



# Throwaway

by: Dennis G. Vatsis

# Dads

Making the case

for fathers: Gender

bias denies dads

custody when

parents divorce

The title of this article is taken from *Throwaway Dads*, a book that captures the gender bias against fathers in Michigan's child custody determinations. This gender discrimination is evident in both friend of the court custody recommendations and in final court dispositions in divorce actions. The anecdotal evidence is undeniable and demonstrates a pattern of ongoing gender bias against fathers.

Commentator David Blakenhorn writes in *Fatherless America* that "Fatherlessness is the most harmful demographic trend of this generation."<sup>1</sup> His concern is echoed by the authors of *Throwaway Dads*, who report that "overall, fatherless children do far worse in school, are more prone to depression, more likely to abuse drugs, get involved in crime, and commit suicide, and are at much greater risk of becoming teen parents."<sup>2</sup>

Fathers are important. When involved in raising their children, they clearly enhance the prospect of raising good and responsible children. Yet the available statistics reveal that in Michigan, fathers are being denied custodial rights to their children. One must ask why this is occurring and how it may be remedied.

## Fast Facts

- *Fathers play a crucial role in child raising, yet when it comes to child custody determinations, many are denied custodial rights.*
- *Women are seen as naturally qualified to be the custodial parent and men are not.*
- *The divorce process is strongly ingrained in tradition and stereotypical attitudes.*
- *The Child Custody Act of 1970 established a gender-blind "best interests of the child" standard but recommendations and awards from the courts continue to deny fathers due process of law.*
- *Whenever feasible, joint custody is a sure way to achieve a gender neutral outcome in divorce custody determinations.*
- *The goal should be to keep both parents actively involved in the upbringing of their children and to promote continued parental access and responsibility.*

## Societal and Cultural Considerations

There is a societal and cultural dynamic for the gender discrimination experienced by fathers within the domestic relations arena. In colonial America, fathers were seen as primary, irreplaceable caregivers especially responsible for older children. They took the main responsibility for their children's religious and moral education and guided them into adulthood. This fundamentally changed when "industrialization and the modern economy led to the physical separation of home and work. No longer could fathers be in both places at once." Additionally, wars took fathers away from the home for extended periods; many never returned to resume fatherhood. Mothers came to be perceived as having a special capacity for caring for children, especially those in their "tender years."<sup>3</sup>

This societal dynamic was incorporated into the culture and domestic relations arena. According to Parke and Brott, "For at least the past 50 years, judges heavily favored mothers in awarding child custody in divorce cases. And until the late 1970s, they based their decisions on what used to be called the 'tender years doctrine.' In a 1978 custody ruling in West Virginia . . . Judge Richard Neely expressed the doctrine this way: 'Behavioral science is so inexact that we are clearly justified in resolving certain custody questions on the basis of the prevailing cultural attitudes which give preference to the mother as custodian of young children.'"<sup>4</sup>

The State Bar of Michigan Task Force on Racial/Ethnic and Gender Issues in the Courts and the Legal Profession commissioned by the Michigan Supreme Court found that the divorce process is "strongly embedded in tradition and stereotypical attitudes." In their report they elaborated on the problem: "Women are seen as the nurturers and caretakers. A woman's influence is in the home while the man is the breadwinner and protector. Women are seen as naturally qualified to be the custodial parent and men are not. Fundamental attitudes about men and women, divorce, and the role of judges and lawyers contribute to gender disparity in domestic relations cases."<sup>5</sup> These stereotypes remain in Michigan even though mothers are increasingly active partici-

pants in the workforce and military forces and are decreasingly relegated solely to the home.

## Child Custody Act of 1970

The law in Michigan is that gender is not a criterion for awarding child custody. The Child Custody Act of 1970, MCL 722.21; MSA 25.312(1), establishes a gender-blind "best interests of the child" standard. See also MCL 722.25; MSA 25.312(5).

MCL 722.23; MSA 25.312(3) defines the best interests of the child as the sum total of:

(a) *The love, affection, and other emotional ties existing between the parties involved and the child.*

(b) *The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.*

(c) *The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.*

(d) *The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.*

(e) *The permanence, as a family unit, of the existing or proposed custodial home or homes.*

(f) *The moral fitness of the parties involved.*

(g) *The mental and physical health of the parties involved.*

(h) *The home, school, and community record of the child.*

(i) *The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.*

(j) *The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.*

(k) *Domestic violence, regardless of whether the violence was directed against or witnessed by the child.*

(l) *Any other factor considered by the court to be relevant to a particular child custody dispute.*

As noted in the Michigan Family Law series, "The Child Custody Act demands an

...it is essential  
subordinate

assessment of the ability of individual parents to care for their children, and *although old assumptions die hard in any area of the law*, the act has largely supplanted the law and assumptions that preceded it.”<sup>6</sup> (Emphasis added.)

## Friend of the Court Child Custody Recommendations

The State Court Administrative Office compiles statewide statistics based on data submitted by the local friend of the court offices on SCAO Form 41. See the Friend of the Court Act, MCL 552.501; MSA 25.176(1). Annually, the State Court Administrative Office publishes a statistical supplement regarding activities of the local friend of the court offices. The one activity monitored by gender since 1997 is that of child custody recommendations. Aggregate statewide statistics are listed below but are available county by county.

The 1997 Friend of the Court Statistical Supplement reported that statewide custody was recommended for the mother on 6,480 occasions, for the father on 2,212 occasions, for third parties on 235 occasions, and for joint physical custody on 1,824 occasions.<sup>7</sup>

The 1998–99 Friend of the Court Statistical Supplement reported that statewide custody was recommended for the mother on 6,616 occasions, for the father on 2,461 occasions, for third parties on 222 occasions, and for joint physical custody on 2,017 occasions.<sup>8</sup>

The pattern of gender-based friend of the court recommendations continued in the

in the Michigan Child Custody Act, this is not occurring.

## Child Custody Awards in Divorce Actions

One may ask what the domestic relations courts in Michigan are doing with regard to actual physical custody awards. The Michigan Department of Community Health maintains statistics of actual physical custody awards for divorce actions in Michigan by gender. MCL 333.2813; MSA 14.15(2813). These vital statistics are compiled from the Record of Divorce or Annulment form filed with the circuit court in every divorce or annulment case. Question 20 on the form asks the number of minor children whose physical custody was awarded to husband, wife, joint, or other. Regrettably, these vital statistics are omitted in the annual editions of *Michigan Health Statistics* and are not readily available. They are maintained in a computer database and are available only upon specific request. I am amazed these most interesting statistics are not annually published. Nonetheless, these statistics for the years 1995 to the present offer insight.

One might believe that the domestic relations judges involved in child custody decision making would have a moderating effect on the lopsided friend of the court child custody recommendations. After all, the courts are bastions of equal justice for litigants and should be gender neutral. However, that is not statistically apparent in divorce actions. According to the Michigan Department of Community Health vital statistics, actual child custody awards issued by the domestic relations courts statewide in divorce actions follow a similar gender-skewed pattern. In 1995, physical custody was awarded to mothers on 15,103 occasions, to fathers on 2,332 occasions, to third parties on 273 occasions, and joint physical custody on 3,028 occasions.

In 1996, the pattern continued with mothers being awarded physical custody on 14,052 occasions, fathers on 2,302 occasions, third parties on 276 occasions, and joint physical custody on 3,000 occasions. In 1997, mothers were awarded physical custody on 13,744 occasions, fathers on 2,276 occasions, third parties on 296 occasions, and joint physical

## Fathers Make a Difference

- *Fatherless children are twice as likely to drop out of school as children who live with both parents*
- *Children who exhibit violent behavior in school are 11 times as likely not to live with their fathers.*
- *Seventy-two percent of adolescent murderers and 60 percent of America's rapists grew up in homes without fathers.*

— Parke, Ross D. and Armin Brott, *Throwaway Dads* (New York, Houghton Mifflin Company, 1999)

custody on 2,719 occasions. In 1998, mothers were awarded physical custody on 13,732 occasions, fathers on 2,400 occasions, third parties on 324 occasions, and joint physical custody on 3,626 occasions. In 1999, mothers were awarded physical custody on 13,094 occasions, fathers on 2,239 occasions, third parties on 352 occasions, and joint physical custody on 3,918 occasions.

These statistics reveal in detail that the power of the state is being used to keep fathers and children apart when parents divorce.

## Recommendations from the Report of the State Bar of Michigan Task Force on Racial/Ethnic and Gender Issues in the Courts and the Legal Profession

Before inequities can be addressed, it is essential that we discard the notion that fathers are subordinate child care providers. An assessment of the ability of individual parents to care for and nurture their children should govern child custody recommendations and awards. Gender stereotypes should be discarded and gender neutrality observed. As previously noted, a similar perspective was addressed in the Racial/Ethnic and Gender Issues report completed in 1989:

that we discard the notion that fathers are child care providers.

2000 Friend of the Court Statistical Supplement. It reported that statewide custody was recommended for the mother on 10,512 occasions, for the father on 2,201 occasions, for third parties on 210 occasions, and for joint physical custody on 2,031 occasions.<sup>9</sup>

The friend of the court offices statewide are not applying an equal treatment standard to fathers and are denying them due process of law. Although each friend of the court should blindly apply the standards set forth

*Gender Recommendation VI-1: Educational programs should train judges and lawyers to recognize the unfairness which can result from gender-based stereotypes in the domestic relations area. These training programs should emphasize the special importance of domestic relations litigation to the parties involved and to society.*<sup>10</sup>

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*Gender Recommendation VI-21: Educational programs for judges should emphasize that the "best interest" of the child should specifically relate to the individual parenting ability of each party and not the societal role placed upon their gender.*

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*Summary of condition prompting 1989 recommendation: "Stereotypes about the traditional roles of men and women as parents may hinder the application of the 'best interests' standard and adversely affect the children, as well as the parents."*<sup>11</sup>

The Michigan Supreme Court adopted Administrative Order No. 1990-3 and implemented many of the task force proposals. The court supported the task force recommendations, expressing its commitment to ensuring the fair and equal application of the rule of law for all in the Michigan court system and in eliminating race, ethnic, and gender discrimination in the Michigan judicial system. In 1998, the State Bar of Michigan Open Justice Commission was formed with a goal of implementing the 1989 task force recommendations. However, despite these valiant efforts, gender bias continues to taint the domestic relations arena.<sup>12</sup>

## The Joint Custody Alternative

An often ignored sure way to achieve the gender neutral outcome required by the law is to award joint legal and physical custody whenever feasible. This keeps both parents active in the lives of their children and makes both parents winners in the domestic relations arena. Each parent can contribute to the raising of the children in a significant manner and add different qualities to their children's lives.

When the legislature adopted MCL 722.26a; MSA 25.312(6a), it addressed joint physical custody in domestic relations cases, stating that "the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody. . . . The court

shall determine whether joint custody is in the best interest of the child" by considering the factors enumerated in MCL 722.23; MSA 25.312(3) and whether the parents will cooperate and agree on important decisions affecting the child's welfare.

This legislation is a positive step toward encouraging joint custody, which should be considered whenever possible as an alternative to the one-parent physical custody arrangements so prevalent in Michigan. The Michigan senate not long ago rejected a provision to the joint custody statute that would have sent a strong signal to the courts to promote joint custody. The rejected senate provision asserted that there is not a presumption against joint custody. The legislature should reintroduce this provision into the statute so that the friends of the court and domestic relations judges will begin to accept the premise that no father should be disenfranchised from his children when the parents separate or divorce and that joint legal and physical custody is encouraged whenever feasible.

## Conclusion

The domestic relations forum is an unfair arena for fathers in Michigan. Statistics bear witness to what many practicing attorneys have known for years—that mothers usually get custody of the children and fathers usually get to visit the children. The United States and Michigan constitutions each provide that no one shall be deprived of the equal protection of the law. The Fourteenth Amendment of the United States Constitution explicitly provides that no state shall deprive a person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law. Yet fathers in Michigan are being denied equal protection and due process and are being deprived of custodial rights to their children. Equal justice under the law is an illusory legal concept in the domestic relations arena.

This gender bias against fathers has to be addressed for the benefit of not only the disenfranchised father, but principally for the children who deserve to have not one, but both parents actively involved in parenting. The State Bar of Michigan task force's recommendation to educate the legal community should

be fully implemented by the Michigan Supreme Court. Encouraging joint legal and physical custody of minor children is a way to avoid Michigan's gender-biased, assembly line custody determinations. If that is not feasible in some instances, an unbiased and neutral application of the Child Custody Act is in order, with liberal coparenting time to the noncustodial parent.

The goal should be to keep both parents actively involved in the upbringing of their children and to promote continued parental access and responsibility.<sup>13</sup> The present adversarial practice of awarding child custody to the exclusion of one parent is greatly flawed in attaining this goal. The children of Michigan deserve better.<sup>14</sup> ♦



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## Footnotes

1. Blankenhorn, *Fatherless America* (New York, Harper Perennial, 1995), p 1.
2. Parke, Ross D. and Armin Brott, *Throwaway Dads* (New York, Houghton Mifflin Company, 1999), p 169.
3. Blakenhorn, p 13.
4. Parke and Brott, p 181.
5. Summary of Condition Prompting 1989 Recommendation, p 116.
6. The Institute of Continuing Legal Education, *Michigan Family Law*, Fifth Edition, § 11.1.
7. Friend of the Court Statistical Supplement, 1997 Annual Report, pp 158, 159.
8. 1998-99 Annual Report, pp 51, 52.
9. 2000 Annual Report, pp 53, 54.
10. Report of the State Bar of Michigan Task Force on Racial/Ethnic and Gender Issues in the Courts and the Legal Profession, State Bar of Michigan, p 116.
11. Task force report, p 146.
12. Weber, *Eliminating the Barriers, Opening the Doors*, 80 Mich BJ 24 (2001).
13. Michigan Parenting Time Guideline, State Court Administrative Office, p 3.
14. For a contrary perspective, see Carpenter, *Why Are Mothers Still Losing: An Analysis of Gender Bias in Child Custody Determinations*, 1996 Det 1:33.