St. John's Law Review

Volume 52
Number 1 *Volume 52, Fall 1977, Number 1*

Article 12

July 2012

Family Court Act §§ 413-414: Divorced Mother Must Share in the Financial Support of Her Children

St. John's Law Review

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

Recommended Citation
St. John's Law Review (1977) "Family Court Act §§ 413-414: Divorced Mother Must Share in the Financial Support of Her Children," *St. John's Law Review*: Vol. 52 : No. 1 , Article 12.
Available at: https://scholarship.law.stjohns.edu/lawreview/vol52/iss1/12

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

By failing to apply properly the jurisdictional predicate contained in CPL § 20.20(2)(b), it is submitted that the *Corsino* court extended New York's extraterritorial criminal jurisdiction to a situation not envisioned by the legislature[122] nor justified by the language of the statute.[123] It is hoped that future decisions will adhere to the test established by the CPL and thereby limit criminal jurisdiction to the bounds prescribed by the legislature.

FAMILY COURT ACT

Family Court Act §§ 413-414: Divorced mother must share in the financial support of her children.

As a consequence of the current focus upon equal treatment of the sexes,[124] courts have been faced with an increasingly large number of equal protection challenges directed at statutes employing sex-based classifications.[125] It is not surprising, therefore, that sections 413[126] and 414[127] of the Family Court Act, which seem to place the primary obligation for child support upon the father,[128] have

---

[122] *See* note 118 *supra.*

[123] *See* notes 114-118 and accompanying text *supra.*

[124] For a general overview of the changing status of women and the effects of the women's rights movement see W. CHAFE, WOMEN AND EQUALITY (1977). *See generally* CALIFORNIA COMMISSION ON THE STATUS OF WOMEN, IMPACT ERA LIMITATIONS AND POSSIBILITIES 144-215 (1976); S. FELDMAN, THE RIGHTS OF WOMEN 31-71 (1974); I. MURPHY, PUBLIC POLICY ON THE STATUS OF WOMEN 19-100 (1973); THE WOMEN'S MOVEMENT 41-63 (H. Wortis & C. Rabinowitz eds. 1972).

[125] *See, e.g.,* Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). New York courts also have been confronted with equal protection attacks upon various statutes. *See, e.g.,* People v. Moss, 80 Misc. 2d 633, 366 N.Y.S.2d 522 (Sup. Ct. Kings County 1975); *In re* Louise B., 68 Misc. 2d 95, 326 N.Y.S.2d 702 (Family Ct. Monroe County 1971). Moreover, passage of the New York Human Rights Law, codified in N.Y. EXEC. LAW §§ 290-301 (McKinney 1972 & Supp. 1976-1977), has led to the invalidation of several statutory distinctions based upon sex. *See, e.g.,* Board of Ed. v. State Div. of Human Rights, 42 App. Div. 2d 49, 345 N.Y.S.2d 93 (2d Dep't 1973), *aff'd mem.*, 35 N.Y.2d 675, 319 N.E.2d 203, 360 N.Y.S.2d 887 (1974).

[126] N.Y. FAM. CT. ACT § 413 (McKinney 1975) provides in pertinent part:

> The father of a child under the age of twenty-one years is chargeable with the support of his child and, if possessed of sufficient means or able to earn such means, may be required to pay for such child's support a fair and reasonable sum according to his means, as the court may determine.

[127] *Id.* § 414 states that

> [i]f the father of a child is dead, incapable of supporting his child, or cannot be found within the state, the mother of such child is chargeable with its support where such child has not attained the age of twenty-one years and, if possessed of sufficient means or able to earn such means, may be required to pay for its support a fair and reasonable sum according to her means, as the court may determine. The court may apportion the costs of the support of the child between the parents according to their respective means and responsibilities.

[128] Prior decisions, reflecting the early common law position, found that the obligation

been attacked on equal protection grounds and declared unconstitutional by at least one New York court.[129] Recently, however, in *Carter v. Carter*,[130] the Appellate Division, Second Department, declined an invitation to strike down as unconstitutional these two sections of the Family Court Act, opting instead to construe the statutory provisions "as meaning that both the father and the mother are equally responsible for the support of their children" and that such support may be apportioned between the parents "in accordance with their respective means and responsibilities . . . ."[131]

---

of support has been the father's "since time immemorial." Lewis v. Lewis, 2 Misc. 2d 849, 851, 151 N.Y.S.2d 894, 898 (Sup. Ct. Nassau County 1956), *aff'd mem.*, 5 App. Div. 2d 674, 168 N.Y.S..2d 473 (2d Dep't 1957), *appeal dismissed mem.*, 4 N.Y.2d 872, 150 N.E.2d 710, 174 N.Y.S.2d 241 (1958). *See* Drazin v. Drazin, 31 App. Div. 2d 531, 295 N.Y.S.2d 183 (1st Dep't 1968) (mem.) (primary duty of support rests upon the father irrespective of mother's financial condition); County of Santa Clara v. Hughes, 43 Misc. 2d 559, 251 N.Y.S.2d 579 (Family Ct. Ulster County 1964) (father has absolute responsibility for support of minor children); Smith v. Jones, 43 Misc. 2d 350, 250 N.Y.S.2d 955 (Family Ct. Kings County 1964) (father not relieved of duty by separation agreement). In view of the common law rule, courts have literally construed Family Court Act §§ 413 and 414, and concluded that a mother cannot be charged with support of her child unless the father "is dead, incapable of supporting his child, or cannot be found within the state." N.Y. FAM. CT. ACT § 414 (McKinney 1975). *See* Haslett v. Haslett, 25 App. Div. 2d 256, 268 N.Y.S.2d 809 (3d Dep't 1966) (since father incapable of support mother required to contribute); *In re* Trust of Garcy, 19 App. Div. 2d 811, 243 N.Y.S.2d 464 (1st Dep't 1963) (mem.) (obligation of father terminates upon death and mother held chargeable for support). In some cases the judiciary has modified this strict interpretation of § 414 and ruled that both parents may be responsible for the support of their child, but retained the notion that the father is primarily obligated since he is likely to be in a better financial position to bear these costs. *See, e.g.*, Earle v. Earle, 158 App. Div. 552, 554, 143 N.Y.S. 841, 843 (2d Dep't 1913).

[129] *See* Carole K. v. Arnold K., 85 Misc. 2d 643, 380 N.Y.S.2d 593 (Family Ct. N.Y. County), *modified*, 87 Misc. 2d 547, 385 N.Y.S.2d 740 (Family Ct. N.Y. County 1976). *Carole K.* involved a 1960 divorce agreement under which the father had made substantial payments for the support of his two sons. When the father discontinued these payments in 1975, presumably because of a reduction in his income, the mother instituted an action for child support under §§ 413 and 414. Relying on several Supreme Court cases in which sex-related statutory classifications were held unconstitutional, *see* cases cited in note 125 *supra*, the family court concluded that § 414 is violative of the equal protection clause because no "rational basis" exists for placing the principal responsibility for support on the father. 85 Misc. 2d at 645, 380 N.Y.S.2d at 597. *Accord*, Bauer v. Bauer, 55 App. Div. 2d 895, 896, 390 N.Y.S.2d 209, 211 (2d Dep't 1977) (mem.) (Latham, J., concurring). Although the majority in *Bauer* refused to strike down §§ 413 and 414 in deference to the statute's presumption of validity, *id.*, 390 N.Y.S.2d at 210-11, Justice Latham, in a concurring opinion, expressed the view that recent Supreme Court decisions dictated a finding of unconstitutionality. *Id.* at 897, 390 N.Y.S.2d at 211-12.

[130] 58 App. Div. 2d 438, 397 N.Y.S.2d 88 (2d Dep't 1977).

[131] *Id.* at 447, 397 N.Y.S.2d at 93-94. In January, 1977, the second department, perhaps anticipating the *Carter* decision, ruled in Bauer v. Bauer, 55 App. Div. 2d 895, 390 N.Y.S.2d 209 (2d Dep't 1977) (mem.) that although the principal duty of support is upon the father, the obligation may be apportioned between the two parents in relation to their means. *Id.* at 896, 390 N.Y.S.2d at 210.

Carter involved a support proceeding commenced by the father, who had been awarded custody of the couple's minor son following a divorce in 1973. Both parents stipulated that the only issue in the case concerned the constitutionality of sections 413 and 414. Finding that a father is primarily responsible for the support of his child under sections 413 and 414, the family court summarily rejected the constitutional challenge and dismissed the father's support petition.[132] In reversing the decision of the lower court, the Appellate Division, Second Department, repudiated several New York decisions which had interpreted sections 413 and 414 as relieving the mother of any obligation for support unless the father is dead, incapable of support, or not within the state.[133] Justice Shapiro, writing for the court, was of the opinion that such a literal reading of the statutory scheme would render it unconstitutional under recent Supreme Court decisions involving sex-based differential treatment.[134] As an alternative, the court, invoking a well-established canon of statutory construction,[135] determined that the two sections

---

[132] 58 App. Div. 2d at 443, 397 N.Y.S.2d at 91. The lower court, which apparently never issued an opinion, concluded that the sections in question were constitutional without any discussion of the issue. *Id.*

[133] *Id.* at 444, 397 N.Y.S.2d at 92. *See* note 128 *supra*. Before rendering its decision with respect to the support issue, the appellate division confronted the question whether the attorney general should have been notified of the constitutional challenge to the Family Court Act. *See* N.Y. EXEC. LAW § 71 (McKinney 1972) which provides in part:

> Whenever the constitutionality of a statute is brought into question upon the trial or hearing of any action or proceeding . . . in any court of record . . . the court or justice before whom such action or proceeding is pending, *may* make an order, directing the party desiring to raise such question, to serve notice thereof on the attorney-general and that the attorney-general be permitted to appear at any such trial or hearing in support of the constitutionality of such statute.

Id. (emphasis added). The family court had deemed application of the statute to be within its discretion and concluded that it was unnecessary to notify the attorney general as neither party had requested such notice. The appellate division disagreed, finding that the lower court had exceeded its authority in failing to order notice "since the purpose of the statute is to have all of the people of the State represented when the constitutionality of their laws are put in issue." 58 App. Div. 2d at 442 n.1, 397 N.Y.S.2d at 90-91 n.1. *See also* Jerry v. Syracuse Bd. of Educ., 44 App. Div. 2d 198, 354 N.Y.S.2d 745 (4th Dep't), *modified on other grounds*, 35 N.Y.2d 534, 324 N.E.2d 106, 364 N.Y.S.2d 440 (1974) (failure to give notice precluded determination of the constitutionality of certain statutes).

[134] 58 App. Div. 2d at 447-48, 397 N.Y.S.2d at 94. For a discussion of the Supreme Court cases, *see* notes 141-142 and accompanying text *infra*.

[135] *See* note 142 and accompanying text *infra*. Courts generally will endeavor to construe statutory language in a manner consistent with constitutional requirements. *See, e.g., In re* Barry Equity Corp., 276 App. Div. 685, 96 N.Y.S.2d 808 (1st Dep't 1950); People v. Vitale, 80 Misc. 2d 36, 360 N.Y.S.2d 375 (Nassau County Ct. 1974). It has been stated that

> "a legislative enactment carries with it an exceedingly strong presumption of constitutionality; that, while this presumption is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt; that every intendment is in favor of the statute's validity; that the party alleging unconstitutionality has a heavy bur-

should be interpreted in a manner consistent with the Constitution.[136] Therefore, the appellate division concluded that the portion of section 414 requiring a mother to support her child upon the death, financial incapacity, or absence of the father is not an exclusive statement of the mother's obligation;[137] as 414 further provides, a " 'court may apportion the costs of the support of the child between the parents according to their respective means and responsibilities.' "[138]

Assuming, however, that section 414 may be read as imposing only a secondary obligation upon the mother, Justice Shapiro stated that the statute can be sustained by holding that the death, incapacity, or absence of the father is not a condition "precedent to a mother's becoming subject to contribution [for support] in accordance with her means."[139] To further support its decision, the court pointed out that this construction of the Family Court Act comports with section 240 of the Domestic Relations Law, which permits the court in any matrimonial action to direct that costs incurred for the maintenance and education of the child be borne by "'either *or both . . . parents.*'"[140]

---

den; and that only as a last resort will courts strike down legislative enactments on the ground of unconstitutionality."

Marcia D. v. Donald D., 85 Misc. 2d 637, 639, 380 N.Y.S.2d 904, 906 (Family Ct. N.Y. County 1976) (quoting *In re* Malpica-Orsini, 36 N.Y.2d 568, 570, 331 N.E.2d 486, 488, 370 N.Y.S.2d 511, 514 (1975)). *See, e.g.*, Crowell v. Benson, 285 U.S. 22, 62 (1932); Panama R.R. Co. v. Johnson, 264 U.S. 375, 390 (1924); People v. Pickett, 19 N.Y.2d 170, 176, 225 N.E.2d 509, 512, 278 N.Y.S.2d 802, 805 (1967).

[136] 58 App. Div. 2d at 448, 397 N.Y.S.2d at 94.

[137] Past decisions considered the opening sentence of § 414, which places the duty of support on the mother if the father is dead, incapable of supporting the child, or not within the state, to be merely an explication of the father's primary responsibility as set forth in § 413. *See* Drazin v. Drazin, 31 App. Div. 2d 531, 532, 295 N.Y.S.2d 183, 184 (1st Dep't 1968) (mem.); Novikoff v. Novikoff, 29 App. Div. 2d 754, 287 N.Y.S.2d 697 (2d Dep't 1968) (mem.); Carole K. v. Arnold K., 85 Misc. 2d 643, 644, 380 N.Y.S.2d 593, 596 (Family Ct. N.Y. County), *modified*, 87 Misc. 2d 547, 385 N.Y.S.2d 740 (Family Ct. N.Y. County 1976).

[138] 58 App. Div. 2d at 446, 397 N.Y.S.2d at 93 (quoting N.Y. FAM. CT. ACT § 414 (McKinney 1975)). Section 413 does not place an absolute duty to support the child on the father, but instead, provides that the father "*may* be required to pay" child support, N.Y. FAM. CT. ACT § 413 (McKinney 1975) (emphasis added). This consideration, together with the fact that § 414 prescribes the mother's support obligation in similar language, led the court to conclude that either parent may be charged with support. 58 App. Div. 2d at 446, 397 N.Y.S.2d at 93.

[139] 58 App. Div. 2d at 446-47, 397 N.Y.S.2d at 93.

[140] *Id.* at 447, 397 N.Y.S.2d at 94 (quoting DRL § 240) (emphasis supplied by the court). Section 240 vests the Supreme Court with broad discretion to direct the custody and care of a child according to the circumstances of the case.

It is interesting to note that the *Carter* court's construction of the statute also coincides with the alimony provisions of the Domestic Relations Law, DRL § 236, under which "the ability of the wife to be self-supporting" is a factor in the award of alimony. Although the economic status of the wife is not dispositive on the issue of alimony, it should be a significant

By interpreting sections 413 and 414 as placing equal responsibility for support on both parents, the *Carter* court obviated the necessity for resolving a serious constitutional question. Decisions of the Supreme Court applying the equal protection clause indicate that "[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[141] Had the appellate division read 413 and 414 to impose the principal duty of support upon the father, it is suggested that the sections would not have been able to survive this constitutional test. In opting for a construction that places the statutes beyond constitutional attack, the *Carter* court has employed a technique previously utilized by the Supreme Court to sustain legislative enactments in the equal protection area.[142]

In addition to its consistency with modern concern for sexual equality, the *Carter* holding would seem to foster the welfare of the

---

consideration. Phillips v. Phillips, 1 App. Div. 2d 393, 397-98, 150 N.Y.S.2d 646, 651 (1st Dep't), *aff'd mem.*, 2 N.Y.2d 742, 138 N.E.2d 738, 157 N.Y.S.2d 378 (1956). *See* Kover v. Kover, 29 N.Y.2d 408, 278 N.E.2d 886, 328 N.Y.S.2d 641 (1972) (alimony not granted where there were no children and wife's income equalled that of husband).

[141] Craig v. Boren, 429 U.S. 190 (1976). Statutes discriminating on the basis of sex are evaluated under an equal protection standard less severe than that applied when a suspect classification or fundamental right is involved, *see, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967), but more rigorous than the traditional "rational basis" test, *see, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961). As enunciated by the Court in Reed v. Reed, 404 U.S. 71 (1971), a gender-related classification is unconstitutional unless it bears a " 'fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' " *Id.* at 92. Applying this standard in the recent decision of Craig v. Boren, 429 U.S. 190 (1976), the Court held that an Oklahoma statute prohibiting the sale of 3.2% beer to males under the age of 21 and to females under the age of 18 could not be sustained. Despite statistics demonstrating that males between the ages of 18 and 20 were involved in more traffic accidents and arrests stemming from alcohol use than were females in that age group, the *Craig* Court ruled that the disparity which exists with respect to males and females who drive while under the influence of alcohol was insufficient to support the conclusion "that sex represents a legitimate, accurate proxy for the regulation of drinking and driving." *Id.* at 204. In short, "the relationship between sex and traffic safety becomes far too tenuous to satisfy *Reed's* requirement that the gender-based difference be substantially related to achievement of the statutory objective." *Id.*

[142] *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (social security benefits equally extended to widowers); Frontiero v. Richardson, 411 U.S. 677 (1973) (dependency no longer required for husbands of female members of the Armed Forces to receive medical benefits and quarters allowances); Shapiro v. Thompson, 394 U.S. 618 (1969) (welfare benefits granted to persons who have resided within the state less than one year); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimate children allowed to share in award of parent's wrongful death benefits). *See generally* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 913 (1971).

child by increasing the potential sources of support funds;[143] on the basis of the decision, both parents will be required to contribute support payments according to their financial capabilities.[144] It is submitted, therefore, that the *Carter* court has adopted a reasonable and desirable interpretation of Family Court Act sections 413 and 414 which hopefully will be accepted by other New York courts.

INSURANCE LAW

Legislature amends New York's No-Fault Statute

In order to insure prompt and equitable compensation for victims of automobile accidents, and reduce the necessity for expensive personal injury litigation, the legislature in 1973 adopted a "no-fault" insurance statute.[145] Although some authorities heralded this legislative enactment as an insurance premium reducing device, recent years have witnessed a steady increase in the cost of automobile insurance.[146] Prompted by these rising costs, as well as abuses of the original statute,[147] the New York Legislature recently amended the no-fault law,[148] effecting significant changes in the statutory scheme.

---

[143] *See* Bauer v. Bauer, 55 App. Div. 2d 895, 897, 390 N.Y.S.2d 209, 212 (2d Dep't 1977) (mem.) (Latham, J., concurring). DRL § 240 directs the supreme court in any marital action to consider "the best interests of the child" in determining the award for custody and support. *See* O'Shea v. Brennan, 88 Misc. 2d 233, 387 N.Y.S.2d 212 (Sup. Ct. Queens County 1976) wherein the court noted that children should be afforded "[t]he right to the most adequate level of economic support that can be provided by the best efforts of both parents." *Id.* at 236, 387 N.Y.S.2d at 215.

[144] *See* Fox, *Divorcee Held Liable to Share Child Support with Ex-Husband,* N.Y.L.J., July 26, 1977, at 1, col. 2.

[145] Ch. 13, §§ 1-11, [1973] N.Y. LAWS 56. *See* Montgomery v. Daniels, 38 N.Y.2d 41, 49-51, 340 N.E.2d 444, 448-50, 378 N.Y.S.2d 1, 7-9 (1975); Governor's Memorandum on Approval of ch. 13, N.Y. Laws (Feb. 13, 1973), *reprinted in* [1973] N.Y. Laws 2335 (McKinney).

[146] *See, e.g.,* Cerra, *Auto Premiums Up 100% for Many New Yorkers,* N.Y. Times, July 25, 1976, § 1, at 1, col. 1.

[147] Memorandum of State Executive Department, *reprinted in* [1977] N.Y. Laws 2445, 2452 (McKinney).

[148] Ch. 892, §§ 1-17, [1977] N.Y. Laws 1824 (McKinney). According to the State Executive Department, the purpose of the legislation is:

> To amend the State's No-Fault Automobile Insurance Law to eliminate various costly abuses, more adequately protect the victims of uninsured drivers, permit greater protection for insured drivers; and to contain the costs of automobile comprehensive and collision coverages by requiring insurers to inspect automobiles, verify their existence and determine their values in advance of loss; and to make other appropriate changes in the automobile insurance system.

Memorandum of State Executive Department, *reprinted in* [1977] N.Y. Laws 2445 (McKinney). The need for a change in the law has been recognized by authorities who have realized the many problems created by the original statute. One commentator has noted that: