

Canadian Journal of Family Law

Volume 31
Number 1 *Remembering Professor Judith
Mosoff*

2018

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Suzanne Zaccour

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Recommended Citation

Suzanne Zaccour, "Crazy Women and Hysterical Mothers: The Gendered Use of Mental-Health Labels in Custody Disputes" (2018) 31:1 Can J Fam L 57.

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Crazy Women and Hysterical Mothers: The Gendered Use of Mental-Health Labels in Custody Disputes

Suzanne Zaccour*

This research studies the use of gendered mental-health labels, such as “crazy,” “hysterical,” “insane,” and “emotionally unstable,” in Canadian custody cases decided between 2000 and 2016. Building on Judith Mosoff’s work on gender and mental health stigma in custody proceedings, it maps how these “pop-psychology” labels impact custody litigation. This investigation reveals that mental-health labels serve to discredit the mother, attack her parenting abilities, and distract from her allegations of violence by the father. The article also explores fathers’, mental health experts’, and judges’ roles in framing the mother’s credibility and parental capacity with regard to her alleged mental instability. It observes how the unjustified use of mental-health labels can backfire against the father, and how mothers can link out-of-court mental-health insults to legal arguments supporting their claim for custody. Although producing varied consequences, mental-health labels often reinforce gender biases and myths regarding domestic violence.

* B.C.L. & LL.B., McGill University (2016), LL.M., University of Toronto (2017), LL.M. candidate, University of Cambridge (2017-2018). The author would like to thank Professor Brenda Cossman for her precious advice, support and supervision in the completion of this article, as well as the anonymous reviewers for their thoughtful and valuable comments.

INTRODUCTION

The trope of the “crazy woman” is influential in our society, affecting psychiatry, the media, our culture, and popular discourses. A simple example, entering “crazy mom” into Google returns significantly more results than the search “crazy dad.” Our society’s historical obsession with labeling women as crazy has had important implications for women in numerous aspects of their lives.

This article explores the intersection between gender and mental health stigma in the context of custody disputes. Building on Judith Mosoff’s work on how a mother’s mental illness negatively affects her claim for custody, it studies how discourses and stereotypes on mother’s mental health impact custody disputes in the context of an opposite sex, dyadic, nuclear family. The conflictual and gendered context of such litigation creates a fertile field for the mobilization of stereotypes about women’s mental health.

This research analyses 120 cases involving the gendered use of a mental-health label, such as “crazy” or “hysterical,” rendered by Canadian courts between 2000 and 2016. It finds that ableist labels are used especially by fathers, but also by judges and experts, to diminish mothers’ credibility and attack their parental capacity. Allegations of mental instability are rarely fully successful, but create space for the use of gendered stereotypes, distract the court from the analysis of the father’s violence, and are rarely punished. Finally, mothers also use mental-health labels to testify that the father has called them “crazy,” yielding mitigating results in trying to attach legal consequences to this verbal abuse. Whether at trial or out

of court, it remains too acceptable to characterize mothers as mentally unstable.

GENDER AND MENTAL ILLNESS

The gendered nature of mental illness illuminates the study of mental-health labels in custody disputes. Far from being a mere coincidence, fathers' and professionals' tendency to pathologize mothers can be traced back to the beginnings of psychiatry, calling for scepticism regarding such allegations: in a patriarchal society, any woman can be "crazy."

Women outnumber men in diagnoses of mental illness since the eighteenth century,¹ when hysteria was so frequently diagnosed that it was said to be "a woman's natural state."² Anorexia, depression, borderline personality disorder, post-traumatic stress disorder, premenstrual dysphoric disorder and anxiety disorders are in turn today's "women's diseases."³ Phyllis Chesler uncovers the role of patriarchy in shaping the ideals of mental health: "What we consider 'madness', whether it appears in women or in men, is either the acting out of the devalued female role or the total or partial rejection of one's sex-role stereotype."⁴ Jane Ussher also exposes the

¹ Jane M Ussher, *The Madness of Women: Myth and Experience* (London: Routledge, 2011) at 1 [Ussher, "The Madness of Women"].

² *Ibid* at 9.

³ *Ibid* at 10–11.

⁴ Phyllis Chesler, *Women and Madness* (Garden City, N.Y.: Doubleday, 1972) at 56.

historical gender biases of psychiatry, namely the pathologization of femininity and the chastisement of women who deviate from expected gender roles. She argues that women—particularly working class, old, lesbian, and Black women—are routinely overdiagnosed by mental health professionals.⁵

Feminist critics of psychiatry also link women's psychological distress with sexism and violence against women. Discrimination and sexual violence are associated with depression,⁶ self-hate,⁷ substance abuse,⁸ post-traumatic stress, and anxiety.⁹ Feminists argue that psychology “depoliticise[s] the roots of women's distress”¹⁰ and that the concept of mental illness obscures oppression by suggesting “an internal pathology that can be incontrovertibly categorised and cured by biomedicine.”¹¹ The pathologization of mothers to conceal domestic violence, that will be explored in this article, exemplifies this relationship between female madness and male violence.

⁵ Ussher, “The Madness of Women”, *supra* note 1 at 76.

⁶ *Ibid* at 37.

⁷ Mary B Ballou & Laura S Brown, *Rethinking Mental Health and Disorder: Feminist Perspectives* (New York, N.Y.: Guilford Press, 2002) at xv.

⁸ Lynn H. Collins, “Alcohol and Drug Addiction in Women: Phenomenology and Prevention” in Ballou & Brown, *supra* note 7.

⁹ Ussher, “The Madness of Women”, *supra* note 1 at 38.

¹⁰ *Ibid* at 35.

¹¹ *Ibid* at 4.

MENTAL ILLNESS AND CUSTODY

Research on custody and mental illness situates the biases, factors, and roles that can be expected to affect cases involving gendered mental-health labels. Particularly, Judith Mosoff explores, in “Motherhood, Madness, and Law”, how mental-health labelling helps sever mentally disabled mothers’ relationship with their children.¹² She investigates how the “psychiatric paradigm” justifies denying a mother any sense of privacy by defining her as a danger to her child.¹³ Mosoff takes issue with the uncritical reliance of judges on psychiatric expertise, viewed as “objective” and “scientific.” She also notes the dissemination of psychological ideas in popular culture, resulting in a reliance on “pop psychology” to evaluate a mother’s fitness as a parent.¹⁴ In “A Jury Dressed in Medical White and Judicial Black”, Mosoff further presents custody proceedings as explicitly adversarial processes where “psychiatric evidence is usually the major aspect of the inquiry”¹⁵ and “becomes a ‘battle of the experts.’”¹⁶ Women face important biases as “an expert’s

¹² Judith Mosoff, “Motherhood, Madness, and Law” (1995) 45:2 UTLJ 107 at 108 [Mosoff, “Motherhood”].

¹³ *Ibid* at 110.

¹⁴ *Ibid* at 111.

¹⁵ Judith Mosoff, “A Jury Dressed in Medical White and Judicial Black’: Mothers with Mental Health Histories in Child Welfare and Custody” in Susan B Boyd, ed, *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) 227 at 229.

¹⁶ *Ibid* at 228.

mental health category or diagnosis becomes a ready vessel for a gendered interpretation of parenting.”¹⁷

Anat S. Geva’s 2012 research in turn explores how judges report factoring mental health in custody determinations, stating that, although an important factor,¹⁸ “parental mental illness is not an *a priori* reason to deny custody.”¹⁹ Geva identifies three main bases for deciding the impact of the mental illness on the case.

First, judges may apply a favourable presumption to the mentally ill parent, either by assuming that the illness is at its worse during litigation,²⁰ or by being skeptical of the parent who bases the custody claim on the other parent’s diagnosis.²¹ However, Diane T. Marsh rather finds that mentally ill people’s inability to parent “is often taken for granted, rather than properly assessed.”²²

Second, judges rely on mental health experts, despite their lack of awareness of “common reasoning and

¹⁷ *Ibid.*

¹⁸ Anat S Geva, “Judicial Determination of Child Custody When a Parent is Mentally Ill: A Little Bit of Law, A Little Bit of Pop Psychology, and A Little Bit of Common Sense” (2012) 16:1 UC Davis J Int L & Pol’y 1 at 17–18.

¹⁹ *Ibid* at 1.

²⁰ *Ibid* at 27.

²¹ *Ibid* at 35.

²² Diane T Marsh, “Parental Mental Illness: Issues in Custody Determinations” (2009) 23:1 Am J Fam L 28 at 29.

research errors committed by these professionals.”²³ This reliance is strongly criticized by Mosoff who states that that “psychiatrists are poor assessors of risk”²⁴ and ground their opinions in “a medical model of mental disorder,”²⁵ which “assumes that disability originates from impairment, a defect in the individual which may be fixed by an appropriate professional.”²⁶

Third, judges rely on their personal knowledge—or “common sense”²⁷—regarding mental illness; however, they may overestimate “their understanding of the psychological factors relevant to post-divorce adjustment.”²⁸ The considerable discretion that judges enjoy and the subtlety of mental health discrimination makes determining whether mental health is considered appropriately a difficult task.²⁹

Research on custody and mental illness focuses on parents with serious and diagnosed mental illnesses, leaving the coding of “normal” (undiagnosed) women as “crazy” unaddressed. This field of study provides a point of comparison for the exploration of the use of “pop-psychology” labels (such as *hysterical*, *crazy*, *nuts...*). Building on Mosoff’s work on perceptions of mentally ill

²³ Geva, *supra* note 18 at 8.

²⁴ Mosoff, “Motherhood”, *supra* note 12 at 134.

²⁵ *Ibid* at 132.

²⁶ *Ibid* at 132.

²⁷ Geva, *supra* note 18 at 1–2.

²⁸ *Ibid* at 2.

²⁹ *Ibid* at 18.

mothers in the judicial system, this research frames how gender, mental health stigma, and pop psychology intersect to affect mothers in custody disputes, even absent actual diagnoses and expert testimony.

DOMESTIC VIOLENCE AND CUSTODY

The prevalence of domestic violence cases requires a brief overview of how gender biases penalize victims of male violence in custody litigation. This background provides the tools to critically assess courts' engagement with domestic violence concerns in the context of fathers' pathologization of mothers, as well as their frequent choice of shared custody arrangements.

Abundant feminist literature has detailed the disadvantages faced by mothers in custody disputes. Notably, Susan Boyd demonstrates that family law has been shaped by the lobbying of fathers' rights activists and that a language of "equality" and "neutrality" masks biases favouring fathers.³⁰ Judges further view women as less credible than men,³¹ and hold mothers to higher standards of proof and of good parenting.³² Mothers who allege

³⁰ Susan B Boyd, *Child custody, law, and women's work* (Don Mills, Ont: Oxford University Press Canada, 2003) [Boyd, "Child Custody"]; Susan B Boyd, "Demonizing mothers: Fathers' rights discourses in child custody law reform processes" (2004) 6:1 *Journal of the Motherhood Initiative for Research and Community Involvement* 52.

³¹ Megan Shipley, "Reviled Mothers: Custody Modification Cases Involving Domestic Violence" (2011) 86 *Indiana LJ* 1587 at 1596–1597.

³² Boyd, "Child Custody", *supra* note 30; Joan S Meier, "Domestic Violence, Child Custody, and Child Protection: Understanding Judicial

domestic violence or violence against the child (which often co-occur)³³ face additional biases. Despite its widespread nature, especially among litigating families, courts repeatedly fail to acknowledge fathers' violence.³⁴ The difficulty of demonstrating family violence is exacerbated by stereotypes that mothers make false allegations of violence.³⁵ Despite victims' tendency to minimize and cover-up domestic violence, courts and assessors routinely assume that women who allege violence exaggerate.³⁶ Their distrust is intensified by misconceptions about the purely physical nature of domestic violence, even though "[m]inor' violence is a predictor of severe injuries in battered women, as is

Resistance and Imagining the Solutions" (2003) 11:2 Am UJ Gender Soc Pol'y & L 657 at 687.

- ³³ Lundy Bancroft, Jay G Silverman & Daniel Ritchie, *The batterer as parent: Addressing the impact of domestic violence on family dynamics* (Thousand Oaks, CA: Sage Publications, 2011) at 9.
- ³⁴ Desmond Ellis, "Divorce and the Family Court: What Can be Done about Domestic Violence?" (2008) 46:3 Family Court Review 531 at 531; Peter G Jaffe, Nancy KD Lemon & Samantha E Poisson, *Child custody and domestic violence: A call for safety and accountability* (Thousand Oaks, CA: Sage Publications, 2003) at 16; Meier, *supra* note 32.
- ³⁵ Adrienne Barnett, "'Like Gold Dust These Days': Domestic Violence Fact-Finding Hearings in Child Contact Cases" (2015) 23:1 Feminist Legal Studies 47 at 71; Christine Harrison, "Implacably hostile or appropriately protective? Women managing child contact in the context of domestic violence" (2008) 14:4 Violence Against Women 381 at 395.
- ³⁶ Meier, *supra* note 32 at 684–685; Elizabeth M Schneider, *Battered women and feminist lawmaking* (New Haven, CT: Yale University Press, 2008) at 104–108.

psychological abuse by the perpetrator.”³⁷ Mothers who denounce violence are painted as “hostile” and “obstructive,” especially if they appear angry or emotional.³⁸ This context illuminates the following discussion on the labelling of mothers who allege violence as “hysterical.” Also relevant is the fact that “batterers . . . commonly retaliate with accusations that their partners are actually the aggressors, are unfit, or are systematically brainwashing [or ‘alienating’] the children.”³⁹ These allegations marginalize concerns regarding the father’s violence, inviting judges to default to the “neutral” position of assigning blame equally to both parties.⁴⁰ This study will observe whether allegations of craziness and mental instability serve a similar function.

Even when mothers succeed in demonstrating fathers’ violence, batterers are routinely granted contact, and even shared or full custody,⁴¹ because judges assume, wrongly, that violence against the mother does not harm the child or stops after the separation.⁴² Even evidence of

³⁷ Elizabeth A Sheehy, *Defending battered women on trial: Lessons from the transcripts* (Vancouver: UBC Press, 2013) at 278.

³⁸ Barnett, *supra* note 35 at 51, 53; Meier, *supra* note 32 at 691.

³⁹ Jaffe, Lemon & Poisson, *supra* note 34, ch 2.

⁴⁰ Shipley, *supra* note 31 at 1597; Meier, *supra* note 32 at 692–696.

⁴¹ Linda C Neilson, “Spousal Abuse, Children and the Legal System: Final Report For Canadian Bar Association, Law for the Futures Fund March, 2001” (2001); Fiona Kelly, “Enforcing a Parent/Child Relationship at All Cost?: Supervised Access Orders in the Canadian Courts” (2011) 49 Osgoode Hall LJ 277.

⁴² Sheehy, *supra* note 37 at 221; Jaffe, Lemon & Poisson, *supra* note 34 at 9; Fiona Kelly, “Producing Paternity: The Role of Legal Fatherhood

violence against the child may be disregarded because of the presumed importance of maintaining the father-child relationship at all cost.⁴³ This treatment of family violence allegations allows batterers to use the legal system as a tool to continue to harass, intimidate, control, and terrorize mothers.⁴⁴ Shared parenting orders also grant violent fathers increased opportunities to exert their violence and control, leading to consequences ranging from physical and emotional violence to abductions and even feminicides and infanticides.⁴⁵

METHODOLOGY

This research is based on an analysis of discourses and trends in custody cases in which gendered labels are used in relation to the mother. First, a literature review of the area of gender and mental health allowed for the preliminary identification of words often used to describe women's madness, such as "hysterical" and "crazy."

in *Maintaining the Traditional Family*" (2009) 21 *Can J Women & L* 315.

⁴³ Kelly, *supra* note 42.

⁴⁴ Ellis, *supra* note 34 at 531–532; Colleen Varcoe & Lori G. Irwin, "If I Killed You, I'd Get the Kids': Women's Survival and Protection Work with Child Custody and Access in the Context of Woman Abuse" (2004) 27(1) *Qualitative Sociology* 77 at 85.

⁴⁵ Helen Rhoades, "The Rise and Rise of Shared Parenting Laws: A Critical Reflection" (2002) 19 *Can J Fam L* 75; Boyd 2003, *supra* note 30.

Second, searches were conducted on Lexis Nexis and SOQUIJ with the following search words, for a total of 1,130 cases:⁴⁶

- Hysteria, hysterical, hystérique, hystérie
- Neurotic, neurosis, névrosée, névrose
- Crazy, folle, fou, folie
- Paranoid, paranoïaque (later excluded)
- Insane
- Delusional
- Maniacal, maniac, maniaque
- Basket case
- Nuts
- Deranged, dérangée
- Malade mentale, sick [...] head, malade dans la tête
- Pathological, pathologique
- Emotionally unstable

Irrelevant cases were excluded from the results, for a total of 524 cases.

Third, the remaining cases were sorted according to who was described by the label in order to verify that the search word was indeed a gendered label.

⁴⁶ Lexis Nexis searches included the following filters: Court cases (All Canadian Court Cases); Legal Topics: Family Law → Common Law Jurisdictions [Family Law] → Custody and access; DATE(>=2000). Searches on SOQUIJ included the following filters: Plan de classification: famille → garde d'enfant; DATE(2000-2016). Negative search words were added to exclude recurrent irrelevant results. SOQUIJ searches include feminine and masculine forms of a word.

Fourth, for those labels that were confirmed as “feminine”⁴⁷ (all except “paranoid”), cases in which the label targeted a child were excluded, and remaining cases were sorted according to the function of the label to allow for the preliminary identification of recurring themes.

Fifth, for each label, the most relevant cases were selected to be more closely analysed, eliminating cases in which the label was used against the father or was irrelevant to the central issues of the case. At this step, 120 cases were identified as most relevant.

Sixth, thematic issues previously identified were refined based on the observation of patterns, problems, and unusual issues among those 120 relevant cases. Cases were classified into four (overlapping) categories. In each category, rates of success were calculated based on whether the mother obtained what she asked for in terms of custody or access. Because the outcome of any given case can depend on a number of factors, closer attention was paid to the judge’s reasoning.

RESULTS

The 120 selected cases reveal different functions of gendered mental-health labels. **Part I** discusses the use of these labels to discredit the mother (25 cases), especially when she alleges violence by the father. **Part II** addresses the use of mental-health labels in relation to the mother’s parental capacity (60 cases). **Part III** explores the consequences that can flow from a judge’s disapproval of

⁴⁷ A “feminine” label was applied more often to mothers and daughters than to fathers and sons.

the father's allegation of mental illness (17 cases). Finally, **part IV** observes the effectiveness of mothers' strategy to testify to the father's out-of-court affirmations that she has mental health problems (40 cases).⁴⁸

Allegations of mental instability are often used by violent fathers. Although they have a low success rate when they are not confirmed by the judge's observations at trial or expert testimony, these allegations shift the focus away from family violence concerns. Judges may succeed in identifying and criticizing opportunistic, illogical, and unsubstantiated allegations of mental instability. However, fathers are rarely penalized, making these inflammatory statements a safe way to try to undermine the mother's case. When it is the mother who brings up the issue by testifying that the father called her "crazy," she invites an analysis of the father's abuse rather than her mental state. Mental-health insults are easily trivialized by the court; however, they contribute to the mother's case when they are attached to broader concerns regarding the father's violence, lack of parenting abilities, or alienation of the children.

PART I: MENTAL-HEALTH LABELS AND MOTHERS' CREDIBILITY

Mental-health labels are used to discredit mothers in 25 cases, including 16 victories for the father. These cases raise two main concerns. First, judges lack the formal training to impose improvised mental-health diagnoses on mothers. Second, the labelling of mothers as mentally ill

⁴⁸ A single case may involve allegations falling under more than one category.

serves to discredit allegations of violence. Although fathers often fail to pathologize the mother who alleges violence, the combined roles of fathers, experts, and judges lead to a shift in focus from the father's violence to the mother's delusionalism.

Ableist labels rhetorically dramatize the mother's lack of credibility. For example, rather than asserting that she is a liar, the father can say that she is a "pathological liar;"⁴⁹ rather than finding that she exaggerates, the judge can find that she is "hysterical." Moreover, the labelling of a bad litigant as a "hysterical mother" need not be based on an actual diagnosis; it can come from the judge's assessment of the mother's conduct. In *J.D.P. v R.M.P.*, the roles of judge and psychiatrist are conflated, as the judge finds that the mother's mental state, which "impacts every aspect of [the] case,"⁵⁰ was apparent even before her medical records were produced:

[The mother's] mental state is a very serious concern. It does not take any formal training to perceive this. Her history of delusional thinking and her disordered recounting of events during the trial raise serious concerns as to her credibility. . . . Most significantly, and like many persons with obsessive thought patterns or delusional thinking, R.

⁴⁹ *ADB v DE*, 2007 NSSC 182, 2007 CarswellNS 289 (WL Can) [*ADB*].

⁵⁰ *JDP v RMP*, 2010 BCSC 1873 at para 98, [2010] BCJ No 2624 (QL).

seems to have lost the ability to doubt herself.⁵¹

In *Droit de la famille — 101255*, the judge finds it clear that the mother should remain the custodial parent,⁵² but still takes the time to criticize her “obvious hysteria”⁵³ based on her aggressiveness during her testimony.⁵⁴ The judge contrasts the parents’ mental stability: “[le père] est apparu à la Cour comme nettement plus calme et pondéré, pour ne pas dire plus équilibré, que la [mère].”⁵⁵ This analysis impacts the mother’s request for support, as the judge finds that the hysterical and resentful mother does not make sufficient efforts to find gainful employment because she wants to “make the father pay.”⁵⁶

Both quotes illustrate Mosoff’s remarks regarding the rise of pop-psychology discourse, as well as Geva’s observations regarding judges’ reliance on their own psychiatric knowledge. Judges are experts in credibility findings, but are not qualified to diagnose litigants who they may only have observed during one of the most

⁵¹ *Ibid.*

⁵² *Droit de la famille — 101255*, 2010 QCCS 2387 at para 65, 2010 CarswellQue 5576 (WL Can).

⁵³ *Ibid* at para 20.

⁵⁴ *Ibid.*

⁵⁵ *Ibid* at para 5. Translation: “[the father] appeared to the Court to be considerably calmer and more balanced, if not more stable, than the [mother].”

⁵⁶ *Ibid* at para 20. See also *AA v SNA*, 2007 BCCA 375 at para 65, [2007] BCJ No 1656 (QL).

stressful periods of their lives. The rhetorical pathologization of mothers is also circular: the mother's mental illness makes her not credible, and her lack of credibility evidences her mental illness.⁵⁷ The discourse of the hysterical litigant echoes feminist literature both in psychiatry, regarding the disproportionate pathologization of women, and in law, regarding the biased evaluation of women's credibility. "Common sense" psychiatric evaluations of mothers are all the more problematic as they serve to discredit allegations of violence.

MOTHERS' CREDIBILITY AND FAMILY VIOLENCE

Mental-health labels used to discredit the mother are strongly correlated with allegations that the father is violent (23/25 cases). Fathers employ this strategy to shift the focus from their violence to the mother's instability, with limited success (four victories in 12 cases). However, when it is the expert (six cases) or the judge (five cases) who raises the issue of mental health, mothers discredited as mentally ill are found "delusional" in their belief that the father has been violent and lose the case.

i. Allegations by the Father

In 12 cases, the father brings the mother's mental health into question as a direct response to an allegation of

⁵⁷ See *Swaren v Swaren*, 2007 ABQB 193 at para 21, [2007] 8 W.W.R. 151.

abuse.⁵⁸ The father’s rhetoric can obscure the actual cause of the mother’s lack of believability, as calling a mother “delusional” leaves unclear whether she is lying or mistaken. *Davie v. Davie* illustrates this possible confusion: the father “asserts that [the mother] is ‘delusional’ and/or exaggerating to discredit him.”⁵⁹ In *Johal v. Johal*, the mother asserts that the father is “a drinker, irresponsible and prone to abuse,”⁶⁰ to which the father responds that “she either believes these things, and is therefore delusional, or, alternatively, has simply boldly, barefacedly lied to this Court.”⁶¹ The judge finds the father’s pathologization of the mother to be unwarranted.⁶² The mother is not mentally unstable, but rather an “immature young women [who] allowed herself to indulge in some rather regrettable descriptions of events that are quite transparent exaggerations.”⁶³

When uncorroborated, fathers’ allegations that the mother is crazy for denouncing violence have limited success (4 victories/12 cases). Nonetheless, this rhetoric

⁵⁸ See for example *Ganie v Ganie*, 2014 ONSC 7500, [2014] OJ No 6332 (QL); *Herar v Herar*, 2012 BCSC 1257 at para 18, [2012] BCJ No 1770 (QL); *EBS v LJS*, 2006 BCSC 968 at para 17, [2006] BCJ No 1551 (QL); *CLB v JAB*, 2016 SKCA 101 at para 5, [2016] SJ No 430 (QL); *ADB*, *supra* note 49 at para 6.

⁵⁹ *Davie v Davie*, 2015 ONCJ 662 at para 22, [2015] OJ No 6215 (QL).

⁶⁰ *Johal v Johal*, 2009 BCSC 139 at para 84, [2009] BCJ No 195 (QL) [*Johal*].

⁶¹ *Ibid* at para 83.

⁶² *Ibid* at para 85.

⁶³ *Ibid* at para 87.

remains worrisome. Fathers can change the narrative and move the focus away from their violence to the mother's mental state. The issue becomes which, of the father's violence or the mother's insanity, can be better corroborated. Faced with diametrically opposed assertions that the father is violent or that the mother is insane, two judges renounce making a finding on either issue,⁶⁴ echoing feminists researchers' observations that violent fathers' inflammatory accusations may lead judges to take a "neutral" stance towards litigants.⁶⁵ The pathologization of mothers who are "too concerned" about the father's violence can also interact with allegations of parental alienation. In *Droit de la famille — 12943*, the mother testifies that she feared for her life, to which the father replies that she is "deranged"⁶⁶ and needs professional care.⁶⁷ Both the judge and expert find the father abusive and unrepentant. Nonetheless, the pathologization of the mother allows the expert to recommend shared custody to prevent further parental alienation,⁶⁸ and leads the judge to force the children to spend time with their father.⁶⁹ This case is suggestive of the tension faced by mothers who must simultaneously protect their child from a violent father and support the father-child relationship.⁷⁰

⁶⁴ *EBS v LJS*, *supra* note 58; *CLB v JAB*, *supra* note 58 at para 12.

⁶⁵ Meier, *supra* note 32 at 692.

⁶⁶ *Droit de la famille — 12943*, 2012 QCCS 1747 at para 37, [2012] JQ No 3760 (QL).

⁶⁷ *Ibid* at para 56.

⁶⁸ *Ibid* at para 63.

⁶⁹ *Ibid* at paras 43, 97, 98.

⁷⁰ Varcoe & Irwin, *supra* note 44 at 92.

ii. Expert Testimony

Judges are more receptive to allegations of mental instability coming from experts, who may refute testimony on the father's violence by labelling the mother "delusional." In the six cases where an expert pathologizes the mother, the father wins. The relevance of expert testimony is exemplified in *C.E.L. v. D.C.A.*, where the expert raises the question of "whether or not [the mother] has fabricated an allegation [of sexual assault of the child] or whether she is delusional in her belief that the sexual abuse occurred, because the evidence she presents does not point to this conclusion."⁷¹ To further ascertain whether the mother has fabricated the abuse, the judge orders the disclosure of documentation pertaining to her complaints of sexual violence as a child. This example resonates with Mosoff's observation that mentally ill mothers are stripped of their privacy. The mother's mental health and personal history are seen as the way to determine whether the father sexually assaulted the child, in lieu of a focus on evidence regarding the father or the child.

Experts label mothers as delusional when they persist in their belief that violence has occurred, despite findings to the contrary. In *R.R.W.E.S.-V. v. S.E.D.V.*, the expert recommends therapy for the mother to address "her excessive anxiety and poor stress coping skills [that] have led to her delusional thinking with regard to the alleged sexual abuse."⁷² According to the expert, the mother's

⁷¹ *CEL v DCA*, 2016 BCPC 147 at para 12, [2016] BCJ No. 1077 (QL).

⁷² *RRWES-V v SEDV*, 2008 BCSC 1136 at para 125, [2008] BCJ No 1593 (QL) [*RRWES-V*].

“delusional beliefs” indicate that she will not refrain from talking negatively about the father.⁷³ This testimony is puzzling: would a sane mother talk respectfully about the father she believes assaulted their child, or are persistent mistaken beliefs in sexual assault always pathological? Considering the law’s failure to identify cases of family violence, the latter deduction is problematic.

Pointing to a precise disorder with causes and symptoms is secondary to the vague pathologization of the mother’s beliefs. In *T.L.L.L. v. J.J.L.*, the expert “raised the possibility that the mother may have a delusional belief system or some other mental health issue”⁷⁴ making her unable to accept that the children were not sexually assaulted. This expert opinion leads to limited supervised access for the mother. Here the expert is not using his psychiatric expertise to diagnose the mother in order to draw conclusions as to her credibility. Rather, unfounded allegations of violence are perceived as symptoms pointing to some vague and unspecified mental-health problem. Similarly, in *A.F. v. D.G.*, the expert “would [seriously consider] a ‘DSM diagnosis of Shared Delusional Disorder.’”⁷⁵ The judge “acknowledges that some of the opinions surrounding [the mother’s] mental health status is [*sic*] based on limited information as there was no formal clinical or psychological testing conducted.”⁷⁶

⁷³ *Ibid* at para 120.

⁷⁴ *TLLL v JLL*, 2013 MBCA 27 at para 25, [2013] MJ No 103 (QL).

⁷⁵ *AF v DG*, 2012 ONSC 764 at para 174, [2012] OJ No 483 (QL).

⁷⁶ *Ibid* at para 219.

Nonetheless, the “specific psychological finding”⁷⁷ is unimportant, and the mother not only loses custody but is also prevented from having any contact with the children (as is her family), until she engages in therapy and accepts that the father did not harm the child.⁷⁸

Of particular concern is *Droit de la famille — 112774*, where the expert’s pathologization operates even if the mother’s allegations of violence are not “delusional.” The expert finds that the mother has hysterical personality traits,⁷⁹ and that she has a tendency to dramatize the violence she was subjected to.⁸⁰ This opinion factors into the judge’s decision to increase the father’s access. This depiction of the mother as overdramatic disregards the propensity of women to understate the amount and severity of violence to which they have been subjected,⁸¹ and it blames the victim for “overreacting” to “minor” violence.

iii. Judges’ Observations

In five cases, it is the judge who labels the mother as irrational, ensuring the father’s victory. Contrary to Geva’s finding that judges take the stressful nature of custody litigation into account, there is no mention in any of the

⁷⁷ *Ibid.*

⁷⁸ *Ibid* at para 243.

⁷⁹ *Droit de la famille — 112774*, 2011 QCCS 4727 at para 48, [2011] JQ No 12040 (QL).

⁸⁰ *Ibid* at para 91. See also *SLT v AKT*, 2007 ABQB 701 at para 21, 48 RFL (6th) 141.

⁸¹ Meier, *supra* note 32 at 684.

cases studied that a mother's behaviour at trial may not reflect her usual mental state.

The mother's false allegations of violence can be used to conclude that she is irrational, or the mother's irrationality can be used to conclude that her allegations are false. In *M.P. v. G.O.*, the Court finds that "[t]he complaints [of child abuse] were driven by hysteria and verged on malicious."⁸² By contrast, in *Droit de la famille — 091654*, the Court comments that the mother appears sincere, but rejects as unfounded her fear of the father: "elle s'est montrée très subjective, elle a développé des réactions excessives qui ne s'appuient aucunement sur la réalité."⁸³ The Court observes that "[le père] est calme et en contrôle de lui-même, contrairement à la [mère] qui s'enflamme et s'excite au point d'en devenir hystérique."⁸⁴ The reliance on the woman's "hysteria" and "subjectivity" gives rise to a discourse that is both gender-coded and infantilizing.

Although these cases may truly involve false allegations of violence, the reliance on stereotypes regarding "hysterical" victims of domestic violence puts

⁸² *MP v GO*, 2012 ABPC 180 paras 29, 31, ACWS (3d) 382. See also *KH v JT*, 2006 ABPC 364 at para 336, [2006] AJ No 1648 (QL); *Bergeron v Gillstrom*, 2009 BCSC 1616 at para 55, [2009] BCJ No 2378 (QL).

⁸³ *Droit de la famille — 091654*, 2009 QCCS 3115 at para 43. Translation: "she has shown herself to be very subjective, she has developed excessive reactions that are not based at all on reality."

⁸⁴ *Ibid* at para 30. Translation: "The [father] is calm and in control of himself, unlike the [mother] who becomes agitated and gets worked up to the point of becoming hysterical."

mothers and children at risk.⁸⁵ Judges' typical "perception of abused mothers as overdramatic or hysterical"⁸⁶ clouds their appreciation of violence allegations in custody disputes. In *Droit de la famille — 113953*, the judge finds that the mother is "quasi-hysterical" and lacks nuance in her portrayal of the father—even though the expert finds that neither parent has psychological problems.⁸⁷ The judge orders shared custody despite the conflictual situation. Astonishingly, the judge uses the fact that the father is in a long-term relationship with another woman to further discredit the mother's allegations of domestic violence.⁸⁸ The pathologization of mothers' mental state is not the only stereotype at play, and fathers' attempts at this pathologization are not always successful. Nonetheless, the insistence on mothers' "hysteria" creates room for stereotypes to distract the court from an unbiased analysis of the evidence of family violence and contributes to the documented use of sexist assumptions in custody disputes. These assumptions hold women to higher standards of credibility, and, when used to improperly discard allegations of violence, can have dramatic and even deadly consequences.

⁸⁵ Meier, *supra* note 32 at 672.

⁸⁶ Shipley, *supra* note 31 at 1595.

⁸⁷ *Droit de la famille — 113953*, 2011 QCCS 6716 at para 13, [2011] JQ No 18659 (QL).

⁸⁸ *Ibid* at para 8.

PART II: MENTAL-HEALTH LABELS AND MOTHERS' PARENTAL CAPACITY

In 60 cases, the labelling of the mother as mentally unstable suggests flaws in her parenting abilities. Mothers win 43 of these cases, with a variable rate of success depending on who raises the issue of their instability. When the labelling is done by experts or judges, the father is likely to win (10/12 cases). By contrast, fathers' labelling is less successful (7/48 cases), but can still distract the court from more serious issues and needlessly increase the complexity of the case. Experts may testify to support or contradict the father's pathologization of the mother. Absent medical evidence, judges use legal arguments and credibility findings to filter opportunistic and unmeritorious allegations targeting the mother.

i. Allegations by the Father

Although judges⁸⁹ and experts⁹⁰ may also bring up the issue, it is most frequently fathers who first invoke mothers' mental health to question their parenting abilities (48/60 cases). Fathers may attempt to dramatize trivial parenting flaws. For example, in *K.M.P. v. B.J.P.*, the

⁸⁹ See *Swaren v Swaren*, *supra* note 57; *JWM v JLM*, 2007 BCSC 1405, 42 RFL (6th) 254; *CB v BB*, 2010 ABPC 355, [2010] AJ No 1278 (QL); *JDP v RMP*, *supra* note 50; *JN v DV*, 2006 ABPC 181, [2006] AJ No 912; *SLT v AKT*, *supra* note 80.

⁹⁰ See *Rawn v Laviolette*, [2007] OJ No 2336, 158 ACWS (3d) 252 [*Rawn*]; *JDP v RMP*, *supra* note 50; *Droit de la famille — 121408*, 2012 QCCS 2694, [2012] JQ No 5768 (QL); *CCP v SMN*, 2002 BCPC 17, [2002] BCJ No 164 (QL) [*CCP*]; *RRWES-V*, *supra* note 72; *Droit de la famille — 112774*, *supra* note 79.

father accuses the mother of being emotionally unstable and “characterizes her as being impatient and easily frustrated.”⁹¹ In *Johal v. Johal*, the father attempts to pathologize the mother’s practices regarding hygiene, but the judge rejects his labelling as “neurotic,” finding the father’s assertions “to be embellished by exaggeration.”⁹² The pathologization of the mother’s care work can also reinforce gendered stereotypes about mothers’ rigid parenting. In *Kriegel v. Kriegel*, the father describes the mother as emotionally unstable, aggressive, violent, histrionic, rigid, and regimented.⁹³ Rather than accepting the father’s assertion that the mother is not a good parent, the Court finds that the parents are incapable of sharing custody because of their animosity and different childrearing styles, and grants custody to the mother.

Despite their limited overall success (7/48 cases), fathers’ allegations of mental instability remain problematic. These serious allegations warrant as much attention as other pressing concerns, such as the father’s violence.⁹⁴ Inflammatory allegations, repeated court appearances and dragging out the litigation process are common abusive tactics of batterers and multiply disruptions to the child’s life, as exemplified in *Butty v. Butty*:

⁹¹ *KMP v BJP*, 2009 BCSC 1373 at para 20, [2009] BCJ No. 1988 (QL).

⁹² *Johal*, *supra* note 60 at para 50.

⁹³ *Kriegel v Kriegel*, 2002 BCSC 752 at para 10, [2002] BCJ No 1094 (QL).

⁹⁴ See *Kovacs v Kovacs*, 59 OR (3d) 671 at para 192, [2002] OJ No 3074 (QL); *Allen v Wu*, 2011 ONSC 4539 at para 22, [2011] OJ No 3670 (QL).

Even if the Respondent had previously been primary caregiver for the children, sudden allegations of mental instability and suicidal behaviour raised sufficient concerns about her to “undo” the status quo. . . . As a result, a temporary equal time arrangement was created. “Without prejudice” from the litigants’ perspective. But with plenty of prejudice for two children whose daily lives and home environment were dramatically impacted.⁹⁵

ii. The Role of Experts

Experts rarely testify directly on fathers’ allegations that the mother is mentally ill. When they do (9 cases), they may contradict the father’s assertions and qualify the mother as “normal enough.” In *T.M.F. v. M.H.*, the judge accepts the expert’s testimony that “[has] not found [the mother] to be sufficiently emotionally unstable that one would say that this should begin to preclude her ability to be an effective parent to the children.”⁹⁶ Similarly, in *Droit de la famille — 0614*, the father asserts that the mother is schizophrenic or bipolar, despite findings to the contrary by his own expert.⁹⁷ The father’s conviction that the mother is crazy makes shared custody impossible. The mother is thus granted full custody. In two other cases, the expert

⁹⁵ *Butty v Butty*, 2008 CanLII 23946 (ON SC) at paras 386–387, 168, [2008] OJ No 2017 (QL) [*Butty 2008*].

⁹⁶ *TMF v MH*, 2001 BCSC 161 at paras 60–61, [2001] BCJ No. 175 (QL).

⁹⁷ *Droit de la famille — 0614*, 2006 QCCS 5558 at paras 27, 80, [2006] JQ No 13918 (QL).

rejects the father's assertion that the mother has a mental illness,⁹⁸ but the mother loses nonetheless. By contrast, when the expert testifies that the mother is delusional, the father invariably wins.⁹⁹

iii. The Role of Judges

In the absence of medical evidence, judges filter unmeritorious allegations of mental instability with legal arguments and credibility findings. Focusing on the child's best interest allows them to maintain the status quo in the absence of specific reasons to change the custody arrangement. In *Yassin v. Loubani*, the father alleges that the mother is emotionally unstable,¹⁰⁰ but the judge comments that "[t]he children are currently in the [mother's] care and control, and there is no suggestion that the [father] feels they are at risk in her care or that she cares for them poorly."¹⁰¹ The mother retains custody.

The lack of real concern for the children's safety is an indicator that the claim of mental instability is unmeritorious. In *Gauci v. Malone*, the mother is alleged

⁹⁸ *Izyuk v Bilousov*, 2011 ONSC 6451 at para 211, [2011] OJ No 4963 (QL); *RCR v SML*, 2016 BCSC 1230 at para 83, [2016] BCJ No 1398 (QL) [*RCR*].

⁹⁹ *Rawn*, *supra* note 90; *Droit de la famille — 121408*, *supra* note 90; *CCP*, *supra* note 90; *RRWES-V*, *supra* note 72.

¹⁰⁰ *Yassin v Loubani*, 2006 BCSC 1887 at para 53, [2006] BCJ No 3261 (QL).

¹⁰¹ *Ibid* at para 54.

to be “emotionally unstable and an unreliable parent.”¹⁰² The fact that the father wants the mother to have generous access to the children shows that he does not truly believe that she is a danger to the children.¹⁰³ The judge maintains the status quo of the children residing primarily with the mother.¹⁰⁴

The inconsistency in the father’s positions is similarly held against him in *Kalsi v. Kalsi*, where the father is concerned “that his wife is emotionally unstable and incapable of looking after the children”¹⁰⁵ but still “insists that [she] is capable of full-time employment.”¹⁰⁶ The judge also notes that it is “very significant” that the father “is content with joint parenting.”¹⁰⁷ The Court concludes that the father’s allegations are opportunistic: “until [the father] found out that his wife had been cheating on him for many years, he apparently had no concerns at all with regard to his wife being a full-time mother at home with the children while he. . . was working long hours.”¹⁰⁸ The judge rejects the father’s application for the production of the mother’s medical records.¹⁰⁹ These cases suggest an

¹⁰² *Gauci v Malone*, [2009] OJ No 2627 (QL) at para 2, 2009 CarswellOnt 3633 (WL Can).

¹⁰³ *Ibid* at para 42.

¹⁰⁴ *Ibid* at para 66. See also *Currie v Maudsley*, 2011 ONSC 4214 at para 13, [2011] OJ No 3294 (QL).

¹⁰⁵ *Kalsi v Kalsi*, 2009 BCSC 513 at para 55, [2009] BCJ No 759 (QL).

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid* at para 58.

¹⁰⁸ *Ibid* at para 56.

¹⁰⁹ *Ibid* at paras 58–59. See also *Butty 2008*, *supra* note 95 at para 372.

effective way for judges to reject opportunistic allegations regarding mothers' mental health without the need for an expert testify to their "normality."

PART III: WHEN MENTAL-HEALTH LABELS BACKFIRE

As we have seen, most allegations of mental instability targeting mothers are unsubstantiated. Although judges often reject fathers' assertions, they express explicit disapproval in only 17 cases. The mother wins in 14 of these 17 cases, although judges decline to attach consequences to the father's problematic allegation in five cases. In the other cases, they may decide against shared custody, reduce the father's access or grant the mother the indemnification of her costs.

A. INCONSEQUENTIAL DISAPPROVAL

In five cases,¹¹⁰ the father's inappropriate allegation of mental illness is irrelevant: either the father wins, or the mother wins for other reasons. In *R.C.R. v. S.M.L.*, the father's lawyer's comment that the mother "needs a litigation guardian as she is insane"¹¹¹ is unfounded and "entirely inappropriate."¹¹² Nonetheless, the mother's application to set aside previous orders is rejected for lack

¹¹⁰ *Sakve v Sakve*, 2000 BCSC 822, [2000] BCJ No 1072 (QL) [*Sakve*]; *DML v DBL*, 2016 BCSC 925, [2016] BCJ No 1066 (QL); *ADB*, *supra* note 49; *Potter v Da Silva*, 2014 ONCJ 302, [2014] OJ No 2970 (QL); *RCR*, *supra* note 98.

¹¹¹ *RCR*, *supra* note 98 at para 83.

¹¹² *Ibid* at para 84.

of change in circumstances or new evidence, and because the children's best interests "are furthered by leaving those orders in place."¹¹³

In *Sakve v. Sakve*, the judge is very critical of both parties' litigious behaviour.¹¹⁴ The father is however more to blame, as he "has attacked her on moral and ethical grounds," calling her mentally unstable, a pathological liar, and an abusive mother.¹¹⁵ The judge finds that the mother "may well be right" in saying that the father, should he receive the increased access that is demanded, will use it "to cause trouble for the [mother] by seeking out evidence to use against her."¹¹⁶ Nonetheless, the Court finds that the child's best interest "lies in as much contact as possible with both his parents"¹¹⁷ and increases the father's access to the child. This case exemplifies courts' failure to prevent fathers from using the court process to frustrate mothers' parenting.

B. DISAPPROVAL WITH CONCRETE CONSEQUENCES

In 12 cases, the judge's disapproval has concrete consequences on the reasoning or outcome of the case. Although custody disputes are not punitive in nature, judges sanction fathers with adverse cost orders in two

¹¹³ *Ibid* at para 69. See also *ADB*, *supra* note 49 at para 13.

¹¹⁴ *Sakve*, *supra* note 110 at para 5.

¹¹⁵ *Ibid* at para 28.

¹¹⁶ *Ibid* at para 30.

¹¹⁷ *Ibid* at para 31.

exceptional cases. In *Miglin v. Miglin*, the judge considers the unreasonableness of the father's behaviour, listing "his unfounded allegations that the [mother] was emotionally unstable, and a threat to the children."¹¹⁸ The judge does not grant the mother the complete indemnification of her costs (\$110,702.85), because "[t]here are always two sides to every family conflict,"¹¹⁹ but still orders the father to pay \$79,500. In *Butty v. Butty*, the father "had deliberately and knowingly fabricated serious allegations [of mental health problems] against the [mother] for the sole purpose of gaining strategic advantage in the custody dispute,"¹²⁰ which also allows for a substantial recovery of the mother's costs.¹²¹

Fathers also risk being penalized for asserting that the mother is crazy if it suggests that shared decision-making¹²² or shared custody¹²³ is impossible. A father's belief and insistence that the mother is inadequate also affects his ability to promote the child's relationship with the mother,¹²⁴ and may even give rise to concerns regarding

¹¹⁸ *Miglin v Miglin*, [2000] OJ No 1042 at para 8.

¹¹⁹ *Ibid* at para 9.

¹²⁰ *Butty v Butty*, 70 RFL (6th) 181 at para 42, [2009] OJ No 1887 (QL).

¹²¹ *Ibid* at para 71.

¹²² *Antemia v Divito*, 2010 ONSC 578 at para 86, [2010] OJ No 871 (QL) [*Antemia*].

¹²³ *Droit de la famille — 0614*, *supra* note 97 at para 130; *Testa v Basi*, [2005] OJ No 3054 at paras 62, 72; *Butty 2008*, *supra* note 95 at para 428.

¹²⁴ *Chen v Liu*, [2010] NBJ No 142.

the alienation of the child, justifying limiting the father's access¹²⁵ or granting custody to the mother.¹²⁶

In short, although fathers' allegations that the mother is mentally ill are often unfounded, judges rarely express explicit reprobation. Despite a few exceptions, fathers still enjoy a large degree of liberty to position themselves as competent to characterise the mother as hysterical, delusional, or pathological with little fear of consequences. The tolerance for these inflammatory allegations is unlikely to deter this disruptive and sexist practice.

PART IV: FATHERS' OUT-OF-COURT MENTAL-HEALTH INSULTS

In 40 cases, the mother testifies that the father has used a mental-health label, generally "crazy," to insult her, shifting the analysis from her mental state to his reprehensible conduct. This strategy has varying degrees of success: mothers experience 18 wins, 15 losses, and 7 mitigated results. Irrespective of the final outcome, the importance of the name calling can be diminished with symmetry-based analyses (ten cases), by finding that the mother exaggerates its gravity (nine cases), by addressing it with a warning (six cases) or for other reasons (four cases). On the other hand, judges attach concrete consequences to the name calling when it is part of a demonstration that shared custody is impossible (ten cases), that the father lacks parental capacity (five cases),

¹²⁵ *CS v MS*, 37 RFL (6th) 373, [2007] OJ No 787 [CS].

¹²⁶ *FDR v MDP*, 2004 ABQB 956, [2004] AJ No 1502 [FDR]; *EV c AVa* (2004), SOQUIJ AZ-50257134 (QCCS) [EV].

that he is alienating (six cases) or that the children have reasons to reject him (two cases).

A. INCONSEQUENTIAL DISAPPROVAL

Although judges do not condone name calling, they often find reasons not to attach concrete consequences to this behaviour. In 25 cases, either the name-calling has no impact on the judge's reasoning (17 cases), or its importance is rhetorically diminished.

i. Symmetry-Based Rhetoric

In ten cases, the father's behaviour is viewed negatively, but the judge also blames the mother and uses a symmetry-based rhetoric. The gender-blind analysis of the parties' behaviour allows for an illusion of symmetry between insults. Sexism and ableism are never raised, even when the father additionally called the mother a "slut" or used other gendered insults. Shared custody is chosen in five of these cases.

In *Droit de la famille — 091942*, the father described the mother as crazy, sick, and lazy. The judge states that the father needs to respect the mother, but immediately switches to parents needing to respect each other:

Ce que Madame veut et désire c'est du respect de la part de Monsieur. [...] Monsieur doit le comprendre tout comme Madame doit cesser de faire des esclandres pour des

raisons futiles Il faut que chaque parent cesse de discréditer l'autre.¹²⁷

In *T.E.H. v G.J.R.*, “[t]he father testified that the mother was emotionally unstable, jealous, controlling and very volatile,”¹²⁸ and the mother “described the father as extremely abusive, controlling, and jealous.”¹²⁹ According to the mother, the father frequently called her “crazy” and a “whore.”¹³⁰ The judge’s factual findings are built on a rhetoric of symmetry of blame, making the father’s name calling rather inconsequential:

3. This was and continues to be a toxic relationship in which both parties display immature and unhealthy behaviour. . . .
4. Both parties are responsible for the conflict in their relationship. . . .
6. Both parties appear to have mental health issues and lack insight into how their behaviour and conduct harms the children.¹³¹

¹²⁷ *Droit de la famille — 091942*, 2009 QCCS 3536 at para 48. Translation: “What the mother wants and desires is respect from the father. The father must understand this just like the mother must stop making scandals for futile reasons. . . . Both parents must stop discrediting the other” [emphasis added].

¹²⁸ *TEH v GJR*, 2016 ONCJ 156 at para 62, [2016] OJ No 1552 (QL).

¹²⁹ *Ibid* at para 61.

¹³⁰ *Ibid* at para 61.

¹³¹ *Ibid* at para 436 [emphasis added].

In ordering joint custody, the judge comments that it is “the least detrimental alternative” for the children.¹³²

Symmetry also serves a gender-neutral distribution of blame in *J.A. v D.A.*, where the father also called the mother “crazy” and a “whore.”¹³³ On the issue of domestic violence, the judge states:

I am satisfied, that there were numerous incidents of pushing, shoving and name-calling. . . . It stands to reason that the [father], being the larger and heavier of the two, inflicted more damage, but I conclude that both parties were active participants on these occasions. I find that I am unable to ascribe more blame to one or the other.¹³⁴

The Court rules in favor of shared custody. The symmetrical description of the parties’ “conflict” illustrates a gender-blind evaluation of domestic violence, reducing gender dynamics to differences in size.

In these examples, the symmetry-based rhetoric absolves fathers of the emotional violence that may be at

¹³² *Ibid* at para 479. See also *Droit de la famille — 082191*, 2008 QCCS 4094 at paras 16, 44; *Droit de la famille — 131375*, 2013 QCCS 2710 at paras 15, 27, 30; *King v Landry*, 2016 MBQB 164 at para 45, [2016] WDFL 5421; *Antemia*, *supra* note 122; *Droit de la famille — 06462*, 2006 QCCS 6801.

¹³³ *JA v DA*, [2002] OJ No 2315 at para 46, 114 ACWS (3d) 773.

¹³⁴ *Ibid* at para 136 [emphasis added]. See also *Usova v Harrison*, 2009 BCSC 1640 at para 45, [2010] BCWLD 2386.

play when they use sexist mental-health insults. In situations of domestic violence, insistence on mutual blame may comfort judges that they are acting as “neutral” arbiters, while leaving unaddressed some fundamental differences between the parties’ behaviours.¹³⁵ The choice of shared custody in half of these cases may appear egalitarian, but it is unlikely to diminish conflict. Rather, shared custody provides increased opportunities for name calling, abuse, and violence.

ii. Insignificance of insults

In nine cases, the judge rejects the mother’s characterization of the father’s behaviour as serious. Shared custody is ordered five times, and custody to the father, once. In *Droit de la famille — 093238*, the judge suggests that the mother makes a mountain out of a molehill: “De fait, dans son témoignage, la mère s’en est pris au défendeur sur de petites choses qu’elle a montées pour les rendre importantes alors qu’elles ne l’ont jamais vraiment été.”¹³⁶ In *T.E.H. v G.J.R.*, the Court finds that “[a]lthough there is evidence that the father was manipulative and controlling of the mother, the mother greatly exaggerated her evidence.”¹³⁷

¹³⁵ See Meier, *supra* note 32 at 692–96; Shipley, *supra* note 31 at 1597–98.

¹³⁶ *Droit de la famille — 093238*, 2009 QCCS 6110 at para 161 [emphasis added]. See also *Droit de la famille — 131455*, 2013 QCCS 2816; *Droit de la famille — 15707*, 2015 QCCS 1423; *Droit de la famille — 141063*, 2014 QCCS 2016.

¹³⁷ *TEH v GJR*, *supra* note 128 at para 411.

This minimization of the father's behaviour can happen even in cases where the father threatened to kill the mother and/or the child.¹³⁸ In *Johal v Johal*, the mother testified that the father called her "crazy" and threatened to kill her and the child. The Court, concluding that there was likely a threat, writes: "I expect what was said was in part the product of the frustration of all the circumstances. [The incident cannot] be taken as reliable evidence that he actually intended to do harm to either the defendant or the child."¹³⁹ The Court concludes by granting shared custody until kindergarten, followed by custody to the father who is seen as more likely to facilitate the mother's access. Considering the real risks of femicide and infanticides faced by mothers who separate from violent partners, punishing the mother for not sufficiently fostering child's relationship with a father who makes death threats appears both unfair and dangerous. Moreover, these cases reinforce the erroneous cliché that victims overstate domestic violence.

iii. Warnings and Second Chances

Judges also use warnings to the father with the hope that his problematic behaviour, including calling the mother "crazy," will stop (six cases). In *Droit de la famille — 13835*, the father's behaviour, which caused the mother to lose her job and be hospitalized for a psychiatric evaluation that revealed no mental illness, is described euphemistically:

¹³⁸ *Droit de la famille — 131375*, *supra* note 132; *Johal*, *supra* note 60.

¹³⁹ *Johal*, *supra* note 60 at para 59.

[Le père] n'a pas eu un comportement exemplaire après la séparation, alors qu'il disait aux enfants que leur mère était une « folle » et une « salope », et qu'il a tout fait pour éloigner celle-ci [de ses enfants] en [la] faisant passer pour une personne atteinte de maladie mentale.¹⁴⁰

The Court believes that the father's inappropriate behaviour will end naturally.¹⁴¹ Stating that custody decisions are not punitive, the Court is content with a warning: if the father continues acting immaturely, the child's interest may no longer lie in a shared custody arrangement.¹⁴²

This case reveals judges' common assumption that harm to the mother does not harm children. Clearly, children are affected by their mother's forced hospitalization and loss of employment, as well as by being repeatedly told that she is crazy. Nonetheless, the warning justifies the judge's failure to sanction or even prevent controlling and sabotaging behaviour by the father, as the shared custody arrangement that is maintained will continue to present opportunities for abuse.

¹⁴⁰ *Droit de la famille* — 13835, 2013 QCCS 1618 at para 70. Translation: “[The father] did not behave in an exemplary manner after the separation, when he told the children that their mother was a ‘crazy person’ and a ‘slut,’ and did everything he could to keep her away from the children by making her look like a mentally-ill person” [emphasis added].

¹⁴¹ *Ibid* at para 70.

¹⁴² *Ibid* at paras 66–68.

In *R.E.G. v. T.W.J.G.*, the Court grants custody and a restraining order to the mother, but rejects the supervision of the father's biweekly access and grants him half of the summer. The Court finds that the father must be more than a "weekend dad." However:

Tom needs to understand that any aggression, any intimidation or any breach of the Court order will not be tolerated. . . . Tom's parenting time with the children shall be conditional upon the following:

- (i) That he refrains from any violent conduct in the children's presence and any aggressive conduct with respect to either [the mother or her boyfriend].¹⁴³

Cases in which the father is granted another chance despite his previous problematic, and even violent, behaviours raise two concerns. First, judges are addressing high-conflict litigating families with statements and orders that encourage them to return to court, rather than with more appropriate clear, strict, and long-lasting orders.¹⁴⁴ Frequent litigation is particularly onerous for the custodial parent, the domestic violence victim, or the parent with less

¹⁴³ *REG v TWJG*, [2011] SJ No 434 at para 132, 376 Sask R 1. See also *King v Landry*, *supra* note 132 at para 46; *Whidden v Ellwood*, [2015] OJ No 3815, 2015 CanLII 41263 (ONSC) [*Whidden*]; *Droit de la famille — 131838*, 2013 QCCS 3410.

¹⁴⁴ Janet R Johnston, "A Child-Centered Approach to High-Conflict and Domestic-Violence Families: Differential Assessment and Interventions" (2006) 12:1 *Journal of Family Studies* 15.

resources—generally the mother.¹⁴⁵ Second, such rulings imply that the mother must continue to be victimized until the father exhausts all of his chances. Domestic violence is not a one-time error in judgment but rather an ongoing pattern that often continues and even escalates post-separation. Such violence is unlikely to disappear with a court warning—especially when the father knows that perpetual litigation is more difficult (emotionally, financially, logistically) for the mother than for him.

iv. Other Reasons not to Attach Consequences to the Name Calling

Finally, judges decline to attach meaningful consequence to the father's name calling in four other cases, leading to shared custody (ordered in three cases and agreed upon in one).¹⁴⁶ In *Droit de la famille — 12998*, the judge refuses to make a finding regarding cruelty as a ground for divorce. The mother says that the father threatened, intimidated and insulted her (including by calling her “crazy”) and controlled all financial decisions.¹⁴⁷ The Court finds that

¹⁴⁵ Varcoe & Irwin, *supra* note 44; Wanda Wiegers, “Gender, Biology, and Third Party Custody Disputes” (2009) 47 *Alta L Rev* 1.

¹⁴⁶ *NH v BH*, 2016 SKQB 153, [2016] SJ No 257; *PYYM v DM*, 2003 BCSC 766, [2003] BCJ No 1149 (QL) [*PYYM*]; *Droit de la famille — 082903*, 2008 QCCS 5420; *Droit de la famille — 12998*, 2012 QCCS 1934.

¹⁴⁷ *Droit de la famille — 12998*, *supra* note 146 at para 6.

attributing blame will not solve communication problems¹⁴⁸ and grants the divorce on a no-fault basis.¹⁴⁹

In *P.Y.Y.M. v. D.M.*, the father had called the mother “crazy,” a “mental case,” and “sick,” and said he wanted the mother dead in the presence of a child.¹⁵⁰ The Court orders shared custody despite the parties’ inability to communicate to repair the children’s relationship with the father: “unless the parties exercise joint custody, [the children] will see their mother as the winner and their father as the loser.”¹⁵¹ Maintaining and promoting the father-child relationship is prioritized over the mother’s safety.

In sum, judges routinely diminish the importance of the father’s denigration of the mother, failing to address issues of sexism, ableism, and emotional violence. Judges rely on problematic assumptions that women exaggerate, that children are not affected by domestic violence, that violence within a couple is reciprocal, and that it ends with the parents’ separation. These observations confirm and reinforce other researchers’ explorations of biases in custody disputes, situating these preoccupations in the context of ableist name calling by the father.

¹⁴⁸ *Ibid* at paras 18–19.

¹⁴⁹ *Ibid* at para 20.

¹⁵⁰ *PYYM*, *supra* note 146 at para 55.

¹⁵¹ *Ibid* at para 59.

B. DISAPPROVAL WITH CONCRETE CONSEQUENCES

Judges attach consequences to the mother's testimony that the father called them "crazy," or rather to the broader argument to which it pertains, in 23 cases. These cases demonstrate a better understanding of the negative consequences of fathers' verbal abuse on mothers and children, but are still often focused on other behaviours such as physical violence and parental alienation.

i. Impossibility of shared custody

In ten cases, the name calling is part of a demonstration that shared custody is impossible because of communication problems or domestic violence. A conclusion to that effect can lead to the mother having full custody even if the court finds the father to be an otherwise good parent.¹⁵² "Communication problems" may also rise to the level of verbal violence. In *D.N.D. v. W.S.C.*, the father's "aggressive and entirely inappropriate communication and other behaviour"¹⁵³ makes shared custody impossible, as the father's domineering approach is not in the child's best interests.¹⁵⁴ In *D.L.C. v. R.J.M.*, the fact that the father bullies the mother in the presence of the child ("calling her

¹⁵² *Droit de la famille — 103750*, 2010 QCCS 6828. See also *JDL v RJLL*, 2012 NBBR 378, [2012] NBJ No 453 (QL); *Antemia*, *supra* note 122; *Easson v Blase*, 2015 ONSC 5170, [2015] OJ No 4803; *Droit de la famille — 131838*, *supra* note 143.

¹⁵³ *DND v WSC*, 2013 BCSC 336 at para 33, [2013] BCJ No 352 (QL).

¹⁵⁴ *Ibid.* See also *GB c AF* (2005), SOQUIJ AZ-50317822 (QCCS) at para 33 [*GB*]; *REG v TWJG*, 2011 SKQB 269, [2011] SJ No 434 (QL).

names such as pathetic, f crazy, a f bitch, a pig, a witch and a crazy nut bar”¹⁵⁵ makes shared custody impossible.¹⁵⁶ The Court recognizes both the child’s and the mother’s interest in not being subjected to this behaviour: “This is not good modelling for a child. [Also], no parent should be expected to subject himself or herself to the bullying of a former spouse in the name of joint custody.”¹⁵⁷

ii. Parental capacity

The father’s denigration can also be part of a demonstration of his poor parental capacity (five cases). The fact that the father is violent,¹⁵⁸ is a poor role model,¹⁵⁹ or puts his desire to humiliate the mother above the children’s interest¹⁶⁰ requires granting custody to the mother or reducing the father’s access. However, in these cases, the father engaged in other problematic behaviours, like physical violence and alcohol abuse,¹⁶¹ death threats,¹⁶² and repeated criminal

¹⁵⁵ *DLC v RJM*, [2005] OJ No 5500 (QL) at para 46, 2005 CarswellOnt 8095 (WL Can).

¹⁵⁶ *Ibid* at para 48.

¹⁵⁷ *Ibid*. See also *BP v UP*, [2001] OJ No 378, where the father obtains no access (also known as *Patel v Patel*, 2001 CanLII 38985 (ON CJ)).

¹⁵⁸ *Whidden*, *supra* note 143; *CC v RW*, 2016 ONSC 1274, [2016] OJ No 909 (QL) [CC].

¹⁵⁹ *Droit de la famille* — 16473, 2016 QCCS 908.

¹⁶⁰ *Droit de la famille* — 082468, 2008 QCCS 4608.

¹⁶¹ *Whidden*, *supra* note 143.

¹⁶² *Droit de la famille* — 131455, *supra* note 136.

activities.¹⁶³ The mental-health insults, by themselves, are not important enough to make the father a bad parent.

iii. Alienation

In six cases, the name calling is part of a demonstration that the father alienates the children from the mother, leading to an increase in the mother's access,¹⁶⁴ a change in custody favouring the mother,¹⁶⁵ or a limitation of the father's access.¹⁶⁶ In *C.E. v F.E.*, the father and the children had reported the mother's allegedly strange behaviour to the family doctor, who had diagnosed her with a mental illness without seeing her and had advised the father to try to have her committed.¹⁶⁷ The Court finds that the father "quite improperly involved the children in his conflict with the [mother]."¹⁶⁸ The mother chooses to "respect the stated views of the children not to have a relationship with her for the moment"¹⁶⁹ but obtains the right to be present at school events. In two other cases, the father's denigration explains why the children reject him and leads to a conclusion that the mother does not alienate them from the father.¹⁷⁰

¹⁶³ *CC*, *supra* note 158.

¹⁶⁴ *Droit de la famille — 141720*, 2014 QCCS 3341

¹⁶⁵ *GB*, *supra* note 154; *FDR*, *supra* note 126; *EV*, *supra* note 126.

¹⁶⁶ *CS*, *supra* note 125.

¹⁶⁷ *Ibid* at para 15.

¹⁶⁸ *CE v FE*, [2016] OJ No 3551 (QL) at para 22.

¹⁶⁹ *Ibid* at para 10.

¹⁷⁰ *DN v TE*, [2000] OJ No 1189 (QL); *Droit de la famille — 073722*, 2007 QCCS 7094.

In sum, mental-health insults may advance the mother's case if they are linked to a broader argument about the impossibility of shared custody, the father's dangerousness or lack of judgment, or parental alienation. By themselves, however, they most often have little importance, as judges may reframe them as "communication problems" and fail to engage in an explicit analysis of sexism, ableism, and emotional violence.

CONCLUSION

This research has mapped the ways in which gender and mental health stigma intersect in custody disputes when pop-psychology labels are used in relation to mothers. A research based on labels such as "hysterical," "neurotic," "crazy," "delusional," and "emotionally unstable" reveals ableist and sexist discourses that are never identified as such. Although judges may consider that insulting the mother is inappropriate or even violent, a gender-blind analysis is the norm. Moreover, fathers, judges and even experts use pop-psychology discourses to dramatize mothers' lack of credibility and parenting flaws. Of particular concern is the use of inflammatory allegations of mental instability by violent fathers. Although fathers' attempts to pathologize mothers are not always successful, their unfounded allegations are seldom punished. Out-of-court assertions that the mother is crazy are not always acted on either, as judges often use euphemistic discourses to limit the attention that they receive. Still, some judges appear more vigilant to opportunistic allegations of mental instability and are harsher on fathers who display verbal violence by calling the mother "crazy." All in all, mental-

health labels often lead to the pathologization of women, gender biases, and myths regarding domestic violence.

This article builds on Judith Mosoff's project to expose how the mental-health discourse penalizes mentally disabled mothers in custody and child protection proceedings, by exploring in turn how the pop-psychology discourse that she saw emerging can bring the mental health of all mothers into question on the basis of gendered interpretations of credibility and parenting abilities. It hopes to pay tribute to Judith Mosoff's work, which challenged the legal system and scholars to take gender and mental health into account, and to celebrate her spirit by continuing to explore and denounce the ways in which our assumed neutral system still fails to treat different people equally.

