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Civil LITIGATION

'Kramer v. Kramer': A 2019 analysis

During Oscar season, I always look forward to watching Turner Classic Movies' "Thirty Days of Oscar," which showcases Academy Award-winning films. This year, I watched the film "Kramer v. Kramer" (1979) starring Dustin Hoffman and Meryl Streep. As a matrimonial attorney, I watched the film with a critical eye. While it is a well-acted drama, it doesn't reflect the ideals of modern family law. This article highlights three ways in which the child custody landscape has changed since the film was released 40 years ago.

"Kramer v. Kramer" is a story of Ted Kramer (Dustin Hoffman), a workaholic advertising executive in New York City whose wife, Joanna (Meryl Streep), leaves him and their young son, Billy, because she is unhappy in the marriage. She has no contact with Billy for a period of approximately 15 months. The movie shows Mr. Kramer's journey juggling his career and single parenthood. After a rocky start, he and Billy eventually fall into a routine and form a close bond.

Fifteen months later, Mrs. Kramer returns to New York and files for custody of Billy. After a bench trial, the judge awards custody of Billy to Mrs. Kramer. Mr. Kramer and Billy are devastated. At the end of the film when Mrs. Kramer goes to pick up Billy to move him to her residence, she decides that Billy already has a home with his father and she is not going to force him to move in with her.

Fast forward to 2019 — how might a court determine child custody given the facts of "Kramer v. Kramer?" First, let's address the issue of maternal presump-



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tion or the tender years doctrine. In the movie, the father's attorney states that the court would presume that the mother was the more fit parent based solely on her sex, even though she abandoned the child for 15 months. He notes that Mr. Kramer's case would be very challenging to win.

Notably, the maternal presumption no longer exists in 2019. More likely than not, a judge will question whether the case should be a joint custody and shared residency case at the first appearance. The facts of the case presented at trial would then dictate why one parent should have sole custody and residency over the other. It would be incumbent on Mr. Kramer's attorney to argue why stability and continuity for Billy with father as primary residential parent would be in Billy's best interests.

In New York State, the analysis for child custody is best interests of the child. There are multiple factors to be considered, such as the child's wishes, the ability to provide for the child's emotional and intellectual development, the quality of the home environment and of the parental guidance provided, the financial stability of the parties, and the ability of the parents to foster a relationship with the other parent. *Eschbach v. Eschbach*, 56 N.Y.2d 167, 172, 436

N.E.2d 1260 (1982). Whether a parent is male or female should not put them at an advantage or disadvantage when determining custody.

Significantly, the child, Billy, is not represented by an attorney. Today, in contested custody cases in Family Court and Supreme Court, an Attorney for the Child is appointed to serve as the child's attorney and to zealously advocate the child's position. Pursuant to Section 7.2 of the Rules of the Chief Judge in New York, the Attorney for the Child is subject to the ethical requirements applicable to all lawyers. The Attorney for the Child must consult with and advise the child in a manner consistent with the child's capacities. While the child's position is not determinative in the custody case, it is an important factor to be considered by the court.

If the Kramer family were litigating in court today, an Attorney for the Child would be appointed. Billy is elementary school age. It was clear from the movie that he wanted to continue to live with his father. With Billy's informed consent, the Attorney for the Child would advocate Billy's position to the court. Billy's attorney would call witnesses or subpoena documents in support of Billy's position. The Attorney for the Child would actively participate in the custody hearing by presenting opening and closing statements, cross examining witnesses, and calling witnesses on Billy's behalf.

A final issue to discuss is child testimony in custody cases. In the film, Mr. Kramer's attorney states that Billy might

have to testify. In 2019, children do not testify in open court for custody hearings. Alternatively, the Attorney for the Child, in consultation with his or her client, may request that the child or children be privately interviewed with the Judge and the Attorney for the Child, on the record in a procedure called a “Lincoln Hearing” pursuant to *Lincoln v. Lincoln*, 24 N.Y.2d 270 (1969). The parents and their attorneys would not be present for this interview. The goal of the interview is for the judge to obtain a full understanding of the effect of paren-

tal differences on the child, as well as an honest expression of the child’s desires and attitudes. As stated in *Lincoln*, “...a child, already suffering from the trauma of a broken home, should not be placed in the position of having its relationship with either parent further jeopardized by ...(being) required to openly choose between them.” *Lincoln v. Lincoln*, 24 N.Y.2d 270.

“Kramer v. Kramer” is a heartfelt movie showing the depth of relationships between parents and their children. Based on the facts, I argue that Mr. Kramer

would have probably been granted primary residency of Billy by a judge in 2019. Child custody law has evolved, and the public should not be misguided by Hollywood stereotypes and outdated concepts. It is the job of the family law attorney to educate their clients about the best strategy to argue for what is in the best interests of the children in the case.

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