

2011

THE “EYE OF THE BEHOLDER”: PROFESSIONAL OPINIONS ABOUT THE BEST INTERESTS OF A CHILD

Noel Semple

University of Windsor, Faculty of Law

Follow this and additional works at: <https://scholar.uwindsor.ca/lawpub>



Part of the [Family Law Commons](#)

Recommended Citation

Semple, Noel. (2011). THE “EYE OF THE BEHOLDER”: PROFESSIONAL OPINIONS ABOUT THE BEST INTERESTS OF A CHILD. *FAMILY COURT REVIEW*, 49 (4), 760-775.

<https://scholar.uwindsor.ca/lawpub/38>

This Article is brought to you for free and open access by the Faculty of Law at Scholarship at UWindsor. It has been accepted for inclusion in Law Publications by an authorized administrator of Scholarship at UWindsor. For more information, please contact scholarship@uwindsor.ca.

THE “EYE OF THE BEHOLDER”: PROFESSIONAL OPINIONS ABOUT THE BEST INTERESTS OF A CHILD

Noel Semple

Child custody evaluations (CCEs) are a central feature of parenting litigation in many North American jurisdictions. However, there has been little recent research comparing CCE decisions about children’s interests with decisions made by judges. This article presents empirical research about the extent to which Ontario judges accept custody and access recommendations from CCEs employed by Ontario’s Office of the Children’s Lawyer. The central finding was that the judges fully agreed with the CCEs only about half of the time. Possible explanations for this finding are explored, the most salient of which is the effect of delay in Ontario family litigation. In conclusion, the article suggests that a more efficient synthesis of the judicial and CCE decision-making processes might be more consonant with the best interests of children involved in these disputes.

Keywords: *child custody evaluations; family court; custody and visitation; custody and access; joint custody; social work; judicial decision-making; Office of the Children’s Lawyer*

Because resolving private parenting disputes using the “best interests of the child” standard is a daunting challenge for legal decision-makers, they often turn to non-lawyers for input. While judges retain the final authority, neutral child custody evaluators are now part of the process in many Western jurisdictions. These experts have important fact-finding, therapeutic, and settlement-inducing roles.¹ However, they are usually also asked to identify the parenting arrangement which would be in the best interests of the child.² This article reports on empirical research based on custody and access (visitation) recommendations made by social workers from Ontario’s Office of the Children’s Lawyer (OCL), and the extent to which judges follow these recommendations.³ The central finding was that the courts followed only 52% of the recommendations in the reported cases used for this study.

This article begins by introducing the judicial decision-making process for Ontario custody and access cases. It then describes the OCL, and the process by which social workers from this agency decide what to recommend in these cases. The next part reports the central empirical finding, and then compares it with results from prior reported studies of judicial concurrence with child custody evaluations. In addition, it examines a secondary data set of recommendations made by OCL lawyers for children. Both of these other data sets indicated much higher rates of judicial concurrence than that of the central finding, and the next part explores possible explanations for this divergence. Delay in Ontario’s family courts appears to be the most compelling explanation. Finally, the next part of this article will review the normative literature about judicial and non-judicial decision-making in private parenting disputes. This article concludes by asking whether children might be well-served by a process which more harmoniously synthesizes investigation and litigation.

Correspondence: mail@noelsemple.ca

JUDICIAL DECISION-MAKING ABOUT CUSTODY AND ACCESS IN ONTARIO

All judicial custody and access decisions in Ontario are to be made on the basis of "the best interests of the child."⁴ The applicable statutes list some factors relevant to this determination.⁵ However, these factors are so broad that, according to one scholar, they "add nothing to the unwieldy vagueness of this term as an operative legal concept."⁶ The task confronting judges is, therefore, as simple to state as it is difficult to perform – to make the order which is in the best interests of the child or children who are the subjects of the dispute.

The statutes provide special procedural rules for custody and access litigation, including provisions intended to reduce delay.⁷ Judges have the power to make orders with conditions, such as access supervision by a third party. They cannot, however, delegate their decision-making powers.⁸ Further orders can be made at a later time if there has been a "material change in circumstances" which may affect the child(ren)'s best interests.⁹ Custody and access matters in Ontario are always heard by a judge alone, without a jury.¹⁰

The most important procedural feature distinguishing custody and access litigation from other litigation is the court's authority to call on non-judicial experts for help in resolving the case. For example, judges can appoint mediators in the hopes of inducing settlement, or request the OCL's involvement.¹¹ In the absence of OCL participation, the court can appoint an expert to assess and report, even without the parties' request or consent.¹² Parties can be ordered to attend for the evaluation, and negative inferences can be drawn if they refuse to do so.¹³ All the same, the jurisprudence regarding the circumstances in which a non-OCL expert will be appointed is relatively conservative. The leading case in Ontario requires that there be "clinical issues" at hand.¹⁴ However, judges are generally more willing to seek assistance from the OCL than they are to order a private sector assessment, given the publicly-funded nature of OCL interventions.

Apart from these procedural features, custody and access litigation is essentially identical to an ordinary civil trial. In Ontario, it is rare for the child who is the subject of the litigation to either be called as a witness or to be interviewed by the judge in a custody or access proceeding.¹⁵ Each party has the right to make opening and closing submissions, to call evidence, and to cross-examine the adversary. Recent estimates suggest that anywhere between 35% and 70% of Ontario family litigants are unrepresented by counsel.¹⁶

THE OCL (ONTARIO)

The OCL is a branch of Ontario's Ministry of the Attorney General. It becomes involved in certain custody and access cases at the request of a judge,¹⁷ but it also declines a substantial proportion of judicial requests for its involvement. When it does become involved, the OCL provides services without charge to the parties. It can take various roles in a custody or access case, including appointing a lawyer to represent the child(ren) in the proceeding. This research project focused on social worker investigations, the other primary form of OCL involvement in custody and access cases. Social worker investigations are conducted by OCL social workers pursuant to s. 112 of Ontario's *Courts of Justice Act*,¹⁸ and they produce reports with recommendations about how the court should rule.¹⁹ A very small proportion of OCL evaluation reports are subsequently considered by courts because in most cases the parties settle.²⁰

How do OCL social workers decide what to recommend? The secondary literature provides some information, and some case reports reviewed for this research also included descriptions of the OCL investigation procedure.²¹ While this process is in many respects similar to those followed by psychologists and psychiatrists doing custody and access evaluations, it also has certain distinguishing features.

OCL social workers, like judges, seek the best interest of the child, and feel free to recommend any order that is within the court's power. The investigative process requires 20-35 hours of work, over the course of two to four months.²² The process generally begins with the basic information provided in court records and the parties' affidavits.²³ Interviews with the parents and the child(ren)

are at the core of the investigation.²⁴ Parents and children are interviewed on multiple occasions over time. Children are interviewed in their parents' homes, and in some cases at school. Techniques such as structured play, drawing pictures, and story-telling are sometimes used with children to facilitate discussions about their feelings.²⁵ A child might be asked to provide a rationale for a voluntarily expressed opinion about a parent. Such techniques obtain the child's input while seeking to avoid the consequences of asking children to choose between their parents, an approach which is considered inappropriate.²⁶

Another central part of the process is the observation of interactions between parents and child(ren), often in the home environment. Additionally, the social worker usually considers "collateral" sources of information other than the child(ren) and the parents. Collateral sources may include schools or daycares, supervised access centers, children's aid societies, relatives and partners of the parties, health-care professionals, or the police.²⁷ These sources permit cross-checking of information provided by the parties and child(ren), a process known as "triangulation."²⁸

Social work evaluations have been described as "naturalistic" and grounded in observations, producing reports in which the parties' and child(ren)'s wishes are visible in the report, along with the evaluator's recommendation.²⁹ The OCL social worker's investigation is verified at certain points by his or her peers and superiors.³⁰ There is usually a meeting with the parties to disclose the contents of the report before it is filed with the court.³¹ Disputes often settle at or shortly after these disclosure meetings.³²

The OCL social worker investigation process has much in common with evaluations conducted by psych-professionals. All of these professionals seek to remain neutral while gathering information from multiple sources via multiple methods, including interviews, observations, and collateral sources.³³ However, there are also important distinguishing features of the publicly-funded social worker investigations. Subjecting parents to psychological tests is common in psychologist/psychiatrist evaluations, but OCL social workers do not appear to use these tests.³⁴ Social worker investigations tend to require less time,³⁵ and are generally more fact-intensive and less diagnostic than those of psychologists and psychiatrists.³⁶ Some authors report that social workers are more likely to conduct home visits.³⁷ In sum, the available evidence suggests that OCL social worker evaluations are a distinct process for making decisions about children's best interests. They have little in common with judicial decision-making, and certain significant differences from private-sector psychologist and psychiatrist evaluations.

OCL SOCIAL WORKER RECOMMENDATIONS: RESEARCH METHODOLOGY AND FINDINGS

METHODOLOGY

How often do Ontario courts concur with custody and access recommendations from the OCL? To address this research question, this author analyzed custody and access cases from 2003 through 2008 (i) which were reported in the LexisNexis Quicklaw database, and (ii) in which the OCL made a recommendation about the ultimate issue which was ascertainable from the case report.³⁸ The database query results were scanned to identify reported recommendations from OCL social workers about what custody or access decision should be made. If a judicial decision on the issue was reported, the OCL recommendation and the judicial decision were included in the database. Where an OCL recommendation was followed by multiple rounds of litigation and multiple judicial decisions about the same child(ren), only the earliest available judicial decision was considered.³⁹ In all, 151 such pairs of recommendation and decision were identified, from 94 different cases. In coding the findings in these cases, the research used the current Canadian legal definitions of custody and access, as follows:

1. *Custody Concurrence*. "Legal custody" is defined in Ontario's common law as the power to make decisions on behalf of a child.⁴⁰ The *Children's Law Reform Act* ("CLRA") provides that "a

person entitled to custody of a child has the rights and responsibilities of a parent in respect of the person of the child and must exercise those rights and responsibilities in the best interests of the child."⁴¹ Legal custody can be either "sole" decision-making authority (held by one adult) or "joint" (held by two adults). Legal custody is theoretically distinct from "physical custody," which generally means the right to live with and have authority over the child. However, Ontario courts usually simply award sole or joint custody without using the adjectives "legal" or "physical." If an award of sole custody over a child is made to an individual, that individual is understood to have both legal and physical custody rights, except insofar as those rights are limited by an access or other order of the court. An award of joint custody usually means that physical custody will be split according to a court-ordered schedule.⁴² Legal decision-making power regarding quotidian issues will rest with the parent who has physical custody at the time when the decision is to be made. However, in a joint custody regime, legal decision-making power regarding one or more larger issues (such as the right to determine the child's religion) may be given to a certain parent permanently.⁴³ The Custody Concurrence field in the database was coded "1" if the judgment of the court concurred with an OCL recommendation about legal custody, and "0" if it disagreed.

2. *Access Concurrence.* "Access," in Ontario, means the right of a person without custody rights to spend time with a child and to receive information about the "health, education and welfare" of that child.⁴⁴ This research project recorded the degree to which the outcome of a case reflected the OCL recommendation about access, if any. However, because in most cases the final court order differed in some way from the recommendation, but did not reject it outright, the following five values were used to code this field:

- "Full Concurrence" represented total court concurrence with the OCL access recommendation. If the OCL recommended X hours per year of access, and the court ordered X hours, then the case was coded "Full Concurrence," regardless of whether there was concurrence regarding the other details of access.
- "General Concurrence" meant that the OCL recommendation and the court-ordered schedule were more similar than different in terms of the total quantity of hours. If the OCL recommended a certain number of access hours per year, and the court ordered more than half as many as the OCL recommended, but less than twice as many, then the case was coded "General Concurrence."
- "General Disagreement" indicated that the two were more different than they were similar. It was used if the OCL recommended a certain number of hours per year but the court ordered less than half as many, or more than twice as many.
- "Total Disagreement" meant total rejection of the OCL access recommendation.
- "Consistency" meant that, based on the information in the case report, the court order was generally consistent with the OCL recommendation. However, in these cases, there was insufficient information in the case report to determine the degree of concurrence with any greater precision.

3. *Joint-Custody Recommendations: Time-Sharing Concurrence.* As observed above, a court ordering joint custody generally creates a schedule establishing which parent has physical custody of the child(ren) at any given point in time. In a large number of cases, the OCL made recommendations about the contents of this schedule. Where the OCL recommended joint legal custody and this recommendation was accepted, and where joint legal custody was the uncontested *status quo*, the results were recorded using the same five values described in the "Access Concurrence" field above.

This field was also used when the OCL's joint custody recommendation was not accepted. In these cases, if the court's allocation of the child's time was as close as possible to what the OCL recommended, given that it had rejected the joint custody recommendation, then the case was coded "Full Concurrence" in this field. If the OCL recommended joint custody with primary residence to parent X, and sole custody was awarded to parent X, the case was coded "Consistent" in this field.⁴⁵

FINDINGS

Table 1
Judicial Concurrence with Recommendations from OCL Social Workers

	<i>Custody Recommendations</i>	<i>Access Recommendations</i>	<i>Time-Sharing Recommendations</i>
Number made	77	46	28
Total concurrence	42	8	5
Consistency		16	7
General Concurrence		12	9
General Disagreement		9	7
Total disagreement	35	1	0
Percentage rate of agreement	55%	52%	43%
Overall average rate of concurrence:		52%	

“Percentage Rate of Agreement,” for access and time-sharing recommendations, was calculated by adding cases coded “Consistency” to those coded “Total Concurrence,” and dividing the result by the total number of recommendations. It is possible that in some of the “Consistent” cases, there was some disagreement not recorded in the case report. In some of the “General Concurrence” cases, the court-ordered outcome was very similar to that which the OCL recommended. These cases were included among the cases of disagreement because most past studies of judicial concurrence with evaluators’ access and time-sharing recommendations appear to have classified any case in which there is any divergence between recommendation and ruling as one of “Disagreement.”⁴⁶ Using the same methodology facilitates comparison of the present findings to those from past studies.

In 37% of the cases in which the social worker made a custody recommendation, the recommendation was for joint custody. The following table demonstrates that OCL recommendations of joint custody were less likely to be accepted by judges than sole custody recommendations:

Table 2
Social Worker s. 112 Custody Recommendations by Content and Concurrence Rate

<i>Social Worker Recommendation:</i>	<i># of Recommendations:</i>	<i>% of All Soc. Worker Custody Recommendations</i>	<i># of Cases in which Judge Concurred</i>	<i>Rate of Judicial Concurrence</i>
Joint Custody	28	37%	9	32%
Sole Custody ⁴⁷	48	63%	32	67%

To determine whether there is a statistically significant difference between rates of judicial concurrence with sole custody and joint custody recommendations, the author conducted a chi-square test. A level of statistical significance of .05 was chosen, meaning that the author would assume that the difference in rates of concurrence occurred by chance unless the statistical test indicated a 95% likelihood that this was not the case. On this standard, the null hypothesis (that judges are equally likely to accept the two kinds of recommendation) can be rejected.⁴⁸

As noted above, the OCL can alternatively intervene in a custody and access cases by appointing counsel to represent the child.⁴⁹ In these cases, the child’s counsel is present at trial, and able to argue a position. The sample included 39 recommendations from OCL-appointed lawyers, in 31 cases from the same 2003–2008 time period. As the following table indicates, the overall rate of judicial concurrence with these recommendations was 83%, compared to 52% concurrence with social worker recommendations.⁵⁰

Table 3
Judicial Concurrence with Recommendations from OCL Counsel

	<i>Custody Recommendations</i>	<i>Access Recommendations</i>	<i>Time-Sharing Recommendations</i>
Number made	20	14	5
Total Concurrence	17.33 ⁵¹	9	4
Consistent		2	0
General Concurrence		2	0
General Disagreement		1	1
Total Disagreement	2.66	0	0
Percentage Rate of Full Concurrence	87%	79%	80%
Overall Average Rate of Full Concurrence:		83%	

LIMITATIONS

While the researcher's choice to focus on case reports rather than written evaluations had advantages, it also gave rise to limitations. First, the case reports provided very limited information about the content of the OCL reports which contained the recommendations. Analysis of the assessments with which judges disagreed might have revealed reasons why they were not followed. Examination of these documents might also show that certain investigatory or reporting techniques were correlated with higher or lower rates of concurrence.

Second, the Quicklaw database does not include every case issued by Ontario's courts, and one of the limitations of this research is the possibility that the sample was not representative of the population. For example, it is possible that (i) Quicklaw is more likely to include longer cases, and (ii) cases in which the court concurs with the OCL recommendation are more likely to be shorter. However, as the portions of the cases addressing the OCL recommendations were often quite short, the latter of these postulates is certainly not proven. In general, Quicklaw does include a broad cross-section from all parts of the province.⁵²

Third, there were also a number of cases in which the reasons mentioned the existence of an OCL s. 112 report, but did not indicate what, if any, recommendations were made in the report. These cases reduce the representativeness of the research sample. Finally, nothing can be learned from my data set about the impact of OCL recommendations in the majority of cases which settle without reported adjudication. If the cases that go to trial are the most "difficult" cases, then they may be more likely to produce outcomes divergent from the OCL's recommendations.

COMPARING AND ANALYZING THE RESEARCH RESULTS

It is important not to exaggerate the differences in opinion between judges and OCL social workers. In a large number of the cases analyzed, the judgment explicitly praised the work of the social worker. It was often noted that the report and/or testimony were balanced or objective.⁵³ In numerous other cases it was remarked that they were helpful to the court.⁵⁴ In a few others, the judgment describes approvingly the OCL professional's experience or credentials.⁵⁵ Even in cases where the OCL's recommendations were rejected, judges sometimes commended the report as a source of evidence about the child's views and preferences or other relevant issues.⁵⁶

However, the 52% overall concurrence rate remains quite low in the context of the existing literature. Most research about child custody and access evaluations involves those done by psychiatrists or psychologists, rather than social workers. These studies have consistently found that judges accept over 90% of the recommendations. Brun et al. studied 119 Danish cases from 1975 and 1976 in which child psychiatrists and psychologists made recommendations.⁵⁷ In only six custody cases and

three access cases did the judicial authority make an order contrary to the recommendation. Although the research report leaves some ambiguity about how many of the cases actually reached a final adjudication, the rate of concurrence was at least 92%. Similarly, Ash and Guyer analyzed 119 American cases from 1978 in which the University of Michigan child psychiatry service provided evaluation reports in contested custody/access cases.⁵⁸ They found that 92% of court dispositions matched the evaluator's recommendation regarding custody, and 89% matched with regard to visitation (access). Moreover, in approximately one-third of the cases in which the court order and the evaluator's recommendation did not concur, the court order reflected a settlement which had been reached by the parties after the evaluation.

They identified 33 cases from 1981 in Paris in which a judicial decision about custody or access was made, following an intervention by a social worker or psychiatrist. The recommendation was followed by the court in every one of these cases.⁵⁹ In 1989, Tobin analyzed 92 cases in which clinicians at a Toronto psychiatric institution had made recommendations about custody outcomes. Of the 62 cases in which the judicial ruling was recorded, the judge concurred with the clinician in 60 of them (96.7% concurrence). In the other two, the parties reached an agreement after the evaluation, which affected the ruling.⁶⁰ While quantifiable data for the period after 1990 is more difficult to find, qualitative reports suggest that "neutral" recommendations continue to have a powerful impact on judicial outcomes.⁶¹

Most of these prior studies did not involve Ontario and did not involve social worker recommendations, so they cannot be directly compared to the findings of the present research. However, it is of note that they all found rates of judicial concurrence in excess of 90%. A similarly high concurrence rate (83%) was found in the secondary data set generated by the present research, consisting of recommendations from OCL lawyers.⁶²

These results lead to two questions. First, why were OCL social worker recommendations accepted by judges only 52% of the time, significantly less often than recommendations from psychologists and psychiatrists in other jurisdictions, and significantly less often than the recommendations of OCL lawyers in Ontario? Second, why were social worker joint custody recommendations accepted even less often, only 32% of the time?

DELAY

The divergence between these results from Ontario and the results from other jurisdictions in prior studies could reflect an Ontario-specific factor, and delay is a likely candidate. Among the 94 cases with social worker recommendations from a s. 112 report, the case report indicated the dates of the OCL recommendations in 63 cases. In these cases, an average of 1.08 years elapsed between the report and the date of the judgment on the same issue. It is possible that these 63 cases are not an entirely representative sample with regard to time elapsed between recommendation and judgment, because judges were probably more likely to specify the date if a longer period of time had elapsed. This conclusion is based on the assumption that judges would see a longer delay as weakening the probative value of the report, and would therefore be more likely to mention the period elapsed in these cases.

Nonetheless, an average of 1.08 years elapsing in two-thirds of the cases suggests that there is very often a substantial period of delay before OCL recommendations are judicially considered. In 18 cases, the court either specifically called attention to the passage of time since the report, or observed that facts had changed since the report was filed.⁶³ Indeed, in several cases, after the first social worker report was filed, an update or a fresh report was prepared because the first one had become stale-dated.⁶⁴

These findings reflect the phenomenon of delay in Ontario family litigation, which has been extensively documented.⁶⁵ The findings also reflect the fact that two parties will often come to court many times with regard to the same child(ren). Often, the later court appearances will consider an OCL report prepared prior to an earlier appearance. The OCL's investigative process ends when the

report is written, so even where the social worker appears at trial, he or she is often working with very old facts. Given how quickly children's circumstances and needs may change, it is clear that insights about their best interests can go stale quickly.

Does the length of the delay between recommendation and adjudication predict whether the recommendation will be accepted or rejected? Within this subset of 63 cases with s. 112 reports and delay data, there were 54 custody recommendations. Among these, in cases in which the date of the report was recorded and a social worker custody recommendation was rejected by the court, an average of 1.22 years had elapsed between the report and judgment. By contrast, when a custody recommendation was accepted, an average of 0.90 years had elapsed.⁶⁶

Within the cases with s. 112 reports and delay data, there were also 36 access/time-sharing recommendations. When the judge was in full or "General Disagreement" with the recommendation, an average of 1.36 years had passed.⁶⁷ When there was "General Concurrence", the average was 0.92 years. When there was "Full Concurrence" or "Consistency", only 0.82 years had passed on average.⁶⁸

Further evidence that delay may have an effect on concurrence comes from the secondary data set involving OCL lawyer recommendations, which as explained above had significantly higher concurrence. These recommendations were made at the trial, not beforehand, and they therefore drew upon more up-to-date facts and observations.⁶⁹ Thus, the fact that OCL lawyer recommendations were more up-to-date and more likely to be accepted may suggest that delay is a significant factor in explaining the low rate of concurrence with social worker recommendations.⁷⁰

CONTENT OF RECOMMENDATIONS: JOINT CUSTODY

Social worker joint custody recommendations were accepted less than 30% of the time, contributing substantially to the low overall concurrence rate of 52%. There are two apparent reasons why judges might be less receptive to joint custody recommendations. First, it may be that social workers and judges have fundamentally different attitudes about joint custody, although there was little evidence for this in the judgments.

Second, the low concurrence with joint custody recommendations may be another consequence of delay. As previously observed, the moment of judicial decision was usually many months after the moment of OCL recommendation. If two parties fail to settle in the period after the recommendation and if they pursue the litigation to the point of judicial decision, those facts augur against joint custody. They suggest that the parties will have difficulty communicating and cooperating after the order is made, and courts hold that joint custody is not in the child's best interests if the parents can't get along well enough to make it work.⁷¹ According to this theory, judges took into account the passage of time without settlement after OCL joint custody recommendations, and discounted those recommendations for that reason. By contrast, the passage of time without settlement would not erode the justification for a sole custody recommendation in the absence of other factual changes. This theory would also suggest that the reason why OCL lawyer recommended sole custody so much more often than OCL social workers did may be that lawyers were making those recommendations at trial, a point substantially later in the life span of the dispute than the point at which the social workers made their recommendations.

JUDICIAL ATTITUDES REGARDING SOCIAL WORKER RECOMMENDATIONS

A third possible explanation for the low rate of judicial concurrence with OCL social worker recommendations is that judges are not as willing to act on advice from social workers, as opposed to advice from psychologists, psychiatrists, or lawyers representing children.⁷² Further research in the form of a comparison of OCL social worker assessments with these other assessments might indicate why this is the case. The social workers' reports might be less convincing to judges than those written by other professionals.⁷³ Moreover, OCL social workers, by contrast to psychologists, do not usually have doctoral-level credentials. This might undermine their authority in judges' eyes. Judicial per-

ceptions of social workers might explain why their recommendations were less often accepted than both (i) recommendations from psychologists and psychiatrists in prior studies, and (ii) OCL lawyer recommendations in the present study.

Although research into social worker recommendations is relatively sparse, one study suggests that these evaluations may attract lower judicial concurrence rates than psychologists' evaluations. Leah Horvath and her colleagues identified 94 Kentucky cases with neutral recommendations about custody or access; social workers authored 72.55% of the evaluations studied in the sample, and psychologists were responsible for the remainder.⁷⁴ In only 27.3% of the cases was the judicial decision on custody or access identical to the recommendation.⁷⁵ On the other hand, Hung-En Liu found that in Taiwanese custody and access cases a number of "judges claimed they almost always decided in accordance with the social workers' conclusions."⁷⁶ Judicial attitudes about social workers might help explain the low rate of concurrence, but further research is required to comprehensively test this theory.

BEST INTERESTS DECISION-MAKING: SOCIAL WORKERS AND JUDGES

This paper first reported an empirical research finding – a rate of evaluator/judge concurrence in Ontario which is very low in the context of prior research. It then proposed an explanation. While judicial attitudes may play a role, the phenomenon of delay in Ontario family courts seems to largely account for both the low overall concurrence and the fact that OCL joint custody recommendations are even less likely to be accepted. What, if any, normative or policy conclusions should be drawn from these findings? Delay is partially a consequence of resource scarcity, and an infusion of new resources to the OCL and Ontario's family courts might substantially address this problem.

The best interests of children might also be served by a more harmonious synthesis between evaluator decision-making and judicial decision-making. For example, whereas the cases studied for this article each had two decision-makers (evaluator and judge), there might be advantages in a system with only *one* decision-maker per case. A "synthesis system" of this nature might more efficiently utilize existing resources, and address problems such as delay which are created in part by the interface between two decision-making processes. A synthesis system could combine the best elements of judicial and non-judicial decision-making in a single decision-maker.

A necessarily prior question arises. What are the strengths and weaknesses of these two types of decision-making in the context of custody and access disputes? Scholars have made compelling arguments for both approaches.

THE CASE FOR JUDICIAL DECISION-MAKING

Most of the existing literature takes for granted that judges will always remain the final decision-makers, and focuses critically on custody and access evaluations. For example, in the April 2009 issue of the *Family Court Review*, Robert Kelly and Sarah Ramsey propose a research agenda designed to comprehensively evaluate the contribution of evaluations to custody and access decision-making.⁷⁷ In a subsequent article of that issue, Mary O'Connell endorses this agenda, adding "the legal system must also clarify the justification for imposing this extensive—and often expensive—intrusion into the privacy of parents."⁷⁸

A number of scholars have argued that, even if non-judicial experts have a role in providing evidence, only judges should make the decisions.⁷⁹ Some authors and judges not only reject the use of expert recommendations as to the ultimate issue in custody and access proceedings, but also reject any participation by these experts at all.⁸⁰ A portion of this criticism focuses on the activities of psychologists and psychiatrists.⁸¹ For example, they have been accused of abandoning the scientific process by stating conclusions with a degree of certainty which is not justified by their observations or by legitimate inferences therefrom.⁸² This mischief is exacerbated if the opinion is misleadingly represented or perceived as having the objective authority of "science."⁸³ Other criticisms are aimed at party-retained experts, but have no force against neutrals such as OCL social workers.⁸⁴

Nonetheless, many of the arguments in the literature can be applied to social workers. For example, some critics argue that custody evaluators are vulnerable to "unsubstantiated theory, personal values and experiences . . . cultural and personal biases, [and] biased perception of their clients derived from their own negative marital and divorce experiences."⁸⁵ Of course, given the inherent difficulty which any decision-maker confronts in trying to predict a child's best interests, the same criticism might be leveled at judges. However, Martha Fineman argued that the litigation process provides a form of insulation from personal decision-maker bias which an investigatory process cannot.⁸⁶ As a result, she recommended limiting the "helping professions" to making determinations about whether a particular adult is "unfit" to be a parent, precluding them from opining about which parent is "better."⁸⁷ Writing in 1983, Foster and Freed claimed that

[a] sacrifice of legal principles and protections is too dear a price to pay for a mess of pottage. At times it is too dangerous to human liberty to listen too attentively to the experts. In addition to juvenile court justice, witness the fad of sterilization and the institutionalization of so-called sex psychopaths. Nonetheless, there is a growing demand that we repeat the same folly and turn the resolution of child custody disputes over to the 'experts.'⁸⁸

Turning to the case reports analyzed in this research project, one finds judges echoing some of these arguments. The OCL's work was explicitly criticized in at least eight cases out of the 90 with social worker recommendations. The most common criticism, which appeared in at least six cases, was that the OCL representative should have talked to more people or gathered more collateral information.⁸⁹ A related concern, which was voiced in two judgments, was that the OCL relied on biased statements from the parties or their allies, without corroboration.⁹⁰ Other occasional criticisms were that the OCL worker was biased,⁹¹ that he or she did not give due weight to stated wishes of the child,⁹² that there was no rationale given for the recommendation,⁹³ and that there was insufficient correspondence between the social worker's notes and the content of the report.⁹⁴

Some scholars have argued that judgments about the best interests of a child have dimensions which only judges can appreciate. Lynn Akre suggested that these decisions involve "moral and legal judgments," which must by their nature remain the province of the judiciary.⁹⁵ Similarly, Gould and Martindale distinguished between "psychological best interests of the child" and the "best interests of the child *simpliciter*," which is the legal standard.⁹⁶ While the former is the legitimate domain of non-legal experts, the latter is "based both on the law, that is outside the competence of most mental health professionals, and on common-sense judgments, that are properly reserved for the judge."⁹⁷ Tippins and Wittman also saw "critically important boundaries between the person invested with the power to make socio-moral and social-control decisions (the judge) and the expert witness who is hired to assist the court."⁹⁸ For this reason, they argued that psychologists and psychiatrists (and, presumably, social workers) should not make outcome recommendations to the court in custody and access disputes. Writing about the Canadian context, Professor Bala claimed that "the determination of a child's 'best interests' always involves application of a legal standard," and therefore an expert "assessment does not provide a definitive answer on the question of what is in the child's best interests."⁹⁹

THE CASE FOR SOCIAL-WORKER DECISION-MAKING

In addition to issues about the accuracy of expert evaluations, the literature clearly demonstrates a concern that non-judicial experts not intrude on a decision-making function which ought to be reserved for judges. However, it does not clearly identify the specifically legal or moral element of the "best interests of a child" standard, nor does it convincingly explain the utility of legal training in making these decisions. Judges themselves have expressed skepticism about their role in this context. One Ontario family court judge was quoted in the *Lawyers' Weekly* complaining that "so little of our work involves genuine legal issues to be truly adjudicated . . . I feel that I am more a social worker than a judge."¹⁰⁰ Another judge began a recent access decision as follows:

Some day, a wise person in a position of authority will realize that a court of law is not the best forum for deciding custody and access disputes, where principles of common sense masquerade as principles of law. Implementing the best-interests-of-the-child precept requires objectivity, not a legal education.¹⁰¹

It is arguable that some of the most powerful intellectual skills at a judge's disposal are of substantially diminished utility in custody and access decision-making. Statutory interpretation is not particularly useful when the statutes simply call for the child's "best interests" to be promoted, and then offer an anodyne list of factors, all of which are obviously good for children. Precedents are seldom of much use; citations of case law were rare in the cases analyzed.¹⁰² Even if there is a helpful precedent, given the high rates of self-representation, there is often no lawyer in the courtroom able to bring it to the judge's attention.

It has been argued that litigation is ideally suited to analyzing the past. It excels in finding historical facts and making legal deductions about them.¹⁰³ Custody and access decision-making, by contrast, requires identifying the plan for an uncertain future which is most likely to further a child's interests.¹⁰⁴ Decision-makers must predict how family members will interact under a variety of hypothetical scenarios, a function for which judges are not necessarily well suited.¹⁰⁵ Vilhelm Auber put this point as follows:

[A judge] is not a planner or an executor of plans. We can see here a close relationship between the nature of legal thinking, relatively unconcerned with utilitarian planning for the future, and the type of decision-making delegated to the judiciary. There is a close correspondence between his way of thinking and the fact that he is without command of the resources which other decision-makers, who must shape the future according to scientific plans, must control.¹⁰⁶

Judicial decision-making about custody and access is also compromised by weak evidence. It is striking that, in a proceeding focused on the best interests of a child, the judge usually has no direct access to the child's evidence. In the absence of participation by neutral experts, judges are generally confined to hearing about the child's wishes as hearsay via the parents or their legal representatives. The only alternatives are for the child to testify in court or be interviewed by the judge. Neither of these things happens often in Ontario courts.¹⁰⁷ There is therefore a stark disjunction between the intellectual task of adjudicating a custody or access dispute and the evidence and argument upon which the judge must rely to do so. The former is all about the child, whereas the latter comes mostly or entirely from the parents, who have no legal interest or rights in the outcome.¹⁰⁸

There are also serious issues about the adult parties' evidence, since judges must evaluate them as potential parents based on their testimony in open court. A person's behavior in this formal and often stressful environment may be a poor indicator of how he or she is likely to behave while alone with the child. By contrast, OCL social workers are empowered and trained to interview children, visit the parties' homes, and deploy an arsenal of information-gathering techniques much broader than that offered by the rules of civil procedure. It is at least possible that, all in all, OCL custody and access recommendations are based on better information than judicial decisions.

CONCLUSION: A SYNTHESIS SYSTEM?

One possible synthesis system would entrust social worker evaluators with the final decision-making authority in custody and access cases. A few commentators have suggested that non-judges should sit in panels with judges, jointly exercising authority.¹⁰⁹ Outside of North America, there is some precedent for non-judicial final decision-making in custody and access disputes.¹¹⁰ Alternatively, family court judges might be given some of the investigatory powers and responsibilities which are currently held by evaluators. While one can imagine judges visiting homes and daycares before making custody decisions, an intermediate and more realistic reform would be mandating or encouraging in-chambers judicial interviews with the children involved.¹¹¹

There is also, of course, something to be said for preserving the role distinctions between those who investigate and those who decide.¹¹² A comprehensive analysis of these considerations and options is clearly beyond the scope of this article.¹¹³ However, it is hoped that the empirical findings about concurrence and delay presented here will contribute to this important debate about the process we use to identify and pursue the best interests of our children.

NOTES

1. See, e.g., Nicholas Bala, *The Best Interests of the Child in the Post-Modern Era: A Central but Paradoxical Concept*, 6 SUP. CT. L. REV. 453 (1995); Janet R. Johnston, *High-Conflict Divorce*, 4 THE FUTURE OF CHILDREN 165 (1994).

2. James N. Bow & Francella A. Quinnell, *Critique of Child Custody Evaluations by the Legal Profession*, 42 FAM. CT. REV. 115 (2004); Michael A. Saini, *Evidence Base of Custody and Access Evaluations*, 8 BRIEF TREATMENT CRISIS INTERVENTION 111 (2008).

3. “Access” is the term generally used in Ontario for what is sometimes also known as “visitation.”

4. Divorce Act, R.S.O. 1985, c.3, § 16(8) (Can.); Children’s Law Reform Act (CLRA), R.S.O. 1990, c. C. 12, § 24(1) (Can.). The near-consensus supporting the best interests principle extends through the Western world and most of the normative scholarship as well. (Noel Semple, *Whose Best Interests? Custody and Access Law and Procedure*, 48 OSGOODE HALL L.J.(forthcoming MONTH 2010).

5. Children’s Law Reform Act, *supra* note 4, at § 24(2) ; Divorce Act, *supra* note 4 at § 16(8).

6. JEFFREY WILSON, WILSON ON CHILDREN AND THE LAW 2 (1986).

7. CLRA, *supra* note 4, § 26, Divorce Act, *supra* note 4 at § 17(5), *Gordon v. Goertz*, [1993] S.C.R. 27 (Can.).

8. CLRA, *supra* note 4, § 28 (explaining general powers of the court); *Id.* at § 34 (explaining access supervision).

9. CLRA, *supra* note 4. at § 29.

10. Courts of Justice Act, R.S.O. 1990, 0.40 § 31. Further, the social worker assessments are authorized by § 112. Further legal representation of the child is authorized by s. 89(3.1).

11. CJA, *id.*, s. 31. The social worker assessments are authorized by § 112; legal representation of the child by s. 89(3.1).

12. CLRA., *supra* note 4, at §§ 30(2), (3).

13. *Id.* at §§ 30(5), 30(6).

14. *Linton v. Clarke* (1994), 10 R.F.L.4TH 92 (Ont. Div. Ct.)

15. Empirical research conducted by the author found direct written or oral evidence from a child in only 3% of the cases a sample of 181 reported custody decisions from 2009. See Noel Semple, *The Silent Child: A Quantitative Analysis of Children’s Evidence in Canadian Custody and Access Cases*, 28 CAN. FAM. L.Q. 7 (2009).

16. Mamo et al., *infra* note 65; Ont. B. Ass’n. Fam. L. Sec., Alternative Disp. Resol. Inst.Ont..Ont. Ass’n.Fam. Mediators, FAMILY LAW PROCESS REFORM: SUPPORTING FAMILIES TO SUPPORT THEIR CHILDREN, available at <http://www.oafm.on.ca/Documents/OBA%20OAFM%20ADR%20Institute%20submission%20Apr%207%2009.pdf> at 6.

17. Ontario’s Courts of Justice Act., *supra* note 10, § 112(2) (provides that the OCL can become involved “on his or her own initiative . . . or at the request of any person” but this rarely happens).

18. *Id.*

19. Rachel Birnbaum & Dena Moyal, *How Social Workers and Lawyers Collaborate to Promote Resolution in the Interests of Children: the Interface between Law in Theory and Law in Action*, 21 CAN. FAM. L.Q. 379 (2003); Nicholas Bala et. al., *Alienated Children and Parental Separation: Legal Responses in Canada’s Family Court*, 33 QUEEN’S L.J. 79 (2007).

20. Rachel Birnbaum, *Examining Court Outcomes in Child Custody Disputes: Child Legal Representation and Clinical Investigations*, 24 CAN. FAM. L.Q. 167 (2005).

21. The following cases provided useful information: *Bolduc v. Bolduc*, [2006] O.J. No. 3317 (Can. Ont. Sup. Ct. J.) (QL); *Collins v. Trimble*, [2005] O.J. No. 3007 (Can. Ont. Sup. Ct. J.) (QL); *Copeland v. Perreault*, [2007] O.J. No. 1889 (Can. Ont. Ct. J.) (QL); *B.K. v. A.P.*, [2005] 141 A.C.W.S. 3d 446 (Can. Ont. Sup. Ct. J.); *Bowles v. Coggins*, [2008] O.J. No. 3593 (Can. Ont. Ct. J.) (QL); *Sidky v. Sidky*, [2005] O.J. No. 1844 (Can. Ont. Sup. Ct. J. Fam. Ct.) (QL); *Azimi v. Mirzaei*, [2008] O.J. No. 1208 (Can. Ont. Sup. Ct. J.) (QL); *C.L. v. D.B.* [2004] O.J. No. 4076 (Can. Ont. Ct. J.) (QL); *Weiler v. Phifer*, [2007] O.J. No. 1096 (Can. Ont. Sup. Ct. J. Fam. Ct.) (QL); *Pretchuk v. Pretchuk*, 2007 CarswellOnt 3024 (Can. Ont. Sup. Ct. J.) (WL); *Belair v. Vercholak*, 2008 CarswellOnt 1964 (Can. Ont. Sup. Ct. J.) (WL).

22. Bala et al., *supra* note 19; Lorraine Martin, *To Recommend Or Not to Recommend: That is Not the Question*, 43 FAM. CT. REV. 246, 249 (2005).

23. *Weiler v. Phifer*, [2007] O.J. No. 1096; *Cormier v. Abu-Safat*, [2004] O.J. No. 3613 (Can. Ont. Ct. J.) (QL); *Brown v. Brown*, [2004] O.J. No. 4281 (Can. Ont. Ct. J.) (QL); *Azimi v. Mirzaei*, [2008] O.J. No. 1208; *Belair v. Vercholak*, 2008 CarswellOnt 1964; *Benaglia v. Benaglia*, [2004] O.J. No. 836 (Can. Ont. Ct. J.) (QL).

24. Barbara-Jo Fidler & Rachel Birnbaum, *Child Custody Disputes: Private and Public Assessments*, 25 CAN. FAM. L.Q. 137 (2006).

25. Office of the Children’s Lawyer, *Report of the Children’s Lawyer*, MINISTRY OF THE ATTORNEY GENERAL, Dec. 9, 2010, <http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/socialwork.asp>.

26. *Id.*; Nicholas Bala, *Mohan, Assessments & Expert Evidence: Understanding the Family Law Context*, (2007), available at <http://ssrn.com/abstract=989761>.

27. *Id.*

28. Martin, *supra* note 22.

29. *Id.* at 250.

30. *Id.* at 249.

31. *Id.*; Birnbaum, "Examining," *supra* note 20, reported that 59% of OCL social workers said that they do so.

32. Martin, *supra* note 22.

33. James N. Bow & Francella A. Quinnell, *A Critical Review of Child Custody Evaluation Reports*, 40 FAM. CT. REV. 164 (2002).

34. Saini, *supra* note 2; ANDREW SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES (2004).

35. Fidler & Birnbaum, *supra* note 24.

36. For example, social worker assessments generally do not purport to identify pathologies in family members or diagnose personality disorders. Martin, *supra* note 22; Bala, Fidler, Goldberg & Houston, *supra* note 19.

37. Nicholas Bala, *Tippins and Wittman Asked the Wrong Question: Evaluators may not be "Experts," but They can Express Best Interests Opinions*, 43 FAM. CT. REV. 554 (2005); Bala, *supra* note 26.

38. The following search string was used to search the LexisNexis Quicklaw database; it produced 728 cases. ((OCL or O.C.L. or "children's lawyer" or "children's lawyer's") and not CASE-NAME("family services") and not CASE-NAME("children's aid"))

The first portion of this search string was designed to find all of those cases in which the OCL participated. The second portion (beginning with the words 'and not') excluded those cases in which a child protection authority was a party. Child protection cases were not part of this study.

39. Because not all decisions are reported, the decision analyzed was not always the first one after the recommendation. Analyzing concurrence using the earliest available decision minimized the extent to which the facts shifted between the time of the assessment and the time of the judgment. This focused the study as much as possible on divergent interpretations of the "best interests test" given similar facts. However, as discussed below, delay between assessment and judgment remained a substantial factor.

40. JAMES GARY MCLEOD, CHILD CUSTODY LAW AND PRACTICE (1992+) at § 1(1). However, this decision-making authority may be circumscribed by authority vested in the "access parent" or other adults.

41. CLRA, *supra* note 4, § 20(2).

42. Canadian courts are understandably reluctant to give authority over a child to someone who is not in the physical presence of the child, given that any such authority could only be exercised indirectly through the hands of the individual with physical custody.

43. Philip Epstein, Q.C. & Lene Madsen, *Joint Custody with a Vengeance: The Emergence of Parallel Parenting Orders*, 22 CAN. FAM. L.Q. 1 (2004).

44. CLRA, *supra* note 4, § 20(5).

45. *See, e.g., Johal v. Johal*, [2006] O.J. No. 4278 (Can. Ont. Sup. Ct. J.) (QL).

46. *See, e.g., G. Brun, et al., Child Psychiatric Advice to Legal Authorities Concerning Custody and Post-divorce Visiting Rights: Results of Collaboration of Lawyers and Child Psychiatrists Over a 2-year Period*, 63 ACTA PHYSIOLOGICA SCANDINAVICA 384, 388 (1981); Peter Ash & Melvin J. Guyer, *Court Implementation of Mental Health Professionals' Recommendation in Contested Child Custody and Visitation Cases*, 12 BULL. OF THE AM. ACAD. OF PSYCHIATRY & L. 137, 143 (1984). Irene Thery, *The Interest of the Child' and the Regulation of the Post-Divorce Family*, in CHILD CUSTODY AND THE POLITICS OF GENDER, 87-88 (Carol Smart & Selma Sevenhuijsen eds., 1989) is unclear on this point. Leah S. Horvath, et al., *Child Custody Cases: A Content Analysis of Evaluations in Practice*, 33 PROF. PSYCHOL.: RES. & PRAC. 557, 562 (2002) distinguished between (i) orders which were "exactly as the evaluator had recommended," (ii) orders which were "similar" to the recommendation, and (iii) those which were "completely counter to the evaluator's recommendation." Other findings from these studies are discussed at length below.

47. This includes recommendations of custody to an individual other than child's mother or father, and recommendations of sole custody in which the judgment did not indicate whom the social worker thought should have sole custody. There was one judgment (*O'Neill v. O'Neill*, [2005] O.J. No. 3573 (Can. Ont. Sup. Ct. J.) (QL)) in which the judge ordered that the OCL custody recommendation be put into effect but did not indicate whether that recommendation was for joint or sole custody. Therefore the total number of joint and sole custody recommendations in Table 2 (n = 76) is less than the total number of custody recommendations in Table 1 (n = 77).

48. $\chi^2_{(1)} = 8.484$, $p < .05$. In 43 of the 48 cases with sole custody recommendations, the judgment indicated that the social worker recommended that the mother should have sole custody or that the father should have sole custody. Judges accepted 21 out of 27 social worker recommendations of sole custody to the mother (78%), and 6 out of 16 social worker recommendations of sole custody to the father (38%).

49. In some of these cases, a social worker assisted the lawyer in representing the child.

50. Another chi-square test was conducted, leading to rejection of the null hypothesis that OCL social worker and OCL lawyer recommendations were equally likely to be accepted ($\chi^2_{(1)} = 11.747$, $p < .05$). On the basis of this analysis, it can be said that judges were significantly more likely to accept recommendations which came from OCL lawyers as opposed to social workers.

51. The fractions reflect *B.K. v. A.P.*, [2006] O.J. No. 2251 (Can. Ont. Sup. Ct. J.) (QL), in which sole custody was recommended for one of the three children and joint custody was recommended for the other two. The judge ordered sole custody for all of the children.

52. The description of this database provided on the LexisNexis website states that it includes judgments from all of the Ontario courts which deal with custody and access matters. A representative of the company informed the author that it includes “all decisions . . . received from the central distribution division of the Ontario Court.” (Personal communication from LexisNexis Canada Inc., December 15, 2008). One indication of sample quality is the substantial overlap between the LexisNexis Quicklaw database and that of its primary commercial competitor, Westlaw Canada. In another study, the author created a database consisting of all the cases from a 5-month period in which “custody and access” appeared among the keywords. This query was run in both the Quicklaw and the Westlaw Canada databases. Among the 108 Ontario cases which met this criteria, the majority (56%) were present in both of the databases. 81 of the 108 (75%) were found in the LexisNexis Quicklaw database; the remainder were only in Westlaw. The considerable overlap in the cases included in the two databases provides some evidence that neither of them has a small and esoteric sample (Semple, *supra* note 15.)

53. *Sui v. Law*, [2008] O.J. No. 3371, para. 16 (Can. Ont. Sup. Ct. J.) (QL); *Faragova v. Farag*, [2007] O.J. No. 714, para. 39 (Can. Ont. Ct. J.) (QL); *Hajdu v. Hajdu*, (2007) 162 A.C.W.S. 3d 269, para. 17 (Can. Ont. Sup. Ct. J.); *Butty v. Butty*, [2008] O.J. No. 2017, para. 359 (Can. Ont. Sup. Ct. J. Fam. Ct.) (QL); *Vanderstelt v. Vanderstelt*, [2008] O.J. No. 2543, para. 10 (Can. Ont. Sup. Ct. J. Fam. Ct.) (QL).

54. *Sui v. Law*, [2008] O.J. No. 3371, para. 16; *Demore v. Demore*, [2006] O.J. No. 4258, para. 5 (Can. Ont. Sup. Ct. J.) (QL); *M.H. v. K.B.* [2006] O.J. No. 5601, para. 69 (Can. Ont. Ct. J.) (QL); *Brown v. Brown*, [2004] O.J. No. 4281, para. 11 (Can. Ont. Ct. J.) (QL); *Figliano v. Figliano*, [2007] O.J. No. 530, para. 106 (Can. Ont. Sup. Ct. J.) (QL); *Butty v. Butty*, [2008] O.J. No. 2017, para. 359.

55. *See, e.g.*, *Purves v. Purves*, [2004] O.J. No. 3337 (Can. Ont. Sup. Ct. J.) (QL); *Azimi v. Mirzaei*, [2008] O.J. No. 1208, paras. 182-83 (Can. Ont. Sup. Ct. J.) (QL).

56. *See, e.g.*, *D.T.V. v. G.G.*, [2007] O.J. No. 3924 (Can. Ont. Sup. Ct. J.) (QL).

57. *Brun et al.*, *supra* note 46.

58. *Ash & Guyer*, *supra* note 46.

59. *Thery*, *supra* note 46, at 78.

60. Patricia Geraldine Tobin, *Clinical Recommendations for Sole Custody in Child Custody Disputes: An Analysis of Sex-Related Factors in the Decision-Making and Assessment Process* (1989) (unpublished Ph.D. thesis, University of Toronto) (on file with Ontario Institute for Studies in Education, University of Toronto).

61. *See, e.g.*, *Bala, Mohan*, *supra* note 26; D. R. Baerger et al., *A Methodology for Reviewing the Reliability and Relevance of Child Custody Evaluations*, 18 J. AM. ACAD. MATRIMONIAL LAW 35 (2002); *Saini*, *supra* note 2.

62. *Supra* Table 3.

63. *Garrad v. MacKay*, [2004] O.J. No. 2159 (Can. Ont. Sup. Ct. J.) (QL); *Edwards v. Tronick-Wehring*, [2004] O.J. No. 4911 (Can. Ont. Sup. Ct. J.) (QL); *J.T. v. S.R.*, [2005] O.J. No. 2017 (Can. Ont. Sup. Ct. J.) (QL); *Park v. Breese*, [2006] O.J. No. 2444 (Can. Ont. Sup. Ct. J.) (QL); *Mackrell v. Frederick*, [2005], O.J. No. 1707 (Can. Ont. Sup. Ct. J.) (QL); *Butcher v. Bentley*, [2007] O.J. No. 1774 (Can. Ont. Sup. Ct. J.) (QL); *M.H.D. v. S.J.D.*, [2005] O.J. No. 447 (Can. Ont. Sup. Ct. J.) (QL); *J.S.B. v. D.L.S.*, [2004] O.J. No. 16 (Can. Ont. Sup. Ct. J.) (QL); *Peacock v. Greenhead-Peacock*, [2007] O.J. No. 2621 (Can. Ont. Sup. Ct. J.) (QL); *J.E.H. v. W.V.D.*, [2004] O.J. No. 2130 (Can. Ont. Sup. Ct. J.) (QL); *Crozier v. Crozier*, [2006] O.J. No. 1965 (Can. Ont. Sup. Ct. J.) (QL); *Nippard v. Raby*, [2007], O.J. No. 3815 (Can. Ont. Sup. Ct. J.) (QL), affirming *Raby v. Nippard*, [2007] O.J. No. 97 (Can. Ont. Sup. Ct. J.) (QL); *S.R. v. A.R.*, [2004] O.J. No. 3596 (Can. Ont. Sup. Ct. J.) (QL); *S.H. v. M.E.*, [2004] O.J. No. 5727 (Can. Ont. Sup. Ct. J.) (QL); *Belair v. Vercholuk*, [2008] O.J. No. 761 (Can. Ont. Sup. Ct. J.) (QL); *Wood v. Wood*, [2005] O.J. No. 3691 (Can. Ont. Sup. Ct. J.) (QL); *Olson v. Olson*, [2008] O.J. No. 478 (Can. Ont. Sup. Ct. J.) (QL); *Reid V. Catalan* [2008] O.J. No. 912 (Can. Ont. Sup. Ct. J.) (QL).

64. *See, e.g.*, *Azimi v. Mirzaei*, [2008] 166 A.C.W.S. 3d 114 (Can. Ont. Sup. Ct. J.); *Islam v. Rahman*, [2005] 139 A.C.W.S. 3d 497 (Can. Ont. Sup. Ct. J.); *Cormier v. Abu-Safat*, [2004] 133 A.C.W.S. 3d 472 3 (Can. Ont. Sup. Ct. J.); *J.E.H. v. W.V.D.*, [2004] 131 A.C.W.S. 3d 273 (Can. Ont. Sup. Ct. J. Fam. Ct.); *Purves v. Purves*, [2004] 132 A.C.W.S. 3d 1117 (Can. Ont. Sup. Ct. J.).

65. Linda Diebel, *Family Court Crisis; Shortage of Judges is Running Up Costs, Putting Lives on Hold*, TORONTO STAR, Dec. 9, 2007, at A01; ALFRED A. MAMO, PETER G. JAFFE, & DEBBIE G. CHIODO, RECAPTURING AND RENEWING THE VISION OF THE FAMILY COURT (2007), available at www.crvawc.ca/documents/Family%20Court%20Study%202007.pdf; Helen Burnett, *More Judges Needed Now in Family Court*, LAW TIMES (TORONTO), Feb. 4, 2008.

66. However, given the sample size, it cannot be said that this difference is statistically significant. A t-test for independent means was used to test the research hypothesis that the cases in which custody recommendations were rejected would have significantly longer periods of delay than those in which the recommendations were accepted. A level of statistical significance of .05 was chosen, meaning that the author would assume that the difference in averages occurred by chance unless the statistical test indicated a 95% likelihood that this was not the case ($t_{(52)} = 1.2923$, $p > .05$).

67. For the definitions of these terms, see “Methodology,” *supra*.

68. Again, however, given the sample size these differences in means cannot be said to be statistically significant. A simple ANOVA test was used to statistically estimate the likelihood that time elapsed was correlated to access/time-sharing concurrence. For this purpose, cases coded as “consistent” were grouped with those coded “full agreement” and cases coded as “full disagreement” were grouped with those coded “general disagreement.” The null hypothesis was that there would be no

significant difference in average time elapsed after recommendation between the different access/time-sharing concurrence categories. A level of statistical significance of .05 was chosen, meaning that the author would assume that any difference in averages occurred by chance unless the statistical test indicated a 95% likelihood that this was not the case. On this standard, the null hypothesis cannot be rejected ($F_{(2, 33)} = 1.9318, p > .05$).

69. In two such cases, it was reported that the OCL had had contact with the children the day before the trial: Roche v. Trafford, [2007] 169 A.C.W.S. 3d 1069, para 11 (Can. Ont. Ct. J.); and Sui v. Law, [2008] 58 R.F.L. 6th 106, para 10 (Can. Ont. Sup. Ct. J.).

70. However, as will be explained below, it is also possible that OCL counsel recommendations were more often accepted because they endorsed sole as opposed to joint custody more often than the social workers did.

71. Kaplanis v. Kaplanis, (2005) 249 D.L.R. 4th 620 (Can. Ont. C.A.).

72. See Bala, *supra* note 26, at 30, Bow & Quinell, *supra* note 2 (both suggest that judges take evidence from psychologists more seriously).

73. Given that the researcher did not have access to the original social worker reports, this hypothesis cannot be proven or disproven by the data.

74. Horvath et al., *supra* note 46.

75. The largest group of cases, 63.6%, were those in which the outcome was similar but not identical to that recommended.

76. Hung-En Liu, *Custody Decisions in Social and Cultural Contexts: In-Depth and Focus Group Interviews with Nineteen Judges in Taiwan*, 16 COLUM. J. ASIAN L. 299 (2004).

77. Robert F. Kelly & Sarah H. Ramsey, *Child Custody Evaluations: The Need for Systems-Level Outcome Assessments*, 47 FAM. CT. REV. 286, 287 (2009).

78. Mary E. O'Connell, *Mandated Custody Evaluations and the Limits of Judicial Power*, 47 FAM. CT. REV. 304 (2009).

79. Timothy M. Tippins & Jeffrey P. Wittmann, *Empirical and Ethical Problems with Custody Recommendations*, 43 FAM. CT. REV. 193 (2005); Lynn M. Akre, *Struggling with Indeterminacy: A Call for Interdisciplinary Collaboration in Redefining the "Best Interest of the Child" Standard*, 75 MARQ. L. REV. 628, 666 (1992).

80. Christopher Allan Jeffreys, *The Role of Mental Health Professionals in Child Custody Resolution*, 15 HOFSTRA L. REV. 115, 124 (1986) (reports that some judges refuse to entertain expert evidence in custody and access disputes); see also sources cited in Bala, *supra* note 26.

81. A recent barrage of such criticism was commenced by Tippins & Wittmann, *supra* note 79. See also Daniel W. Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgment*, 36 FAM. L.Q. 135, 144-153 (2002).

82. Jonathon W. Gould & David A. Martindale, *A Second Call for Clinical Humility and Judicial Vigilance*, 43 FAM. CT. REV. 253 (2005).

83. Shuman, *supra* note 81.

84. See, e.g., Jeffreys *supra* note 80; Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79 (1997).

85. Joan B. Kelly & Janet R. Johnston, *Commentary on Tippins and Wittman's "Empirical and Ethical Problems with Custody Recommendations"*, 43 FAM. CT. REV. 233 (2005); see also the judgment of Justice L'Heureux-Dubé in *Young v. Young*, [1993] 4 S.C.R. 3 (Can.).

86. Martha Fineman, *The Politics of Custody and Gender: Child Advocacy and the Transformation of Custody Decision Making* in SMART & SEVENHUIJSEN, *supra* note 46.

87. *Id.*, at 47.

88. Henry H. Foster & Doris Jonas Freed, *Child Custody and the Adversary Process: Forum Conveniens?* 17 FAM. L.Q. 133, 136-37 (1983).

89. Ellis v. Ellis, [2004] O.J. No. 3850, para. 10 (Can. Ont. Sup. Ct. J.) (QL); Lalonde v. Lalonde, [2008] O.J. No. 258, para. 11 (Can. Sup. Ct. J.) (QL); Islam v. Rahman, [2005] O.J. No. 1920, paras. 26-27 (Can. Ont. Sup. Ct. J.) (QL); D.T.V. v. G.G., [2007] O.J. No. 3924, paras. 128-9 (Can. Ont. Sup. Ct. J.) (QL); Rice v. Abbott, [2006] O.J. No. 4889, paras. 94-96 (Can. Ont. Sup. Ct. J.) (QL); Waddington v. Ryan, [2006] O.J. No. 533, paras. 24-28 (Can. Ont. Sup. Ct. J. Pembroke) (QL).

90. Islam v. Rahman, [2005] O.J. No. 1920, paras. 26-27; D.T.V. v. G.G., [2007] O.J. No. 3924, at para 176.

91. Ellis v. Ellis, [2004] O.J. No. 3850; Cormier v. Abu-Safat, [2004] O.J. No. 3613, para. 61 (Can. Ont. Ct. J.) (QL).

92. Islam v. Rahman, [2005] O.J. No. 1920, at paras. 26-27.

93. Boyce v. Boyce, [2004] O.J. No. 2251 (Can. Ont. Sup. Ct. J. St. Thomas) (QL).

94. Rice v. Abbott, [2006] O.J. No. 4889, paras. 94-96.

95. Akre, *supra* note 79, at 668.

96. Gould & Martindale, *supra* note 82.

97. Melton, G. B., & Limber, S., *Caution in Child Maltreatment Cases*, 46 AMERICAN PSYCHOLOGIST 82 (1991), cited in Gould & Martindale, *supra* note 82.

98. Tippins & Wittmann, *supra* note 79. See also Schepard, *supra* note 34, at 159-60.

99. Bala, *supra* note 26.

100. Cristin Schmitz, *Canadian Judges in Distress, Psychologist Finds in Survey*, THE LAWYERS WEEKLY (TORONTO), August, 23 2002.

101. Geremia v. Harb, (2008) 90 O.R. 3d 185, para 1 (Can. Ont. Sup. Ct. J.). See also, Hon. Linda Dessau, *A Short Commentary on Timothy M. Tippins & Jeffrey P. Wittmann's "Empirical and Ethical Problems with Custody Recommendations"*,

43 FAM. CT. REV. 266 (2005), who asks “Why is it that a judge, an expert in the law, is better placed than a social scientist to decide the exquisitely difficult issues thrown up in the aftermath of family breakdown?”

102. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS., Summer 1975, at 226.

103. Kirsten Sandberg, *Best Interests and Justice* in SMART & SEVENHUIJSEN, *supra* note 47 at 106; Edward D. Bayda, *Procedure in Child Custody Adjudication: A Study in the Importance of Adjective Law*, 3 CAN. J. FAM. L. 66 (1980).

104. Weinstein, *supra* note 84, at 67; Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203 (2004); Bala, *supra* note 26.

105. Mnookin, *supra* note 102, identifies the “Interdependence of Outcome-Affecting Factors” as an inherent dilemma. The best interests standard requires a prediction of the future, while the future depends on the parties’ conduct, and the parties’ conduct in turn depends on the nature of the decision made.

106. Vilhelm Aubert, *Courts and Conflict Resolution*, 11 J.CONFLICT RESOL. 40, 42-43 (1967).

107. Semple, *supra* note 15; Bala, *supra* note 26; Donna Wowk, *How To Get Children’s Evidence Before The Court*, in THE SIX-MINUTE FAMILY LAW LAWYER 2008 (2008); Rachel Birnbaum & Nicholas Bala, *Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio*, 24 INT’L J. OF L., POL’Y, & FAM. 300 (2010).

108. Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, in SOLOMONIC JUDGEMENTS: STUDIES IN THE LIMITATIONS OF RATIONALITY (1989).

109. Toronto lawyer Michael Cochrane, *cited in* Landon Pearson & Roger Gallaway, FOR THE SAKE OF THE CHILDREN: REPORT OF THE SPECIAL JOINT COMMITTEE ON CHILD CUSTODY AND ACCESS (1998), at Chapter 4, section (A)(2)(ii); *see also* Jeffreys, *supra* note 80, at 128-129.

110. Amanda Barratt & Sandra Burman, *Deciding the Best Interests of the Child: An International Perspective on Custody Decision Making*, 118 SOUTH AFRICAN LAW JOURNAL 556 (2001).

111. Birnbaum and Bala, *supra* note 107.

112. *See, e.g.*, *supra* notes 95–99.

113. For the author’s effort to analyze custody and access decision-making procedure from the point of view of children’s interests, *see* Semple, *supra* note 4.

Noel Semple (J.D., LL.M) is a Ph.D candidate at Osgoode Hall Law School in Toronto. His doctoral focus is the procedures by which child custody and access arrangements are made for children following the breakdown of their parents’ relationships. His work critically analyzes the litigation and settlement mechanisms used to resolve these disputes, and their costs and benefits for the children involved. In Spring 2012, Mr. Semple will teach the Children and the Law course at the University of Western Ontario Faculty of Law.