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Witnessing Good Mothering *Experts and Expertise in Family Law Decisions*

Experts serve an important role in the evaluation of mothers and in the incorporation of motherhood ideology into case law. I conclude elsewhere (Miller, 1997) that experts provide judges with a perceived objective interpretation of mothers that is subjectively grounded in the motherhood myths of maternal instinct, maternal self-sacrifice and maternal fulfillment (Schwartz, 1993: 51). These expert judgments then serve as part of the justification for judicial decision-making. Yet how are experts granted their expertise? Upon what criteria is expertise valued by the courts? In this paper I focus on one aspect of these larger questions: perceptions about court experts and expertise contained in judicial discourse. Specifically, I discuss perceptions of non-mother experts as hard-working and blameless, as the “true” child advocates in the system, and as accurate predictors of the future of mothers and their children. I argue that collectively these perceptions about court experts held by judicial actors contribute to the devaluation of the experiences and perceptions of mothers in family law decisions.

Evaluations and sanctions of mothers have recently entered a more politicized public debate. As John Meyer and his colleagues argue, “mother-child conflicts that were once the substance of folklore and common gossip have become items for public discussion and political regulation...” (1988: 138). Experts have played a central role in this discussion and regulation. For instance, both experts and the court evaluate mothers and make decisions within family law using the criterion of “best interests of the child.” This legally mandated standpoint perspective withdraws expertise from individual mothers and places it in the hands of the child advocates in the system. Further, scientific expertise has been brought to bear to define relevant terms and to provide advice, criticism, and support in such areas as breastfeeding (Wall, 2001: 604),

balancing work and motherhood (Garey, 1999: 11) and general mothering practices (Hays, 1996: 51-70).

To this end, the establishment of courtroom expertise and perceptions about experts themselves should be considered, as it is through the guise of claimed expertise that mothers find their behaviors evaluated and punished. To help in this discussion, I present examples of United States case law derived from a larger study of judicial evaluations of motherhood. The larger study contains 311 United States family law cases decided between 1980 and 2001 generated from the Lexis/Nexis database system. I begin my analysis by presenting information on the role of experts and the expertise of mothers and judges in United States family law.

The role of experts

Professional expertise has been incorporated into judicial decision-making and has been used to justify intervention into the private realm of motherhood. As *In re Kailer* articulates:

Under the law of the land the welfare and best interests of children are primarily the concern of their parents, and it is only when parents are unfit to have the custody, rearing and education of children, that the state as *parens patriae*, with its courts and judges, steps in to find fitting custodians *in loco parentium*.

The legal presumption is that motherhood is a private act, and remains necessarily so unless there is some compelling state interest that requires intervention. Identification of a compelling state interest, however, may require an invasion of the domain of privacy to assess the need for a more substantial intervention by the court. That initial intrusion, which later justifies court-ordered intervention and/or response, is frequently performed by experts.

The role of experts in judicial decision-making should not be underestimated. Although judges retain final decision-making authority, experts define good mothering, mediate conflicting reports on mothering activities, and provide ongoing assessments of mothers' attempts at improvement. Experts also serve as a primary source of information and evaluation about the interests and needs of children. The role of experts, then, may be fluid and ambiguous, while their testimony may be influential to the court.

Expertise is presumed to be held by a limited number of individuals who have received specialized training in fields related to the case. Medical personnel (Champagne, 1992: 6), psychiatric experts (Mosoff, 1995: 110), and social workers (Gothard, 1989: 65) dominate both in their use as expert witnesses and in their status as legally-defined experts. As Michael King describes, the role of "The Expert" "... allows a privileged status, a mantle of reliability, to be extended to professionals who are not members of the legal

fraternity” (1991: 313). For a judge to accept the expert testimony of an individual, he/she must be satisfied with the qualifications of the expert and the integrity, credibility and neutrality of the testimony itself. To a certain extent, then, a court’s evaluation of experts forces them to act like experts themselves.

The discourse of expertise reflects several distinct issues. First, scientific experts utilize a discourse of contingency as opposed to a discourse of truth (Jasanoff, 1993: 77). For instance, researchers often note the limitations of their methodology. These caveats serve as indicators of the validity and generalizability of the research. Such empirical contingencies are expected within scientific communities but in the courtroom they become problematic. King (1991: 314) argues that “subject[ing] one form of truth to the truth-validating procedures of another necessarily results in distortion...”

Second, competing discourses force legal personnel and researchers to both modify their language. Accordingly, researchers have found that experts, attorneys, judges and juries all agreed that one of the most important criteria in identifying “good” experts was their ability to translate technical information to the court (Champagne, 1992: 10). Yet, ultimately, judges must construct their own conceptualizations of expertise. As Sheila Jasanoff says: “the ultimate goal of the courts is the attainable one of dispensing justice, not the impossible one of finding objective truth” (1993: 80).

Judges as experts

As the dissenting judge noted in *In the Interest of Angela Dee Holt*, judges hold an “awesome, Godlike” responsibility. Yet in making decisions, courts sometimes go beyond the mantle of expertise granted to them by their position. For instance, in deciding the financial divisions following a divorce, the court in *Granbery v. Carleton* assumed personal expert status by claiming his experience as a parent and an artist made him uniquely qualified to understand the parenting needs of an artistic and intelligent child. In doing so, the judge justified his criticism of the mother, despite the fact that custody had already been decided and the criticism was irrelevant to the case.

The expertise of judges usually, however, rests with the position they hold. In *Anonymous v. Anonymous* the court was asked to decide the best interests of a mentally retarded minor whose parents were seeking permission to have sterilized. The trial court did not find either the testimony of the family physician or the arguments of the parents compelling. Taking full responsibility and expertise upon themselves alone, the appellate court judges noted:

Ultimately, it is the duty of the court, and not the parents, to determine the need for sterilization.... While the parents’ duty of custody, care and nurture gives rise to their right to advise a child and participate in any decision, a decision relating to reproductive anatomy belongs to the child....

In claiming the authority to make the decision on behalf of the child, the court also assumed the expertise to appreciate her condition, her limitations, and her future. Without years of experience with the child, how is it that the judges' review of legal doctrine and interpretation of "best interests" becomes more important in a life-altering decision than the parents who raised the child?

Mothers as experts

Within the courtroom, the privileges affiliated with the expert role are associated with the ability of the person, so endowed, to state her/his *opinion* about the issues at hand. Others, identified by King (1991: 314) as "non-experts," are required to provide only "factual" testimony. Mothers are rarely granted expert status; instead, they "may describe how the child has been behaving, but they are not allowed to give any opinion as to why the child behaves as she or he does or what will be the best way of dealing with the child's behavior" (King 1991: 314). In short, a mother's expertise may be constrained to the role of witness.

In *Brooks v. Hitch*, both parents were seeking custody of their five year old daughter. This meant that the court was faced with competing interpretations of the child's behavior and claims about which parent could better address the behavior. The mother argued that her daughter's encopresis was best cured with time and love and that her temper tantrums would decrease as she gained stability in her life. The mental health experts and the father disagreed. Vilifying the mother's close relationship with the child to the point of "smothering," and criticizing the mother for her failure to complete a questionnaire on parenting as part of his evaluation, one expert defined both the child's problems and their source— inappropriate mothering. Building their decision upon this expert's opinion, the court granted custody to the father, soundly chastising the mother in the process: "Perhaps the most difficult aspect of this case is that it is Mother's attachment to her daughter—which comes close to a dependency—this is most destructive to this child...."

In another example, in 1979 a 19-year-old unmarried woman with an IQ of 73 gave birth (*In the Matter of Martin E. Borst, Jr.*). She asked her caseworker to arrange for adoption of the child. The caseworker refused, concluding that the mother "could manage the role of motherhood with guidance." Two years later, the same social service agency sought to terminate the mother's parental rights in the child (with whom she had by then developed a relationship), testifying that "there is some question whether she is mentally capable of... planning" for her child's future. After initially requiring the mother to be a mother despite her wishes to the contrary (an endorsement of the myths of motherhood), the agency then claimed that the mother was not fulfilling her obligations toward her child. The court acknowledged the mother's failures as described by the experts, but postponed termination of parental rights. In doing so, the judge initiated a process for the experts to gather more evidence about

the mother's failings. Instead of rejecting the experts' judgment (both in terms of the adoption and parental termination), the decision reinforced the expertise of the agency by granting them the obligation to further evaluate the mother's behaviors.

Perceptions of experts

I discuss below three perceptions endorsed by courts related to experts and expertise: 1) that experts are hard-working and blameless for the failures of their clients; 2) that experts are the "true" child advocates in the system and, as such, are a better source of information about the "best interests" of children; and 3) that experts are able to accurately predict the future for mothers. Each of these perceptions serves to remove expertise from mothers.

Perception 1: experts as hard-working and blameless

Sometimes, defining the qualities of mothering means confirming the quality of the experts involved in their case. In *Brand v. Alabama Department of Pensions and Security*, the courts concluded that the social services department had done everything they could to encourage the mother's relationship with her child, from whom she had recently had her parental rights terminated. Despite efforts by agency staff to schedule visitation between mother and child, the court noted that it was the mother's own history of drug use, prostitution and other inappropriate choices that led to the termination of parental rights. Similarly, the court-ordered friend in *In re Adoption of K.F.H. and K.F.H.* testified that she had been "frustrated" many times while attempting to coordinate visitation between the non-custodial mother and her infant twins. The court concluded that despite the best efforts of the court-ordered friend, the mother failed to have any contact with the children for over a year, hence justifying their adoption by the custodial father's wife. While the court acknowledged the mother's difficulty in maintaining contact with pre-verbal infants when they lived out of state, they discounted the mother's claim that the distance and age of the children made a mediated relationship with her children a necessity.

What these cases signify is the reluctance of the court to blame experts involved in the evaluation of mothers. Rarely did a majority court remark on inappropriate or less than superior actions on the part of experts. Occasionally, a dissenting judge would ironically point out that, as did the judge in *In the Interest of Angela Dee Holt*:

[There is] little evidence in the record of efforts made by the state to help [mother] herself straighten out her emotional problems and find employment. Apparently Health and Welfare's only positive actions were to give her the very psychological tests which would later be used as evidence against her in the child forfeiture proceeding.

Overall, the subtext of court decisions relies upon an assumption of experts actively and effectively performing their respective duties. Generally, the court presumed the integrity and commitment of the experts hired to ensure the “best interests” of the children in the court. In doing so, they reinforced both the validity of the opinions expressed by these experts and the externality of the mother’s perspective and experience to the court proceedings.

Perception 2: experts as the “true” child advocates

The tendency of the court to place the advocacy of “outsiders” in higher esteem than the advocacy of insiders (read mothers), may rest upon values of neutrality and objectivity which, for obvious reasons, mothers are perceived not to have. Nevertheless, such claims are also a not-so-subtle denigration of mother’s perspective, grounded as it is in her lived experience. For instance, in *In re the Marriage of Kleist and Mendez*, the parents were arguing over custody. In deciding, the court turned to a court-appointed expert for her opinion about the best placement. The expert claimed that her recommendation was based upon a strategy whereby she sought a decision “that is fairer for the child than it is for either of the parents.” In other words, the expert ignored the parents’ claims of knowledge about their child’s best interests. Notice that this negation of expertise is true for both parents, including the one that the expert recommended for custody (in this case, the mother). Hence, the court, in accepting the expert’s strategy and her recommendation, endorsed the expert’s role as the “true” child advocate and silenced the mother’s and father’s voices in the process.

While *Kleist* involves custody, this issue is more poignant for parental termination, where the adversarial expert voice has little or no experiential involvement with the child. This fungible expert enjoys an assumption of knowledge because of her/his universalistic experience with mothers and children, while the mother’s particularistic knowledge of her child is negated.

Perception 3: experts as prescient beings

Courts sometimes presume that experts hold unique prescient capabilities about mothers. This presumption is important because judges must make decisions that rest upon their ability to predict the “best” outcome. Indeed, the appellate court in *Young v. Young* chastised the trial court for its apparent disregard of the testimony of a court-appointed psychiatrist, a law guardian (the court-appointed child advocate), three pediatricians, caseworkers, and an expert hired by the mother (qualifications unspecified), noting that it behooves courts to give significant weight to the conclusions drawn by credible, neutral witnesses, or to justify themselves when they ignore such experts’ recommendations. Reliance, therefore, upon experts who have been granted expertise partly because of their willingness to make predictions about the future behaviors of mothers is seen as appropriate. Yet the willingness to predict itself is controversial; some mental health practitioners argue experts must never

decide the outcome of facts (by predicting the future) but instead they should solely testify to the accuracy and objectivity of facts (Wolfe, 2003: 344).

The goal of expert testimony in *In re Interest of D.L.S. v. J.S.C.*, was to diagnose the mother's failures and outline her potential for recovery. The State had petitioned for the termination of mother's parental rights noting, *inter alia*, that the mother was incapable of proper parenting "because of mental illness or mental deficiency" which they believed would "continue for a prolonged indeterminate period." Two psychologists testified that the mother had a "dependent personality disorder" characterized by an inability to "make decisions on her own." They predicted a lengthy recovery process. Using this information, the majority court terminated the mother's rights, arguing "[w]e cannot gamble away an additional two years of this child's life on the speculative hope that the mother can overcome the deficiency which she, albeit through no fault of her own, brought to motherhood." *D.L.S.* demonstrates how important this prescient ability is. By predicting a long recovery the experts presented to the court the image of a child kept perpetually in foster care. Despite the court's recognition of the mother's lack of blame for her condition (ironically reflecting her inability to make good decisions herself), this image dominated their decision.

Family law decisions sometimes involve contrasting different conclusions drawn by individuals with similar qualifications. For instance, in *In re Stephanie* two social service agency caseworkers, two psychiatrists, a psychiatric nurse, a clinical psychologist and a neuropsychologist testified regarding the termination of a mother's parental rights in her infant daughter. While the mother's mental health diagnosis varied depending upon the expert, at issue was the mother's ability to care for her child in the future. The neuropsychologist claimed that the mother's ailment was temporary and "improvement could well become realized within a four to six week treatment period." The other experts predicted a long, potentially fruitless treatment. Both the trial and the appellate courts terminated the mother's parental rights immediately, rejecting the need to take more time to assess the long-term prognosis (and failure) of the mother.

In general, courts deferred to experts' predictions generated from their diagnoses of mothers' mental illness, intelligence, failure with previous children, inability to meet the experts' recommendations, or a perceived unwillingness to try to improve mothering behaviors. What all of these issues have in common is the willingness of the experts to presume knowledge of future events based upon present circumstances. Interestingly, a survey of research on the accuracy of mental health experts' predictions of clients' behaviors conducted by David Faust and Jay Ziskin (1988: 34) suggested that professionals were no more accurate in their predictions than laypersons. Nevertheless, the confidence by which mental health experts expressed their opinions led to judicial and jury bias, in that both entities were prejudiced toward the conclusions drawn by credentialed experts despite their relative inaccuracy and their incredible cost (Faust and Ziskin, 1988: 35). In other words, because judges and

juries engendered experts with expertise, their predictions were endowed with greater validity than research would warrant.

Conclusion

If we allow for the recognition that an ideology of motherhood exists in the United States' system of justice, the question becomes: What role do experts play in supporting this ideology? Experts contribute in a number of ways to the judicial decision-making process, yet their role in defining and evaluating mothers is complicated. In general, expertise is granted only to those perceived credible by the courts. This certification process involves embodying experts with three expertise-affirming perceptions: 1) that experts are hard-working and blameless for the failures of mothers; 2) that experts are the "true" child advocates; and 3) that experts can accurately predict the future of mothers. Each of these perceptions serves to further endorse the voices and claims of experts in the courtroom. As Peter Schuck states: "...scientific facts are not immanent in an objective reality waiting to be discovered by any scientists who look in the right place. Instead, they are constructed and validated through a social process dominated by those in the scientific community who possess authority to do so" (1993: 15). Through this social construction, the voices and experiential knowledge of mothers is devalued and their perceived adversarial positions are negated.

In this paper I have considered the establishment of expertise in U.S. family law. I have argued that courts rely upon expert testimony in making decisions about mothers and, in doing so, often rely upon myths about motherhood that have little relationship to the lived experiences of mothers. By finding their voices silenced in comparison to the voices of experts, mothers can do little to shatter these myths or to claim their own knowledge about motherhood. The outcome is mothers as non-experts and a reinforcement of the ideology of motherhood.

Addressing the restrictions on mothers' voices and expertise in family law decisions is complicated, as the silencing occurs within an adversarial, male-dominated system of law that is able to invoke—*by statute*—a paternalistic relationship to its charges. And, existing experts may be complicit in the process; Sol Gothard (1989: 65), for instance, urges social workers to strive for expert status in the courtroom, because doing so enhances the prestige of the field of social work. In short, transforming perceptions of mothers' expertise may require a shift in power relations, between mothers and judges and between mothers and those who evaluate them. As Lauren Snider (1994: 97) notes:

Laws have the potential to be interpreted in ways which hurt women because women lack the power to resist such interpretations (emphasis in original).

At a minimum, this shift could involve acknowledging the bias endemic

to all expert testimony. This would serve to make obvious in the courtroom that which researchers have argued for a long time: that knowledge is subjective. Within this framework, the lived expertise of mothers could be interpreted as no less valid than—although distinctive from—the learned expertise of psychologists. It is also important to reject the adversarial structure of the judicial decision-making process that puts mothers, perhaps for the first time, outside the circle of concern for her children. In a court system that so often presumes mothers' and children's interests to be aligned (as in the issue of child support), it is ironic that mothers in family law cases are sometimes presumed to be arguing in direct opposition to the "best interests" of their children. Avoiding competitive claims of "true advocacy" by acknowledging all perspectives in the decision-making process would further reduce the impact of these decisions on mothers.

Finally, while the transformation of the judicial decision-making process may improve the status of mothers in the court, it is important to recognize that structural inequities outside of the justice system continue to affect mothers' lived realities and will continue to enter into the court decision-making process. The power differentials within the courtroom are therefore reflective of power differentials in the greater society and, as such, may not easily be reduced.

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