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FAMILY COURT OF AUSTRALIA at ADELAIDE***In the Marriage of E (TA and LA); P (EL and PM) Intervening (No 2)*****Asche and Pawley S JJ and Strauss J****24 October 1979 — (1979) 36 FLR 12; 5 Fam LR 244; [1979] FLC 78,368 (¶90-645)**

FAMILY LAW – CUSTODY – APPLICATION BY PERSONS OTHER THAN PARTIES TO MARRIAGE – PREVIOUS COMPLETED CUSTODY PROCEEDINGS BETWEEN HUSBAND AND WIFE WHEREIN APPLICANTS GRANTED LEAVE TO INTERVENE – IN PREVIOUS PROCEEDINGS CUSTODY GRANTED TO HUSBAND WITH ACCESS TO INTERVENERS – INTERVENERS FILING FRESH APPLICATION FOR CUSTODY ALLEGING SEXUAL INTERFERENCE BY HUSBAND WITH CHILD – WHETHER FAMILY COURT HAS JURISDICTION TO HEAR APPLICATION – PRINCIPLES TO BE APPLIED IN CUSTODY CONTEST BETWEEN NATURAL PARENT AND STRANGER – WEIGHT TO BE GIVEN TO RELATIONSHIP BETWEEN PARENT AND CHILD – MANNER IN WHICH UNSUBSTANTIATED ALLEGATIONS OF SEXUAL INTERFERENCE REFLECT ON SUITABILITY OF MAKER OF STATEMENTS TO ACT AS CUSTODIAL PARENT – WEIGHT TO BE GIVEN TO FINDINGS THAT CHILD REGARDED STRANGERS AS HER "PSYCHOLOGICAL PARENTS" – DEFINITION OF "MATRIMONIAL CAUSE" – ACCESS – APPLICATION FOR ACCESS BY PERSON OTHER THAN PARENT OF CHILD – PRINCIPLES TO BE APPLIED – WHETHER PRESUMPTION ARISES THAT ACCESS BY PERSON OTHER THAN PARENT WILL BENEFIT CHILD – COSTS – APPLICATION FOR CUSTODY BY PERSON NOT PARENT OF CHILD – APPLICATION BASED ON ALLEGATIONS OF SEXUAL MOLESTATION OF CHILD BY PARENT – ALLEGATIONS FOUND TO BE UNSUBSTANTIATED – WHETHER APPROPRIATE TO ORDER COSTS AGAINST APPLICANT: *FAMILY LAW ACT 1975*, ss4(f), 61, 64, 92, 117.

H. and W. married in 1972 and separated in January 1975. A daughter S. was born in June 1973 who after the parties separated remained in the custody of H. In May 1975 H. and S. went to live with W's aunt and uncle, Mr and Mrs PE. H. left that home in February 1976 although S. remained with Mr and Mrs P until May 1977. In June 1976 W. commenced proceedings seeking an order that Mr and Mrs P be granted custody of S. and subsequently Mr and Mrs P. were granted leave to intervene in those proceedings. In May 1977 McGovern J of the Family Court of Australia at Adelaide ordered that H. be granted custody of S., at the same time noting that it was intended that Mr and Mrs P. have liberal access to her. The question of access was adjourned *sine die*.

Following periods of access in June 1977 Mr and Mrs P. applied to the Family Court seeking custody of S. alleging that H. had sexually interfered with her. Mr and Mrs P. were then granted interim custody and a full welfare report was ordered as well as separate representation for the child. The welfare officer administered a test to the child which indicated that the child recognized Mr and Mrs P. as her "psychological parents". On the hearing of the application McGovern J found that the allegations of sexual molestation were unsubstantiated but nevertheless granted the custody of the child to Mr and Mrs P. H. appealed from that decision.

HELD: The appeal should be allowed and custody granted to H.

By a majority the Court held that it did have jurisdiction to hear the application of the interveners as it related to the earlier completed proceedings.

The Court agreed: It is not necessary for a stranger who desires to institute proceedings for custody pursuant to par (f) of the definition of 'matrimonial cause' to seek leave to intervene under s92 of the *Family Law Act*. The object of s92 is to enable the person who has a legitimate interest in proceedings pending between others to take part in such litigation.

***In the Marriage of Waters; Townsend Intervening* (1978) 32 FLR 492; [1978] FLC 90-428, doubted.**

Pawley SJ and Strauss J held that the making of unsubstantiated allegations of sexual impropriety represented a substantial flaw in the suitability of the maker of the statements to be the custodial parent of the child and was a weighty circumstance to be considered.

Pawley SJ and Strauss J also held:

In a contest between a natural parent on the one hand and a stranger on the other hand, *prima facie* the welfare of a young child demands that a parent who is in a position, not only to exercise paternal rights, but also to perform parental duties, should have the custody of his child. The importance of giving a child parental care, affection and control is an element of the greatest significance in relation to the welfare of a young child.

Asche SJ disagreed, saying it is improper to approach any custody case on the basis of *prima facie* presumptions. The only question to be decided is the welfare of the child and all factors must be weighed.

On the question of costs, Pawley SJ and Strauss J (Asche SL dissenting) held that as the basis of the application – the sexual misbehaviour of the father – had been found to be entirely without foundation, calling into question not only the father's fitness as custodian but also his honour and reputation, it was fitting that the intervenors pay the father's costs.

Access: Per Pawley SJ and Strauss J: Unless there are cogent reasons for so doing, the court should not seek to interfere with the rights of litigants to order their own lives and those of the children. Where the question of access by strangers arises, it cannot be assumed as is the case of a natural parent, that a continuing association will benefit the child. Before any such order is made in favour of strangers there ought to be convincing evidence that the welfare of the child requires it. Having regard to the hostilities between the father's household and that of the interveners and the other factors evident in this case it would be wrong to submit this child to any further risk of emotional turmoil and accordingly the interveners should not be granted access to the child.
