

CUSTODY DISPUTES BETWEEN PARENTS AND NON-PARENTS: RECENT DEVELOPMENTS IN AUSTRALIA AND CANADA

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In legislation providing for custody of children after divorce, the court is given a particularly wide discretion as to the orders which it may make. In Canada, section 11(1) of the *Divorce Act*¹ grants the court power to make orders relating to the custody, care and upbringing of the children of the marriage provided that the court has regard to "the conduct of the parties and the condition, means and other circumstances of each of them." The legislation in Australia is more specific. Section 64(2) of the *Family Law Act*² provides that, "In proceedings with respect to the custody of a child of a marriage, the court may, if it is satisfied that it is desirable to do so, make an order placing the child in the custody of a person other than a party to the marriage". The court is also empowered, by s.64(3) of the *Act*, to make an appropriate order for access by the parents in such circumstances. In addition, s.92 of the *Act* specifically provides that any person may seek leave to intervene in such proceedings and that the court may make an order entitling them to intervene. In Canada, provincial legislation also plays an important part in such disputes³, but in Australia, because of the general scope of the *Family Law Act*, such legislation, although it continues to exist, plays relatively little part in modern Australian law.

Despite the existence of provisions such as those contained in the Australian Act, there is evidence that, for one reason or another, this course of action is not popular with the courts. Thus, in Eekelaar's sample of 652 English cases, in only one was custody awarded to a third party and in only two was the child committed to care.⁴ Thus, it seems that, although available, neither placing the children in the care of people other than the parents nor the utilisation of state agencies is a popular course of action. There may be obvious, if not necessarily good, reasons for this. First, there may not be interveners, whether relatives of the child or not, who are sufficiently interested in the proceedings. Second, even if such interveners do exist, they may, for a multitude of reasons, not be suitable to have custody of the child. Third, even where suitable interveners are available, traditional notions of claims based on parental right may still be prevalent. Fourth, courts may not be keen, again for a variety of reasons, to involve state agencies such as state Social Welfare Departments in Australia or Child Welfare Departments in Canada. There may, for instance, be a prejudice against these agencies because they deal, *inter alia*, with delinquent children.

Notwithstanding Eekelaar's finding, however, there have been a number of cases from these two fairly analogous⁵ jurisdictions where non-parents have sought custody of children after their natural parents have

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1. R.S.C. 1970, C.L.C.D.-8.

2. Stat. Australia 1975, no. 53.

3. Thus, as will be observed later, in the Canadian context, provincial legislation such as the Ontario *Infants Act* R.S.O. 1970, c. 222 the *Deserted Wives' and Children's Maintenance Act* R.S.O. 1970, c. 128 and the Manitoba *Child Welfare Act* S.M. 1974, c. 30, to name a few, will also be relevant.

4. J.M. Eekelaar "An Enquiry Into Custody Disposition in Divorce Cases" in *The Child and the Courts* (1978 Ed. Baxter and Eberts) 5, at 23.

5. By "analogous" it is meant that both countries share the common law tradition, both have a scattered distribution of population and both have federal systems of government which, themselves, are not dissimilar.

divorced or separated. The purpose of this article is to examine these cases in order to ascertain whether there is any discernible pattern in judicial attitudes to such interventions as well as to the kind of person (for example, relative or family friend) who intervenes in these circumstances.

The Australian Cases

In the Marriage of E and E

There can be no doubt that the leading case in modern Australian family law is the recent decision of the Full Court of the Family Court of Australia in *In the Marriage of E and E (No. 2)*⁶. *E* is most important on the question of custody generally and raises a great many issues relating to the exercise of judicial discretion conferred by the *Family Law Act*. The case involved an appeal by a father from a decision of McGovern, J. where custody of a four year old girl had been awarded to interveners, Mr. and Mrs. P., who were the child's mother's aunt and her husband (aged 58 and 59) years respectively). Mr. and Mrs. P. had been the interveners in the original custody dispute between the father and mother when sole custody had been granted to the father with care and control to his parents and undefined access to Mr. and Mrs. P. After their first period of access, the interveners then applied to the court for an order of custody, claiming that the father had seriously sexually interfered with the child. McGovern, J. discharged the previous orders and awarded custody to the interveners even though he found that the allegations of sexual impropriety had not been substantiated and had accepted the father's evidence that nothing of that kind had occurred. In so deciding, he had concluded that the issue became simply one of competing claims for custody of the child. He granted custody to Mr. and Mrs. P. first, because disputes over access would cause the child to suffer and he found that the father and grandparents had shown unwillingness to comply with the access order granted to the interveners. Second, McGovern, J. was of the view that the child's emotional needs would be best provided for if the interveners were granted custody.

The Full Court of the Family Court of Australia allowed the father's appeal and granted him sole custody of the child.⁷ As regards the first issue — that is, the conduct of the interveners — Strauss, J., of the Full Court, expressed the view⁸ that the unfounded allegations made by Mr. and Mrs. P. were of crucial significance in determining whether they were fit and proper persons to have custody of the child. Strauss, J. went on to say that "worse still, the only proper inference to be drawn from the evidence appears to me to be, that the child was deliberately schooled by Mrs. P. to make allegations against her father".⁹ The judge was also of the opinion that the finding of the trial judge¹⁰ to the effect that Mrs. P. had jumped to an erroneous conclusion initially about something the child had said and the remainder of the allegations that followed from that premise, partly as the result of fantasy, irrationality and a desire to please on the part of the child

6. [1979] F.L.C. 90-645 (Fam. Ct. Aust.) reversing [1978] F.L.C. 90-402.

7. They also held, with Asche S.J. dissenting, that access by the interveners be terminated immediately and that they should pay the father's taxed costs of the appeal.

8. *Supra* n. 6, at 78, 388.

9. *Ibid.*

10. See [1978] F.L.C. 90-402 at 77, 076.

and partly as a result of probing and suggestion by Mrs. P., was not reasonably open on the facts¹¹. Strauss, J.'s view of the trial judge's finding did not, however, end there. He said:

But even if the explanation of the allegations is as his Honour saw it, grave doubts must have arisen whether a woman who was so lacking in balance and discernment and so prone to jump to conclusions adverse to the father, and who was given to such exaggerations, and who had put such matters in the child's mind, was a suitable custodian. Her conduct had shown that she held the father in low esteem, and that she could not be trusted to allow the child to have a fair and balanced perception of him, and that in her care the child was unlikely to maintain a worthwhile relationship with him . . . The potential harm resulting to the child from being brought up in a home in which these baseless allegations had been made and persisted in against the father, must be a grave and weighty circumstance in determining the future care and upbringing of the child.¹²

Asche, S.J. disagreed with Strauss, J.'s remarks concerning the behaviour of the interveners, especially that of Mrs. P. Even though he unequivocally accepted that the father should be acquitted of any suggestion that he had sexually interfered with his daughter, he preferred to accept the finding of the trial judge.¹³ His Honour commented that, "It is one thing to make allegations based upon some substratum from which conclusions, albeit incorrect and biased may be drawn; it is quite another to make deliberate accusations based upon no foundation whatsoever". Asche, S.J. did not consider that Mrs. P. had been guilty of the latter variety of conduct. He did, in fact, comment that there was "nothing in the evidence to suggest that when the interveners took in the child, . . . they were not people of goodwill who generously gave kindness, care and consideration to a child who was at first nothing to them but the child of a boarder."¹⁴ When one considers the evidence and bearing in mind the role of an appellate court in this situation¹⁵, it is hard to resist the conclusions to which Asche, S.J. came.¹⁶

The second major issue on which the Full Court based their decision is altogether more contentious. Strauss, J. disagreed with the trial judge's finding that the case ought to be treated as one involving competing claims for custody, since the contest was between the child's natural father on the one hand and an aunt and uncle of the child's mother on the other. The main authority upon which both Strauss, J. and Asche, S.J. relied was the decision of the High Court of Australia in *Storie v. Storie*¹⁷, especially the judgment of Latham, C.J., There, the then Chief Justice had said:

Prima facie the welfare of a young child demands that a parent who is in a position, not only to exercise parental rights, but also to perform parental duties, should have the custody of the child as against any stranger. The fact that a stranger can also

11. *Supra* n. 6, at 78, 389.

12. *Ibid.*

13. *Id.*, at 78, 370.

14. *Ibid.*

15. See *Paterson v. Paterson* (1953), 89 C.L.R. 212 (High Ct. Aust.).

16. This notwithstanding a greater awareness today of the issue of sexual abuse of children by close relatives See e.g., R.S. Kempe and C.H. Kempe, *Child Abuse* (1978) 60 ff; J. Renvoize, *Web of Violence* (1978) 173 ff; A.H. Manchester, 'Incest and the Law' in *Family Violence: An International and Interdisciplinary Study* (1978 Ed. Eekelaar and Katz) 487 ff.

17. (1945), 80 C.L.R. 597 (High Ct. Aust.).

provide as good (or even, I should say, a better) home is in such circumstances of only slight, if any, weight.¹⁸

In addition, Strauss, J. relied on the decision of the New South Wales Court of Appeal in *Powell and Another v. Anderson*¹⁹. In that case, Moffitt, P. had said

When the welfare of a child is under consideration, being brought up by its natural parents within its own family group must be regarded as a powerful, almost dominant consideration, which demonstrates in the clearest fashion, that its welfare demands otherwise. This is a simple truth long accepted by any wise parent in communities such as ours structured on the family.²⁰

Similarly, Hutley, J.A. had said that, "The claims of the parents cannot be denied. Any other doctrine would mean that where parents are compelled to place children with others because of misfortune or ill health, they are in peril of losing their children altogether to strangers".²¹

It is submitted that this last principle is the least satisfactory aspect of the decision in *E*. In an earlier article,²² the present writer expressed the opinion that *Powell and Another v. Anderson* was not an especially satisfactory decision and, hence, extrapolation from it is a hazardous undertaking. In that regard also, the authority of *E* is somewhat weakened by the approach adopted by Asche, S.J. who, whilst agreeing that the father should be awarded custody, did not accept the attitude expressed in *Storie* as uncritically as did Struass, J. Asche, S.J. considered that the comments of Latham, C.J. in *Storie* did not suggest anything more than that a strong *prima facie* case could be made out in favour of a natural parent against a stranger in blood in any custody case. The judge continued by noting that all such considerations, and they were merely to be regarded as such rather than as *prima facie* assumptions, must be assessed in the light of the welfare of the child. He then referred to the judgment of Demack, S.J. in *In the Marriage of Jurss and Jurss* where it was said that

The welfare of a child in any particular case must be determined on the facts of the particular case. Certainly rules of experience and prudence may indicate the limits of the inquiry in any particular case, and certainly experience may indicate certain factors which are more significant than other factors . . . the inquiry is essentially a positive one designed to promote the interests of the child . . .²³

Asche S.J. disagreed with the other members of the Full Court in their interpretation of the principle enunciated in *Storie* and remarked that he had gained the impression that they had ". . . started from a presumption that natural parents should be preferred to non-parents and then applied that to the present situation. If I am right in my impression, I cannot agree with the approach. I prefer the 'essentially positive' approach suggested by Demack, S.J.".²⁴

In the Marriage of E and E is, for a variety of reasons, a most important case in the law of custody in Australia, perhaps, in some ways, the most

18. *Id.*, at 603.

19. [1977] F.L.C. 90-235 (Fam. Ct. Aust.).

20. *Id.*, at 76, 258.

21. *Id.*, at 76, 260.

22. F. Bates, "Disputes Over Children Between Natural Parents and Foster Parents: A Comparative Study of Recent Developments" (1978), 9 Man. L.J. 1, at 5.

23. [1976] F.L.C. 901041 (Fam. Ct. Aust.), at 75, 184.

24. *Supra* n. 6, at 78, 372.

important case to be decided since the *The Family Law Act 1975* came into force. Many issues, quite apart from the instant problem have been raised by it,²⁵ and, in view of the comments made by Strauss, J. concerning the conduct of the interveners²⁶, there can be no doubt that it was correctly decided. Yet, at the same time, the case cannot be allowed to pass without some comment. First, the remarks of Ashe, S.J. concerning the attitude of the other members of the Court towards the preference for natural parents have already been noted. In that regard, it is submitted that the view taken by Ashe, S.J. is altogether more modern than that to be found in the judgment of Strauss, J. In recent years, with the obvious exception of the New South Wales Court of Appeal in the *Powell* case²⁷, courts have rejected positively claims made by parents on the basis of *right*, as opposed to the child's welfare. The most striking instances have been provided by the English House of Lords' decision in *J. v. C.*²⁸ and the Court of Appeal's in *In re S. (A Minor)*.²⁹

Second, it had been suggested in evidence by a welfare officer that the interveners had become the "psychological parents" of the child in the sense that that term is used by writers Goldstein, Freud and Solnit³⁰. Strauss, J. remarked that the expression needed to be properly understood. He said:

It implies no special virtues and no special capabilities. In the normal two parent family, the biological parents are also the psychological parents. In a family in which there is only one parent living with the children, that parent is frequently the only psychological parent In the present case the concept conveys no more, than that S. had made the situational adjustment which required her to look primarily to Mr. and Mrs. P. for the satisfaction of her physical and emotional needs. That she should look upon Mr. and Mrs. P. as her "psychological parents" implies no rational and not even an instinctive choice on her part, but all it meant was that she had come to accept the situation which in fact existed. It does not even signify that these physical and emotional needs were met well, but all the test conveys is that at the time of the test, the P's stood by and large *in loco parentis* as far as S was concerned. Nor does the broad description of a person as the psychological parent mean, that all important adult attachments of the child are necessarily directed to that person. The description of a person as the psychological parent is not of itself a testimonial of that person's fitness to be the custodian of the child.³¹

The attitude expressed by Strauss, J. seems, at least in terms of the analysis made by Crouch³², consonant with the response of the American courts to the writings of Goldstein, Freud and Solnit.

From various standpoints, it is clear that *E.* is a most important and, all being well, unusual case. From the admittedly peculiar position of the family law teacher in Australia, *In the Marriage of E and E (No. 2)* seems likely to provide a launching pad for the teaching of issues raised by contested

25. Notably, the matters of the wishes of the children and religious beliefs of the interveners.

26. *Supra* n. 9 and text.

27. *Supra* n. 19. See also *Overton v. Martinez* [1978] F.L.C. 90-406. For further comment, see *Supra* n. 22, at 7.

28. [1970] A.C. 668.

29. [1978] Q.B. 120 (C.A.). For comment, see F. Bates (1978), 56 Can. B. Rev. 516. See also *In re W. (An Infant)*, [1971] A.C. 682 (H.L.) and *O'Connor v. A. and B.*, [1971] 1 W.L.R. 1227 (H.L.).

30. J. Goldstein, A. Freud and A.J. Solnit, *Beyond the Best Interests of the Child* (1973) 17-20, 98.

31. *Supra* n. 6, at 78, 391.

32. R.E. Crouch, "An Essay on the Critical and Judicial Reception of *Beyond the Best Interests of the Child*" (1979), 13 Fam. L.Q. 49.

custody disputes, a position hitherto held by *Priest v. Priest*³³. Its many facets can introduce a student to a great many of the legal, moral and social considerations inherent in the adjudication of a custody dispute. No commentator, least of all the present, is likely to be able to make any alternative disposition to that which was made in that case.

Parents versus Grandparents

Yet another issue which was raised in the judgment of Strauss, J. in *E* the large difference in age between Mr. and Mrs. P. and the child. This matter is important to the present discussion because of the not infrequent occurrence of intervention by grandparents. In another area of Australian family law, the courts had already shown themselves hostile to the omission of a generation in the question of the upbringing of children. In the case of *Re X*, which involved a proposed adoption by grandparents, Selby, J. had said:

The creation of a situation in which the child's mother would legally become her sister is fraught with dangerous possibilities. The probability of future discord between the child's mother and her parents . . . and a conflict of loyalty in the child is so real that I cannot feel satisfied that it would promote the child's welfare to make the order.³⁴

In Australia, there have been recent cases directly involving the role of grandparents in custody disputes under the *Family Law Act*. It is, perhaps, not altogether without significance that two cases in the Family Court of Australia, and the way in which they were dealt with, were decided by that remarkably far-sighted judge in that jurisdiction, Wood, S.J.³⁶. In *In the Marriage of Smith and Swain*³⁷, a former wife had remarried and was living in a city some thousands of miles from her four year old daughter who was living with the former husband's parents. The mother applied to regain custody but her application was resisted by the grandparents, who intervened in the proceedings and who had cared for the child for over two years. Wood, J., as he then was, ordered that, until further order, the custody of the child be awarded to as the grandparent interveners but with liberal access to the mother³⁸. At the same time, however, the judge was of the view that the interests of the child would ultimately be served by her returning to her mother's custody. Wood, J. found that the mother was enjoying a happy relationship with her new husband, who himself genuinely desired to establish a reconstituted group incorporating the daughter. Nonetheless, the evidence suggested to Wood, J. that the child's "entire stability and emotional balance would be threatened were she to be removed from the secure environment of the last eighteen months and transferred into a strange environment."³⁹ His Honour also found that the home which the child had with the grandparents constituted the secure and loving environment which

33. (1963), 9 F.L.R. 384 (Sup. Ct. Vict.). See A.D. Hambly and J.N. Turner, *Cases and Materials on Australian Family Law* (1971) 543.

34. [1964-5] N.S.W.R. 468, at p. 470 (Sup. Ct. N.S.W.). See also the English case of *In re D.X. (An Infant)*, [1949] 1 Ch. 320 (High Ct. Ch. D.), at 321.

36. For comment regarding the decisions of Wood, S.J. in a slightly different area, see F. Bates, "The Relevance of Children's Wishes In Contested Custody Cases: An Analysis of Recent Developments in Canada and Australia" (1979), 2 F.L.R. 83, at 86.

37. [1978] F.L.C. 90-400 (Fam. Ct. Aust.).

38. It was not necessary to make an order for access in respect of the father as he already was able to take advantage of access because of his relationship with his parents. See *id.*, at 77, 057.

39. *Supra* n. 37, at 77, 056.

a developing child needed and that she had formed a deep attachment to her grandparents. In view of all these considerations, Wood, J. referred the whole matter to his Depute Director of Counselling to report to him as to how the orders and the child's future should best be organized "not so much from the point of view of giving interested adults the benefit of [the child's] company, but from the point of view of bolstering [her] sense of security and assisting her in the eventual change in her custodial situation".⁴⁰

Another case decided by Wood, J., although perhaps tangential to the central issue, was *In the Marriage of Lawrence and Lawrence*⁴¹. In that case, a father had applied for the continuation of an *ex parte* interim order granting him custody of his small son. Wood, J. granted the order and expressed sympathy with the difficulties which the child had faced. It appeared that the mother had travelled to a very distant part of Australia, where she had had, in the judge's words, 'some amatory experiences'. The husband was living with his parents, his mistress and the boy in a less than adequate home. The boy, however, had been living there for some time after a series of changes of home. Wood, J. commented that, "The significant thing is that whatever may be the degree of stability, or lack of stability of the parents, the grandparents seem to me unchallenged as persons who have had an association with the child, who are accustomed to the child and who can care for the child."⁴² Accordingly, he made the order conditional on the basis that the grandparents continue to live with the father while the child is living at his home.

These two cases illustrate that one judge at least of the Family Court of Australia, at any rate, is aware of the beneficial influence which grandparents may be able to play in the development of a child. The relevance of deep attachment of the child to the grandparents in *Smith and Swain* would accord with the views of Goldstein, Freud and Solnit⁴³ and the views expressed by the judge in *Lawrence* seem to find an interdisciplinary analogue in the views of Rutter⁴⁴, who has emphasized the totality of the child's experience.

Grandparents have also figured in cases involving the right of parties to intervene.⁴⁵ In *In the Marriage of Hogue and Hogue*⁴⁶, the child's paternal grandmother had sought to leave to intervene under s.92 of the *Family Law Act*. Wood, J. considered that his chief concern was whether the paternal grandmother should have any future role in the upbringing of the child. The affidavits revealed that the grandmother had been the person substantially concerned with the care, control and upbringing of the child almost from birth and, therefore, it was conceivable that the court would make an order which would place the continued care and control in the parental grandmother. Woods, J. concluded that the grandmother was entitled to be heard

40. *Id.*, at 77, 057.

41. [1976] F.L.C. 90-135.

42. *Id.*, at 75, 644.

43. *Supra* n. 30.

44. M. Rutter, *Maternal Deprivation Reassessed* (1972) 125.

45. The question of the right to intervene also involves jurisdictional issues under the *Family Law Act*. See *Russell v. Russell; Farrelly v. Farrelly* [1976] F.L.C. 90-039 (High Ct. Aust.) and *In the Marriage of Robertson and Robertson* [1977] F.L.C. 90-214 (Fam. Ct. Aust.).

46. [1976] F.L.C. 90-097 (Fam. Ct. Aust.).

on the basis of being represented and not merely being called as a witness.

Grandparents were also concerned in the case of *In the Marriage of Pearn and Appleby*⁴⁷ where Frederico, J. discussed the general principles applicable in disputes between natural parents and interveners. In *Pearn and Appleby*, the wife had initially applied to the Family Court for custody of her four year old daughter. By the time of the hearing, the husband had consented to her having custody, but a dispute then arose between the former spouses and the maternal grandparents, who had been granted leave to intervene. In granting leave, Frederico, J. seemed to take a rather more restrictive view of when leave ought to be granted than did Wood, J. in *Hogue*, although he came to the same conclusion for very similar reasons. But he did say that, "Leave to intervene in a proceeding between husband and wife as to custody of their child could not be lightly granted to any interested third party, but only in special circumstances."⁴⁸ Frederico, J. mentioned two factors which justified permitting the grandparents' intervention in *Pearn and Appleby*: first, the close relationship which had existed between the interveners and the child, to the extent that the grandparents were *de facto* custodians of the child and had evidenced a real concern for the child; second, that the interveners were *prima facie* in a position to mount a viable claim that custody should be granted to them rather than to either of the natural parents. Frederico, J. regarded the second consideration as the crucial one and said that had it not been present an order for separate representation of the child would have been more appropriate. "But," his Honour went on to say, "in a case where the interveners were themselves in a position to claim custody, or to play a significant role in the upbringing of the child, the child's interests would best be placed by the interveners themselves . . ."

The additional facts in *Pearn and Appleby* which were relevant to the outcome of the case were that there had been two previous orders, one from a Court of Petty Sessions and the other from the Supreme Court, granting custody to the father. Since that time, arrangements with the father's sister-in-law for the care of the child had broken down, and the father had remarried. The mother had also remarried, had set up her own hairdressing business and her life style had stabilised. Frederico, J. awarded custody to the mother with specified access to the grandparents. The judge was of the opinion that it would be contrary to other provisions⁵⁰ in the *Family Law Act* to deal with matters of child custody as between parents and a blood relative or stranger⁵¹ on the basis of claims based on notions of "parental right" or "preferred role of a parent"⁵² or even on the basis of a "rebuttable presumption"⁵³ in favour of the parent.

A particularly important passage of Frederico, J.'s judgment referred to s.43(b) of the *Family Law Act*, which requires that the Court, in pro-

47. [1976] F.L.C. 90-231 (Fam. Ct. Aust.).

48. *Id.*, at 76, 228.

49. *Id.*, at 76, 229.

50. These provisions were s. 64(1)(a) of the *Act*, which required that the court regard the welfare of the child as the paramount consideration, and s.43(c) which provided that, in adjudicating proceedings under the *Act*, the court must have regard to the need to protect the rights of children and to promote their welfare.

51. The present writer has elsewhere deprecated the use of the word "stranger" in this context. See *supra* n. 22, at 5-6.

52. See e.g. *Westwood v. Palise* [1973] V.R. 311 (Sup. Ct. Vict.), *Nobels v. Anderson* [1972] V.R. 821 (Sup. Ct. Vict.).

53. See e.g. *C. v. R.*, [1967] V.R. 220 (Sup. Ct. Vict.), at 226-7.

ceedings under the *Act*, have regard to, "the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of young children". In the abstract, the present writer is by no means convinced of the utility or value of including such assertions of doubtful anthropological accuracy in legislation, but particular difficulties are caused in circumstances such as those in *Pearn and Appleby*, a fact recognized by Frederico J. Referring to s.43(b), he said:

This may create a different situation where the family remains a viable unit, but in the situation of a case such as this where the family unit is irretrievably disrupted it could be contrary to the welfare of the child to deal with the matter on any of the above bases. Nor is it helpful to rely on any "statistical" formula such as natural parenthood being decisive "in many, no doubt in most, cases" if only for the reason that it would be relatively infrequently that an intervener would see fit to challenge a parent for custody and then obtain the court's leave to do so.⁵⁴

Frederico, J. went on to say⁵⁵ that, in his opinion, the correct basis upon which the court should proceed had been expressed by Helsham, J. in *Re B.W.C. (An Infant)*, who said that, "No rule of practice in this Court gives preference to any right of the parent, nor requires the court to do other than to have as its first and paramount consideration the welfare of the child in question, giving such weight to the claims of blood relations as common sense and human nature dictate".⁵⁶ The judge considered the evidence at length and concluded that both the mother and the interveners would be suitable custodians. However, he was of the view that the child's interests would best be served by her being placed in the custody of her mother, commenting that to award custody to the grandparents, only permitting the natural parents to have access to the child, would "be a most unusual situation and one which could well cause the child doubt and insecurity as she advances in age".⁵⁷

Additional factors which the Judge felt militated against the grandparents' claim were, first, that they were two generations removed from the child which could prove to be disadvantageous to the child as she matures, a problem which was, second, exacerbated by the isolation in which the interveners lived and the essential simplicity of their life style. Third, his Honour was of the opinion that the mother would be able to provide a more natural and selfless affection for the girl than would the interveners, "who, as a result of their own charity, have developed a degree of possessiveness towards the child which seems to some extent to be unhealthy."⁵⁸

Pearn and Appleby is not an easy case to evaluate, as much of the adjudicative process was based on the impressions which the judge had formed of the various parties, and these impressions cannot properly be disputed. On the broader issues, nevertheless, it does seem that the case does not make the lot of non-parent interveners easier. The grandparents were, according to Frederico J., good and charitable people who had been led into the present unhappy situation as a result of the conduct of their

54. *Supra* n. 47, at 76, 230.

55. *Id.*, at 76, 231.

56. [1969] 1 N.S.W.R. 100 (Sup. Ct. N.S.W.), at 104.

57. *Id.*, at 76, 233.

58. *Id.*, at 76, 234.

daughter, who, in fact, maintained an antipathetical attitude towards them. *In the Marriage of Pearn and Appleby* clearly does demonstrate that balancing the criteria to be weighed in the process of decision making in this kind of case can, and does, prove to be a remarkably difficult process.

Non-Relatives

It is not, of course, merely relatives of the child who may be granted permission to intervene under s.92 of the *Family Law Act*. In the case of *In the Marriage of Waters, Waters and Townsend*⁵⁹, a woman, who had been the full-time nurse of the child from its birth until several years after the breakup of the parents' marriage, had appealed against a decision refusing her permission to intervene. At the time of the parents' divorce, the father had been granted custody of the girl and the nurse continued to be responsible for her day-to-day care until she reached the age of twelve. At that point, the father dismissed the nurse and proposed to place the child in a boarding school. The nurse then applied for orders granting her permission to intervene and for custody of the child. Both these applications were dismissed, however, on appeal the Full Court of the Family Court of Australia granted leave to intervene.

Cases Under State Law

There have, in addition to the cases under the *Family Law Act*, been two recent cases involving state law, in both instances the custody and wardship jurisdiction of the New South Wales Supreme Court. *Thompson v. Thompson*⁶⁰ involved the custody of two children of the defendant father and his deceased wife, who had died some eighteen months prior to the hearing. The plaintiff in the action was the 35 year old unmarried daughter of the deceased wife by a previous marriage or association. The children were presently living with her. The defendant had remarried and was living with his second wife and her two sons in a house owned by the new wife. Needham, J., having decided that the court had jurisdiction to entertain the matter⁶¹, ordered that the father have custody of the two children. He said:

The task of the Court is to give effect to the course which will advance the welfare of the children. In doing so, I am entitled, if not bound by authority, to assume that, all other things being equal, the welfare of the children is best served by being brought up by their parents. Here we have but one parent who had remarried and can offer a home in which a woman's care can also be exercised and expressed.⁶²

The plaintiff, on the other hand, was only able to offer a single establishment, even though there was evidence that she enjoyed a close relationship with the children. Though not bound by previous authority, the judge referred, perhaps inevitably, to the cases of *Powell v. Anderson*⁶³ and *Storie v. Storie*⁶⁴ and noted that, in this kind of case, it was incumbent on the plaintiff to overcome the high regard had by the courts for the notion

59. [1978] F.L.C. 90-428 (Fam. Ct. Aust.).

60. [1980] F.L.C. 90-815 (Sup. Ct. N.S.W.).

61. The judge decided that the matter was not a "matrimonial cause" as described in s.4 of the *Family Law Act* as it was not a dispute between parties to a marriage. To have held otherwise would have brought the case under the *Family Law Act* and, thus, to be tried by the Family Court of Australia. Cf. *Meyer v. Meyer* [1978] F.L.C. 90-465 (Sup. Ct. N.S.W.).

62. *Supra* n. 60, at 75, 144.

63. *Supra* n. 19.

64. *Supra* n. 17.

that the best interests of a child were generally served by being brought up by its natural parents in its family group. Despite the fact that there were matters which told against both of the parties, it seems as though the presumption in favour of natural parents was the crucial factor in the ultimate decision in *Thompson*.

In *Lloyd v. Lloyd and Others*,⁶⁵ Needham J. was required to deal with rather different matters from those in his prior decision in *Thompson v. Thompson*. In the *Lloyd* case, the natural mother, was a twenty-one year old widow, sought custody of her two children as against the defendant aunt and uncle of the children. The case was complicated by the fact that there was evidence that the mother had, at various times, been unable to cope with the children. Further, the defendants claimed that the mother had neglected and ill-treated the children and was, in other ways, an unfit mother. Various witnesses were called, some of whose evidence the judge found to be exaggerated, and the evidence of a psychiatrist was called on behalf of the mother. Needham J. made the children wards of the court, although he gave care and control to the plaintiff mother, to ensure that the court's approval would be required for all decisions of importance in the children's future. In addition, it was made a condition of the care and control order that the mother accept the assistance and counselling of a social worker, to be nominated by the Director of Youth and Community Services, who would make regular reports to the Court regarding the welfare of the children. The judge also commented, perhaps with considerable significance, that "Orders of this nature are not final. Once the children have been made wards of the Court, it is open to the Court itself to make any necessary alterations to the orders which seem necessary by the state of affairs at the time — for example by revoking the order investing custody in the plaintiff."⁶⁶ Despite this last warning comment, it was again inevitable that the authorities relied upon by Needham J. were *Powell v. Anderson* and *Storie v. Storie*. However, his Honour's attitude to these decisions seemed to be a little different from that which he had expressed in *Thompson*. After quoting from the judgments of Moffitt P. in *Powell* and Latham C.J. in *Storie*, Needham J. stated that he did not think that these two judges were, ". . . enunciating legal principles. At the highest, these statements amount to a recognition that there is a rebuttable presumption that, in a contest between parents and strangers, the welfare of the child is best served by being brought up by the parents."⁶⁷ This comment appears to be rather less strong in its endorsement of the parents' rights idea than that made by the same judge in the case previously discussed.⁶⁸ In addition, Needham J. referred to the case of *J. v. C.*,⁶⁹ which, at the very least, strengthened the hand of long term foster parents as against natural parents where the interests of the child were congruent with that course of action.⁷⁰

What, then, do these Australian cases broadly tell us? It is submitted that, despite the various legislative provisions allowing children to be placed

65. [1980] F.L.C. 90-816 (Sup. Ct. N.S.W.).

66. *Id.*, at 75, 154.

67. *Id.*, at 75, 150.

68. *Supra* n. 62-64 and text.

69. *Supra* n. 28.

70. For more detailed comment, see *supra* n. 22, at 1-3.

in the custody of people other than parents, the Australian courts are, nevertheless, reluctant to adopt that course of action. The reasons which they have expressed, ranging from presumptive notions of parental right and of necessary parental benefit to the child's development, such as expressed in *Thompson*,⁷¹ to doubts about the suitability of particular interveners, as have been expressed in various cases, demonstrate the judicial scepticism which permeates the area. At the same time, the liberal way in which s.92 of the *Family Law Act* has been interpreted suggests that the way is not totally closed.

The Canadian Cases

As might be expected, there is not inconsiderable judicial dispute inherent in the Canadian case law. However, there have been some very strong comments from Canadian judges in support of claims of parental right.

A case arising under the *Divorce Act* where this opinion was expressed was *Bratland v. Bratland*.⁷² There, the children had been placed in the care of their paternal grandmother by an interim custody order. The respondent husband had indicated that he would move in with his mother, who appeared to be a responsible person and would provide the children with good care and accommodation for the time being. In addition, there was evidence that, during the period of the breakup of the parties' marriage, the mother had neglected and ill-used the children. Despite these facts, after an analysis of earlier case law,⁷³ McDonald, L.J.S.C. of the British Columbia Supreme Court awarded custody to the mother. As regards the mother's conduct, which had included threats to kill both herself and the children, the judge was of the opinion that regard ought to be had to the qualities which she displayed as a mother rather than to those she displayed as a wife.⁷⁴ Concerning the welfare of the children, the judge was satisfied that the arrangements provided by the grandmother were appropriate in the short term, but said that:

[U]nder this arrangement it would be the grandmother who would have the care and upbringing of these children for the time being at least and should the father remarry then the care and upbringing of the children would be in the hands of the step-mother. As regards the paternal grandmother, while she would care for and look after the children, the fact remains that children of this age need their mother; it is nature's way.⁷⁵

This statement is not a little disturbing. Even at its most basic level, it is a very strong statement of parental right, as the potential claims of two surrogate parents were dismissed. One cannot help but express misgivings regarding McDonald L.J.S.C.'s comments regarding a future stepmother. The position of step-parents is rather ambiguous in modern law⁷⁶ and that ambiguity is generally compounded from a variety of literary and anecdotal

71. *Supra* n. 62-64 and text.

72. (1978), 29 R.F.L. 34 (B.C.S.C.).

73. See *Re Orr*, [1933] 2 D.L.R. 77 (Ont. C.A.); *Baker v. Baker*, [1943] 2 D.L.R. 22 (Ont. C.A.); *Weeks v. Weeks*, [1955] 3 D.L.R. 704 (B.C.C.A.); *Talsky v. Talsky*, [1976] 2 S.C.R. 292; *Re Chave* (1967), 62 W.W.R. 193 (B.C.C.A.).

74. *Supra* n. 72, at 40.

75. *Id.*, at 42.

76. For comment, see S. Maidment, "The Step Relationship and Its Legal Status" (1976), 5 *Anglo-American L. Rev.* 259.

sources.⁷⁷ These judicial statements in *Bratland* are unlikely to go any way towards resolving the position of step-parents. Further, and perhaps rather more serious, is the attitude expressed by the judge towards the relationship between the children and their natural mother, which he regarded as being in the nature of an inviolable bond, which, in turn, could not be replaced by any other person. As has been observed in relation to the Australian case of *In the Marriage of E and E (No. 2)*, this view is not one which is held with unanimity either by judges or behavioural scientists.

The natural parent was also granted custody over the grandparents in *Howland v. Howland*⁷⁸, although the grandparents' claim was not as strong as those in other cases as the child had not been living with them for any great length of time. Bence C.J.Q.B. applied the comments of Rand J. of the Supreme Court of Canada in *Hepton v. Maat* where that judge had said:

It is, I think of the utmost importance that questions involving the custody of infants be approached with a view of the governing considerations. That view cannot be less than this: *prima facie* the natural parents are entitled to custody unless by reason of some act, condition or circumstance affecting them it is evident that the welfare of the child requires that that fundamental natural relation be severed.⁷⁹

Bence C.J.Q.B. emphasised that the process involved in deciding this kind of question was not "a question of balancing one situation off against the other and determining the issue on the balance of probabilities."⁸⁰

In the slightly earlier case of *Re Mackinnon*⁸¹, the strength for claims of parental right may be seen. The dispute in this instance was between the natural mother, the petitioner, and the child's paternal grandparents. There was evidence that the mother, who lived in a trailer, had committed adultery and was living in conditions which seemed to be distinctly squalid. On the other hand, Hart, J. commented about the grandparents that the home which they maintained represented an ideal type of environment in which to rear that particular child. Nevertheless, he ordered that the little girl in question be returned to her natural mother. It is clear that Hart, J.'s decision was based entirely on the view that the child would necessarily be better off with her natural mother. He said:

I cannot reach the conclusion that a two-year old year should be deprived of the normal influences of the maternal relationship that exists between mother and daughter. The evidence may indicate that she is a very poor housekeeper, but this is not sufficient in my opinion to justify the removal of a child from a parent who wants that child, even though some very good custodial arrangements could be made.⁸²

Again, there are some disturbing features in this decision. The facts seemed to suggest evidence of peripheral neglect and, certainly, a lack of proper hygiene. Whilst taking into account the notorious difficulty of demarkation in the area, one wonders how much more evidence relating to

77. Thus, for example, the wicked step-parent is not an uncommon figure in children's fiction (See *Cinderella*, *Snow White*, *The Babes in the Wood*) and in the anonymous Scots Ballads (See *The Lairdly Worm*, for instance). In the latter form, however, natural parents are not always depicted as acting in their children's best interests'. (See *The Famous Flower of Serving Men and Edward, My Son*).

78. (1974), 18 R.F.L. 311 (Sask. Q.B.).

79. [1957] S.C.R. 606, at 607.

80. *Supra* n. 78, at 315.

81. (1972), 4 R.F.L. 61 (N.S.S.C.).

82. *Id.*, at 64.

the mother's scarcely satisfactory standard of living would be needed to change the decision. In many jurisdictions, the preferred right of the mother in these cases is not as entrenched as once it was⁸³ and the eight years between the original decision in *Re Mackinnon* and the present commentary could well have seen some change.

But, of course, the line of demarcation is blurred. In *Allen v. Allen*⁸⁴, for example, the child's paternal grandmother had had effective care and control for some time. She intended to bring the child up as her own and had expressed a strong dislike of her daughter-in-law, the child's natural mother. Stark, J. awarded custody to the natural mother, finding that she was an entirely suitable guardian, being both a natural and psychological parent to the child.

In the case of *Cortan v. Dessler*⁸⁵, the applicants, who were the natural mother and father of the child, brought an application under the Ontario *Infants Act*⁸⁶ for the custody of their child from the respondent, the child's maternal grandmother who, herself, brought a cross-application for custody. The relevant facts were that the applicants had married young and, in 1971, as a result of their inexperience and financial position, the marriage had faltered. The child was then given to the respondent who had retained her until the time of the instant action. The applicants became reconciled in 1975 and resumed cohabitation. The reason for the application was that it was discovered that the respondent's husband had committed indecent acts on one of the respondent's children, had a serious drinking problem and had seriously assaulted his wife. Further, although the husband had been prohibited from entering the premises while the respondent was living there, he had, in fact, been to the house. Maedel, Surr. Ct. J. ordered that custody should be granted to the natural parents. The judge refused to find that the applicant parents had abandoned the child but did, in reality, have the interests of the child at heart when they left her with the respondent when they separated. There was, the judge considered, no thought of the child's being ultimately adopted by the respondent.

It had also been argued on behalf of the respondent that if custody were to be awarded to the natural parents, it would result in the child's being taken from her school, her friends and her familiar surroundings and in her religious faith being changed.⁸⁷ Even so, the judge still considered that the child's interests were best served by a transfer of custody. The child had not been well looked after in the respondent's care and had not become attached to other children in that household. The judge did find that the child looked upon the respondent as her mother, but this he thought was only because of inducements made by the respondent to the child. It is submitted that the decision in *Cordon v. Dessler* was clearly correct as the unsuitability of the third party's household was quite obvious.

83. See F. Bates, "The Changing Position of the Mother in Custody Cases: Some Comparative Developments" (1976), 6 Fam. L. 125.

84. (1975), 19 R.F.L. 25 (Ont. S.C.).

85. (1978), 4 R.F.L. (2d) 111 (Ont. Surr. Ct.).

86. R.S.O. 1970, c. 222.

87. The respondent was a member of the *Jehovah's Witnesses* sect. For comment, see F. Bates, "Child Law and Religious Extremists: Some Recent Developments" (1978), 10 Ottawa L. Rev. 299.

A case where a grandmother was successful in obtaining custody is *McQuillan v. McQuillan and Salomaa*.⁸⁸ The child, at the time of the hearing, was aged four and a half years and had spent the greater part of her life with her grandmother while the mother searched for a philosophy which would bring her happiness. At the time of the hearing, the natural mother was a member of the Hare Krishna sect, although the judge was of the opinion that there was no guarantee that the mother would remain in the sect or was sufficiently mature to raise the child properly even in connection with that sect. On the broader issue of disputes between parents and non-parents, O'Leary J. stated that:

Neither, in my view, in a contest between a parent and a non-parent is a parent to be denied custody simply because on a balancing of all those consideration that relate to the welfare of the child it can be said that the child would be better off with the non-parent. If [the natural mother] had been able to establish that she could properly look after her son I would have awarded custody to her, even though on a weighing of all factors it appeared the child would be better off with his grandmother.⁸⁹

Thus, the major reason why custody was awarded to the grandmother was that, if that course of action was not adopted, the welfare of the child would be actively endangered. The case can, therefore, not be looked to as demonstrating any willingness in the courts to award custody to a non-parent in anything but a severe case.

At another level, O'Leary, J.'s decision in *McQuillan*, and the approach towards the general principles to be applied in such cases was inevitable, as it followed hard on the same judge's decision in *Wiltshire v. Wiltshire*⁹⁰ where reference was made to the Ontario Court of Appeal's landmark decision in *Re Moores and Feldstein*⁹¹. This case, like *J. v. C.*⁹², strengthened the hand of long term foster parents in disputes with natural parents.⁹³ In *Wiltshire*, O'Leary, J. was of the strong opinion that the *Moores* case ought not to be interpreted

to mean that in all cases in a contest for custody between a parent and a non-parent the question is what is in the best interests of the child . . . Parents do not stand the risk of losing custody of their children just because a non-parent can establish that it would be in the best interest of those children that the non-parent have custody.⁹⁴

O'Leary J. went on to say that a natural parent would be deprived of custody where to give him custody would endanger the welfare of the child.⁹⁵ Thus, a natural parent would not be awarded custody where he was unable to replace the personal relationship which the child had hitherto enjoyed or where the household provided by the natural parent was significantly less adequate than that where the child had been living. The result in *Wiltshire* was that custody was awarded to the maternal grandmother as the proposals which the father had advanced for the care of the child were wholly unsatisfactory when compared with the orderly and stable

88. (1976), 21 R.F.L. 324 (Ont. S.C.). For comment on another aspect of the case, see Bates, *supra* n. 87, at 307.

89. *Id.*, at 330-1.

90. (1976), 20 R.F.L. 50 (Ont. S.C.).

91. (1974), 12 R.F.L. 273 (Ont. C.A.). For comment see *supra* n. 22, at 8-9.

92. *Supra* n. 28.

93. See also *Dey v. Tanguy* (1978), 30 R.F.L. 109 (Ont. Div. Ct.).

94. *Supra* n. 87, at 56.

95. *Id.*, at 57.

home offered by the grandmother. *Wiltshire* is, perhaps, a more straightforward case than *McQuillan* in that the arrangements suggested by the father, which involved sharing the care of the child amongst the father and his friends because of his work commitments, were so obviously unsatisfactory.

It is also true to say that disputes between parents and non-parents cannot be treated separately from other issues. For instance, both *McQuillan* and *E and E*⁹⁶ additionally dealt with involvement with esoteric religious sects. The additional factors in *Banks v. Banks*⁹⁷ were rather more mundane. Both the husband and wife had applied for custody of the child and Kirby J. of the Alberta Supreme Court found that both parents were fit to raise the child. The husband, however, was living with his parents and the child would reside there if the husband was successful in his application. The grandparents were fond of the child and were able to look after her. Conversely, the wife would have required approximately \$200 per month from her husband to provide day-care for the child and to maintain a proper standard of living. The husband claimed that, at the relevant time, he was unable to afford to make that kind of provision. Kirby J. awarded custody of the child to the husband and vested guardianship in the grandparents. The key to his decision was the position of the grandparents who were able to step in and provide the proper environment and security for the child. The similarity between the approach of Wood J. in *In the Marriage of Lawrence*⁹⁸ and the instant case is clearly apparent.

As a general comment on the Canadian cases, the task of assessment has been made more difficult by the fact that the judges are reluctant to comment on the broad principles which might govern disputes between parents and non-parents. Instead, they have tended to confine themselves to evaluation of the facts of the specific cases.

Conclusion

The case law on disputes between parents and non-parents in custody cases, in both Canada and Australia, does not present a particularly coherent picture. This is probably inevitable since, as Kirby J. noted in *Banks*,⁹⁹ the area is a particularly difficult one. As a tentative conclusion, it may be said that Canadian courts are rather more willing to award custody to third parties than are their Australian counterparts. This practice would seem to be consonant with the way in which those courts have treated the claims of foster parents¹⁰⁰ and, also, possibly with a greater willingness on the part of the Canadian courts to utilise state agencies¹⁰¹. Although the present discussion has much in common with the issue of disputes between natural parents and foster parents, the present matter is altogether more complex because, in the case of foster parents, their relationship with the child has been, to some degree at any rate, formalized. Another difficulty is

96. *Supra* n. 6.

97. (1978), 2 R.F.L. (2d) 179 (Alta. S.C.).

98. *Supra* n. 41.

99. *Supra* n. 97, at 182.

100. *See supra* n. 22.

101. *See Doey v. Doey* (1978), 3 R.F.L. (2d) 38 (B.C.S.C.). For comment, *see* F. Bates, *supra* n. 36, at 85.

also apparent in that many of the non-parents involved in these cases are grandparents. The resulting problems relating to age differences and family hierarchy have already been noted in connection with the discussion of *In the Marriage of E and E (No. 2)*¹⁰². These are, of course, additional to the difficulties normally attendant on any contested custody case.

However, it is suggested that these difficulties can be minimised if two broad principles are kept in view. First, the welfare of the child must genuinely be regarded as the paramount consideration; hence, the present writer would emphatically reject the formulation made by O'Leary J. in *McQuillan*¹⁰³ and *Wiltshire*¹⁰⁴. Awarding custody to a non-parent ought not to be, in any way, regarded as an emergency or last resort measure but rather as one which can be used to enhance the welfare of the child. Second, in this as in so many related areas, we should not have too idealised a view of the natural conjugal family, which, so often, can be an unpleasant and dangerous place for its weaker members who are often children. The cases and writings on child abuse alone tell us that. If granting custody to a non-parent is going, even on balance, to protect the child or provide a more suitable environment then the courts ought not to shirk adopting such a course of action and, equally, ought not to avoid saying that they are prepared so to do.

102. *Supra* n. 85.

103. *Supra* n. 87.

104. *Supra* n. 90.

