SM (Sadomasochistic) Interests as an Issue in a Child Custody Proceeding

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SUMMARY. This article describes a child custody case centered on the fitness of the mother, who was involved in an SM relationship with her live-in boyfriend. Although the investigation confirmed that no child abuse had occurred, that the child was unaware of the mother's sexual interests, that there were no incidents of inappropriate sexual activities in front of the minor, and that the child was doing well, the court severely limited the mother's visitation and custody arrangements and ended her alimony. Practitioners of alternative sexual lifestyles have not fared well in child custody hearings, and this case is no exception. The present case indicates how the family court system can be biased against sexual mi-

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norities in general and SM practitioners in particular. In addition, the present case demonstrates how the *DSM* diagnostic criteria can be misused in dealing with alternative lifestyle practitioners. Recommendations for further education of the court and for future research are made.

KEYWORDS. BDSM, child custody, paraphilia, psychotherapy bias, sadomasochism, sexual minorities

Divorce in this society is often contentious and, once divorced, partners often prefer to have no further contact with each other. Shared child-raising often forces the former partners to regularly interact with each other over an issue that engenders strong feelings: the rearing of their children. One partner may denigrate the other, in hopes of limiting contact, maintaining control of the childrearing process, and just to cause the other partner distress. Often the issues that divide the partners are real, honest disagreements that contributed to the dissolution of the marriage. At other times, of course, the opposite is true–partners cooperate, especially around child-rearing.

Each partner may try to discredit the other partner by exposing the other's sexual history in child custody cases. Parental fitness has been (and continues to be) questioned, for example, because someone has been a single mother, committed adultery, been "promiscuous," is homosexual, or participates in other "unusual" sexual activity. In such cases, the accusing partner suggests to the court that the child would be disadvantaged or endangered because the other parent has engaged in the suspect behavior.

The best-researched area in this regard is on the effect on a child of having a homosexual parent. The bulk of this research has shown that the sexual orientation of parents has little effect on parenting or on the child (Anderssen, Amlie, & Ytteroy, 2002; Dundas & Kaufman, 2000; Patterson, 1992; Tasker & Golombok, 1995). Nevertheless, other sexual interests (e.g., transvestitism, swinging, and sadomasochism) are still regularly contested in courts.

The present paper illustrates that parental sexual interests can be used to question one's fitness to parent without evidence that any harm has

been done. We did not interview the principles in this case and take no position on whether the mother is fit or not. We do contend that the expert's report was prejudiced. We will analyze the appointed expert's report to the court, showing its inconsistencies and biases. This case is particularly compelling because all parties involved accepted the facts presented as true. Names and other identifying information have been changed to protect the confidentiality of the individuals. The court rendered its judgment in 2003.

THE CASE

The present case came to the attention of one of the authors (C.M.) when Sam Jones contacted him, seeking expert consultation in a custody hearing. Mr. Jones is the current SM (sadomasochistic) partner of Ms. Smith, the mother of Ed, an 11-year-old minor; the case involved custody of Ed. Mr. Jones and Ms. Smith live together in Ms. Smith's home; Ed lived with them part-time and with his father part-time

Mr. Jones and the author (C.M.) had met approximately 15 years earlier, when the author was involved in a research project involving SM participants. Mr. Jones facilitated distribution of questionnaires and helped arrange interviews from an SM social group in which he was involved. There was no subsequent contact after that, but that prior relationship precluded the author testifying in this case. The case was then referred to and accepted by the other author (M.K.). The psychological report and other court documents were reviewed and discussed by both authors.

This case concerns custody of Ed, the son of Ann and Bob Smith, born after 19 years of marriage. Ed was born with a congenital physical problem. His intellectual level is above average and his social functioning is appropriate for his age. The Smiths divorced after 27 years of marriage. Joint physical and legal custody of Ed was awarded to both parents; his primary residence was with his father. Ms. Smith received liberal visitation rights, and Ed resided with her during Mr. Smith's frequent business travel. One reason the couple divorced was their disagreements about Ms. Smith's interest in SM (sadomasochism), which she initially explored with her husband. After their separation, she eventually moved in with Mr. Jones, where they developed an ongoing, intense SM relationship.

The present court proceeding emerged after Ms. Smith informed Mr. Smith of a medical problem Ed experienced on his last visit. It was cus-

tomary and expected for each parent to share any change in Ed's medical condition with the other. Ed's congenital problems had led to a fecal impaction, which caused him considerable pain. This problem had created difficulties for Ed and his family on several occasions. Mr. Jones had worked as a medical technician and knew how to disimpact someone. With Ms. Smith and Ed's permission, Mr. Jones inserted a gloved and lubricated finger into Ed's rectum and relieved the fecal impaction. Ms. Smith observed the entire procedure; Ed never complained of feeling violated during or after the procedure. In fact, Ed was grateful for relief from the pain, and thankful for the intervention. Nevertheless, Mr. Smith was furious that his ex-wife's boyfriend had penetrated his son with his finger. He felt this was child sexual abuse and petitioned the court to prevent Mr. Jones from having any further contact with Ed; a formal investigation ensued.

Dr. Blair, a forensic and clinical psychologist, was appointed by the court to evaluate Mr. and Ms. Smith, Mr. Jones, and Ed, and to render an opinion on whether the disimpaction constituted child abuse and on the parental fitness of all the adults. During that investigation, Dr. Blair was told about the SM relationship between Mr. Jones and Ms. Smith. Dr. Blair then shifted the focus of the investigation and pursued (1) the possibility that the SM interests of Ms. Smith and Mr. Jones posed a danger to Ed, and (2) the question of whether Ms. Smith was fit to parent Ed.

DR. BLAIR'S REPORT

Dr. Blair concluded that the fecal disimpaction, though perhaps ill-advised, was not "abuse." The court accepted this analysis, and the allegation that Mr. Jones sexually abused Ed was dropped as an issue in these proceedings.

Dr. Blair instead decided to focus on the SM interests of Ms. Smith and Mr. Jones. Although it is appropriate to explore any issue that may affect the welfare and development of the minor, Dr. Blair did not provide a rationale for focusing on the sexual relationship of Mr. Jones and Ms. Smith. He confirmed that the couple had successfully shielded Ed from any knowledge of the nature or specifics of their sexual relationship. He attempted to show that Mr. Jones had a sexual interest in children, but admitted that there was no evidence to support this belief. Additionally he admitted that Ed has good parent-child relationships with both his mother and Mr. Jones. He also determined that Ed is doing well in school, with his peers, and has no unusual social or psychologi-

cal problems. All Dr. Blair's concerns focused on the possibility that something problematic could happen in the relationship between Mr. Jones and Ms. Smith.

From his interviews, Dr. Blair diagnosed Mr. Jones with Sexual Sadism and Ms. Smith with Sexual Masochism according to the *DSM-IV-TR* (APA, 2000). These diagnoses each have two criteria; both are necessary to make these diagnoses. The second criterion requires the person to experience significant distress or dysfunction as a result of his or her sexual interests. Dr. Blair did not indicate that Ms. Smith or Mr. Jones suffered from any distress or dysfunction; in fact, he indicated that they were happy and fulfilled in their chosen lifestyle. The *DSM-IV-TR* (2000) specifically warns against assuming that deviant behavior is indicative of a mental disorder: "Neither deviant behavior (e.g., political, religious, or sexual) nor conflicts between the individual and society are mental disorders . . ." (APA, 2000, p. xxxi).

Even if both Mr. Jones and Ms. Smith fulfilled the diagnostic criteria for their respective disorders, there is no indication that parenting deficits are associated with individuals so diagnosed. Considering that Dr. Blair should have known this, and that the court is unlikely to understand the finer points of these diagnoses, his report can be seen as deliberately misleading and prejudicial. Beyond simplistic speculation, the report did not describe how the health and welfare of the minor would be affected by the couple's involvement in SM.

Dr. Blair did not give any example of inappropriate behavior by Ms. Smith or Mr. Jones. Dr. Blair himself agreed that the incident which led to the proceeding was not inappropriate, though it did show questionable judgment. Thus, it is unclear on what basis, other than prejudice or lack of education, Dr. Blair decided that Ms. Smith and Mr. Jones's sexual relationship presented a danger to Ed's health and welfare. Dr. Blair argued that the *DSM* suggests that individuals diagnosed with Sexual Sadism or Sexual Masochism do present a danger. The DSM states, "Usually, however, the severity of the sadistic acts increases over time" (APA, 2000, p. 574) and, "Not uncommonly, individuals have more than one Paraphilia" (APA, 2000, p. 567). Dr. Blair used the first statement to justify his recommendation to limit Ms. Smith's custody of Ed as a mechanism to protect Ms. Smith from herself. He used the second statement to assert that Mr. Jones would likely develop Pedophilia and sexually molest Ed if the current custody arrangement remained in force, although he found no evidence of such an interest in Mr. Jones's history.

The problems with the logic, the lack of empiric literature to support the statements, the lack of internal consistency, inaccuracies, and other problems with the *DSM* in general and the Paraphilia section specifically have been discussed in detail elsewhere (Moser, 2001, 2002; Moser & Kleinplatz, 2002, in press). There is no empirical research suggesting that even those "appropriately" (according to the *DSM* criteria) diagnosed with Sexual Sadism or Sexual Masochism are likely to experience either a dangerous increase in the intensity of their SM interactions nor that Pedophilia is a likely outgrowth of these activities.

Accurate or not, the diagnoses given to Mr. Jones and Ms. Smith are contrary to the spirit of the cautionary notes in the *DSM* concerning its use in legal settings: "[T]here are significant risks that diagnostic information will be misused and misunderstood" (APA, 2000, p. xxxii-xxxiii). Additionally, the fact that individuals meet the diagnostic criteria for a mental disorder does not mean that these individuals will manifest every aspect of the diagnosed disorder, or that they will lack the ability to control their behavior (APA, 2000). It should be noted that impulse control disorders and compulsions are described elsewhere in the *DSM*, but are not mentioned in the definition or diagnostic criteria of a Paraphilia. Simply put, the diagnoses of Sexual Masochism and Sexual Sadism do not assume the individual will also have impulse control difficulties, obsessions, or compulsions.

Dr. Blair seemed to be overly concerned that Ms. Smith would be injured. But in fact, there was no history of Ms. Smith being injured or requiring medical attention. There is no indication that individuals with these diagnoses are clogging our hospital emergency rooms or that these individuals suffer an unusually high rate of serious injury from their sexual activity.

The following statements are from Dr. Blair's report and are illustrative of his attitude:

> I ponder the effects on the child if [Ms. Smith] were to die or become impaired during sexual activity, especially if the child was in the house.
>
> Although [Ms. Smith and Mr. Jones] describe their activities as a hobby or sport, I believe it is domestic violence. Although the child has not observed it, he is exposed to the after-effects. I don't have enough information to understand what the effects on the child might be at this time. However, it would obviously be cata-

> strophic if a mother were injured or died as a result of her behavior and choices.

Dr. Blair also doubted that anyone could freely choose to be involved in SM; he also believed that everyone involved in the SM community is a potential child molester. The following are quotes from his report:

> I am not sure whether [Ms. Smith's] choice [of SM behavior] is reflective of self-gratification, or a desire to please Mr. Jones. I suspect, however, that she is so subservient and eager to please him that her thinking may be clouded or confused.
>
> I don't think it would be a good idea for [Ms. Smith] to use members of the [SM] scene for childcare; since they each have at least one paraphilia, which means they might have others, including pedophilia. Each member of the scene is an unknown quantity and possible risk factor.

The amount of sexually explicit material depicting SM and the large number of references to SM in the media argue that SM is not uncommon in the United States. If SM resulted in psychological or physical problems, they probably would be reported in the clinical literature. The clinical literature is lacking in any studies showing an association between these diagnoses and other clinical or social problems.

THE DECISION

The court's decision followed Dr. Blair's recommendations closely. It included new limitations on the liberal visitation rights with Ed that Ms. Smith had previously enjoyed. It also specified a complete ban on Mr. Jones having any contact with Ed. All parties involved acknowledged that Ed had a close relationship with Mr. Jones; Dr. Blair admitted that Ed's relationship with Mr. Jones was better than the relationship that Ed had with Mr. Smith. There appeared to be no concern for the effect of abruptly denying Ed access to Mr. Jones.

Ed's relatively frequent visits to his mother's home were severely limited for several reasons. His father was moving to another state, which limited the formerly easy accessibility to his mother's residence. In addition, the court's ban on contact with Mr. Jones limited the time Ed could realistically spend with his mother. The court order required

that Mr. Jones vacate his own residence whenever Ed visited his mother. Not only is this problematic logistically, it added an additional note of cruelty to Mr. Jones's loss of contact with the boy he had been stepparenting. Ms. Smith also lost all spousal support, despite the fact that her husband made significantly more money than she did, and that their marriage lasted for 27 years. This loss of support limited Ms. Smith's ability to rent other lodgings for her visits with Ed.

It is also interesting that the court ordered that if Ms. Smith hired an attorney to represent Ed's rights in court, that attorney must have taken a domestic violence prevention training course. Ms. Smith was required to attend 30 psychotherapy sessions focused on her participation in "domestic violence." She was told to enroll in a domestic violence education program; refusal to do so would be held against her in any future court proceedings. It appears that the court was attempting to protect Ms. Smith from domestic partner abuse and her son from witnessing the tragic results of that abuse. One can only conclude that the court decided that Ms. Smith was a domestic violence victim and her reported interest in SM was a justification or denial of her abuse. It is true that without proper training someone might mistake SM for domestic violence. In this case, however, the court did hear testimony clearly differentiating domestic violence from SM, but chose to disregard it. Note that there is no record of any of the Smith/Jones's neighbors being concerned about domestic violence–no emergency room visits, no police calls, no child protective services reports. The only "evidence" supporting Dr. Blair's domestic violence accusations were Mr. Jones and Ms. Smith's own statements honestly describing their consensual sexual activities.

THE MEANING OF THIS CASE

It could be argued easily that this is a tragic situation in which a psychologist allowed his own prejudice to influence his opinion, encouraging the court, in its ignorance (or its own prejudice) of the situation, to disregard the testimony of another expert. Unfortunately, this is not an isolated case, and the results are regrettably similar to those of other cases in other family court systems across the United States. The authors have been consulted in other cases in which a parent's SM interests have been an issue. According to Susan Wright, Spokesperson for The National Coalition for Sexual Freedom, a sexual minority advocacy group, they receive many requests for assistance involving similar circumstances (personal communication, July 7, 2004). These cases gen-

erally result in the SM involved parent losing custody and other parenting privileges. We know of no cases where the parent admitting to SM interests obtained or retained custody of the minor.

In the Smith v. Smith case, it could be argued that the lack of evidence supporting the allegation of domestic violence and child abuse does not mean they did not happen. Similarly, one could argue that the likelihood of these occurring–despite the lack of evidence of their existence, or of statistical co-morbidity–was so great that the court acted preventatively, protectively and appropriately. Perhaps, but such reasoning is contrary to the philosophy and standards of the American judicial system.

Some might argue that the safety and well-being of the child is paramount, and the unknowns in this case support the court's actions. The argument is familiar, as it has been used for years by those opposed to custody by homosexual parents. The courts do not seem to have generalized the lessons provided by the contemporary discrediting of this common form of judicial discrimination. Because it is logically impossible to prove a negative, it will never be possible to prove that parenting by SM practitioners has no harmful consequences.

The court's decision to make Ms. Smith attend a domestic violence education program, participate in domestic violence psychotherapy, and hire an attorney trained in domestic violence cases implies that it believed Ms. Smith was a victim of domestic violence. It is important to recognize that the courts rarely punish domestic violence victims by limiting custody and visitation. If domestic violence victims fear that such an admission could result in the loss of custody of their children, this would be a powerful incentive for these individuals *not* to seek help to escape the violence. Obviously that is not in the best interests of these women, their children, or society.

This case has another important meaning. The content of Ms. Smith's private sex life led the court to limit severely custody of and visitation with her son, end her alimony, and ban Mr. Jones from having any contact with Ed. The decision is unequivocally about the couple's SM behavior alone. No other problem or obstacle to effective parenting was found to have any substance.

CONCLUSIONS

There is clearly a need to educate the courts and forensic professionals about SM, and how it differs from domestic violence. The present

report may serve as an impetus to start such an education program; it also demonstrates the need to keep statistics about how SM-identified parents fare in child custody cases. We hope that this will attract future research.

The explicit mandate of the Family Courts is to act in the best interests of the children involved. In this case, the court chose to ignore its own expert's observation of the child's positive, emotional connections with Mr. Jones, as well as the child's own wishes. It decided that the positive relationship enjoyed by Ed and Mr. Jones was unimportant. It decided that decreasing the amount of time that Ed spent with his mother was appropriate because of her private sexual behavior.

This case is one example of many known to the authors that demonstrate how the *DSM* diagnoses are misused by forensic professionals. It should provide further impetus to the editors of the *DSM* to reevaluate its classification of atypical sexual behavior as pathological, and to strengthen its warnings against misuse.

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