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N.Y. courts failing in family law

By CHRIS NELSON
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On May 5, Chief Judge Judith Kaye presided over New York's Law Day 2003 celebration at The Judicial Institute. This year's Law Day theme was "Celebrate Our Freedom: Independent Courts Protect Our Liberties." Judge Kaye addressed this theme with comments on judicial review, fair and uniform treatment, accountability and protected rights. While the structure of our judicial system is admirable, to avoid blind, self-congratulatory narcissism, one must ask how well the courts are doing on these issues. In many cases, the answer must be, "Not very well."

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(where divorces are litigated) and Family Courts (where follow-up matters of custody and support are addressed) routinely — and often without cause or justification — separate children from their fathers, depriving children of the care and companionship of one of their parents and depriving those fathers of their rights as parents.

Kaye reveled in "the idea that our written Constitution [is] the supreme law of the land," but the Constitution is routinely ignored in family law. Writing in the *Journal of Law and Family Studies*, legal scholar Donald Hubin noted, "The U.S. Supreme Court regards parental rights as fundamental [but] despite their status as fundamental constitutional rights, parental rights are routinely suspended or revoked as a result of procedures that fail to meet even minimal standards of procedural and substantive due process."

Kaye also noted, "Obviously, judicial independence does not mean that the courts are immune from criticism or beyond accountability." She failed to observe that, with regard to family law, New York courts are above reproach and beyond accountability. Domestic Relations Law Section 235 seals decisions in divorce proceedings in Supreme Court, and the Family Court Act does the same for custody and support decisions in Family Court. It is impossible for the public to assess how the court system in general or a judge in particular is ruling on these crucial matters. While we can appreciate the desire for privacy in these often intimate matters, with no information available for review at all, the courts are, in fact, unaccountable.

The veil of secrecy is pulled aside on rare occasions, but what is revealed is not encouraging. In 1993, the Child Support Standards Act Evaluation Project surveyed custody decisions across New York state. It found that 93 percent of custody decisions are made in favor of the mother. That is hardly the uniform treatment Kaye says we're assured. And bad as that sounds, it is important to realize that these are cases where a father was dedicated enough to his children to stick it out through litigation and still his attempts to fulfill his responsibilities as a parent were thwarted by the court.

Unfortunately, that is the last available data on gender bias in New York courts. To make the courts truly accountable, such information would have to be made available on an annual or, at worst, biennial basis. Such reporting — perhaps by the Office of Court Administration — would be a step toward ensuring an accountable judiciary.

And if the court system is not accountable in broad strokes, neither are judges willing to be accountable for their individual actions. For example, in Rensselaer County Family Court, recording devices are not allowed past the front door. A party has no chance to record proceedings for independent verification at a later time, and there is no chance of recording an impropriety to take action against a bad judge.

Kaye says, "Our courthouses, and the business conducted within them, are open for public viewing and comment." But in matters of family law — matters that touch us in the most intimate ways — this is clearly not the case. New York courts consistently fail to ensure parental rights and are not accountable for those lapses. Perhaps the judiciary is a little too independent. Some accountability to the public it serves might make it more responsible in carrying out its duties.

Chris Nelson lives in Clifton Park.