power . . .

LADR, art. 9.

LADR.⁹¹ This proceeding is known as the “Conciliation [Mediation] First Principle,” and it is a core principle of Japanese family law.⁹² It is virtually impossible to obtain judicial relief in B-type matters without going through at least one family court-sponsored mediation session, even when the parties are in agreement on the matter they wish to have formalized (e.g., a post-divorce change in child custody arrangements).⁹³ In addition, this procedural regime means that each matter for which family court action is sought – divorce, visitation, child custody, support, etc. – is technically a separate cause of action, each subject to separate mediation requirements. Although the mediation for various actions will usually be combined, this is not always the case.⁹⁴ Nor is it required that the court issue decrees regarding all subjects of the mediation. Thus, courts can issue a custody decree without making any provisions for child support or visitation.⁹⁵

Mediation typically takes place once every few weeks, with each session lasting around one to two hours, depending upon

⁹¹ See GUIDE TO THE FAMILY COURT OF JAPAN, *supra* note 11, at 18. Article 17 of the LADR requires family courts to effect mediation for “any suit regarding personal affairs and other cases relating to family [except A-type matters],” and Article 18 requires any court in which a suit relating to such matters is first brought to remit the case to the family court for mediation.

⁹² GUIDE TO THE FAMILY COURT OF JAPAN, *supra* note 11, at 18; Article 18 of the LADR is titled “Conciliation [Mediation] First Principle” (*chōtei zenchi shugi*).

⁹³ Japan’s Civil Code specifies that changes in legal custody arrangements are under the authority of the courts. MINPŌ [CIVIL CODE], art. 819-6.

⁹⁴ This may at least partially explain the tragic example of Samuel Lui who was required to go through mediation just to seek visitation with his son who had been abducted from California by his Japanese ex-wife, despite having been awarded sole custody by a California court, an award that was confirmed by the Japanese court system all the way up to the SCJ. See Samuel Lui, . . . the Osaka Family Court Rendered a Mandatory Visitation Schedule: Since I was the Custodial Father, I am Entitled to See My Son Once a Year for 3 Hours (Mar. 2004), www.crnjapan.com/pexper/lus/en/index.html [hereinafter 3 Hours].

⁹⁵ This happened in my own case.

the circumstances, the loquaciousness of the participants, and presumably the other commitments of the mediators.⁹⁶ Held in conference rooms in the family court building, the mediation typically does not involve direct interaction between the husband and wife. Rather, each takes turns discussing their positions with the mediation panel, who conveys it to the other party.⁹⁷ Mediation may continue for any number of sessions, until a settlement is reached, or a mediated resolution is deemed unattainable (a conclusion usually reached after two or three sessions).⁹⁸ In addition to helping the parties communicate, one purpose of the mediation is supposedly to encourage the parties *not* to divorce, though this policy is not specified in any law or regulation.⁹⁹

If the mediation is successful, a “mediation protocol” (*chōtei chōsho*) formalizing the agreement is filled out by the

⁹⁶ See, e.g., HITOMI MATSUE, RIKON WO KANGAETA TOKI NI YOMU HON [THE BOOK TO READ WHEN YOU ARE THINKING OF DIVORCE] 48 (2004).

⁹⁷ Mediation with both parties present in the same room is also possible and is reportedly increasing. See KAJIMURA, *supra* note 52, at 82. See also HALEY, *supra* note 31, at 127-128 (describing family court mediation).

⁹⁸ See, e.g., HIROMI IKEUCHI & YASUTAKA MACHIMURA, KATERU?! RIKON CHŌTEI [DIVORCE MEDIATION: CAN YOU WIN?] 210 (2004) (stating that most divorce mediations either succeed or fail after two to four sessions). By way of example, of the 68,296 marriage-related cases brought before family courts in 2003, 12,146 were settled after a single session, 17,465 in two sessions, and 13,523 in three. FAMILY CASE STATISTICS, *supra* note 33, at 38. Of 22,246 cases relating to physical custody (*kangoken*, which presumably includes cases relating to visitation), 6,203 were settled after a single session, 5,605 after two, 3,890 after three, and 2,272 after four. *Id.* at 52. In considering these statistics, it is important to bear in mind two things. First, “settled” includes not just cases where an agreement was reached at mediation, but also cases where there was no agreement and a judicial determination resulted. Second, cases settled in one or two sessions may include a significant number of cases where parties actually agree, but simply need to follow the court procedures – including mandatory mediation – in order to achieve their desired result (e.g., the designation of one parent as physical custodian and the other as legal custodian, as discussed below). Yamaguchi reports that until the last decade, mediations would often be continued for one or two years. YAMAGUCHI, *supra* note 39, at 98.

⁹⁹ TAKASHI UCHIDA, MINPŌ IV: SHINZOKU/SŌZOKU [THE CIVIL CODE, VOLUME IV: FAMILY AND INHERITANCE] 108 (updated ed. 2004).

family court clerk.¹⁰⁰ If the mediation involves a divorce, it will be a “mediated divorce” (*chōtei rikon*), with a notification of divorce (*rikon todoke*) accompanied by the mediation protocol or a court-prepared summary.¹⁰¹ Mediation protocols regarding A-type matters have the same effect as a confirmed judgment (*kakutei hanketsu*), while those regarding B-type matters have the same effect as a confirmed decree (*kakutei shita shimpan*).¹⁰²

In certain instances, the family court may issue a decree in lieu of mediation (*chōtei ni kawaru shimpan*).¹⁰³ In divorce mediation, the court may issue a decree when, for example, the mediation reveals the parties agree on the idea of divorce, but are unable to agree upon the financial or other terms.¹⁰⁴ If appealed within two weeks of its issuance, such a decree is rendered void and a litigated divorce commences.¹⁰⁵ Perhaps as a result, divorce decrees in lieu of mediation are rarely issued.¹⁰⁶

If the parties are unable to agree, the mediation will be declared unsuccessful (*chōtei fuseiritsu*). Although in theory the parties lead the mediation process, the decision as to whether mediation is unlikely to succeed, or even whether the terms of a supposedly successful mediation are acceptable, is up to the mediators and the judge.¹⁰⁷ Parties thus may be pressured to participate in further mediation even though they have concluded

¹⁰⁰ KAJIMURA, *supra* note 52, at 102.

¹⁰¹ See MATSUE, *supra* note 96, at 52.

¹⁰² LADR, art. 21.

¹⁰³ LADR, art. 24.

¹⁰⁴ UCHIDA, *supra* note 99, at 108.

¹⁰⁵ LADR, art. 25.

¹⁰⁶ UCHIDA, *supra* note 99, at 108. In 1998, only 76 divorces were accomplished by decree in lieu of mediation, compared to 221,761 cooperative, 19,182 conciliated, and 2,164 litigated divorces. *Rikon ni kansuru tōkei* [Statistics relating to divorce], reprinted in UCHIDA, *id.* at 109. The limited number of divorces by decree is consistent with my conclusion that Japanese courts quite rationally refrain from issuing orders that they know will be frustrated, avoided, or otherwise rendered meaningless.

¹⁰⁷ LADR Regulations, art. 138-2.

further mediation to be pointless. Again, each additional mediation session means four to six more weeks of no judicial action, and, if visitation is at issue, it also means an additional month or more of a child having no contact with a parent.¹⁰⁸ Paradoxically, therefore, it is possible to delay visitation by participating in mediation. Any order of visitation or other disposition can be further delayed for months merely by appealing, since, under the LADR, the effect of the family court decree is automatically suspended until the appeal is resolved.¹⁰⁹

In the case of unsuccessful mediations, the parties are deemed to have requested the family court to issue a decree, at least in the case of B-type matters.¹¹⁰ Thus, for matters other than divorce (e.g., post-divorce visitation proceedings), family courts will issue a decree on the matter.¹¹¹ In divorce cases, if the mediation is unsuccessful, a litigated divorce (*saiban rikon*) must be sought under the PALC, rather than the LADR. The PALC empowers the family court to decide matters ancillary to the

¹⁰⁸ While family courts have limited powers to order interlocutory dispositions, these are generally unenforceable and tend to be limited to urgent situations. LADR Regulations, art. 133. See also UCHIDA, *supra* note 99, at 218-219; LADR, art. 15-3; LADR Regulations, art. 52-2. At the litigation stage, further interlocutory remedies may be available under other statutes. See DAI'ICHI TOKYO BENGOSHIKAI SHIHŌ KENKYŪ I'INKAI [TOKYO FIRST BAR ASSOCIATION, LEGAL SYSTEM RESEARCH COMMITTEE], KODOMO NO UBAIAI TO SONO TAIŌ [THE ABDUCTION AND COUNTER-ABDUCTION OF CHILDREN AND HOW TO DEAL WITH IT] 90 (2002) [hereinafter CHILD ABDUCTION]. However, there is a split of authority as to how such interlocutory orders can be enforced, if at all. UCHIDA, *supra* note 99, at 218. During my mediation proceedings, the court invited me to withdraw my motion for eight hours of pendente lite visitation a week because the judge did not see any "urgency" to the request. I refused, and the motion was never acted upon. Another possible issue with interlocutory remedies is that court-ordered dispositive actions upset the notion of mediation. If visitation is the subject of mediation, then ordering it while the mediation is in process presumably renders the proceedings pointless. More relevant, however, may be the fact that pendente lite visitation may result in an unremediable change of possession of the child, for which the court may be blamed.

¹⁰⁹ Under Article 13 of the LADR, all family court decrees are suspended pending appeals, which may take months or years if pursued all the way to the SCJ.

¹¹⁰ LADR, art. 26.

¹¹¹ *Id.*

divorce, such as permanent custody arrangements for minor children and visitation (though provisional decrees may be issued for physical custody, in connection with the termination of mediation).¹¹²

It is important to reiterate that family court decrees issued in connection with a failed mediation are done at the sole discretion of a single judge. In the absence of statutory mandates regarding visitation or child custody, such decrees are effectively administrative decisions made with the perhaps controlling input from the mediators and other family court personnel.¹¹³ Furthermore, all mediation and other proceedings leading to a decree are non-public.¹¹⁴ There are no adversarial proceedings, no oral arguments, and no opportunity to cross-examine the other party in front of the mediation panel (including the judge who may never hear either party speak before issuing a decree).¹¹⁵ Nor are the parties' statements given under oath, or subject to liability for perjury. If a family court investigator's report is part of the basis for a custody or visitation decision, disclosure of that report to the affected parents is at the discretion of the court.¹¹⁶ To the extent that physical custody and visitation proceedings are involved,

¹¹² PALC, art. 32.

¹¹³ The fact that family court decrees (*shimpan*) are in essence administrative decisions not based in law is illustrated by at least one definition of the Japanese term: "a disposition involving a certain discretionary decision involving no application of law. *Decrees of family courts are of this character.*" HÖREI YÖGO JITEN [DICTIONARY OF STATUTORY TERMS] 442 (2001) (emphasis added). See also FUESS, *infra* note 162, at 149 ("Judges are so overworked that mediators are entrusted with the bulk of the proceedings. Sometimes a judge only appears to sign the agreement reached by the two parties.")

¹¹⁴ LADR Regulations, art. 6. The only exception is that the family court judge has discretion to allow "appropriate persons" to observe. *Id.*

¹¹⁵ Yamaguchi notes that in mediation proceedings "there is no opportunity to directly hear the other party's assertions or what sort of lies they may be telling." YAMAGUCHI, *supra* note 39, at 94.

¹¹⁶ LADR, art. 12. Whether investigative reports even need to be prepared is at the judge's discretion. *Id.* art. 10. I have never seen the family court investigator's custody evaluation that resulted in my losing physical custody of my child and being denied visitation.

therefore, it is possible for parents to be formally denied all contact with their children in proceedings where there is no opportunity to directly hear the other parties speak, let alone challenge their assertions, little or no opportunity to be heard by the judge before he or she issues a decree, and limited ability to even know all of the evidence upon which that decree is based.¹¹⁷

If the mediation fails, a divorce case moves into litigation and proceedings slightly more familiar to Western lawyers.¹¹⁸ If children are involved, the judgment will include a determination of physical and legal custody (*shinken*).¹¹⁹ There may be evidentiary hearings and oral arguments, though these will generally spread out over time, as is the case with most Japanese civil litigation, where the absence of a civil jury system obviates the need to have continuous proceedings.¹²⁰

C. Appeals

Family court decrees are subject to immediate appeal to a high court, as are judgments in a litigated divorce.¹²¹ Decrees relating to ancillary matters (e.g., a decree awarding provisional physical custody pending resolution of a litigated divorce) are subject to immediate appeals (*sokuji kōkoku*) that suspend the

¹¹⁷ Japan uses an inquisitorial system of evidence gathering that leaves judges in charge of both gathering, accepting, and evaluating the evidence. Since there are no concentrated proceedings that presuppose a jury trial, there are apparently few limitations on what can be presented as evidence and when it can be presented. Anything, apparently, can be submitted to the court as evidence in the context of a custody trial – a home video of young children saying “mother is not our real mother, grandma is our real mother” is an example from one recent case. *Furious Battle*, *supra* note 4.

¹¹⁸ The switch from mediation to litigation does not mean that the court will not continue to encourage the parties to reach a mediated settlement.

¹¹⁹ CIVIL CODE, art. 819.

¹²⁰ For 2000, the average time to judgment in all non-criminal cases was 13.7 months. Shozo Ota, *Reform of Civil Procedure in Japan*, 49 AM. J. COMP. L. 561, 581 (2001). This is not necessarily representative of family law cases under the new PALC regime, and does not take into account the time involved in mediation proceedings.

¹²¹ LADR, art. 14.

decree until the appeal is resolved.¹²² The high court's ruling in an interlocutory appeal can be appealed to the SCJ as a matter of right when matters of constitutional interpretation are involved (*tokubetsu kōkoku*, or special appeal to the Supreme Court), or with the permission of the high court, if important interpretations of law are involved (*kyōka kōkoku*, or appeal by permission).¹²³ Similar appellate procedures apply for the appeal of a final judgment in a litigated divorce.¹²⁴

V. SUBSTANTIVE FAMILY LAW

A. Children's Rights Legislation

Japan has no substantive laws for the protection of children's rights in cases of parental separation. There are no statutes of guiding principles to determine the best interests of minor children when their parents divorce or cease cohabitating.¹²⁵ Unless, that is, one includes the U.N. Convention on the Rights of the Child (hereinafter Convention). Japan is a signatory of the Convention, together with virtually every other country on Earth

¹²² LADR, art. 13. Such appeals can take months. However, in the case of a provisional custody award, to the extent the custodial parent is already "in possession" of the child, the fact that the appeal has suspended the decree is largely meaningless.

¹²³ See generally SUPREME COURT OF JAPAN, OUTLINE OF CIVIL LITIGATION IN JAPAN 21 (2002).

¹²⁴ See *id.* at 17-20.

¹²⁵ Cf. CAL. FAM. CODE § 3020 (Deering 2006). In addition to numerous procedural requirements, the California Family Code includes the following statement of legislative purpose:

The legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy

Id.

(with the notable exception of the United States).¹²⁶ The Convention recognizes a number of rights relevant to a child whose parents are separated, including “the right to know and be cared for by his or her parents.”¹²⁷ Article 8 of the Convention obligates signatory states to provide assistance and protection when a child’s rights to “preserve his or her identity, including . . . family relations” are unlawfully interfered with.¹²⁸ Article 9 requires signatory states to “ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable laws and procedures, that such separation is necessary for the best interests of the child.”¹²⁹ Notwithstanding such separation, signatory states are further required to “respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.”¹³⁰

Although Japan’s Constitution specifies that “[t]he treaties concluded by Japan and established laws of nations shall be faithfully observed,”¹³¹ Japan appears to have done little to implement the provisions regarding preservation of the parent-child relationship. Indeed, in the academic writing and

¹²⁶ Convention on the Rights of the Child, *opened for signature* Jan. 26, 1990, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter Convention].

¹²⁷ Convention, art. 7(1). Article 14 requires states to “respect the rights and duties of the parents . . . to provide direction to the child in the exercise of his or her right . . .” Article 18 requires states to use “best efforts” to “ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.”

¹²⁸ Convention, art. 8.

¹²⁹ Convention, art. 9(1).

¹³⁰ Convention, art. 9(3).

¹³¹ KENPŌ, art. 98.

court opinions I reviewed, the Convention is rarely featured.¹³² In addition, when Japan issued its second 5-year report on its implementation of the Convention in 2004, a coalition of foreign and Japanese NGOs issued a detailed critique of the inadequacies of Japan's legal system in protecting the rights of parents and children in parental separation cases, and further asserted that Japanese courts and other authorities engaged in routine and systematic discrimination based on nationality, gender, and legitimacy.¹³³ Such discrimination is also proscribed by the Convention.¹³⁴

Japan does have a statute intended to prevent and facilitate the early detection of child abuse, although it was only enacted in 2000.¹³⁵ Among other things, this law imposes upon teachers,

¹³² *E.g.*, although it is considered the definitive exposition of the SCJ's view on visitation, the Sugihara Memorandum discussed below makes no mention of Japan's obligations under the Convention. *See e.g., infra* note 303. In fact, one Japanese children's rights lawyer notes that the official government translation of the Convention uses terms that appear to intentionally limit its scope and applicability. YUKIKO YAMADA, *KODOMO NO JINKEN WO MAMORU CHISHIKI TO Q&A [PROTECTING THE RIGHTS OF CHILDREN: KNOWLEDGE AND Q&A]* 8-10 (2004). For example, the official translation uses the term *jidō* for "child," rather than the most common translation of "child," *kodomo*. Since *jidō* would more commonly be translated as "infant" or "minor," its use establishes children as the subject of protection, rather than as persons benefiting from and able to exercise the rights recognized by the Convention. *Id.*

¹³³ Report from Children's Rights Council of Japan et al. to U.N. Committee on the Rights of the Child (Jan. 12, 2004), *A Critique of Japan's Second Periodic Report on the Convention on the Rights of the Child By Japan*, http://www.crnjapan.com/treaties/uncrcreport/en/crc_critique.html [hereinafter Report from Children's Rights Council].

¹³⁴ State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's *or his or her parent's* . . . race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
Convention, art. 2 (emphasis added).

¹³⁵ *Jidō gyakutai no bōshi ni kansuru hōritsu* [Law for the

lawyers, and other designated professions a special obligation to detect child abuse, though it does not provide any consequences for failing to do so. In any case, the statute's definition of "child abuse" is limited to actual violence against the child or other household members, or "emotionally damaging verbal conduct."¹³⁶ It does not include, for example, behavior which might foster parental alienation syndrome (PAS), which has only recently begun to receive attention in Japan,¹³⁷ and is regarded by at least some in the United States as a form of child abuse.¹³⁸

Prevention of the Abuse of Minors], Law No. 82 of 2000.

¹³⁶ *Id.* art. 2.

¹³⁷ My attempts to educate the family court regarding parental alienation were ignored. I have found only limited references to the subject in Japanese, including a web site operated by a pair of anonymous Japanese doctors who confirm that the subject has only recently started to receive attention in Japan. See PAS (Parental Alienation Syndrome) – Kataoya Hikihanashi Shōkōgun – Gozonji desuka? [Do You Know about PAS?], Sept. 6, 2005, <http://www.atomicweb.co.jp/~icuspringor> (on file with author). I have also talked with two Western-trained mental health professionals who practice in Japan, both of whom have confirmed that awareness of the syndrome is minimal in the country.

¹³⁸ See RICHARD GARDNER, THE PARENTAL ALIENATION SYNDROME xxi (2d. ed.1992) ("The Parental Alienation Syndrome as a Form of Child Abuse"). Gardner's observation that "[w]ithout a thorough knowledge of the etiology, pathogenesis, and manifestations of this disorder, legal professionals are ill-equipped to assess such families judiciously," would imply that Japanese family court investigators as a group, who are unlikely to be sensitive to the realities of PAS, are inadequately equipped to make child custody recommendations. *Id.*

It should be noted, however, that Gardner's original conceptualization of PAS has been severely criticized, and, in the public, PAS has "generated both enthusiastic endorsement and strong negative response along gender lines." PAS has been severely criticized both in terms of its status as a diagnosable psychiatric disorder and as a useful tool for courts. Janet R. Johnston, *Parental Alignments and Rejection: An Empirical Study of Alienation in Children of Divorce*, 31 J. AM. ACAD. PSYCHIATRY L. 158 (2003). See also Michele A. Adams, *Framing Contests in Child Custody Disputes: Parental Alienation Syndrome, Child Abuse, Gender, and Fathers' Rights*, 40 FAM. L.Q. 315 (2006); Robert E. Emery, *Parental Alienation Syndrome: Proponents Bear the Burden of Proof*, 43 FAM. CT. REV. 8 (2005); Alayne Katz, *Junk Science v. Novel Scientific Evidence: Parental Alienation Syndrome, Getting It Wrong in Custody Cases*, 24 PACE L. REV. 239 (2003). Without getting into whether PAS is a scientifically diagnosable disorder, I believe that the term serves as a useful shorthand for the generally accepted, and in some jurisdictions legislatively-mandated, notion that ongoing contact with both parents is usually

Similarly, custodial interference, interference with visitation rights, and parental alienation are similarly not subject to any specific sanctions under this law or any other statute.¹³⁹ Thus, despite the special duty imposed on lawyers to detect child abuse, there may be nothing to prevent them from encouraging parents to engage in behavior such as access denial, which in the U.S. might be considered detrimental to the best interests of the child (or even criminal).¹⁴⁰

B. *The Civil Code (Minpō)*

The principle source of laws governing divorce and child custody is Japan's Civil Code. The Civil Code also provides the basic rules governing interpersonal legal relationships in society, such as contract, tort, inheritance, property, and other basic areas of law. However, a significant amount of family law is judicially created. For example, there are no clear statutory provisions for visitation in the Civil Code, and the SCJ has only recently ruled that visitation orders are within the scope of authority to make custody determinations granted by the Code.¹⁴¹

It should be noted at the outset that the Civil Code only really addresses the parent-child relationship within the framework of marriage and divorce. Therefore, if a child is born out of wedlock, the father effectively has no rights. And since many of the most difficult child custody and visitation issues arise while parents are estranged but still legally married, courts have dealt

in the best interests of a child and therefore behavior by one parent to alienate a child from its other parent is presumptively not in the child's best interests.

¹³⁹ Cf. CAL. PEN. CODE §§ 277-280 (Deering 2007) (criminalizing interference with natural custody and court-ordered custody or visitation rights).

¹⁴⁰ For example, in her divorce guide for women, attorney Kurumi Nakamura writes that she "cannot really recommend visitation while a child's parents are separated but a divorce has not occurred." NAKAMURA, *supra* note 60, at 198.

¹⁴¹ UCHIDA, *supra* note 99, at 135-136. An amendment to the Civil Code that would have codified existing family court practice by adding to Article 766 specific references to "visitation and interaction" as matters courts could decide in connection with custody determinations was proposed, but never adopted. *Id.*

with these cases by effectively amending the clear wording of the Civil Code through interpretation.

C. Family Registration Law

Another key statute for understanding the legal significance of marriage, divorce, and child custody in Japan is the Family Registration Law.¹⁴² The Family Registration Law was based on an early system of household registration first set up for security purposes in Kyoto when that city was the imperial capital.¹⁴³ Births, marriages, and legal custody of children after divorce are recorded in the household registry, a frequently required identity document.¹⁴⁴ It is a core source of the identity of Japanese people and sets forth their relationships with parents, spouses, and children. While access to a family's registry is somewhat restricted, it is not a completely private document; submission of full or abbreviated copies of the registry may be required for a variety of public and private purposes.¹⁴⁵ One's

¹⁴² Kosekihō [Family Registration Law], Law No. 224 of 1947.

¹⁴³ NIHON HŌSEISHI [HISTORY OF THE JAPANESE LEGAL SYSTEM] 275-276 (Hidemasa Maki & Akihisa Fujiwara, eds. 1993).

¹⁴⁴ HALEY, *supra* note 31, at 25 (“The required submission of certified copies of a person’s registry by schools, employers, banks and others in effect invites the stigma of having offended social norms governing personal status and behavior. The legal rules may be neutral or permissive, but registration enables disclosure and the resulting social control.”).

¹⁴⁵ See, e.g., UCHIDA, *supra* note 99, at 305-306; quote from HALEY, *supra* note 31, at 24-5. Until 1976, a person’s family registry was a public document that *anyone* could view. Due to privacy concerns, laws were amended to limit access to the individual whose registry it is, lawyers and certain other professions, as well as anyone whose stated reason for wishing to view the record is not “clearly inappropriate.” *Id.* at 305; Family Registration Law, art. 10. One is theoretically free to create a new family registry at the time of marriage, though many family registries go back for generations and are retained in a geographic location in which some or all of its registrants no longer reside. One reason given for the continuation of an existing registry is the fear that a new registry will create suspicion that the registrants are of *burakumin* origin, *burakumin* being Japan’s traditional “outcast” caste, who are often associated with particular villages or other geographical locations. See, e.g., Bryant, *supra* note 45, at 109; Frank Upham, *Instrumental Violence and Social Change: The Buraku Liberation League and the Tactic of “Denunciation Struggle”*, 17 LAW IN JAPAN 185 (1984) (both describing the role of the family registration system in perpetuating discrimination against *burakumin*). There

entire family structure and history is thus subject to disclosure and may result in various types of social discrimination.¹⁴⁶ Whether a child is born out of wedlock, for example, is readily apparent from notations in the parents' family register, and is a source of unofficial, or even statutory, discrimination.¹⁴⁷ Together with the century-old paternalistic Civil Code provisions, which define the parent-child relationship, the family registry is also a source of serious problems because of its inability to accurately reflect modern family relationships.¹⁴⁸

is also anecdotal evidence that, because non-Japanese do not have family registers, in the event of divorce between a Japanese parent and a non-Japanese parent, at least some family courts will always award custody to the Japanese parent in order to keep the child on that parent's register.

¹⁴⁶ UCHIDA, *supra* note 99, at 306.

¹⁴⁷ *Id.* See, e.g., Taisuke Kamata, *Adjudication and the Governing Process: Political Questions and Legislative Discretion*, 53 LAW & CONTEMP. PROBS 181 (1990) ("A child born out of wedlock is treated as an illegitimate child and is forced into a disadvantaged position in society. Illegitimate children are allowed to use only their mother's family name and enjoy property rights differently from legitimate children."). Article 900 of the Civil Code grants children born out of wedlock only half the share of inheritance of legitimate children, a form of discrimination with potentially constitutional implications. See Taisuke Kamata, Chakushutsu, Hichakushutsu Kubun no Kenpō Tekigōsei [Constitutionality of the Illegitimacy Clause in the Japanese Family Law], 308 DŌSHISHA HŌGAKU 1 (2005). Such discrimination is also proscribed by the Convention. Convention, art. 2.

¹⁴⁸ For example, thousands of parents and their children have been negatively affected by the prohibition against married couples registering children born within 300 days of their mother's divorce from a prior husband. This is because Article 772 of the Civil Code presumes children born within 300 days after a divorce to be the children of the previous husband, meaning that these children cannot be registered in the family registry reflecting the new marriage, even though it includes both of their biological parents. Despite both the availability of scientific techniques capable of proving paternity and the negative impact on every person involved, this section of the law seems unlikely to be changed. Conservative politicians are said to oppose the change because, among other things, Article 772 is thought to serve as a disincentive to female infidelity. See, e.g., *LDP Eyes Eased Rule on Nuptials*, ASAHI SHIMBUN (Mar. 21, 2007), available at <http://www.asahi.com/english/Herald-asahi/TKY200703210074.html>; Philip Brasor, *LDP Fuddy-Duddies' Social Engineering Hits Women and the Birthrate*, JAPAN TIMES (Apr. 15, 2007), available at <http://search.japantimes.co.jp/cgi-bin/fd20070415pb.html>; Masami Ito, *Archaic Paternity-Registry Law Eludes Change: LDP Digs in Heels Against Biological Realities*, JAPAN TIMES (Apr. 20, 2007), available at <http://search.japantimes.co.jp/cgi-bin/nn20070420f1.html>. The SCJ also

D. Marriage

Marriage is accomplished legally by couples affixing their respective seals to a Registration of Marriage (*kon'in todoke*) and submitting it to the local government office (for foreigners, a signature is used instead of a seal).¹⁴⁹ The marriage is then registered in the family registry. One spouse is typically entered into the other's registry, or a new registry is created.¹⁵⁰ This system requires one spouse to legally adopt the other's surname. In the overwhelming majority of cases, wives adopt their husband's surname despite the inconvenience a mandatory name change may cause professional women.¹⁵¹

E. Divorce

Despite the casual Western observer's perception that traditional Japanese family values include a cultural bias against divorce, compared to most other nations, Japan has what one author calls "rules which are unusual in how freely they permit divorce."¹⁵² Indeed, Japan may be one of the few countries where it is as easy to get divorced as it is to get married – if both parties agree to the transaction.¹⁵³ There is no minimum

recently refused to allow twins born in the United States to a surrogate mother to be registered as the children of their Japanese genetic parents, thereby denying the children the same nationality as their parents. *Weekend Beat/Got a Visa, Kid?* ASAHI SHIMBUN (Apr. 28, 2007), available at <http://www.asahi.com/english/Herald-asahi/TKY200704280071.html>.

¹⁴⁹ CIVIL CODE, art. 739; Family Registration Law, arts. 25, 74.

¹⁵⁰ Usually the wife is registered in the husband's registry, though the reverse also occurs, with the husband adopting the wife's surname. See, e.g., UCHIDA, *supra* note 99, at 49.

¹⁵¹ Article 74 of the Family Registration Law requires that the couple specify in their marriage registration which family name they will use. In over 98% of cases the wife adopts the husband's name. UCHIDA, *supra* note 99, at 49.

¹⁵² UCHIDA, *supra* note 99, at 102.

¹⁵³ Because it is so easy, and because divorce papers only require the affixation of personal seals, it is not uncommon for one spouse to use the other's seal (or if a spouse is a foreigner, to forge that spouse's signature, there being no notarization requirement) and essentially submit a fraudulent divorce

residency period, and if the parties agree to the divorce, they simply affix their seal to a Registration of Divorce (*rikon todoke*) and submit it to the local government office.¹⁵⁴ Approximately 90% of divorces are accomplished this way.¹⁵⁵

When children are involved in such a divorce, legal custody is also determined by the formatting of the paperwork: the Registration of Divorce contains two columns, one for the names of children for whom the husband will act as legal custodian, and one for the names of children for whom the mother will act in such capacity. The Registration of Divorce does not allow joint custody over individual children or any notations regarding visitation. Thus, in most divorces, custody arrangements are all-or-nothing affairs with virtually no third-party supervision.¹⁵⁶ Since most divorces are consensual (*kyōgi rikon*) and accomplished through these simple procedures, only cases with some element of dispute enter the jurisdiction of the courts.

If one party is opposed to the divorce, however, it can be difficult and time-consuming to obtain one. One theory holds that having entered into the marriage consensually, the parties

filing. As a result, an unofficial “cooling off” period has developed for divorce registrations whereby one can file a request with one’s local government office asking that they not accept a filing for the next six months. This system acts as both a check on the ability of spouses to submit fraudulent filings, and provides an escape hatch for parties who have changed their minds. UCHIDA, *supra* note 99, at 68, 103.

¹⁵⁴ Family Registration Law, art. 76; CIVIL CODE. arts. 763-765. Couples may not get a consensual divorce if neither spouse is Japanese and therefore has no family registry. Such couples must go through the motions of a mediated divorce as described below.

¹⁵⁵ UCHIDA, *supra* note 99, at 102. It is easy to read too much into the 90% figure for consensual divorce. Many people acquainted with the family court system may simply decide that participating in its proceedings is futile and agree to a disadvantageous divorce to get on with their lives.

¹⁵⁶ I have encountered only one instance of academic commentary on the incongruity of a family court system that is supposedly devoted to protecting the best interests of children in divorce, but allows most divorcing parents to decide custody arrangements with little or no oversight. TAKAO SATŌ, SHINKEN NO HANREI SŌGŌ KAISETSU [COMPREHENSIVE OVERVIEW OF PARENTAL AUTHORITY - RELATED PRECEDENTS] 22 (2004). Professor Sato recommends eliminating consensual divorce when children are involved.

have a right not to be unilaterally divorced (*rikon sarenai kenri*).¹⁵⁷ In such cases the Civil Code recognizes only five grounds for divorce: (1) infidelity; (2) malicious abandonment; (3) the passage of more than three years, during which it is unknown whether the spouse is alive; (4) serious mental illness; and (5) “any other grave reason for which it is difficult . . . to continue the marriage.”¹⁵⁸ Although many claims for marital dissolution, such as basic irreconcilable differences, fall under the fifth catch-all provision, even when one of the first four grounds are established, the court retains absolute discretion over granting a divorce and may “dismiss the action for divorce, if it deems the continuance of the marriage proper in view of all the circumstances.”¹⁵⁹

The difficulty in obtaining a divorce may become even greater when requested by the spouse deemed “at fault.”¹⁶⁰ Divorces were uniformly denied to the spouse “at fault” until a 1987 Supreme Court case acknowledged that such divorces could be granted in certain cases.¹⁶¹ While the pre-1987 jurisprudence might seem to reflect longstanding cultural values protecting marriage, in fact, a landmark 1952 SCJ case ushered in what one scholar calls “the most restrictive divorce regime in Japan since the seventeenth century.”¹⁶² Historically, Japan had a much more

¹⁵⁷ UCHIDA, *supra* note 99, at 96-97. I have never seen articulated a theory that a similar right exists in the parent-child relationship, i.e., the right not to have the parent-child relationship unilaterally terminated by the other parent.

¹⁵⁸ CIVIL CODE, art. 770-1.

¹⁵⁹ CIVIL CODE, art. 770-2. Judges thus have tremendous discretion to impose their personal views of marriage and family on the proceedings. See UCHIDA, *supra* note 99, at 111.

¹⁶⁰ *Id.* at 99.

¹⁶¹ To give a flavor for how time-consuming a contested divorce could be, the case that led to this Supreme Court decision was decided after the plaintiff husband had been separated from his wife for thirty-five years and had sought a mediated divorce on numerous occasions. *Id.* Uchida also reports on a 1995 high court case in which a husband’s request for divorce was rejected despite twenty-one years of separation. *Id.*

¹⁶² HARALD FUESS, DIVORCE IN JAPAN 150 (2004).

relaxed attitude to divorce: as noted by Professor Harald Fuess, “[s]ome regions in nineteenth-century Japan . . . had divorce rates similar to those of America in the 1980s.”¹⁶³ He has further shown that Japan introduced a more restrictive divorce regime at least partially in response to Western criticism of the ease with which Japanese men appeared to be able to divorce their wives.¹⁶⁴ While Fuess notes that the history of divorce in Japan is not nearly as one-sided in favor of husbands as is commonly portrayed, the notion of divorce law as a means of protecting wives is critical to understanding the way divorce, child custody, and visitation are viewed today.¹⁶⁵

Closely linked to the notion that divorce protects wives is the fact that, although in theory a spouse is entitled to a share of marital property¹⁶⁶ as well as damages and child support if applicable,¹⁶⁷ the reality for Japanese wives may be quite different.

¹⁶³ *Id.* at 3; UCHIDA, *supra* note 99, at 92.

¹⁶⁴ FUESS, *supra* note 162, at 2. As Fuess’ study shows, divorce was historically a matter between households rather than individual couples. A wife was thus as likely to be rejected by the head of the husband’s household as by the husband himself. Husbands entering their wives’ household as “adopted grooms” were often subject to the same danger, though the relative scarcity of such marriages naturally creates the impression in modern eyes of a system inherently discriminatory against women. *Id.* at 45-46 (“To officials [of Edo period Japan], seniority and one’s position in the house were at times more important than one’s sex in determining divorce.”). This image may have been reinforced by Edo period popular dramas that used the blameless, virtuous wife, unilaterally divorced by a heartless or misunderstanding husband, as a common storyline. *Id.* at 26-27.

¹⁶⁵ *Id.* at 98 (“Previous scholarship emphasized ad nauseam the power of the husband or mother-in-law to expel a young bride at will, but recent scholarship . . . shows that there is mounting evidence that wives too, have in practice been able to leave their husbands since the Edo period.”)

¹⁶⁶ Article 767 of the Civil Code simply states that a spouse effecting divorce “may demand the distribution of property from the other spouse” and that if the parties are unable to agree on a distribution, the family court may step in. Article 762 states that property received by a husband or wife during marriage “in his or her own name constitutes his or her separate property.” That said, courts have developed a number of theories by which a non-working wife may receive more protection than the Civil Code alone would grant in property settlements. *See, e.g.*, UCHIDA, *supra* note 99, at 27-48, 123-132; KAJIMURA, *supra* note 52, at 180-202.

¹⁶⁷ *See* UCHIDA, *supra* note 99, at 124, 128, and 137.

As noted by Haley, “Japanese law does not provide the divorced wife the protection of either common law dower rights or, as in many jurisdictions, civil law community property. The Civil Code’s separate property regime often leaves the divorced wife with limited economic benefits.”¹⁶⁸ Furthermore, family court mediators may discourage wives from asserting their full rights: family court mediators have in some instances discouraged wives from claiming a full 50% share of marital property on the ground that such demands are “unrealistic.”¹⁶⁹ The issue of enforcing ongoing payment obligations may also result in favoring lump-sum payments for the prosaic reason that receiving a lump-sum is more likely.¹⁷⁰ Actual awards to wives may be relatively small.¹⁷¹ Child support is also difficult to enforce and may be paid in lump sums.¹⁷² The limited use of joint bank

¹⁶⁸ HALEY, *supra* note 31, at 130. See also FUESS, *supra* note 162, at 98 (writing of the pre-war regime that “only in exceptional cases . . . was any form of alimony even considered.”)

¹⁶⁹ Bryant, *supra* note 45, at 19-20.

¹⁷⁰ See FUESS, *supra* note 162, at 159.

¹⁷¹ Over 60% of property settlements resolved in 2003 at the family court level were for amounts of less than ¥4 million. FAMILY CASE STATISTICS, *supra* note 33, at 42.

¹⁷² The situation of child support and its enforcement may be even bleaker than that of custody and visitation. Some observers report that there are far more cases of mothers and children being abandoned without support than fathers being denied access. See, e.g., Kennedy, *supra* note 2, at 19. In 2003, approximately 2/3 of child support payments by fathers achieved through family court settlements were ¥80,000 (approximately \$800) or less per month, including cases where more than one child was being supported. FAMILY CASE STATISTICS, *supra* note 33, at 40-41. Fuess reports that “A study of divorced mothers with small children receiving public funding in Osaka found that only ten to twenty percent of fathers had contributed to the support of their children.” FUESS, *supra* note 162, at 158. In a more recent survey conducted by a private organization in 2004, of 338 custodial parents surveyed, 110 were not receiving any child support payments and 36 were receiving some but not the full amount. TERUE SHINKAWA, RIKON KATEI NO MENSETSU KŌSHŌ JITTAI CHŌSA [A SURVEY OF THE SITUATION OF VISITATION IN DIVORCED FAMILIES] 9 (2004). In 2003, government statistics paint an even bleaker picture with 66% of post-divorce single mother households surveyed reporting not having any child support arrangements. Equal Employment, Children and Families Bureau, Ministry of Health, Labor and Welfare, Heisei 15 Nendo

accounts may further disadvantage divorcing housewives whose husbands' salaries flow through accounts that are in the husbands' names only.¹⁷³

One explanation for the bar on unilateral divorce is that it empowers wives "to extract from husbands seeking divorce a larger settlement than the law would otherwise assure them."¹⁷⁴ Despite the elimination of the judicial ban on unilateral divorces, the financial aspects of divorce remain an incentive to use whatever procedural benefits the parties are able to leverage, including the ability to deny estranged spouses access to their children, in order to obtain a financially advantageous divorce.

Given the context of the actual and perceived disadvantaged status of women in the pre-war legal system, it should not be controversial to state that the current system of divorce in Japan has developed primarily as a means of protecting women.¹⁷⁵ As a result, when Japanese scholars or practitioners

Zenkoku Boshi Setaitō Chōsa Kekka Hōkokusho [Report on Survey of Single-Mother Households Nationwide for Fiscal Year 2003] (Jan. 19, 2005), <http://www.mhlw.go.jp/houdou/2005/01/h0119-1b17.html> [hereinafter Single-Mother Survey]. One problem with enforcing child support was that until 2004, enforcement proceedings could be brought only for past due amounts which, in the case of child support arrears, may be so small that enforcement is uneconomical. Recent amendments that enable garnishment of a delinquent parent's wages on a going-forward basis once a pattern of delinquency is established may facilitate enforcement. See UCHIDA, *supra* note 99, at 137-138. See also TERUE SHINKAWA & TOSHIKO SAKAKIBARA, YŌIKUHI KYŌSEI SHIKKŌ MANYUARU [A MANUAL FOR THE ENFORCEMENT OF CHILD SUPPORT].

¹⁷³ Typically, a husband's salary might be paid into an account of which he is the sole legal owner. However, husbands may procure ATM cards for their wives, and give them complete control over the account by entrusting them with the account book and bank seal, which allows them to carry out most common bank transactions. This explains the advice of one attorney on leaving the marital home in anticipation of divorce: "It is not a bad thing for you to take with you the cash card, the bank book and bank seals. Afterwards your husband may squawk about his wife having stolen them, or having embezzled his money, but as long as you are husband and wife, you can consider yourself free from fear of being arrested for any criminal acts." NAKAMURA, *supra* note 60, at 90-91.

¹⁷⁴ HALEY, *supra* note 31, at 131.

¹⁷⁵ See, e.g., PORT & MCALINN, *supra* note 6, at 965.

talk about “equality of the sexes,” the phrase is often code for enhancing or protecting the rights of women, rather than actual gender equality.¹⁷⁶ As shown below, this is reflected in the way the courts review custody and visitation matters, and also in the areas of family law that receive attention from lawyers and academics. The recent, long-overdue amendments to the law to enhance the collection of child support from ex-husbands is an example of how the practical and academic efforts focus on family law issues important to women.¹⁷⁷ Similarly, long-overdue amendments to pension laws will enable divorcing wives to receive 50% of their husband’s pensions starting in 2007; these amendments further illustrate how marital law continues to develop with the goal of advantaging women who have played “traditional” roles as stay-at-home housewives.¹⁷⁸

At the center of the [pre-war] traditional family law system was the house or *ie* system. Under this system, the head of the household had virtually unbridled authority over all those within the household. The consent of the father, or eldest brother if the father was deceased, was required to legitimize a broad range of activities Women were considered inferior to men and wives lacked legal capacity under the Civil Code.

Id. See also LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 366 (Arthur von Mehren ed., 1963) (regarding the dominant position of the husband under the pre-war Civil Code).

¹⁷⁶ See, e.g., Ai’ichi Nunabe, *Kaji chōtei no enkaku to katei saibansho no setsuritsu* [The Development of Family Mediation and the Establishment of Family Courts], in MEDIATION MANUAL, *supra* note 81, at 7 (“Because the new Constitution enacted after the war required that legislation relating to family and marriage be founded in respect for the individual and the fundamental equality of the sexes, etc., *fundamental amendments were needed to the family and inheritance law sections of the Civil Code which were founded on the patriarchal household system.*”) (emphasis added).

¹⁷⁷ See UCHIDA, *supra* note 99, at 137-138; SHINKAWA, *supra* note 172. The law is phrased in gender-neutral terms, but the issue is clearly non-paying fathers. For example, the SCJ does not even bother to publish statistics for mothers paying support to custodial fathers. FAMILY CASE STATISTICS, *supra* note 33, at 40-41.

¹⁷⁸ Kokumin nenkinhōtō no ichibu wo kaisei suru hōritsu [Law to

Despite the supposed historical disadvantage suffered by women in divorce, most divorces continue to be initiated by women. According to one scholar “female plaintiffs have in fact outnumbered men in judicial divorces *since the turn of the twentieth century* (emphasis added)” and by a ratio of five to one during the 1900-1940 period.¹⁷⁹ The situation is no different today: in 2003, wives commenced 49,000 marital actions in family courts, compared to approximately 19,000 brought by husbands, a ratio close to 3 to 1.¹⁸⁰ And if book sales are any indicator, most popular how-to guides about divorce are by and/or for women.¹⁸¹ There are also few Japanese lawyers who specialize in family law issues, and the majority of those who do are women.¹⁸² Within the bar, there may be a perception that male lawyers risk being regarded as unsuccessful if they handle too many divorces.¹⁸³

Amend a Portion of the Welfare Pension Law, etc.], Law No. 104 of 2004. See also *Greedy Grannies Grinning about Skinning Grumpy Old Gramps*, MAINICHI DAILY NEWS, Apr. 15, 2005, available at <http://mdn.mainichi-msn.co.jp/waiwai/archive/2005/04/20050415p2g00m0dm998000c.html>.

¹⁷⁹ FUESS, *supra* note 162, at 161.

¹⁸⁰ FAMILY CASE STATISTICS, *supra* note 33, at 32-33. Note that not all of these may be divorce actions, because, as noted elsewhere, a significant number of actions brought by husbands involve complaints about a wife refusing to cohabit. Yamaguchi asserts without substantiation that approximately 80-90% of divorce filings are by women. YAMAGUCHI, *supra* note 39, at 65.

¹⁸¹ A search of the terms “law” (*hōritsu*) and “divorce” (*rikon*) in September 2005 revealed that of the ten top-selling books in Amazon’s Japanese book database, three were written exclusively by women for women (two having titles indicating they were “for women” (*onna no tame*) and one on how to use new laws to enforce child custody payments), and three others were written by women. A similar search of books “divorce for women” (*josei no tame no rikon*) revealed a number of how-to titles, while a search of “divorce for men” revealed none. Printouts of search results are on file with the author.

¹⁸² For example, of the eleven lawyers who participated in a practice manual for parental child abduction cases, nine are women. CHILD ABDUCTION, *supra* note 108.

¹⁸³ See, e.g., YAMAGUCHI, *supra* note 39, at 3.

F. Custody

1. No Joint Custody

There is no joint custody in Japan.¹⁸⁴ Neither statute nor judicial precedents provide for it, and it is impossible for parents to agree to it in any legally operative manner.¹⁸⁵ It is possible for a family court to designate one parent physical custodian and the other legal custodian, but this can only be done through the court system. It is impossible to provide for formal joint, shared, or split custody in a consensual divorce: there is no place in the divorce form for any such notation.¹⁸⁶

Some Japanese scholars have dismissed the possibility of joint custody due to the “national sentiment” (*kokumin kanjō*).¹⁸⁷ As is common in cultural explanations of Japanese legal behavior, this assertion is presented as conclusive, yet it is completely unsupported. More significantly, the assertion may be coupled with references to implementation problems, suggesting the real issues may be enforcement and the need to modify the nationwide family registry system to accommodate a solution that might be in

¹⁸⁴ Cf. CAL. FAM. CODE, §§ 3040, 3080 (Deering 2006) (creating a preference for joint custody when agreed to by the parents and otherwise granting courts discretion to order it in any case).

¹⁸⁵ One local government goes so far as to warn divorcing couples that it will reject any divorce filings that attempt to provide for joint custody. See Japan Children's Rights Network, Joint Custody is Illegal in Japan, <http://www.crnjapan.com/custody/en/jointcustodyillegal.html> (last visited Feb. 18, 2007) (citing Shiminka [Citizen Section], Okayama Shiyakusho [Okayama City Hall], Koseki no todoke [Notification of Family Register], <http://www.city.okayama.okayama.jp/shimin/shimin/koseki/rikon.htm> (last visited Feb. 18, 2007)). My own request for joint physical custody was ignored.

¹⁸⁶ It may be possible to accomplish quasi-formal split custody through a notarized legal document (*kōsei shōsho*), though it is unclear whether this will actually have any significance in subsequent proceedings involving custody disputes. See IZUMI SATO, ONNA NO RIKON GA WAKARU HON [A BOOK FOR UNDERSTANDING DIVORCE FOR WOMEN] 98 (2004).

¹⁸⁷ HIROSHI ENDO ET AL., MINPŌ (8) SHINZOKU [CIVIL CODE, V. 8 FAMILY RELATIONS] 126-127 (2000). Uchida also notes (without explanation) that “the view that [joint custody] would be unworkable under current conditions in Japan is persuasive.” UCHIDA, *supra* note 99, at 137.

the best interests of children (but would involve a great deal of bureaucratic effort).¹⁸⁸ In any case, other scholars have pointed to the need to move to a system of joint custody, showing that there is in fact no homogeneous “national sentiment” on the issue.¹⁸⁹ While this provides hope, currently Japan does not recognize or grant joint custody, even when applying foreign laws that allow for it. Thus, except in the rare cases described below, where physical and legal custody are split, judicial custody determinations are all-or-nothing affairs.

2. Parental Power (*Shinken*): Legal Custody and Full Custody

Shinken is sometimes translated as “parental power.”¹⁹⁰ During a marriage, it vests in both parents, who may exercise it jointly and severally.¹⁹¹ *Shinken* includes all of the rights and responsibilities included in *kangoken* (physical custody, as described below). It also includes the right to engage in legal acts on behalf of a minor child (including applying for a passport and disposing of the child’s property) and the obligation of supporting the minor child.¹⁹² *Shinken* continues until it terminates in connection with a divorce, the child reaches the age of majority (generally 20), or is terminated judicially, for reasons such as child abuse.¹⁹³

When separated from *kangoken*, *shinken* is probably best understood as “legal custody” though in a narrower sense than commonly understood in the United States. When separated

¹⁸⁸ UCHIDA, *supra* note 99, at 137.

¹⁸⁹ E.g., Takao Sato, *Oya no sekinin, jikaku wo: Minpō no “shinken” minaoshi hitsuyō* [Make Parents Aware of their Responsibilities: The Need to Amend “Parental Authority” Under the Civil Code], NIHON KEIZAI SHIMBUN, May 27, 1998.

¹⁹⁰ “Parental power” is the term used in the EHS Law Bulletin Series translation of the Civil Code referred to throughout this article.

¹⁹¹ CIVIL CODE, art. 818-3

¹⁹² UCHIDA, *supra* note 99, at 210-214.

¹⁹³ *Id.* at 240-245.

from *kangoken*, *shinken* does not include authority over education, the right to participate in deciding where a child will live, visitation rights, or even the right to know where the child is living or going to school.¹⁹⁴ Since *shinken* is recorded in the family register, it is readily provable, and has significance in relations with third parties. For example, a parent must have *shinken*, either jointly during marriage or solely after divorce, in order to apply for a Japanese passport for a child.¹⁹⁵ Since formal separation of *shinken* and *kangoken* is rare, however, the term *shinken* is frequently used to refer to full custody – legal and physical.

Three things should be noted about *shinken*. First, if a child is born out of wedlock, *shinken* vests automatically in the mother, and the only way the father can obtain any parental rights at all is with the mother's consent or through judicial proceedings similar to those specified for changes of custodian after divorce.¹⁹⁶ Second, since joint custody is impossible, divorces require the designation of one parent as sole custodian. Thus, while it is

¹⁹⁴ Cf. Cal. Fam. Code § 3006 (Deering 2006) (“‘Sole legal custody’ means that one parent shall have the right and responsibility to make the decisions relating to the health, education and welfare of a child.”).

¹⁹⁵ Japanese passport regulations require that passport applications by a minor be signed by their legal custodian (*shinkensha*) or guardian. See, e.g., Embassy of Japan, Pasupōto no Tōnan, Funshitsu, Shōshitsu no Todokede/Kikoku no Tame no Tokōsho [Notification of Stolen, Lost, or Burned Passport/Travel Letter for Return to Japan], <http://www.us.emb-japan.go.jp/j/html/passport/tounan.htm> (last visited Mar. 2, 2007). Note that Japan does not appear to have any mechanism to block the issuance of a replacement passport when a parent fears that the other parent will abduct their child. Moreover, Japanese embassies have procedures for issuing emergency travel letters to Japanese nationals who urgently need to return to Japan and cannot wait for normal passport issuance procedures. *Id.*

¹⁹⁶ CIVIL CODE, arts. 818-4, 5. This seems to violate the Convention's requirement that children and their parents not be discriminated against based upon gender or legitimacy. Convention, art. 2. Thus, unmarried fathers who wish to have a relationship with their children may have no recourse but to abduct them, for which they may be arrested. See, e.g., Kennedy, *supra* note 2, at 14-15. When it comes to obligations of fathers of children born out of wedlock, however, the Civil Code is focused primarily on the issue of whether or not a child born shortly after a divorce is his. Civil Code arts. 772-777. The code also provides a mechanism for actions for acknowledgement of paternity, which can be brought by the child or its representative. Article 787.

possible to have a determination of sole physical custody prior to or without a divorce (in fact, in most cases, this decision will be determinative of final legal and physical custody), a designation of sole legal custody is generally impossible without a declaration of divorce. Legal custody is noted in the family registry, whereas physical custody is not. Third, once *shinken* has been determined, whether by the parties in a consensual divorce or by a court in a litigated divorce, it cannot be changed without further proceedings in family court that include mandatory mediation.¹⁹⁷

Parents who lose both physical and legal custody in a divorce have virtually no rights with respect to their children.¹⁹⁸ They may not know where their children live, and custodial parents can change the children's names and have the children adopted by either a grandparent or a new spouse without the non-custodial parents' consent.¹⁹⁹

3. Physical Custody (Kangoken)

As noted above, *shinken* consists of two elements: (1) the ability to conduct legal acts and manage property on behalf of a child, and (2) the rights and obligations associated with raising a

¹⁹⁷ UCHIDA, *supra* note 99, at 237.

¹⁹⁸ Or, as one scholar put it, "the status of the non-custodial parent has not been of much interest to academics." SATŌ, *supra* note 156, at 22.

¹⁹⁹ While adoptions usually require the involvement of the family court, an exception is provided for cases where a child is adopted by one's parents or spouse. CIVIL CODE, art. 798. "Special Adoptions" involving children under the age of 6 (or 8, in certain cases) necessitate the involvement of the family court and require the consent of the natural parent, unless the natural parent is "unable to declare [his or her] intention or where there is cruel treatment, malicious desertion by the father and mother, or any other cause seriously harmful to the benefits of a person to be adopted." CIVIL CODE, arts. 817-5, 6 (emphasis added). Obviously, a non-custodial parent who does not even know the child's location will be unable to express her or her intent. I have talked to several Japanese and foreign non-custodial parents who have encountered the use of adoption by grandparents or a new spouse as a means of frustrating visitation or other attempts to exercise parental rights. Published accounts also report the use of name changes to frustrate contact with the non-custodial parent. See Wilkinson & Pau, *supra* note 1. See also Kennedy, *supra* note 2, at 15 (relating an account of a foreign father whose estranged wife and in-laws allegedly forged his signature on adoption papers to make his in-laws his son's legal parents).

child, including the right to decide his or her education and place of residence. When separated from the first element, the latter set of rights and obligations is referred to as *kangoken* and roughly correlates to the notion of physical custody in many U.S. jurisdictions.²⁰⁰ During marital cohabitation, *kangoken* is a component of *shinken* and is exercised jointly by both parents. It is possible to separate *kangoken* from *shinken*, designating one parent (typically the father) as the legal custodian, and the other parent as the physical custodian (typically the mother). Such an arrangement can be ordered by a court under Article 766 of the Civil Code.²⁰¹ Designation as physical custodian is not recorded in a family registry.²⁰²

The system whereby *kangoken* could be separated from *shinken* is a remnant of the pre-war Civil Code, under which it was sometimes deemed desirable to formally allow mothers to continue acting as caregivers for younger children, even though fathers were usually awarded legal custody.²⁰³ Thus, depending upon your point of view it is a development in Japanese family law intended either to make divorce less painful for women or to preserve fathers' paternal rights while sparing them the actual burdens of child-rearing.²⁰⁴ Since women may now be legal custodians, the mechanism is no longer needed and is rarely

²⁰⁰ Cf. CAL. FAM. CODE § 3007 (Deering 2006) (“‘Sole physical custody’ means that a child shall reside with and be under the supervision of one parent, *subject to the power of the court to order visitation.*” (emphasis added)).

²⁰¹ CIVIL CODE, art. 766-2.

²⁰² See, e.g., MATSUE, *supra* note 96, at 128, 130. Matsue also points out that unlike changes of *shinken* arrangements, *kangoken* arrangements can be modified by the parents without court involvement simply by changing the child's living arrangements. *Id.* Cf. Family Registration Law, arts. 78-79 (mandating registration of changes in legal custody due to divorce).

²⁰³ UCHIDA, *supra* note 99, at 133.

²⁰⁴ This compromise mechanism is now criticized as discriminatory in its implicit assumption that women are incapable of exercising legal custody. See NAKAMURA, *supra* note 60, at 195. Such criticism is ironic given that women are awarded full custody in most cases due in part to the assumption that men are incapable of exercising physical custody.

used.²⁰⁵ While it may be a useful solution that parties occasionally agree to as a compromise in mediation, it is difficult to imagine a family court ordering such a solution on its own initiative over the objection of one of the parents.²⁰⁶

Designation of *kangoken* may actually have greater significance prior to divorce.²⁰⁷ Although, literally, Article 766 of the Civil Code only provides for a determination of *kangoken* in the context of divorce, the courts have extended its application to cases involving separation.²⁰⁸ As the award of *kangoken* pending divorce gives a parent the sole right to determine all aspects of the child's day-to-day life, education, and place of residence, and because *kangoken* is rarely separated from *shinken*, it can be safely assumed that the parent awarded *kangoken* prior to divorce will also be awarded *shinken* upon the divorce. Thus, when it comes to custody, *kangoken* proceedings (i.e., mediation sessions and subsequent judicial decrees that can be based solely on the written findings of mediators and court investigators, if assigned) may be more important than divorce litigation. Parents can expect courts to ratify the pre-divorce award of *kangoken* and to expand the custodial parent's rights to include legal custody.

An award of *kangoken* to one parent effectively empowers that parent to completely exclude the non-custodial parent from all aspects of their child's upbringing and day-to-day life. While the non-custodial parent may retain hypothetical rights as a joint legal

²⁰⁵ For example, in 2003, fathers were awarded *shinken* in only 2,716 of the 20,041 child custody cases brought before family courts. Of these 2,716 cases, 255 cases involved the mother being awarded *kangoken*. In contrast, in that same period, mothers were awarded *shinken* in 17,971 cases. Of those 17,971 cases, fathers were granted *kangoken* in only 18 instances. FAMILY CASE STATISTICS, *supra* note 33, at 39.

²⁰⁶ See NAKAMURA, *supra* note 60, at 195.

²⁰⁷ For example, of the 276 cases in 2003 involving mediation of physical custody determinations, 182 involved parents who were still married. FAMILY CASE STATISTICS, *supra* note 33, at 57.

²⁰⁸ See, e.g., UCHIDA, *supra* note 99, at 138. It was not until 1995 that courts confirmed that Article 766 could be applied to order the payment of pre-divorce child-rearing expenses. *Id.*

custodian prior to divorce, in practice, such rights are largely meaningless.²⁰⁹

4. Standards for Making Custody Determinations

There are no clear statutory guidelines that a family court must follow in making custody determinations, other than a generic “best interests of the child” standard. Without clear guidelines, custody determinations are almost entirely an administrative decision left to the discretion of family court judges, family court investigators, and mediators, whose only real guidance is apparently what they imagine to be the child’s best interests. There is, for example, no “good parent” rule whereby the parent more likely to allow visitation is preferred in custody determinations, nor are there any other legally-mandated criteria that a court is required to consider in making such decisions.²¹⁰

Parents seeking a consensual divorce are free to bypass the legal system and agree to any arrangement they deem suitable, regardless of the best interests of the child. On the subject of *kangoken*, Article 766 of the Civil Code provides only that:

1. In cases [sic] father and mother effect a divorce by agreement, the person who is to take the [physical] custody of their children and other matters necessary for the [physical] custody shall be determined by their

²⁰⁹ Due to the suspension of the family court’s custody order pending appeal, there was a period during which I had, in theory, full legal and physical custody. Nonetheless, I was unable to see or know the whereabouts of my child for extended periods, and he was removed from Japan without my consent or knowledge. All of these actions were later ratified by the appeals court.

²¹⁰ Cf. e.g., CAL. FAM. CODE § 3040(a) (Deering 2006) (stating that “the court shall consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the custodial parent.”); § 3040(a) (prohibiting a court from considering the gender of the parent in making custody determinations); § 3011 (setting forth criteria to be considered in determining the best interests of the child); § 3046 (specifically prohibiting the court from considering absence from the family residence in most cases).

agreement, and if no agreement is reached or possible, such matters shall be determined by the Family Court.

2. The Family Court may, if it deems necessary for the benefit of the children, change the person to take the custody of them or order such other dispositions as may be appropriate for the custody.²¹¹

On the subject of *shinken*, the Civil Code provides only that “[i]n cases of judicial divorce the Court shall determine [sic] father or mother to have the parental power [legal custody].”²¹²

Furthermore, there is no requirement that parties submit a parenting plan or even have the opportunity to demand one.²¹³ In fact, a custody evaluation may consist of nothing more than a family court investigator’s visit to the children’s home to observe their living environment. A custody determination may even be made without an evaluation of both parents.²¹⁴ Finally, there is no clearly articulated statement of public policy that frequent and continuous contact between a child and both parents is presumed to be in the best interests of the child, as is expressed (for example) in the California Family Code.²¹⁵

There have been, however, a few attempts at providing guidance. For example, Article 54 of the LADR Regulations requires that a court hear the statements of any child of 15 or older

²¹¹ CIVIL CODE, arts. 766-1, 766-2(emphasis added).

²¹² CIVIL CODE, art. 819-2.

²¹³ Cf. CAL. FAM. CODE, § 3040(a)(1) (Deering 2006) (“The court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.”). I submitted a parenting plan *sua sponte*. It was (apparently) ignored.

²¹⁴ Cf. CAL. FAM. CODE §§ 3081, 3110 (Deering 2006).

²¹⁵ Cf. CAL. FAM. CODE, § 3020(b) (Deering 2006).

involved in custody proceedings.²¹⁶ Professional publications also reference various aspects of a child's environment that should be considered for custody determinations.²¹⁷ Nevertheless, many of these aspects, such as "mental intercourse with the child," tend to be highly subjective.

One striking exception to the absence of express criteria for awarding custody is the clear and long-standing preference for giving custody to mothers. Despite numerous constitutional and statutory imperatives requiring gender equality,²¹⁸ judicial precedent has created a "tender years" doctrine that results in women being awarded custody in the vast majority of cases,

²¹⁶ LADR Regulations, art. 54. Some practitioners note that the opinions of children of 10 or above should also be taken into consideration when making determinations. CHILD ABDUCTION, *supra* note 108, at 14. In practice, however, it appears that the views of a child of any age are likely to be referenced only to the extent they support the court's conclusion. For example, in a 1996 Gifu case, a father was denied visitation with his 3 year old child because his child objected. 48 KASAI GEPPŌ 57 (Gifu F. Ct., Mar. 18, 1996). The court held that forcing a child so young to leave his mother to spend time with his father would cause the child "not insignificant emotional unease." Cases like this are frustrating because the mother is free to leave the child with anyone she pleases despite the ostensible justification for denial of visitation with the father.

²¹⁷ For example, CHILD ABDUCTION, *supra* note 108, at 14-15, lists a number of criteria that should be looked at when making custody determinations, including the parents' love towards the child, mental health, and financial condition.

²¹⁸ *E.g.*, KENPŌ, art. 24, para.2. ("With regard to . . . divorce, and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes."); LADR, art. 1 ("This Law shall have for its purpose the maintenance of domestic peace and sound collective life of relatives on the basis of individual dignity and essential equality of the sexes."). There is also a statute aimed at creating a society where men and women can participate equally. The statute includes provisions that specifically call for (a) minimizing systems and customs that interfere with the equal participation of men and women in society, and (b) creating a society where both men and women can both take part in, among other things, child rearing while also engaging in activities outside the home. Danjo kyōdō sankaku shakai kihonhō [Basic Law for Equal Social Participation by Men and Women], Law No. 78 of 1999, arts. 1, 4, and 6. Child custody is not the only example where the notion of gender equality apparently falls by the wayside. For example Article 733 of the Civil Code prohibits women from remarrying within six months of a divorce or annulment, but imposes no such restriction on men. *See also* FUESS, *supra* note 162, at 164.

including cases where the child is past the tender years.²¹⁹ The notion of preferring the mother permeates the court system²²⁰ and is openly endorsed by some legal scholars. For example, on the subject of custody, Takao Sato, a family law expert, writes:

When a child is small, it is thought that the mother should generally be designated custodian. For a young child, the mother's existence is irreplaceable, and in mediation, custody designations should usually proceed from this basis When a father is demanding to be designated custodian,²²¹ it is not uncommon for him to base his arguments on the fact that because he has to work outside the home, his own parents can look after the child. However, it can be said that it is better for the child to live with his mother than with his grandparents. Unless the conditions in which a mother lives are judged unsuitable for the child, as a general rule I cannot approve of awarding sole custody to fathers. Even if grandparents do look after the child, it is likely that matters will

²¹⁹ See, e.g., MASAMOTO KANAI, RIKON NO HŌRITSU KAISETSU [OVERVIEW OF THE LAW OF DIVORCE] 104-105 (2003). One of the early cases on this point states that “Unless there are special reasons why the mother is inappropriate, naming the mother as custodian (*shinkensha*) and allowing her to raise and educate the child will be in the child's best interests [when the child is of a young age].” 18 KASAI GEPPŌ 81 (Shizuoka F. Ct., Oct. 7, 1965).

²²⁰ KAJIMURA, *supra* note 52, at 50 (quoting criticism of gender bias against fathers).

²²¹ Note that references in the quoted language are to *shinken*, though in the context the references refer to full custody, including physical custody.

arise daily in which they will not pay the same level of attention as a parent.²²²

This passage is noteworthy for a number of reasons. First, it comes from a manual written specifically for family court personnel and can thus be presumed to be authoritative and to influence the family court. Second, it is the only criteria for initial custody decisions offered in the manual's chapter on custody determinations, yet has no legal basis.²²³ Of course, because this criterion is so clearly enunciated, it becomes a bright-line test and renders other criteria unnecessary. And, because custody decisions are an administrative determination at the discretion of the presiding judge, there are no institutional checks to prevent decisions made on the basis of parental gender alone.

Furthermore, the quoted language reflects and reinforces a stereotype that all Japanese mothers stay at home with their

²²² Takao Sato, *Shinkensha Shitei/Henkō no Kijun* [Criteria for Making and Changing Custody Awards], in *MEDIATION MANUAL*, *supra* note 81, at 220. Attorney Yamaguchi is blunter in his advice to fathers seeking custody: give up.

Unless there are special circumstances, like the mother is addicted to amphetamines with no hope of recovery, is serving time for something bad she has done, or is too busy with messy relationships with men to raise children, if the child is under 15, it is no exaggeration to say that the mother will get sole custody of the children almost 100% of the time.

YAMAGUCHI, *supra* note 39, at 112. And, as noted by Fuess, "As long as motherhood continues to play such an important role in defining female role identity, no change in custody practice should be expected." FUESS, *supra* note 162, at 158.

²²³ Other criteria are mentioned in passing – the child's welfare, living conditions and environment after divorce, and the responsibility of the parent, all of which are to be "carefully" considered – but are not explained any further. Sato, *supra* note 222, at 219-220. Of course, all other criteria become meaningless when the family law system makes having the mother always receive custody the key criterion.

children. Yet many married Japanese women pursue careers outside the home,²²⁴ and many divorced mothers are forced to work due to the financial realities of divorce.²²⁵ The announced preference for the mother over a paternal grandparent may in practice equate to nothing more than a preference for maternal grandparents or, in some cases, an unrelated caregiver chosen by the mother. This passage thus shows the degree to which stereotypes can influence family court practice, in spite of clear statutory principles requiring gender equality that suggest other

²²⁴ See generally YOSHIO SUGIMOTO, AN INTRODUCTION TO JAPANESE SOCIETY 16-17 (2d ed. 2003).

[T]o cope with the chronic labor shortage of the last three decades, Japanese capitalism has sought to recruit women, chiefly as supplementary labor, at low wages, and under unstable employment. . . . These women work, not to secure economic independence, but to supplement their household income. On average, the contribution a woman makes to the family income remains less than a quarter of the total, an amount too small to achieve economic equality with her husband in their household. . . . In contrast with Euro-American and other Asian societies, where . . . housewives [who give priority to waged work at the expense of domestic work] dominate, the Japanese pattern indicates a predominance of [housewives who suspend full-time work in favor of dedication to child-rearing, and whose waged work is resumed later in life as part-time work].

Id.

²²⁵ According to Ministry of Health, Labor and Welfare statistics for 2003, mothers in 84.9% of single family households had some sort of employment (statistics also include widows and unwed mothers). Single-Mother Survey, *supra* note 172, <http://www.mhlw.go.jp/houdou/2005/01/h0119-1b17.html>. Note, however, that while women do have jobs, Japan has also long been criticized for failing to provide equal remuneration and employment opportunities and, as recently as 2003, has been criticized on this by the United Nations' Committee to Eliminate Discrimination Against Women. See, e.g., Charles Weathers, *In Search of Strategic Partners: Japan's Campaign for Equal Opportunity*, 8 SOC. SCI. JAPAN J. 69, 69 (2005).

criteria should be used.²²⁶

Those tempted to justify a maternal preference as reflecting traditional Japanese cultural values should note that, until the mid-1960s, fathers took custody in the majority of divorces.²²⁷ The “tender years” doctrine also runs counter to the hundreds of years where parents took custody of their children according to gender—daughters with mother, sons with fathers—or the tradition of children remaining in the household in which they had been raised before the divorce.²²⁸ The maternal preference also ignores the long-standing custom of *atotori* (or *atotsugi*), where children (usually the eldest son) are expected to carry on the paternal household’s family name, business, and other traditions.²²⁹

In the publications I reviewed, there was also no mention

²²⁶ The favoritism for mothers is systematic in some cases. For example, Japan has a system of subsidies that by statute is only available to single-parent households headed by women. *Jidō fuyō teatehō* [Law for Child Support Subsidies], Law No. 238 of 1961 (Article 4 provides that among those qualified to receive the subsidy are children whose *fathers* have died, gone missing or are handicapped). See also KAJIMURA, *supra* note 52, at 51 (quoting criticism of this mothers-only subsidy).

²²⁷ FUESS, *supra* note 162, at 157. During the pre-war period, the institutional preference for paternal custody appears to have been even stronger. *Id.* at 116. See also von Mehren, *supra* note 175, at 374 (stating that the post-war Civil Code meant that “[a] mother need no longer consider the loss of her children as the price of divorce.”). One possible though entirely speculative explanation for the maternal preference is that it developed from the personal experiences of the many people who had grown up in mother-only households due to the death or prolonged absence of their fathers during WWII and its antecedent conflicts. If this were the case, it would not be a coincidence that the maternal preference started to develop in the 1960s, around the time when such people would have been in their 30s and 40s and starting to take a central role in the courts and other areas of society. Fuess attributes the timing of this change to “the spread of second-wave feminism in Japan during the 1970s” and notes that it was “accompanied by the greatest inequality in post-divorce parenting arrangements visible in the statistical record.” FUESS, *supra* note 162, at 157.

²²⁸ FUESS, *supra* note 162, at 91-92. As noted by Fuess, in pre-Meiji Japan there were significant regional variations in divorce and child custody practices. *Id.*

²²⁹ FUESS, *supra* note 162, at 92-93 (discussing a variety of traditional regional practices regarding post-divorce custody arrangements, most of which revolve around maximizing the likelihood of a continuing family bloodline through male children).

of considering whether the child has been unilaterally removed from the marital home as a criterion for custody determinations. In other words, it does not appear to matter if a parent unilaterally removes the children from the marital home, changes their school (which in an international abduction case may change the very language they must use), or otherwise completely disrupts the environment in which the children have lived for years. This blind-spot presumably reflects the fact that a significant number of divorces are initiated by mothers taking their children and leaving the marital home, often returning to live with their parents.²³⁰ In fact, it appears to be a practice recommended by at least some Japanese lawyers.²³¹ To consider the radical disruption of a

²³⁰ Although the number of marital actions brought in family courts in 2003 by wives (49,306) was far greater than the number brought by husbands (18,990), the absolute number of cases brought by husbands (2,036) where one of the complaints was about their spouse's refusal to cohabitate was larger than number of wives (1,435) making the same complaint. *Id.* at 32-33. These statistics reflect not only divorce actions, but also cases where one party formally demands that the spouse return home. That domestic violence and/or child abuse may be a factor in some such cases is acknowledged, as is the fact that Japan has only recently started to deal with these problems. *See, e.g.,* Yoko Tatsuno, *Child Abuse: Present Situation and Countermeasures in Japan*, Jan. 26 2001, <http://wom-jp.org/e/JWOMEN/childabuse.html>; Yukiko Tsunoda, *Sexual Harassment and Domestic Violence in Japan*, 1997, <http://www.tuj.ac.jp/newsite/main/law/lawresources/TUJonline/SexualDiscrimination/tsunodasexualharrassment.html>. Of the 49,306 women bringing actions in family court in 2003, 14,588 complained of violence by their husbands. Of 18,990 husbands, 1,096 complained of violence by their wives. FAMILY CASE STATISTICS, *supra* note 33, at 32-33. Under Japan's new domestic violence law, it is possible to get a court-issued six-month restraining order based upon allegations of domestic violence, which will also prevent allegedly abusive spouses from contacting their children. Haigūsha kara no bōryoku no bōshi oyobi higaisha no hogo ni kansuru hōritsu [Domestic Violence Law], Law No. 31 of 2001, art. 10. Similarly, Japan's anti-stalking law may be used to prevent alleged stalkers from telephoning their victims or making other attempts at contact. Sutōkā kōi tō no kiseitō ni kansuru hōritsu [Law Regarding the Restriction of Stalking Behavior], Law No. 81 of 2000. More recently, there have been proposals to expand access to restraining orders in cases of verbal abuse. *Restraining Orders Eyed for Verbal Spouse Abuse*, ASAHI SHIMBUN, Apr. 7-8, 2007, at 21.

²³¹ *See, e.g.,* NAKAMURA, *supra* note 60, at 89-90 (advising wives contemplating a "time out" in their a marriage that: "Even if it is not certain that there will be a divorce, if you feel you would want to take the children if you do divorce, without a doubt you should take the children with you.") Attorney Yamaguchi characterizes the standard advice of a certain Japanese divorce lawyers along the lines of:

child's environment as a factor in custody determinations would doubtlessly hinder the continuing preference for mothers as custodians.

Whatever its basis may be, the maternal preference, combined with the dismal status of visitation discussed below, renders fathers an optional part of a child's life.²³² Professor Takao Sato finishes the section of his chapter by stating, "Under the current legal regime of sole custody, all that can be done is to make non-custodial parents aware of their position, and strongly convince them of their natural support obligations as parents."²³³ Family courts may adhere to this "rule" even when fathers offer to take time off of work and dedicate themselves to raising their children.²³⁴ In such situations, the courts may urge fathers to give money to their ex-wives to raise their children instead.²³⁵

There is also anecdotal evidence that race plays a role in custody determinations when one parent is not Japanese.²³⁶ In

You should take the children to your parents' house on such and such a date. You will need to take care of the transfer of their school, so be sure to make the necessary arrangements. Also be sure to change your address registration. If your husband calls you must not talk to him. You must not see him. . . . Under no circumstances allow him to see the children.

YAMAGUCHI, *supra* note 39, at 107. I have met a number of parents who were subjected to this treatment.

²³² This result lies in opposition to current government policy that seeks to encourage increased participation by fathers in child-rearing, as expressed in the Basic Law for Equal Social Participation by Men and Women and elsewhere.

²³³ Sato, *supra* note 222, at 221. In fairness to Professor Sato, it should be noted that he is an advocate of joint custody, and notes that discrimination against the non-custodial parent is an irrational result of the existing sole custody regime. Sato, *supra* note 189.

²³⁴ YAMAGUCHI, *supra* note 39, at 111-112.

²³⁵ *Id.*

²³⁶ The CRN Japan website lists a variety of forms of racial discrimination which foreigners may suffer in family-related disputes in Japan,

her fieldwork in the Japanese family courts in the 1980s and 1990s, Professor Bryant observed that in most such cases, custody was awarded to the Japanese parent, and even if it was not, there were elaborate protections in the divorce arrangements to protect the children's Japanese identities at the expense of the cultural heritage of their non-Japanese parent.²³⁷ According to Bryant, "notions of blended families or bicultural identity did not factor into discussions of the post-divorce family conditions for the child(ren)."²³⁸ Racial discrimination in custody determinations is also one of the criticisms that NGOs have leveled at Japan in connection with its implementation of the Convention.²³⁹ Interestingly, while the SCJ maintains statistics on custody determinations by gender, and statistics by nationality for divorces involving non-Japanese parties, it does not publish figures for custody determinations by nationality.²⁴⁰

Finally, since custody determinations are effectively an administrative determination not based on substantive law, the court does not have to justify its decision other than by concluding that its decision is in the best interests of the child.²⁴¹ There is no

including discrimination in custody awards, enforcement of foreign judgments, application of foreign law, failing to assist in locating children, and the award of restraining orders. It should be noted that some of these claims are speculative and still being developed. Japan Children's Rights Network, Discrimination in Japan Concerning Children's Rights, <http://crnjapan.com/discrimination/> (last visited Mar. 3, 2007).

²³⁷ Bryant, *supra* note 45, at 18-19.

²³⁸ *Id.* Bryant was writing of family courts in the 1980s and 1990s. My experience with family courts in Tokyo – the most metropolitan and international city in Japan, if not Asia – was that in 2003, the institution seemed unable to understand or was simply uninterested in the special issues affecting children growing up in multi-lingual/multi-cultural environments.

²³⁹ Report from Children's Rights Council, *supra* note 133. Part of the problem may simply be the inability of family court mediators, investigators, and judges to imagine a child's well-being in a non-Japanese context, particularly in the absence of clear guidelines. Bryant, *supra* note 45, at 19.

²⁴⁰ Almost one-half of the international divorce cases brought before family courts in 2003 involved Japanese men with Asian wives, primarily Filipina or Chinese. FAMILY CASE STATISTICS, *supra* note 33, at 46.

requirement that a judge explain why a particular result is in the best interests of the children, or provide any formal protections for the benefit of non-custodial parents.²⁴²

G. Visitation

There are no visitation rights in Japan.²⁴³ There is only a concept called visitation (*mensetsu kōshōken*), which is sometimes referred to as if it were a right.²⁴⁴ Japanese family courts have used this concept in resolving marital disputes since as early as 1964.²⁴⁵ As no statute specifically provides for visitation, it has

²⁴¹ Cf. CAL. FAM. CODE § 3082 (Deering 2006) (specifically prohibiting judges from justifying a custody decision with nothing more than a statement that “joint custody is, or is not, in the best interest of the child” in cases where joint custody has been requested by a party). Doctor Gardner points out how meaningless the “best interests of the child” standard has become in the context of U.S. custody disputes and suggests that it should be replaced with a “best interests of the family” presumption. GARDNER, *supra* note 138, at 374.

²⁴² Cf. CAL. FAM. CODE § 3048 (Deering 2006) (detailing the matters which must be included in every custody or visitation order).

²⁴³ In comparison, the California Family Code has an entire chapter devoted to visitation. CAL. FAM. CODE, Ch. 5 (Deering 2006). § 3100 of the code states that a court “shall” order visitation unless it would be detrimental. California precedent further holds that unless a custody order specifically denies the non-custodial parent visitation, he or she is “entitled to reasonable visitation as a matter of natural right.” *Feist v. Feist*, 46 Cal. Rptr. 93, 95 (App. 4 Dist. 1965).

²⁴⁴ The terms *menkai kōryūken* and *menkai kōshōken* are also sometimes used. The term “*ken*,” used in all three terms, would normally be translated as “right.”

²⁴⁵ A leading case on the subject stated in 1964 that:

Meetings and interaction with a minor child is a minimal request of the parent without legal or physical custody, and even if due to the unfortunate occurrence of the mother and father’s divorce it is in practice no longer possible for the mother and father to jointly exercise physical and legal custody, with one being named as physical and/or legal custodian, despite one parent raising and educating the child alone, the parent not having legal or physical custody has the right to meet and interact with the minor

been created by precedent based exclusively on the authority granted courts under Article 766 of the Civil Code to “order such other dispositions as may be appropriate for the [sic] custody” in connection with a divorce or other marital breakdown.²⁴⁶

1. The Realities of Visitation in Japan

It is impossible for parents to provide for formal visitation rights in a consensual divorce. There is simply no place to do so on the form used in the divorce filing.²⁴⁷ Non-custodial parents in a divorce must either give up attempts to see their children, hope for the ongoing cooperation of the custodial parents and thereby submit to their control, or attempt to secure visitation privileges through family court proceedings that involve mandatory mediation. None of these options provide any assurance of obtaining access. Indeed, involving the family court may actually result in the formal termination or denial of visitation rights if the custodial parent is hostile or uncooperative.

Visitation is a subject of only limited interest in academic

child, and so long as it does not interfere with the welfare of the child, it should not be restricted or taken away.

OVERVIEW OF THE LAW OF DIVORCE, *supra* note 219, at 124-129 (citing a Dec. 12, 1964 Tokyo family court case). As noted below, the characterization of visitation as a right of the parent has been proved incorrect by subsequent precedents. For a summary of recent visitation case law, *see also* Shuhei Ninomiya, *Mensetsu Kōshō ni Kansuru Atarashii Hanrei no Dōkō* [*New Trends in Visitation Cases*], in SHINKAWA, *supra* note 172, at 124-129.

²⁴⁶ CIVIL CODE, art. 766. Note that in the apparent absence of any constitutional dimension to the parent-child relationship, *see infra* note 291, a logical corollary of visitation being derived from Article 766, which focuses on custody during marital breakdown, is that there is no statutory basis for visitation involving children born out of wedlock.

²⁴⁷ Separating parents may agree upon visitation, as well as child support payments or other matters relating to the divorce, in a notarized agreement (*kōsei shōsho*). A breach of the agreement, however, may simply result in the aggrieved parent having to resort to the same family court procedures as would apply absent the agreement. *See, e.g.*, KANNA HIMURO, RIKON GO NO OYAKOTACHI [POST-DIVORCE PARENTS AND CHILDREN] 20-22 (2005) (citing an example of a breach of a notarized visitation agreement being dealt with through mediation for visitation).

and practical literature. There are almost no books—academic or popular—devoted to the subject. Most treatises on family law devote a page or two to the subject at most.²⁴⁸ The “how-to-divorce” guides I reviewed also cover visitation briefly and tend to characterize it as something parents may agree to, or is decided in family court mediation or pursuant to a family court decree. The lack of writing on the subject may be simply because there is not much to say about it.²⁴⁹ It may also reflect the fact that although visitation is primarily an issue for fathers, women are more likely to initiate the divorce and thus read books on the subject in preparation. Most of the how-to books on divorce I reviewed for this article presented visitation as something for custodial mothers to tolerate or deny if it is causing problems.²⁵⁰

²⁴⁸ An exception is Kajimura’s very helpful book on family court mediation. KAJIMURA, *supra* note 52.

²⁴⁹ Perhaps nothing illustrates this phenomenon better than attorney Yukiko Yamada’s recent mass-market book on children’s rights. YAMADA, *supra* note 132. Containing close to 200 pages of discussions in Q&A format of the rights of children in Japan, Yamada’s book covers numerous topics such as whether children can be forced to sing the national anthem at school, how to protect them from corporal punishment by teachers, the rights of minors in the criminal justice system and so forth. On the subject of the rights of children in divorce, the book has a single section spanning two pages. Of these two pages, a single paragraph is devoted to visitation:

The parent who did not take custody of the child can request meetings and correspondence, etc. with the child from the parent who did take custody. This is called visitation. However, this is not so much a right of the parent, but from the child’s perspective should be more appropriately viewed as a responsibility of the parent. Indeed, it is probably more appropriate to consider children as having a right to visitation with their parent. In practice, it is decided and carried out *once every few months or a few times a year*, but it should be conducted with due respect for the wishes of the child and the conditions thereof.

YAMADA, *supra* note 132, at 145 (emphasis added).

²⁵⁰ See, e.g., MATSUE, *supra* note 96, at 139 (summarizing three

As with custody determinations, there are few clear criteria regarding visitation determinations. Visitation is based on the seemingly rational principles of “best interests of the child” (*kodomo no rieki*) and “welfare of the child” (*kodomo no fukushi*).²⁵¹ What is fascinating, however, is that while there are no clear criteria for granting visitation other than best interest of the child, there are numerous guidelines for terminating or refusing it in the first place.²⁵²

court cases on the subject of visitation that present the view that it is easy to deny fathers visitation, but hard to do so for mothers because they should probably be the custodial parent in the first place).

²⁵¹ See, e.g., MATSUE, *supra* note 96, at 138. *Id.* at 129.

²⁵² One guide for practitioners sets forth no less than ten grounds for which visitation can be terminated, restricted, or refused in the first place:

- (1) When the non-custodial parent has a serious personality imbalance.
- (2) When the non-custodial parent displays anti-social behavior.
- (3) Where there are concerns that, due to the circumstances leading to divorce, the dispute between the parents will reignite.
- (4) Where the non-custodial parent says bad things about the custodial parent or things that would upset the child’s day-to-day life or mental condition.
- (5) When the non-custodial buys expensive gifts to curry the child’s favor.
- (6) When the non-custodial parent uses visitation to attempt to re-establish his relationship with the custodial parent.
- (7) When visitation may be used to abduct the child.
- (8) When the child does not want visitation.
- (9) When the non-custodial is not providing support despite being able to do so.
- (10) Other reasons.

CHILD ABDUCTION, *supra* note 108, at 28. Matsue’s mass-market divorce book provides a similar, though more condensed list of criteria for the general reader. MATSUE, *supra* note 96, at 137. Interestingly, I have yet to see a similar list of criteria for the denial or termination of custody rights. Thus, while disparaging the custodial parent may result in termination of visitation, in regards to custody, disparaging the non-custodial by the custodial parent is apparently a non-issue. Similarly, while a non-custodial parent apparently risks loss of visitation if he or she uses visitation to attempt reconciliation, a custodial parent is apparently free to use the denial of access as a means of

Apparently any excuse that can justify a negative impact on the child's welfare may terminate a father's access to his child. The case of Hideaki Tanaka, a parents' rights activist, is a sobering example.²⁵³ The mother unilaterally removed their three sons from the marital home and filed for divorce.²⁵⁴ He has not seen them for over five years.²⁵⁵ His visitation rights were formally terminated on the basis of the mother's claims that she "becomes 'psychologically unstable' just by letting their children see their father and that this has a negative impact on the way she brings them up."²⁵⁶ If visitation is any sort of right at all, it may be one that exists primarily for the purpose of being terminated. This interpretation has a logic to it, though not in a way that has anything to do with the best interests of the children: family courts can deny visitation entirely "in-house," whereas awarding it involves the unpredictable world outside the court and the enforcement issues discussed below.

Another basis for terminating or disallowing visitation is the notion of parental feuding (*kattō*).²⁵⁷ Here, the non-custodial

coercing the return of a spouse who has left the marital home.

²⁵³ Hideaki Tanaka, *Kodomotachi no Tame ni Genkō Minpō no Kaisei wo Motomemasu* [A Demand for Amendments to the Existing Civil Code for the Sake of Our Children], in SHINKAWA, *supra* note 172, at 105.

²⁵⁴ *Id.* at 108.

²⁵⁵ *Id.*

²⁵⁶ *Furious Battle*, *supra* note 4. Mr. Tanaka's story is also relayed in part in Hideaki Tanaka, *Kodomotachi no Tame ni Genkō Minpō no Kaisei wo Motomemasu* [A Demand for Amendments to the Existing Civil Code for the Sake of our Children], in SHINKAWA, *supra* note 172, at 105-109. Other reasons for mothers unilaterally denying visitation on the grounds of negative influence are reported in responses to the questionnaires in Shinkawa's book on visitation, and include: "we think too differently," "he focuses on himself and not the child," "he is lazy," "he is selfish and does not think of the children," and "he has a personality problem." SHINKAWA, *supra* note 172, at 10.

²⁵⁷ In my case, the Tokyo family court did not address the issue of visitation although no specific allegations had been made that I was in any way an unfit parent or that contact with my son would be detrimental to him. On appeal, I argued that under applicable law, the court was required to order visitation. Based solely on the trial record (there were no oral arguments), however, the Tokyo High Court concluded *sua sponte* that because of "parental

parent is denied visitation on the grounds that it is bad for a child to be exposed to hostility between the parents.²⁵⁸ Although this is superficially reasonable, it does not seem to apply to children exposed to parental feuding within a marriage or as part of a family-court sponsored “successful” reconciliation between estranged parents. Nor do courts seem to consider that the “feuding” may be due to the denial of visitation, possibly because the courts would then be expected to address the issue.²⁵⁹ Thus, with *kattō* as possible grounds for terminating visitation, parents may risk punishment for expressing their frustration at the court’s failure to protect the parent-child relationship.

While denial of visitation is primarily an issue for fathers, mothers may also be negatively affected by the absence of meaningful visitation.²⁶⁰ Before mothers became favored as custodians in the 1960s, they were just as likely to be expected to disappear from a child’s life after divorce, as evidenced by the following passage from a 1965 Tokyo High Court case in which an all-male panel of judges denied visitation to a mother:

We judge that it will be best for the child that the mother pray from the shadows for his healthy upbringing If she is worried about her child, she should ask about him through others, secretly watch him from behind a wall, and be satisfied with what she hears about

feuding,” it was in the best interests of my child that there be no visitation.

²⁵⁸ See, e.g., CHILD ABDUCTION, *supra* note 108, at 28.

²⁵⁹ Note that I have used the terms “custodial” and “non-custodial” parent throughout as a matter of convenience, but since visitation can theoretically be terminated before any custody rulings have been made, “cohabitating/non-cohabitating” parent may be the more appropriate terms.

²⁶⁰ See, e.g., Masayuki Tanamura, *Mensetsu Kōshōken Jiken no Toriatsukai [Dealing with Visitation Cases]*, in MEDIATION MANUAL, *supra* note 81, at 231-233 (listing several cases in which mothers are denied visitation).

the way he is growing up. Acting in accordance with her emotions, even if they are based on maternal love, will cause the child misfortune. Suppressing her emotions for the sake of her child at the times when they should be suppressed, that is the true love of a mother towards her child.²⁶¹

In fact, the relatively recent trend of favoring mothers in custody decisions, as well as the paucity of visitation for fathers, may be the cause of some of the most tragic cases involving mothers seeking visitation. Because of the widespread knowledge that mothers always get custody, women who are not with their children after divorce (e.g., due to abduction by the father or former in-laws) risk negative community perceptions that it is because they are terrible mothers. Such women may feel pressure to hide the fact that they even have children.

For either parent, the frequency of visitation is generally much less than what an American lawyer or parent might expect. For example, of the 2,025 Japanese family court cases in 2003 that involved an agreement of visitation, only 294 (14.5%) involved overnight stays and only 95 (4.7%) of these involved extended visits.²⁶² In contrast, 443 cases (21.9%) involved visitation with a frequency of once every two to six months.²⁶³ The most common range of frequency was “once a month or greater,” which accounted for 1,056 cases (52.1%).²⁶⁴ For example, one attorney writes in her divorce guide that “in many cases it [frequency of

²⁶¹ 17 KASAI GEPPŌ 58 (Tokyo F. Ct., Dec. 8, 1965). This passage also illustrates how the recent trend towards favoring mothers is not rooted in any long-standing cultural tradition.

²⁶² FAMILY CASE STATISTICS, *supra* note 33, at 56.

²⁶³ *Id.*

²⁶⁴ *Id.*

visitation] is about once per month.”²⁶⁵ Foreigners whose expectations are based on visitation in their home countries may find the paucity of visitation particularly disturbing. One foreign father whose children were unilaterally abducted within Japan reports that “[i]n court, when I said I wanted to see my kids every weekend, they laughed at me.”²⁶⁶ A shocking example is that of Samuel Lui, to whom the Osaka Family Court awarded three hours of visitation per year with his son, despite the fact that he was the child’s sole custodian under a California court order affirmed by Japan’s Supreme Court.²⁶⁷ Indeed, the visitation was reportedly awarded *because* he was putatively the custodial parent.²⁶⁸

The court’s award of limited frequency of visitation may also reflect the personal views of family judges and mediators that visitation is, at best, a necessary evil and perhaps one that should not be granted at all.²⁶⁹ Bryant’s research on Japan’s family courts show that requests for visitation were viewed by mediators as “atypical” or “selfish,” and that “[m]any mediators did and still do believe that post-divorce contact between non-custodial parents and children is harmful to the children.”²⁷⁰ This view may be widely held. In his authoritative four volume treatise on the Civil Code, Professor Takashi Uchida writes of visitation that:

²⁶⁵ MATSUE, *supra* note 96, at 137. See also Nakamura, *supra* note 60, at 198 (giving a range of frequency of “once a month, or three times a year” and recommending against any visitation whatsoever until the divorce is finalized).

²⁶⁶ Struck & Sakamaki, *supra* note 2.

²⁶⁷ 3 Hours, *supra* note 94.

²⁶⁸ *Id.*

²⁶⁹ A long-time Japanese fathers’ rights activist told me that in the past, whether visitation was awarded was completely a matter of luck. In other words, visitation depended on whether the particular judge was in favor of or opposed to post-divorce contact between children and non-custodial parents. Even now, there are reportedly some judges who are infamous for never awarding visitation.

²⁷⁰ Bryant, *supra* note 45, at 19-20. See also the comments of family court mediator Endo, *infra* note 316.

In Japan, there is a strong negative view of parents who, without putting the welfare of the child first, divorce for their own convenience and then raise the issue of visitation as a parent's right. In addition, there is also the argument that visitation, where a parent who is not part of the child's everyday life has sporadic contact, is undesirable and destroys the continuity of the [custodial] parent-child bond. This argument is based on research in family psychology and psychoanalysis that shows that it is a fundamental necessity for a child's healthy development that the [custodial] parent-child bond be stable and continuous.²⁷¹

This "negative view" of visitation may appear logical at first glance, but only if the court accepts that a loving parent-child relationship is best preserved by sporadic contact. It also ignores the fact that the parent seeking to terminate the marriage "at their own convenience" (most likely the mother) and the parent seeking visitation (most likely the father) are not always the same individual. It is also unclear from Uchida's citations what he means by "family psychology and psychoanalysis."²⁷² Indeed, in my survey of the legal literature on custody and visitation, there is a noticeable lack of citations to authorities on child psychology or other mental health professionals outside the legal system.

²⁷¹ UCHIDA, *supra* note 99, at 134-135.

²⁷² Uchida cites to ABE ET AL., *GENDAI KAZOKUHŌ TAIKEI 2* [OUTLINE OF FAMILY LAW VOLUME 2] (1980), which is not a work on mental health, nor particularly recent. His citation also includes a reference to "other works."

While frequency of visitation is, at best, a minor issue for Japanese family courts, focus on quality is non-existent. In one recent private survey of visitation, 83 of 148 respondents (56.1%) reported an average time per visitation of six hours or less, including 12 (8.1%) who reported average visits of less than one hour.²⁷³ Although visitation supposedly concerns the welfare of the child, there is virtually no consideration of the visitation environment. For some non-custodial parents and their children, visitation may mean an hour in a restaurant in the presence of both parties' counsel.²⁷⁴ Virtually none of the works on visitation I reviewed discuss whether visitation should be unsupervised or requires the presence of the custodial parent. While a child's reluctance to participate in visitation is often discussed in the literature and is sometimes given as grounds for a denial, I have yet to see anyone contend that a child's dislike of visitation may be due not to the contact with the other parent, but the environment where both parents are present and constantly on the verge of argument. Nor is it considered that the child may be overtly or subtly pressured by the custodial parent to appear negative towards the non-custodial parent. If visitation is about the "best interests of the child," the quality of visitation should be of paramount concern to decision-makers. Yet it is not.

While some commentators appear aware of the complexity of visitation, particularly from the children's standpoint,²⁷⁵ the apparent overall lack of insight into the profoundly difficult situation in which children of broken relationships are placed and

²⁷³ SHINKAWA, *supra* note 172, at 11. I talked to one Japanese mother whose "visitation" consisted of being allowed to see the child from the entrance to the custodial parent's house.

²⁷⁴ See *Furious Battle*, *supra* note 4; Struck & Sakamaki, *supra* note 2 (writing of one foreign father who "gets to meet his children once a month for thirty minutes at a Roy Rogers restaurant – if his ex-wife bothers to bring them.").

²⁷⁵ See, e.g., Tanamura, *supra* note 260, at 232-233 (expressing the view that the mere opposition of the custodial parent should not be a reason for limiting or prohibiting visitation, and noting the need to evaluate the views of children in light of the complex emotional situation in which they are often placed).

the negative role that custodial parents may play in it is saddening. Furthermore, courts can completely terminate the non-custodial parent's visitation, and virtually all remaining parental rights, at the first sign that it is harmful to a child, even though the problem may be the visitation environment, rather than the non-custodial parent's conduct, i.e., child abuse.

Certainly many people working within the family court system probably regard the realities of visitation as less than ideal. Yet there is little they can do about it when one parent or his or her counsel opposes visitation: in most cases, the parties must both agree. Professor Masayuki Tanamura, an authority on visitation, cites a study conducted by a family court investigator on visitation cases.²⁷⁶ Most of the cases involved non-custodial fathers seeking visitation from custodial mothers.²⁷⁷ The average age of the children involved was between 6 and 10.²⁷⁸ Half of the cases were withdrawn, while most of the remainder settled through mediation.²⁷⁹ Resolution by decree was "rare," meaning the courts did not order it when the custodial parent was not amenable to permitting visitation.²⁸⁰ The SCJ's own interpretation of the status of visitation generously states that the SCJ is "not negatively disposed" towards the concept when it is agreed to by both parents.²⁸¹

²⁷⁶ Tanamura, *supra* note 260, at 234.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.* SCJ statistics paint a similar picture. Of 3,894 cases involving a request for visitation in 2003, only 150 resulted in the request being accepted by the court. 158 were formally rejected, 1,875 were "resolved" through mediation, 1,636 withdrawn, 10 expired naturally, and 65 resulted in a failed mediation, meaning the issue was either given up on or settled as part of a litigated divorce. FAMILY CASE STATISTICS, *supra* note 33, at 53. Note that withdrawal of a matter does not necessarily mean that the party bringing the action is satisfied with the result.

²⁸¹ Memorandum from Judge Norihiko Sugihara, Supreme Court of Japan (2000), *reprinted in* KAJIMURA, *supra* note 52, at 172-77 [hereinafter Sugihara Memorandum].

Even if the parties reach an agreement on visitation through family court mediation, there is no guarantee of access to the children. As noted by Bryant, in general the courts do no follow-up on the visitation agreements they broker.²⁸² Furthermore, by this point in the proceedings, everyone involved in the process should be aware that any agreement on visitation is unenforceable. The visitation agreements are also likely to be so vague that, as in the words of one lawyer, they are “the same as having decided nothing at all.”²⁸³ Short, vaguely-worded visitation agreements are recommended.²⁸⁴ For example, one lawyer advises that “it is best not to put in writing details regarding the method of visitation. If you don’t make special efforts to communicate [with your ex-spouse], you will not be able to alter visitation so that it is appropriate to your child’s development.”²⁸⁵ This view may reflect an underlying assumption that the parents will be able to make adjustments to the visitation schedule on an on-going, as-needed basis. Given that most parents capable of cooperating have been filtered out by the time the courts are involved, on-going modifications may be extremely difficult to agree upon. More to the point, vague terms may also allow the family court to minimize hearing further disputes regarding the same matter by minimizing contractual provisions over which a specific breach can be asserted.²⁸⁶

²⁸² Bryant, *supra* note 45, at 16-17 (“There is no systematic follow-up research to find out whether the agreement actually resolved the dispute or was implemented.”).

²⁸³ YAMAGUCHI, *supra* note 39, at 118.

²⁸⁴ Matsue states that most visitation agreements resulting from mediation do not specify the frequency or time. MATSUE, *supra* note 96, at 140.

²⁸⁵ See, e.g., NAKAMURA, *supra* note 60, at 198-199.

²⁸⁶ See, e.g., Tanamura, *supra* note 260, at 234. The dispute most likely to arise is that the non-custodial parent is not complying with the agreement. In the U.S. context, Dr. Gardner notes that court intervention may be necessary where one party is stubbornly uncooperative.

Flexibility is not a word that is to be found
in the vocabularies of [Parental Alienation

Again, it is hard to determine whether this outcome is in the best interests of the child or of the court.²⁸⁷

Because the best interests of the child in visitation are defined negatively or not at all, and are not identified through structured, evidentiary procedures, anything can be asserted as applicable. Thus, notwithstanding the existence of a visitation agreement, flexible drafting may enable the custodial parent to generate excuses to frustrate visitation on any specific occasion.²⁸⁸

2. Visitation as a Right

The status of visitation as a “right” was the subject of academic debate and a variety of lower court interpretations for many years.²⁸⁹ At one point, there were a number of theories as to the character of visitation as a “right,” including that visitation was: (i) an inherent right arising naturally from the parent-child relationship; (ii) an aspect of physical custody; (iii) a right arising in connection with physical custody; (iv) a right of children to develop emotionally through contact with their parent; and (v) a right of both parent and child.²⁹⁰ The debate becomes

Syndrome] indoctrinators, at least when it applies to visitation with the despised parent. Obviously, makeups for missed visits are not permitted and the deprecated parent may have to get a court order to obtain such.

GARDNER, *supra* note 138, at 143.

²⁸⁷ As noted by Yamaguchi, “since courts are a bureaucratic organization, just like any other bureaucracy they hate having their workload increased.” YAMAGUCHI, *supra* note 39, at 54.

²⁸⁸ Yamaguchi, writing from a male standpoint, writes of how custodial mothers are able to use vaguely-worded visitation agreements that purport to advance the child’s best interests as a means of limiting visitation. YAMAGUCHI, *supra* note 39, at 116-118.

²⁸⁹ See, e.g., Tanamura, *supra* note 260, at 229-231; UCHIDA, *supra* note 99, at 135-136; Michihiro Tanaka, *Shinken no Kōryoku* [*The Effect of Parental Power*], in SHINZOKU—MINPŌ, DAI 725 JŌ KARA DAI 881 JŌ MADE [FAMILY RELATIONS—CIVIL LAW, ARTS. 725 TO 881] 207-208 (Ichirō Shimazu & Tadaki Matsukawa eds., 2001); SATŌ, *supra* note 156, at 74-83 (includes useful summaries of a number of visitation cases).

²⁹⁰ See, e.g., SHIMPAN CHŪSHAKU MINPŌ (25) - SHINZOKU

particularly complicated when the parents are estranged but still married. Logically, visitation is unnecessary in such cases since both parents retain joint parental authority, which may include the right to visitation. Furthermore, Article 766 of the Civil Code refers only to divorce situations, though courts have expanded its scope to include parental separation. In practice, due to the unenforceability of visitation, this debate has probably been meaningless in terms of its impact on parents and children affected by divorce.

In 1984, the SCJ issued its first decision on visitation when it rejected a father's argument that failure to award visitation in a consensual divorce (*kyōgi rikon*) was a violation of the right to pursue happiness guaranteed under Article 13 of the Constitution.²⁹¹ According to the SCJ, the father's claim was a matter of interpretation and application of Article 766 of the Civil Code, and did not rise to the level of a constitutional issue.²⁹² In short, in Japan, the preservation of the parent-child relationship is not a matter of constitutional import.²⁹³

[ANNOTATED CIVIL CODE, NEW EDITION: v. 25, FAMILY RELATIONS] 82-85 (Fujio Oho & Jun Nakagawa, eds., 2004). See also Ishida Toshiaki, *Fubo Bekkyo Chū no Mensetsu Kōshōken* [Visitation Rights During Parental Separation], in KAZOKUHŌ HANREI HYAKUSEN [100 FAMILY LAW JUDICIAL PRECEDENTS], May 2002, at 79 (setting forth a similar list of the various theories of the right of visitation in the context of parental separation); Tanamura, *supra* note 260, at 229 (describing some of the different views of the rights and character of visitation). References to the rights implied by the Convention are generally absent from this debate. By comparison, California courts have found that visitation is "as much a right of the child as it is of the parent." *Camacho v. Camacho*, 173 Cal. App. 3d 214, 220 (Cal. Ct. App., 1985).

²⁹¹ 37 KASAI GEPPŌ 35 (Sup. Ct., Jul. 6, 1984).

²⁹² *Id.*

²⁹³ *But cf.*, *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (A case in which the Supreme Court reaffirmed that in cases where the state sought to terminate parental rights: "The fundamental liberty interest of natural parents in the care, custody and management of their child is protected by the Fourteenth Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." Thus, the Court held that due process requires the application of a higher clear and convincing evidence standard rather than the preponderance of the evidence standard used in the state statute at issue.)

Courts below the SCJ have also dealt with the issue of visitation and for a time there was a split of authority regarding the nature of the rights involved. Some appellate courts were cool to the idea that there were any affirmative rights of visitation. Others focused on the absence of any provisions in the LADR empowering family courts to make visitation determinations, or referred generally to the absence of any clear statute that would otherwise allow courts to interfere with family life.²⁹⁴

The SCJ issued further guidance on visitation in a 2000 decision (hereinafter 2000 Decision).²⁹⁵ The case involved a mother appealing a family court decision on the grounds that the family court lacked any statutory authority to award her husband four hours a month of visitation.²⁹⁶ She argued that there were no clear Japanese laws or court precedents providing for visitation and that, notwithstanding the established family court practice for visitation, nothing in Article 9 of the LADR or Article 766 of the Civil Code gave family courts the authority to issue visitation decrees, particularly while the child's parents were still married.²⁹⁷ She distinguished the SCJ's 1984 decision by characterizing it as merely rejecting a right of visitation based on Article 13 of the Constitution.²⁹⁸ In the instant case, however, the SCJ stated that family courts had the authority to order visitation ancillary to a custody determination under Article 766 of the Civil Code.²⁹⁹

The 2000 Decision does not seem dramatically different

²⁹⁴ On the various views of Japanese courts on the subject of visitation, *see, e.g.*, Ninomiya, *supra* note 245.

²⁹⁵ 52 KASAI GEPPŌ 31 (Sup. Ct., May 1, 2000) [hereafter 2000 Decision].

²⁹⁶ *Id.* It is likely that the mother expected to lose her appeal but brought it anyway, simply to delay the visitation order from taking effect, as appeals can take months or years to be decided. *See supra* note 109.

²⁹⁷ 2000 Decision, *supra* note 295. As noted previously, the LADR lists a broad range of matters with respect to which a family court can issue a decree. Visitation is not one of them.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

from the 1984 decision in that it deals largely with procedural issues relating to the scope of the family court's authority. It confirms existing family court practices and adds a necessary clarification to the meaning of the LADR.³⁰⁰ Nonetheless, the ruling is generally understood to have ended the debate and split of authority on the subject of visitation.³⁰¹ Specifically, it rejected the notion that visitation is a right of demand (*seikyūken*) and held that it is instead a right to request appropriate measures for the child (*kodomo no tame ni tekisei na sochi wo motomeru kenri*).³⁰² This understanding is based on an explanatory memo (hereinafter Sugihara Memorandum) clarifying the SCJ's position on visitation written by Norihiko Sugihara, a judge and SCJ judicial research official, who was responsible for the 2000 Decision.³⁰³

A significant portion of the Sugihara Memorandum deals with the troublesome ties of marriage and custody, as well as visitation when a child's parents are separated but still legally married.³⁰⁴ Sugihara points out that there is little reason to treat cases where a marriage is effectively but not legally over any differently. The 2000 Decision is significant in that it confirms the existing family court practice of awarding visitation when appropriate, both before and after divorce.³⁰⁵ At the same time, Sugihara notes that when the parents are still married, visitation presents particularly acute problems.

³⁰⁰ UCHIDA, *supra* note 99, at 136.

³⁰¹ KAJIMURA, *supra* note 52, at 171; NAKAMURA, *supra* note 60, at 197.

³⁰² KAJIMURA, *supra* note 52, at 171.

³⁰³ Sugihara Memorandum, *supra* note 281. To the extent it sets forth the SCJ's view on visitation in a document written by a judicial administrator, the Sugihara Memorandum serves as an excellent example of the SCJ bureaucracy setting national policy on Japanese family life.

³⁰⁴ The case that gave rise to the 2000 Decision involved visitation before a divorce had taken effect.

³⁰⁵ Sugihara Memorandum, *supra* note 281.

[T]o the extent a divorce has not occurred, the parent who is not living with the child has joint parental authority, and the other parent with parental authority could not originally prohibit the parent from having visitation in the absence of circumstances such as it being damaging to the welfare of the child and clearly an abuse of parental authority, etc. However, in the case of a doomed marriage where a state of separation continues with one parent properly caring for the child, because the other parent may plan to abduct the child, or demand unrestricted visitation, from the standpoint of the welfare of the child, there is a significant need to provide appropriately for the scope and method, etc. of visitation.³⁰⁶

In other words, apparently, the dangers associated with visitation are greater prior to divorce because under the largely fictional retention of parental authority, the non-cohabitating parent may use visitation as an opportunity to abduct the child. While real, this danger exists precisely because of the Japanese legal system's inability to enforce the return of a child abducted by a parent (whether during visitation or otherwise).

While the 2000 Decision clarified the procedural status of visitation, particularly in cases of separation before or without divorce, it also confirmed that visitation is not a substantive right that could be asserted by parents, either for their own sake or for the sake of their children. The Sugihara Memorandum acknowledges as much by stating that "to follow the view that

³⁰⁶

Id.

visitation is a natural or inherent right of the parent would leave room for constitutional problems to arise if no visitation is permitted.”³⁰⁷ Put more simply, Sugihara rejects characterizing visitation as a right because doing so would trigger constitutional due process requirements before visitation can be terminated. Again, this rationale has a certain logic, but only from the standpoint of judicial convenience, not from the standpoint of the welfare of a child.

The Sugihara Memorandum goes on to state that the most important thing about visitation should be the welfare of the child, rather than the wishes of the parent.³⁰⁸ This conclusion preserves the judiciary’s authority and its ability to perpetuate “family values” of which it remains the sole arbitrator. As noted above, there are few mechanisms, either by statutory mandate, or the parties’ ability to procure outside evaluations, to separate the interests of the court from the welfare of the child. Thus, the 2000 Decision and Sugihara’s explanation of it have a particular logic. Visitation is not a right of the child or of the parent; it is a right of the judiciary, a prerogative of judges to confer a privilege on worthy and cooperative parents, parents who will agree to visitation without giving rise to the potentially embarrassing issue of enforcement. This is an issue with significant implications for the prestige of the judiciary and the way it is perceived by society.

VI. ENFORCEMENT

The notion that visitation is a prerogative of judges rather than a right of parents or children makes sense once the limited enforcement powers of Japanese family courts are taken into account. The difficulty of enforcing civil judgments is the elephant in the room of much that is written about Japanese civil law. Drawing attention to the practicalities of enforcement can

³⁰⁷ *Id.*

³⁰⁸ *Id.*

significantly distract from whatever interesting theoretical areas are under discussion.

The issue of enforceability lurks at the highest levels of Japanese jurisprudence and may be one reason why the SCJ is reluctant to clearly hold that severing a parent-child relationship is unconstitutional. Professor John Haley has noted the general lack of mechanisms by which Japanese courts can enforce their orders in civil cases: the courts have no equitable or enforcement powers.³⁰⁹ Courts have civil “enforcement officers” (*shikkōkan*), but they are in no way comparable to U.S. armed marshals. Furthermore, Japanese police do not get involved in civil disputes in general, and family disputes in particular.³¹⁰ In Yamaguchi and Soejima’s exposé-style book on trials in Japan, their enforcement of civil judgments chapter is entitled “Finally You Got a Judgment, but the Only Thing it is Good for is Paper to Wipe Your Bottom.”³¹¹ They also identify reforming the enforcement system as one of the most pressing issues in the Japanese legal system today.³¹² Concern over the effectiveness of the civil execution (i.e., enforcement) system has also been raised by the Justice System Reform Council (JSRC), a working group of thirteen prominent lawyers, academics, and business

³⁰⁹ HALEY, *supra* note 6, at 118.

³¹⁰ According to some accounts, the Japanese police will get involved when violence or foreigners are involved. Wilkinson & Pau, *supra* note 1.

In cases that involve violence, the Japanese police can be both quick and brutal. In cases where there is no violence, but the child is a Japanese national or dual national, the police will act quickly and violently against the non-Japanese abducting party as long as they have sufficient warning. Since there is no specific law in Japan making this a crime, they will use other means, by finding some irregularity with a passport or visa.

³¹¹ YAMAGUCHI & SOEJIMA, *supra* note 29, at 45-74.

³¹² *Id.* at 253.

executives established by the Cabinet to propose sweeping legal reforms.³¹³

This situation is even more pronounced for family courts, whose orders are widely recognized as unenforceable.³¹⁴ One family court insider notes that “family courts have no enforcement powers to realize the best interests of children.”³¹⁵ Another, a family court mediator, writes that there are effectively no legal remedies available in cases where the custodial parent stubbornly refuses visitation.³¹⁶ Foreign commentators have expressed similar views regarding enforcement of visitation rights in Japan.³¹⁷ While non-custodial parents alleging interference with visitation are occasionally successful in tort litigation, the legal victories do not necessarily result in visitation, and are often

³¹³ See Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?* 2 ASIAN-PAC. L. & POL’Y. J. 89, 107 (2001); JUSTICE SYSTEM REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL (June 12, 2001), available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>.

³¹⁴ See, e.g., EIKO ISHIDA ET AL., *KEKKON, RIKON, OYAKO NO HÖRITSU SÖDAN* [LEGAL ADVICE ON MARRIAGE, DIVORCE AND PARENT-CHILD MATTERS] 27 (Nobuo Takaoka ed., 2004) (stating that because payment of child support is voluntary, one should not expect a family court “compliance advisory” issued to a delinquent parent to be effective); Struck & Sakamaki, *supra* note 2.

³¹⁵ Ken’ichi Hayashi, *Ko no Ubaiai wo Meguru Funsō Jiken ni Okeru Katei Saibansho Chōsakan no Yakuwari* [The Role of Family Court Investigators in Disputes Involving the Abduction and Counter-Abduction of Children], 1100 HANREI TAIMUZU 185 (Nov. 10, 2002).

³¹⁶ Fujiko Endo, *Mensetsu Kōshō no Jiki, Hōhō, Rikō Kakuho* [Visitation: Scheduling, Methods and Ensuring Compliance], 1100 HANREI TAIMUZU 191 (Nov. 10, 2002). This perhaps explains her remarkable conclusion that visitation is not a legal problem at all, but a “personal relationship” problem. *Id.* As noted above, family courts seem comfortable regarding visitation as a legal right for purposes of terminating it.

³¹⁷ See, e.g., Wilkinson & Pau, *supra* note 1 (“All matters of custody and parental rights are handled in powerless ‘family courts’ which can only use persuasion to achieve results.”); U.S. Dept. of State, International Parental Child Abduction: Japan, http://travel.state.gov/family/abduction/country/country_501.html (last visited Mar. 3, 2007) (stating that “compliance with [Japanese] Family Court rulings is essentially voluntary, which renders any ruling unenforceable unless both parents agree.”).

meaningless if the custodial parent is judgment-proof.³¹⁸ Enforcement of visitation is in any case a matter of minor interest, and some commentators regard it as completely unenforceable.³¹⁹ The enforcement of orders to hand over parentally abducted children receives more attention, but enforceability issues remain.³²⁰

If a party fails to comply with a family court mandated obligation, the family court may issue a non-binding “compliance advisory” (*rikō kankoku*) or a “compliance order” (*rikō meirei*) if the advisory is ineffective.³²¹ In 2003, family courts received a total of 16,106 requests for compliance advisories.³²² The vast majority of these advisories involved monetary or “other” obligations.³²³ Only 883 were requested in connection with “personal relationship” (*ningen kankei*) matters.³²⁴ Of these, less

³¹⁸ See, e.g., ISHIDA, *supra* note 314, at 90. Based on my discussions with Japanese parents, it appears that other than receiving a money judgment, the only benefit of obtaining a judgment against a custodial parent for interference with visitation, is that it can induce a promise to allow visitation in exchange for dropping the suit. Once the suit is dropped, however, the custodial parent can, and sometimes does, resume the denial of visitation, requiring the non-custodial parent to bring an entirely new action.

³¹⁹ CHILD ABDUCTION, *supra* note 108, at 34; Endo, *supra* note 316, at 191; ISHIDA, *supra* note 314, at 90. These commentators suggest that one remedy for interference with visitation would be for the courts to order a change in custody, but none cite recent cases where this has been implemented.

³²⁰ A total of 554 matters involving the hand-over of a child were brought in family courts in Japan in 2003. FAMILY CASE STATISTICS, *supra* note 33, at 10-11. Unfortunately, these statistics do not indicate the gender of the parent seeking relief, though it seems likely that the majority are women seeking the return of a child abducted by an estranged husband.

³²¹ LADR, arts. 15-5, 15-6. On the practicalities and limitations of compliance advisories in abduction cases, see Ken'ichi Hayashi, *Rikkō Kankoku no Jitsujō to Mondaiten* [The Realities and Problems of Compliance Advisories], 18 KAZOKU (SHAKAI TO HŌ) 55-60 (2002). Hayashi notes that in abduction cases compliance advisories rarely result in the return of a child. *Id.* at 56.

³²² FAMILY CASE STATISTICS, *supra* note 33, at 67.

³²³ *Id.*

³²⁴ *Id.*

than half resulted in full or even partial compliance.³²⁵

Despite the poor track record of compliance advisories, in the same period, the entire family court system received only eighty-four requests for compliance orders.³²⁶ Although this low number might imply that compliance orders are rarely needed, the fact that in response to these eighty-four requests, compliance orders were only issued twenty-nine times suggests that judges rarely feel inclined to issue them.³²⁷ One reason for this judicial disinclination may be that compliance orders are just as difficult to enforce as compliance advisories. Under the LADR, a court may impose a fine of up to ¥100,000 (less than U.S. \$1,000 at current exchange rates) on a party who fails to obey a compliance order or otherwise disobeys “measures ordered by the Mediation Committee or the Family Court . . . *without justifiable cause*” (emphasis added).³²⁸ One explanation for the paucity of compliance orders, as well as the small number of divorce decrees, is that courts are reluctant to provide remedies that will be proved paper tigers. Almost any parent would rather pay the ¥100,000 fine than obey an order to transfer possession of his or her child. The same is doubtless true of parents seeking to deny visitation. The “without justifiable cause” exception also gives non-complying parties a way to avoid incurring this minimal penalty and frees family courts from the obligation to issue them.

Indirect enforcement (*kansetsu kyōsei*) is another means of enforcement provided under Article 414 of the Civil Code and Article 172 of the Civil Enforcement Law.³²⁹ Together, these

³²⁵ *Id.*

³²⁶ *Id.* at 69.

³²⁷ *Id.*

³²⁸ LADR, art. 28. Although there is at least one court case citing failure to allow visitation as a factor in determining whether the custodial parent’s custodial rights should be altered or terminated, nothing in the literature suggests that this is a practical and frequently used option. CHILD ABDUCTION, *supra* note 108, at 34.

³²⁹ CIVIL CODE, art. 414; Minji shikkōhō [Civil Enforcement Law], Law No. 4 of 1979, art. 172. See also Naoko Nakayama, *Kodomo no Ubaiai Jiken no Toriatsukai* [Dealing with Cases of Parental Abduction and

provisions give courts discretion to levy fines on an ongoing basis against non-complying parties. This remedy, however, merely imposes a financial obligation, which may be unenforceable if the non-complying party has no identified and attachable assets or wages subject to garnishment, as may often be the case with custodial stay-at-home mothers.³³⁰ Furthermore, because the welfare of the child is one of the goals of the family court, some courts may be reluctant to order remedies that impoverish the child's household. In any case, as noted in one guide on child-abduction, this method of enforcement is unlikely to result in the hand-over of the child and thus "cannot be expected to have any real effect."³³¹ As with penal fines, in most cases, enforcement mechanisms that involve the choice between paying a fine and having contact with one's children can be expected to have limited impact.

Direct enforcement is also limited. Even if a child is abducted in violation of a custody order, the police are unlikely to intervene. There also does not appear to be a formal mechanism whereby courts can order police involvement.³³² There is some

Counter-Abduction], in *MEDIATION MANUAL*, *supra* note 81, at 226-227 (stating that there are difficulties associated with the methods of enforcing an order to return a child).

³³⁰ See, e.g., 3 Hours, *supra* note 94. Lui writes that:

the court rendered a judgment, penalizing my ex-wife 30,000 yen a day for not returning my son to me. Yet, this penalty was difficult to enforce, as my ex-wife did not work and therefore had no wages to be garnished. Moreover, her bank account information was unknown. According to my lawyers, all she needed to do was to file for bankruptcy to escape from paying at all.

Id. Yamaguchi and Soejima also note the limited ability of victorious plaintiffs to obtain financial information about defendants for enforcement purposes. YAMAGUCHI & SOEJIMA, *supra* note 30, at 253.

³³¹ CHILD ABDUCTION, *supra* note 108, at 9.

³³² As noted by one Japanese writer on the subject of visitation, "Suppose that the separately-residing parent does not have custody [shinken]. Even if he kidnaps his children, the police will only say 'It's the children's

academic debate over whether a child can be treated as analogous to a piece of movable property for purposes of applying Article 169 of the Civil Enforcement Law, which deals with the specific enforcement of the transfer of such property.³³³ While in theory it is possible for a court enforcement officer to overcome the resistance of a parent and take possession of a child, in practice, courts have been reluctant to endorse such remedies.³³⁴ As noted by one family court insider, in cases where the parent refuses to physically hand over a small child, enforcement is impossible.³³⁵ Furthermore, if the child refuses to cooperate, enforcement may again be regarded as impractical.³³⁶ One woman I interviewed went to her child's kindergarten, accompanied by a court enforcement officer, to take custody of her abducted child over whom she had full legal custody. This effort was defeated by the

father – it's not like he is going to kill them or anything, so there is not much for us to do.” Hiromi Ikeuchi, *Nihon ni Okeru Rikon Go no Mensetsu ga Konnan na Jidaiteki Haikei* [*The Historic Background for the Difficulty of Post-Divorce Visitation*], in SHINKAWA, *supra* note 172, at 96-97. Cf. CAL. FAM. CODE § 3048(b)(2)(K) (Deering 2006), which empowers a court to involve law enforcement authorities if necessary.

³³³ See, e.g., CHILD ABDUCTION, *supra* note 108, at 9. This debate also comes up in the context of interlocutory preservative orders (*shimpan mae no hozen shobun*), which are also sometimes issued in abduction cases prior to the family court issuing a formal decree. While direct enforcement of such orders is theoretically possible, such enforcement is limited by the “best interests of the child” standard, and it seems unlikely that theory is often converted into practice. On the enforcement of preservative orders, see, e.g., Naoko Nakayama, *Kodomo no Ubaiai to Katei Saibansho no Shihōteki Kinō* [Parental Abduction and the Judicial Function of Family Courts], 18 KAZOKU (SHAKAI TO HŌ) 43, 50-52 (2002).

³³⁴ CHILD ABDUCTION, *supra* note 108, at 9. Another factor that may limit direct enforcement is that, although enforcement officers are court employees, they derive their compensation from fees paid by the parties seeking enforcement and may have limited incentive to assist in cases not involving money or property. See Supreme Court of Japan, Shikkōkan [Court Enforcement Officers], <http://courtdomino2.courts.go.jp> (last visited Mar. 4, 2007); Shikkōkanhō [Enforcement Officer Law], arts. 7-12.

³³⁵ Wataru Yamazaki, *Kodomo no Hikiwatashi no Kyōsei Shikkō* [*Enforcing the Hand-over of Children*], 1110 HANREI TAIMUZU 189 (Nov. 10, 2002).

³³⁶ *Id.* This is another instance where the Japanese system both seemingly encourages and rewards parental alienation.

teacher simply refusing to hand the child over.³³⁷

There seems to be a general awareness within the legal community of the inability of the legal system to prevent or remedy parental abduction and counter-abduction, as illustrated by the following statement in a manual written by lawyers specializing in child abduction cases:

Even if the return [of the child] is successful, it is difficult to imagine that the dispute will end there. Unless the obligor [i.e., abducting parent subject to the return order] develops the psychological foundation for accepting the legal decision, the danger that the same sort of dispute will continue forever cannot be ruled out. Accordingly, it is desirable to avoid such enforcement methods.³³⁸

This language confirms that compliance with family court orders is optional, and that a stubborn parent who never becomes “psychologically prepared to accept the legal decision” will often win.³³⁹

The greatest hurdle to enforcement, however, may be the discretion granted to family courts in exercising what limited

³³⁷ Yamaguchi states that fathers will not be arrested for abducting their own children and resisting efforts to enforce their return. YAMAGUCHI, *supra* note 39, at 121. It is worth noting that a recently-published 600 page practice manual for court enforcement officers does not deal with enforcement of child custody or visitation. SHIKKŌKAN JITSUMU NO TEBIKI [PRACTICAL MANUAL FOR ENFORCEMENT OFFICERS] (Shikkōkan jitsumu kenkyūkai ed., 2005).

³³⁸ CHILD ABDUCTION, *supra* note 108, at 9.

³³⁹ In such cases, there is a possibility that those who ignore the law actually end up being given preferential treatment. Ryōko Yamaguchi, *Yōji Hikiwatashi Seikyū no Seishitsu [The Essence of Requests to Hand-over Young Children]*, 162 BESSATSU JURISUTO 75 (May 2002).

powers they do have. I talked to one woman whose efforts to enforce visitation with her children ended when her husband hung up on the family court investigator who had telephoned to convince him to obey a compliance order. The investigator told her, “There is nothing more I can do.”³⁴⁰ The family court is apparently free to give up on cases such as these. And the more difficult the case, the more incentive there may be for the family court to do so, both in terms of institutional resources and prestige, as well as the individual interest of docket-clearing. In such cases, some courts reportedly convince applicants to withdraw motions, or will simply reject them.³⁴¹

One other enforcement remedy sometimes available is Japan’s habeas corpus statute (*jinshin hogohō*).³⁴² If a child is unlawfully detained, the court may issue a writ of habeas corpus (*jinshin hogo meirei*), which requires the person detaining the child to bring him or her to court and explain the reasons for detention.³⁴³ Habeas corpus proceedings are the only proceedings involving child custody where the child may be separately represented by government-appointed counsel.³⁴⁴ Hearings are usually conducted within two weeks and, because they are brought in district or high courts, represent the only way for parents to avoid the time-consuming, mediation-focused family court system.³⁴⁵ Theoretically, parties are penalized for failing to comply with an order.³⁴⁶ Nevertheless, some commentators generally regard habeas corpus judgments as

³⁴⁰ Interview with anonymous source.

³⁴¹ Yamazaki, *supra* note 335, at 187.

³⁴² *Jinshin hogohō* [Habeas Corpus Law], Law No. 199 of 1948. That a statute originally intended to protect citizens from the unlawful use of state power has become a tool in child custody disputes illustrates the paucity of available remedies.

³⁴³ Habeas Corpus Law, art. 11.

³⁴⁴ Habeas Corpus Law, art. 14.

³⁴⁵ Habeas Corpus Law, arts. 4, 6.

³⁴⁶ Habeas Corpus Law, art. 26.

unenforceable.³⁴⁷

Whether or not habeas corpus judgments are enforceable, the SCJ has severely limited access to the only remedy that provides prompt access to an alternate forum, independent representation of the child through appointed counsel, and the remote possibility of criminal sanctions, including imprisonment, for non-compliance. In a 1993 decision, the SCJ held that, where the disputants were the child's parents, habeas corpus orders should only be available where the exercise of custody by one of the parents was a "gross violation" (*kencho na ihōsei ga aru*).³⁴⁸

³⁴⁷ CHILD ABDUCTION, *supra* note 108, at 50. A 2002 case illustrates the judiciary's awareness of these limitations. The case was a suit for damages by a father who had abducted his children to Texas after losing custody and being ordered to stop seeing them, contacting them, and even to stop seeking visitation. His ex-wife received a habeas corpus order and the father brought the children back to Japan for proceedings at the Himeji branch of the Kobe District Court. The children were entrusted to court personnel while the hearing took place. At the end of the proceedings, court personnel blocked the courtroom doors, physically preventing the man and his father from leaving. The children were then handed over to the mother, and later that day the court issued an opinion ordering the transfer of physical custody even though it had already taken place. The man thus sued the presiding justice of the Himeji branch on the grounds that the court's actions were *ultra vires*. Although he lost, it is still interesting to note that the court used the hearing to accomplish the transfer of physical custody before actually ordering it. GYŌSEI REISHŪ (Kōbe Dist. Ct., Apr. 15, 2002).

Judge Hiroshi Segi argues that habeas corpus orders issued by family courts need to be fully enforced, but also notes the limited enforceability of this remedy under some theories. For example, under some theories, whether such orders are directly enforceable depends upon the child's age and mental capacity. And, if direct enforcement is not possible, indirect enforcement (monetary sanctions) is the only remaining option. Hiroshi Segi, *Kasai no Saiban no Shikkō to Jinshin Hogo Seikyū* [*Habeas Corpus and the Enforcement of Family Court Judgments*], KAZOKU (SHAKAI TO HŌ) 61-91 (2002). Noting that monetary sanctions are unlikely to be effective on parties with limited financial resources, he confirms that "as a legal system, in terms of the ability to ensure enforcement, current habeas corpus proceedings are, to be honest, seriously deficient." *Id.* at 67, 76. Segi is also somewhat critical of the court's role in cases like the Kobe habeas corpus case cited above, since the party bringing the child to the court feels ambushed and that the proceedings were not even a trial. *Id.* at 73. He also notes that another issue in enforcing habeas corpus cases can be the difficulty of getting prosecutors interested. *Id.* at 72.

³⁴⁸ 47 MINSHŪ 5099 (Sup. Ct., Nov. 19, 1993), *available at* <http://courtdomino2.courts.go.jp/promjudg.nsf/766e4f1d46701bec49256b8700435d2e/a3f856ed9deed3ee492570ff00377a15?OpenDocument>; CHILD

Thus, the SCJ has limited the remedies available to parents most likely to need them.³⁴⁹

Because enforcement is so difficult, a parent who refuses to accept the authority of a court with respect to child custody or visitation by the other parent may be subject to only minimal sanctions. Given the ability of a custodial parent to deny the non-custodial parent all contact with their child, it is unsurprising that some parents, usually fathers, choose to abduct their children; there may appear to be few legal risks in doing so, and it may be the only way to retain a relationship with their children. One lawyer even explains how this works. In his book on divorce, Hiroshi Yamaguchi has a section entitled “How Fathers Can Obtain Full Custody through Self-help Remedies.”³⁵⁰ According to Yamaguchi, if a father abducts his children while the divorce is still proceeding, the court will order the child returned, but this order can be safely ignored, as can other orders from the family, district, or high courts.³⁵¹ At some point, the court will recognize the new status quo and award custody to the father.³⁵²

ABDUCTION, *supra* note 108, at 48-49; Yamazaki, *supra* note 335, at 186.

³⁴⁹ The restrictions on habeas corpus judgments helps explain the case of Stephen Lui, who was denied his request for habeas corpus even though the SCJ confirmed his California custody order only a month earlier. 3 Hours, *supra* note 94. One possible explanation for this paradox is that, because the U.S. embassy had become involved, the SCJ was paying lip-service to international comity by recognizing the judgment of a U.S. court, but did not see anything wrong with the child being raised by his Japanese mother in violation of that order.

³⁵⁰ YAMAGUCHI, *supra* note 39, at 120-123. In closing, Yamaguchi makes clear that he could not continue to represent a client contemplating such a course of action, and that it should only be considered if the other parent is abusing the child or in other such circumstances that the court has failed to notice exist. *Id.* There is also evidence that police may be taking a more active role in combating this type of behavior using current law. *See infra* note 359. The fact that I have cited this section of Yamaguchi’s book should in no way be taken as an endorsement of parental abduction of any sort.

³⁵¹ *See id.*

³⁵² *Id.* A Japanese lawyer from whom I sought a second opinion suggested that I consider grabbing my son on his way home from school.

With little or no enforcement mechanisms, the family court fails to protect children and their parents, usually at the time parents' expectations of court assistance are greatest. The most tragic example I encountered of such failure is that of a Japanese mother I interviewed in 2005.³⁵³ She and her husband obtained a consensual divorce when their child was about 1 year old. The divorce filing named her as the child's legal and physical custodian, but her ex-husband refused to hand the child over. Despite mediation and decrees by family and appellate courts that confirmed her status as sole custodian, enforcement failed. Nor did his threatening her in front of the entire mediation panel make any difference. Desperate to see her child, she agreed to her husband's offer to allow visitation in exchange for her giving up custody and paying child support. An agreement was drawn up and the necessary procedures were commenced at the family court to transfer custody. After completion of these proceedings, she was able to see her child briefly a few times until her husband again refused to allow visitation and demanded increased child support. When I met with her, her hope was that she could at least have her child remember her face. It is doubtful that the courts will be able to turn even this small wish into reality.

A. *A Note on International Cases*

This being an article primarily for U.S. practitioners, it would be remiss not to mention the status of U.S. family court judgments in Japan. While there are principles and applicable law on the recognition of foreign judgments by Japanese courts,³⁵⁴

³⁵³ *Kodomo ni Aenai Okāsan* [A Mother Who Can't See Her Children], in SHINKAWA, *supra* note 172, at 82; Interview with anonymous source.

³⁵⁴ See, e.g., Takao Sawaki, *Recognition and Enforcement of Foreign Judgments in Japan*, 23 INT'L LAW 29 (1989). As a matter of black letter civil procedural law, the final judgment of foreign courts will be given effect if all of the following conditions are satisfied: (1) the foreign court has jurisdiction under a statute or treaty; (2) the losing defendant was given necessary notice or served with process or answered notwithstanding the absence thereof; (3) the contents of the judgment and the procedures by which it was arrived at do not conflict with Japanese public order or good morals; and (4) there is comity. *Minji soshō hō* [Code of Civil Procedure], Law No. 109 of

recognition of a foreign judgment is largely irrelevant to the issue of enforcement. Japanese courts may choose to recognize a foreign custody order, as they did in the case of Samuel Lui, or ignore it, as in the case of Murray Wood, whose children were abducted from Canada by their non-custodial Japanese mother during visitation in Japan.³⁵⁵ But whether or not the foreign judgment is recognized, virtually no Japanese court has ever ordered a child returned to the United States.³⁵⁶ In fact, one of the absurdities of the current situation is that a Japanese court order may be more enforceable abroad than at home because a parent who brings a child to the U.S. in violation of a Japanese court order could face criminal sanctions under American law.

Virtually any Japanese lawyer or legal scholar will probably explain that the cases involving children abducted to Japan are difficult in part because they must be dealt with through the family court system. The police generally do not get involved, and it is best to leave such matters up to the specialists in the family courts: this was, after all, one of the rationales behind the SCJ limiting access to habeas corpus in parental abduction cases.³⁵⁷

Nevertheless, this de facto immunity does not seem to apply to a foreign parent trying to leave Japan with a child. Recently, a Dutch father was arrested for trying to leave the country with his child who had been living with his estranged wife.³⁵⁸ He was prosecuted for violating a pre-war section of the

1996, art. 118.

³⁵⁵ Daphne Bramham, *Torn Between Their Parents: Murray Wood Believed the Best Care for His Two Children Would Be to Share Their Custody with His Ex-wife. He Hasn't Seen Them Since November*, VANCOUVER SUN, Mar. 15, 2005, at B2. In Murray Wood's case, both the Saitama Family Court and the Tokyo High Court recognized that the Japanese mother had abducted their two children from Canada in violation of a Canadian custody order, and that doing so was criminal under Canadian law. Nonetheless, the court justified making a new custody award in her favor on the grounds that the welfare of the children outweighed these factors. *Id.*

³⁵⁶ Perez, *supra* note 2.

³⁵⁷ 47 MINSHŪ 5099 (Sup. Ct., Nov. 19, 1993).

Penal Code originally enacted to prevent the trafficking of minors to China for prostitution.³⁵⁹ The SCJ confirmed his conviction in 2003.³⁶⁰ The child's parents were still married and, therefore, the father still had full custody. The hand-over of the child was apparently accomplished summarily, without the procedural niceties debated by legal practitioners and academics. It would be easy to attribute this result to racial discrimination – in child abduction cases, perhaps Japan has one set of rules for foreigners and another for Japanese people. More likely, however, it was simply a case where another bureaucracy – the immigration service – decided to get involved and, unlike the judiciary, had the ability to enforce the hand-over of the child independent of the considerations described by the judiciary as being critical in custody determinations.

VII. SYNTHESIS

As far as child custody and visitation is concerned, there is no substantive law in Japan. There is procedure but no substance. Decisions about a child's welfare are administrative dispositions based on the internally generated rules, procedures, and values of a judicial bureaucracy. Even where there are clear laws, such as the provisions requiring fundamental gender equality in the Constitution and the LADR, or the rights espoused in the Convention, they may not be applied if they conflict with the goal of preserving judicial authority, or the judiciary's own family values.³⁶¹ Custody and visitation rights can be bypassed at the

³⁵⁸ 57 KEISHŪ 187 (Sup. Ct., Mar. 18, 2003).

³⁵⁹ The crime in question was abduction or enticement for purposes of removing from Japan (*kokugai isō mokuteki ryakushu oyobi yūkai*). KEIHŌ [PENAL CODE], art. 226. This provision of the Penal Code was amended in 2005 so that it covers kidnapping and abduction from any country, not just Japan. For a detailed discussion of this case and its implications for parental abduction, see Colin P.A. Jones, *No More Excuses: How Recent Amendments to Japan's Criminal Code Should (but Probably Won't) Stop Parental Child Abduction*, 6 WHITTIER J. OF CHILD & FAM. ADVOC. 289 (2007).

³⁶⁰ 57 KEISHŪ 187 (Sup. Ct., Mar. 18, 2003).

³⁶¹ My belief that Japanese courts will go so far as to bypass substantive law when necessary to preserve their institutional authority is based

discretion of judges and other family court personnel to further the judiciary's bureaucratic imperatives, unrelated to the best interests of children.³⁶²

Some may attribute Japanese custody law to culture, to some "traditional" notion that one parent should disappear after divorce, or that Japanese people regard children as property.³⁶³

in part on my own case, which was supposedly adjudicated based on California law. Under Japanese choice of law rules, if none of the parties involved in a family dispute are Japanese nationals the dispute should be settled by the law of the common jurisdiction of the disputants (this rule is difficult to apply, however, if the disputants share the same nationality but are from a different jurisdiction within a federal system such as the United States or Canada). Hōrei [Act on the Application of Laws], Law No. 10 of 1898, art. 31, *translated in* 3 *ASIAN-PAC. L. & POL'Y. J.* 230, 241-42 (2002) (current version Hō no tekiyō ni kansuru tsūsokuhō [Act on the General Rules of Application of Laws], Law No. 10 of 1898 (amended 2006), *translated in* 8 *ASIAN-PAC. L. & POL'Y. J.* 138 (2006)). Thus, unlike disputes between Japanese couples, there were clear statutory statements that it is a fundamental precept of California law that children have frequent and continuing contact with both parents, as well as binding California precedents that the court must grant visitation in most cases and find visitation to be implied where a clear grant has not been made. CAL. FAM. CODE § 3020 (Deering 2006). While I certainly did not expect Japanese courts to adopt the procedural provisions of California law, both the Tokyo Family Court and an appellate panel of Tokyo's High Court ignored some fairly clear substantive provisions of the California family code as well as California precedents brought to their attention. It is difficult to imagine that they failed to understand the black letter law; they may simply have found its content inconvenient. Similarly, while it is speculation on my part, the Tokyo High Court's erroneous finding of fact that my son was a habitual resident of California makes sense within the context of my model, as it bolstered an otherwise tenuous basis for the lower court choosing to apply California law in the first place. Deeming my son to be a resident of California as a factual matter would make the courts' choice of law decision less likely to be later criticized or questioned by commentators or other judges. By this point in the discussion, that courts might be tempted to engage in result-oriented fact-finding to further their own interests is hopefully obvious. Furthermore, I am not aware of any external checks and balances that exist to prevent courts from doing so, particularly within the secretive context of child custody cases.

³⁶² The case of another father that I talked to, if true, further illustrates the primacy of the interests of the court over those of the child. This man was accused of domestic abuse, which he denied. The judge reportedly threatened to deny awarding any visitation to the father if he refused to accept a judgment that included a finding-of-fact that he had engaged in domestic violence.

³⁶³ See, e.g., Struck & Sakamaki, *supra* note 2 (quoting a Japanese mother as saying "In Japan, children are treated like things. Japan watches silently as parents and children are torn apart."). Former Prime Minister Junichiro Koizumi is often held out as a model of the "one parent disappears" tradition of divorce. After his divorce, he took custody of two of

While there may be some truth to cultural explanations, I leave them for others to develop. I prefer to think that Japanese people are like Americans, Europeans, and everyone else; they love their children and would like to be a part of their lives as much as possible. My view here is shaped by the many dedicated Japanese parents I have met who seek to change the current system and preserve their parent-child relationships, regardless of marital status. “One parent disappears after divorce” may indeed be the norm in Japan, but it is a cultural response to the failure of the legal system, rather than an explanation for why it functions the way it does.³⁶⁴

In fact, a great deal of how family courts function in Japan can probably be understood from the perspective of the dilemma of Chief Justice Marshall in *Marbury v. Madison*: how does a judge preserve the authority of a weak court when he knows that the order he wants to give can be ignored without consequence?³⁶⁵ In *Marbury*, Marshall was called upon to issue a writ of mandamus for the delivery of a commission that he had issued as secretary of state in the preceding presidential administration. He resolved the issue by finding the jurisdictional statute

the three children from his failed marriage. His children have reportedly not seen their mother since the divorce, and he has had no contact with a son born after the divorce. *Id.*

Those seeking cultural explanations for the Japanese system should be aware that these theories cut both ways and, seen through from the other side of the mirror, can appear absurd or offensive. For example, one widely-published expert on divorce and family problems gives a cultural explanation for why visitation in Japan differs from other countries: “[R]ooted in a gun culture different from Japan, in American/European societies with their long history of incest, incidents where children are kidnapped, raped or murdered by the non-residential parent happen frequently [leading to police involvement].” Hiromi Ikeuchi, *Nihon ni Okeru Rikongo no Mensetsu ga Konnan na Jidaiteki Haikei* [*The Historic Background for the Difficulty of Post-Divorce Visitation*], in SHINKAWA, *supra* note 172, at 96-97.

³⁶⁴ To paraphrase one Japanese father’s rights activist I talked with, “fathers are supposed to disappear in Japan, but then the legal system provides them with few other options. This has been the case for so long that people have come to think of it as a cultural norm.”

³⁶⁵ *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803).

unconstitutional, thereby establishing the Court's power of judicial review, while at the same time handing an ostensible victory to a hostile Jefferson presidency. While federal courts now wield a great deal of power within the U.S. political system, Japanese family courts continue to deal with this dilemma on a daily basis and may resolve it by, for example, finding the denial of visitation and the maintenance of the custodial status quo to be in the best interests of the child.³⁶⁶

³⁶⁶ Yamaguchi and Soejima point out that judges are perfectly aware of the problems with enforcement and it is a key reason why they are constantly encouraging parties to settle.

This situation is truly absurd. Saying that "because enforcement is inadequate, it would be better to settle" is nothing more than an acknowledgment of the defects in the court system, which is itself attempting to use that defect to convince citizens who have come to rely on the court system.

YAMAGUCHI & SOEJIMA, *supra* note 30, at 31.

This dynamic is not limited to family courts, and can be seen in the way other Japanese courts resolve cases, particularly those involving state actions. On September 30, 2005, the Osaka High Court issued a judgment that Prime Minister Koizumi's controversial visits to the Yasukuni Shrine, a shrine for Japan's war dead that includes several alleged Class A war criminals, were a violation of the constitutional separation of religion and state. Notwithstanding the ruling, he visited the shrine again two weeks later, and although he took some different steps in the formalities, he ignored the essence of the ruling. This did not, however, cause a constitutional crisis, because the Osaka court's ruling had been carefully crafted to make future visits possible. Although the holding of unconstitutionality received widespread media attention, because the court rejected the plaintiffs' claims on the grounds they had not suffered any actual damages due to the visits, Koizumi technically won. The finding of unconstitutionality was contained in dicta, which Koizumi was able to overcome by slightly changing the way he conducted future visits. This decision had the benefit of being unappealable — Koizumi was the victor and lacked standing to appeal, and the plaintiffs had sought only nominal damages and were thus presumably satisfied with the holding of unconstitutionality. *Koizumi Visits Yasukuni*, DAILY YOMIURI, Oct. 18, 2005, at 1.

An Osaka case where a judge ordered a father to maintain contact by "letters and pictures" in lieu of visitation is an example of family courts using this technique to preserve their authority. 47 KASAI GEPPŌ 45 (Osaka F. Ct., Dec. 22, 1993); Ninomiya, *supra* note 245 (characterized as "ordering"). The only legally operative part of the judgment was the *shubun* (the section setting forth the court's disposition) denying the father's visitation. The "order" for

In many cases, family courts are unable to change the status quo due to their limited enforcement powers. They thus have two options: (a) issue orders that are ignored, exposing their powerlessness and encouraging self-help remedies; or (b) use the legal process to ratify the status quo. The latter option both preserves the court's authority and lightens its dockets.

The person initiating the divorce, therefore, has a huge advantage in his or her ability to create a status quo regarding child custody arrangements. Thus, much of what may appear to be gender or racial discrimination may be nothing more than a reflection of this dynamic. The majority of divorces are initiated by women, and they are more likely to create the new status quo.³⁶⁷ The same is true of cases involving a foreign parent; the Japanese parent is likely to have the advantage in creating the status quo, as the Japanese parent is more likely to file for divorce in Japan, their native country.

On the other hand, family courts have limited powers to protect newly established status quos. Thus, a parent who has created a status quo with his or her children can only ensure continued custody by denying access to the other parent.

letters and pictures was merely dicta, which could be ignored without consequence.

Former Judge Kaoru Inoue has written a fascinating book on the apparently widespread practice of Japanese judges structuring opinions in this fashion. KAORU INOUE, *SHIHŌ NO SHABERISUGI [BLABBERMOUTH JUDICIARY]* (2005). An English language review of this book is available at Colin P.A. Jones, *Book Review: Kaoru Inoue's Shihō no Shaberisugi (Blabbermouth Judiciary): Moral Relief, Legal Reasoning and Judicial Activism in Japan*, 19 *EMORY INT'L. L. J.* 1563 (2006). Possibly because of the book's unpopularity amongst his colleagues, Inoue was threatened with non-reappointment for writing opinions that are too short and ultimately resigned. *Short Decisions*, *supra* note 28.

³⁶⁷ That said, courts do appear willing to put their authority at risk when it comes to enforcing their preference for mothers as custodians by ordering fathers to hand over children. Yet, even this may be more reflective of bureaucratic imperatives: because the maternal preference has been the standard for so long, family court bureaucrats are unlikely to ever be criticized for following it as a rule. Similarly, the maternal preference may also be pragmatic in that, because the court's few coercive powers, such as the garnishment of wages, are primarily of a financial character, they are more likely to be successful against a salaried father than a stay-at-home mother.

Allowing visitation, particularly prior to divorce, invites the risk of losing all contact with the children to the other spouse. Lawyers know this and advise their clients accordingly. Of course, some non-custodial parents may be seeking nothing more than visitation. Lawyers, however, may not be familiar enough with the other parent and the nature of the relationships involved to make such an assessment, and may recommend against visitation. Indeed, lawyers are likely to be blamed if they approve a visitation that results in abduction. Visitation can also be used as a bargaining chip to extract concessions involving child support or the abandonment of custody claims. And, because denial of contact is not recognized as a form of child abuse and visitation is unenforceable, access can be repeatedly used as a bargaining chip. Even when visitation is ordered, a parent can neutralize the order for months or even years by appealing it, further limiting the non-custodial parent's judicial relief.

When non-custodial parents are denied even occasional contact with their children or are blackmailed through escalating financial demands, some of them may regard abduction as their only hope for maintaining a relationship with their children. This in turn renders visitation an even riskier prospect for the custodial parent. A vicious downward spiral rapidly develops that the involvement of lawyers may only exacerbate; perhaps without lawyers to advise them of the unenforceable nature of family court orders, parents would be more likely to comply with them. Indeed, a number of the Japanese parents I know talked of the shock they felt upon first realizing that the court system was unable to help them see their own children.

Many family court actors doubtless sympathize with parents who go for months or years without seeing their children and do what they can to improve the situation. Visitation issues represent a serious challenge to such well-meaning people. If a custodial parent does comply with a visitation order that then results in child abduction, the court and possibly court personnel will be blamed for the new status quo they are powerless to change. On the other hand, if the visitation order is ignored, the court will likely be burdened with more work in the form of

further motions and demands, which may expose the ineffectiveness of the process and the system itself. It is unsurprising, therefore, that the court may choose to deny visitation except when the parents can be convinced to agree to it.³⁶⁸ Denial of visitation is, after all, something the judiciary can do entirely in-house, whereas awarding visitation involves the messy and non-compliant outside world. “It is in the child’s best interests not to have contact with Dad now that he and Mom are separated – case closed” may thus be a more satisfying conclusion to those generating it than “Dad should see his children, but there is nothing we can do about it.” It is understandable that generating such self-reaffirming conclusions could become institutionalized, particularly when careers and the legitimacy of the system itself are at stake.

The courts functioning in their own best interest also explains the SCJ’s refusal to characterize visitation as a positive right, as well as the ease with which visitation rights can be refused or terminated and the lack of detailed and expansive criteria for doing so. Indeed, the result of the 2000 Decision makes more sense viewed as the SCJ’s response to a challenge to judicial authority, rather than anything to do with visitation.

Thus, while my description of the Japanese system in the context of child custody and visitation may seem to portray it as illogical, it is not. It functions adequately in protecting the interests of the judicial system and its actors. Of course, protecting the interests of children is also a goal of the family court, but in the context of divorce, there is no way for an outsider to separate the best interests of the child from that of the court. Tellingly, when child custody enforcement problems are debated, the focus is often not on the tragic impact it has on parents and children, but on its effect on the people’s trust in the legal system.³⁶⁹

³⁶⁸ It is important to remember that by the time the family court becomes involved, most of the couples who can agree on the terms have already been filtered out.

³⁶⁹ See, e.g., Saneyuki Yoshimura, *Ko no Hikiwatashi to Jinshin Hogo Seikyū* [The Hand-over of a Child and Habeas Corpus], 1100 HANREI

VIII. CLOSING OBSERVATIONS

This paper does not presume to make any recommendations as to how Japan should change its child custody and visitation regime, or to even suggest that such changes are necessary. The way Japanese courts handle these cases may in fact be the best system for the country and its people in many cases, though I have certainly met many Japanese people who think otherwise.³⁷⁰ I have simply tried to provide a descriptive model that will help practitioners in the U.S. and elsewhere to decide how to deal with cases where their legal system may interact with Japan in child custody cases.

In any case, without accompanying changes to the enforcement regime, few recommendations for improving visitation and custody in Japan seem likely to succeed. For example, some Japanese parents' organizations have called for the country to implement a joint custody regime.³⁷¹ However, so long as one parent can continue to assume sole custody by *fait accompli*, it is difficult to see how a change in the substantive law will have any impact. Furthermore, to the extent that a decision to grant joint custody is left to the discretion of judges, it is

TAIMUZU 176, 179 (Nov. 10, 2002). The author, a family court judge, writing of the difficulties of enforcing habeas corpus orders, states that if a court order to "hand the child over" does not resolve the issue, "it may encourage self-help remedies, and even result in mistrust of the judicial system." *Id.* See also YAMAGUCHI, *supra* note 339, at 75 (detailing theories that assert the need to have effective enforcement because of its importance in obtaining the trust of the citizenry); Segi, *supra* note 347, at 86 (writing of the difficulty of obtaining the trust of litigants and the public at large without the courts having sufficient enforcement powers in parental child abduction cases).

³⁷⁰ Indeed, one of the things I find admirable about Japanese institutions is that they generally assume that parties are acting in good faith, whereas the adversarial nature of the U.S. legal system tends to lead to the opposite assumption prevailing. Mediation rather than litigation is also probably a good starting point in most divorce and child custody cases. Even Samuel Lui has positive things to say about mediation in his account of his tribulations in Japanese courts. 3 Hours, *supra* note 98. However, in difficult cases where one party is intractable and the other seeks help from the judiciary, assuming the good faith of the parties and the positive impact of mediation may be inappropriate when most of the people who can agree have been filtered out and there is no interim relief (such as immediate provisional visitation).

³⁷¹ See, e.g., Tanaka, *supra* note 256.

difficult to imagine that they will act any differently in light of the judiciary's well-established preference for mothers as sole custodians and the courts' inability to enforce its orders. Courts would likely only award joint custody when both parents already agree to it, just as they do now with split custody and visitation.³⁷²

Similarly, there has been discussion of Japan joining the Hague Convention, but in my view it is doubtful that it would make a significant difference.³⁷³ First, without a drastic change to the enforcement regime, it seems unlikely that the Hague Convention will become anything other than another law that Japanese courts reason their way around or simply ignore. Second, joining the Hague Convention will not by itself reduce the more numerous cases of parental abduction within Japan. Third, accession to the Hague Convention could actually worsen the situation because it would make it easier for parents to take children back to Japan for ostensible visitation and then keep them there. Currently, Japan's status as a non-signatory to the Hague Convention is a red flag to U.S. judges considering visitation or custody arrangements that involve taking a child back to Japan. If Japan joined the Hague Convention, U.S. judges might find it easier to allow such travel, even if there are no changes in Japan's enforcement. Fourth, there is anecdotal evidence that being a Hague Convention signatory by itself does not render a country amenable to returning abducted children.³⁷⁴ In any case, Japan

³⁷² More to the point, in a country where there is resistance to even the notion of changing the law so that family registers reflect the biological realities of the parent-child relationship, joint custody may simply be too radical. *See discussion supra* note 148.

³⁷³ One writer has suggested that Japan could establish a regime allowing it to resolve international abduction cases before making the legal changes necessary to deal with domestic cases. Hans van Loon, *The Implementation and Enforcement of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction in Comparative Perspective: It's Japan's Move!*, THE TOHOKU UNIVERSITY 21ST CENTURY COE PROGRAM, GENDER LAW AND POLICY ANNUAL REVIEW 2, 189 (2004). A regime that offers more remedies to foreign parents than Japanese ones would certainly be an odd result.

³⁷⁴ *See, e.g.,* Bramham, *supra* note 355 ("Even Hague countries – Germany being one of the worst – are often slow to return children . . . because

could almost certainly return children now, just as the United States has returned numerous abducted children to Japan, despite the latter not being a Hague Convention party.³⁷⁵ Recent amendments to Japan's Penal Code criminalize abducting a person out of a country, and an older version of this law has been used to combat at least one attempt by a parent to abduct a child out of Japan.³⁷⁶ All that is probably necessary is for police and other relevant bureaucracies to decide to get involved, though it is difficult to imagine how they would find it in their interests to do so.

American practitioners should consider taking the following precautions in cases involving a Japanese element. First, when a Japanese parent is involved, great care should be taken in structuring visitation or custody arrangements. When a parent who has no ties to the U.S. and little reason to fear violating a U.S. court order seeks to take a child to Japan for visitation or as part of a custody arrangement, there is a significant risk that the other parent may lose all contact with the child. The Japanese legal system cannot be relied upon to significantly mitigate this risk, which increases depending on the degree of hostility between the parents. Likewise, the possibility of Japanese grandparents intervening and attempting to retain the child in Japan should also be kept in mind. While grandparents and other relatives in Japan are able to travel to the United States where they may have enforceable visitation rights, the reverse is not true.

Second, it is absurd that Japanese family court orders may be more enforceable abroad than they are in Japan. Moreover, whatever principles of comity apply in theory are likely to be one-sided in practice. A Japanese court may decide to ignore a U.S. custody order by invoking the "best interests" standard to

the convention allows courts to overrule foreign custody orders if it's deemed in the best interests of the child.").

³⁷⁵ My observations regarding cases involving children taken to the United States from Japan are based on discussions with a U.S. practitioner in Japan who specializes in such cases.

³⁷⁶ See discussion *supra* note 359.

ratify an abduction to Japan, and even if the validity of a U.S. court order is recognized, it will probably remain unenforceable.³⁷⁷ Furthermore, when considering whether to uphold a Japanese custody order or denial or limitation of visitation, U.S. courts should know that the order probably may not have involved the same degree of scrutiny required to satisfy U.S. due process requirements, particularly if the legal or defacto denial or termination of parental rights is involved.

Finally, American judges, lawyers, and legal scholars should take every opportunity to explain to their Japanese counterparts the expectations of Western legal systems regarding child custody and visitation. While it seems unlikely that Japan will cease to be a haven for parental child abduction any time soon, the Japanese judiciary should at least be helped to understand that courts in the U.S. and elsewhere may make it increasingly difficult for Japanese couples living abroad or Japanese residing overseas and married to foreign nationals to bring their children back to their own country when marriages go bad.

IX. EPILOGUE

A few weeks before I finished the first draft of this article, a surprising item appeared on the news. A divorced Japanese man was arrested for abducting his 9 year old daughter. This news was noteworthy for two reasons. First, the police were involved.³⁷⁸ Second, and more significantly, the man was a

³⁷⁷ See, e.g., Perez, *supra* note 2 (“The U.S. State Department says it is not aware of any cases in which a child taken by a parent to Japan has been ordered returned to the United States by Japanese courts, even when the left-behind parent has a U.S. custody decree . . .”).

³⁷⁸ He was arrested for abducting a minor (*miseinen ryakushu*). I suspect that in this case, as in the case of the foreigner described *supra* note 359, the police got involved because the abduction was conducted noisily and in public. I predict that if parental child abduction is increasingly perceived as a problem that the court system is failing to deal with, the police will become more involved to the extent their prestige is preserved or enhanced. Furthermore, the police could do this using current law. My discussions with Japanese fathers and a recent incident in Chiba, where a father was arrested for “abducting” his child from his estranged wife, suggest this is already happening. *Bekkyo Chū no Chonan Tsureari, 25sai Chichioya Taiho* [25 Year-Old Father Arrested for Abducting Eldest Son], TUF NYUSU SOKUHŌ, Apr. 9, 2007,

former judge. The abduction took place on the day he was supposed to participate in family court proceedings regarding his case.³⁷⁹ What does it say about Japan's family court system when even a former insider gives up on it?

<http://tuf.co.jp/i/news/mori/0409/04091035> (last visited Apr. 23, 2007).

There is evidence that a similar phenomenon is occurring in the area of Internet-based defamation, where civil remedies are perceived as inadequate. Salil Mehra, *Criminalizing Cyberdefamation: Does Private Ordering Need Public Prosecutors?* (draft manuscript). Thus, events may evolve so that fathers in Japan are increasingly sanctioned under existing law for abducting their children and failing to pay child support, but receive little or no relief in the area of visitation.

³⁷⁹ See, e.g., *Fukuoka de Mototsuma to Kurasu Shō San Musume wo Tsuresaru Bengoshi wo Genkōhan de Taiho* [Former Lawyer Arrested in the Act of Abducting 3rd Grade Daughter Living with Ex-wife in Fukuoka], YOMIURI SHIMBUN, Oct. 7, 2005.