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***The Best Interests of Children: An Evidence-Based Approach* by Paul Millar**

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BOOK REVIEW

Paul Millar, *The Best Interests of Children: An Evidence-Based Approach* (Toronto: University of Toronto Press, 2009).

Gene C. Colman*

What variables influence Canadian courts when they grant custody orders? What variables *should* influence Canadian courts? Is there any empirical data that would inform the policy maker and the decision maker of the need for relevant principles to apply to the decision making process? Paul Millar was most recently a post-doctorate fellow in the department of community health sciences at Brock University. In his new book, *The Best Interests of Children*, Dr. Millar creatively and expertly makes sense of the available empirical data. The author presents a persuasive and well thought out analysis that explains child custody outcomes in Canada.

Proponents of equal shared parenting and their detractors alike revel in citing statistics. Each side of the debate can marshal statistics to support their respective positions. What distinguishes Dr. Millar's work is his expert use of two mega-sample databases, his statistical analysis of those databases, and his effortless explanation of what the data means in common sense language.

Dr. Millar applied to the Canadian Department of Justice, pursuant to Canada's *Freedom of Information Act*. He

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was able to obtain data from the Central Divorce Registry of the Centre for Justice Statistics (He also obtained additional data from the National Longitudinal Survey of Children and Youth (“NLSCY”). The data that he obtained from Justice Canada included over 2.5 million divorces in Canada between June 1, 1996 and the end of September, 2002. After he excluded some of the data on a variety of grounds, he was left with a sample of 673,450 children and 378,390 cases. He examined the outcome of custody cases according to three categories: no custody, joint custody, and sole custody. The data was further broken down according to multiple variables including the following:

- grounds for divorce;
- number of children;
- child’s age at divorce;
- family position;
- region;
- marriage length;
- age difference between husband and wife;
- wife’s age at marriage;
- wife’s age at divorce;
- gender;
- who was petitioner and who was respondent; and
- whether a contested hearing was held.

Dr. Millar also provides us with a basic understanding of the importance of child support to household income. This is the first attempt to gauge the effects of child support on household income in Canada using a representative database. In this case, the source was the Survey of Labour and Income Dynamics (“SLID”), another database maintained by Statistics Canada.

Dr. Millar’s empirical findings, based on a multidimensional analysis of the data, are nothing less than startling. The statistical data clearly demonstrate that time and

again, the custody result seems to be tied to gender no matter what configuration of factors is examined. The clearest predictor of result is gender. For example (see pages 24 - 25), Dr. Millar finds that mothers gain some form of custody (whether sole or joint) in 89% of cases, while men completely lose custody in 67% of cases, although losing legal custody does not necessarily imply they lose all contact with their children. Custody results from this study do not include data on access or contact with the children. They include court orders pursuant to a hearing as well as so called "consent" orders, since divorce negotiations are conducted "in the shadow of the law", that is, within the context of the expected outcome in a court of law. Dr. Millar compares this to a previous 1979 study based on custody data from 1975 (pages 25 - 26) where the results were virtually identical with respect to sole custody situations. It would therefore appear that the 1986 amendments to the *Divorce Act* had little effect on modifying the effects of gender on sole custody outcomes.

Dr. Millar finds that where there is a contested hearing, it improves the chances for sole custody for both parents. The probability for success of mothers, however, is significantly greater, such that fathers have five times less probability of succeeding in gaining custody than do mothers at a contested hearing. The focus of the book is on custody outcomes and the data being analyzed is with respect to custody claims only. The extent of access claimed and granted would surely make for an interesting follow up study.

Mothers are approximately 27 times (2,600%) more likely to obtain sole custody than no custody, and have five times greater odds of achieving joint custody than no custody. Most mothers were the petitioner, and indeed, being the petitioner increases the odds of obtaining both joint and sole custody over no custody by 71% and 281%, respectively. Dr. Millar finds that being the petitioner increases the odds of gaining sole and joint custody by 280% and 70%, respectively,

independent of parental gender.

Dr. Millar's research determines that where the grounds for divorce are physical or mental cruelty, this appears to reduce the chances for joint custody significantly (see page 30). The longer the marriage, the greater the chance there is for joint custody over no custody. The more children there are in the marriage, the less chance there is for an order of joint custody. Millar examines the interplay between gender with: length of marriage, grounds for divorce, and whether a hearing was held. With respect to all three factors, gender has a significantly greater statistical effect on the result, with mothers still having about 142 times greater odds of achieving sole custody and a 12 times greater chance of achieving joint custody, compared to no custody, when there is no hearing, the husband has not filed for divorce on the basis of adultery, and when the marriage was very short.

A surprising finding in this respect is that the double standard is apparently alive and well in Canada's courts. If the husband alleges adultery on the part of the wife, the wife's chances of achieving joint or sole custody are reduced by 37% and 58%, respectively. Feminist legal analysis has claimed that where fathers claim custody they tend to achieve that result more often in the courts. Millar found some support for this. The data reveals that a contested hearing reduces the chances of mothers obtaining custody by 8% for joint custody and 16% for sole custody.

Millar finds that if the "mitigating factors" of adultery, marriage length, and contested hearing are not present, the mother's chances of obtaining some form of custody would be even higher than the 2600% chance previously noted.

Faced with the apparently astronomical odds against succeeding in custody claims, it is understandable that fathers have generally declined to contest custody. Until now, we had

mostly anecdotal reports that complained of the odds being stacked against fathers. Millar's work conclusively demonstrates that gender definitely plays a role in predicting judicial outcomes, despite the fact that, as Millar observes at page 110: "... gender of a parent or caregiver is a poor indicator of parental fitness".

Millar notes that the longer the father was married to the child's mother, the greater the chance he has of obtaining custody. He concludes that this was because "the legal definitions of fatherhood are largely based on the father's relationship with the mother as opposed to his relationship with the child". While this writer cannot argue with the statistical correlation, he does take issue with the author's conclusion. It is the perceived relationship between the parent and the child that the court focuses on and not the father's relationship with the mother. Combating perceptions based on preconceived gender roles is the main challenge.

The author correctly concedes that mere statistical correlation does not necessarily equal causation. In the middle part of his book, he examines such issues. Drawing upon a wide range of social science literature, the author persuasively demonstrates what other researchers have found: gender does indeed play a strong role in predicting divorce court custody/access outcomes. What is particularly germane to Millar's analysis is his demolition of the Goldstein, Solnit, and Freud¹ approach to best interests of children. Goldstein et al.'s primary caregiver trump card approach is shown to be exactly what it is: a non-scientifically based compilation of presumptions that stack the deck against fathers with little, if

¹ Goldstein, Joseph, Anna Freud, & Albert J. Solnit, *Beyond the Best Interests of the Child* (New York: Free Press, 1973). Also see their texts *Before the Best Interests of the Child* (New York: Free Press, 1979) and *The Best Interests of the Child* (New York: Free Press, 1986).

any, regard to a parent's actual ability to benefit the child.

What factors can we look at to predict positive outcomes for children of divorce? Chapter 4 examines empirical data from the NLSCY database to help inform the decision-maker with respect to the factors that should be examined in order to predict positive outcomes for children. Millar finds (at pages 88 - 89) that parental gender is, in fact, not a good predictor with respect to any of the outcomes for children on any axes, whether behavioural, educational, or health. Indeed, as Millar writes at page 110: "[t]he models testing the effect of caregiver gender on children's behaviour, health, and school performance indicate that there is no direct effect of caregiver gender on these outcomes".

Not all of Millar's criticisms of our legal system are accurate. For example, he writes at pages 109 - 110 that "the best interest criteria degenerates into judicial discretion, unfettered by any legal restraint save the review of superior courts". Judicial discretion is not as wide as Millar would have us believe. Previous decisions, particularly those of courts of appeal, do fetter the discretion of the lower courts somewhat. Lists of factors to be considered in provincial legislation (not divorce cases) also provide at least some degree of legislative guidance to judges. That being said, it should be abundantly clear that greater direction is required from the legislature under the federal *Divorce Act* and particularly when we are faced with a system that appears to *de facto* place undue emphasis on gender.

What does affect outcomes for children? Millar notes the factors and the statistics in the studies that appear to have some predictive ability (see page 111):

1. behaviours involving physical punishment;
2. yelling;
3. speaking in a raised voice to children;

4. positive parental interaction with children;
5. consistent setting of boundaries by parents;
6. depression in a caregiver;
7. parent-child ratio within the family;
8. household income; and
9. caregiver education.

One might possibly criticize Dr. Millar for over emphasizing the “custody” aspect and not sufficiently examining the “access” axis. How can such an exclusive focus on custody be justified? The answer is relatively simple. It is a straightforward exercise to measure if custody or joint custody was claimed in a divorce pleading. Similarly, it is easy to see what the result of the case was by looking at the final order. From these observations being joined with other factors as described in the book, the researcher can come to some conclusions based upon fairly clear empirical data. Dr. Millar undertook to examine factors that seem to influence custody orders. He has done an admirable job with mega sized samples of data.

Most fathers after all do achieve some measure of access to their children. What is the extent of that access? At what age do courts permit a father to enjoy overnight access? What is the effect of geographical distance between the two residences? Is there any difference between the nature of the access that non-custodial fathers obtain versus the nature of access that non-custodial mothers obtain? Perhaps Dr. Millar or some other academic will accept the challenge and do the empirical legwork to uncover and elucidate the myriad types of access claims and how the courts address the access issue.

It is generally accepted that both genders are capable of parenting. Should the result of custody decisions favour the parent who did the majority of the hands on parenting during the marriage? Feminist legal analysis would claim that mothers simply do the majority of parenting during marriage

and that all the courts are doing is reflecting that social reality. The criticism would be that all Millar uncovered through his analysis of the data was that the courts reflect back a stark social reality that permeates Canadian society and that social reality should not be ignored to the peril of Canada's children.

On the other hand, the argument that pre-divorce arrangements are the primary causative factor that drives the results that Millar reported is also not supported by the evidence - men do nearly half of child care these days. But even if this were not the case, it is not clear that pre-divorce child care should determine post-divorce care, since what is happening is that the father is often being surgically excised from the *daily* lives of his children. This is just "primary caregiver" in another guise. It is not by any means a continuation of the previous arrangement where both parents saw the children daily and both managed their care. If, for example, the children were looked after by a day care provider (as is common), no one would expect that the custody should be affected by the out-sourcing of hands-on care or that the day care provider or nanny should be considered for custody simply because of hands-on care. The situation after divorce will necessarily be different from pre-divorce arrangements, which should be decided on a best interest standard properly and clearly legislatively mandated.

The author concludes that "custody decisions must cease their reliance on gender as their primary determinative factor". While this writer agrees with Millar's conclusion, he parts company with Millar when the author places politically unrealistic expectations on the judiciary to somehow automatically or magically reform its decision making modalities. Millar calls upon "the Courts ... to renew their relevance". It is the function of the legislature to direct the court as to the appropriate factors to consider when making custody and access orders. Even Millar would agree that these are dynamic political questions which ought not to be delegated

to open-ended judicial discretion. The legislature must delineate the guidelines. Dr. Millar's work will hopefully inspire the legislative reform that is so clearly needed to keep pace with the evolving societal gender roles and assumption of parental responsibility in contemporary marriage and post separation/divorce relationships.

