

## **Child Custody, Law, and Women's Work**

*By Susan B. Boyd (Don Mills, ON: Oxford University Press, 2003)*

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*Pendant plus de deux siècles, les féministes au Canada ont lutté en vue de faire adopter des lois plus équitables en matière matrimoniale et de faire reconnaître le travail non rémunéré des mères. Leurs efforts ont souvent été gênés par les postulats du patriarcat, par des lois vétustes et sexistes et, dans les récentes décennies, par l'opposition de plus en plus organisée et médiatisée des groupes revendiquant les droits des pères. Les amendements proposés à la Loi canadienne sur le divorce (Projet de loi C-22) représentent la dernière ronde de cette lutte incessante. Les amendements transformeraient le domaine des droits de garde et de visite au Canada, en remplaçant les ordonnances de garde et de visite par des ordonnances parentales et enchâssant le discours de la responsabilité parentale. Le livre remarquable de Susan Boyd retrace, de façon exhaustive, l'histoire du droit canadien en matière de garde d'enfants depuis les deux derniers siècles. En se fondant sur une vaste gamme de sources primaires et secondaires, tout en analysant l'évolution du droit au Royaume-Uni, en Australie et aux États-Unis, Boyd offre à son lectorat une documentation solide permettant de comprendre les origines et la portée de ces changements. Boyd neutralise les prétentions des groupes militant pour les droits des pères, en démontrant que les mères n'ont jamais reçu de traitement préférentiel de la part des tribunaux et que toute « présomption en faveur de la mère » reposait toujours sur la norme très exigeante de la « bonne mère ». Dans ce livre, Boyd évalue de nombreuses stratégies en matière de réforme du droit, y compris les modèles de la garde partagée et du parent « pare-chocs », soit le parent qui assure le travail parental au quotidien. Ce livre constitue une ressource inestimable pour toute personne qui œuvre dans le domaine du droit de la famille, qu'il s'agisse de recherches, d'analyses à caractère scientifique ou de pratique devant les tribunaux.*

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*For more than two centuries, feminists in Canada have been fighting for the passage of equitable family laws and the recognition of women's unpaid work as mothers. Their efforts have often been hampered by patriarchal assumptions, antiquated and sexist laws, and, in recent decades, the increasingly vocal and organized opposition of fathers' rights groups. The proposed amendments to the Divorce Act (Bill C-22) represent the latest round in this ongoing battle. The amendments would transform the terrain of custody and access in Canada, replacing custody and access orders with parenting orders, and enshrining the language of parental responsibility. Susan Boyd's outstanding book provides an extensive review of child custody law in Canada during the past two centuries. Drawing upon a vast range of primary and secondary sources and examining*

developments in the United Kingdom, Australia, and the United States, Boyd provides readers with a solid foundation from which to understand the origins and significance of these changes. Countering the claims of fathers' rights advocates, Boyd demonstrates that mothers have never received preferential treatment in the courts and that any "maternal presumption" was always contingent upon the highly normative standards of "good" mothering. Throughout the book, Boyd evaluates a number of strategies for legal reform, including shared parenting and the primary caregiver model. The book is an invaluable resource for researchers, scholars, and practitioners in the field of family law.

On 10 December 2002, Justice Minister Martin Cauchon introduced Bill C-22, *An Act to Amend the Divorce Act*, in the House of Commons.<sup>1</sup> The much-anticipated bill represents a major revision of the divorce regime in Canada, as it proposes to replace custody and access orders with parenting orders and to enshrine in law the notion of parental responsibilities. While not travelling as far along the path towards "shared parenting" as fathers' rights advocates have demanded or the Joint Senate/Parliamentary Committee recommended in 1998, the bill nonetheless promises to have dramatic consequences for divorcing parents and their children.

The legislation has been in the works for a long time. Indeed, for more than two centuries, feminists in Canada have been fighting for equitable family laws.<sup>2</sup> During the nineteenth and early twentieth centuries, first-wave feminists challenged patriarchal laws that denied mothers any rights to custody of, or access to, their legitimate children. Second-wave feminists continued this struggle, fighting for the passage of divorce legislation, for child support, and for many other reforms. On the home front, many second-wave feminists embraced a concept of shared parenting as a means to lessen women's domestic responsibilities while providing children with a broader base of love and support. Many others worried about the long-term consequences of legislative efforts to equalize parenting, fearing that it might provide embittered fathers with new means to control the lives of their former partners. During the 1980s, as California led the movement towards the presumption of joint custody, Canadian feminist academics and activists fought vigilantly to exclude such a presumption from the amendments to the *Divorce Act*.<sup>3</sup> While we technically "won the battle" in many respects, we essentially "lost the war," as discourses of equality and gender neutrality coupled with the increasingly sophisticated and well-organized (not to mention well-funded) efforts of fathers' rights activists have led to what has often

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1. Bill C-22, *An Act to Amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Judges Act and to Amend Other Acts in Consequence*. The act died on the order paper, when Parliament was prorogued in November 2003.
  2. For a recent discussion of these efforts, see Katherine Arnup, "In the Best Interests of the Child? Rethinking Child Custody and Divorce in a 'Post-Feminist' World," in Margrit Eichler, June Larkin, and Sheila Neysmith, eds., *Feminist Utopias: Re-Visioning Our Futures* (Toronto: Inanna Publications, 2002), 103-16.
  3. *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp) at s. 17(4).

amounted to a *de facto* presumption of shared parenting—a far more nebulous, ill-defined, and potentially dangerous concept.

In the twenty-first century, these challenges remain. How do we fight for equitable family laws without abandoning the hard-won legal recognition of our work as mothers? How do we recognize the persistence of the gendered division of labour within the family without contributing to its survival? Why have we failed to transform gendered roles within the family? How has the law acted to assist or impede our search for equality? Finally, how have feminists' demands for gender neutrality and equality been used against us by fathers' rights advocates, angry ex-partners, and an often uncomprehending judiciary. These are among the questions that Susan Boyd's brilliant new book can help us to address.

*Child Custody, Law, and Women's Work* is one of the most long-awaited books in Canadian feminist legal scholarship in recent years. Written by eminent legal scholar Susan B. Boyd, the book was more than a decade in the making. Boyd was certainly not idle during this period. On the contrary, she has produced literally dozens of articles that have set the standard for meticulous scholarship and cogent analysis of child custody and the law. At the same time, she has been active in lobbying for legal reform through the National Association of Women and the Law and other women's organizations. All this, while serving as chair of feminist legal studies at the University of British Columbia, teaching courses in feminist legal analysis, and supervising graduate students!

Boyd's research is exhaustive, meticulous, and wide ranging, encompassing a tremendous range of primary and secondary sources. Recognizing the international context within which family law reform functions, Boyd reviews the major legal developments in Canada as well as in the United Kingdom, Australia, and the United States. The bibliography reflects leading-edge scholarship in the field, providing an invaluable resource for researchers in the field as well as for students new to the topic. As with all her writing in the field, Boyd's scholarship is always grounded in both the theoretical debates and the empirical research.

At the core of the book is the issue of "how women's responsibility for caregiving has been dealt with by the law," particularly during separation and divorce.<sup>4</sup> While women's concerns are at the forefront of this examination, the rights claims of fathers and the needs and interests of children are never far from centre stage. In this drama of the unravelling and remaking of nuclear families, rights and needs do indeed compete. In examining both the historical and contemporary landscapes, Boyd shows that mothers' and children's interests are often inextricably intertwined and interconnected. How to recognize these interconnections, while avoiding the pitfalls of biological determinism, is a central dilemma for feminist scholars and activists alike.

In order to address these questions, Boyd begins with an examination of the sweeping changes that have taken place in child custody and access laws during the past two centuries. Boyd traces the shift from the absolute rights of fathers,

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4. Susan B. Boyd, *Child Custody, Law, and Women's Work* (Don Mills: Oxford University Press, 2003) at 2.

which held sway until the mid-nineteenth century, to the so-called maternal presumption of the twentieth century. Finally, with the passage of the *Canadian Charter of Rights and Freedoms*<sup>5</sup> and the enshrining of gender equality, Canada witnessed a shift to “gender neutrality” in legal discourse, decision-making, and legislation. As Boyd documents, “contrary to many current impressions, mothers have never been the favoured darlings of child custody law.”<sup>6</sup> On the contrary, even the maternal presumption operated on extremely narrow grounds, favouring only those mothers who met the established norms of purity, devotion to duty, and “good mothering.” Through an exhaustive review of cases in the area, Boyd demonstrates that the “maternal presumption,” based on the tender years doctrine, was always a contingent one. Issues of blame (for example, who appeared to be to blame for breaking up the marriage, how proficient a mother was in domestic skills, and whether she worked outside the home) could easily turn the tables against mothers seeking custody of even the youngest children. Thus, a woman who left the marital home (for whatever reasons, including abuse) might be viewed as depriving her child(ren) of a “normal” family life, and she therefore ran the risk of losing custody to her ex-husband. As Boyd concludes, “[t]he tender years doctrine rarely constituted a clear presumption in favour of mothers unless judges chose to emphasize it.”<sup>7</sup>

One of the important insights of feminist legal scholarship is that family law is contested terrain. Today, it has become a major battlefield on which gender politics and the politics of parenting are fought. Yet, surprisingly, many people are unaware of the degree to which mothers’ ability to parent their children has been severely hamstrung by recent legal developments. The past two decades have witnessed men’s increasing control over women’s lives via custody and access (aided by mechanisms such as the friendly parent and maximum content rules). The fathers’ rights movement has grown from a disorganized, marginal collection of embittered fathers, to a powerful, well-organized, mainstream lobby with supporters in virtually all political parties. Boyd’s book is particularly helpful in enabling us to understand the significance of the fathers’ rights movement. Boyd demonstrates that fathers’ rights activists have been successful in cloaking their work in the palatable language of “shared parenting” and “the best interests of the child.” She notes that fathers’ rights groups “purported to align the rights of fathers with the needs and best interests of children by asserting that there is a crucial need for the children of divorce to have contact with their fathers in order to ensure their psychological well-being.”<sup>8</sup> As a result, these groups were highly influential in the Senate/Parliamentary hearings, and their voices are prominent in the final report.<sup>9</sup> Indeed, in a clever act of linguistic juggling, they succeeded in

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5. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11.

6. Boyd, *supra* note 4 at 215.

7. *Ibid.* at 71.

8. *Ibid.* at 201.

9. “For the Sake of the Children,” report of the Special Joint Committee on Child Custody and Access, December 1998.

shifting the meaning of gender bias from discrimination against women to bias against fathers.

In the face of these battles, an examination of the implications of “gender-neutral” parenting for mothers and children is particularly critical. We must ask the difficult question: how do we reconcile our abhorrence of biological determinism with the recognition that women/mothers do in fact perform most of the work of “parenting”? One strategy that feminists have adopted is to focus on the concept of the primary caregiver as a key variable in the determination of custody. Boyd has written extensively on this issue, bolstering feminist lobbying for its inclusion in family law regimes. Unfortunately, these efforts have been largely unsuccessful. In light of the failure of the primary caregiver presumption to take hold in any meaningful way, what strategy do we best employ to recognize the gendered nature of work within the family without enshrining it permanently? How do we navigate the terrain of gender-neutral parenting in the profoundly gendered world of the family? As Boyd notes, changes to language alone will not transform parenting roles or the family, as they “will not fundamentally shift the power dynamics structured by gender relations.”<sup>10</sup> On the contrary, “[w]ithout structural socioeconomic changes that enhance the ability of parents to participate meaningfully in the labour force and in parenting, significant changes to the sexual division of labour in both public and private spheres are unlikely to occur.”<sup>11</sup> Clearly, a great deal of work remains to be done!

In concluding this review, I want to consider two further issues that promise to shape child custody and family law in the years to come. The first is the emergence into mainstream legal circles of lesbian and gay families. Throughout her research, Boyd has been consistently attuned to questions of sexual orientation, particularly in relation to child custody determinations. With lesbian and gay marriage fast becoming a legal reality, these issues become all the more pressing. If we are to assume that lesbian and gay relationships will follow the pattern set by heterosexual couples (with some 33 to 50 per cent of relationships ending in separation and divorce), it is arguable that the “lesbian baby boom” will soon be joined by a lesbian divorce boom. How will the courts deal with an influx of separating lesbian and gay parents? We have already seen a limited number of cases appearing before the courts. In some instances, particularly in the United States, biological mothers have succeeded in denying custody and access rights to their former partners. In others, lesbian co-parents have disavowed their parenting role, in an effort to avoid the responsibility of child support following the dissolution of a lesbian relationship. In Canada, judges have imposed child support orders on lesbian co-parents (operating on the broad notion of intent to parent). In custody disputes, judges have frequently sided with biological mothers on the assumption that the biological mother is the natural caregiver. In others, judges have assumed that a lesbian family is an egalitarian unit, in which each woman is an equal parent.

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10. Boyd, *supra* note 4 at 199.

11. *Ibid.* at 225.

Neither of these assumptions is necessarily accurate. Research on lesbian mothers suggests that it is not gender alone that dictates parenting skills and practices but rather a host of factors, including predisposition and personality, early parenting experiences, (including the impact of pregnancy and breast-feeding on parental attachment), and the demands of work in the paid labour force. To understand precisely how these factors translate into parenting practices, these assumptions must be interrogated with data from people's actual lives in order to determine how gender plays out in lesbian families. In many respects, lesbian families represent the ultimate equality test. Is the primary caregiver notion still relevant in the context of a household that lacks a gendered division of labour? What are the relevant indicia of caregiving? What roles might power or abuse play in lesbian households? These are analytical and empirical issues to which attention and research must be addressed in the coming years.

As I noted at the outset of this review, Bill C-22 promises to transform the terrain of parenting in the twenty-first century. Unfortunately *Child Custody, Law, and Women's Work* was published before Bill C-22 was introduced. Thus, Boyd was unable to provide us with her assessment of its implications. The legislation is an attempt by the federal government to steer a "middle ground" between the competing demands of fathers' rights activists and feminists. To establish the appearance of neutrality, the government avoided the language of shared parenting, relying instead upon parenting plans and the concept of parental responsibility. There are many practical limits to this approach. Sadly, many people are simply not responsible parents. While judges can impose parenting plans, there are few ways in which to force parents to put the interests of their children first. Parents can and will neglect their children. In all likelihood, mothers will continue to maintain and oversee their children's schedules, making all the medical and dental appointments, ensuring that children have the necessary school supplies and equipment, and so on. In the context of "shared parenting," they will simply do this work in double time during their allotted time with their children. Such an approach will surely take a huge toll on mothers and their children, while continuing to render invisible the amount of work that raising a child actually involves.

As the divorce rate continues to rise, as lesbian and gay marriage becomes a reality, as "experts" rail about the "trauma" of divorce, the issues of child custody and divorce remain critical ones. These issues affect the lives of millions of parents and their children in Canada today. As Susan Boyd eloquently concludes, "child custody law is but a tiny microcosm of the complex structures regulating the family, and feminist struggles in this field rarely provide much satisfaction in terms of larger and longer efforts to shift the sexual division of labour."<sup>12</sup> Nonetheless, these struggles can and do make a profound difference in the lives of individual women and their children; thus it is critical that we continue to analyze, research, and, most importantly, work for change.

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12. *Ibid.* at 226.

### ***Post-Script***

Since this review was written, political events have once again intervened. As of November 2003, the parliamentary session was prorogued, with the result that Bill C-22 died on the order paper. While it is technically possible for the next government to re-introduce the bill, it appears unlikely that Paul Martin will choose to revive such a controversial piece of legislation at this early stage of his mandate. Furthermore, neither Paul Martin nor his Justice Minister have indicated their position on the issue of divorce reform. After years of lobbying by feminists and fathers' rights activists alike, divorce reform is once again on the back burner.