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'M' Is for the Many Things That 'Mother' Means Family Life Has Changed, but Family Law Hasn't Kept Pace

Jane C. Murphy
University of Baltimore School of Law, jmurphy@ubalt.edu

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May 03, 1998 | By Jane C. Murphy

As we approach Mother's Day, it is worth re-examining our understanding of what it means to be a mother.

At first blush, the law seems an unlikely place to turn. Until recently, legal scholars have written little about the subject of motherhood. There is even confusion about how to define "mother" under the law. As Columbia Law School Professor Carol Sanger said, "'Who is a mother?' no longer has a simple answer, now that genetic contribution, gestation and stroller pushing may each be provided by a different woman."

Despite this inattention and confusion, a look at family and welfare law clearly shows whom the law rewards as a good mother. Judicial and legislative pronouncements about when mothers may have custody of their children, when mothers may or must work, and with whom mothers may live are all entrenched in a legal construct of ideal motherhood. The stereotype these laws embody is that of a self-sacrificing, nurturing, married and stay-at-home mother.

The way mothers behave has changed dramatically in the past 40 years. Much of family law is premised on the ideal construction of the family that presumes an arrangement that is almost nonexistent ` a mother at home with minor children and a father working outside the home.

The law sets standards for child-placement decisions based on a view of a mother's proper role that has changed little since the 1950s. Mothers are expected to be married, to stay at home, to be available to their children around the clock, and preferably to be monogamous and heterosexual.

The adherence to the ideal mother stereotype, however, yields to an assumption of equality when the law considers mothers' economic rights and responsibilities. Contrary to women's actual experiences, the law assumes mothers enjoy an autonomy that permits them to make choices without regard to their children's needs and an equality of economic opportunity between mothers and fathers. Since the 1980s, a presumption of equality has governed laws regulating child support and public benefits for poor mothers with children. Here, the law assumes that parents ` again, primarily mothers ` caring for infants and small children have equal access to work opportunities. This assumption is misplaced and harms women.

Mothers' gender and role as caretakers put them at a disadvantage in the workplace. Although mothers' diminished earning capacity has long been recognized, statutory and judicial reform has done little to change the situation. Discrimination against women, "concern" for the health of mothers ` actual or potential ` continue to hinder women's employment opportunities. The wage gap for women has improved from 60 cents for every dollar men earned in 1980 to 76 cents in 1997. Although the gap has narrowed, at least for middle- and upper-income women, it still exists.

Moreover, mothers' predominant role in child rearing means that they are particularly disadvantaged in the labor force. Many studies demonstrate that it is women who sacrifice career advancement for parental responsibilities. Mothers, not fathers, opt for the "mommy track" rather than succumbing to the open-ended availability that most high-paying, demanding jobs require. Women, by necessity, take time off for childbirth and, more often than fathers, work part time after their children's birth. Mothers, rather than fathers, take time off to care for sick children or when there is a lack of child care. All of these circumstances limit the work choices of mothers with children at home and harm many mothers in the workplace.

Despite the disadvantages mothers experience as wage earners, child support and welfare laws are premised on the policy decision that custodial parents of small children should be in the workplace rather than at home caring for children. This policy is based upon a flawed premise of women's economic equality and hurts mothers and their children.

For example, under Maryland's child support laws, if a single parent ` and it's primarily mothers who do this ` stays at home to care for a 3-year-old child, that parent is considered to have "voluntarily impoverished" herself. The result is that support from the child's father is reduced.

The situation might be even worse for poor mothers under the new welfare law. The cost of conforming to the dual standard of ideal mother and unencumbered wage earner is high for mothers whose public benefits depend on efforts to find and keep employment. If these new working mothers lack vigilance, and if they leave children unsupervised and exposed to street dangers or domestic dangers from violent boyfriends or husbands, they are at great risk of losing their children to another relative or the state.

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A noncustodial father who has had little contact with his child often looks better to a court than a mother who has struggled for years with an imperfect record of child rearing. The current public benefits scheme presents the same double bind that is so common to the law governing maternal conduct: Get a job, support yourself, but do not deviate from the ideal-mother standard, or you will lose your children.

Also, adherence to the narrow stereotypes of mothers as caretakers and the illusion of economic equality also affect fathers by immunizing them from much legal responsibility for their children and devaluing their roles in their families.

There are some signs of positive change. Efforts at improving fathers' financial accountability have been the focus of intense federal scrutiny in the past decade, and the most recent signs hint at some progress. The task of fashioning an appropriate legal response to enhance fathers' physical and emotional support of their children is more complex.

Fully acknowledging the primacy of mothers' bonds with their children might result in child-placement policies that reinforce mothers' dominant role in child rearing. Consistently assuming the role of caretaker, in turn, reinforces the stereotypes and the potential for sanctions when mothers' actions do not fit the model.

Policies must be developed that strike an appropriate balance between valuing the work of mothers who have assumed the role of caretaker and provider and encouraging, or in some instances, requiring fathers to be active participants in their children's lives from the beginning.

Again, some evidence of policies that strike this balance do exist. In the area of child custody, commentators have long urged adoption of a primary caretaker standard, which values a history of being the primary parent. An increasing number of states have incorporated this concept into their custody law.

In addition, more states, including Maryland, are requiring that courts consider evidence of domestic violence when resolving custody and visitation disputes. In child-protection proceedings, increased efforts to bring fathers into the process at the earliest possible stage might benefit families.

These programs can be successful, however, only if child welfare personnel and judges rethink the potential role these fathers can play in their children's lives. In the past, when fathers could be found and brought into court, the court viewed them as alternative custodians and, therefore, adversaries of the mothers.

Instead, judges should encourage these fathers to begin or resume regular contact with their children. This regular contact would improve fathers' relationships with children and ease the burden on the caretaking mother.

Courts hearing child-protection cases should also have the authority to refer cases to proper proceedings for imposing and enforcing child support orders. This legal remedy would provide mothers with the economic support to leave abusive relationships and would improve the conditions that precipitated state intervention. Such programs have begun in few states and should be expanded.

The law must conceptualize mothers or any individual legally responsible for the full-time care of minor children. Public benefits and child support laws should take into account the burdens of rearing small children and resist the legal fiction of equal opportunity.

At the same time, when the law must evaluate a caretaker, it should apply the same standard to mothers and fathers. The law cannot expect mothers to be self-sacrificing, perfect nurturers while exacting lesser sanctions against fathers who assume little or no responsibility for the care and nurturing of their children.

The rhetoric suggesting that this nation sees our children as its greatest resource is all around us. Few would disagree with Hillary Rodham Clinton's claim "nothing is more important to our shared future than the well-being of children."

Yet lawmakers have not accepted the notion that courts should evaluate the adults who care for these children ` at this point, primarily mothers ` in a way that accurately accounts for the circumstances of their lives. The adherence to stereotypes, whether they reflect the nurturing, stay-at-home mother or the child-neglecting, lazy welfare mother, needs to change.

At the same time, policy-makers must rethink laws governing access to financial support ` laws that assume mothers can quickly and easily transform into economically self-sufficient workers when other support fails.

Jane C. Murphy is an associate professor at the University of Baltimore School of Law and the mother of four children. This article is adapted from a recent article in the Cornell Law Review.

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