

**For the Sake of the Facts: Some Comments on "For the Sake of the Children: Preventing Reckless New Laws.**

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**Abstract**

This rejoinder points out some major difficulties with the evidence that Marie Laing relies upon in her article entitled "For the Sake of the Children: Preventing Reckless New Laws." In particular we take issue with the assertions made regarding Canadian custody determinations. We find that Laing presents an inaccurate history of custody determinations in Canada, and completely misapprehends the direction of bias in custody determinations. Her errors stem from relying on secondary sources, non-academic references, and samples which are not representative of the population in question. Laing's work is an object lesson of the importance of carefully examining, not only a source's conclusions and interpretations, but also the methods and evidence supporting an author's claims.

For the Sake of the Facts: Some Comments on "For the Sake of the Children: Preventing Reckless New Laws."<sup>1</sup>

In her paper, Laing chooses to set the proceedings of the Special Joint Senate-Commons Committee on Child Custody and Access in the context of what is presented as a factual and empirical account of a patriarchal society<sup>2</sup> and a judicial system where fathers are successful in achieving custody in 65% of cases<sup>3</sup>. The purpose of this response is not to review the author's treatment of the proceedings themselves. Rather, our intent is to deal with this depiction of the current and historical context. This context is the basis for her introduction and summary of extant research and figures prominently in her interpretations and conclusions. If it is flawed or biased (and in our view it is both), any reader of the article will be led to read the proceedings of the committee through a distorted lens that cannot help but produce a distorted picture. In the interests of accuracy, we offer the following rejoinder.

### **Early Custody Law**

Laing's allegation of paternal bias and her interpretation of events in this light begins with her peculiar reconstruction of early custody law in Canada. According to her, "Not until 1855, did any Canadian mothers, in cases of widowhood, separation, divorce or abandonment, have even limited legal claim and recourse in regard to their children."<sup>4</sup>; and [only] "By 1912, unmarried mothers could petition for support from their child's father"<sup>5</sup>

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<sup>1</sup> This article contains previously published information from Millar, Paul and Sheldon Goldenberg, *"Explaining Child Custody Decisions in Canada"*, (1998) 13:2 C.J.L.S. 209.

<sup>2</sup> Laing, Marie, *"For the Sake of the Children: Preventing Reckless New Laws"* (1999) 16:2 Canadian Journal of Family Law 229 at 230.

<sup>3</sup> *Ibid* at 277.

<sup>4</sup> *Ibid* at 231.

<sup>5</sup> *Ibid* at 231.

In point of fact, Canadian law followed British law and legislation until such time as the colony adopted its own laws. Even then, British common law precedents could have been relied upon. With respect to custody, a law was passed in Britain in 1839, known as Talfourd's Act, which permitted a mother to petition for custody of her children<sup>6</sup>. Judges could also have relied on two even earlier common law precedents in British case law, in 1763 and 1774, where mothers were awarded custody<sup>7</sup>. The first specifically Canadian legislation in the area of custody and child support was indeed passed in Upper Canada in 1855, but with legislation allowing for financial support of illegitimate children following soon after, in 1859.<sup>8</sup> Laing's representation of history suggests a later date for women's legal right to custody than our reading of the same history.

### **Gender Neutral Law**

Continuing her misconstruction of the case for a historic paternal bias, Laing claims that custody case law created the "best interest of the child" standard by the 1950s. This standard allegedly replaced the "tender years doctrine" - in Laing's view, a briefly held maternal preference - as early as mid-century, and legislation became gender neutral, based upon the best interest of the child in the 1960s: "During the middle decades of the century, the principle of "the best interests of the child" replaced the principle of "parental" rights."<sup>9</sup> and "Thus in the 1960s and 1970s, gender neutral terms such as "the best interest of the child" were legislated and replaced the "tender years doctrine" or maternal preference in case law in order to make the court more "even-

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<sup>6</sup> 2&3 Victoria, c.54, 1839, at 179-180, An Act to Amend the Law Relating to the Custody of Infants.

<sup>7</sup> Goldstein, Jacob & C. Abraham Fenster, "Anglo-American Criteria for Resolving Child Custody Disputes from the Eighteenth Century to the Present: Reflections on the Role of Socio-Cultural Change" (1994) 19:1 J. of Family History 35 at 37.

<sup>8</sup> Ursel, Jane, *Private Lives, Public Policy: 100 years of State Intervention in the Family* (Toronto: Women's Press, 1992) at 329. The statutes were SUC c.126 Custody of Infants Act (1855) and SUC c. 77 Support of Illegitimate Children Act (1859).

<sup>9</sup> Laing, *supra* note 2 at 276.

handed" in the disposition of cases involving custody."<sup>10</sup> Laing's interest here seems to be in describing the evolution of custody law as thoroughly dominated by paternal rights save for a brief flirtation with maternal preference that ended by mid-twentieth century.

However, the author provides no citation to support her contention that case law developed a gender neutral custody standard in the middle of the twentieth century. It appears instead that the maternal presumption of the "tender years doctrine" prevailed at that time. As we will later show, the century began with a strong maternal preference. Even Canada's first Divorce Act, in 1968 did not change the maternal presumption. Wives received custody at a rate more than five times that of husbands in 1969.<sup>11</sup> Although some judges may have used a phrase like "the best interest of the children" when determining custody, it appears to be unrelated to the gender preference in place for guiding actual disposition of cases at the time. In terms of a genuine attempt to introduce gender neutrality, the second Divorce Act, proclaimed in 1986<sup>12</sup>, was more likely the first attempt to legislate a "best interest of the child" gender neutral standard.<sup>13</sup> However, it too has not noticeably affected judicial behaviour thus far, at least not in the direction of moving dispositions in the direction of equity between fathers and mothers.<sup>14</sup> For example, in 1994 Canadian mothers were awarded custody of children at a rate seven times greater than fathers.<sup>15</sup> This Canadian finding is similar to findings of two American studies: in Los Angeles County,<sup>16</sup> and in Utah.<sup>17</sup> Thus, examination of the empirical evidence does not support the author's description of the law as having favoured fathers except for a brief period in

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<sup>10</sup> Ibid at 232-233.

<sup>11</sup> McKie, D.C., B. Prentice and P. Reed, *Divorce: Law and the Family in Canada* (Ottawa: Minister of Supply and Services Canada, 1983) at 213. Statistics Canada Catalogue No. 89-502E.

<sup>12</sup> *Divorce Act*, R.S.C., 1985 (2nd Supp.) c. 3, s. 16(10).

<sup>13</sup> Millar & Goldenberg, *supra* note 1.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid at 216.

<sup>16</sup> Weitzman, Lenore, *The Divorce Revolution*, (New York: The Free Press, 1985) at 232.

the first half of the twentieth century. On the contrary, the tender years doctrine prevailed for considerably longer than Laing suggests. Indeed, a maternal bias is still clearly evident in Canadian custody determinations today.

## **Custody**

Laing presents us with a version of the history of custody determinations in which custody begins in the twentieth century as a father's right, proceeding to a brief period of maternal presumption and returning to a continuing paternal preference: "This century has seen parental rights come full circle. At the beginning of the century, fathers had absolute rights to the children of the marriage."<sup>18</sup> We have suggested that mothers had the right to petition the courts for custody before 1900 and that this soon developed, through change in case law, into a maternal presumption - the tender years doctrine<sup>19</sup> which dominated Canadian custody law until legislative change in 1986. Certainly custody in the first part of the century was not awarded in a particularly even-handed manner: a study that examined 609 cases from Nova Scotia and Ontario between 1900 and 1939 found that custody was awarded to the mother or her family in about three quarters of cases, and to the father or his family in the rest<sup>20</sup>. Despite the legislative change in 1986, the maternal preference continues to dominate judicial decisions to an even greater degree since, despite what one assumes to have been an intention of gender equity on the part of the framers of this legislation.

Nonetheless, in her quest to illustrate an alleged paternal bias today, Laing presents us with a variety of researchers who report that fathers are increasingly successful in achieving

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<sup>17</sup> Bahr, Stephen J. et al, "Trends in Child Custody Awards: Has the Removal of the Maternal Preference Made a Difference?" (1994) 28:2 Family Law Quarterly 247.

<sup>18</sup> Laing, *supra* note 2 at 276.

<sup>19</sup> Crean, Susan, *In the Name of the Fathers*, (Toronto: Amanita, 1988) at 23.

<sup>20</sup> Snell, James G., *In the Shadow of the Law: Divorce in Canada 1900-1939* (Toronto: University of Toronto Press, 1991) 196. The sample was either all cases or selected randomly, depending on the number of cases for the period and location.

custody of their children to the point where they succeed more often than they fail when applying to the court for custody.

"In 1987, fathers petitioning for custody succeeded in 43% of cases and by the 1990s researchers estimate challenging fathers succeed in 50-60% of cases. Similarly Wertzman, determined that two thirds of fathers who petitioned for custody obtained it through negotiation with the mother; Armstrong reported that in the United States, in 63% of contested cases, custody is awarded to the father; and Chesler held that two thirds of fathers petitioning for custody received it."<sup>21</sup>

Since the social reality of custody decision-making in Canada is one of the most important contexts for the proceedings of the Special Joint Senate-Commons Committee on Child Custody and Access, it is important to correctly assess the reality of custody determinations in Canada. First, let us review the sources the author relies upon to support her claim.

Laing relies on a report by Boyd which claims that in Canada in the 1970s "fathers who petitioned for divorce, presumably often challenging mothers for custody as well, had a close to 50 per cent chance of being successful."<sup>22</sup> When examining Boyd's primary source more closely, it turns out that "close to 50 percent" is 42.6%, which might well be interpreted as closer to 40% than 50%. Further, the same source which Boyd cites elsewhere provides figures that show women won custody at a rate more than five times that of men for the 11 year period 1969-1979.<sup>23</sup> In support of her "close to 50 percent" assertion, Boyd also cites Weitzman as finding that "one-third of fathers who contested custody in court were awarded it"<sup>24</sup> (although 33% is still further from 50% than was 42.5%!). Upon closer inspection, again of the primary source, it turns out that Weitzman's finding is not statistically significant and cannot be used to generalize to cases in Los Angeles County (where the study was conducted) let alone to another country

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<sup>21</sup> Laing, *supra* note 2 at 259-260.

<sup>22</sup> Boyd, Susan, *Investigating Gender Bias in Canadian Custody Law, Reflections on Questions and Methods*, (Toronto: Faculty of Law, University of Toronto, 1992) at 30.

<sup>23</sup> McKie et al, Statistics Canada, *supra* note 11.

such as Canada.<sup>25</sup> For that matter, as with the previous example, Boyd selectively refers to a portion of Weitzman's study whereas the same study reports elsewhere that fathers obtained custody in only about 6% of cases<sup>26</sup> and that judges in Los Angeles, San Francisco and Illinois exhibit a strong bias in favour of maternal custody.<sup>27</sup> In a separate citation, Laing refers to 'Wertzman', which is apparently a secondary citation via Boyd's previously mentioned report. This seems to be a typographical error - the reference is probably to Weitzman, referred to on page II-30 of Boyd's report. The claim that "two thirds of fathers who petitioned for custody obtained it through negotiation with the mother" appears to suffer from the same problem of statistical insignificance as the earlier claim from Weitzman.<sup>28</sup>

Chesler is another equally questionable source of support for custody results cited by the author. Chesler studied custody by interviewing a group of sixty American mothers who had been involved in custody cases between 1960 and 1981. Approximately 60% of her cases were self-selected. That is, they answered newspaper ads or contacted Chesler after hearing about her research by word of mouth.<sup>29</sup> The rest were selected in what might be characterized as a snowball or convenience sample, that is, by referrals from previous interviewees or from referrals that Chesler got from professionals. No fathers were studied. There were apparently no efforts to ensure the cases selected were representative of any particular population. Clearly, generalizations about overall custody results in Canada cannot properly be made from 60 cases selected in a decidedly non-random fashion from 21 years of divorces in the United States.

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<sup>24</sup> Boyd, *supra* note 22.

<sup>25</sup> Weitzman, *supra* note 16 at 233.

<sup>26</sup> *Ibid* at 232.

<sup>27</sup> *Ibid* at 235-236.

<sup>28</sup> *Ibid* at 232-236. To be fair, Weitzman presents her findings in a misleading way. She states rates of fathers' success as if her findings were significant on p. 236 of her book, when on p.233 she admits they were not significant.

<sup>29</sup> Chesler, Phyllis, *Mothers On Trial* (New York: McGraw-Hill, 1986) at 70-71.

Still another reference is to Brown who, in her report entitled *Gender Equality in the Courts*, cites a study by McBean<sup>30</sup> to support the idea that there is no longer a maternal preference in Canadian custody judgements: "If there is a custody dispute, the father has at least as good a chance of winning as the mother".<sup>31</sup> It turns out that this claim by Brown and McBean is also based on the book by Chesler,<sup>32</sup> which has been already discussed and dismissed, above.

It is unclear how the reference to Dennis's book supports Laing's claim that fathers win custody 50-60% of the time, since Dennis cites Statistics Canada figures indicating fathers receive custody in 10% and mothers 70% of cases.<sup>33</sup> In addition, Dennis asserts that "The reality in Canada today is that no matter how good a father a man may be, if his marriage ends and his wife decides she wants custody... the chances are overwhelming that he will lose the right to parent [his children]."<sup>34</sup> This seems to be arguing directly against Laing's assertion of a paternal preference in custody determinations.

Laing resorts to non-academic sources in several citations. The Jodoin reference was unobtainable from the N.D.P. party.<sup>35</sup> The reference to Armstrong's book<sup>36</sup> is a secondary citation, quoting a 1981 report by an obscure Washington, D.C.-based group.<sup>37</sup> We weren't able to locate this report. The book by Taylor, Barnsley and Goldsmith cited by Laing is a non-academic work by a Vancouver-based lobby group, and provides no references, citations,

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<sup>30</sup> McBean, Jean, "*The Myth of Maternal Preference in Child Custody Cases*", in Martin, Sheilah and Kathleen Mahoney, *Equality and Judicial Neutrality*, (Toronto: Carswell, 1987) at 188.

<sup>31</sup> Brown, Mona, *Gender Equality in the Courts* (National Association of Women and the Law, 1988) at 87.

<sup>32</sup> McBean, *supra* note 27.

<sup>33</sup> Dennis, Wendy, *The Divorce From Hell*, (Toronto: McFarlane, Walter & Ross, 1998) at 331.

<sup>34</sup> *Ibid.*

<sup>35</sup> The reference is to S. Jodoin, *Joint Custody and Access Enforcement: Mothers and Children at Risk* (1989) [unpublished N.D.P. Caucus]. The Communications Director of the federal N.D.P. caucus reports no record of such a publication, nor of any staff named S. Jodoin.

<sup>36</sup> Armstrong, Louise, *The Home Front: Notes from the Family War Zone* (New York: McGraw-Hill, 1989) at 50-51.

<sup>37</sup> Hendrickson, Adele and Joanne Schulman, *Trends in Child Custody Law: What They Mean for Women* (Washington, D.C.: National Center on Women and the Law, 1981) at 7.

footnotes or even a bibliography that can be examined. The above citations betray a desperate attempt by Laing to find evidence of any sort, regardless of quality, to support her claims.

Laing proceeds to conclude: "Increasingly, fathers petitioned for custody and were successful in approximately 65% percent of cases."<sup>38</sup> The origin of the figure of 65% is not cited, and is not evident from the figures she cites earlier in her article, which are discussed above. We have shown in previous work that courts in Canada overwhelmingly favour mothers when awarding sole custody.<sup>39</sup> This bias has been increasing since 1986 when children were ordered into the sole custody of their mothers more than 4 times as often as their fathers. This sexism in the courtroom is highly influential in out of court negotiations as well, as couples "bargain in the shadow of the law".

Custody is highly disputed and differences still exist in sole custody awards to fathers and mothers in Canada at the end of the twentieth century. But this differential favours mothers, not fathers, as Laing has alleged, time and again. In fairness to the author of "For the Sake of the Children: Preventing Reckless New Laws", she may not have been aware of the most recent empirical evidence at the time her article was published.

Uncritical reliance upon secondary sources as if they were definitive is a common methodological failing. Numbers, once created, seem to take on a life all their own. While Laing did not collect her own data, her misuse of these sources serves as an enduring example of the importance of careful examination, not only of an author's conclusions and interpretations, but even more so of their methods and evidence. Failure to do so certainly leaves the author open to charges of believing what she wants to and looking critically only at evidence with which she disagrees - not exactly the hallmark of an open minded, critical social scientist.

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<sup>38</sup> Laing, *supra* note 2 at 277.

<sup>39</sup> See Millar & Goldenberg *supra* note 1 for a detailed presentation of these findings.

## **Conclusion**

As women move towards a more equal position in economic terms, it would seem equitable and beneficial, for both women and children, that men take a greater part in family life, even after divorce. This could contribute to women's economic standing, since childcare is a major reason why women's wages differ from men's. Divorce has now become a part of our social landscape and family policy a valid place to apply social science findings that point to better outcomes for children. In our view, the social scientific evidence supports the assertion that fathers are capable of and interested in caring for their children. This evidence suggests social policies, and judicial decision-making, that increase the involvement of fathers in their children's upbringing and that reduce emphasis on strict gender roles. Current legislation mandates that the child's welfare is the primary consideration in custody decisions. Both empirical evidence and an emerging ideological consensus among men and women support the contention that gender stereotyping and rigid gender role assignment are harmful to children and their parents alike. This is the premise for women's quest for equity in the occupational sphere as it is the premise of men's quest for equality in the sphere of the family. Perhaps it is time we recognised the legitimacy of both positions.