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Book Review: The Best Interests of Children: An Evidence-Based Approach, by Paul Millar

Book Review

THE BEST INTERESTS OF CHILDREN: AN EVIDENCE-BASED APPROACH, by Paul Millar¹

NOEL SEMPLE²

IF CUSTODY AND ACCESS DISPUTES are a deck of cards, the best interests of the child doctrine is the trump suit. When separating parents litigate about how—and with whom—their children should live, findings about what is best for the children are meant to sweep away the parents' interests and rights claims. This principle is uncontroversial, but applying it is difficult. What parenting arrangements are best for children, and how successful is the legal system in putting these arrangements in place? Sociologist Paul Millar responds to these questions with this volume, the goal of which is to “explain child custody outcomes in Canada in terms of factors that predict legal behaviour and factors that are empirically associated with beneficial outcomes for children.”³ The empirical data in this book are a powerful and fruitful new resource. However, the book would benefit from a broader and more objective account of the law and secondary research in this field.

I. EMPIRICAL INSIGHTS

This book uses a novel empirical methodology to generate powerful insights about the best interests of children. Empirically-minded Canadian family law scholars have often used qualitative methods, such as interviews to reveal the experiences of justice system participants.⁴ Others have applied quantitative

1. (Toronto: University of Toronto Press, 2009) 132 pages.

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3. *Supra* note 1 at i.

4. See e.g. Michaela Keet, Wanda Wieggers & Melanie Morrison, “Client Engagement Inside Collaborative Law” (2008) 24 Can. J. Fam. L. 145; Rachel Birnbaum & Nicholas Bala,

methodology to relatively small samples of court documents.⁵ Millar, however, has produced a statistical analysis of enormous data sets that are relevant to family policy issues. This type of research is unprecedented in Canadian family law.

The book's first substantive chapter draws on data from the Central Divorce Registry, which has basic information about every divorce granted in Canada between 1986 and 2002. Using multivariate modelling techniques, Millar identifies several variables that predict the custody outcome of a divorce. The main finding is that "women gain some form of custody 89 per cent of the time, while men completely lose custody in 67 per cent of the cases."⁶

Chapter three reviews scholarship about the relationship between divorce and children's welfare, about children's interests after divorce, and about child custody evaluations. The strongest part of the book is chapter four, which examines factors that lead to positive or negative outcomes for children. This chapter draws on data from the National Longitudinal Survey on Children and Youth, which was conducted by Statistics Canada between 1994 and 2001. Almost ten thousand households with children were contacted as part of the study, and the "Person Most Knowledgeable" (PMK) about any children in the household was asked questions about the child(ren), about himself or herself, and about the household. The welfare of the children was rated by the PMKs in terms of eight outcome variables, such as "emotional disorder" and "overall school performance."⁷

"The Child's Perspective on Representation: Young Adults Report on Their Experiences with Child Lawyers" (2009) 25 Can. J. Fam. L. 11; and Janet Mosher *et al.*, *Walking on Eggshells: Abused Women's Experiences of Ontario's Welfare System: Final Report of Research Findings from the Women and Abuse Welfare Research Project* (2004), online: Osgoode Hall Law School <http://www.yorku.ca/yorkweb/special/Welfare_Report_walking_on_eggshells_final_report.pdf>.

5. See *e.g.* Renée Joyal & Anne Quéniart, "Enhancing the Child's Point of View in Custody and Access Cases in Québec: Preliminary Results of a Study Conducted in Québec" (2002) 19 Can. J. Fam. L. 173; Shelley Kierstead, *Parent Education Programs in Family Law Courts: Perils and Potential* (D. Jur. Dissertation, Osgoode Hall Law School, 2005) [unpublished], online: <<http://proquest.umi.com/pdqweb?did=1126759891&Fmt=7&clientId=65345&RQT=309&Vname=PQD>>; and Noel Semple, "The Silent Child: A Quantitative Analysis of Children's Evidence in Canadian Custody and Access Cases" (2009) 29 Can. Fam. L.Q. 1.
6. *Supra* note 1 at 24.
7. *Ibid.* at 82.

Scholars and judges have often complained about the ambiguity of the best interests of the child standard.⁸ Millar's signal contribution to custody policy is to use the survey data to statistically link particular outcomes with certain characteristics of the PMK and the household. While this reviewer is not equipped to critically evaluate the statistical methods that Millar deploys,⁹ the book makes a convincing case that there are significant causative (and not merely correlative) relationships within the data.¹⁰

The strongest effects on the outcome variables were a result of verbal and physical punishment, which had negative impacts on children. Significant and positive effects were also found for "consistency in discipline," and praising, laughing, and playing with the child.¹¹ Empirical findings such as these have the potential to contribute to "evidence-based practice" in custody and access disputes.¹² Reliable empirical data about what is good for children can shape legislation, judicial decision making, and settlements. For example, after showing the apparent benefits of a low parent-to-child ratio, Millar questions the law's skepticism about "split custody" (where siblings are placed under the custody of different parents).¹³ Split custody is likely to lower the parent-to-child ratio that the children experience. This empirically verified benefit should be considered along with the familiar drawbacks of this parenting arrangement.

More broadly, statutory instruction to consider the disciplinary styles of the parties, as well as their willingness and ability to spend time with the child, would direct judges and parents towards concrete findings of fact. This instruction could be a useful complement to the current text of Ontario's *Children's Law Reform Act*, which refers to vague factors such as the parties' "love, affection and emotional ties" with the child, and the ability of each to "act as a parent."¹⁴

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8. See e.g. Jon Elster, "Solomonic Judgments: Against the Best Interest of the Child" (1987) 54 U. Chicago L. Rev. 1; Martin Guggenheim, *What's Wrong with Children's Rights* (Cambridge: Harvard University Press, 2005) at 153.
 9. Different forms of regression analysis are described and used by Millar. See *supra* note 1 at 4-5.
 10. *Ibid.* at 51-54.
 11. *Ibid.* at 83, 111.
 12. See Michael Saini & Rachel Birnbaum, "Linking Judicial Decision-making in Joint Custody Awards with Evidence-based Practice: It Is Possible" (2005) 24 Can. Fam. L.Q. 139.
 13. *Supra* note 1 at 90.
 14. R.S.O. 1990, c. C.12, ss. 24(2)(a), 24(2)(g).

In chapter five, Millar uses the Statistics Canada Survey of Labour and Income Dynamics data set from 1999–2002 in order to analyze support payments in Canada. Child support is primarily calculated on the basis of the payor's income and the number of children involved. If the payor's income changes, either party has the right to obtain a court order varying the support obligation. Millar's clearest finding is that the amounts of support being paid do not change nearly as often as payors' incomes do. A plausible explanation is that the procedural and financial impediments to obtaining a court order varying child support deter many parents who are entitled to this relief. Millar suggests that an administrative agency would be better suited to the recalculation of child support than courts.¹⁵ While this case has been made elsewhere in the literature,¹⁶ Millar adds compelling empirical evidence.¹⁷

II. QUESTIONABLE ASSUMPTIONS

Millar's rigorous empirical research is not always accompanied by a comprehensive and neutral reading of the existing literature and case law. As a result, this book relies on a number of questionable assumptions about the legal system. These assumptions are not made at random, but rather are made to support an argument that runs throughout Millar's work in the field:¹⁸ that sole maternal custody is chosen too frequently after divorce due to judicial biases in favour of mothers over fathers.¹⁹ Millar believes that children would be better served by awarding sole or joint custody to fathers more often.²⁰

15. *Supra* note 1 at 119.

16. See Department of Justice Canada, *Retroactive Child Support: Benefits and Burdens* by Shelley Kierstead (Ottawa: Family, Children and Youth Section, 2009), online: <<http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/tool-util/topic-theme/rcs-par/pdf/rcs-par.pdf>>; Dena Bonner, "Recalculating D.B.S.: Envisioning a Child Support Recalculation Scheme for Ontario" (2007) 23 Can. J. Fam. L. 115.

17. See *Family Law Act*, R.S.O. 1990, c. F.3, s. 39.1(1) [*FLA*]. It seems that lawmakers are listening: in Ontario, provisions for a "child support service" were added to the *FLA* in 2009, although these remain unproclaimed and details are not yet available. Similar initiatives are underway in other provinces.

18. Sheldon Goldenberg & Paul Millar, "Explaining Child Custody Determinations in Canada" (1998) 13 C.J.L.S. 210; Paul Millar & Sheldon Goldenberg, "A Critical Reading of the Evidence on Custody Determinations in Canada" (2003) 21 Can. Fam. L.Q. 425.

19. *Supra* note 1 at 33–34, 110, 120.

20. *Ibid.* at 62, 119–20.

The statistical prevalence of maternal sole custody is uncontroversial and is confirmed by chapter two. The book's explanation for this phenomenon is judicial "reliance on gender as the primary determinative factor."²¹ However, there are two alternative explanations. First, given that the overwhelming majority of custody orders are made on the consent of both parties,²² fathers may not *want* custody in most cases. Millar's response is that parents are "bargaining in the shadow of the law" when they settle custody disputes.²³ In other words, fathers consent to giving up custody only because they see no hope of winning it at trial.²⁴

However, this theory relies on the dubious assumption that most fathers who consent to sole maternal custody actually want a different outcome. Custody simply means the parent has the right to make certain decisions on behalf of that child, and this right is accompanied by significant responsibilities.²⁵ What is most important to many—if not most—parents is the right to spend time with and to know their child. Orders for access provide for this interaction, and a sole custody award for one spouse is almost invariably accompanied by an access order for the other.²⁶

The second reason why sole maternal custody might be the predominant outcome despite a gender-neutral judiciary is that mothers spend more time caring for children before the relationships dissolve and are, therefore, found by judges to be better equipped to discharge this role afterwards.²⁷ Millar states that when Statistics Canada telephoned Canadian households and asked to speak to the "person who is the most knowledgeable" about the child, it was a woman who responded in 92 per cent of the cases.²⁸ This suggests a continuing gender pattern in childcare.

21. *Ibid.* at 120.

22. *Ibid.* at 9-10.

23. *Ibid.* at 9, citing Robert H. Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale L.J. 950.

24. *Ibid.*

25. See James G. McLeod, *Child Custody Law and Practice*, looseleaf (Toronto: Carswell, 1992) at § 1(1).

26. *Ibid.* at § 9(1).

27. See Susan Boyd, "From Gender-Specificity to Gender-Neutrality? Ideologies in Canadian Child Custody Law" in Carol Smart & Selma Sevenhuijsen, eds., *Child Custody and the Politics of Gender* (New York: Routledge, 1989) 126.

28. *Supra* note 1 at 83.

As Millar points out, there is also evidence that we are drawing closer to childcare gender parity in two-parent families.²⁹ However, to the extent that this move towards gender parity is a real phenomenon, it is a relatively recent one.³⁰ The data in chapter two are not presented in a form that allows one to conclude that gender trends in custody outcomes are mirroring gender trends in childcare in intact families.³¹

Millar believes that judges prefer sole over joint custody because they are in thrall to the “psychological parent” theory developed by Goldstein, Solnit, Goldstein, and Freud in the 1970s.³² This doctrine holds that each child has at least one “psychological parent,” who assumes this status through “day-to-day interaction, companionship, and shared experiences” with the child.³³ The law must protect this one relationship at all costs, usually with a sole custody order and very limited access rights for the non-custodial parent. As Millar explains, this theory is now contradicted by substantial evidence that children develop and benefit from the preservation of multiple relationships with caring adults.³⁴

In referring to the psychological parent theory as “the current dominant paradigm” that is “widely accepted in the legal community,” Millar may be overstating the theory’s current vitality.³⁵ References to it are now quite rare in the case law.³⁶ For example, a search for the terms “psychological parent” or the

29. See Health Canada, *2001 National Work-Life Conflict Study: Report One* by Linda Duxbury & Chris Higgins (Ottawa: Health Communities Division, Health Canada, 2001), online: <<http://www.phac-aspc.gc.ca/publicat/work-travail/report1/index-eng.php>>. See also Ellen Galinsky, Kerstin Aumann & James T. Bond, *Times Are Changing: Gender and Generation at Work and at Home* (2008), online: Families and Work Institute <http://familiesandwork.org/site/research/reports/Times_Are_Changing.pdf>; Kerry Daly, “The Changing Culture of Parenting” (2004), online: Vanier Institute of the Family <<http://www.vifamily.ca/node/400>>.

30. Duxbury & Higgins, *ibid.* at 58.

31. Most of the data pertains to all divorces during the period of 1986-2002, including the headline finding regarding the gender pattern. *Supra* note 1 at 24.

32. Joseph Goldstein *et al.*, *The Best Interests of the Child: The Least Detrimental Alternative* (New York: New York Free Press, 1996).

33. *Ibid.* at 12.

34. *Supra* note 1 at 60-64.

35. *Ibid.* at 115.

36. Saskatchewan is the exception. See *Gordon v. Goertz*, [1996] 2 S.C.R. 27. The concurring judgment of L’Heureux-Dubé J. mentioned the theory. This opinion was cited approvingly in *Haider v. Malach* (1999), 177 Sask. R. 285 (C.A.) [*Haider*]. The passages in these two

combination of “Goldstein” and “Freud” among Ontario cases issued after 1999 in the Quicklaw database reveals only sixteen cases among hundreds of substantive custody and access decisions issued during the same period.

Millar states that custody and access decisions today seek “severance of the child from all supportive adult relationships but one,” and that other relationships are “regarded as potential threats to the child’s well-being and are allowed only upon the discretion of the custodial parent.”³⁷ These statements are difficult to reconcile with the governing statutes and leading precedents. The *Divorce Act* states that in making a custody or access order, the court is to “give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child.”³⁸ This provision, which is known as the “maximum contact principle,” is the only specific factor relevant to the best interests standard identified by the *Divorce Act*, and courts have given it commensurate importance.³⁹ A parent without custody will almost always be given access rights that are enforceable and not subject to the discretion of the custodial parent.⁴⁰

Finally, Millar’s argument that the law should more actively encourage the child’s relationships with all competent adults would also benefit from reference to the well-established risks of this approach. Few would disagree that, all else being equal, a child’s interests are best served by preserving substantive relationships with both parents.⁴¹ However, the negative effects of inter-parental conflict

cases that refer to the “psychological parent” theory are often cited in Saskatchewan. The meaning of the theory in Canadian cases today was aptly summarized in *Haider* at para. 89:

In making a decision as to custody, consideration must be given to the importance of maintaining stability in the relationships which the child has. This is particularly important when the court is faced with a request to change the custody from the primary caregiver, who has had custody for some period of time, to the non-custodial parent.

37. *Supra* note 1 at 115.

38. R.S.C. 1985 (2d Supp.), c. 3, s. 16(10).

39. See *e.g.* *Young v. Young*, [1993] 4 S.C.R. 3 at para. 18.

40. See McLeod, *supra* note 25 at § 9(2); Nicholas Bala & Nicole Bailey, “Enforcement of Access & Alienation of Children: Conflict Reduction Strategies & Legal Responses” (2004) 23 Can. Fam. L.Q. 1.

41. See *e.g.* Rhonda Freeman, “Parenting after Divorce: Using Research to Inform Decision-making about Children” (1998) 15 Can. J. Fam. L. 79; Seth J. Schwartz & Gordon E. Finley, “Mothering, Fathering, and Divorce: The Influence of Divorce on Reports of and Desires for Maternal and Paternal Involvement” (2009) 47 Fam. Ct. Rev. 506.

on children are just as firmly established as the positive effects of contact.⁴² When parents are unable to get along, legal efforts to keep them both involved can increase the child's exposure to conflict between them.⁴³ Millar states that "joint legal custody ... is a device to enable communication related to a child's welfare to supportive adults," and it can be exactly that with the right parties.⁴⁴ However, if the parties cannot communicate constructively, joint custody can also be a prelude to years of wrangling that can seriously scar a child.⁴⁵ To seek the best interests of the child after a relationship breakdown is to balance contact promotion against conflict avoidance, but this book only places weight on one side of that scale.

Millar has brought a powerful empirical technique and an informative data set to the study of family law and policy. He uses these tools to generate useful insights about custody and child support. However, this groundbreaking empirical work is undermined by the author's injection of the father's rights agenda into the research and his selective reading of the existing literature and law in this area. Nonetheless, this book is a valuable addition to the literature and, hopefully, is a precursor to future quantitative empirical contributions to family law.

42. See *e.g.* Bala & Bailey, *supra* note 40; Martha Shaffer, "Joint Custody, Parental Conflict and Children's Adjustment to Divorce: What the Social Science Literature Does and Does Not Tell Us" (2007) 26 *Can. Fam. L.Q.* 285.

43. See Jana B. Singer, "Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift" (2009) 47 *Fam. Ct. Rev.* 363.

44. *Supra* note 1 at 120.

45. Jennifer E. McIntosh, "Legislating for Shared Parenting: Exploring Some Underlying Assumptions" (2009) 47 *Fam. Ct. Rev.* 389.