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The Changing Role of the Tender Years Doctrine: Gender Bias, Parenthood, and Illinois Law
By Erin N. Birt and Elizabeth J. Chacko

In the 1970's, when Illinois family courts last relied on the gender-biased principles of the Tender Years Doctrine, *Eight is Enough*, *The Brady Bunch*, and *One Day at a Time* were among the most popular television programs.¹ The success and popularity of that programming are not the only similarities. Each show also shared a relatively edgy premise for television in the 1970's: non-traditional families. Interestingly, while each show tackled the serious issue of single parenting to some degree or another, each explained the custodial parent greatly differed. Both *Eight is Enough* and *The Brady Bunch* starred fathers that maintained custody of their children after the death of the mother. *The Brady Bunch* also starred a mother that maintained custody of her children; however, the narrative never disclosed how her prior marriage ended. *One Day at a Time* starred the most unique single parent for its time, as it focused on a divorced single mother that was presumably granted custody subsequent to the divorce.

All three help illustrate the social climate of the 1970's — a climate where a single mother with children was preferred, not questioned, and not explained — and a single father with children had to be justified and explained as having overcome difficult circumstances such as becoming a widower. Their popularity may have helped to perpetuate the belief that mothers are the preferable caretakers of children. Little did viewers realize, but such popular culture may have also helped support the legal principle called the Tender Years Doctrine. up through the 1970's the Tender Years Doctrine was a valid legal principle in many states including Illinois. Under the Tender Years Doctrine, mothers, not fathers, were the preferred caregivers for young children absent extreme circumstances and allegations against the mother. Not surprisingly, as the social climate began to change in the 1980's so did the popularity of the no-longer edgy 'single parent/divorced parent/blended family' shows. By the 1980's those programs were no longer in production, the preferred family dynamic changed, and Illinois, as well as other states, explicitly rejected the Tender Years Doctrine.²

Gender Bias and Parenthood. Did the changing economic, social, and legal trends for men and women during the past thirty years make the gender bias of the Tender Years Doctrine truly obsolete or has it been simply replaced by other legal means? In order to trace the changing role of the Tender Years Doctrine, this article will focus on the legal history of the Tender Years Doctrine, the current statistics for the average single parent, whether the gender of parents matter, and how the proposed revisions to the Illinois marriage and Dissolution of marriage Act may or may not protect children and affect future use of the gender bias principles of the Tender Years Doctrine.

Legal History. The principles of the Tender Years Doctrine have been around for centuries. The origins of the Tender Years Doctrine in colonial America stemmed from the heavy influence of English law.³ Originally, fathers, in both England and the united states, were awarded custody of children.⁴ During early English common law and thus American law, fathers had an absolute right to custody of children as married mothers had few, if any legal rights.⁵ In the 1800's the culture of the united states began to change. Families began to focus on children and realized that children needed special attention.⁶ In 1839, congress enacted the Talfourd Act which created the legal presumption that children under the age of seven should be awarded to the mother.⁷ The presumption is what became known as the Tender Years Doctrine.⁸

In *Miner v. Miner*, decided in 1849, the court found that "an infant of tender years is generally left with the mother, if no objection to her is shown to exist, even when the father is without blame, merely because of his inability to bestow upon it that tender care which nature requires, and which it is the peculiar province of a mother to supply."⁹ Over 100 years later, the Tender Years Doctrine persisted; and in 1952, in *Nye v. Nye*, the supreme court of Illinois held that compelling evidence must be presented proving the mother to be unfit for custody to be denied to the mother and further that due to the tender years of the child it would not be unusual for the mother to be entrusted with the children.¹⁰ It reasoned the mother, due to her maternal nature, was in a better position to care for the child than the father.¹¹ By the 1970's, a child's tender years were generally acknowledged to be between birth and 13 years.¹² The burden of proof continued to be placed on the father to demonstrate that denying the mother custody would not be in the best interests of the child, or in other words, that the mother was unfit.¹³ Up through 1981, the Tender Years Doctrine was used to help decide custody cases in Illinois. In 1981, Illinois explicitly rejected the Tender Years Doctrine due to the changes in social and legal trends and in the new lifestyles of men and women.¹⁴ While explicitly rejected, Illinois courts did acknowledge that due to a majority of primary caregiver's being mothers, that in practice, a majority of custody awards will still be to mothers.¹⁵ The rejection of the Tender Years Doctrine was also due to the perception that it was antiquated and outdated and furthermore denied fathers due process and equal protection of the laws.¹⁶ Under the Illinois constitution, equal protection is mandated irrespective of one's sex.¹⁷ The equal Protection clause of the Fourteenth Amendment of the united states constitution also mandates that each state provide equal protection under the law.¹⁸ Thus the Tender Years Doctrine was determined to be unconstitutional. It is due to such equal rights that where both parents are fit, each parent has an equal right and equal standing to petition for the custody of their children.¹⁹ Subsequent to the rejection of the Tender Years Doctrine, Illinois created the legal standard of "The Best Interests of the child." section 602 of the Illinois marriage and Dissolution of marriage Act provides that the court must consider all relevant factors in making a determination of custody.²⁰ While section 602 enumerates specific factors for the court to consider in determining custody, no one single factor is controlling or given more weight.²¹ Even as the courts now utilize the best interests of the children standard when determining custody, the age and sex of the children and the parent can arguably be factors considered by the courts in determining custody.²² In addition, under section 602, the courts can consider caretaking activities such as which parent feeds, bathes, transports the children to school, consults with the teachers, and involves the child in community activities. If the mother performs such acts and is the primary caretaker (which statistics show to be more often the case) section 602 arguably achieves similar results to that of the Tender Years Doctrine all while bypassing constitutional objections.²³

The Average Single Parent. While patterns of family formation and household structures are changing, statistics about the average single parent in the United States have remained surprisingly consistent with the principles of the Tender Years Doctrine. According to the U.S. Census Bureau, in the spring of 2010, there were an estimated 13.7 million single parents with custody of children under the age of 21.²⁴ Of the 13.7 million single parents, 82.2% of custodial parents were mothers and 7.8% were fathers.²⁵ The typical single mother is most likely divorced or separated (44%), over the age of 40 (37%), employed (76%) and working full time (49.5%), not living in poverty (70%), not receiving public assistance (78%) and is raising one child (57%).²⁶ Current research reveals that single fathers often receive custody of boys, older children, or children with behavioral problems when mothers lacked interest in parenting, committed neglect or abuse, or died.²⁷ Single fathers are most often sued for custody whereas mothers often obtain custody through mutual agreements.²⁸ Thus, current research and statistics about the average

single parent do not appear to conform to the idea that times have significantly changed and that the gender bias principles of the Tender Years Doctrine are rejected or obsolete.

Gender and Parenting. The issue of gender and parenting can easily ignite volatile debates over single parenthood, same-sex marriage, gay parenting, and divorce. While the purpose of this article is not to explore the research regarding the merits or results of various family forms, it will explore the limited context of a gender preference in custody matters and within the principles of the Tender Years Doctrine. Popular belief would lead many to believe that there are gender preferred parenting abilities. Presidents, organizations, and even laws have perpetuated the stereotypical views about gender specific parenting. In 2008, President Obama stated of all the rocks upon which we build our lives, we are reminded today that family is the most important. And we are called to recognize and honor how critical every father is to that foundation. They are teachers and coaches. They are mentors and role models. They are examples of success and the men who constantly push us toward it.²⁹ While it can be argued that both parents are valuable, arguments that both a father and mother are needed to raise a child presumes that mothering and fathering are gender specific. current research, however, does not support such an argument.³⁰ While researchers agree that men and women parent differently, the source and consequence of the parenting differences is generally unknown.³¹ They further agree that both genders appear to present both “motherly” and “fatherly” qualities as a single parent and in the absence of the other parent.³² Researchers also agree that after attempting to control for all other family variables, two parents that exist in a low conflict relationship generally provide more advantages for children than one parent.³³ Thus it appears there is a lack of current research to support the popular belief that the gender of a parent matters for a child’s well-being. Rather, research indicates that families headed by at least two committed and compatible parents, regardless of gender or marital status, are generally best for children.³⁴

Minimize Conflict, Not Gender. Children experiencing a parental divorce or separation may go through hardships during certain developmental stages as the child deals with the emotional impact of the divorce.³⁵ The child’s development starts in infancy with trust as the cornerstone. If a child’s attachment to either parent is broken whether by divorce, conflict, or other factors, it can lead the child to regress and develop mistrust. Once mistrust is established, the child may develop feelings of shame, doubt, guilt, inferiority, and identity confusion.³⁶ To minimize regression, mistrust, and conflict, children need committed and compatible parents. other key factors that contribute to positive advantages for children, regardless of a parent’s gender, are: (1) appropriate parenting (support, supervision, discipline, and reasonable expectations), (2) access to the non-residential parent, (3) suitable custody arrangements, (4) low parental conflict, and (5) psychologically healthy parents.³⁷ Appropriate parenting should consider the developmental stages of a child, and in context of a custody case, parents should modify their parenting to consider the child’s developmental stages as influenced by divorce or separation. To help children cope with divorce and minimize conflict, mental health professionals support the use of certain appropriate developmental stage interventions.³⁸ For instance, when experiencing a parent’s divorce, children from infancy through the age of 10 may experience an awareness of tension, guilt, fear of abandonment and an appropriate intervention by parents is to develop a routine, a predictable schedule, and simple explanations for questions.³⁹ Being familiar with developmental stages of a child and appropriate interventions can help all single parents, regardless of gender, minimize conflict and thus maximize positive advantages for their children.

Revisions to the Illinois Marriage and Dissolution of Marriage Act. At the time this article was prepared, Illinois House Bill 1452 (“HB 1452”), which seeks to amend the Illinois marriage and Dissolution of marriage Act (“ImDmA”), had been set for a Judiciary Hearing and General law subcommittee meeting. The proposed amendments contained in HB 1452 include major changes to the parenting time provisions of the ImDmA. The amendments aim to essentially render any gender bias in parenting obsolete. As first reported in the Illinois Bar Journal, the Illinois Family law study committee, which is comprised of family law experts, two appointees from the Illinois supreme court and two from the Department of Healthcare and Family services, unanimously agreed that there should be a statutory presumption in Illinois that it is in the best interest of the child for that child to spend at least thirty-five percent of their time with both parents.⁴⁰ Taking into account the time children spend in school or daycare, the amendment essentially provides a presumption for parents to have equal parenting time. Shared parenting time appears to be the trend not only in Illinois, but in other states as well. Alaska, Iowa, Kansas, Massachusetts, Michigan, New York, North Dakota, Oklahoma, Texas, and Wisconsin are among the states that have either considered or implemented shared parenting initiatives.⁴¹

Summary & Recommendations. The social climate has changed since the Tender Years Doctrine was last formally implemented in Illinois. The social and economic trends for men and woman have greatly changed as have the legal trends for determining custody. While Illinois explicitly rejected the Tender Years Doctrine in the 1980’s, it appears that the role of the Tender Years Doctrine simply changed from a mandated presumption to a consideration under section 602. Current statistics reflect, however, that a gender bias may still exist as the typical single custodial parent is still the mother. While research appears to suggest that gender should not matter in parenting, in practice, single mothers continue to care for a majority of the children. Based upon the history of the doctrine, the statistics of custodial parents, and the research about gender and parenting, it could be argued that the principles that culminated in the Tender Years Doctrine still influence American culture and thus family services and courts today. Illinois HB 1452 attempts to remedy the replacement of the Tender Years Doctrine with section 602 of the ImDmA by requiring a presumption of shared parenting time. It is unclear, however, if mandated shared parenting time will result in quality parenting time. With or without a presumption of joint or shared custody, to adequately protect children of divorce from the hardships, children will need routines, predictability, both parents, and minimal conflict. It is suggested that should the presumption of shared parenting time be implemented, or even advocated, that divorce professionals and parents minimize conflict by utilizing proactive services and resources such as parenting coordinators, divorce coaches, qualified mediators, mental health professionals, and experienced family law attorneys.

1 Screen Source Website, www.amug.org/~scrnsrc/top_tv_shows_70s.html. (last visited march 18, 2013).

2 *In re Marriage of Kennedy*, 94 Ill. App. 3d 537, 418 N.E.2d 947 (1st dist. 1981).

3 Richard A. Warshak, Ph.d., *The Custody Revolution: The Father Factor and the Motherhood Mystique*, Poseidon Press (1992).

4 *Id.*

5 *Id.*

6 Cynthia A. McNealy, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 fl. St. univ. l. rev. 891 (1998)

7 *Id.* at 896.

8 *Id.*

9 *Miner v. Miner*, 11 Ill. 43 (1849)

10 *Nye v. Nye*, 411 Ill. 408, 105 N.E.2d 300 (1952)

11 *Id.*

12 *Huey v. Huey*, 25 Ill. App. 3d 20,21, 322 N.E.2d 560, 561 (1975).

13 *Breedlove v. Breedlove*, 5 Ill. App.3d 774, 776, 283 N.E.2d 919, 921 (1972).

14 *In re Marriage of Kennedy*, 94 Ill. App.3d.537, 418 N.E.2d 947 (1981).

15 *In re Marriage of Bush*, 170 Ill. App.3d 523, 525 N.E.2d 163 (1988); *In re Custody of Switalla*, 87 Ill. App.3d 168, 408 N.E.2d 1139 (1980); *Strand v.*

Strand, 41 Ill. App.3d 651, 355 N.E.2d 47 (1976)

16 *Carlson v. Carlson*, 80 Ill. App.2d 251, 225 N.E.2d 130 (1967)

17 Il. const. Art I § 2.

18 U.S. Const. Amend. XIV, § 1.

19 *Anagnostopoulos v. Anagnostopoulos*, 22 Ill.App.3d 479, 317 N.E.2d 681 (1974).

20 750 IlCS 5/602.

21 *Id.*

22 *Mulvihill v. Mulvihill*, 20 Ill. App.3d 440, 444, 314 N.E.2d 342, 345 (1974); *Switalla*, 87 Ill. App.3d at 172, 408 N.E.2d at 1142.

23 United States census department. *Custodial Mothers and Fathers and Their Child Support: 2009*. Timothy S. Grall. (Issued December 2011).

24 *Id.*

25 *Id.*

26 *Id.*

27 Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?* Journal of marriage and family 72:3-22. (February 2010).

28 *Id.* at 13.

29 CNN Politics, *Obama’s Father’s Day Speech*, available at http://articles.cnn.com/2008-06-27/politics/obama.fathers.day_1_foundation-black-children-rock?_s=Pm:POLITICS (last visited march 20, 2013); Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?*, Journal of marriage and family 72:3-22. (February 2010).

- 30 Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?*, *Journal of marriage and family* 72:3-22. (February 2010).
31 *Id.* at 2.
32 *Id.* at 14.
33 *Id.* at 3.
34 *Id.* at 15.
35 J. Kelly, "children's adjustment in conflicted marriage and divorce," *J. child & Adol. Psych*, 39:963-973 (2000).
36 Rhodes, J. Lynn, M.A., IPC, "The Impact of divorce Across the developmental Stages", *Paradigm*, Winter 2000.
37 American Psychological Association, *The Changing Role of the Modern Day Father*, available at <http://www.apa.org/pi/families/resources/changing-father.aspx> (last visited march 18, 2013).
38 Erikson, Erik H., "childhood and Society", W.W. Norton & company, Inc. (1950).; Johnston, Janet r. & roseby, Vivienne. *In the Name of the Child-A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce*. The free Press, New York. 1997.
39 Partners in Parenting, *Quick Reference Cards: Developmental Stages and Divorce*, available at <http://www.listen2kids.net/quick.html> (last viewed march 11, 2013).
40 Lasker, Adam W., "Is a family-law overhaul on the way?", *Illinois Bar Journal*, September, 2012, Vol. 100, Number 9, Page 458.
41 American coalition for fathers and children, <http://www.acfc.org/> (last visited march 18, 2013); Julie garrison, *Shared Parenting Law Trends Across the Country*, <http://www.dadsdivorce.com/articles/shared-parenting-laws-trends-across-the-country.html> (last visited march 18, 2013); Attorney general of Texas Website, available at <https://www.oag.state.tx.us/cs/off/index.shtml> (last visited march 20, 2013). expectations), (2) access to the non-residential parent, (3) suitable custody arrangements, (4) low parental conflict, and (5) psychologically healthy parents.

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