Fathers' Rights in New York Child Custody Proceedings

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Introduction

There is a growing epidemic in New York that has nothing to do with disease or health but with custody proceedings. Many marriages end in divorce and many of those divorces involve children. As both parents go to court to do battle over such issues as child support and custody, the mothers have an inherent advantage. The New York State court system, which currently recites the "the best interest of the child" as the standard for custody issues but skews that "interest" to an archaic and outmoded societal ideal. Domestic Relations Law Article 5 §70 addresses the best interest standard stating:

> a) Where a minor child is residing within this state, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly. (N.Y.S. DRL § 70 (2012))

This standard is an early 20th century (and earlier) family model when the father was the breadwinner and the mother was a stay-at-home mom. In contrast, many other states have adopted father's rights laws, specifically enumerating the statutory definition of a father. New York State is one of a handful of states that does not have Fathers Rights Laws in place nor a legal definition of a father. Some examples of statues that do address the definition of a father are as follows:

Alabama: Ala. Code § 26-17-5

An acknowledged father is a man who has established a father-child relationship. An adjudicated father is a man who has been adjudicated by a court to be the father of a child. An alleged father is a man who alleges himself to be, or is alleged to be, the genetic father or a possible genetic father of a child but whose paternity has not been determined. A presumed father is a man who is recognized as the father of a child until that status is rebutted or confirmed in a judicial proceeding. A putative father is the alleged or reputed father. (Gateway, C. W. p. 7)

Idaho: Ann. Stat. § 16-2002

The term 'parent' means: • The birth mother or the adoptive mother • The adoptive father

• The biological father of a child conceived or born during the father's marriage to the birth mother • The unmarried biological father whose consent to an adoption of the child is required pursuant to § 16-1504

A 'presumptive father' is a man who is or was married to the birth mother and the child is born during the marriage or within 300 days after the marriage is terminated. A 'parent and child relationship' includes all rights, privileges, duties, and obligations existing between parent and child, including inheritance rights, and shall be construed to include adoptive parents. An 'unmarried biological father,' as used in this chapter and chapter 15, title 16, Idaho Code, means the biological father of a child who was not married to the child's mother at the time the child was conceived or born. (Gateway, C. W. p. 31)

The lack of statutory legislation have caused consistent awards of custody to mothers even if the evidence does not show such award to be in the best interest of the child. New York's legislature must pass legislation that requires the courts to recognize fathers as equal parents and to follow clear gender-neutral factors when awarding child custody.

Divorces have become a very complicated legal matter affecting more than just the two people who are seeking to dissolve their marriage. In many cases, divorce also involves children. Family courts have been the arbiter of which parent receives custody of the children of a marriage.

The bias the courts have against fathers does not seem to be limited to divorce situations alone. Estate law has limited children from being beneficiaries in their father's estate. According to the New York State Estates, Powers and Trusts Law a mother is always considered to be a mother. A father has several factors to be met to be considered a father, especially if the parents are unwed. These factors include genetic testing, and paternal notification filed previously with the court. If a father has passed away previous to meeting the requirements of the statute the children will not be able to partake in inheritance of the deceased father. (EPTL§ 4-1.2)

In the matters of adoption there are documented cases where the fathers were not even provided with notification that their own children were to be adopted. As biased as the laws and the courts appear for divorced fathers, unwed fathers have an even tougher battle with laws that are expressly and clearly biased against them. This is evidenced in *In re M./B. Children*, 7 Misc.3d 272, 792 N.Y.S.2d 785 (2004) where the court determined that because the father had not paid child support he was therefore ineligible to be notified of the child's pending adoption or contest it.

This paper exposes New York State court decisions demonstrating bias in issuing custody orders to mothers rather than fathers. Certain other states are also examined in their handling of father's rights as well as the potential role the federal government might play in the issue.

Gender Bias in New York Custody Decisions

Fifty percent of children in this country are witnesses to their parents being separated or divorced and the Courts' appointment of custody in divorce cases can be viewed as being gender biased because

custody is awarded to mothers at a much higher rate than fathers, as the court applies laws that no longer are relevant to today's society. New York State has long held to the practice that custody is usually best fit for the mother in issues dealing with divorce. The old stereotype of the working dad and the stay at home mother just does not fit with today's society and therefore have made the laws that address these issues antiquated and biased against men.

The issue in New York, of fathers being treated unequally by the courts, has been the subject of much discussion and has spurred many support groups that have become an outlet for fathers that are dealing with custody issues to turn to. There are also a growing number of lawyers that specialize in father's rights using the existing laws in an attempt to legally gain custody for their clients. The United States Government has even published findings that fathers are not viewed in the same light as mothers when it pertains to custody. "Historically, unmarried fathers have had fewer rights with regard to their children than either unwed mothers or married parents." (Gateway, C. W. p. 1-2). The New York State court has even addressed the ambiguity of the statues requiring unmarried fathers to pay child support for their children but yet in adoption cases do not have the right to be notified of pending adoptions of their very own children. (*In re M./B. Children*, 2004). The statute, DRL § 111, subd. 1(d), was declared to be unconstitutional as it denied equal protection based on sex and marital status. Even though there have been small victories along the way such as this, overall the courts have failed to apply such a standard across the board (*In re M./B. Children*, 2004). This case will be distinguished later in the paper.

New York State has no legal definition of a father (Gateway, C. W. p. 69). This in and of itself creates a problem in the courts. Not having a legal definition of a father leaves the interpretation of such open to the courts discretion which stretches well beyond the issue of custody and into other areas such as estate law and inheritance. Estates Power and Trusts Laws in New York State McKinney's EPTL §

4-1.2, states that a non-marital child of a mother is simply the maternal child of the mother. As it pertains to addressing the issue of the father it continues for three sections and has requirements that must be met to be determined that the father be declared as such. This law, placing requirements on the determination of a father being different from that of the mother demonstrates the biased nature of the law in New York State for fathers. This further demonstrates the issue that a father must adhere and perform certain actions in the determination of being the parent of a child.

This is an example of the complication of New York not having a definition of a father. Each different set of laws that must address the issue of fatherhood have its own set of requirements. The lack of a uniform code in dealing with fathers creates confusion and assists in furthering the bias against fathers. The laws do not have the similar requirements of proof of parenthood even when separated from the child that an unwed father does. According to the ETPL § 4-1.2, even if both mother and father openly and willingly admit to parenthood, the father will not be considered legally to be the father.

Although New York has no definition of a father they do have a statutory definition of parents. McKinney's Consolidated Laws of New York, Domestic Relations Law § 24. Effect of marriage on legitimacy of children goes on to describe the parental relationship to children in the basis of a marriage and that definition will maintain itself in the event of a divorce or annulment. In the statute the law remains neutral as to gender.

Definition of a father

A child heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage, or shall have consummated a common-law marriage where such marriage is recognized as valid, in the manner authorized by the law of the place where such

marriage takes place, is the legitimate child of both birth parents notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void. (DRL § 24, 2010)

The neighboring state of New Jersey does not have the same issues as New York. New Jersey has a clear and unambiguous definition of a father without installing legal speed bumps in the declaration of such. New Jersey Ann. Stat. §§ 9:3-38; (2010) states in part: "The term 'parent' means a birth parent or parents, including the birth father of a child born out of wedlock who has acknowledged the child or to whom the court has ordered notice to be given." The statute further goes on to enumerate the simplicity of the requirements by stating "While the child is a minor, he receives the child into his home and openly holds out the child as his natural child. While the child is a minor, he provides support for the child and openly holds out the child as his natural child." (Gateway, C.W., p. 65)

This simple statutory definition of a father has eliminated the need for litigation in such matters as inheritance, custody and adoption. New York's inclusion of a similar type of statute would seem to work towards eliminating the bias that has long been held. There are many other states that have addressed these issues thirty and forty years ago, evaluating their statutes and the courts recognizing that the antiquated laws were biased against fathers.

Outside of New York

It would seem the state of Illinois began to address such issues as far back as 1972, albeit through a Supreme Court decision. In *Stanley v. Illinois*, (405 U.S. 645, 1972) the United States Supreme Court heard a case whereas the unwed biological father was not given notification of an adoption of his child when the mother had passed away. In the process of the adoption, based on Illinois statute, the father was not given notice of the impending adoption nor was he given the opportunity to

garner custody of his child. The Illinois law, as it was written, was presumptive that an unwed father was not a fit parent.

Justice White in delivering the opinion of the court made notice of the specific law and its bias towards fathers. "Under Illinois law, therefore, while the children of all parents can be taken from them in neglect proceedings, that is only after notice, hearing, and proof of such unfitness as a parent as amounts to neglect, an unwed father is uniquely subject to the more simplistic dependency proceeding. By use of this proceeding, the State, on showing that the father was not married to the mother, need not prove unfitness in fact, because it is presumed at law. Thus, the unwed father's claim of parental qualification is avoided as 'irrelevant." (*Stanley v. Illinois*, 1972)

The Illinois court had made their decision based on the statute at the time which stated that an unwed father "upon death of the mother, are declared dependents without any hearing on parental fitness and without proof of neglect. S.H.A.Ill. ch. 37, §§ 702–1, 702–4, 702–5, 705–8; (*Stanley v. Illinois*, 1972). The Supreme Court reversed and remanded the Illinois court ruling stating that the petitioner's fourteenth amendment rights were violated and at the very least be subject to a competency hearing as a parent.

In evidence that Illinois has progressed in its standards of the rights of fathers, one need to look no further than the statute defining a father and the requirements that must be met to obtain such a designation. Illinois Comp. Stat. Ch. 750 § 45/2; 45/5 (2010) states as one of the aspects to determination of being a father is simply "He and the child's mother have signed an acknowledgment of paternity." The simplicity of the application of the proper statutes in New York State could go a long way towards ending the bias that is exhibited.

In another representative case out of Illinois, the children of an unwed father were being held to a separate standard in the case of an inheritance. In *Trimble v. Gordon* (430 U.S. 762, 1977) an unwed father had passed away and did not leave a will. Based on the statutory law in the state of Illinois at the time, the fathers heirs were not able to partake of his estate but such an inheritance claim was automatic to children when it pertained to their mothers. Provisions of the Illinois Probate Act, allowing children born out of wedlock to inherit from their mothers whereas children born in wedlock may inherit from both mothers and fathers, was clearly biased in its nature and a perfect example of how that bias to fathers can translate to s situation whereas the children are then subject to that bias.

The court determined that this could not be justified and served to valid purpose. In essence what the Illinois statue was doing was to classify relationships while holding children to different standards. The Illinois statute (Ill.Rev.Stat.1961, ch. 3, § 12; S.H.A.Ill. ch. 3, § 2-2;) was declared unconstitutional under the fourteenth amendment of the United States Constitution under the Due Process Clause and The Supreme Court reversed and remanded the case back to Illinois for a new decision consistent with their verdict. (*Trimble v. Gordon*, 1977).

These two examples of decisions and changes that the state of Illinois made demonstrate what can be done to correct the situation of bias against fathers. Illinois has adjusted its existing statutes to eliminate the bias and have gone as far as to add a definition of a father and how to achieve such a definition. As previously demonstrated New York still has similar bias statutes being held as valid and maintained by the courts. It should not have to take Supreme Court intervention to eliminate discrimination within the statutes.

New York requirements

In New York there is the office known as Office of Temporary and Disability Assistance, Division of Child Support Enforcement. This is an official department in the state and addresses issues pertaining to paternity and non-custodial parental information. The website for the department addresses the issues of paternity and fatherhood and is very specific as to the rights of unwed fathers and highlights the discriminatory practice within the state. The requirements for proof of fatherhood clearly state: "Even though you and your child's mother know that you are the father of your child, unless you and the mother are married, you are not the legal father of your child. That means that unless you do certain things, you will not be the legal father of your child and your name will not be on your child's birth certificate." (Division of Child Support Enforcement, 2013).

The essence of the requirement does not extend itself to collection of child support and or child maintenance. A father does not need to register or admit paternity to be brought to court and demand that they pay child support. There is clearly a double standard present in the regulations that hold fathers to a different requirement. It is assumed that if a man was denying paternity they would have certain steps they could take in court in determining the validity of such a claim. A father does not have to be proven to be the paternal parent to be dragged through the courts and forced to pay support, just an acknowledgement from the mother that the man brought before the court is the father. This is one of the strongest examples of New York State's bias against fathers.

This type of action was evident in In *re M./B. Children* 7 Misc.3d 272, 792 N.Y.S.2d 785 N.Y.Fam.Ct.,2004. In this action there was a petition brought forth to terminate an unwed fathers parental rights stating that the father was only entitled to notification and an opportunity to be heard in

the nature of the best interest of the child, but that is where the legal requirements to the father would end.

This case references back to the child support issue mentioned earlier. Although the payment of child support seems to still today be blatantly one sided aimed at fathers, the law when this case was heard in 2004 was even more prohibitive; to the point of unconstitutionality.

This case took place in Family Court in Kings County (Brooklyn) New York, which is one of the busiest Family Court's in the entire state. "Justice Nora Freeman held that: (1) statute requiring unwed fathers to establish payment of child support before father's consent was required for adoption of children was unconstitutional as applied to father, but (2) father did not establish a substantial relationship with one child as required for father's consent to be required before adoption of child." Again this is a case where the Domestic Relations Law DRL § 111, subd. 1(d) is called into question for its constitutionality but yet New York State legislature has done nothing to address the law and its bias approach.

In this case the court held that the father did not maintain a relationship with the child in the previous six months, thereby having his motion denied in part simply because the father did not live with the child nor did he petition the court previously for custody or visitation. There is mother that has been held to the same standards. In fact in this particular case the unwed parents had conceived five children together. The state was intervening as the mother was determined to be an unfit parent and the children were the award of the state, thereby prompting the adoption proceedings.

The court maintained the six month relationship statutory requirement even though the petitioning father was incarcerated for that time and the maternal grandmother, who was the foster mother, testified to the fact that the father did call the children from prison and once released made

himself known and visible to the children. The court did not feel that these circumstances did not fit with the statute requiring being involved with the children in the direct six months previous. The father also had court orders of filiation for the four older children, in essence legal documentation proving him to be the father.

The Supreme Court has had limited intervention as that most cases of this nature are recognized state's rights issues. That is not to say the court has not addressed certain issues, including that of a father and his notification of adoption. In *Caban v. Mohammed* 441 U.S. 380, 1979, the court touched on the issue of a father having a relationship with his children. The court went as far as to state "that an unwed father may have a relationship with his children fully comparable to that of the mother." *(Caban v. Mohammad,* 1979). This appears to be the first time that an authorized court body declared that a father can have a relationship with their child to be deemed as good as that they child may have with their mother. It must also be noted that in Caban, there was strong dissent in the opinion.

More importantly, being that Caban was a case out of New York, the court ruled on the constitutionality of the Domestic Relations Law Section 111. In some of the most unambiguous language possible the court determined the law demonstrated a clear gender bias and stated "it is clear that § 111 treats unmarried parents differently according to their sex. The section's consent requirement is no mere formality, since the New York courts have held that the question of whether consent is required is entirely separate from the consideration of the best interests of the child." Furthermore the court continued "The sex-based distinction in § 111 between unmarried mothers and unmarried fathers violates the Equal Protection Clause of the Fourteenth Amendment because it bears no substantial relation to any important state interest." (*Caban v. Mohammad*, 1979).

In fact it was not until 1978 that New York State even recognized the issue of joint custody by parents. Joint custody is different than that of physical custody whereas in joint custody both parents are responsible for the decisions that affect the child including but not limited to religious training, medical decisions, schooling etc. Physical custody is as it sounds; the parent that the child regularly resides with. The non-custodial parent would usually be provided with visitation and the obligation of child support and spousal support. In the New York Appellate Court's landmark ruling, the award of joint custody was made only after a lower court that had awarded custody to the father, was vacated.

Joint custody in New York

Joint custody was finally recognized in New York State in 1978 and the second such case that applied it was in *Braiman v. Braiman*, (44 N.Y.2d 584, 1978). This case was brought about by a divorced couple where the mother was looking to move the children away from the father. The Special Term of the Supreme Court in New York State originally awarded physical custody to the father. This is one of the earliest cases in New York where a father was awarded custody while the mother was alive and present as a participant in the court case. The decision granting the father custody was short lived as the mother appealed. The New York State Appellate Court reversed the decision and issues its own elaborate decision for the children to be with both parents and thereby joint or divided custody.

This was an extremely complicated case that even the appellate court recognized was difficult to decide. It was a long drawn out divorce, one that was contested on many aspects and is not one that would have been considered civil on either side. The Appellate court recognized that they were not privy to establish old arguments that were previously made in court but to determine the law as it applied to the father being granted full custody of his children. This decision in New York was only 35 years ago and after Illinois began to address its own ambiguities in father's rights. It must be noted that

the appellate court did reverse the courts order of custody to the father, which in its tradition, seems to maintain the custody issue predominantly to the mothers. In Braiman, as in most cases, there were several complications and claims made on both sides that the other was an unfit parent. The Appellate Court does not reconsider the arguments but the ruling itself.

In a case that was only months before Braiman, *Dodd v. Dodd* (93 Misc.2d 641, 1978), was the landmark case for New York State. It must be noted that many other states at this point already had dealt with issues of joint custody as well as father's rights. In Dodd, during their divorce the father petitioned the court for joint custody, splitting time for the children amongst both parents, in essence maintaining two legal homes.

One of the most interesting components of the decision must be addressed and may show the root reason as to why the Court ruled in favor of joint custody. The court specifically stated "Joint custody is an appealing concept. It permits the court to escape an agonizing choice, to keep from wounding the self-esteem of either parent and to avoid the appearance of discrimination between the sexes." (*Dodd v. Dodd*, 1978).

As noted in Dodd, Justice Felice K. Shea, cites scientific findings in that fathers that are designated to the of sporadic visitation are usually left with feelings of depression and loss and that there is no scientific data that states children are inherently better off with their mothers. In fact, when referring to the scientific evidence the court states "They contend that a child needs a sustained involvement with both his parents and that the conventional single parent custody arrangement "tends to make ex-parents of fathers, painfully deprived creatures out of the children and overburdened people out of mothers." (*Dodd v. Dodd*, 1978).

It seems that the court was observing the relationship between mothers and fathers and that of the award of custody. In Dodd, it would seem that Justice Shea was making reference to the long standing legal practice that custody of children usually falls to that of the mother. The wording in Dodd plainly speaks to the bias against fathers and addresses the issues in which the bias is baseless. It would not appear that New York State picked up on it to make any formative changes.

It is in the courts own words that joint custody "avoids the appearance" of any bias or discrimination. It did not seem that they were concerned with the actual bias but had seemed to find a way to avoid the appearance of such a bias. It would appear that New York State is still trying to avoid an appearance of a bias in father's rights as opposed to actually eliminating the bias. New York State's standard of "the best interest of the child" certainly seems like an attempt to avoid an appearance of discrimination but lacks the sufficient action to address the problem.

Father's rights in adoption cases

This bias of the New York State Courts in its handling of fathers is not limited to issues of custody and has been demonstrated of adoption, specifically that of notification to the father of an impending adoption of one of his own children. Depending on the circumstances, fathers will have no rights in cases of adoption except that of notification predominantly in cases whereas the parents were never married.

Some of these unambiguously biased laws were still on the books as recent as 1990. In the *Matter of Baby Girl S*. (76 N.Y.2d 387, 1990), the New York State Appellate Court took on the issue of disparity of treatment between natural fathers and adoption. New York State Domestic Relations Law § 111(1) states:

while an unwed mother's consent is always required—an unwed father's consent to the adoption of his under six-month-old child is required only where he has openly lived with the child or the mother for six continuous months immediately preceding the child's placement for adoption, openly acknowledged his paternity during such period, and paid reasonable pregnancy and birth expenses in accordance with his means. (DRL § 111(1))

Once again this is a clear perspective of father's being discriminated solely based on their gender. The New York State Appellate Court viewed it that way as well and declared that the law was unconstitutional. In Baby Girl S, the unwed father filed a motion to stop a pending adoption of his own child. The father had become aware of the adoption and filed motion with the court. New York State law did not require notification of the adoption in the case of the father because he never married the mother. The mother had placed the child for adoption one day after birth. In both of these cases the New York State of Appeals combined the cases and heard them as one as they were addressing the same statute within the Domestic Relations Law and that the cases involved similar circumstances of notification of fathers in adoption cases.

The Appeals court found two primary components at issue in the case and determined that there was a constitutional violation within the statutes. This was further complicated In the Matter of Baby Girl S. was that the baby was placed for adoption one day after birth. It was testified that the father openly admitted to paternity and repeatedly offered re-natal care costs and financial assistance to the birth mother. The court determined that this was enough to have satisfied the six month rule as it pertained to establishing a relationship with the child as stated in the statute. Although the court did not address the constitutionality of the part of the law requiring at least a six month relationship they did address the issue of notification of the unwed father in cases of adoption stating " the statute requiring an unwed father to openly live with his child's mother for six continuous months before the child's

placement for adoption, as a condition to the father's right of consent to adoption, violated the Federal Constitution;" *(In the Matter of RAQUEL MARIE X., an Infant*., 1990)

The consideration that needs to be given is that there were two lower courts that did not view the law as unconstitutional and that fathers should be subject to different laws than mothers raising into question the discretion that the courts are allowed in relation to issues pertaining to fathers. These practices and adherence to gender biased statutes continue in New York State still today.

The example of the New York State DRL provides a very clear synopsis of the gender bias that fathers are still dealing with in New York.

New York State Domestic Relations Law 14 of the Consolidated Laws, Article VII. Adoption Title I. Adoptions Generally § 111. This law states in general that mothers are allowed to place a child for adoption if the child is born out of wedlock. As the section addresses the rights of the father in an adoption proceeding there are two subsections and requirements of the relationship the father must have with the child in order to be considered even for notification.

Fathers with custody

A more disturbing statistic would be that of The United States Census Bureau and how it is able to highlight the statistical differences of custody between parents demonstrating the gender bias in society. In 1970 there are about 3 million unmarried mothers that were the head of the household while that number grew to ten million in 2003. (Fields, 2003). Similarly, for fathers the number was two million households which only represented an increase of a half million over the same time period. These statistics demonstrate that there is not only a New York State problem, but a national one and very possibly not one that can any longer be considered in the traditional sense of a father and a mother.

These statistics alone seem to demonstrate the gender bias that exists when it comes to the determination of custody in the United States. One of the most startling statistics included in the Census Bureau report would be that of the rise in single parent homes and the increase in categories of that or mothers and fathers separately. The report states "from 1970 to 2003 the proportion of single-mother family groups grew to 26 percent from 12 percent and that of single-father family groups grew to 6 percent from 1 percent." (Fields, 2003). It certainly appears on the face that the single fathers with custody have made gains over the last thirty-three years in sheer numbers alone raising from one percent in 1970 to 6 percent in 2003. This fails in comparison when you examine the statistic for mother with custody grew by fourteen percent over the same time period. These statistical numbers demonstrate that the situation for fathers gaining custody over the years have actually gotten worse and not better, outgaining men by a two to one margin.

Michigan is a state that has taken a proactive approach to fathers obtaining custody of their children. A Michigan Law Review article titled "Rethinking the Substantive Rules for Custody Disputes in Divorce by David L. Chambers, (Michigan Law Review, 83, 477-554, 1984) demonstrates the progressive thinking that was taking place in the courts at that time. In fact page 524 begins to discuss the placing of children with same sex parents much before it became the socially accepted practice that it is today.

Chambers addresses many of the issues that are being examined here and does questions why there is no definitive authority on the placement of a child. Chambers notes "In a nation tolerant of diverse approaches to childrearing, without a single national orthodoxy about what sorts of adults children should grow into, such an omission is understandable. Many state statutes duck the problem of definition and simply direct their courts to serve the child's 'best interests' or 'welfare' without providing any further guidance." (Chambers, 1984).

The clarity and simplicity of Chambers' statement is astounding to comprehend in reviewing that the article was written in 1984. The questions that were being asked then are still being asked today and yet fathers are in no better position legally or figuratively, with their very own children. The concept of the best interest of the child is subjective at best and biased at its worst. This allows the courts, as well as a judges own personal opinion for that matter, to have too much discretion where there is an absence of a statute addressing the issues.

The current New York State laws seem to be lacking in direction and fail to address the gender bias that is exhibited by the courts on a regular basis. When searching for a definition of the "best interest of a child" standard, there does not even seem to be one steadfast definition. There are several practices that will address the standard such as the appointment of a law guardian and interviews of the child, especially after the age of fourteen.

The issue of father's rights may be growing and fathers seem to be seeing more support from society albeit legislatively fathers have not made major advancement, and in fact, may have even seen setbacks due to the marriage equality movement in the United States. The issue of marriage is a state's rights issue whereas the federal government leaves the legislation of marriage and custody to the states to determine. In fact the Supreme Court has not addressed same sex marriage since 1972 when they denied a writ of certiorari of a Minnesota case that denied two men the right to marry stating that there was no federal issue to interpret.

It appears that the efforts of addressing the states' rights issues of marriage and custody are skipping over the male father and looking to address issues of same sex marriage, not that is not a strong enough social issue on its own that needs to be addressed. Even with the issue of same sex marriage

being a state's rights issue, one in which the Supreme Court is clearly reluctant to be involved in, the federal government has issued legislation of their own on the matter.

Federal legislation and judicial intervention

In 1996 Congress passed the Defense of Marriage Act (DOMA):

"No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship. (28 USC § 1738C)

The irony of the federal government's unwillingness to get involved in state's rights issues but yet create federal laws essentially taking the ability out of the state's hands to address such issues seems counter-productive at best and restrictive on state legislatures at worst. The connection of same sex marriage and that of father's rights meet on the same plain; as more states legalize same sex marriage the more that state courts will have to address custody issues without the traditional concepts of a father and a mother. This is where there may be the possibility of equality in custody becoming a legislative issue in the future. It is of note that the Supreme Court has heard arguments in March, 2013 on DOMA and the constitutionality of the law. A ruling is not expected until June 2013.

Although the federal law only addresses a small part of the population that would be federal employees it does address a larger part of the population that would take part in benefits of entitlement programs such as social security and healthcare. The reason that this is central to the tenant of this paper is that of the recognition of a classification of citizens that are being singled out based on their gender. The laws pertaining to custody and the best interest standard are biased against fathers as is the DOMA.

There could certainly be some productive movement in this area if the federal government would become involved in a positive way. Congress certainly has the capabilities to establish the guidelines by which parents could be held and how they should be held. This could apply to same sex couples as well. This would go a long way in eliminating the bias that currently exists in custody awards and father's rights.

The United States Supreme Court has had limited involvement in the matter essentially ruling on individual laws in individual states and we do not have a definitive decision that would provide for the basis of equalizing the process of assigning child custody. Being that the court has not definitively ruled on same sex marriage as of yet it would seem unlikely that they are likely to become involved with custody issues.

There certainly could be many positive aspects to come out of federal legislation and and/or judicial intervention. As discussed previously, if the Supreme Court declares DOMA unconstitutional it can be the impetus to spur new legislative action as it pertains to the family. Although DOMA, seemingly directed at same sex marriage, if found unconstitutional it would require legal authority and definitions to be addressed by Congress. These changes could result in meaningful statutory change in federal guidelines on the definition of a family being that the lines of a traditional father and mother have changed. New York State is notoriously back logged with cases of divorce and custody issues and a definitive approach would go a long way into alleviating that log jam. It may also have parents work more towards a negotiated settlement of such issues which not only would help with the congestion of the court, but more importantly the family unit and the children themselves. The more the parents can reach an agreement the more likely there will be less hostility and animosity amongst them and therefore provide a more pleasant and nurturing atmosphere for the child.

A New York father and the courts

It is common knowledge in New York that mothers do have an advantage when it comes to custody issues. In an interview I conducted with Jerry Svoboda of Massapequa, New York, it was revealed how, women are inclined to, can use the system to the point of abuse in fueling their own hostilities.

Mr. Svoboda was married for nineteen years with three daughters, at the time of his separation the youngest was six and the oldest 13. The issues began once Mrs. Svoboda made it known her desire for a divorce. There were police called to the home on multiple occasions with claims and allegations of spousal abuse and according to Mr. Svoboda, the claims were never founded. Mr. Svoboda states that he could not afford to move out of the house that they jointly owned and that these police calls were the attempt to get him out of the house.

The Svoboda's had accumulated some wealth during their marriage and had also acquired some property. There were motions made along the way of the divorce in the attempt to get some of the property sold, all of which Mr. Svoboda denied. In an attempt to influence Mr. Svoboda to give up the house and some property in North Carolina, she began to withhold visitation from Mr. Svoboda and started to tell the children stories about their father that Mr. Svoboda states are completely untrue and were to influence his daughters against him. Mr. Svoboda filed for custody of his daughters and the court stated there would be no determination of custody while Mr. Svoboda lived in the home as they were not living separately.

Mr. Svoboda moved from the home to a two bedroom apartment within ten minutes of the house and established a separate residence and re-petitioned the court. The ruling of the court found that Mr. Svoboda did not file a petition of the court for enforcement of the separation agreement as it pertained to visitation and absent that petition that the petition for temporary custody was forthwith denied. Mrs.

Svoboda openly admitted in court to withholding visitation which is how the court made its ruling. This all took place while Mr. Svoboda was still living in the house and when presented to the judge and the law guardian they resolved that Mr. Svoboda should have still filed for a violation of the agreement as it pertained to visitation.

Once Mr. Svoboda left the home he became responsible for spousal maintenance and child support. Mr. Svoboda was found to be responsible for ninety-seven percent of all costs because his wife did not work "on the books" during the marriage. Mr. Svoboda documented evidence that his wife did work "off the books: and was capable of providing income to the household and therefore his portion should be reduced accordingly. The court denied his Order to Show Cause and stated that it was not the position of family court to determine the tax status of Mrs. Svoboda and that the income was not documented and therefore did not exist.

During this time Mrs. Svoboda would file with the court for what many would have considered frivolous charges such as charging for gas mileage to take the children to the doctor, gifts for the girls' friends' birthday parties and the like. If Mr. Svoboda did not remit for the charges, Mrs. Svoboda would file non-compliance claims with the court so as he would be ordered to make payments. The financial requirements that Mr. Svoboda was held to became worse over time and each and every response Mr. Svoboda filed in family court was denied. It was around this time that Mr. Svoboda could no longer afford an attorney and was no longer being represented in court. Mr. Svoboda had to represent himself while the court ordered him to pay for his wife's attorney to ensure she was represented.

As his oldest daughter approached college the issue of tuition payments became a large contention. Mr. Svoboda, by the divorce decree, was responsible to cover the costs of fifty percent of a state college or university tuition. His oldest daughter, by this point had no contact with her father at all, decided she

wanted to attend Quinnipiac University in New Jersey. His daughter did not apply for financial aid or loans as the tuition was approximately $32,000 a year. Mrs. Svoboda, not receiving the money for the tuition went to court and again filed a claim of non-compliance with a court order. The court determined that being that Mrs. Svoboda still did not show any income that Mr. Svoboda would be responsible for the tuition and determined that if that marriage had continued he would have paid the tuition.

Being that Mr. Svoboda was already being assessed with ninety-seven percent of all charges it was a physical impossibility for him to be able to maintain tuition payments for that amount. The repeated court appearances and disputes with his now ex-wife had led him to issues with his employer, the New York Metropolitan Transportation Authority. After thirty-two years on the job with the MTA they let him go due to attendance irregularities costing him his $132,000 a year salary. The MTA allowed Mr. Svoboda to retire as to keep his pension and benefits in place. This did not deter Mrs. Svoboda from continuing her quest of full financial restitution for the children's costs.

Mr. Svoboda returned to court and filed for a change of circumstance and a downward modification of support. The court denied his application on the basis that he was now considered retired from the MTA and that retirement was a voluntary change of life and did not qualify for any downward modification. His daughter at this point had completed two years at Quinnipiac and the school was not going to accept her back without a the tuition being paid and up to date. He was now out of work, behind on his rent and not making any of his other bills as the state would deduct his pension for the basis of child support leaving him with just over $100 for the month.

This did not deter Mrs. Svoboda who was well versed in the system of New York State Family Court. Once again she went to court to file application to move to her ex-husband to be found in

contempt of court and non-payment of the college tuition. This time when Mr. Svoboda arrived for the court hearing he was promptly arrested, charged with contempt of court and incarcerated in the Nassau County jail. Mr. Svoboda had no money and was incarcerated. The court informed him that his incarceration did not stop the incurring of new charges in child support and he would be responsible for any new charges as well as his established child support.

At this point Mr. Svoboda after being incarcerated for forty-five days, was able to have his 90 year old mother take out a mortgage on her home with his sister as the guarantor, and paid his back child support as well as the college tuition.

Upon his release from jail he was forced to move in with his mother about fifty miles from where his daughters lived, making it very difficult to visit with the one daughter that would see him, the youngest one who is now fourteen years old. His middle daughter has just recently started to attend college at Stonybrook University on Long Island and Mr. Svoboda is responsible for the tuition there as well.

Being that he was imprisoned it has become near impossible for him to find a job, never mind anything akin to the management position that he maintained with the MTA. He is currently employed with Home Depot earning $14 an hour as a sales associate and is currently falling behind on his payments once again. His ex-wife has recently filed in family court for non-compliance and realizes that there is a very good chance that he may be incarcerated again in the near future. This time there will be no hope of coming up with the money and will be at the mercy of the court, which has shown him none.

This is a prime example of what is wrong with the system and why legislative intervention is required. The judicial being left to their own devices, are capricious with their rulings and lack

consistency and clarity. Mr. Svoboda stated in the interview: "I know the court was against me just because I am a male. I have been going through this for ten years and have met many people at court and have spoken to many lawyers and judges along the way. I have yet seen a woman held to the same standards that I have been." (Svoboda, 2013).

Hope for change

More states are evaluating their positions regarding same sex marriage and many have passed state constitutional amendments legalizing or de-criminalizing it. The popularity of the acceptance of same sex marriage has also brought with it the acceptance of same sex couple adopting children which has become more common as same sex couple want to raise families of their own. The unfortunate side effect of such is that these couples will seek divorce and that there will be custody battles playing out in our state courts.

According to Chambers, the divorce rate for same sex couples is roughly about the same as heterosexual couples. This is going to bring more custody cases to light for the courts to decide without a definition of a father, as New York State is already operating, but is also going to call into question the role of the mother or which person is designated to be the representative mother if there is no biological connection. According to New York State law as it is currently written, in same sex marriages that have children, the parent that is not the biological attachment would automatically be considered to be the father as there is no definitive of such and that the biological mother would be the demonstrative figure in any custody proceeding. This, of course, would change if that non-biological parent would have adopted the child legally. Otherwise in New York State it would be reasonable to assume that the non-biological parent would be treated by the courts akin to that of the unwed father.

The point of the matter is that the new social agenda and accepted changes within our society of same sex marriage may become the conduit in which fathers may finally be able to achieve equal rights and no longer be biased solely based on their sex as it has been clearly demonstrated throughout this paper that the laws are in need of being adjusted. The issues that will be brought to Family Court will not be able to be adhered to using the old statutes and regulations and certainly will not be acceptable as to the old standards of the judiciary. Addressing the custody issues of same sex marriage may force the state legislature to adjust its position on custody as a whole and redefine the roles of a parent and who a parent actually is, regardless of sex or sexual orientation.

Conclusion

Having demonstrated the disparity in the New York State laws, laws of other states and that of the federal government, demonstrate gender bias in custody issues and father's rights have been supported over the years by various entities. The traditional family in the early to mid-1900's simply does not exist any longer and in many cases issues of custody are still being based on the mother as the care taker and the father and the breadwinner.

As the dynamic of the family changes and what is considered acceptable to society, so must the laws that govern such change. As it stands New York State must have meaningful legislative change in eliminating statutes that perpetuate the gender bias that exists in father's rights. The first step that New York should undertake is to determine a legal definition of a father. There are many states as noted previously with legal definitions of a father and New York State should adopt a similar definition. There should a simple set of standards, including admittance of both parents to paternity, which would establish fatherhood in a simplified and correct way. That would seem to go a long way in eliminating

many of the other laws that seem to be prejudicial not just in custody issues, but adoption and inheritance as well.

The issues that the country has seen as of late as it pertains to marriage equality would seem to speak to the federal government establishing legislation in an attempt to create a uniform set of laws in eliminating bias on all levels pertaining to the family. States that establish marriage equality will inevitably be forced to deal with custody issues that will not fit the antiquated definitions that are currently being used as a basis for custody issues. It is time for the federal and state legislations to apply a gender neutral approach to parenting and custody and given the breadth of the topic it may be time to consider laws that are also consistent from state to state.

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