

Fathers' Perception of Bias in Michigan's Family Courts

Some thoughts arising out of the 13th Annual Batterer's Intervention Services Coalition of Michigan, and the 1st Annual Michigan Fatherhood Policy Forum

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Are Michigan's family courts biased in favor of mothers? Many who work in the justice system would say "no," pointing to Michigan's gender-neutral laws that focus on the "best interests of the child," the right of every child to have "a close and continuing relationship with both of his or her parents," and the legal presumption that parents should be awarded joint custody of their children.²

It's also a fact that mothers most often receive physical custody of their children after a divorce or separation because of the parents' own agreement, not the decision of a judge, referee, or Friend of the Court caseworker. Most divorce and custody cases—as is true with civil cases in general—are settled by the parties before trial. In Ottawa County, many divorce actions begin with an agreement for a temporary custody order, reached at a "coordination conference" mediated by a Friend of the Court representative with both parents present, before any court hearing is ever held. This fact, however, doesn't resolve the concern over bias—some settlements are reached when one party simply concedes, believing that a better result is unobtainable.

The perception of bias was brought home to this judge at the Michigan Fatherhood Policy Forum, held on September 19, 2008. This conference was the first of its kind in Michigan, and was jointly sponsored by a number of state, federal, and private agencies and organizations.³ The 150 or so attendees consisted of 4 state lawmakers, 19 judges, clergy members, service providers, and representatives of the state, federal, and private sponsoring agencies, as well as many fathers who related their sometimes harrowing stories of family dysfunction, made longer and more difficult by their biased treatment in the judicial system.

Sources of Perceived Systemic Bias

While many examples of actual bias were reported, let's look at examples of unintentional, systemic bias. We should first acknowledge that some of the unequal treatment of fathers is biological, and unavoidable. Children are born to mothers, who are always present at the birth, and who are therefore (almost always) known. Fathers may not even know that they are fathers, and even those who know and are looking forward to the birth of a child do not have the right to be present at the birth. Between unmarried parents, the father (whom we call the "putative" father) has no rights until his paternity has been legally established. If an Acknowledgement of Parentage is not signed by both parents voluntarily, a paternity case is required, and if the mother is uncooperative, the process of establishing paternity can take months.⁴ Until paternity is established by court order, the putative father has no rights of parenting time.

The majority of paternity cases and family support cases⁵ are filed after the mother applies for State benefits for the child, such as Medicaid, Food Stamps, or childcare assistance. This triggers a requirement that she cooperate in establishing the father's child support obligation.⁶ Paternity and family support cases start with the mother's referral to the prosecutor's office, which then files the paternity or family support action. The father is served with the complaint, and is given notice of a referee hearing. Here's his typical experience:

- At the first court hearing, in front of a referee, the putative father finds the child's mother sitting with the prosecuting attorney. He has no attorney there unless he retained one at

his own expense. However, since an indigent paternity defendant is entitled to a court-appointed attorney, the hearing is adjourned if he wants one, and the appointed attorney will be present with him at the next (second) hearing.

- If he waives an attorney (or at the next hearing), he will be asked if he admits that he's the father of the child. If he doesn't know, denies it, or asks for a paternity test, then genetic testing is scheduled. If he admits that he's the father, no test is ordered, and none may ever be done.
- Once paternity is established, either by Acknowledgement of Parentage, by admission in court, or by testing, the referee then continues the hearing⁷ for the purpose of setting child support. Both parents are asked to produce paystubs, W-2 forms, and tax returns, and support is set using the Child Support Formula.
- If the father asks for joint physical custody, or even joint legal custody, he's generally told that he'll have to file a separate Petition for Custody, pay the \$100 filing fee,⁸ and ask the judge to order a custody investigation and recommendation by the Friend of the Court. This can take anywhere from two months (in Ottawa County) to two years, depending on the court's caseload and other factors. Nearly all initial orders in paternity and family support cases grant legal and physical custody of the minor child to the mother.
- If the father asks for parenting time, he'll be directed to the "standard" paragraph in the paternity order, which states that he has "reasonable rights of parenting time as the parties mutually agree." If they don't agree, either party may ask the Friend of the Court to mediate the dispute and recommend a parenting time schedule. However, the recommendation isn't binding, and if the dispute continues, the father must then file a Motion for Parenting Time, pay the \$100 filing fee, and schedule a hearing in front of the judge. Again, depending on the caseload of the particular court, this can take two weeks to two months, and the length of time allocated for the hearing may be a half-hour, or five minutes.
- By the time a father's paternity has been established, and he files a motion for custody, the child has often been in the mother's exclusive care for long enough to create an "established custodial environment," which means that the "preponderance of the evidence" burden of proof no longer applies. He'll then have to prove that a custody change is in the child's best interests by "clear and convincing evidence," which is a difficult standard to meet, particularly in the case of a father of a young child who hasn't been given much time or opportunity to establish a strong bond with the child.
- If the father is unable to exercise parenting time because of conflict with the child's mother, he may conclude that the court and the Friend of the Court are far more interested in collecting support from him than in enforcing his parenting time. He will not be surprised to learn that federal law provides for reimbursement of Friend of the Court operating expenses based upon its success in collecting child support, but doesn't even track parenting time enforcement. He will also quickly see that the Michigan Child Support and Parenting Time Enforcement Act provides equal penalties of up to 90 days in jail for violating a child support or parenting time order,⁹ yet there are dozens, if not hundreds, of payers in jail for non-payment of child support for every one parent sent to jail for violation of a parenting time order.

It's no wonder that one father in the Forum said that the Friend of the Court reminded him more of the "friend of his ex-wife." It has also become apparent that, in spite of good intentions, there remain plenty of examples of unintended bias in the system, as well as delays that work to the disadvantage of fathers who want to be involved in the lives of their children. At the same time, there are multiple studies supporting the proposition that children with two involved parents are less likely to be involved with the law, less likely to commit suicide, less likely to drop out of school, and less likely to suffer from depression or mental illness.

Domestic Violence—the Elephant in the Living Room

The elephant in the living room—the factor that explains some of the dichotomy between the recognized need for fathers in children’s lives and the perceived failure of the judicial system to accommodate this need—is domestic violence. Domestic violence is all too common,¹⁰ and where it is present, the consideration of what is in the best interests of the child is rightly replaced by a “safety first” approach. Michigan law, however, does not permit a “safety *only*” approach, even where domestic violence has occurred. Judges are required to “accommodate” existing custody and parenting time orders when issuing a personal protection order.¹¹ Further, judges may not deny parenting time unless there is “clear and convincing evidence” that it will cause physical, mental, or emotional harm to the child (but may impose conditions upon parenting time, such as supervision, etc.).¹² Unfortunately, at least four out of five domestic violence perpetrators are men, and the majority of fathers who are not violent sometimes have to deal with the suspicion or the allegation that they fall within the violent minority.

This tension has been apparent in the previous lack of communication between domestic violence prevention organizations and fatherhood organizations. Domestic violence prevention and batterer’s intervention programs date back 30 years or more, and have made hard-won gains in recognition as well as in federal and state funding for their efforts. They have been loathe to share those gains with fatherhood organizations.

The improvement in communication made evident at the first Fatherhood Forum stems from mutual recognition and acknowledgement. Dr. Oliver Williams presented his analysis of the rough distinctions among the fatherhood organizations that have arisen over the past 10 to 15 years:

- “Father’s Rights” Organizations—these organizations focus on fighting the perceived bias in the judicial system. These organizations tend to be more militant, less likely to acknowledge the impact or incidence of domestic violence, and use concepts of “parental alienation” in custody and parenting time disputes. At best, these organizations may simply be marketing tools for attorneys seeking to recruit male divorce clients; at worst, they are shields and

excuses for abusive men seeking custody and parenting time.

- “Father Involvement” groups—the poster child for this category is PromiseKeepers, the Christian men’s organization that seeks to turn the hearts of men toward their wives and children. Domestic violence advocates look on these groups with suspicion, focusing on that part of the Bible that calls for wives to “submit” to their husbands, and husbands to be “the head of the wife.”¹³ However, as Dr. Williams advised, “Read the rest of the chapter.” The passage goes on to state that husbands should love their wives as themselves, and give themselves up for their wives as Christ gave himself up for the church¹⁴—a call for servant leadership, not command and control.
- “Responsible fatherhood” groups—these groups were promoted at the Fatherhood Forum as groups that work to improve men’s parenting skills. Recommended curricula from these groups include “Proud Fathers—Proud Parents,” which is being used in multiple locations across the state, including Kent County. These groups are also government-sponsored, through sites such as the National Responsible Fatherhood Clearinghouse (www.fatherhood.gov).

Some Suggestions for Improving Perceptions and Outcomes

Many proposals for improving performance and perceptions were discussed at the conference, including:

- “Proud Fathers—Proud Parents” and other programs include domestic violence awareness components, and also help to improve fathers’ parenting skills.
- The Michigan Department of Corrections (MDOC) promoted the organization “Fathers Behind Bars,” on behalf of thousands of incarcerated fathers who will be re-entering Michigan communities over the next several years. MDOC also promotes increased parenting time for incarcerated fathers.
- MDOC is promoting a change in federal law to deal with support arrearages that become unmanageable during incarceration, and

become barriers to successful prisoner re-entry after release. State law (MCL 552.517(1)(b)) requires the FOC to review support if a party is incarcerated and sentenced to a term of more than one year. This provision does not require suspension of child support. However, this is frequently the result of the FOC review, because the court of appeals has held that where a noncustodial parent is imprisoned for a crime other than nonsupport, that parent should not be liable for child support while imprisoned unless it is affirmatively shown that he or she has the income or assets to make such payments. Ottawa and Muskegon counties' method of dealing with this, by proactively inserting an automatic suspension provision in all support orders, was well-received by MDOC representatives in attendance. MDOC also proposed sharing with FOC its prisoner information as to bank accounts or other assets available to pay support in those cases where it exists.

- It was suggested that judges and referees should be pro-active in addressing custody and parenting time issues from the bench, during the initial hearing, rather than just rubber-stamping an initial order that enshrines a "one-parent-friendly," rather than a "two-parent friendly," order.
- Many of the fathers present at the conference argued that improved enforcement of parenting time orders would improve collection of child support payments, as their incentive to pay child support declines significantly when their parenting time is subject to repeated denial or interference. ©

Endnotes

- 1 The issues discussed here represent the issues raised and views expressed at these conferences, and do not necessarily reflect the views of the author or the 20th Circuit Court.
- 2 Ottawa County, specifically, points to its record in custody disputes over the past two calendar years. Court records show that, of those custody cases not settled by the parties before trial, the Friend of the Court recommended joint legal and joint physical custody in about one-third of the total cases, recommended primary custody to fathers in another one-third of those cases, and recommended primary custody to mothers in the remaining one-third of those cases.
- 3 The federal Department of Health and Human Services, the Michigan Department of Human Services, the Office of the Governor, the Governor's Office of Community and Faith-Based Initiatives, the Michigan Department of Corrections, the Batterer Intervention Services Coalition of Michigan, the Michigan Domestic Violence Prevention & Treatment Board, Michigan Action for Youth and Families, the Michigan Fatherhood Coalition, and the Midwest Center on Workforce and Family Development Inc.
- 4 If the putative father is uncooperative, the process doesn't take long. If the putative father avoids personal service of notice of the complaint, the prosecutor will request and the court will often grant an order for "substituted service," allowing the father to be served by mail, or even by legal notice in the newspaper. If the father fails to show up for the hearing, or fails to show up for scheduled genetic testing, he'll be found to be the father by default, and a paternity/support order will be entered, finding him to be the legal father.
- 5 In Ottawa County in 2007, there were 163 new paternity cases filed, and 300 family support actions.
- 6 Where State benefits are being paid, the first \$50 per month in child support goes to the mother, and the rest goes back to the State to reimburse the taxpayers for the benefits being provided.
- 7 This may be the second or third hearing, depending upon whether prior hearings have been adjourned to obtain legal counsel or genetic testing.
- 8 Any court filing fee can be waived if the filer is indigent, with approval of the judge, by filling out and filing an "Affidavit and Order for Suspension of Fees" form, available from the Court Clerk.
- 9 Penalties for violation of a support or parenting time order can include fines, costs, make-up parenting time, and incarceration for up to 45 days on a first offense, or up to 90 days on a second or later offense.
- 10 In Ottawa County in 2007, there were 494 new divorce actions filed involving minor children, and there were 465 domestic personal protection orders requested. Available data does not indicate the extent to which these categories overlap.
- 11 MCR 3.706(C)(2).
- 12 MCL 722.27a.
- 13 Ephesians 5:22-24.
- 14 Ephesians 5:25-33.