

Reshaped, reframed and innovated

PIONEERING INITIATIVES EMPOWERING COUPLES TO APPROACH RELATIONSHIP BREAKDOWN DIFFERENTLY ARE INCREASINGLY ATTRACTIVE. OUR FAMILY IN TWO HOMES PROVIDES A GENUINE ALTERNATIVE. BY NADINE UDOROVIC, REBECCA DAHL AND CATHERINE GALE

A transformational shift in family law

Australia's family law landscape has undergone considerable direction change in recent years. Family law practitioners acknowledge the merits of non-legal avenues of dispute resolution.¹ The merits of these avenues for both client and practitioner lie in their "non-adversarial, non-litigious, interest-based" approach to resolving conflict.² Especially in the context of parenting and relocation matters, the adversarial or adjudicative system can result in trying to fit the proverbial round peg into the square hole.³

Family lawyers and mediators agree that practitioners should prioritise fostering working relationships between separated parties. This approach should replace the "win at all costs" mentality which has historically been prevalent in family law proceedings.⁴ Considering the traumatic impact litigation (and the ensuing adverse economic consequences that flow) can have on families, the growth of client-centric approaches to dispute resolution indicates that Australian family law is evolving for the better.

The Federal Circuit and Family Court of Australia is at the centre of this transformation

The implementation of the new Federal Circuit and Family Court of Australia Practice Directions in September 2021 solidified this substantial shift. The practical effect of the Practice Directions is to ensure parties engage in a pre-action procedure (family dispute resolution (FDR) or mediation) prior to commencing financial and parenting court proceedings.⁵

Knowing which alternative dispute resolution method to apply

Family law practitioners have a suite of dispute resolution strategies at their fingertips, such as FDR, mediation, round table conferencing, arbitration, constructive lawyer negotiation and collaborative law. Correctly matching the approach with your client's circumstances, budget, and approach to resolution and litigation is vital when it comes to reaching a successful outcome.

Our Family in Two Homes – a different approach

The Our Family in Two Homes concept grew initially out of interest-based negotiation and collaborative law. Collaborative law requires the parties to sign an agreement that if no resolution is reached their lawyers and any other experts involved will be disqualified from acting further. The Our Family in Two Homes approach offers much greater flexibility and enables the parties to retain their lawyers in any ongoing dispute. In addition (and compared to these other approaches) and based on the experience overseas, it assists parties to adopt a more insightful approach to interest-based conflict resolution leading to better and more durable outcomes.

The concept aims to move parties from an adversarial and position-based negotiation into a present and future focused conversation around "what will our family look like now we are moving into two homes".



The Our Family in Two Homes model is ideal for those people who are able to take responsibility for their own outcomes, are comfortable to sit across the table from the other party in the presence of their lawyers and actively participate in the discussions and negotiations (rather than leaving this role wholly to the lawyers), and who desire a constructive and ongoing parenting relationship for the benefit of their children.

It offers a flexible and organic approach to solving the issues that arise from family disintegration. It assists the clients to focus their attention on the whole family. It intentionally tries to take the dispute off the table and put cooperation and compromise back on. It allows the parties to retain a significant level of control over the timing and speed of the discourse, enabling them to take ownership of the issues and solutions that they reach. It removes the experience common in both outcomes negotiated in FDR and mediation that the parties have been pressured into making decisions which they later regret.

Family lawyers should consider offering this approach to clients who:

- hope to have a constructive ongoing parenting relationship and are prepared to listen to and understand each other's perspective during the separation period and into the future
- are comfortable being involved in the negotiation process themselves
- would prefer a non-tactical, non-adversarial style of negotiation
- are comfortable to take ownership of the decisions they make in the process
- feel they can map and resolve many of the issues themselves
- want to participate in a facilitative style of mediation but with the benefit of lawyers present and do not wish to be involved in an evaluative style of mediation with a third-party mediator
- want to participate in an organic, flexible and future-focused approach to their family and the future parenting of their children
- want to involve (in a meaningful way) people important to the children or to each of them to help them resolve their issues
- want to continue using the same lawyers if the matter goes to litigation.

Dr Robert Simon,⁶ an internationally recognised leader in forensic psychology consulting with more than 35 years of experience in family law, talks about the need for the family law system to have a “light footprint” and be “less interventionist”.⁷ This is where Our Family in Two Homes assists by allowing clients to safely and calmly “disagree agreeably”.⁸

That said, one of the primary advantages of Our Family in Two Homes is that it can be used as part of mediation, alternative dispute resolution and litigation. The model can be used at any stage of a dispute – whether parties have previously litigated or not.

Our Family in Two Homes respects families of all shapes and sizes, including polyamorous relationships, cross-border relationships and rainbow families, families with or without children and family members of different generations.

SNAPSHOT

- The merits of non-legal avenues of dispute resolution lie in the non-adversarial approach to resolving conflict.
- Our Family in Two Homes is a genuine alternative to traditional resolution methods.
- Our Family in Two Homes has positive potential for both clients and practitioners.

Workbooks frame and direct a different kind of conversation

Our Family in Two Homes comprises a workbook given to clients for their personal use. The workbooks are effective regardless of whether one or all parties utilise them and have been customised to accurately reflect Australian family law.

The goal is to reframe thinking from contention to conversation and debate to the discussion, thereby facilitating compromise rather than animosity.

The workbooks assist clients in being reflective, communicative and more involved in the conversation, thereby producing better outcomes for everyone involved.

For example, the workbooks examine how each or both parties approach communication. It asks “

... think about your pattern of communication with your former partner and ask yourself: what is getting in the way of healthy communication as we approach discussions about our separation? ... When I need to talk about difficult things with my former partner, I tend to behave like ... I interpret my former partner's behaviour as ...”. And on trust, “What parts of trust have broken down? Which parts do I hope to restore? Boundaries? Accountability? Honesty? Generosity?” Each of these has component parts.⁹

There are three workbook options:

- “Our Family in Two Homes” – used where the family has children living at home or for couples who don't have children.
- “Our Family in a Few Homes” – used where the family has adult children.
- “Designing Our Future Together” – used to help a couple prepare for a fruitful, frank and direct conversation before agreeing to a Binding Financial Agreement, moving in together, marrying, blending families, seeking a relationship “refresh” or marital mediation.

This article focuses on the first workbook.

Each workbook contains questions and activities focusing on communication strategies, trust and conflict resolution. These questions encourage clients to consider the elements of their personalities, values, priorities, relationships, circumstances, conflicts and goals.

Armed with this information and insight, families can then work together to resolve present and future issues by identifying (and being cognisant of) each person's priorities and needs, including the needs of the children.

The Our Family in Two Homes model is available to firms who join the program and attend the training. The workbooks form part of a fee agreement¹⁰ with Jacinta Gallant (an accomplished Canadian family lawyer and mediator) who developed the initiative.

Firms pay an annual fee for the use of the model. This fee includes access to marketing materials, ongoing training for any of the subscribing firms' practitioners who want to use the model and access to a group of international family lawyers who use the model and can share a wealth of experience. Training is conducted regularly in two-hour live webinars from Canada at times convenient to Australian practitioners.

Dispute resolution

A 360° approach to family law conflict resolution

The workbooks explore how the former couple approaches:

- parenting – mapping attitudes on issues such as access to children, discipline, the role of technology in the child's upbringing, healthcare, vaccination and schooling. It is future-focused and canvasses issues such as introducing new partners to children and events such as weddings
- property and asset division
- finances including debt, superannuation, child support and spousal maintenance
- any bespoke matters particular to the family.

These conversations are likely to produce positive outcomes when they adhere to the “Insight Approach to Conflict”, which recognises that resolution can be achieved through an “interactive pattern of learning aimed at generating insights that facilitate critical thinking and cooperative dialogue”.¹¹

Once parties come to a resolution, their agreements are formalised in the usual way. The legal rules pertaining to evidence, privilege, confidentiality and enforceability apply to any agreement reached with the aid of this model.

Workbooks can be used in and outside of litigation

One of the great features of the workbooks is that they can be used as a tool to help parties – even those litigating – as they focus on gaining insight into what is important to the individual and family to help alleviate the “win at all costs” on every point of law approach.

A case study

It is useful to explore how the Our Family in Two Homes model may work compared to, for example, traditional mediation.

Background facts: M and F were married in 2000 and have three children (aged 9, 15 and 20) who live at home. M travels a lot for work and F has traditionally had a primary carer role. M and F have agreed to separate, and M has re-partnered with C. C has their own children who will live with M and C full time. F has returned to work part-time. M and F's asset pool comprises M's super, the family home, a holiday home and some shares. There is high anxiety in the family about the separation, financial security, C's role and C's children. The children have been seeing a specialist child psychologist and F is seeing a therapist. The relationship between F and M is fraught but courteous. They both agree that the children's welfare is the priority and they both want active roles in the children's lives going forward. M wants to take the children on family holidays with C and wants regular but flexible access to accommodate work commitments.

The process: The workbooks are designed to help M and F (and, for example, C, if parties agree) shift their focus from a position-based negotiation (“this is mine and that is theirs”) to an interest based (“we want our children to benefit from wealth accrued during the marriage and for that wealth to be quarantined – ie, not for C's children”) and insight-based approach.

The first part of the workbook is completed by M and/or F alone and assists them to focus on their goals and values (ie, M will value flexibility to continue “away” working). It is reflective work for each of M and F which again supports a move towards

a future-focused and insightful conversation around what might work best for their family as they move from one home into two. M and F may or may not choose to discuss their answers to this exercise with their lawyers.

The workbooks then proceed through an agenda of issues M and F set around care arrangements, housing, child support, financial division and an array of other issues. They provide structure to the conversation in an insightful and non-tactical way, keeping the conversation forward-focused at all times. For example, given M's work pattern and F's return to work, the focus may be on flexible access and parenting that still gives the children consistency.

In both family dispute resolution and evaluative mediation, the conversation is often backward looking and can easily become adversarial in style. The Our Family in Two Homes concept enables M and F to engage in an approach similar to a facilitative style of mediation but with the benefit of their lawyers being present to ensure sound legal outcomes and at the same time allows them to adopt a flexible and organic approach to the resolution of their disputes.

The process may involve several joint meetings with lawyers participating and M and F may choose to invite other professionals to join them to support their conversations and development as they move towards a solution. In this particular example, the child psychologist may be invited to attend to help map out C's interface with the children (discipline, finances, diet, attendance at events), giving F a chance to contribute. The parties' accountant or financial adviser may join to help reduce their stress around the financial aspects of their separation.

The overall approach is less structured than other types of mediation and allows the parties great flexibility as to how they would like to conduct their negotiation, over what period of time and who they might like to attend.

Putting a human face on family law

The workbooks convey substantive legal content in an accessible format. They summarise major family law concepts such as “best interests of the child”, “parental responsibility” and “significant and substantial time”. They also contain relevant court documents such as the Parenting Questionnaire and Financial Questionnaire.

Relevant sections of the *Family Law Act 1975* (Cth) are included under headings applicable to issues relevant to the client.

For instance, parents negotiating a parenting plan can refer to the section of the workbook containing s60CC of the *Family Law Act 1975* (Cth), familiarise themselves with the content and then review the accompanying practical notes.

Helping practitioners with day-to-day client management

The Our Family in Two Homes workbooks are equally useful for practitioners in the mediation context and when engaging with allied health specialists. Its strength is in its light touch. By empowering the family, the onus and power to change outcomes falls onto the parents themselves.

The ability to proactively and substantively involve the family's support structure such as psychologists and wealth planners can be valuable. This helps put sharp focus on the issues that really matter and allows others to contribute “out

of the box” solutions. For example, in the case study above, the children’s psychologist could talk to M and F about how C could be successfully introduced to the family in a way that worked for them all. Dr Simon often asks clients to concentrate on “Who loves your children? It’s not the judge and it’s not the lawyers – it’s you”. Questions such as these focus on resolving issues. As Dr Simon says, this removes the hostility and toxicity from negotiations and promotes better outcomes.¹²

For the practitioner, the workbooks help facilitate a deeper understanding of a client’s mental and physical environment. Experience shows the lawyer-client conversation becomes less about “what am I entitled to take” and more about “what will work”. Clients are not obliged to share their completed workbooks with their lawyers, but most do. It is a helpful strategy to bring the conversation back when emotion gets in the way: “Remember, your priority in your workbook was to achieve Y. Let’s work on that”.

At its core, this is what the Our Family in Two Homes model achieves.

What happens if the family dispute does go to litigation or formal mediation?

One of the enduring benefits of the Our Family in Two Homes approach is that, unlike the formal collaborative practice approach, it does not require the lawyers to withdraw if the process doesn’t deliver agreement. Hence, relationships with clients are maintained, costs are saved and the sense of trust the client builds in their legal team is not eroded.

Provided clients give their consent and their answers remain strictly confidential, barristers and mediators can also use the workbooks in pre-litigation and courtroom preparation, providing a deeper insight into the client’s experiences, goals and preferences. This may give lawyers a more meaningful understanding of how the parties operate ahead of mediation.

Our Family in Two Homes will not suit every family

It is important to note that the Our Family in Two Homes approach will not suit everyone or every dispute. Neither party is under an obligation to adopt the approach. Either party may use the workbook as a support tool or both may use it, which is recommended. Parties can cease using the toolkit at any stage.

In some circumstances, an alternative approach to dispute resolution may be more suitable.

Conclusion

Our Family in Two Homes presents family law as forward-thinking, innovative and human-centric. We see immense usefulness in a strategy that looks beyond the immediacy of the relationship breakdown and the angst around parenting in two or more homes and instead sees the family foster and build relationships. Given the Court’s enthusiasm for resolution outside of its walls, tools such as Our Family in Two Homes – and others that have come before and after – may well be the future of family law. ■

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1. Henry Kha, “Evaluating Collaborative Law in the Australian Context” (2015) 26 *Australasian Dispute Resolution Journal* 178, 178.
2. Note 1 above, 184.
3. Dr Robert Simon PhD (Family Law Conflict Resolution Presentation to Nicholes Family Lawyers), 24 August 2022. Dr Simon is not directly or indirectly associated with the Our Family in Two Homes product and he has endorsed the comments in this article. Dr Simon’s comments are thematically dealt with in his books, <http://www.dr-simon.com/author.html>.
4. See, eg, *Simic & Norton* [2017] FamCA 1007 at [2]–[3] where the trial judge observed “Whether this win at all costs, concede little or nothing, chase every rabbit down every hole and hang the consequences approach to family law litigation is a reflection of a Sydney based culture by some or many litigants or whether it is an approach by some legal practitioners or a combination of both, I do not know. Whichever is the cause, the consequence of obscenely high legal costs are destructive of the emotional, social and financial wellbeing of the parties and their children. It must stop”.
5. Federal Circuit and Family Court of Australia, Family Law Case Management Central Practice Direction r 4.1(a).
6. Dr Robert Simon PhD <<https://dr-simon.com>>.
7. Note 6 above.
8. Note 6 above.
9. Innovation for Lawyers, Our Family in Two Homes <<https://intwohomes.com/our-family-in-two-homes-sample-pages-2/>>.
10. The authors acknowledge that the fee agreement includes access to marketing support which has been developed by Jacinta Gallant. That marketing support largely comprises social media and website content etc. None of the marketing support has been used in this article. This article has been prepared by the authors based on their own experience of both the Our Family in Two Homes model and other alternative dispute resolution strategies.
11. Dr Cheryl Picard, “The Insight Approach to Conflict and Collaborative Practice”, International Academy of Collaborative Professionals 2018 Forum PFI, “Deepening Without Drowning: Accessing Hopes, Understanding Threats and Breathing Fresh Air”, 1.
12. Note 11 above.

