

There Is No Substitute For A Mother's Love:
The Rise and Fall of the "Tender Years" Doctrine in California

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It is not open to question, and indeed it is universally recognized, that the mother is the natural custodian of her young. This view proceeds on the well known fact that there is no satisfactory substitute for a mother's love.

— *Washburn v. Washburn*,
49 Cal.App.2d 581, 588, 122 P.2d 96 (1942)

I. INTRODUCTION

In its simplest terms, the “tender years” doctrine holds that mothers should be given the custody of their young children after a divorce. This article will put the “tender years” doctrine into its historical context. This article will also show that the doctrine was a early manifestation of women’s rights in the nineteenth century—like married women’s property acts and women’s suffrage— but, ironically, was killed by feminism in mid-twentieth century.

Although much history has been written in recent decades about women in divorce situations,¹ historians have so far overlooked the “tender years” doctrine as it was applied in the late nineteenth and early twentieth centuries. The primary literature—trial court files and appellate court case reports from divorce proceedings, statutes and legislative debates—is focused on resolving the immediate problems of real-life husbands, wives and children enduring a very difficult period in their lives. If history is discussed at all, it is merely cited as legal precedent for whatever ruling or argument the court or counsel intends to make. The secondary

¹ See e.g. Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill, N.C.: North Carolina University Press, 1986); Paula Petrik, ““Send the Bird and Cage”: The Development of Divorce Law in Wyoming, 1868-1900” in *Law in the West*, edited by Gordon Morris Bakken and Brenda Farrington, 451 (New York: Garland Publishers, 2000); Donna C. Schuele, “Community Property Law and the Politics of Married Women’s Rights in Nineteenth Century California,” *Western Legal History* 7, no. 2 (1994): 245; Jamil S. Zainaldin, “The Emergence of a Modern American Family Law: Child Custody, Adoption and the Courts, 1796-1851” *Northwestern University Law Review* 73 (1979): 1038; Richard A. McFarlane, “A Mere Question of Fact: Women, Men & Extreme Cruelty in Two Orange County Divorce Cases in the 1940's” (unpublished manuscript on file with the author).

literature is, for the most part, either intended to aid practitioners in representing their clients,² or in advocating a particular public policy.³ This essay will rely on both primary and secondary sources. Among the secondary sources is Joel Prentiss Bishop's *New Commentaries on Marriage, Divorce, and Separation*.⁴ Published in 1891, *Bishop on Marriage and Divorce* was the leading treatise on divorce in the nineteenth century, judging by the frequency with which it was cited by appellate courts during the period.

II. THE RISE OF THE "TENDER YEARS" DOCTRINE

Under Roman law, children were under the power of their fathers.⁵ In his commentary on Justinian's *Institutes*, Thomas Collett Sandars wrote:

The *patria potestas* [paternal power] differed originally little, if at all from the *dominica potestas*. If the sense of ownership was not so complete in the former, it was probably limited more by natural feeling than by law. The father could sell, expose, or put to death his children.⁶

² See e.g. Jeff Atkinson, *Modern Child Custody Practice*, 2d ed. (New York: Matthew Bender & Co., 2004); 2 William. P. Hogoboom & Donald B King, *California Practice Guide: Family Law* (Encino, Calif.: The Rutter Group, 2005) ¶¶ 7:1-7:675 (with suggested forms); Kathryn Kirkland et al., *California Family Law Practice & Procedure* 2d ed. New York: Matthew Bender, 2004) §§ 30.01-42.201 (with suggested forms); M. Dee Samuels & Fredrick A. Mandabach, *Practice Under the California Family Code* (Berkeley: Continuing Education of the Bar, 2005) 207-256.

³ See e.g. Allan Roth, "The Tender Years Presumption in Child Custody Disputes," *Journal of Family Law* 15 (1977): 423; Robb Storm, Comment, "The Tender Years Presumption: Is It Presumably Unconstitutional?" *San Diego Law Review* 21 (1983-84): 861; Ramsay Laing Klaff, "The Tender Years Doctrine: A Defense," *California Law Review* 70 (1982): 335.

⁴ Joel Prentiss Bishop, *New Commentaries on Marriage, Divorce, and Separation* (Chicago: T.H. Flood, 1891).

⁵ Justinian, *Institutes of Justinian*, translated by Thomas Collett Sanders. (New York: Longmans, Green & Co., 1905) 30.

⁶ Thomas Collett Sandars, "Commentary" to Justinian, *op. cit.*, 29.

This paternal power existed so long as the father lived, and a “son, though he becomes a soldier, a senator, or a consul, still remains in the power of his father.”⁷ Allan Roth cites authorities showing that “similar absolute power existed in ancient Persia, Egypt, Greece, and Gaul.”⁸

Ramsay Lanig Klaff, in his defense of tender years doctrine, wrote:

Under the common law, a father has an absolute right to the control and custody of his legitimate minor children. Parental rights were property rights and, like other property rights acquired during marriage, they vested exclusively in the husband.⁹

In his *Commentaries on the Laws of England*, Sir William Blackstone actually wrote, “The power of a parent by our English laws is much more moderate; but still sufficient to keep the child in order and obedience. . . . The legal power of a father (for a mother, as such, is entitled to no power, but only to reverence and respect) . . . over the persons of his children ceases at the age of twenty-one.”¹⁰ Also, children of a divorce “*a vinculo matrimonii*” were declared bastards, even if born during their parents’ marriage.¹¹ Sir William’s contemporary, Lord Mansfield, in the Chancery case *Bisset’s Case*, hinted at the “best interests of the child” standard while, at the same time, affirming the rights of fathers. Lord Mansfield wrote:

⁷ Justinian, *op. cit.*, 49.

⁸ Roth, *op. cit.*, 425.

⁹ Klaff, *op. cit.*, 337.

¹⁰ William Blackstone, *Commentaries On the Laws of England* (1776, reprint of first edition, London: Dawson of Pall Mall, 1966) 1:*440-441.

¹¹ *Ibid.* at *445. Italics in the original. A divorce “*a vinculo matrimonii*” was a “total divorce . . . for some cause of the canonical causes of impediment before-mentioned; and those, existing before the marriage as is always the case of consanguinity; not supervenient, or arising afterwards, as may be the case in affinity or corporal imbecility. . . . This issue of such a marriage, as is thus entirely dissolved, are bastards.” *Ibid.* at *428.

The natural rights is with the father; but if the father is a bankrupt, if he contributed nothing for the child or the family, and if he be improper, for such conduct as was suggested in the Judge's chambers, the Court will not think it right that the child should be with him. . . . That the power of a father over a child, however despotic the law allowed it to be in other respects as to the child, itself, was yet subordinate to the power and constitution of the State, so as not to justify anything contra rempublicam.¹²

The law in England was considered settled; "with perhaps the exception of very early infancy, there is no equality of right between father and mother; but the claim of the former is paramount."¹³

In Blackstone's time, the second-half of the eighteenth century, "the husband and wife [were] one person in law; that is the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband."¹⁴ This condition was called "coverture."¹⁵ A married woman could not sue or be sued without joining her husband as a party, could not make contracts, could not convey or alienate property she owned before the marriage or earned during the marriage, nor could she manage her property.¹⁶ In return, a husband had a legally enforceable responsibility to provide maintenance and support for his wife.¹⁷ Also at English common law, parents had three duties toward their legitimate

¹² *Blisset's Case*, 98 Eng. Rep. 899 (K.B. 1774); see also *King v. Greenhill*, 111 Eng. Rep. 922 (K.B. 1836).

¹³ *Ahrenfeldt v. Ahrenfeldt*, 1 Hoff. Ch. 497, 499, 6 N.Y. Ch. Ann. 1221, 1222 (1840).

¹⁴ Blackstone, *op. cit.*, 1:*430.

¹⁵ *Ibid.*

¹⁶ Salmon, *op. cit.*, 14-18; Terri L. Snyder, *Brabbling Women: Disorderly Speech and the Law in Early Virginia* 16-17 (Ithaca, N.Y.: Cornell University, 2003).

¹⁷ Salmon, *op. cit.*, 77-78.

children: a duty to support or maintain, a duty to protect, and a duty to educate.¹⁸ Although Blackstone's *Commentaries* places these duties on "parents," fathers only were expected to discharge these responsibilities; and, therefore, fathers had the right to custody of their children.¹⁹

The English common law came to England's American colonies and hence to the United States. Prior to the American Civil War, the law in most States followed the English model. However, the English rule was weakened by subsequent American decisions, the first of which was *Commonwealth v. Addicks*.²⁰ In *Addicks*, the Supreme Court of Pennsylvania ruled that the Court was not "bound to decide who is entitled to the guardianship, or to deliver infants to the custody of any particular person."²¹ The Court rejected the arguments of counsel that the father was the "natural guardian of the children [and] had a right to their custody."²² The Court then ruled:

It is to [the children] that our anxiety is principally directed; and it appears to us, that considering their *tender age*, they stand in need of that kind of assistance, which can be afforded by none so well as a mother.²³

¹⁸ Blackstone, *op. cit.*, 1:*434.

¹⁹ Bishop, *op. cit.*, § 1162; *see also State v. Smith*, 6 Me. 462, 464 (1830); *Mercein v. the People ex rel. Barry*, 25 Wend. 64 (N.Y. 1840).

²⁰ *Commonwealth v. Addicks*, 5 Binn. 520, 521 (Pa. 1813); *see Ahrenfeldt*, 1 Hoff. Ch. 500. Professor Zainaldin maintains that *Nickols v. Giles*, 2 Root 461 (Conn. 1796) is the "first American appellate custody dispute," Zainaldin, *op. cit.*, 1052; however, there is no majority opinion reported from the *Nickols* court, *see* 2 Root 461-462.

²¹ *Addicks*, 5 Binn. at 521.

²² *Ibid.*, 520.

²³ *Ibid.*, 521 (*Italics added.*).

This marks the first use of the “tender years” doctrine in the United States.²⁴ In 1813, the children were ten and seven years old. Three years later, the matter was heard again in the Supreme Court. This time, the Court, in an opinion by Chief Justice Tilgman, found that the children were not “in the same situation as formerly.”²⁵ The older girl, whose name was Adelaide, had “arrived at a critical age; every moment is important; and the education of the next three years will probably be decisive of her fate.”²⁶ Chief Justice Tilghman, citing the “impropriety” of the mother’s conduct—she had left the girls’ father to live with her adulterous lover—applied the “best interests of the child” standard, “It is the more incumbent on us, therefore, to guard the children against the consequences of this pernicious [conduct by their mother], and to fortify their minds.”²⁷ The Court then granted custody to the girls’ father. At about the same time the Pennsylvania court decided the second *Addicks* case, the Supreme Court of Judicature of New York, the highest common law court in New York at the time, decided the case *In Re Waldron*.²⁸ Here the court, citing the first *Addicks* case, exercised its discretion to deny a father’s writ of habeas corpus and leave a minor with her grandparents. About three years later, the New York Court of Chancery ruled that, in exercising its discretion, it could and would consult with the minor, if he or she was “competent to form and declare an election, then to allow

²⁴ Ramsay Laing Kelly, “The Tender Years Doctrine: A Defense” *California Law Review* 70 (1982): 335, 340.

²⁵ *Commonwealth v. Addicks*, 2 Sreg. & Rawle 174, 176 (Pa. 1816).

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *In Re Waldron*, 13 Johns. 418 (N.Y. 1816).

the infant to go where she pleased.”²⁹ In this case the “infant” was a thirteen-year-old girl who wished to remain with her mother and her mother’s brother-in-law rather than return to Louisiana with the guardian appointed by her father’s will.

In Re Waldron, *In Re Wollstonecraft*, and *Addicks* were slightly ahead of their time. Other American courts were chipping away at the father’s presumed right to custody of his children, but were doing so more slowly. In the case *Commonwealth v. Briggs*, the Supreme Court of Massachusetts stated, “in general, . . . the father is by law clearly entitled to the custody of his child.”³⁰ However, the Court modified this general rule, “In the case of a child of tender years, the good of the child is to be regarded as the predominant consideration.”³¹ In the case *People ex rel Nickerson v. _____*, the New York Supreme Court of Judicature stated definitively “The father is the natural guardian of his infant children, and in the absence of good and sufficient reasons shown to the court, such as ill usage, grossly immoral principles or habits, what of ability, etc., is entitled to their custody, and education.”³² In the case *Paine v. Paine*, the Supreme Court of Tennessee was “called upon to expound what is the common law relation between the father, the wife and the child.”³³ The Court declared the common law to be “that the father is entitled . . . to the exclusive custody of his children; and that if he have it a court of

²⁹ *In Re Wollstonecraft*, 4 Johns. Ch. 80, 82-83 (N.Y. Ch. 1819).

³⁰ *Commonwealth v. Briggs*, 33 Mass. (16 Pick.) 203, 205 (1834).

³¹ *Ibid.*

³² *The People ex rel. Nickerson v. _____*, 19 Wend. 16 (N.Y. 1837). The original case report gives a blank line in place of the defendant’s name. The court does not explain why the defendant was not named.

³³ *Paine v. Paine*, 23 Tenn. (4 Hum.) 523, 534 (1843).

common law will not deprive him of it but for an abuse of this trust affecting their persons.”³⁴

However, the Court declined to “establish any general rule upon the subject” and declared “the only question left for consideration is, in whose possession will the *interest of the children be best provided for*.”³⁵ The Court looked at the facts of the case to answer the question. *Paine* involved three children: an eight-year-old boy, a six-year-old girl, and a four-year-old boy. The Court exercised its discretion “from the best lights that [the Court’s] knowledge of society” gave them and ordered “that the oldest boy can be better raised by the father . . . , but that the other two are of too *tender an age* to be removed . . . from the fostering care of the mother.”³⁶

By the 1840s, America was getting ready to expand into a continental power, and beginning to industrialize. According to Professor Zainaldin, “With the rise of civil society the father’s sovereign power passed to the chief or government of the nation.”³⁷

In 1848, the United States conquered all Mexican territory north of the Rio Grande, including California.³⁸ Soon after admission to the Union in 1850,³⁹ the California Legislature rejected the Hispano-Mexican legal tradition, which has its roots in Roman law, in favor of the English common law tradition.⁴⁰

³⁴ *Ibid.*

³⁵ *Ibid.*, 536 (Italics added.).

³⁶ *Ibid.*

³⁷ Zainaldin, *op. cit.*, 1071 (internal quotation marks and footnote omitted.).

³⁸ Treaty of Guadalupe Hidialgo, Feb. 2, 1848, U.S.-Mexico, 10 *Stat.* 922.

³⁹ Act of Sept. 9, 1850, ch. 50, 9 *Stat.* 452.

⁴⁰ Act of April 13, 1850, ch. 95, 1850 *Cal. Stat.* 219 (codified at *California Civ. Code* § 22.2 (West 2005)).

English common law on child custody was soon applied by the California Supreme Court in the case of *Graham v. Bennet*. *Graham* involved bigamy and parental kidnapping by the husband. The issue at trial was whether the husband took the children from their mother without her consent and without being married to her, if so he was guilty of abduction. The jury found for the mother and the father appealed. The California Supreme Court reversed the trial court and ruled:

The law declares [the children] shall be legitimate. They are, therefore, in relation to their father, the inheritors of his name, his heirs-apparent, and entitled to look for and demand from him, his care, maintenance and protection. On the other hand, he has the unquestioned right to their custody, control and obedience.⁴¹

English common law was fully applied to child custody matters in California, but only temporarily. The California Supreme Court revisited this issue, but on different facts, in 1860. From that time, the harsh English rule began to fall away.

In the case *Wand v. Wand*, the parties were legally married and divorced. The reason for the divorce was extreme cruelty: Mr. Wand attempted to kill his wife “by snapping a loaded pistol at her breast.”⁴² The trial court granted the divorce and awarded custody of the Wand’s only child, “an interesting girl of some six or seven years of age” to her father.⁴³ On appeal, the Supreme Court stated the common law rule:

that from parentage necessarily flow both the right and duty to educate and maintain the offspring; and from these flows also the right to their custody; that as between the parents, the law having placed the husband at the head of the family, and made his will paramount whenever he and the wife differ in judgment, and

⁴¹ *Graham v. Bennet*, 2 Cal. 503, 506-507 (1852).

⁴² *Wand v. Wand*, 14 Cal. 512, 514 (1860).

⁴³ *Ibid.*, 515.

having likewise vested in him the property from which the children must be supported, it follows, of necessity that he is entitled, in preference to her, to their custody.⁴⁴

However, the Court modified this rule by holding that the public's interest in the education and morals of the children, and the children's own interests are superior to those of the parents; therefore, the "good of the child should be the leading consideration."⁴⁵ To sum up:

the rule would seem to be, that *prima facie*, after a separation, the father is entitled to the custody of the children, unless there be a divorce for his fault; in which case, the mother is entitled; yet, that this *prima facie* right must always be subject to the superior claims, that is, the good of the children.⁴⁶

The *Wend* case provides the most comprehensive statement of the common law on child custody in California in the nineteenth century.

Simultaneously, the California Legislature was acting to alter the common law. In 1851, the California Legislature enacted the State's first divorce law.⁴⁷ Although not directly on point, section 7 of that Act states:

In any action for a divorce, the court may, during the pendency of the action, or at the final hearing, or afterwards, make such order for the support of the *wife, and the maintenance and education of the children* of the marriage as may be just, and may at any time thereafter annul, vary, or modify such order, as the interest and the welfare of the children may require.⁴⁸

The implication is that the wife would have custody of the children, otherwise why would the

⁴⁴ *Ibid.*, 516.

⁴⁵ *Ibid.*, 516-517.

⁴⁶ *Ibid.*, 517.

⁴⁷ Act of March 25, 1851, ch. 20, 1851 *Cal. Stat.* 186-187.

⁴⁸ *Ibid.*, § 7 (Italics added.).

court need to make an order for the children's support and education. Also, this order is to be made with the best interests of the children in mind. In 1872, the California Legislature enacted the California Civil Code. Section 138 of the Code states:

In an action for divorce the court may, before or after judgment, give such direction for the custody, care, and education of the children of the marriage as may seem necessary or proper and may at any time vacate or modify the same.⁴⁹

Section 246 of the Code sets the standards which ought to guide the courts in awarding the custody of children. The first consideration is the best interests of the child "in respect to its temporal and its mental and moral welfare, and if the child be of a sufficient age to form an intelligent preference, the court may consider that preference in determining the question."⁵⁰ The second consideration is the tender years doctrine:

As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right; but all other things being equal, if the child be of tender years, it should be given to the mother; if it be of an age to require education and preparation for labor or business, then to the father.⁵¹

In 1905, section 138 was broadened:

In actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper and may at any time vacate or modify the same.⁵²

Section 246 of the Code was unaffected by this amendment and remained a guide for the courts

⁴⁹ *California Civil Code* § 138 (Deerings 1899).

⁵⁰ *California Civil Code* § 246(1) (Deerings 1899).

⁵¹ *California Civil Code* § 246(2) (Deerings 1899).

⁵² Act of March 3, 1905, ch. 49, 1905 *Cal. Stat.* 43 (codified at *California Civil Code* § 138 (Deerings 1909)).

in awarding custody; however, it was not until 1930 in the case *Taber v. Taber* that the California Supreme Court explicitly linked sections 138 and 246.⁵³

In 1931, the California Legislature amended section 138 of the Civil Code by adding the following language:

In awarding the custody the court is to be guided by the following considerations:

- (1) By what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; and if the child is of sufficient age to form in intelligent preference, the court may consider that preference in determining the question;
- (2) As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of *tender years*, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father.⁵⁴

This language, which is virtually identical to Civil Code section 246, removed any lingering doubt about the application of both the “best interests of the child” doctrine and the “tender years” doctrine in divorce cases. Further amendments in 1951 did not substantively change the standard.⁵⁵ For the next forty-one years, the “tender years” doctrine was the touchstone in divorce proceedings in California.

Professor Zainaldin believed that the changes in family law away from the absolutist position on child custody to a more flexible standard involving the “best interests of the child” and the “tender years” doctrines “was grounded on a conception of the family as companionate

⁵³ *Taber v. Taber*, 209 Cal. 755, 756, 290 P. 36 (1930).

⁵⁴ Act of June 15, 1931, ch. 930, § 1, 1931 *Cal. Stat.* 1928, 1929 (codified at *California Civil Code* § 138 (Deerings 1937)).

⁵⁵ Act of July 23, 1951, ch. 1700, § 6, 1951 *Cal. Stat.* 3910, 3912.

and the marriage relation as a copartnership,”⁵⁶ among other reasons. Professor Zainaldin wrote, “As courts came to view empathy and affection as the basis of family relationships, the enforcement of ‘superior’ legal rights derived from the English model of patriarchy now ran counter to the purpose of family life. . . . Equalitarianism, changing sexual roles, domestic feminism, and novel ideas about children fragmented familial authority.”⁵⁷ It is altogether proper that this should happen in California, because, although California rejected the Hispano-Mexican civil law tradition generally, California retained one very important aspect of it, community property.⁵⁸

The civil law viewed marriage as a partnership in which the partners shared equally in the economic benefits and burdens.⁵⁹ In her article on the politics of community property in nineteenth-century California, Donna Schuele wrote:

The delegates [to the California Constitutional Convention in 1849] knew that California was a place where fortunes could be made and lost in a day, and that the new state would be in no position to provide for the welfare of its inhabitants. Trying to protect the wife and family from the misfortunes of an unlucky or unscrupulous husband seemed a laudable goal. One delegate remarked, . . . I claim that it is due to every wife, and to the children of every family, that the wife’s property should be protected.⁶⁰

The California Constitution of 1849 included a provision which at least seemed to protect a

⁵⁶ Zainaldin, *op. cit.*, 1086.

⁵⁷ *Ibid.*, 1086-1087.

⁵⁸ Schuele, *op. cit.*, 249.

⁵⁹ *Ibid.*, 249.

⁶⁰ *Ibid.*, 258 (Ellipsis added, footnote and internal quotation marks omitted.).

wife's separate property and establish a community property system.⁶¹ The community property law system was further enacted by statute.⁶² Thus, women became secured in their own property and in the right to share equally in the property of the community. Therefore, one of the justifications for granting father's paramount rights—father's had the means to support the children—was eliminated. Throughout the rest of the nineteenth century, women worked to expand community property rights of women as well as to secure women's suffrage. Leaders in both efforts included Nettie C. Tator of Santa Cruz and Marietta Stow of San Francisco.⁶³ In 1872, Ms. Tator addressed a joint committee of the California Legislature. Although speaking specifically about the treatment of marital property in a probate context, her remarks are equally relevant in the context of child custody. She said, "You say this is necessary to protect the interests of her children. Who, I ask, looks after the interests of children more than mothers do?"⁶⁴ Ms. Schuele concludes her article, "[I]n the Golden State, advocacy of joint property remained a politically potent force for much [of the nineteenth century], and with it attempts to use marital property law to empower women rather than simply to protect them."⁶⁵ Examination of the leading case law and legislative enactments of this period shows that women were empowered, at least in regards to the custody of their children.

⁶¹ California Constitution of 1849, art. xi, § 14; *see also* Schuele, *op. cit.*, 260.

⁶² Act of April 17, 1850, ch. 103, § 2, 1850 *Cal. Stat.* 254-255; *see also* Schuele, *op. cit.*, 262.

⁶³ Schuele, *op. cit.*, 268-280.

⁶⁴ *Ibid.*, 272 (Original footnote omitted.).

⁶⁵ *Ibid.*, 281.

III. THE “TENDER YEARS” DOCTRINE TRIUMPHANT

Until it was repealed in the 1970s, the “tender years” doctrine enjoyed legislative and judicial approval in California. Indeed, some commentators believed that the state of the law was such that a de facto presumption in favor of mothers existed. In the case, *Roche v. Roche*, the California Supreme Court, by a vote of five-to-two, overturned a trial court’s order awarding physical custody of an eight-year-old girl to her paternal grandparents.⁶⁶ The holding in *Roche* was criticized by the Court of Appeal in the case *Shea v. Shea*.⁶⁷ The Judge Bray of Court of Appeal, writing for a unanimous panel, said, “California has, in effect, adopted the harsh rule that the right of a fit and proper parent to have the custody of his child is somewhat in the nature of a property right and paramount to the welfare and best interests of the child.”⁶⁸ However, despite the grumbling of appellate court judges, the law of the land remained presumptively in favor of mothers.

In the case of *Washburn v. Washburn*, the Court of Appeal refused to modify a trial court’s custody award to the mother.⁶⁹ The Court, after paying “lip service to the best interests of the child doctrine,”⁷⁰ declared the law to be:

⁶⁶ *Roche v. Roche*, 25 Cal. 2d 141, 144, 152 P.2d 999 (1944).

⁶⁷ *Shea v. Shea*, 100 Cal.App.2d 60, 223 P.2d 32 (1950).

⁶⁸ *Ibid.* at 65. See also Joseph Landisman, “Custody of Children: Best Interests of Child v. Rights of Parents” 33 *California Law Review* 33 (1945): 306, 308-311 (1945); Marilyn C. Lazar, “Persons—Parent and Child—Custody of Children” *Southern California Law Review* 19 (1954): 72-72. It should be noted that both *Roche* and *Shea* involved a custody dispute between one parent and the grandparents of the child, not a dispute between two parents.

⁶⁹ *Washburn v. Washburn*, 49 Cal.App.2d 581, 122 P.2d 96 (1942).

⁷⁰ Landisman, *op. cit.*, 309.

It is not open to question, and indeed it is universally recognized, that the mother is the natural custodian of her young. This view proceeds on the well known fact that there is no satisfactory substitute for a mother's love. So true is this that in this state the code exacts that she shall have custody of her child, everything else being equal, unless the child has reached the age which necessitates a particular education or preparation for its life work. In the case of girls it is obvious that they are particularly in need of the sympathy, affection, consideration and tender care which only a mother can give.⁷¹

However, in some cases, mothers were denied custody of their children. Three such examples are *Kelly v. Kelly*,⁷² *Bush v. Bush*,⁷³ and *Clarke v. Clarke*.⁷⁴ Each of these cases involved a divorce proceeding brought by the husband against the wife for extreme cruelty, one of the few grounds available for divorce prior to passage of the Family Law Act of 1969.⁷⁵ In two cases, the husband was granted custody of the minor child. In *Clarke*, custody was granted to the wife. In each case the appellate court affirmed the judgement of the trial court.

On November 8, 1957, Richmond K. Kelly, Jr. filed a complaint for divorce in the

⁷¹ *Washburn*, 49 Cal.App.2d 588 (Citation omitted.).

⁷² *Kelly v. Kelly*, 153 Cal.App.2d 469, 343 P.2d 391 (1959).

⁷³ *Bush v. Bush*, 81 Cal.App.2d 695, 185 P.2d 38 (1947).

⁷⁴ *Clarke v. Clarke*, 35 Cal.2d 259, 217 P.2d 401 (1950).

⁷⁵ The Family Law Act, ch. 1608, sec. 8, § 4506, 1969 *Cal. Stat.* 3312, 3324 (now codified at *California Family Code Annotated* § 2310 (West 2005)). The statute operable in the 1940's was California Civil Code section 92 which stated, "Divorces may be granted for any of the following causes: One. Adultery. Two. Extreme cruelty. Three. Wilful desertion. Four. Wilful neglect. Five. Habitual intemperance. Six. Conviction of a felony. Seven. Incurable insanity." *California Civil Code Annotated* § 92 (Deerings 1941). "Extreme cruelty" was defined as "the wrongful infliction of grievous bodily injury, or grievous mental suffering upon the other by one party to the marriage." *California Civil Code Annotated* § 94 (Deerings 1941).

California Superior Court in and for the County of San Diego.⁷⁶ The complaint alleged that Mrs. Kelly was unfit to have the custody and control of the couple's minor child, Richmond K. Kelly, III, aged about two.⁷⁷ The complaint also alleged that Mrs. Kelly had committed adultery and deserted her husband.⁷⁸ The Kelly's divorce appears to have been very contentious. The trial court file contains restraining orders,⁷⁹ injunctions,⁸⁰ and many motions.⁸¹ At trial, the court found that "[Mr. Kelly] is a fit and proper person to have the care, custody and control of Richmond K. Kelly, III, the minor child of the parties; [Mrs. Kelly] is not a fit person to have the care, custody or control of said minor child."⁸² The court also found that Mrs. Kelly was an adulteress and had treated her husband with "extreme cruelty and [had] wrongfully inflicted upon him grievous mental suffering."⁸³ The trial transcript is not included in the superior court's records; however, the Court of Appeal's published decision quotes the trial court:

The Court is faced with what is for the best interests of this young child, considering the physical well being of the child, together with his moral well being.

Now, from the moral standpoint, by her actions within the last several

⁷⁶ Complaint for Divorce at 1, *Kelly v. Kelly*, No. 219895 (Super. Ct. San Diego Co. filed Nov. 8, 1957).

⁷⁷ *Ibid.*, 2.

⁷⁸ *Ibid.*

⁷⁹ Order to Show Cause and Temporary Restraining Order at 1, *Kelly*, No. 219895.

⁸⁰ Preliminary Injunction at 1, *Kelly*, No. 219895.

⁸¹ *See e.g.* Notice of Motion to Strike Complaint and of Hearing on Demurrer at 1, *Kelly*, No. 219895; Notice of Motion to Change Venue at 1, *Kelly*, No. 219895.

⁸² Findings of Fact and Conclusions of Law at 2, *Kelly*, No. 219895.

⁸³ *Ibid.*, 3.

years, the defendant has proven herself to be morally unfit to have the custody of this child. In addition to that moral unfitness, which appears to the court to be still present, the defendant manifest a certain instability emotionally, I take it.⁸⁴

The Court of Appeal concluded:

In the instant case the trial court stated that he was faced with what was for the best interests of the child involved, considering its physical well being, together with its moral well being, and that the defendant had from a moral standpoint, by her actions within the past several years, proved herself to be morally unfit to have the child. . . . While [Mrs. Kelly] claims that she is ashamed of her conduct and the record supports the conclusion that she did take proper physical care of the child, fitness to have his custody also requires an environment which will not be detrimental to the child's character and morals. A review of the entire record herein compels us to conclude that the trial court did not abuse its discretion in awarding the custody of the child involved to [Mr. Kelly].⁸⁵

On December 31, 1943, Ronald A. Bush filed a complaint for divorce in the California Superior Court in and for the County of Orange.⁸⁶ Only the ultimate fact of “extreme cruelty, in that [Mrs. Bush] has wrongfully and without cause or provocation inflicted upon [Mr. Bush] grievous mental suffering” is alleged.⁸⁷ Pauline Bush filed an answer on January 21, 1944 in which she denied “generally and specifically each and all of the allegations” of extreme cruelty.⁸⁸ She did not allege any facts in defense or affirmative defenses. However, on October 4, 1944, just one month before trial, Mrs. Bush filed an amended answer to the complaint in which she generally plead “that since the marriage of the parties hereto, [Mr. Bush] has been guilty of

⁸⁴ *Kelly*, 173 Cal.App.2d 472.

⁸⁵ *Ibid.*, 475-476.

⁸⁶ Complaint for Divorce at 1, *Bush v. Bush*, No. 42332 (Super. Ct. Orange Co. filed Dec. 31, 1943).

⁸⁷ *Ibid.*, 2.

⁸⁸ Answer to Complaint at 1, *Bush* (No. 42332).

extreme cruelty and he has wrongfully and without cause or provocation inflicted upon [Mrs. Bush] grievous mental suffering.”⁸⁹ The matter was tried on November 4, 1944 by the Honorable Kenneth E. Morrison, Judge of the Superior Court, sitting without a jury.

On November 20, 1944, Judge Morrison issued his findings of fact and conclusions of law. In addition to finding that Mrs. Bush “has been guilty of extreme cruelty in that she has been wrongfully and without cause or provocation inflicted upon the plaintiff [Mr. Bush] grievous mental cruelty.”⁹⁰ In addition, Judge Morrison found:

That Ronald Mitchell Bush, the minor child of the parties hereto, was sickly in his early years and was weak at the time the defendant took work [at a Marine base officer’s club] and regardless of said fact, [Mrs. Bush] left said child in the care of others while she was away from home at work and on at least one occasion said child became seriously ill while in the care of others; that [Mrs. Bush], prior to the bringing of this action, associated with at least one man who was not her husband and [Mrs. Bush] is not a fit or proper person to have the care, custody or control of said Ronald Mitchell Bush, said minor child; that [Mr. Bush] is a fit and proper person to have the care, custody and control of said minor child and [Mr. Bush] is able to give said child a good home with the mother of [Mr. Bush] who agrees to care for said child.⁹¹

He awarded custody of Ronald to Mr. Bush.⁹² This judgment was upheld on appeal.⁹³

On April 29, 1946, Mrs. Bush filed an Affidavit In Re Modification of Custody Order.⁹⁴ In her affidavit, Mrs. Bush alleged that Mr. Bush worked long hours and was active in his lodge,

⁸⁹ Amendment to Answer to Complaint at 1, *Bush*, (No. 42332)

⁹⁰ Findings of Fact and Conclusions of Law, at 4, *Bush* (No. 42332).

⁹¹ *Ibid.*, 8.

⁹² *Ibid.*, 9.

⁹³ *Bush v. Bush*, 72 Cal.App.2d 487, 164 P.2d 774 (1946).

⁹⁴ Affidavit In Re Modification of Custody Order, at 1-4, *Bush* (No. 42332).

and, therefore, has no time for young Ronald, now aged five years; that Mr. Bush's mother, Ronald's grandmother and primary care-giver, is ill and under the care of a physician.⁹⁵ Further, Mrs. Bush alleges that if she were given custody of Ronald, she would enroll him in "Chadwick Seaside School for boys and girls in Rolling Hills."⁹⁶ Unfortunately, the court record is silent as to the evidence presented at the hearing on the order to show cause; however, the appellate opinion reveals that Mrs. Bush's

chief causes of complaint are three: (1) That Ronald's table manners were poor; (2) that he was not sufficiently disciplined; (3) that on numerous occasions she drove from Redondo to Santa Ana to get Ronald for weekends but found no one home and had not been notified of their absence.⁹⁷

The Court of Appeal, citing *Phillips v. Phillips*,⁹⁸ ruled that Civil Code section 138, subdivision 2, "does not give the mother the absolute right to the custody of a child of tender years. The qualifying clause 'but all other things being equal,' still leaves a large measure of discretion with the trial court."⁹⁹ Inasmuch as Judge Morrison had exercised his discretion to deny Mrs. Bush's request, the Court of Appeal saw no reason to disturb the matter.

On March 29, 1948, Robert E. Clarke filed a complaint for divorce in the California Superior Court in and for the County of Los Angeles.¹⁰⁰ The complaint alleges that Mrs. Clarke

⁹⁵ *Ibid.*, 2.

⁹⁶ *Ibid.*

⁹⁷ *Bush*, 81 Cal.App.2d 697.

⁹⁸ *Phillips v. Phillips*, 48 Cal.App.2d 404, 119 P.2d 736 (1941).

⁹⁹ *Bush*, 81 Cal.App.2d 699.

¹⁰⁰ Complaint for Divorce at 1, *Clarke v. Clarke*, No. D357816 (Super. Ct. L.A. Co. filed Mar. 29, 1948).

is a “fit and proper person” to have custody of the couple’s minor child, Michele C. Clarke, aged twenty months.¹⁰¹ Significantly, Mr. and Mrs. Clarke had a written agreement between themselves which disposed of their community property and made arrangements for Michele’s custody.¹⁰² The agreement was dated February 17, 1948 and was filed with the Superior Court on May 10, 1948.¹⁰³ Paragraph 3 of the agreement is significant. It read:

Second Party [that is, Mrs. Clarke] shall have the care custody and control of the minor child of the parties thereto, namely MICHELE C. CLARKE, for the entire year, with the exception of the months of July, August, and the first two weeks of September of each year, during which period of time the care custody and control of the minor child hereto shall be with First Party [that is, Mr. Clarke]. Both parties shall have the right to visit said child at all reasonable times, and neither of the parties hereto may take the said child out of the State of California, without the written consent of the other.¹⁰⁴

An interlocutory order for divorce was entered on May 10, 1949, which included the terms of the settlement agreement quoted above.¹⁰⁵ This case would have remained unremarkable had Mrs. Clarke not moved to New York in July 1948. In October 1948, Mrs. Clarke took Michele to her new home in New York City with Mr. Clarke’s permission.¹⁰⁶ However, when Mr. Clarke learned that Mrs. Clarke was having an affair with a dental student and intended to marry him once the divorce was final; Mr. Clarke went to New York and kidnapped Michele.¹⁰⁷ Mr. and

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*, 2.

¹⁰³ Property Settlement Agreement and Agreement for Support, at 1, *Clarke* (D358816).

¹⁰⁴ *Ibid.* (Capitalization in the original.).

¹⁰⁵ Interlocutory Judgment of Divorce (Default), at 1, *Clarke* (D358816).

¹⁰⁶ *Clarke*, 35 Cal. 2d 260.

¹⁰⁷ *Ibid.*, 261.

Mrs. Clarke filed competing petitions for a writ of habeas corpus and for an order modifying the award of custody which were heard on April 7, 1949.¹⁰⁸ The trial court modified the order of May 10, 1948 and Mr. Clarke appealed alleging abuse of discretion.¹⁰⁹

On appeal, the California Supreme Court ruled that

[a]n abuse of discretion must be clearly established before the reviewing court will interfere with an award of custody. . . . It is the welfare of child and the shortcomings of the respective parties which is determinative. The court exercised a reasonable discretion in concluding in effect that “other things” were at least “equal.”¹¹⁰

These three examples show that the California did more than pay “lip service” to the doctrine of the best interests of the child.¹¹¹ Although the California Supreme Court never explicitly overruled its holding in *Roche*,¹¹² it clearly abandoned the de facto presumption in favor of mothers, if it ever existed. Trial courts exercised discretion in favor of children and only awarded the custody of children to their mothers when that really was in the minor’s best interest.

These three case, *Bush v. Bush*, *Kelly v. Kelly*, and *Clarke v. Clarke*, all arose during or just after World War II—a time when women were moving into the work force to take the jobs of men who had gone to war, and thereby became more financially, socially, and politically independent. Logically, one would expect more emphasis on the “tender years” doctrine specifically and on mothers being given custody of their children after a divorce. However, as

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*, 262.

¹¹¹ Landisman, *op. cit.*, 309.

¹¹² *Roche v. Roche*, 25 Cal. 2d 141, 144, 152 P.2d 999 (1944).

the old saw would have it, sauce for the goose is sauce for the gander, fathers came to be viewed as more than mere breadwinners, but also as care-givers to their children.

IV. THE DECLINE OF THE “TENDER YEARS” DOCTRINE

Criticism of any presumption other than the best interests of the child grew during the 1950s through 1970s. This was a time when social changes begun during World War II were being recognized in the legal and political arenas. In 1953, the United States Senate passed and sent to the House of Representatives a proposed constitutional amendment.¹¹³ The text of the proposed amendment read:

Equal rights under the law shall not be denied or abridged by the United States or any State on account of sex. The provisions of this article shall not be construed to impair any rights, benefits, or exemptions now or hereafter conferred by law upon persons of the female sex.¹¹⁴

The second sentence of the proposed amendment was intended to constitutionalize—or to protect from becoming unconstitutional—certain State laws intended to protect women, among them laws giving women a preference for custody of minor children after a divorce or separation.¹¹⁵ The language “shall not be construed to impair any rights, benefits, or exemptions now or hereafter conferred by law, upon persons of the female sex,” the so-called Hayden rider, after Sen. Carl Hayden (D-Ariz.), might also have been intended to kill the proposal in the Congress

¹¹³ *Cong. Rec.* 83d Cong., 1st sess., 1953, 99, pt. 7:8951-8974; “Equal Rights Plan Adopted by Senate,” *New York Times*, July 17, 1953, p. 10. Among the senators voting against the amendment was Prescott Bush (R-Conn), father of President George H.W. Bush and grandfather of President George W. Bush. *Ibid.*

¹¹⁴ S.J. Res. 49, 83d Cong., 1st sess., *Cong. Rec.* 1953, 99, pt. 7:8973.

¹¹⁵ *Cong. Rec.* 83d Cong., 1st sess., 1953, 99, pt. 7:8951-8974; “Equal Rights Plan Adopted by Senate,” *New York Times*, July 17, 1953, p. 10. The United States Supreme Court upheld State laws protecting women beginning with *Muller v Oregon* 208 U.S. 412 (1908).

because the rider's qualification was "not acceptable to women who want equal rights under the law. It is under the guise of so-called 'rights' or 'benefits' that women have been treated unequally and denied opportunities which are available to men."¹¹⁶ In reporting on the Senate's action, the *New York Times* observed:

The question of rights versus privileges for women is one that has spilt the feminist movement in this country almost from its beginning. It was one of the reasons for the division into the National Woman's Party and the League of Woman Voters soon after ratification of the Nineteenth Amendment to the Constitution gave women the right to vote.¹¹⁷

The proposed constitutional amendment, including the Heyden rider, died in the House of Representatives.¹¹⁸

By 1966, "many lawyers, psychiatrists and psychologists [were] beginning to question not only the criteria for fitness but the basic concepts of a child's welfare that now govern court decisions."¹¹⁹ Doctor Stanley Lessen, editor-in-chief of the *American Journal of Psychotherapy* said, "Relationships between mothers, fathers and their communities are changing constantly."¹²⁰

¹¹⁶ Citizens' Advisory Council on the Status of Women, *The Proposed Equal Rights Amendment to the United States Constitution: A Memorandum* (Washington, D.C.: Citizens' Advisory Council on the Status of Women, 1970) 2 reprinted in Catharine Stimpson, ed., *Women and the "Equal Rights" Amendment: Senate Subcommittee Hearings on the Constitutional Amendment, 91st Congress* (New York: R.R. Bowker Co., 1972) 264 (internal foot note omitted.); Mary Frances Berry, *Why ERA Failed: Politics, Women's Rights, and the Amending Process of the Constitution* (Bloomington, Ind.: Indiana University Press, 1986) 60.

¹¹⁷ "Equal Rights Plan Adopted by Senate," *New York Times*, July 17, 1953, p. 10.

¹¹⁸ *Cong. Rec.*, 83d Cong., 1st sess., 1953, 99, pt. 7: ____.

¹¹⁹ Katherine Davis Fishman, "Children at Stake," *New York Times*, Dec. 11, 1966, p. 348.

¹²⁰ *Ibid.*

The Task Force on Family Law and Policy of the Citizens' Advisory Council on the Status of Women reported in 1968:

At the dissolution of a marriage the custody of the children should be awarded in accordance with their best interests. This is the general rule today. However, in some States, the mother is automatically given preference in custody of children of tender years. The task force believes that there should be no automatic preference of a parent on the basis of sex and that neither the mother nor the father should have a superior right to custody.¹²¹

A presidential task on women's rights and responsibilities advocating support of the Equal Rights Amendment observed, "It [the ERA] would require that women not be given automatic preference for custody of children in divorce suits. The welfare of the child would become the primary criterion in determining custody."¹²²

The "tender years" doctrine came to be viewed as discriminatory against both women and men. In hearings before the United States Senate in May 1970, Aileen Hernandez, president of the National Organization For Women (NOW), testified, "The National Organization for Women is in favor of paternity benefits. We feel there is a great deal to be said for husbands being able to be with their wives at the time when their children are being born."¹²³ Ms. Hernandez's colleague, Brenda Fasteau, vice president for legislation of NOW, testified

¹²¹ Citizens' Advisory Council on the Status of Women, *Report Task Force on Family Law and Policy*, (Washington, D.C.: Government Printing Office, 1968) 22, reprinted in Stimpson, *op. cit.*, 427.

¹²² The President's Task Force on Women's Rights and Responsibilities, *A Matter of Simple Justice* (Washington, D.C.: Government Printing Office, 1970) 5 reprinted in Stimpson, *op. cit.*, 485.

¹²³ Senate Subcommittee on Constitutional Amendments of the Committee on the Judiciary, *Equal Rights 1970 Hearing, 91st Congress, 2d. Sess. on Proposing an Amendment to the Constitution of the United States Relative to Equal Rights for Men and Women*, 1970, reprinted in Stimpson, *op. cit.*, 47.

Obviously the child [of divorcing parents] should go to the parent who will take the best care of him or her, but I think at the moment that there is almost a legal presumption that the mother should get the child unless she is absolutely incapable of taking care of that child.

One possibility, which sounds somewhat more enlightened to me, would be to consider the age and sex of the child along with generally accepted (and respected) psychological theories, in order to help determine which parent should get custody, that is, what is best for the child.¹²⁴

Author Gloria Steinem testified, “Part of the program of Women’s Liberation is a return of fathers to their children. If laws permit women equal work and pay opportunities, men will then be relieved for their role as sole breadwinner. Fewer ulcers, fewer hours of meaningless work, equal responsibility for his own children: these are a few of the reasons that Women’s Liberation is Men’s Liberation.”¹²⁵

In an article published in the *New Mexico Law Review*, Jennie D. Behles and Daniel J.

Behles wrote:

In an earlier age when a woman’s place truly was in the home, raising the children, a small child was placed with the mother because the father worked for a living all day and could not properly supervise his child. Also, a woman was judged better able to perform the life functions of cooking for, clothing, cleaning, and feeding the child. In that earlier day this was probably true. But the facts today are different. Rare is the divorced woman whose alimony and property settlement is so generous that she can afford not to work. In this day of compulsory education when the child, after age six, is supervised daily by professional teachers for most of the day, the necessity of having a parent at home is decreased. The average father no longer works 60 hours a week, but 35 or 40. Child day care center, babysitter, and the new labor-saving technology in the modern home makes it practical for a father to care properly for a child while maintaining a full-time job. In short, there is often very little difference between a father and a working mother in the amount of time and attention they can devote to raising a child properly. The very social forces which have given rise to the agitation for an Equal Rights Amendment have dissolved many of the differences

¹²⁴ *Ibid*, 48-49.

¹²⁵ *Ibid.*, 105.

between the father and the mother which once made the preference for the mother justifiable.¹²⁶

Behles and Behles also wrote:

The mass of publicity about the “Woman’s Lib” movement ... sometimes creates the impression that these proposals are solely attempts to improve the lot of women. Actually, as we shall see, there are many areas exist in law where men are being discriminated against, and the proposed amendments will work in their favor. Particularly is this true in the area of divorce and separation.¹²⁷

In 1974, Elizabeth Spalding, National Coordinator of the Task Force on Marriage and Divorce for NOW, clarified her organizations policy to be “that fathers are ‘entitled to equal rights of custody.’”¹²⁸ During the ratification debate on the Equal Rights Amendment, Barbara Allen

Babcock, law professor at Stanford University Law School, opined:

the Equal Rights Amendment would prohibit both statutory and common law presumption about which parent was the proper guardian based on the sex of the parent. Given present social realities and subconscious values of judges, mothers would undoubtedly continue to be awarded custody in the preponderance of situations, but the black letter law would no longer weight the balance in this direction.¹²⁹

Mary A. Delsman, a very partisan supporter of the ERA, asserted, “Sexually based laws or presumptions of this sort would be invalid under ERA. Custody cases would have to be decided according to the welfare of those affected, without preference toward either parent because of

¹²⁶ Jennie D. Behles and Daniel J. Behles, “Equal Rights in Divorce and Separation,” *New Mexico Law Review* 3 (1973): 133.

¹²⁷ *Ibid.*, 119.

¹²⁸ *Family Law Reporter* (Washington, D.C.: Bureau of National Affairs, 1974) 1:2056; see also Roth, *op. cit.*, 423.

¹²⁹ Barbara Allen Babcock, et al., *Sex Discrimination and the Law: Causes and Remedies* 736 (Boston: Little, Brown & CO., 1975).

sex.”¹³⁰ The Equal Rights Amendment failed to be ratified by three-fourths of the States; nevertheless, the goal of gender-neutral child custody standards was achieved through other means.

The United States Supreme Court began to view sex as a suspect classification under the Fourteenth Amendment. In *Reed v. Reed*, a unanimous Court found an Idaho law which gave similarly situated men a mandatory preference over women in appointment as administrators in probate proceedings to be an unconstitutional violation of the equal protection clause.¹³¹ A year later, in *Stanley v. Illinois*, the Supreme Court ruled that a Illinois law which treated unwed fathers as strangers to their illegitimate children violated the due process clause of the Fourteenth Amendment.¹³² A New York trial court specifically found the tender years doctrine unconstitutional on largely Fourteenth Amendment grounds.¹³³

In an article published in the *Southwestern University Law Review* in 1975, Judge Everette M. Porter and Mr. Joseph P. Walsh wrote, “[I]n no area of the law was change more needed or more welcome, than in the area of child custody.”¹³⁴ Against this social, legal and political background, California made the change by abandoning the tender years doctrine.

¹³⁰ Mary A. Delsman, *Everything You Need to Know About ERA* 194 (Riverside, Calif.: Meranza Press, 1975).

¹³¹ *Reed v. Reed*, 404 U.S. 71, 76-77, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971).

¹³² *Stanley v. Illinois*, 405 U.S. 645, 649, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (Opinion by White, J).

¹³³ *Watts v. Watts*, 77 Misc. 2d 178, 350 N.Y.S. 2d 285 (Fam. Ct. 1973); see also Strom, *op. cit.*, 877.

¹³⁴ Everette M. Porter & Joseph P. Walsh, “The Evolution of California’s Child Custody Laws: A Question of Statutory Interpretation,” *Southwestern. University Law Review* 7 (1975): 1.

Assembly Bill 662, sponsored by Assembly Member John F. Dunlap (D-Napa), was signed by Governor Ronald Reagan in 1972.¹³⁵ This act amended section 4600 of the Civil Code to read, in relevant part,

In any proceeding where there is at issue the custody of a minor child, the court may, ... make such order for the custody of such child during his minority as may seem just and proper. ... Custody should be awarded in the following order of preference: (a) To either parent according to the best interests of the child.¹³⁶

Although the language of the statute has been amended several times, the best interests of the child standard remains the law in California. The current law in California is found at sections 3010, 3011, 3020 and 3040 of the Family Code. Section 3010 states:

- (a) The mother of an unemancipated minor child and the father, if presumed to be the father under Section 7611, are equally entitled to the custody of the child.
- (b) If one parent is dead, is unable or refuses to take custody, or has abandoned the child, the other parent is entitled to custody of the child.¹³⁷

Section 3020 defines the concept of “best interests of the child” at least as well as such a nebulous concept may be defined in statute:

- In making a determination of the best interest of the child ... , the court shall, among any other factors it finds relevant, consider all of the following:
- (a) The health, safety, and welfare of the child.
 - (b) Any history of abuse by one parent or any other person seeking custody against any of the following:
 - (1) Any child to whom he or she is related by blood or affinity or with whom he or she has had a caretaking relationship, no matter how temporary.
 - (2) The other parent.
 - (3) A parent, current spouse, or cohabitant, of the parent or person seeking

¹³⁵ Act of Aug. 17, 1972, ch. 1007, 1972 *Cal. Stat.* 1854 (codified at *California Civil Code Annotated*. § 4600 (Deerings 1974); repealed Act of July 11, 1992, ch. 162, 1992 *Cal. Stat.* 463.

¹³⁶ *Ibid.*

¹³⁷ *California Family Code Annotated* § 3010 (West 2005).

custody, or a person with whom the parent or person seeking custody has a dating or engagement relationship.

....

(c) The nature and amount of contact with both parents, except as provided in Section 3046.

(d) The habitual or continual illegal use of controlled substances or habitual or continual abuse of alcohol by either parent.¹³⁸

Section 3020 states:

(a) The Legislature finds and declares that it is the public policy of this state to assure that the health, safety and welfare of children shall be the court's primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children. The Legislature further finds and declares that the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child.

(b) The Legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where the contact would not be in the best interest of the child, as provided in Section 3011.

(c) Where the policies set forth in subdivision (a) and (b) of this section are in conflict, any court's order regarding physical or legal custody or visitation shall be made in a manner that ensures the health, safety, and welfare of the child and the safety of all family members.¹³⁹

Section 3041, subdivision (a) states, in relevant part, "Custody should be granted in the following order of preference according to the best interests of the child as provided in Sections 3011 and 3020: (1) To both parents jointly ... or to either parent. In making an order granting custody to either parent, the court ... shall not prefer a parent as custodian because of that parent's sex."¹⁴⁰

Building on the momentum of the 1940s, the 1960s and 1970s saw a great expansion of women's

¹³⁸ *California Family Code Annotated* § 3011 (West 2005).

¹³⁹ *California Family Code Annotated* § 3020 (West 2005).

¹⁴⁰ *California Family Code Annotated* § 3041 (West 2005).

rights though legislation, with it came a corresponding expansion the rights of fathers to have custody of their children. The best interests of the child only now control child custody decisions in California.¹⁴¹

V. CONCLUSION

In history's first recorded child custody dispute, King Solomon of Israel was asked to award the custody of a child to one of two harlots.¹⁴² Although his method was crude and even barbaric, King Solomon applied the best interests of the child standard to determine which of the women ought to be mother of the living child. Today, judges also apply the best interests of the child test. The best interests of the child standard is used in international law as well as in California and most States.¹⁴³ Prior presumptions under Roman law, or English law served those societies, California is now served by the best interests of the child test. Together with community property rights, which gave them the means to support, protect and educate their children, the tender years doctrine served its purpose to empower women to take custody of their children after their marriages were broken. However, as women gained social and political equality with men, the need for the tender years doctrine passed away to be replaced by the best interest of the children.

¹⁴¹ The best interests of the child standard is not free of criticism. Ramsay Laing Klaff suggests, perhaps tongue-in-cheek, that custody decisions ought to be made by a coin toss. He wrote, "Both systems [the best interests standard and the coin toss] are ultimately arbitrary, but the coin flip has the virtue of being openly and impersonally so." Klaff, *op. cit.*, 358.

¹⁴² *Kings* 3:16-27.

¹⁴³ See generally Claire Breen, *The Standard of the Best Interests of the Child* (New York: Kluwer Law International, 2002).