Parents Behaving Badly: Whether, in the Wake of Miller-Jenkins, Public Policy Considerations Should Play a Role in Custody Decisions

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DECISIONS

ABSTRACT

Miller-Jenkins v. Miller-Jenkins illustrates the dilemma facing courts in contentious custody disputes: At what point, if ever, should the best interests of one child cede to the interests of society at large? The best interests standard has become the predominant norm for settling custody disputes under both domestic and international law, yet satisfying the needs of one child can potentially establish precedent that runs counter to public policy, often forcing courts to ignore – or at least claim to ignore – these public policy considerations in order to reach a decision based on the individual child’s best interests. Undoubtedly aware of this dilemma, the Miller-Jenkins Court seemingly attempted to cloak its public policy concerns under the guise of the child’s long-term interests, thus apparently adhering strictly to a best interests analysis.

Several scholars have looked at Miller-Jenkins as it relates to same-sex marriage and the domestic best interests standard to discuss whether the decision was “correct,” but few have looked at how these domestic issues interplay with foreign and international law, particularly relating to the role of public policy. This Article suggests that there are circumstances where public policy considerations ought to be considered in custody disputes. By analyzing Miller-Jenkins as it relates to other U.S. and foreign cases, this Article contextualizes the situation, showing how courts can and should attempt to resolve this dilemma. Importantly, courts should always ensure that the child at issue has the opportunity to be heard, as required by the Convention on the Rights of the Child. Specifically, this Article looks to a Canadian case factually similar to Miller-Jenkins to demonstrate how a court can thoroughly assess the psychological needs of the child before coming to a decision supported by public policy considerations. There is no doubt a balancing act that courts must perform in such cases, and there may never be a perfect solution. With better guidance, however, this Article suggests that courts such as that in Miller-Jenkins can improve their decision-making by acknowledging, rather than hiding from, external public policy considerations when necessary.

When deciding which parent an eight year old child should live with for the rest of her life, is it desirable for the ruling court to be “aware of the national attention [the] case has gained”? 1 Courts frequently consider the public policy ramifications of their decisions in

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1 Miller-Jenkins v. Miller-Jenkins, 12 A.3d 768, 778 (Vt. 2010).
various cases, but questions arise if a court factors these considerations into a custody decision. It is well established that a primary consideration in a custody dispute “must be the best interests of the child.” Courts frequently face a dilemma, then, where the best interests of the child do not necessarily align with public policy goals. Arguably, the Vermont Supreme Court faced precisely this dilemma in Miller-Jenkins v. Miller-Jenkins, ultimately twisting and maneuvering the best interest standard in order to fulfill its public policy objectives.

Of course, there is no easy fix for custody disputes. By design, custody disputes place the child at the center of litigation, and this battle can make the child a “mediator, weapon, pawn, bargaining chip, trophy, go-between or even spy.” Perhaps all divorces will be harmful to the child, but contested divorces can have more serious effects. The best interests standard is intended to minimize these issues by determining exactly what is in the child’s interests and avoiding as much harm as possible.

By awarding the child in dispute to the non-custodial mother in a same-sex marriage case, the Miller-Jenkins Court arguably ignored the child’s best interests, in contravention of both domestic and international norms. Faced with a custodial parent who interfered with a

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2 See, e.g. Sonnier v. Crain, 649 F. Supp. 484, 491 (E.D. La. 2009) (finding that a university’s speech policy furthers interests of the “university’s educational mission, ensure[s] public safety, and foster[s] diversity”); Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, 886 F.2d 1200, 1204 (9th Cir. 1989) (determining that an alternate ruling of reinstatement would have harmful effects on automobile safety and maintenance, endangering the safety of the general public); Coman v. Thomas Mfg. Co., 381 S.E.2d 445, 447 (N.C. 1989) (finding that at-will employment cannot be terminated when that purpose would contravene public policy that could encourage truck drivers to commit fraud and perjury).

3 Id. at 774 (citing Begins v. Begins, 721 A.2d 469, 471 (1998)). Accord CRC, supra n. 43, Art. 3, § 1.

4 See generally Miller-Jenkins, 12 A.3d 768.


6 Id.

court-mandated visitation order, the court transferred custody to the previously non-custodial parent. In doing so, the court appears to have looked to the broader, long-term effects of its decision. Had the court allowed the custodial mother to maintain custody of the child in question, that decision likely would have had the least detrimental psychological effects on that individual child. Instead, the court realized that were it not to change custody, the decision could encourage parents in future custody disputes to violate court-ordered visitation in a similar manner, something against the interests of children in future custody disputes. In essence, the court seems to have weighed the interests of future children against the interests of the child at the center of *Miller-Jenkins*. These sorts of policy considerations are not explicitly provided for under the best interests standard, and this Article will consider whether there should be room for such considerations, and if so, how that should be done.

This Article will begin by looking at the Vermont Supreme Court’s analysis of the best interests standard in *Miller-Jenkins v. Miller-Jenkins*. It will then assess how the best interests standard is currently applied under the Convention on the Rights of the Child, as well as United States, Canadian, Islamic, and European law. Next, the Article will look at whether *Miller-Jenkins* correctly applied the best interests standard, and it will conclude by proposing how future courts should use policy considerations and other factors, along with the child’s best interests, in custody disputes.

I. THE CASE OF *MILLER-JENKINS V. MILLER-JENKINS*

In *Miller-Jenkins v. Miller-Jenkins*, the court faced a bevy of complicated custody issues – many of which presumably were not in the minds of the drafters of various domestic laws and international agreements. Two women, Lisa and Janet Miller-Jenkins, entered into a civil union
in Vermont in December 2000, after having lived together for several years in Virginia.\(^8\) While living together, Lisa conceived a child through artificial insemination, and Janet participated fully in the decision-making process.\(^9\) In 2002, Lisa gave birth to a daughter (“IMJ”), and the three lived together in Vermont until late 2003, when the couple separated.\(^10\) Following the separation, Lisa – the child’s biological mother – took their daughter with her to Virginia,\(^11\) while Janet remained in Vermont.\(^12\) In her petition for dissolution of the civil union, Lisa sought custodial rights, with Janet maintaining some parent-child contact.\(^13\) In June 2004, the court granted Lisa temporary custody and awarded Janet specific temporary visitation rights, as well as daily telephone contact with IMJ.\(^14\)

Lisa did not adhere to the court order. After Janet’s first weekend of visitation, she did not allow Janet any physical or telephone contact with IMJ as ordered by the Vermont family court.\(^15\) The Vermont court subsequently found Lisa in contempt for refusing to comply with the court order and modified its parental rights determination by awarding physical and legal

\(^8\) Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 956 (Vt. 2006).
\(^9\) Id.
\(^10\) Id.
\(^11\) Id.
\(^12\) Id.
\(^13\) Miller-Jenkins v. Miller-Jenkins, 12 A.3d 768, 771 (Vt. 2010).
\(^14\) Miller-Jenkins, 912 A.2d at 956.
\(^15\) Id. at 956 (Vt. 2006). While this was ongoing, Lisa also filed a parentage petition in the Virginia courts. Id. This Article will not thoroughly analyze the jurisdictional issues as resolved under the Parental Kidnapping Prevention Act, although the Vermont court did decide that Vermont – rather than Virginia – had jurisdiction over this case. See id. at 959-62. Lisa also challenged whether Janet, as a non-biological parent, could have a parental interest. Id at 965. The court held that Janet did have a parental interest. See id. at 972-73. This decision surely has broad implications for the rights of homosexual parents, particularly in Vermont, but this Article will not further address these implications. For the purpose of this Article, the issues of the child’s best interest following a custodial parent’s interference and alienation should remain the same, regardless of whether the parents are homosexual or heterosexual.
custody to Janet, the non-biological mother.\textsuperscript{16} Under Vermont law, the trial court was statutorily required to “be guided by the best interests of the child.”\textsuperscript{17} In order to do so, the court considered nine statutory factors:

(1) the relationship of the child with each parent and the ability and disposition of each parent to provide the child with love, affection and guidance;
(2) the ability and disposition of each parent to assure that the child receives adequate food, clothing, medical care, other material needs and a safe environment;
(3) the ability and disposition of each parent to meet the child's present and future developmental needs;
(4) the quality of the child's adjustment to the child's present housing, school and community and the potential effect of any change;
(5) the ability and disposition of each parent to foster a positive relationship and frequent and continuing contact with the other parent, including physical contact, except where contact will result in harm to the child or to a parent;
(6) the quality of the child's relationship with the primary care provider, if appropriate given the child's age and development;
(7) the relationship of the child with any other person who may significantly affect the child;
(8) the ability and disposition of the parents to communicate, cooperate with each other and make joint decisions concerning the children where parental rights and responsibilities are to be shared or divided; and
(9) evidence of abuse . . . and the impact of the abuse on the child and on the relationship between the child and the abusing parent.\textsuperscript{18}

Specifically relating to the fifth factor,\textsuperscript{19} the trial court found that Janet could foster a relationship with Lisa, whereas Lisa had demonstrated she was unable to do so with Janet.\textsuperscript{20}

Despite this factor weighing strongly against Lisa, the court determined that the potential harm

\textsuperscript{16} Miller-Jenkins v. Miller-Jenkins, 12 A.3d 768, 771-72 (Vt. 2010).

\textsuperscript{17} 15 V.S.A. § 665(b).

\textsuperscript{18} 15 V.S.A. § 665(b).

\textsuperscript{19} The court did not expressly list which factor it was relying on, but the language it used, “that Janet had the ability to foster a positive relationship with Lisa, while Lisa demonstrated through her ‘contemptuous refusal to permit parent-child contact’ that she could not foster such a relationship.” Miller-Jenkins, 12 A.3d at 772. There is surely some overlap amongst the nine factors, particularly factor eight, but it seems that the court was looking specifically at this sixth factor.

\textsuperscript{20} Id.
resulting from uprooting IMJ, then five years old from her life with Lisa in Virginia was so
great that it awarded Lisa sole physical and legal custody. The court did, however, threaten
Lisa that if she continued to prevent Janet’s visitation, the court might modify custody.

Following this order, Lisa continued to significantly restrict contact between Janet and
their daughter, with the two only spending a total of forty-eight hours together in 2008 and
2009, and she was found to be in contempt another seven times. When Janet attempted to
visit IMJ in Virginia, Lisa would not permit any contact. Because she was prevented contact
with her daughter, Janet filed a motion for custody. After analyzing the best interests of IMJ,
now eight years old, the family court transferred sole physical and legal custody to Janet. Lisa
appealed the change in custody on three grounds. First, she challenged the Vermont family
court’s factual determinations that a transfer of custody to Janet was in IMJ’s best interests.

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21 Id.
22 Id.
23 Id. at 773.
24 Id. at 773.
25 Miller-Jenkins, 12 A.3d at 773.
26 Id.
27 Id. Lisa argued:

(1) that a transfer of custody to Janet violates her fundamental parental rights as the sole biological
parent of IMJ, and

(2) that the family court deprived Lisa of due process in the custody transfer.

Id. at 773-74.
Additionally, she made two constitutional challenges relating to her parental rights and due process relating to the transfer of custody.\textsuperscript{28}

The Supreme Court of Vermont began its analysis by stressing that it is the child’s interests, rather than those of the parents, that are of importance.\textsuperscript{29} In doing so, the court could look to the parents’ past behavior, but it was to do so under the lens of the individual child’s best interests.\textsuperscript{30} One factor, IMJ’s adjustment to the status quo with her school and home, weighed heavily in Lisa’s favor.\textsuperscript{31} Three factors, however, weighed in Janet’s favor: (1) that she would foster continuing contact with Lisa; (2) that she would not block IMJ from contact with Lisa’s family; and (3) that she had a better ability to guide IMJ.\textsuperscript{32}

In balancing these factors, the family court specifically clarified that the first two factors weighed heavily in Janet’s favor.\textsuperscript{33} The court emphasized that a child’s best interests are advanced most when he or she can have a relationship with both parents.\textsuperscript{34} Because changing custody to Janet would allow IMJ to maintain a relationship with both parents, the court concluded that these long-term benefits outweighed any short-term issues that IMJ might face by being uprooted.\textsuperscript{35} Throughout the extensive appellate history of the case, there is nothing on

\begin{footnotes}
\item[28] Id. at 774.
\item[29] Id. at 774.
\item[30] Id. at 774.
\item[31] Miller-Jenkins, 12 A.3d at 775.
\item[32] Id.
\item[33] Id.
\item[34] Id.
\item[35] Id.
\end{footnotes}
the record suggesting that the family court or any appellate court used any individual testing, psychological or otherwise, of IMJ to determine how its decision would affect IMJ.\(^{36}\)

In reaching its conclusion, the majority opinion wrote, “We are aware of the national attention that this case has gained.”\(^{37}\) The court did not really further develop this, and it never explained why the national attention was relevant, but it presumably relates to the rise to national prominence of same-sex relationships. Nevertheless, this seems to suggest that the court was aware of some relationship between its decision and society at large.

In a concurring opinion, Judge Skoglund took issue with the court’s determination that Janet had a good relationship with her daughter.\(^{38}\) Specifically, he found a lack of support that Janet had any relationship at all with IMJ, even if this deficit was a result of Lisa’s illegal actions,\(^{39}\) meaning this factor, too, should weigh in Lisa’s favor. While the best interests analysis does require looking at the child’s entire life, Judge Skoglund stressed that “it is illogical and potentially harmful to simply ignore the reality of this child’s existence,” which did not include a relationship with Janet.\(^{40}\) Similarly, he wrote that “[the court] cannot ignore the plight of children whose relationships are significantly disrupted and/or distorted when one parent chooses to prevent another from contact.”\(^{41}\) Despite his concerns about the nature of IMJ’s relationship with Janet, the judge further noted that “the family court should not construe

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\(^{37}\) Miller-Jenkins, 12 A.3d at 778.

\(^{38}\) Id. at 781 (J. Skoglund, concurring).

\(^{39}\) Id.

\(^{40}\) Id.

\(^{41}\) Id. at 781.
the application of the § 665(b) best-interest factors in a manner that gives incentive for wrongdoing by a parent.\textsuperscript{42}

Judge Skoglund could hardly state more clearly that he decided with the majority because of the policy implications. To award custody to Lisa would have given incentive to custodial parents to interfere with the visitation rights of non-custodial parents. Instead, Judge Skoglund and the rest of the majority sent a message to the rest of the public that such bad acts by a custodial parent will not be tolerated. This potentially benefits children in future custody disputes, but it remains unclear what sort of impact this decision might have on IMJ.

II. HOW THE WORLD CURRENTLY APPLIES THE BEST INTERESTS STANDARD IN CUSTODY DISPUTES

A. BEST INTERESTS IN THE CONVENTION ON THE RIGHTS OF THE CHILD

The Convention on the Rights of the Child (“CRC” or “the Convention”) addresses the concerns of children in custody proceedings, although arguably not as explicitly as one might hope. Most importantly, Article 3 of the Convention declares that “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child \textit{shall be a primary consideration}.”\textsuperscript{43} While the Convention does not specifically articulate how States ought to do so, Article 3 does provide some other considerations. Specifically, section 2 requires protecting children to a degree that “is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him

\textsuperscript{42} Id. at 781.

\textsuperscript{43} Convention on the Rights of the Child, Art. 3, § 1, Nov. 20, 1989, 1577 U.N.T.S. 3 (emphasis added) [hereinafter CRC].
or her.” 44 This suggests that parents’ roles – and their rights – are not intended to be completely ignored, but the actual degree to which their needs are to be considered is not elaborated anywhere within the Convention. Importantly, the Convention does not leave any room for other policy considerations.

The Convention on the Rights of the Child is not completely silent on custody issues, but it does not offer explicit guidance, either. Article 9 begins by declaring that States:

shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence. 45

Beyond this, the Article stresses that “Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.” 46

Article 9 further establishes that all interested parties, including the child, be afforded the opportunity to participate in the proceedings. 47 Besides Article 9, the Convention does not explicitly discuss custody disputes, 48 but it does lay important groundwork for the role a child should have in proceedings. Article 12, though not expressly dealing with custody disputes, explains that children’s views should be “given due weight in accordance with the age and

44 Id., Art. 3, § 2.
45 Id. Art. 9, § 1.
46 Id. Art. 9, § 3.
47 Id. at Art. 9 § 2.
48 See generally Id.
maturity of the child.”^49 Additionally, the child is supposed to have “the opportunity to be heard in any judicial and administrative proceedings . . . either directly, or through a representative.”^50

B. BEST INTERESTS STANDARD AS APPLIED GLOBALLY

While the Convention on the Rights of the Child requires consideration of the best interests of the child, it never defines what exactly this “new and controversial principle of interpretation in international law”^51 requires. ^52 Whether this is an intentional omission or not, the lack of guidance elucidated in Article 3 forces judges, legislatures, and other decision makers to interpret it for themselves, leaving much to innovation, rather than explicit factors to aide in this determination. ^53 Unsurprisingly, scholars, legislatures, and courts have therefore discussed various standards, as “what is in a child’s best interests is value-laden, and to some extent indeterminate.”^54 This has left judges around the world to standardize children’s best interests in their own way, often on a case-by-case basis. ^55 Given that the best interest standard

^49 CRC Art. 12 § 1.

^50 Id. Art. 12 § 2. Importantly, Article 12 further says that this opportunity must be provided “in a manner consistent with the procedural rules of national law.” Id. This will become important in the case of IMJ.

^51 Michael D.A. Freeman, Upholding the Dignity and Best Interests of Children: International Law and the Corporal Punishment of Children, 73 LAW & CONTEMP. PROBS. 211, 216 (2010).

^52 See CRC, supra n. 43.


^54 FREEMAN, supra n. 51, at 216.

is currently used in custody determinations in all fifty states, the reality is that it is subject to different interpretations in each of those states.\textsuperscript{56}

Even if a judge might be aware of the best outcome that is indeed in the child’s best interest, it may be difficult, if not impossible, to accurately determine what means will achieve that end.\textsuperscript{57} Simply put, some scholars argue, if both parents pass basic fitness criterion, the child’s best interests can be indeterminate, even by highly qualified experts.\textsuperscript{58} Research has shown an evolving consensus about two factors that define a child’s best interests.\textsuperscript{59} First, it is always better to protect and provide a meaningful relationship with both parents, and second, it is against a child’s interests to witness inter-parental conflict.\textsuperscript{60} In the United States, the Uniform Marriage and Divorce Act (UMDA) attempts to establish five baseline factors for courts to determine the child’s best interests, instructing courts to look at any relevant factors, including, at a minimum:

1. the wishes of the child’s . . . parents as to his custody;
2. the wishes of the child as to his custodian;
3. the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest;
4. the child’s ability to adjust to living arrangements at home, school, and in the community; and
5. the mental and physical health of all individuals involved.\textsuperscript{61}

\textsuperscript{56} Kathryn J. Harvey, The Rights of Divorced Lesbians: Interstate Recognition of Child Custody Judgments in the Context of Same-Sex Divorce, 78 FORDHAM L. R. 1379, 1407 (2009).

\textsuperscript{57} SEMPLE, supra n. 55, at 291.

\textsuperscript{58} ELSTER, supra n. 5, at 16.

\textsuperscript{59} SEMPLE, supra n. 55, at 291.

\textsuperscript{60} Id.

\textsuperscript{61} Unif. Marriage and Divorce Act, 9A U.L.A. 159, § 402 (1998). The second factor is particularly important as to IMJ and her case’s relation with the CRC. This factor is the sort of procedural national law that Article 12, Section 2 of the CRC considers. See CRC Art. 12, § 2.
As articulated in the Comment to the rule, however, this is not an exhaustive list for judges to consider. These factors could, however, provide guidance as to what the standard ought to encompass.

1. **Best Interests Throughout the United States**

The closest thing to a unified definition of the best interest standard in the United States comes from Justice Cardozo’s explanation in *Finlay v. Finlay*. Justice Cardozo explained that a judge applying the best interest standard “acts as *parens patriae* to do the best for the interest of the child. He is to put himself in the position of a ‘wise, affectionate, and careful parent and make provision for the child accordingly.’” Perhaps unsurprisingly from this language, this standard has been criticized as being “amorphous” and “indeterminate.” Beyond this well-accepted “standard” for judges, however, there is an overall lack of uniformity and guidance for judges in custody disputes.

   i. **Statutory Interpretations of Best Interests in the Different States**

   Various states have either implemented statutes or established subsequent case law enumerating what specific factors courts should consider in the best interest framework. If a

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63 1-10 Child Custody and Visitation § 10.06 (citing Finlay v. Finlay, 148 N.E. 624, 626 (1925)).

64 Finlay v. Finlay, 148 N.E. 624, 626 (1925).


68 1-1 Child Custody and Visitation § 1.05.
court places too much weight on any one factor, it can constitute reversible error. At minimum, all United States jurisdictions consider the five factors articulated under the Uniform Marriage and Divorce Act. Beyond this minimum, however, states expand the criteria with some, such as Maine, including up to sixteen factors. Some factors states have statutorily defined, besides those nine factors defined in Vermont’s statute as discussed infra, Section I, include:

- “The permanence, as a family unit, of the existing or proposed custodial home or homes.”
- “The moral fitness of the parties involved.”
- “The mental and physical health of the parties involved.”
- “Whether either parent has failed to make all child support payments, including all arrearages, required of that parent pursuant to a child support order under which that parent is an obligor.”
- “Whether either parent established a residence, or is planning to establish a residence, outside [the state].”
- “The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.”
- “Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with a court order.”
- A sort of catch-all provision, allowing the court to look at “[a]ny other factor considered by the court to be relevant to a particular child custody dispute.”

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69 1-10 Child Custody and Visitation § 10.06 (citing Acosta v. Acosta, 687 N.Y.S.2d 414 (App. Div. 1999)).
70 1-1 Child Custody and Visitation § 1.05.
71 1-1 Child Custody and Visitation § 1.05.
75 Oh. R.C. § 3109.04(F)(1).
76 Oh. R.C. § 3109.04(F)(1).
78 Oh. R.C. § 3109.04(F)(1).
Many states – almost one-third – have no statutory factors, but instead, require judges to broadly determine each child’s best interests. As one might expect, courts throughout the United States have thus found a range of custody decisions to be in individual children’s best interests.

ii. Interference and Alienation by a Custodial Parent in the United States

An unfortunate phenomenon in contested divorces and custody disputes occurs when one parent attacks the other in order to gain favor in the proceeding. This is frequently referred to as “alienation” or “interference.” Alienation can be a polarizing issue, with men’s rights activists alleging mothers are making false accusations as a form of revenge, while women’s rights activists dismiss claims of alienation as fabrications by fathers who are justifiably refused contact by the mother. Regardless of motives, alienation can cause great hardship to children, as they are influenced by the parent making these sorts of allegations. These situations force


81 Barbara Jo Fidler & Nicholas Bala, Children Resisting Postseparation Contact with a Parent: Concepts, Controversies, and Conundrums, 48 FAM. CT. REV. 10, 10 (2010); Rebecca E. Hatch, Cause of Action for Transfer of Child’s Custody Based on a Custodial Parent’s Interference with Visitation Rights, 40 CAUSES OF ACTION 2d 241 (2010).

82 FIDLER & BALA, supra n. 81, at 10.

83 Id. at 12.
courts to balance the harm to the child by staying with the custodial, alienating parent as opposed to the harm that could arise from transferring custody of the child to the other parent.\textsuperscript{84}

Ultimately, this sort of alienation can lead to violations of court ordered custody and visitation decrees, whether by choice of the custodial parent or not. When alienation becomes severe enough, mental health professionals sometimes “advise rejected parents to give up on trying to enforce visitation, believing this is the least detrimental alternative for the child.”\textsuperscript{85} Although giving up on a relationship with the child would be in that child’s immediate, short-term best interests, this seems to punish the innocent parent and not be in the child’s long-term interests. Other specialists advise against the non-custodial parent severing the relationship with the child, noting that it is better for children to maintain a relationship with “two involved and effective parents.”\textsuperscript{86} There seems to be widespread agreement that it is in every child’s best interest to have as strong a relationship with each parent as possible.\textsuperscript{87}

Different jurisdictions have various methods for dealing with custodial parents who alienate or interfere with the child’s interactions with the non-custodial parent. There is

\textsuperscript{84} Swadner v. Swadner, 897 N.E.2d 966 (Ind. Ct. App. 2008); Spenser v. Spenser, 128 Misc. 2d 298 (Fam. Ct. 1985); Matter of Marriage of Birge, 579 P.2d 297 (Ore. 1978); HATCH, supra n. 81, § 6. In Spenser, the court determined that:

Evidence from which it may be inferred that the custodial parent’s hostile attitude toward the noncustodial parent may prevent the child from developing and maintaining a relationship with the noncustodial parent will frequently be sufficient to support the conclusion that the advantages of a transfer of custody outweigh the harm to the child which may result from a change in the custodial arrangement

Id. (discussing Spenser v. Spenser, 128 Misc. 2d 298, 304 (Fam. Ct. 1985)).

\textsuperscript{85} FIDLER & BALA, supra n. 81, at 23.

\textsuperscript{86} Id.

\textsuperscript{87} SEMPLE, supra n. 55, at 291.
precedent for courts to reverse custody in cases of severe alienation.\textsuperscript{88} Many courts will generally transfer a child’s custody where the non-custodial parent has proven:

(1) that the custodial parent's interference rises to such a level that it amounts to a material change in circumstances, and

(2) that the transfer would be in the child’s best interests.\textsuperscript{89}

Some courts have specifically reversed custody in situations like this, noting how interference with the other parent’s visitation rights runs counter to the child’s best interests.\textsuperscript{90} If one parent “persistently interfere[s] with the [other’s] visitation rights by making unfounded allegations of child abuse against the [other], by coaching the child to make false allegations of abuse, and by causing disruption to the child's visitation and vacation plans with his [other parent],” New York courts will reverse custody decisions.\textsuperscript{91}

Almost all courts in the United States decline to use a parent’s interference in the visitation of the other parent as the sole basis for a custody transfer.\textsuperscript{92} This sort of reversal could detrimentally affect the child who has maintained a relationship with the previously custodial, alienating parent, and no consensus exists among professionals as to how severe alienation should be in order to justify such a traumatic change for children.\textsuperscript{93} Because of these

\textsuperscript{88} FIDLER \& BALA, supra n. 81, at 29. See also Adams v. Zantz, 963 F.2d 197, n. 8 (8th Cir. 2002) (citing Zant [sic] v. Adams, No. 872-0784 (Mo.Cir.Ct. March 28, 1988)).

\textsuperscript{89} Teller v. Richert, 744 So. 2d 1230 (Fla. Dist. Ct. App. 3d Dist. 1999); HATCH, supra n. 81, § 6.


\textsuperscript{92} HATCH, supra n. 81, § 3.

\textsuperscript{93} FIDLER \& BALA, supra n. 81, at 29.
risks, courts must thoroughly consider the individual child’s best interests. Some courts will seemingly refuse reversal if it is in any way possible to do so. Those who oppose custody reversal – dubbed by some critics as a “parentectomy” – say that such an abrupt and drastic switch causes effects so severe to the child, as well as to the relationship with both parents, that the status quo is a non-ideal, but preferable solution. As such, the parent seeking the change in custody bears the burden of proving that the transfer would be in the child’s best interests.

Courts are reluctant to switch custody arrangements, instead preferring to protect children’s interest in stability and therefore “act with restraint and caution” before changing custody in a case of interference.

As an alternative to uprooting a child when his or her parent violates a custody decree, courts can use other means to persuade custodial parents to comply, such as holding the violator in contempt and awarding “makeup period[s] of visitation” for the time lost. Courts following

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96 Fidler & Bala, supra n. 81, at 30.


98 Hatch, supra n. 81, § 3 (citing Sweeney v. Sweeney, 654 N.W.2d 407 (N.D. 2007)). See also Ellis v. Ellis, 952 So. 2d 982, 990 (Miss. 2006); Niko v. Foreman, 144 Cal. App. 4th 344 (Cal. 4th Dist. 2006); Frieze v. Frieze, 692 N.W.2d 912 (N.D. 2005); Braun v. Headley, 750 A.2d 624 (2000). The Ellis Court elaborated that:

[V]isitation, or interference thereof, should generally not be considered by the lower court while hearing the plea of a non-custodial parent to modify custody as ‘[t]he better rule would be for a chancellor to enforce contempt orders through incarceration ... rather than resorting to a change of custody,’ but in some extraordinary cases the interference with a non-custodial parent’s visitation rises to the level where it constitutes a material change in circumstances.

Id. (quoting Ash v. Ash, 622 So.2d 1264, 1266 (Miss. 1993)).

this approach tend to base their decisions on the logic that a transfer of custody gives too much credence to the non-custodial parents’ own individual rights – something purported to be irrelevant in custody decisions.\textsuperscript{100} By using these alternate remedies, the courts punish the wrongdoings of the alienating parent, rather than punish the innocent child by uprooting him.\textsuperscript{101} If the custodial parent is otherwise a competent, fit parent who can meet the child’s best interests – and initially receiving custody seems to generally suggest that to be the case – transferring custody seems to have the effect of punishing the child by placing him or her with a less qualified parent, whereas holding the parent in contempt punishes his or her own behavior.\textsuperscript{102} Where there is no actual evidence of harm to the child from the existing arrangement – even where the custodial parent is alienating or interfering – when balancing the harms, some courts will favor stability.\textsuperscript{103} 

Other specialists argue for custody reversal only in certain limited circumstances, largely relating to the analysis of the particular child’s needs.\textsuperscript{104} This problem – aptly described as a “stark dilemma” by British Columbia Supreme Court Justice Bruce Preston – raises a fundamental question of whether “the long-term benefits of having a relationship with the rejected and healthier parent outweigh the shorter-term risks, such as the emotional costs or the potential for the child's destructive behavior associated with temporarily separating the child

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\textsuperscript{100} HATCH, supra n. 81, § 7.
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\textsuperscript{103} Roorda v. Roorda, 611 P.2d 794, 796 (Wash. Div. 1 1980).
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from the favored parent.”\textsuperscript{105} This divide among United States courts, however, reflects the lack of uniformity as to how much weight a court should give to sanctioning a parent’s attempts at interference or alienation.

2. \textit{Canada’s Strong Child-Centered Focus}

Canadian courts and legislatures have “repeatedly and forcefully stated that the interests or rights claims of adults in [disputes] are not relevant.”\textsuperscript{106} No statute within the country, in fact, confers any rights to adults in custody disputes.\textsuperscript{107} Custody disputes arising from divorces in Canada are governed by the Divorce Act, which requires that “[T]he court shall take into consideration \emph{only} the best interests of the child . . . as determined by reference to the condition, means, needs and other circumstances of the child.”\textsuperscript{108} These factors – “the condition, means, needs and other circumstances of the child” – are the only factors articulated within the statute.\textsuperscript{109}

Further sections, however, illustrate the difficulty of establishing what is in the child’s best interests, and the Divorce Act seems to consider similar issues to those in \textit{Miller-Jenkins}. After first declaring that a parent’s past conduct is relevant only to assess that person’s parenting ability,\textsuperscript{110} the Divorce Act establishes that courts “shall give effect to the principle that a child . . . should have as much contact with each spouse as is consistent with the best

\textsuperscript{105} Fidler \& Bala, \textit{supra} n. 81, at 30 (citing A.A. \textit{v} S.N.A., 2007).
\textsuperscript{106} Semple, \textit{supra} n. 55, at 290.
\textsuperscript{107} Semple, \textit{supra} n. 55, at 295.
\textsuperscript{109} See R.S.C. 1985 (2d Supp.), c. 3.
\textsuperscript{110} R.S.C. 1985 (2d Supp.), c. 3, § 16(10).
interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact."\textsuperscript{111} What degree of contact is in any child’s best interests, of course, is a fact-specific determination apparently left for the court to decide. Importantly, the Canadian Supreme Court has unequivocally stated that “[T]he amendments to the Divorce Act in 1986 . . . elevated the best interests of the child from a ‘paramount’ consideration to the ‘only’ relevant issue.”\textsuperscript{112} This has left Canadian courts to wrestle only with exactly how to determine what is in a child’s best interests and how to subsequently apply those interests, rather than concern itself with how to apply the child’s interests in light of other factors.

The British Columbia Court of Appeals has articulated how Canadian courts deal with transferring custody following issues of alienation and interference.\textsuperscript{113} The court established that, when giving paramount consideration to the best interests of the child, it would look at the following factors:

(a) the health and emotional well being of the child including any special needs for care and treatment;

(b) if appropriate, the views of the child;

(c) the love, affection and similar ties that exist between the child and other persons;

(d) education and training for the child;

(e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.\textsuperscript{114}

\textsuperscript{111} Semple, supra n. 55, at 292 (quoting R.S.C. 1985 (2d Supp.), c. 3, § 16(10)).


\textsuperscript{114} Id. ¶ 1.
In A.A., the mother never let the father have one-on-one contact with their daughter, and after a
disagreement between the parents, she prevented him from having any access.\textsuperscript{115} The court
further found that the mother had been manipulative and untruthful, attempting to undermine all
ttempts the father made to build a relationship with his daughter.\textsuperscript{116} In this case, however, the
court considered evidence of a psychologist who noted that “[the daughter] vacillated between
being resistant to and interested in her father,” but, when around her mother, she “[became]
resistant, agitated, emotional, and angry.”\textsuperscript{117} A different psychologist testified that “[the
daughter] needs first and foremost to establish a relationship with her father.”\textsuperscript{118}

Following all of this psychological evidence, the appellate court looked at this “stark
dilemma,” noting that the dilemma itself was created by the custodial mother.\textsuperscript{119} Because it
was the custodial mother who was responsible for these issues, the court concluded that any
detrimental effects from a transfer of custody would be “short term and not ‘devastating,’” and
that the child’s long term interests were better served with her father.\textsuperscript{120} The court found that
the current custodial arrangement was so detrimental to the child, having no relationship with
her father in more than two years, that the risks of the transfer were in her best interests.\textsuperscript{121} The
parallels and differences between this case and \textit{Miller-Jenkins} are quickly apparent, and will be
further discussed \textit{supra}, Section IV.

\begin{thebibliography}{99}
\bibitem{115} Id. ¶ 5.
\bibitem{116} Id. ¶ 9.
\bibitem{117} Id. ¶ 12.
\bibitem{118} Id. ¶ 19.
\bibitem{120} Id. ¶ 27 (emphasis in original).
\bibitem{121} Id. ¶ 28.
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3. Weak Individual Child Focus under Conservative Religious Law

Countries adhering to religious law place less of a focus on individual needs of children and largely rely on religious tradition to determine a child’s best interests. While this could be said about any religion, the predominance of Islamic law in many countries best lends itself to this analysis. In many countries governed by Islamic law, family law issues, in particular, remain closely governed by religious tenets, even in countries where there is only a Muslim minority, such as India and Israel.122 Traditionally, at the time of dissolution of a Muslim marriage, the mother receives physical custody of a young child as a care-giver,123 while the father always maintains legal decision-making power until he takes physical custody of the child at a certain legally-proscribed age,124 so that the father can ensure the children’s proper religious upbringing.125 Under traditional Shari’a law, this legal guardianship passes through the father’s bloodline if he is unable to take custody – never to the mother or other maternal relatives.126

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123 Id. at 50. Accord Maria Reiss, The Materialization of Legal Pluralism in Britain: Why Shari’a Council Decisions Should be Non-Binding, 26 ARIZ. J. INT’L & COMP. L. 739, 754 (2009). Some countries rooted in Shari’a law go so to such lengths to give mother’s physical custody of young children that even if the mother is placed in prison, the courts still give her physical custody. Id.

124 Krivenko, supra n. 122, at 50. This age can be as low as two years old, as it is in Iran. Id. at n. 8 (citing J.J. Nasir, The Islamic Law of Personal Status (2nd ed., 1990), at 187-89)). Other countries, such as Egypt, have placed the age for boys at 10 and girls at 12. Janet A.W. Dray, International Conflicts in Child Custody: United States v. Saudi Arabia, 9 Loy. L.A. INT’L & COMP. L.J. 413, 417 n. 49 (1987) (citing J. Esposito, Women in Muslim Family Law (1982)).

125 Dray, supra n. 124, at 417

126 Reiss, supra n. 123, at 753.
All Islamic states, however, are parties to the Convention on the Rights of the Child, and as such, they all have committed to adhere to the best interests of the child standard. Critics of these traditional Islamic law requirements have pushed for reforms to these standards, with differing degrees of success in various Muslim countries. To avoid children passing by default to the father, some countries have raised the age of transfer of custody to the age of majority or marriage, so the father actually has custody in name only. Many of these Muslim states, in their domestic legislation, explicitly require judges to consider the best interests of the child, which can include a consideration of the child’s preferences.

Many countries, including some typically viewed as the most traditional Muslim nations, such as Iran, Syria, Egypt, Yemen, Sudan, and Tunisia have passed laws requiring the interest of the child to be the paramount concern. Even in the most liberal Muslim countries, mothers can face significant hurdles – sometimes rising to levels of persecution – when judges perceive paternal custody to be better for the child. These hurdles, as one would expect, are even more restrictive in more conservative Muslim countries, where children will always be taken away from their mother at the state-mandated age. As parties to the Convention, these

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127 Krivenko, supra n. 122, at n. 12.

128 Id. at 51.

129 Id. Specifically, Algeria and Morocco have passed legislation of this sort. Id. Egypt also raised the age at which mothers must relinquish custody. Dray, supra n. 1254, at 417, n. 49 (citing J. Esposito, Women in Muslim Family Law (1982)).

130 Krivenko, supra n. 122, at 51. These states include Egypt, Iraq, the Maldives, Mauritania, Morocco, Pakistan, Tunisia, Syria, and Bangladesh. Id. at n. 14 (citing Abu Baker Siddique v. S.M.A. Bakar and others, 38 Dhaka Law Reports (AD) 1986; and Pakistan: Mst. Zohra Begum v. Sh. Latif Ahmed Munawar, Pakistan Legal Decisions 1965, Lah. 695).

131 Dray, supra n. 1254, at 417-18, n. 49 (citing J. Esposito, Women in Muslim Family Law (1982)).

132 Krivenko, supra n. 122, at 52.

133 Id.
Muslim governments certainly would argue they are adhering to the best interests of the child standard, and that these religious-based principles are more important than considering the emotional or psychological needs of an individual child. In most of the countries with legislation establishing a best interests standard, the legislation carries with it a rebuttable presumption “that the welfare of the child is best served by applying the strict rules of the traditional law.”

4. Best Interests Under the European Convention on Human Rights

The European Convention on Human Rights (ECHR) is largely silent on the rights of the child, making only two direct references to children. As a result, relatively few people have brought claims to the European Court on behalf of children, causing a dearth of case law on the subject, as well. Because all members of the Council of Europe have ratified the Convention on the Rights of the Child, some scholars and judges have advocated incorporating children’s rights under Article 8 of the ECHR.

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134 Dray, supra n. 124, at 418, n. 49 (citing J. Esposito, Women in Muslim Family Law (1982)).


Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.


136 Effective Protection, supra n. 135, at 336.

137 Id.
Article 8 of the ECHR is the only article that refers to the family. Under Article 8, “Everyone has the right to respect for his private and family life, his home and his correspondence.” The language protecting “Everyone” can be read to include children. Additionally, public authorities may not interfere “with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of . . . the protection of health and morals or for the protection of the rights and freedoms of others.”

Protocol 7 to the ECHR seems to “address this shortfall” by including the interests of the child, although not in an affirmative way, noting that during marriage and dissolution of marriage, it “shall not prevent States from taking such measures as are necessary in the interests of the children.” While it does not further define the standard, it is the only express reference to the best interests of the child in the ECHR.

Although the words are absent from Article 8, the European Court has held that “what is in the best interests of the child is in every case of crucial importance.” In applying its standards to Strasbourg case law, Kilkelly argues the Court meets or exceeds the requirements

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138 ECHR, supra n. 135, art 8.
139 Id., art. 8, § 1.
140 Effective Protection, supra n. 135, at 339.
141 ECHR, supra n. 135, art. 8, § 2.
143 ECHR, supra n. 135, Protocol 7, art. 5.
144 Best of Both Worlds, supra n. 142, at 312.
set out by Article 3 of the CRC.\textsuperscript{146} To see precisely how the European Court applies the best interests standard, it is helpful to look at some of its case law.

i. Sahin v. Germany

In \textit{Sahin}, a child of German nationality was born out of wedlock to a father who then sought visitation rights.\textsuperscript{147} Relying on the German Civil Code, the District Court of Germany noted that the father could only have access to his daughter if such access was in her best interests, and that despite his own affection for his daughter, after an expert psychological analysis, “personal contact . . . is not in the child's best interests, since her mother dislikes her father so deeply and opposes all contact so fiercely that any visits ordered by the court would take place in a tense, emotionally charged atmosphere which would probably be extremely harmful to the child.”\textsuperscript{148} In its opinion, the European Court looked to several sources of law, including the Convention on the Rights of the Child, ensuring that the child have a relationship with both parents, unless it was against her best interests.\textsuperscript{149} Under its Article 8 analysis, the Court specifically noted that ‘consideration of what is in the best interests of the child is of crucial importance in every case of this kind.”\textsuperscript{150}

\textsuperscript{146} \textit{Effective Protection}, supra \textsuperscript{n. 135}, at 342. Kilkelly does not explain how this Strasbourg test relates, but in short, the Strasbourg case law sets forward a standard for determining how to address children seeking to go to a European country in order to reunify with their parents. Thomas Spijkerboer, \textit{Structural Instability. Strasbourg Case Law on Children’s Family Reunion}, 11 EURO. J. MIGRATION & L. 271 (2009). It predominantly deals only with migration, so this Article will not further assess that lineage of cases. Id. at 288.


\textsuperscript{148} Id. ¶ 16. Germany’s Civil Code Section 1711 states, in relevant part, “If it is in the child's interests to have personal contact with the father, the guardianship court can decide that the father has a right to personal contact.” Germany Civ. Code § 1711(2).


\textsuperscript{150} Id. ¶ 64.
After this, however, the Court’s analysis becomes more unclear. First, it noted that the Court would generally defer to national courts in such matters, though custody disputes require stricter scrutiny. Then, the Court wrote:

Article 8 requires that the domestic authorities should strike a fair balance between the interests of the child and those of the parents and that, in the balancing process, particular importance should be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parents.

Based on the completeness of the expert findings, however, the Court found that the German courts’s decisions were rationally supported, and ultimately found no violation of the father’s rights.

ii. Sommerfeld v. Germany

The facts in Sommerfeld are similar to those of Sahin, with a father of a daughter born out of wedlock seeking visitation rights after the mother forbade contact. The District Court of Germany similarly denied access to the child under Civil Code 1711, finding that it would not be in the child’s emotional or psychological best interests. The European Court used precisely the same language it used in Sahin to explain the requirements of the Convention on the Rights of the Child. Again, citing to the crucial importance of the child’s best interests,

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151 Id. ¶ 65.
152 Id. ¶ 66.
153 Id. ¶¶ 77-78.
155 Id. ¶ 23.
the Court repeated its analysis of the standard as it had in *Sahin*. The Court then looked at whether the lower courts sufficiently protected the father’s interests in light of his daughter’s interests and ultimately decided that given the child’s thirteen years without visitation, as well as her stated desire not to see her father, the German courts’ decision to deny access was reasonable. The Court did not, however, further elaborate as to exactly how much weight it was giving the parents’ interests as opposed to those of the daughter.

iii. X.Y.Z. v. United Kingdom

The facts in *X.Y.Z. v. United Kingdom* become a bit more complicated as the European Court attempted to determine how to use the best interests standard in determining the parental rights of a transsexual parent. All three applicants are British citizens; “X” is a female-to-male transsexual, “Y” is the woman with whom he had a long-term relationship, and “Z” is a child born to Y via artificial insemination. Complications arose relating to X’s rights as the child’s father. Under the United Kingdom’s Human Fertility and Embryology Act of 1990, when “an unmarried woman gives birth as a result of [artificial insemination] with the involvement of her male partner, the latter, rather than the donor of the sperm, shall be treated for legal

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159 See generally id.


161 See id. ¶ 12-13.
purposes as the father of the child.” Conversely, only a biological man could be the “father” of the child for purposes of registering a child.

The applicants therefore filed a complaint that these laws violated Article 8 by “den[y]ing respect for their family and private life as a result of the lack of recognition of the [X’s] role as father . . . and that the resulting situation in which they were placed was discriminatory.” The Court was thus dealing with questions of law regarding transsexuals as well as artificial insemination, something that lacked a shared approach among member states of the ECHR. The applicants listed a host of problems their child could face if X was not declared her father, including the child’s sense of security, possible distress, immigration issues, and problems with future inheritances. The Court looked at these potential issues, but noted that “there [was] uncertainty with regard to how the interests of children in Z’s position can best be protected.” As a result, the Court seemed to refrain from creating any substantive policy where the child’s best interests were indeterminate, but the standard did in theory remain important to the analysis.

III. WAS THE MILLER-JENKINS COURT WRONG?

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162 Id. ¶ 21.
163 Id. ¶ 17.
164 Id. ¶ 29.
165 Id. ¶ 44.
167 Id. ¶ 51.
168 The court specifically noted a lack of a consensus among member States, affording the United Kingdom a wide margin of discretion, and given the “complex scientific, legal, moral, and social issues,” the European Court found no violation of the ECHR. Id. ¶¶ 44, 52.
There are two primary issues with the majority decision: (1) the majority’s decision essentially hinged solely on one statutory factor; and (2) public policy considerations seemed to underlie the majority’s decision to transfer custody.

A. **RELYING ON ONE FACTOR – JANET’S WILLINGNESS TO FOSTER A RELATIONSHIP WITH LISA**

Looking at the decision as written, it is quite apparent that the majority heavily relied on Vermont’s fifth statutory factor: “the ability and disposition of each parent to foster a positive relationship and frequent and continuing contact with the other parent, including physical contact, except where contact will result in harm to the child or to a parent” in deciding to transfer custody of IMJ to Janet.\(^{169}\) Although the court discussed three factors that weighed in favor of Janet, the non-custodial mother,\(^ {170}\) all three factors come down to the same issue – Janet was willing to foster IMJ’s relationship with Lisa, while Lisa was not.\(^ {171}\) The court further explained that Janet, the non-custodial mother who had not spent any meaningful time with her toddler daughter in over two years,\(^ {172}\) had an equally good relationship with IMJ as Lisa, the custodial mother who had constant, meaningful contact with IMJ throughout her entire life.\(^ {173}\) As a result, the court found that the factors relating to IMJ’s relationship with both of her parents “weighed evenly between [Janet and Lisa].”\(^ {174}\)

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\(^{169}\) 15 V.S.A. § 665(b).

\(^{170}\) Miller-Jenkins v. Miller-Jenkins, 12 A.3d 768, 775 (Vt. 2010).

\(^{171}\) See generally id.

\(^{172}\) Id. at 781 (J. Skoglund, concurring).

\(^{173}\) Id. at 777.

\(^{174}\) Id. at 775.
Even if upon reading the majority opinion one did not realize the court’s decision hinges on one factor, Judge Skoglund’s concurring opinion makes it impossible to ignore. As Judge Skoglund bluntly wrote regarding the majority’s finding that Janet has a good relationship with IMJ, “I cannot find support for [that] conclusion.” Looking at IMJ’s entire life, including the recent years, she had not had sufficient meaningful contact with Janet to conclude that they had any significant relationship. Judge Skoglund does not expressly state which factors he used to agree with the majority’s decision, but by changing this factor to weigh in favor of Lisa, it appears that he based his decision solely on Lisa’s inability to foster a relationship with Janet. If, as Judge Skoglund suggests, *Miller-Jenkins* was decided solely on the basis of the fifth statutory factor, it could constitute reversible error.177

**B. CAN THE COURT USE PUBLIC POLICY GOALS AS CUSTODY JUSTIFICATION?**

By agreeing with the majority decision despite his concern with the court’s factor analysis, however, Judge Skoglund seems to highlight what it had already appeared the court might be doing – looking at policy considerations. As he noted, “we should not construe the application of the [Vermont statute’s] best interest factors in a manner that gives incentive for wrongdoing by a parent.” He continued, “[W]e likewise cannot ignore the plight of children whose relationships are significantly disrupted . . . when one parent chooses to prevent another from contact. Parental Kidnapping is the most common form of abduction in the United States

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175 Id. at 781 (J. Skoglund, concurring).
176 Id. at 781.
177 1-10 Child Custody and Visitation § 10.06 (citing Acosta v. Acosta, 687 N.Y.S.2d 414 (App. Div. 1999)). See also In re Marriage of Wilson, 210 P.3d 170 (Mont. 2009).
178 *Miller-Jenkins*, 12 A.3d at 781 (J. Skoglund, concurring).
with more than 20,000 children victims each year.” \(^{179}\) By pointing to the nationwide problem of parental kidnapping, it seems obvious that Judge Skoglund was looking at the public policy implications of the court’s decision, even if he was relying only on one factor. He was looking to protect future children.

Whether or not the *Miller-Jenkins* majority expressly acknowledged it, its decision carried great potential to influence future custody disputes. If Lisa’s campaign of alienation and interference with Janet’s visitation rights proved successful, it could encourage other parents to follow similar paths of ignoring court orders to achieve their own desired outcome. By transferring custody to Janet, the court seems to be telling parents that Lisa’s behavior is not an acceptable course of action. Issues with this tactic, however, arise if the court was using IMJ to teach other parents how to behave in future custody disputes.

Vermont’s statute establishes that, in custody disputes, “the court shall be guided by the best interests of the child,” as outlined by the factors discussed *supra*, Section I. \(^{180}\) Note that the law requires consideration of the best interests of the child at issue in the dispute, not children who may fall subject to future disputes. Nothing in the statute provides for consideration of how any one dispute might impact the future behavior of other members of society or any other interests, besides those of the child. \(^{181}\)

There are, of course, compelling reasons for courts to consider the policy implications of their decisions. This dilemma forces courts to choose between “act utilitarianism” and “rule utilitarianism.” \(^{182}\) The language of the best interests standard calls for act utilitarianism –

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\(^{179}\) Id (citations omitted).

\(^{180}\) 15 V.S.A. § 665(b) (emphasis added).

\(^{181}\) See 15 V.S.A. § 665.

\(^{182}\) ELSTER, *supra* n. 5, at 21.
finding the outcome that will maximize utility for the actors in that particular case.\textsuperscript{183} Conversely, policy-based decisions aim for rule utilitarianism, thereby maximizing utility for all persons in all future cases.\textsuperscript{184} By maximizing the interests of a child in one case, such as opting for the status quo in a case similar to \textit{Miller-Jenkins}, act utilitarian-based decisions could incentivize parents to take actions that are harmful to children in general.\textsuperscript{185} These are not new concerns. As early as the 1980s, scholars have argued against this sort of \textit{fait accomplis} that would arise by allowing parents to use illegal tactics to gain custody.\textsuperscript{186}

Setting aside, for a moment, the issue of custodial parents interfering with visitation rights, and instead looking to a different policy-based custody decision demonstrates the benefit of looking at more than one child’s best interests. The 1984 United States Supreme Court case of \textit{Palmore v. Sidoti} is the best example justifying an argument that courts ought to consider the policy ramifications of custody decisions, not solely the best interests of the child. Twenty-seven years after \textit{Palmore}, it may seem that the decision was in the child’s best interests, but at the time, the Court did not even attempt to justify its rationale as anything but policy-based.\textsuperscript{187}

\textbf{1. Palmore v. Sidoti: If the Supreme Court Can Consider Policy, Why Can’t Vermont?}

The \textit{Palmore} Court considered the custody dispute between two Caucasian parents and their young Caucasian daughter.\textsuperscript{188} After divorcing when the daughter was three years old,

\begin{flushleft}
\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{186} Id. at 21-22.
\textsuperscript{188} Id. at 430.
\end{flushleft}
Linda Sidoti Palmore, the mother, obtained custody. One year later, Anthony Sidoti, the child’s father, sought a transfer of custody because Linda was cohabiting with, and subsequently married, an African American man. The Florida state court then looked to the fact that “[Ms. Palmore] has chosen for herself and for her child, a lifestyle unacceptable to the father and to society. . . . The child. . . is, or at school age will be, subject to environmental pressures not of choice,” thereby concluding that the child’s interests were better served by being under her father’s custody. The Florida court further relied on the following rationale:

This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that [the child] will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.

The Supreme Court began its analysis by expressing concern that the Florida court’s fear of the impact of a racially mixed household on a child “raises important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race.”

The Court further noted:

The court correctly stated that the child's welfare was the controlling factor. But that court was entirely candid and made no effort to place its holding on any ground other than race. Taking the court's findings and rationale at face value, it is clear that the outcome would have been different had petitioner married a Caucasian male of similar respectability.

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189 Id.
190 Id.
191 Id.
192 Id.
193 Palmore, 466 U.S. at 431.
194 Id. at 431-32.
195 Id at 432.
The Court then proceeded to do a strict scrutiny analysis under the Fourteenth Amendment, stressing the purpose of the Amendment was to do away with all racial classifications. The best interests of the child, the Court acknowledges, is important enough that it rises to a substantial government interest under the Fourteenth Amendment’s strict scrutiny test.

From there, however, the Court’s opinion seems to take a pretty clear turn towards policy implications. The Court specifically wrote that racial prejudices remained prevalent, and acknowledged the “risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.” Nevertheless, the Court stressed that the Constitution, and thus, the Court, cannot tolerate this sort of prejudice by removing a child from an otherwise qualified custodial parent – despite any risks stemming from “private biases.” The Court seemingly could not be more explicit that public interest supersedes that of the individual child when it stated:

Whatever problems racially mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917. The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.

Based on this decision, it is obvious that the Court looked at something bigger than the individual best interests of the child.

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196 *Id.*
197 *Id.* at 432-33.
198 *Id.* at 433.
199 *Palmore*, 466 U.S. at 433.
200 *Id.* at 434.
2. Should Public Policy Implications Ever Influence a Custody Determination?

As previously discussed, there is a general consensus among psychologists that maintaining the status quo, if at all possible and if it is not directly harmful to the child, is in every child’s best interests. Assuming this view is correct, it stands to reason that children in IMJ’s position would typically be best served by remaining with the custodial parent. Were this done in Miller-Jenkins, however, it would have rewarded Lisa for her use of “illegal tactics of abduction or procrastination to create a fait accompli in order to benefit from the status quo presumption.” Under the principle that the status quo is best for the child, transferring custody to the non-custodial parent punishes not only that parent, but also the child.

Custodial parents should be punished when they do not comply with court orders, in order to “render the illegal action entirely fruitless.” The issue is what sort of punishments can deter a parent from these actions without harming the child. In Mississippi, courts favor incarceration when a parent continues to interfere with court orders, using modification of custody as a last resort. It is difficult to comprehend how this better serves the child at issue. Surely, sanctioning the non-compliant parent with incarceration, thereby necessitating at minimum a temporary change of custody, anyway, could harm the child even more than a permanent custody transfer. There could be other penalties, such as fines, but that could further harm the child indirectly, as well, if his or her living condition is severely affected. Thus, while it is easy to say that some other punishment ought to be used, it is difficult to determine what

201 ELSTER, supra n. 5, at 11.
202 Id. at 18.
203 Id.
204 Id.
205 Ellis v. Ellis, 952 So.2d 982, 990 (Miss. 2006).
sort of punishment might “fit the crime” without excessively penalizing the child. Extending that logic further, it could then be argued that almost any punishment to the parent could ultimately become a punishment to the child. Thus, these alternates aimed at punishing the parent, rather than the child, might be no better than the option of transferring custody.

IV. IS THERE A SOLUTION?

Most, if not all, of the aforementioned concerns have been debated ever since the best interests standard first emerged. Miller-Jenkins demonstrates that these issues have not subsided, and courts are still searching for the appropriate solution. There may not be a perfect solution, as divorces and custody disputes are inherently contentious and personal proceedings that will impact everyone involved, but there may be an answer hidden within the Convention on the Rights of the Child and case law that can better instruct future decisions.

Some scholars have criticized Article 3 of the Convention as watering down the best interests requirement in some domestic laws where the child’s interests are “paramount.” These critics argue that, as written in the Convention, the principle is still based on parents’ interests disguised as being those of their children, and “has yet ‘to find a life of its own based on genuine concern for children’s wellbeing.’” This issue largely arises from the language of the Convention that establishes that “the best interests of the child shall be a primary consideration.” Not the primary consideration. Not the paramount consideration. Merely a

206 Elster, supra n. 5, at 18.
207 See generally Id.
208 Relocation, supra n. 53 at 25 (citing Children Act of England and Wales, § 2 (1989); Guardianship of Infants Act, § 3 (1964)).
210 CRC, supra n. 43, Art. 3, § 1 (emphasis added).
primary consideration. By failing to provide any guidance for how to specifically define or apply the Article 3 principles, the argument goes, courts and legislatures are left to fend for themselves and determine which factors are important to consider, and what may be more important than the child’s best interests.\textsuperscript{211}

The European Court’s interpretation of the best interests standards seems to reflect this criticism of the Convention on the Rights of the Child’s standard. In both \textit{Sahin} and \textit{Sommerfeld}, the European Court looked directly at the language of the CRC for guidance as to what was in the child’s best interests.\textsuperscript{212} The Court’s reliance on the CRC could explain why the Court has found that “Article 8 requires that the domestic authorities should strike a fair balance between the interests of the child and those of the parents.”\textsuperscript{213} This runs counter to the notion that the best interests of the individual child should be the only consideration, or at least paramount. Instead, the European Court has called for some sort of balancing test without further elaborating exactly what weight it will assign to each party’s interests. Given that judges are responsible for assessing the specific facts of each case, this sort of balancing – without any guidelines – could lead to inconsistent rulings. Importantly, the European Court’s case law says nothing about policy considerations for future cases, balancing only the interests

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\item[211] \textit{Relocation, supra} n. 53, at 30.
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of the child and the parents, so questions still remain relating to how it might handle a case like Miller-Jenkins.

As written, Vermont’s statute leaves no room for the court to consider any factors besides the best interests of the child in question. This is consistent with the popular notion that the interests of the child at issue should be the sole consideration. This sort of limitation forces courts to do exactly what the Miller-Jenkins Court seemingly did: manipulate the allowed factors to achieve the same policy objectives. Doing so in this manner, however, means courts are interpreting this sort of standard with few guidelines. When does policy outweigh the child’s need for stability? What degree of interference or alienation justifies a transfer? How widespread do the policy implications need to be? These are all questions without well-established answers.

Other states are not necessarily as restrictive as to what the courts may consider. Michigan’s statute, for instance, contains a catch-all provision that the courts can rely on “Any other factor considered by the court to be relevant to a particular child custody dispute.” This language would seemingly provide for policy considerations to play a role when necessary.

Again, however, there is little standardization as to what exactly these courts should consider,
particularly regarding what role policy should play, and how those considerations should
impact a determination of what is in the child’s best interests.

Canadian law narrowly focuses on the individual child’s best interests, requiring that to
be the only consideration.\textsuperscript{219} This law closely parallels that of Vermont’s statute.\textsuperscript{220} Although
Vermont’s statute does not use the restrictive term “only,” its language does not provide for
consideration of any interests besides those of the child.\textsuperscript{221} Looking only at the interests of the
child made the Vermont and Canadian courts’ respective decisions in \textit{Miller-Jenkins} and \textit{A.A.}
particularly difficult. In both cases, the custodial parent’s interference with court-ordered
visitation led to a transfer of custody.\textsuperscript{222} Without any room to consider policy implications,
determining that a transfer was in the child’s best interest was the only way the courts would be
able to demonstrate that such behavior would not allow custodial parents to override court-
ordered visitation.

Two significant differences between \textit{Miller-Jenkins} and \textit{A.A.}, however, bear mentioning.
First, the Canadian court in \textit{A.A.} did not reference any sort of national awareness of the case or
any other sort of awareness that this case could have long lasting implications.\textsuperscript{223} While the
\textit{Miller-Jenkins} Court never affirmatively stated that it was pursuing policy objectives, the mere
mentioning of “the national attention” surrounding the case suggests that it played some role.\textsuperscript{224}


\textsuperscript{221} See 15 V.S.A. § 665(b).

\textsuperscript{222} \textit{Miller-Jenkins} v. \textit{Miller-Jenkins}, 12 A.3d 768, 775 (Vt. 2010); \textit{A.A. v. S.N.A.}, 2007 BCCA 363, ¶¶ 26-28
(2007).


\textsuperscript{224} \textit{Miller-Jenkins}, 12 A.3d at 778.
Second, the Canadian court relied on extensive testimony by multiple psychologists who said that the daughter would be better off living with her father,225 a stark contrast with the Miller-Jenkins Court. Although the daughter herself may not have had the opportunity to testify, these psychologists were able to go before the court on her behalf. In contrast, IMJ had no such representatives to speak for her.

There is unlikely to be any one solution that neatly resolves the conflict and distress of custody disputes, as there are simply too many personal and emotional factors involved. With better guidance, however, courts might be able to improve their decision-making and minimize harmful results. The Convention on the Rights of the Child merely states that the best interests of the child shall be a primary consideration.226 It does not, however, describe what other factors ought to be considered. The European Court has used this leeway to weigh the child’s interests against those of the parents. Many scholars specifically advocate ignoring the interests of the parents,227 so it is unclear what basis the European Court is using to allow for such factors to be considered. Nothing within the ECHR explains exactly what factors should be weighed, nor does it explain how much weight each should be given.228 It is debatable whether the parents’ interests should be considered at all, but if they are playing a role in custody determinations, there ought to be some guidelines for doing so.

Similarly, some courts seem to allow for policy considerations to play a role in determining custody of a child, even if the policy benefits are directly conflicting with the individual child’s interests. There is certainly a compelling argument to be made that, at times,

226 CRC, supra n. 43, Art. 3, § 1.
227 SEMPLE, supra n. 55, at 292.
228 See generally ECHR, supra n. 135.
policy considerations should be considered. *Palmore v. Sidoti* represents precisely one of those times. With twenty-seven years of hindsight, it is now readily apparent that a child should not be taken away from her mother merely because the mother remarries a man of a different race. At the time, however, this was surely a controversial issue,\(^\text{229}\) and the non-custodial father was likely correct that his daughter could face hardships based on her step-father’s race. As the United States Supreme Court wrote, however, “The effects of racial prejudice, however real, cannot justify . . . removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.”\(^\text{230}\) The Court unequivocally asserted that despite any real, potentially harmful effects the child might face, the Constitution could not support such an outcome. Today, it is doubtful that most people would dispute that finding, but had the Court not made this policy-based decision – in spite of the risks of harm to the child in dispute – no one can say what the implications on racism in the United States might have been. If any case demonstrates the need for some policy considerations, *Palmore v. Sidoti* is that case.

The question, then, is when the policy implications of a decision become strong enough that they justify setting aside or minimizing the importance of the individual child’s best interests. This would require some sort of weighing of factors and a consideration for the current state of affairs. In *Palmore*, for instance, where racial intolerance remained a significant national problem in the United States and the custodial mother was found to be a fit parent, it seems justifiable that the Court chose broad, beneficial policy considerations over the possibility that a child might be mocked for her step-father’s race. In the United States in the

\(^{229}\) *Semple*, *supra* n. 55, at 292.

1940s, this quite possibly would have been an untenable decision due to potentially higher risks to the child. By the 1980s, however, the policy implications surely outweighed the risk.

It would not be difficult to foresee a similar situation play out relating to homosexuality. In the United Kingdom, courts have given custody to a father on the basis that the mother was a lesbian. In particular, the court was concerned that the mother’s lifestyle could “lead to severance from normal society, to psychological stresses and unhappiness and possibly even to physical experiences which may scar them for life.” Even though this case was decided in 1980, it remains a contentious issue in the United States in 2011. Like Palmore, however, were the Court to make a ruling tomorrow on a similar case based on policy, its conceivable that twenty-seven years later, people would look at it as an obvious decision.

A case like Miller-Jenkins would pose a more difficult question. The policy considerations at issue in Miller-Jenkins are deterrence-based; courts want to discourage custodial parents from interfering with visitation orders and alienating the non-custodial parent and punish the bad behavior. While such actions certainly have societal implications, these implications are more abstract than those of racism or homophobia. Each issue of interference or alienation impacts that family internally, whereas racism deals with a mindset of many external actors.

As a result, courts should be careful not to encourage parents in future disputes to act like Lisa Miller-Jenkins, but they also should be careful to give those risks the appropriate weight in light of the risks to the child. In Palmore, the child risked the psychological effects of being chastised. In Miller-Jenkins, the child risked the psychological effects of being uprooted

231 ELSTER, supra n. 5, at 27 (citing S. v. S., 1 Fam. L. Rep. 143 (1980)).

232 Id. (citing Susan Maidment, Child Custody and Divorce chs. 4, 5, p. 181 (1984)).
from the parent and home she had known her entire life, something that psychologists universally agree is generally against a child’s best interests.\textsuperscript{233} This is not to say that courts may never transfer custody based on this sort of policy consideration. Instead, courts should be vigilant to thoroughly assess the potential psychological effects on that child, as was done in Canada in A.A.

The CRC explicitly established that courts should allow the child “the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”\textsuperscript{234} The UMDA included “the wishes of the child” as one of the factors that U.S. courts should consider.\textsuperscript{235} Although the Vermont statute does not include this factor, the nine factors are a minimum.\textsuperscript{236} Given Article 12 of the CRC, and consistent with the UMDA’s protocols, it would not be unreasonable for Vermont to consider the child’s individual desires. In \textit{Miller-Jenkins}, however, there is no evidence that the court considered IMJ’s desires. There is similarly no evidence that they appointed anyone to speak on her behalf, whether that be a psychologist or some other professional.

It is impossible to speculate how the \textit{Miller-Jenkins} Court could have weighed the effects of a transfer of custody on IMJ against the other considerations without any record of any psychological assessments. Potentially, one could see a more comprehensive solution where the courts continued to monitor the children after the custody decision, maintaining the option to modify custody if it appears to fit the child’s needs. At the very least, however, courts

\textsuperscript{233} \textsc{Fidler & Bala}, \textit{supra} n. 81, at 30; \textsc{Elster}, \textit{supra} n. 4, at 11.

\textsuperscript{234} CRC art. 12 § 2.


\textsuperscript{236} 15 V.S.A. § 665(b).
should give some consideration to the individual child in dispute, his or her wishes, and the psychological effects of these decisions on children before considering other factors. This might not directly resolve public policy issues, but it should provide some guidance to courts to best balance the interests of individual children against the broader needs of society. Hopefully, courts could then avoid potentially sacrificing one goal, such as the child at the center of the dispute, in order to protect the other.