Essays on Child Custody Laws, Divorce, and Child Outcomes

DISSERTATION

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Abstract

Economists have long been interested in the effect of family law on marriage, divorce and child outcomes. The existing literature has focused on the adoption of unilateral divorce laws. However, researchers have overlooked another important legal reform related to divorce: changes in child custody laws. Between the 1970s and 1990s, state custody laws moved from maternal preference, also known as the tender years doctrine, to the best interests of the child doctrine, giving fathers and mothers equal treatment in child custody cases. This dissertation studies the effect of changes in child custody laws on divorce and child outcomes.

In the first chapter, I create the first comprehensive coding of child custody law changes in the United States. My legal coding systematically records each individual state's year of transition to gender-neutral custody laws. I use an innovative methodology that takes into account both custody statutes and case law. This coding makes the empirical analysis of the custody law reform possible. Furthermore, the legal coding establishes that states' movement to gender-neutral custody laws is independent of the adoption of unilateral divorce laws in time. I can therefore disentangle the effects of both legal reforms in my empirical analysis.

The second chapter examines the impact of the transition in custody laws on divorce. I exploit variation across states in the timing of the legal changes to identify the effect of
custody law changes on divorce. I find that changes in custody laws have a dynamic effect on divorce rates. The divorce rate increases seven years after a state's adoption of the new custody law and remains elevated thereafter. Also, changes in custody laws increase individuals' likelihood of being separated. The effects I find for custody law changes are independent of the effects of unilateral divorce laws. The lack of an immediate rise in divorce rates and the increased likelihood of separation suggest that custody law changes may alter bargaining within marriage and affect marriage markets, both of which could have implications for child outcomes.

The third chapter analyzes the long-term effects of custody law changes on children's educational outcomes. First, I develop an intra-household Nash bargaining model which predicts that the new, gender-neutral custody regulations give fathers greater bargaining power. Importantly, the reform of custody laws alters the bargaining power for all married couples with children, whether they divorce or not. The aggregate effect on child outcomes, however, is theoretically ambiguous, as it depends on the degree of bargaining power changes within marriage and the effect of marital dissolution on children whose parents divorce. Using data from the U.S. Census and the American Community Survey, I examine the long-term implications of growing up in a gender-neutral custody law regime for children, by utilizing variation across states in the timing of custody law changes. My empirical results show that childhood exposure to gender-neutral custody laws has a negative and significant effect on educational outcomes. For example, a man exposed to the new custody law as a child is less likely to graduate from high school by, on average, 2.04 percentage points. Each additional year of exposure to the new custody
law reduces his probability of high school graduation by 0.24 percentage points. Results are similar for women. Moreover, the results are robust to various specification checks, such as the inclusion of state-specific time trends, and controlling for childhood exposure to unilateral divorce laws.
To my parents, Aiqing Chen and Xueyi Miao, and to my husband, Jian Shen.
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Chapter 1: Legal Coding of Child Custody Law Changes

This legal coding summarizes information about the changes in the child custody laws in the United States. The first section gives an overview of the child custody law changes and explains how I define the law changes. Section two explains in detail how the legal change in each state is coded and provides relevant evidence.

1.1 Introduction

For over a century the dominating rule in assigning child custody in divorce was maternal preference, which assumes that mother is the better custodian for children when other things equal. In many states, the maternal preference is called the "tender years doctrine," which "establishes a presumption that children of their tender years should be placed in the custody of their mother, because she is best equipped to provide for the physical, emotional, and psychological needs of a young child" (Jones, 1978, p. 696). The doctrine was usually in the form of a judicial preference used in custody cases rather than a formal legal statute (Klaff, 1982).

The movement from maternal preference to gender-neutral custody assignment began in the 1970s. The feminist and the fathers’ rights movements started to question the validity
of the presumption that mothers are naturally superior to and more suitable for rearing children. In place of the tender years doctrine, courts began to determine children’s custody assignment using a new guideline, the "best interests of the child" (BIOC) doctrine. BIOC is the dominant rule followed by most states today. It is usually written in state statutes, and consists of several criteria, such as the emotional ties between children and parents, capacity of parents to meet children’s physical, emotional, and educational needs, stability and desirability of environment, and wishes of the child. The new doctrine is gender-neutral, with no presumption of which parent is the better custodian.

Defining Custody Law Changes

One of the main contributions of this study is the documentation of the transition from maternal preference to gender neutrality in each state. The major difficulty in constructing a legal coding is the inconsistency between state statutes and actual court practice. While quite a few states had gender neutrality written into their statutes in the 1970s, courts continued to practice maternal preference in child custody cases. This is due to the fact that the tender years doctrine was very often in the form of an implicit presumption rather than a legal statute.

The evolution of maternal preference in Utah is a typical example of the inconsistency between state statutes and case law. Maternal preference had long existed in Utah in the form of an explicit statute.¹ In 1977, the statutory presumption that the mother is the

¹ The statute passed in 1903 required the custody of minor children to be awarded to mother (1903 Utah Laws, ch. 82, § 1). The statute later used the language "the natural presumption that the mother is best suited to care for young children" (1969 Utah Laws, ch. 72, § 7).
preferred custodian was repealed by the legislature. However, the court continued to recognize a judicial preference in favor of the mother, all other things being equal. Several custody decisions in the late 1970s and early 1980s cited the tender years presumption or maternal preference and awarded child custody to mothers. It was not until 1986 that the judicial preference towards mothers was explicitly abolished in the case, *Pusey v. Pusey*. After this case, maternal preference ceased to appear in judicial decision making in Utah.

States like Utah present a serious issue of measurement in the coding of custody law changes. Simply relying on the custody statute would not give an accurate description of the case practice. It is entirely likely that a custody dispute decided in Utah would explicitly depend on maternal preference even with a state statute abolishing the practice. In other words, simply relying on the statute would not reflect the reality of custody assignment.

To measure the actual changes in custody cases, I define custody law transitions in a uniform way. I apply a consistent rubric to determine states’ year of transition—I look for the year after which a custody dispute, if contested in court, would be decided on a gender-neutral basis. This way of coding utilizes information from both state statutes and court practices to accurately determine when each state completed the change from maternal preference to gender-neutral custody assignment. The rubric assures that my coding of legal transition reflects the actual likelihood of a child custody dispute being resolved on gender-neutral terms.

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4 See *Pusey v. Pusey*, 728 P.2d 117 (Utah 1986)
I carefully read through contested custody cases and state statutes during the transition period to identify the exact year when states completed the transition.\(^5\) I develop consistent criteria and apply them systematically to all states. For example, most states had gender neutrality or best interests of the child written into legal statutes before they were mentioned in custody cases. For case rulings that simply upheld a gender-neutral state statute which was introduced earlier, I code the year when the statute was passed as the year of change. For case rulings that clarified, disavowed, or reinterpreted the previous statutes, on the other hand, the year when the case was decided would be used to code the year of transition. I was able to determine the exact year of custody law changes for 48 states and Washington, D.C.\(^6\)

Compared with the legal summaries prior to this study, my coding makes several contributions. First, I capture a more complete picture of the custody law changes as I look at both aspects of custody laws: statutes and case law. Most of the previous taxonomies only emphasize one aspect, which leads to inaccurate information about the timing of the legal changes. Second, my coding is transparent and conservative. I start from a definition not of policy but of practice. My coding is directly related to the actual likelihood that a custody dispute in a given year would be settled in a gender-neutral way. Third, much of the previous literature covers only a short period of time. Most existing studies summarize custody law development in the 1970s, when the removal of maternal preference first

\(^5\) I use LexisNexis Academic Dataset for the source of case law. I also compiled information from several secondary sources that summarize the development in custody laws.

\(^6\) Timing of custody law changes was indeterminate for two states: Maine and Washington. I am not able find sufficient evidence of either maternal preference or gender neutrality in the past few decades.
brought attention to the issue. My coding updates and extends the legal transition to the present, allowing one to see the full transition.

1.2 Coding of Custody Law Changes in Each State

**Alabama**

Until 1979, the tender years doctrine was in use in determining children's custody. For example, it was mentioned in a case opinion in 1979 that the tender years presumption is constitutionally sound on equal protection grounds [*Taylor v. Taylor*, 372 So. 2d 337 (Ala. Civ. App. 1979)]. In the opinion of another case in the same year, it was also stated that "In deciding what would be in the best interests of the child, the courts are ever mindful of the proposition that a mother, unless unfit, is the proper custodian of children of tender years rather than the father." [*Rohrer v. Rohrer*, 373 So. 2d 331 (Ala. Civ. App. 1979)]

Courts started to question the validity of the tender years doctrine since 1981. In the 1981 case of *Ex parte Devine* [398 So. 2d 686 (Ala. 1981)], the court ruled that the tender years doctrine was subject to scrutiny under the Fourteenth Amendment.

The tender years presumption represents an unconstitutional gender-based classification which discriminates between fathers and mothers in child custody proceedings solely on the basis of sex. The tender years doctrine creates a presumption of fitness and suitability of one parent without any consideration of the actual capabilities of the parties. The presumption imposes legal burdens upon
individuals according to the "immutable characteristic" of sex. By requiring fathers to carry the difficult burden of affirmatively proving the unfitness of the mother, the presumption may have the effect of depriving some loving fathers of the custody of their children, while enabling some alienated mothers to arbitrarily obtain temporary custody.

After this benchmark case, three cases in 1984 and 1985 cited the above case and clearly stated that the doctrine was no longer in use.


The tender years presumption -- that young children are prima facie better off with their mother in a divorce action -- is no longer constitutionally permissible. *Ex parte Devine*, 398 So. 2d 686 (Ala. 1981); *Smith v. Smith*, 448 So. 2d 381 (Ala. Civ. App. 1984). However, the sex and age of the child are factors the trial court can consider, along with such other factors as the capacity and interest of each parent to provide for the emotional, social, moral, material, and educational needs of the child, in determining custody awards. *Robertson v. Robertson*, 415 So. 2d 1085 (Ala. Civ. App.), cert. denied, 415 So. 2d 1089 (Ala. 1982) (Maddox, J., concurring). The weight to be given to these and all other relevant factors is in the trial court's discretion. *Makar v. Marker*, 398 So. 2d 717 (Ala. Civ. App. 1981). Of course, the paramount concern of the trial court in child custody matters is the best interests of the child, and all the evidence will be weighed with that concern in the forefront of
the trial court's consideration. *Smith v. Smith*, supra. We disturb the trial court's judgment on appeal only when there is a clear and palpable abuse of its discretion.


Now the rule is simply that custody of a young child is awarded according to the best interest of the child. The tender years presumption Therefore, we could conclude that the tender years doctrine was abandoned in Alabama between 1981 and 1985. Finally, we address the father's contention that the trial court erred by applying the "tender years" presumption when it considered the custody issue. The "tender years" presumption, which presumed that, in absence of evidence to the contrary, the natural mother is the proper person with whom custody should be placed when the children are of "tender years," has been abolished in Alabama. *Ex parte Devine*, 398 So. 2d 686 (Ala. 1981). The father no longer has to "carry the difficult burden of affirmatively proving the unfitness of the mother." *Ex parte Devine, supra*. Now, the "rule is simply that custody of a young child is awarded according to the best interest of the child as disclosed by the particular facts in each case." *Thompson v. Thompson*, 431 So. 2d 1310 (Ala. Civ. App. 1983).

*Cooper v. Cooper* [473 So. 2d 1083 (Ala. Civ. App. 1985)] stated that "the tender years presumption has been declared to be an unconstitutional gender-based classification, and the present rule is that child custody is awarded according to the best interest of the child, as it is disclosed by all of the particular and pertinent facts and circumstances in each case. *Ex parte Devine*, 398 So. 2d 686 (Ala. 1981)."
Alaska

In the early 1970s, the tender years doctrine was still in use, but only as a tie breaker. For example, *Sheridan v. Sheridan*, 466 P. 2d 821, 825 (Alaska 1970), for example, it was stated that "the tender years doctrine will be applied only when other considerations are evenly balanced and is further subject to the court's discretionary power to safeguard the best interests of the children."

Alaska Stat. § 09.55.205 (renumbered Alaska Stat. § 25.24.150 in 1983) provided "In awarding custody the court is to be guided by the following considerations: (1) by what appears to be for the best interests of the child and if the child is of a sufficient age and intelligence to form a 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."

The Notes to Decisions of the above statute recorded that:


In conclusion, the tender years doctrine was still in use in the early 1970s. Starting in 1977, cases cited the "best interests of the child" statute and rejected the doctrine.

**Arizona**

According to Freed and Foster (1979), the tender years doctrine has been rejected by statute or court decision in Arizona by 1978, but they did not provide any evidence. According to Jones (1978), "language in two cases indicated that a father need not prove a mother to be unfit before he may be awarded custody and that the tender years doctrine may not be applied even where other factors are equal."

In 1971, the tender years doctrine was clearly still in consideration. *Stapley v. Stapley* [15 Ariz. App. 64, 485 P.2d 1181 (1971)] stated that:

> Ariz. Rev. Stat. § 14-846(B) provides that as between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child is of tender years, it shall be given to the mother.

In the same case, it was also mentioned that "Preference should be given to the mother where the custody of children of tender years, particularly requiring their
mother's care, are involved, provided all other things are equal. *Johnson v. Johnson*, 64 Ariz. 368, 172 P.2d 848 (1946); *Patterson v. Patterson*, 63 Ariz. 499, 163 P.2d 850 (1945). This policy is aptly stated in *Annot.*, 23 A.L.R.3d 6, 17 (1969): "One facet of the relative fitness criterion which has been elevated by the courts into something approaching an independent principle is the rule, repeated in nearly all the cases, that ordinarily the custody of an infant of tender years should be given to the mother on the ground that the mother is the natural guardian and custodian of her child and that there is no substitute for a mother's love." Courts are loath to deprive a mother of custody of young children unless she has been shown unfit to provide them a suitable home. 27B C.J.S. 457-458, Divorce § 309(4). Custody change certainly is not an appropriate sanction for contempt. I do not believe the record reveals cogent reasons showing the change is advantageous to the children's welfare.

However, one case in 1979 shows that the doctrine was not in use any more. *Anderson v. Anderson* [121 Ariz. 405, 406-07, 590 P.2d 944, 945-46 (App. 1979)] stated that:

Whether the tender years presumption is of common law origin is of no moment under current Arizona law because the Legislature, by enacting former Ariz. Rev. Stat. § 25-332(A) (now Ariz. Rev. Stat. § 25-403), has manifested an intent that there be no presumptions favoring either parent.

Appellant's principal contention is that, since she was found fit to have custody, the tender years of the children should have dictated her selection as the custodial
parent. In advancing this contention, appellant acknowledges the repeal of former A.R.S. § 14-846(B) and the enactment of present A.R.S. § 25-332. Former § 14-846(B) provided: "As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child is of tender years, it shall be given to the mother. If the child is of an age requiring education and preparation for labor or business, then to the father."

Present A.R.S. § 25-332(A), which became effective August 8, 1973, provides:

The court shall determine custody, either originally or upon petition for modification, in accordance with the best interests of the child. The court may consider all relevant factors, including:

1. The wishes of the child's parent or parents as to his custody.

2. The wishes of the child as to his custodian.

3. The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest.

4. The child's adjustment to his home, school and community.

5. The mental and physical health of all individuals involved.

Relying upon McFadden v. McFadden, 22 Ariz. 246, 196 P. 452 (1921), appellant argues that the presumption in favor of the mother is of common law origin and remains in effect in Arizona because it is not inconsistent with the best interests
standard of § 25-332(A). Whether the tender years presumption is of common law origin is of no moment under current Arizona law because the Legislature, by enacting § 25-332(A), has manifested an intent that there be no presumptions favoring either parent.

Appellant further argues that this case falls within the "other things being equal" test of Porter v. Porter, 21 Ariz. App. 300, 518 P.2d 1017 (1974) and Ward v. Ward, 88 Ariz. 130, 353 P.2d 895, modified 88 Ariz. 285, 356 P.2d 30 (1960). Those cases hold that the statutory presumptions in favor of one parent or the other should be applied in cases where "other things are equal." Whether other things are equal depends upon: (1) whether both parents are fit, and (2) whether the welfare of the child clearly demands the presumption not apply in that particular case. Appellant first points out that the judgment of the trial court finds that both parents are fit. She then argues that none of the evidence meets the standard of clearly demanding that the tender years presumption not be applied in this case. We do not find this argument compelling as both Ward and Porter were decided on the law as it existed prior to the 1973 changes.

Porter v. Porter [21 Ariz. App. 300, 518 P.2d 1017 (1974)] also stated that the repeal of the former statute A.R.S. § 14-846 has removed the tender years preference.
Arkansas

The tender years doctrine had not been questioned in Arkansas until the late 1970s. In 1974, the court held that "So long as the best welfare of the child does not otherwise require, there is a decidedly humanitarian preference for placing a child or tender years, particularly a daughter, in the custody of the mother." [Weber v. Weber, 256 Ark. 549, 508 S.W.2d 725 (1974)]

Case Drewry v. Drewry [3 Ark. App. 97, 622 S.W.2d 206 (1981)] provides a detailed narrative of the history of the abandonment of the tender years doctrine in Arkansas:

Ark. Stat. Ann. § 34-2726 (1979) provides: In an action for divorce the award of custody of the children of the marriage shall be made without regard to the sex of the parent but solely in accordance with the welfare and the best interest of the children. In view of the clear language contained in 1979 Ark. Acts 278, the Supreme Court of Arkansas has no difficulty in deciding that in custody actions the Arkansas General Assembly fully intends to abolish any legal preference given a parent when that preference is based on gender.

In many other jurisdictions, states, like Arkansas, have statutes which leave no doubt that neither a mother nor father shall be denominated the custodian of the parties' child because of the application of a common law presumption or Tender Years Doctrine based on the parent's gender.
The Supreme Court of Arkansas holds that a chancellor is not obligated to apply the Tender Years Doctrine to a custody determination since the court believes the Doctrine was abolished by the enactment of 1979 Ark. Acts 278.

At common law, a father was the natural guardian of the minor child and was entitled to his child's custody, even above the mother, unless the child required the mother's care on account of tender years or because the child was female. *Baker v. Durham*, 95 Ark. 355, 129 S.W. 789 (1910). The court's predisposition to award young and female children to their mother's custody became known as the Tender Years Doctrine. The common law preference for the father to receive custody was later abrogated by law enacted by the Arkansas General Assembly. See Act 257 of 1921. The general rule became that each parent's right to custody was of equal dignity, and the primary consideration determining custody was the welfare and best interests of the child. See *DeCroo v. DeCroo*, 266 Ark. 275, 583 S.W. 2d 80 (1979). In spite of the "equal dignity" concept employed in the general rule, the courts have continued to apply the Tender Years Doctrine and have generally found that in most cases the mother was the primary care giver to the children. Thus, the net result, as stated by our Supreme Court, has been that "it is not usual for a chancellor or this court, for that matter, on trial de novo to award custody of young children to anyone other than their mother." *Stephenson v. Stephenson*, 237 Ark. 724, 375 S.W. 2d 659 (1964).

The Arkansas General Assembly expressed its concern over the difficulty fathers had in obtaining custody notwithstanding that, in many instances, they are more
qualified to care for children than mothers. In noting its concern, the General Assembly enacted Act 278 of 1979, now compiled as Ark. Stat. Ann. § 34-2726 (Repl. 1979), which provides:

In an action for divorce the award of custody of the children of the marriage shall be made without regard to the sex of the parent but solely in accordance with the welfare and the best interest of the children.

Although the Supreme Court and our court have had occasion to observe an apparent conflict between Act 278 and the Tender Years Doctrine, neither court until now has been requested to decide whether Act 278 abolishes the Doctrine in Arkansas. *Kimmons v. Kimmons*, 1 Ark. App. 63, 613 S.W. 2d 110 (1981); *DeCroo v. DeCroo*, supra. In view of the clear language contained in Act 278, we have no difficulty in deciding that in custody actions the Arkansas General Assembly fully intended to abolish any legal preference given a parent when that preference is based on gender.

Another case, *Kimmons v. Kimmons* [1 Ark. App. 63, 613 S.W. 2d 110 (1981)] further confirms that the 1979 Ark. Acts 278 has eliminated the tender years doctrine in Arkansas.

The appellant argues that the Chancellor evidently considered the tender years doctrine as the controlling factor in this case, and since the parties' child was only one and one-half years old, he awarded custody to the appellee mother. Of course, no hearing was held after the Chancellor made his remarks on May 8, and no findings or conclusions were a part of the June 16 order which would indicate that

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he changed custody premised on the tender years doctrine. This being true, we
decline to decide on the record before us that the Chancellor applied the doctrine to
the facts at bar.

Our courts have long recognized the doctrine and accordingly have been reluctant
to deprive a child of tender years of the care and affection of his mother when other
things between the mother and father are considered equal. *Self v. Self*, 222 Ark.
82, 257 S.W. 2d 281 (1953) and *DeCroo v. DeCroo*, 266 Ark. 275, 583 S.W. 2d 80
(1979). However, our 1979 Arkansas General Assembly enacted Act 278, compiled
as Ark. Stat. Ann. § 34-2726 (Supp. 1979) which in effect provides that in divorce
actions custody of children must be awarded without regard to the sex of the parent.
Since there is nothing in the record to show that the Chancellor did or did not
consider § 34-2726, we are in no position to decide that he did not. Since this case
and the issue of custody have not been fully developed in the trial below, this cause
must be remanded so that the parties' rights can be clearly determined. See Arkansas National Bank v. Cleburne County Bank, 258 Ark. 329, 525 S.W. 2d
82 (1975). When this case is fully heard by and presented to the Chancellor, the
parties will have the opportunity to properly raise the issue regarding the tender
years doctrine if the evidence warrants.
California

A case in 1979 indicated when California removed maternal preference [In re Marriage of Carney, supra, 24 Cal.3d 725, 157 Cal. Rptr. 383, 598 P.2d 36, 3 A.L.R.4th 1028 (1979)]:

Since it was amended in 1972, the California Civil Code no longer requires or permits the trial courts to favor the mother in determining proper custody of a child "of tender years." Cal. Civ. Code § 4600(a) now declares that custody should be awarded to either parent according to the best interests of the child. Regardless of the age of the minor, therefore, fathers now have equal custody rights with mothers; the sole concern, as it should be, is "the best interests of the child."

Colorado

The case Rayer v. Rayer [32 Colo. App. 400, 512 P.2d 637 (1973)] ruled that the court should use best interests of the children, not the motherhood, as the criterion to determine custody: "The trial court did not have to find the wife unfit to have custody of the children; it only had to determine was in the children's best interests." "The mere fact of motherhood is not sufficient to give a mother any special standing in the proceeding or preference as to custody. Colo. Rev. Stat. § 46-2-4(6) (1963). The prime criterion in the court's determination is the welfare of the children."

The Annotation to the Colo. Rev. Stat. § 14-10-124 provides the complete history of the usage of tender years doctrine in Colorado:
In its concern for children, particularly those of tender years, the supreme court
formerly enunciated guides for trial courts in the disposition of controversies

Formerly, courts did not deprive the mother of the custody of her children of tender
years, unless it was clearly shown that she was so unfit a person as to endanger the
welfare of the minors. Hayes v. Hayes, 134 Colo. 315, 303 P.2d 238 (1956); Evans
v. Evans, 136 Colo. 6, 314 P.2d 291 (1957); Green v. Green, 139 Colo. 551, 342

A mother's love, care, and affection for a child of tender years were considered the
most unselfish of all factors in human relations, and a child was not to be deprived
thereof unless for a very good reason, founded on lack of moral fitness and proper

Mere fact of motherhood is not sufficient to give a mother any special standing in
the proceeding or preference as to custody. Rayer v. Rayer, 32 Colo. App. 400, 512

Court's undue emphasis on motherly instincts reversible error. Court's undue
emphasis on "motherly instincts" constituted a presumption that the mother was
better able to serve the best interests of the child because of her sex and was both
1983).
Sufficient findings unrelated to parental gender. Although the court states that one of its considerations in making a custody award is a belief in the importance of a "meaningful relationship" between a father and son, the remark does not rise to the level of a presumption where the court makes sufficient findings unrelated to parental gender to support the award. *In re Clarke*, 671 P.2d 1334 (Colo. App. 1983).

**Connecticut**

In 1973, the Connecticut statute (1973 Conn. Acts 373, § 15) provided that, "In making or modifying any order with respect to custody or visitation, the court shall be guided by the best interests of the child, taking into consideration the causes for dissolution of the marriage or separation and giving consideration to the wishes of the child if he is of sufficient age and capable of forming an intelligent preference."

The case *Skubas v. Skubas* [31 Conn. Supp. 3440, 330 A.2d 105 (1974)] cited this statute as the criteria for determining child custody. The court applied the best interests of the child standard, and did not take the custodian's gender into consideration:

The legislature, when it enacted in 1973 the act concerning dissolution of marriage, recognized that such situations may occur. Section 16 of Public Act No. 73-373, as amended by § 9 of Public Act No. 74-169, provides in part: "Such counsel may also be appointed on the motion of the court or on the request of any such person in any case before said court when the court finds that the custody, care, education,
visitation or support of a minor child or children is in actual controversy, provided the court shall not be precluded from making any order relative to a matter in controversy prior to the appointment of counsel where it finds immediate action necessary in the best interests of any such child. Any such counsel shall be heard upon all matters pertaining to the custody, care, support, education and visitation of the child or children so long as the court deems such representation to be in the best interests of the child or children."

By § 46 of Public Act No. 73-373, the act applies to "motions for modification of, any alimony, support or custody order entered pursuant to a decree of divorce, legal separation or annulment rendered prior to" the effective date of the act.

Delaware

In 1974, Delaware Statute established the best interests of the child doctrine as the criteria for determining custody (Del. Code Ann. Tit. 13, § 722): "The Court shall determine the legal custody and residential arrangements for a child in accordance with the best interests of the child." It also gives eight relevant factors to consider in determining the best interests of the child, and none of which mentions the gender of the custodian.
District of Columbia

I examine the cases involving custody disputes in the 1970s and the 1980s in the District of Columbia. The status of the tender years doctrine in court decisions has changed over time. In the case *Rzeszotarski v. Rzeszotarski* [296 A.2d 431, 440 (D.C. 1972)], a divorced mother was challenging the trial court's decision of awarding the custody of her son to the father. The Supreme Court affirmed the trial court's ruling. The court stated that "Although it is recognized that children of tender years are better off with their mothers, absent a finding that the mother is unfit, this presumption cannot be viewed as controlling but merely as a usually persuasive factor relating to the issue of custody." Therefore, the court had not discarded the tender years doctrine totally in 1972. The doctrine was a "controlling but merely as a usually persuasive factor relating to the issue of custody".

In 1975's case *Ross v. Ross* [339 A.2d 447, 1975 D.C. App. LEXIS 398 (1975)], the court again supported a trial court's decision of transferring custody of minor children from the mother to the father. However, the tender years presumption still existed. It was mentioned that "The best interest of the children must be considered as paramount in determining custody. There is a presumption that the interests of children of tender years will be best served when they are in the custody of their mother. However, such presumption is not controlling. The law does not compel the award of custody of a small child to the mother, although she is a fit custodian, if the trial court on consideration of all the evidence concludes that the best interests of the child will be served by awarding custody to the father."
In 1978's case *Bazemore v. Davis* [394 A.2d 1377, 1379 (D.C. 1978)], the tender years presumption was further challenged. The court stated that "Although mentioned in several cases, the tender years presumption has rarely formed the basis of a decision in this court. As this review of our cases shows, if there is one thing that is evident, it is that custody does not go to the mother as a matter of law if she is a fit custodian. The trial judge retains broad discretion in defining the child's best interest and in determining what criteria may apply". It further concluded that "If the "tender years presumption" as applied in this jurisdiction is a presumption at all, it is a presumption of fact. The review of our case law demonstrates this. And as Wigmore puts it, a presumption of fact is not really a presumption at all; it is an inference. Whatever else it may have been in years past, our decisions show the tender years "presumption" in this jurisdiction is a misnomer."

The case *In re D.I.S.*[494 A.2d 1316, 1323 (D.C. 1985)] cited the case above as "rejecting 'tender years' presumption that small children are better off with their mother":

> We have stressed that each case must be dealt with on its own terms, and have rejected the use of presumptions for determining the best interests of the child. See *Bazemore v. Davis*, supra, 394 A.2d at 1383 (rejecting "tender years" presumption that small children are better off with their mother).

Foster and Freed (1978b) recorded that the statute that desexed custody: "without conclusive regard to the … sex, …, in and of itself, of the other party." D.C. Code Ann. § 16-911 (as amended, Oc. 1, 1976, D.C. Law, No. 1-87, § 14 (1977 Cum. Supp.))."
The tender years doctrine was clearly in use in Florida during the 1970s. In the 1976 case *Klavans v. Klavans* [330 So.2d 811 (Fla. 3d DCA 1976)], the court awarded child custody to a mother instead of the father, even though both parties were equally fit. The court stated that it was because the child was of tender years. "Where equal consideration given to the father in determining child custody results in the finding that the parties are equally fit to have custody, children of tender years should be awarded to the mother."

In another case in the same year, *Snedaker v. Snedaker* [327 So.2d 72 (Fla. 1st DCA 1976)], the court cited the tender years presumption that "Other things being equal, prime consideration should be given to the mother of a child of tender years in custody proceedings. However, when the evidence reveals that "other things" are not equal then the primary consideration accorded the mother is subservient to the best interests and welfare of the child."

In 1986, the case *Kerr v. Kerr* [486 So. 2d 708 (Fla. 5th DCA 1986)] stated that the tender years doctrine has been abolished.

We assume the trial judge was applying the "tender years doctrine" which has been effectively abolished in Florida by section 61.13(2)(b)(1), Florida Statutes (1983) which provides: Custody and Support of Children; Visitation Rights; Power of Court in Making Orders. . . . It is the public policy of this state to assure each minor child frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and to encourage parents to share the rights
and responsibilities of child rearing. Upon considering all relevant factors, the father of the child shall be given the same consideration as the mother in determining custody without regard to the age of the child.

However, there was a reversing trend in the late 1980s and early 1990s that tender years doctrine had been used again in custody cases. *Gibbs v. Gibbs* [686 So. 2d 639 (Fla. 2d DCA 1996)] mentioned this trend:

> In reading these many tests, one is reminded of the childhood game of telephone in which a message is whispered from player to player, changing along the way with no intent by the parties to alter the message. We find a small conflict within the rhetoric of these cases, a residual influence of the "tender years" doctrine, and a gradual incorporation of the 1982 legislation, but we perceive no conflict among the rules or outcomes announced in these cases.

The two cases below, for example, cited the tender years doctrine.

*DeCamp v. Hein*, 541 So. 2d 708 (Fla. 4th DCA), rev. denied, 551 So. 2d 461 (Fla. 1989).

The equal rights provision of Fla. Stat. ch. 61.13(2)(b)(1) only applies after considering all relevant facts. **Relevant facts should obviously include, at least in part, some consideration of the tender years doctrine.**

Third, passing next to the question of whether the husband or the wife should be preferred as the custodial parent of two female children aged one and three, we note the provision in section 61.13(2)(b)(1) that "the father of the child shall be given
the same consideration as the mother in determining the primary residence of the child irrespective of the age of the child." (Emphasis supplied) This statutory language at first blush appears to abolish the tender years doctrine, as indeed the Fifth District believes it has. See *Kerr v. Kerr*, 486 So.2d 708 (Fla. 5th DCA 1986). Yet, this very same section also provides that the equal rights provision only applies "after considering all relevant facts." (Emphasis supplied) Relevant facts should obviously include, at least in part, some consideration of the tender years doctrine. It is true that the doctrine can no longer be dispositive because the 1983 amendment to the statute added the "irrespective of age" language; however, we do not believe the doctrine has been totally abolished. For example, a six-month-old baby being nursed by her mother should obviously be in her mother's custody, unless the judge found her unfit. In the case at bar, there is no mention of whether the one-year-old was being nursed by the mother. Nonetheless, our version of common sense suggests that, under the facts of this particular case, the one-year-old female infant and her three-year-old sister preferably should reside with the mother. In *Brown v. Brown*, 409 So.2d 1133 (Fla. 4th DCA 1982), Judge Hurley quoted with approval the testimony of a psychiatrist who opined: "From zero until four and a half . . . the essential person in that child's life is the mother . . . . I maintain it's extremely important for [a] three year old little girl to be with her mother." True, that case was decided before the 1983 amendment to the statute, as was the seminal case of *Dinkle v. Dinkle*, 322 So.2d 22 (Fla. 1975), yet the psychiatrist's pronouncement in Brown would still, in our opinion, prove to be a relevant factor in deciding the primary residence of these two baby girls. The reader may well study the preceding
deathless prose and remark of its author: "What is he talking about? The trial
court did make the wife the primary custodial parent." However, as we have already
noted, that was largely an illusory award. The trial court, having agreed that the
wife had to permanently return to New Jersey, yet having given "custody" to the
husband until she relocated back to Florida, for all practical purposes made the
husband the custodial parent. In fact, the record reflects that the husband has had
both children living with him ever since the final hearing.

_Usher v. Usher_, 568 So. 2d 471 (Fla. 2d DCA 1990).

The tender years doctrine directs the trial court to give prime consideration to the
mother when determining custody of young children. However, the doctrine only
applies after the trial court finds that both parents equally meet the criteria of Fla.
Stat. ch. 61.13(3).

Section 61.13(3), Florida Statutes (1989), provides the court with guidelines for
determining the best interests of the children in matters regarding custody.
Additionally, section 61.13(1)(b)1, Florida Statutes (1989), instructs the court to
give the father the same consideration as the mother when determining
custody. See _Stamm v. Stamm_, 489 So.2d 851 (Fla. 5th DCA 1986). While the
mother's argument regarding the "tender years doctrine" has merit, it is not without
exception. The doctrine directs the trial court to give prime consideration to the
mother when determining custody of young children. However, the doctrine only
applies after the trial court finds that both parents equally meet the criteria of section 61.13(3). See Dinkel v. Dinkel, 322 So.2d 22, 24 (Fla. 1975).

The tender years doctrine was shown to be abolished again by the two cases below. They also showed that the rejection of the tender years doctrine applied to future cases.

*Ketola v. Ketola, 636 So. 2d 850 (Fla. 1st DCA 1994).*

Among other things, the former wife argues that the trial court erred in failing to consider and apply the "tender years" doctrine when performing the analysis required by section 61.13, Florida Statutes (1993), and reaching its decision to name the father as primary residential parent. She relies primarily on *Usher v. Usher*, 568 So. 2d 471 (Fla. 2d DCA 1990), *Dinkel v. Dinkel*, 322 So. 2d 22 (Fla. 1975), and *DeCamp v. Hein*, 541 So. 2d 708 (Fla. 4th DCA), rev. denied, 551 So. 2d 461 (Fla. 1989). **We reject this argument because certain amendments now incorporated in subsection 61.13(2) have clearly and effectively negated any further application of the "tender years" doctrine.**

The "tender years" doctrine gives a preference to the mother of a child of tender years in matters of custody determination. Under this doctrine, as stated by the supreme court, "other essential factors being equal, the mother of the infant of tender years should receive prime consideration for custody." *Dinkel v. Dinkel*, 322 So. 2d at 24. In *Anderson v. Anderson*, 309 So. 2d 1 (Fla. 1975), notwithstanding the language in subsection 61.13(2), Florida Statutes, that then provided, "Upon considering all relevant factors, the father of the child shall be given the same
consideration as the mother in determining custody," the court held that the preference recognized by the tender years doctrine remained the law of this state. The court reasoned that subsection 61.13(2) "providing for equal consideration of the father in the award of custody is not inconsistent with this rule of law historically enunciated by the courts." 309 So. 2d at 2. Thus, whatever the legislative intent underlying this provision in subsection 61.13(2) may have been, the supreme court continued to insist on following the preference created by the "tender years" doctrine. Since these decisions, however, legislative amendments intended to override the court's persistence in applying this doctrine have been enacted.

Subsection 61.13(3) provides in part that when determining the child's best interests with respect to parental responsibility and primary residence, the trial court shall evaluate "all factors affecting the welfare and interests of the child, including but not limited" to those factors listed in this subsection. Subsection (2)(b)1 of section 61.13 now provides that "after considering all relevant facts, the father of the child shall be given the same consideration as the mother in determining the primary residence of a child irrespective of the age or sex of the child." (Emphasis added.) Effective July 1, 1982, the phrase "regardless of the age of the child" was added to the original language in subsection 61.13(2). Ch. 82-96, § 1, at 233, Laws of Fla. Effective July 1, 1991, this provision was amended again to read "irrespective of the age or sex of the child." Ch. 91-246, § 4, at 2411, Laws of Fla. These amendments clearly evidence an intent to abolish any and all preference for
a mother over the father to receive custody of their minor child, regardless of the age or sex of the child. The legislative history in the Florida State Archives reveals that the Staff Report issued by the House Judiciary Committee on House Bill 62 and Senate Bill 439, these being the companion bills that contained the amending language in 1982 ultimately enacted as part of chapter 82-96, confirms this construction of the statutory language. That report recites that the amending language "would indicate the Legislature's intent to override the 'tender years' doctrine and if successful, might prove to be the most substantial change included in this legislation." Accordingly, we agree with the Fifth District's decision in Kerr v. Kerr, 486 So. 2d 708 (Fla. 5th DCA 1986), that subsection 61.13(2)(b)1, Florida Statutes (1983), effectively abolished the "tender years doctrine" in Florida. Accord Barnes v. Frazier, 509 So. 2d 401, 402 (Fla. 5th DCA 1987) ("The trend in current jurisprudence is to treat both sexes equally, and the Shared Parental Responsibility Law is designed to achieve that goal in the realm of child custody.").

The following commentators agree that one of the effects of the 1982 and subsequent amendments to section 61.13 is the abolishment of the tender years doctrine:

(1) Stanton L. Cobb, Parental Responsibility, II Florida Dissolution of Marriage, § 11.42, at 11-59 (Fla. Bar CLE July 1993) ("The Florida Legislature continued to reject the tender years doctrine, despite its reaffirmation by the courts. A 1982 amendment to F.S. 61.13(2)(b) gives the father and mother equal consideration in determining custody regardless of the age of the child. After a 1991
amendment, F.S.61.13(2)(b)1 now requires the father to receive equal consideration irrespective of the age or sex of the child. Even after this statutory mandate, some courts reasserted the doctrine. *DeCamp v. Hein*, 541 So. 2d 708 (Fla. 4th DCA 1989), rev. den. 551 So. 2d 461. On the other hand, some courts have recently reversed orders awarding custody to a mother without giving equal consideration to the father. See *Powell v. Powell*, 604 So. 2d 30 (Fla. 2d DCA 1992); *Wagler v. Wagler*, 593 So. 2d 602 (Fla. 1st DCA 1992); *Cuffie v. Cuffie*, 564 So. 2d 587 (Fla. 2d DCA 1990)."

(2) Renee Goldenberg, Pity the Poor Child and the Practitioner: Handling Current Issues Concerning Parental Responsibility, 61 Fla. B. J. 45 (Nov. 1987) (citing Barnes for the principle that the trend in Florida is to treat both sexes equally in child custody cases, whether the child is legitimate or illegitimate, and noting that the determination of which party should be the primary residential parent would be according to section 61.13 and the 10 factors listed in subsection (3) of that statute).


Fla. Stat. ch. 61.13(2)(b)1 (1983) effectively abolishes the "tender years doctrine" in Florida.

The mother substantially relies upon language in this court's opinion in *DeCamp v. Hein*, 541 So. 2d 708 (Fla. 4th DCA), rev. denied, 551 So. 2d 461 (Fla. 1989), arguing that, there, this court recognized the continuing validity of the "tender years" doctrine, a preference for awarding custody to the mother when the child is
young. In *DeCamp*, we rejected the conclusion of the Fifth District, in *Kerr v. Kerr*, 486 So. 2d 708 (Fla. 5th DCA 1986), that section 61.13(2)(b)1 had abolished the tender years doctrine, determining instead that the "equal rights provision" of the statute only applies after considering "all relevant facts," one of which still must be the tender years doctrine. See *DeCamp*, 541 So. 2d at 709-10.

We note the emphasis placed on the sex of the child in *DeCamp*, and that the legislature subsequently added to subsection 61.13(2)(b)1 that the father be given equal consideration "irrespective of the age or sex of the child." Ch. 91-246, § 40, at 2411, Laws of Fla. (emphasis added). Recently the First District, in *Ketola v. Ketola*, 636 So. 2d 850 (Fla. 1st DCA 1994), reviewed the legislative history of the amendments to section 61.13(2) when it followed Kerr and acknowledged a possible conflict with *DeCamp*:

Subsection (2)(b)1 of section 61.13 now provides that "after considering all relevant facts, the father of the child shall be given the same consideration as the mother in determining the primary residence of a child irrespective of the age or sex of the child." (Emphasis added.) Effective July 1, 1982, the phrase "regardless of the age of the child" was added to the original language in subsection 61.13(2). Ch. 82-96, § 1, at 233, Laws of Fla. Effective July 1, 1991, this provision was amended again to read "irrespective of the age or sex of the child." Ch. 91-246, § 4, at 2411, Laws of Fla. These amendments clearly evidence an intent to abolish any and all preference for a mother over the father to receive custody of their minor child, regardless of the age or sex of the child. . . . Accordingly, we agree with the
Fifth District's decision in *Kerr v. Kerr*, 486 So. 2d 708 (Fla. 5th DCA 1986), that subsection 61.13(2)(b)1, Florida Statutes (1983), effectively abolished the "tender years doctrine" in Florida. Accord *Barnes v. Frazier*, 509 So. 2d 401, 402 (Fla. 5th DCA 1987) . . . .

The Legislature has now established unequivocally that it is the public policy in this state to give no preference to either the mother or the father in judging each parent's right to custody or primary residence of the minor child; rather, that determination will have to rest upon an impartial evaluation of the factors listed in subsection 61.13(3). Accordingly, the courts have no business perpetuating a court-made doctrine of preference that is patently inconsistent with this policy. To the extent that the decisions in *Usher v. Usher* and *DeCamp v. Hein* may be inconsistent with our construction and application of subsection 61.13(2), we decline to follow them.

636 So. 2d at 852.

While we recognize that the result in *DeCamp* can stand on its own merits independent of its discussion of the tender years doctrine, we cannot simply dismiss, as dicta, this language indicating a preference for the mother:

Third, passing next to the question of whether the husband or the wife should be preferred as the custodial parent of two female children aged one and three, we note the provision in section 61.13(2)(b)(1) that "the father of the child shall be given the same consideration as the mother in determining the primary residence of the
child irrespective of the age of the child." (emphasis supplied) This statutory language at first blush appears to abolish the tender years doctrine, as indeed the Fifth District believes it has. See Kerr v. Kerr, 486 So. 2d 708 (Fla. 5th DCA 1986). Yet, this very same section also provides that the equal rights provision only applies "after considering all relevant facts." (Emphasis supplied) Relevant facts should obviously include, at least in part, some consideration of the tender years doctrine. It is true that the doctrine can no longer be dispositive because the 1983 amendment to the statute added the "irrespective of age" language; however, we do not believe the doctrine has been totally abolished. For example, a six-month-old baby being nursed by her mother should obviously be in her mother's custody, unless the judge found her unfit. In the case at bar, there is no mention of whether the one-year-old was being nursed by the mother. Nonetheless, our version of common sense suggests that, under the facts of this particular case, the one-year-old female infant and her three-year-old sister preferably should reside with the mother. In Brown v. Brown, 409 So. 2d 1133 (Fla. 4th DCA 1982), Judge Hurley quoted with approval the testimony of a psychiatrist who opined: "From zero until four and a half...the essential person in that child's life is the mother...I maintain it's extremely important for [a] three year old little girl to be with her mother." True, that case was decided before the 1983 amendment to the statute, as was the seminal case of Dinkle v. Dinkle [sic], 322 So. 2d 22 (Fla. 1975), yet the psychiatrist's pronouncement in Brown would still, in our opinion, prove to be a relevant factor in deciding the primary residence of these two baby girls.
DeCamp, 541 So. 2d at 709-10 (emphasis added).

We deem it necessary to recede from any implication in that DeCamp language indicating that this court may not be in accord with the view that the tender years doctrine has been effectively abolished. But having clarified this, we also emphasize that we do not recede from the recognition, in DeCamp, that the relevant facts considered in any given case still may properly include reference to the age or sex of a child, whenever it is relevant in weighing the statutory factors.

Given the intervening amendments to section 61.13, we do not consider this opinion to clash with the supreme court's recognition of a tender years doctrine in Dinkel v. Dinkel, 322 So. 2d 22 (Fla. 1975). We do, however, as did the court in Ketola, acknowledge possible conflict with Usher v. Usher, 568 So. 2d 471 (Fla. 2d DCA 1990).

Georgia

In Georgia, there has been no usage of the tender years doctrine in history, either from the first or the secondary sources. The Georgia statute has provided that the party not in default in the divorce proceeding shall be entitled to the custody of the minor children (GA. Code Ann. § 30-127, Supp. 1978). In the 1975 case Todd v. Todd [234 Ga. 156, 157, 215 S.E.2d 4 (1975)], it was stated that "neither parent had a prima facie right of custody and the award was within the discretion of the trial judge". From reading other custody dispute cases around the same time, no evidence has been found to show that the court placed preference
Buehler and Gerard (1995) cited the above case as establishing gender neutrality in Georgia.

Hawaii

In *Turoff v. Turoff* [56 Haw. 51, 527 P.2d 1275 (1974)], the court denied the mother's request to grant her the custody of her minor child, and awarded the custody to the father. The judge stated that, "but the statute states that the parents are equally entitled to their child's custody, .... The Court's sole consideration is to be the child's best interest."

Hawaii statute HRS § 571-46 provided that custody may be awarded to either parent "according to the best interests of the child." The Notes to Decisions of the statute mentions that:

> Neither parent has preferred status in custody determination.

In both the original custody determination and any subsequent motion for a change, each parent has an equal right to custody. Neither parent has a preferred status. *Fujikane v. Fujikane*, 61 Haw. 352, 604 P.2d 43, 1979 Haw. LEXIS 171 (1979).

Under paragraph (1), each parent has an equal right to an award of custody of the minor child. That is, the law in this jurisdiction takes a neutral stance and thus, neither parent has any preferred status to an award of custody. *Turoff v. Turoff*, 56 Haw. 51, 527 P.2d 1275, 1974 Haw. LEXIS 86 (1974).
Tender years doctrine had not been discarded in Idaho yet.

In 1981, the case *Moye v. Moye* [102 Idaho 170, 172-73, 627 P.2d 799, 801-02 (1981)] denied reversed an initial custody award to the father from the mother. However, the case opinion stated that "The Tender Years Doctrine, that custody of a child of tender years should be vested in the mother, has limited impact in Idaho law. To the extent previous case law exists which suggests a preference for the mother as custodian of a child of tender years, the preference exists only when all other considerations are equal." This suggests that the preference for mother still existed, but was only used when other things are equal.

In another case in 1984, the court denied the usage of the tender years doctrine in the case, but mentioned that "…. a preference for the mother as custodian of a child of tender years, the preference exists only when all other considerations are equal. Since it is apparent that the magistrate did not determine that all other considerations were equal, there was no need to apply the Tender Years Doctrine." [*Shumway v. Shumway*, 106 Idaho 415, 679 P.2d 1133 (1984)]. This again shows that the doctrine was still applied when other things are equal in 1984.

In *Clair v. Clair* [153 Idaho 278, 281 P.3d 115 (2012)], it was shown that the maternal preference during child's tender years is still in use:

For determinations of custody, a magistrate court is required to base its decision on the best interests of the child. Idaho Code Ann. § 32-717(1)(a)-(g) sets out a non-exhaustive list of relevant factors that a magistrate court may consider. This list
includes the wishes of the child's parents as to custody; the child's wishes for custody; the interaction and interrelationship between the child and parents, and siblings if applicable; the child's adjustment to his or her community; the character and circumstances of all involved; the need to promote continuity and stability for the child; and any instance of domestic violence. Idaho Code Ann. § 32-717(1)(a)-(g). This list of factors is not exhaustive or mandatory and courts are free to consider other factors that may be relevant. The preference for the mother as custodian over the father of a child of tender years is considered only where all other considerations are found to be equal.

This is the most recent case I have found that mentioned the tender years doctrine.

Illinois

A case in 1975 still recognized the tender years doctrine [Randolph v. Dean, 27 Ill. App. 3d 913, 327 N.E.2d 473 (3 Dist. 1975)]:

One of the factors admittedly partially considered by the trial court, and challenged by defendant here, is a presumption favoring custody in the mother for a child of tender years. Our supreme court had expressed such preference for maternal custody in such cases as Nye and Bukovich. In light of recent developments with regard to discrimination on the basis of sex, such doctrine has been questioned in some cases. (See Marcus v. Marcus (1st Dist. 1974), 24 Ill.App.3d 401, 407, 320 N.E.2d 581; Anagnostopoulos v. Anagnostopoulos (1st Dist. 1974), 22 Ill.App.3d
479, 482, 317 N.E.2d 681.) We do not divine from the record that the decision of the trial court in the instant case is primarily based upon such presumption. As a result of the cases referred to, it is apparent that there is now no inflexible rule (if there ever was one) requiring custody in the mother unless she is shown to be unfit. The general nature of the maternal instinct and particular characteristics of the mother, in each case, as well as those of the father, may certainly be considered by the trial court. Whatever weight the trial court in this case gave to the so-called maternal presumption, it is apparent that it was not excessive or erroneous, but simply another factor in support of the trial court's decision.

In the case *Drake v. Hohimer* [35 Ill. App. 3d 529, 530, 341 N.E.2d 399 (1976)], the court stated, regarding to the tender years doctrine, that "the court cannot recognize a presumption in favor of the mother in a contest for custody of children of tender years. The guiding star is and must be, at all times, the best interest of the child." This seems to show that the doctrine had been discarded.


The second issue raised by defendant is whether the trial judge erred by failing to award custody of the parties' six-year-old daughter to defendant, her mother. Defendant cites *Huey v. Huey*, 25 Ill. App. 3d 20, 322 N.E.2d 560, and *Nye v. Nye*, 411 Ill. 408, 105 N.E.2d 300, to support her position the trial court erred in failing to award her custody of her six-year-old daughter. On the basis of the so-called tender years doctrine defendant attempts to harmonize her position with the
provision of the 1970 Illinois Constitution which provides that equal protection of the law shall not be denied or abridged because of sex (Ill. Const. 1970, art. I, § 18). She claims the tender years doctrine derives from a common understanding of a young child's maternal needs. The crux of this doctrine is that maternal affection is more active and better adapted to the care of the child and this is especially true in the case of a minor daughter. (Nye v. Nye, 411 Ill. 408, 105 N.E.2d 300.) In a recent appellate decision, Huey v. Huey, 25 Ill. App. 3d 20, 322 N.E.2d 560, the court cited Nye for the rule that compelling evidence must be presented in proving the mother to be an unfit person to cause the custody of her minor daughter to be denied her or there must be a positive showing that the best interests of the child would be served by denying custody to the mother. However, the validity of the doctrine is weakened by other recent cases. In Anagnostopoulos v. Anagnostopoulos, 22 Ill. App. 3d 479, 317 N.E.2d 681, the court stated, "While giving custody to the mother may be the usual result of a custody hearing, there is no rule in Illinois that unless she is shown to be unfit, custody should be given to the mother. Furthermore, our 1970 Illinois Constitution provides that equal protection of the law shall not be denied or abridged because of sex." See also Marcus v. Marcus, 24 Ill. App. 3d 401, 320 N.E.2d 581; Pratt v. Pratt, 29 Ill. App. 3d 214, 330 N.E.2d 244; Kauffman v. Kauffman, 30 Ill. App. 3d 159, 333 N.E.2d 695; and Christensen v. Christensen, 31 Ill. App. 3d 1041, 335 N.E.2d 581.

The issue here is whether the custody award was in the best interests of the child. The trial court found the best interests of both children would be served by granting...
their custody to their father and we cannot hold as a matter of law that such holding was contrary to the manifest weight of the evidence. Accordingly, we hold it was not error for the trial court to deny custody of the parties' six-year-old daughter to her mother.


Tender Years Presumption: Equal protection of the law shall not be denied or abridged because of sex. Ill. Const. art. 1, § 18.

Although earlier cases did express a preference for the mother to be entrusted with the custody of children of tender years, (Nye v. Nye, 411 Ill. 408, 105 N.E.2d 300; People ex rel. Bukovich v. Bukovich, 39 Ill. 2d 76, 233 N.E.2d 382) our 1970 Illinois constitution now provides that equal protection of the law shall not be denied or abridged because of sex. (Ill. Const. 1970, art. 1, sec. 18.)

As the trial court in the instant case properly concluded: "[N]o presumption of preference applies." The trial court arrived at its conclusion after a careful examination of this doctrine and its history:

"The early Illinois case of Wright v. Bennett 7 Ill. 587 (1845), in which the attorney for the defendant in error was a person named A. Lincoln, enunciated the common law rule that as between the mother and father of an illegitimate child the mother's right of custody is superior and the father's right secondary. A mother was assumed not to have outside employment. She was expected to be at home caring for the child. Further it was thought that if a young child could not have both maternal and
paternal influences that it would benefit more from a mother's care. Today, women are often employed, and present day authorities assert that 'fathering' can be as essential as 'mothering' for both boys and girls."

"Illinois courts have taken judicial notice of the recent emancipation of women socially and economically. Recent decisions have limited long-standing presumptions based upon sex in the matter of alimony, *Tan v. Tan* 3 Ill. App. 3d 671 279 NE2d 486 (1972) and child support *Plant v. Plant* 20 Ill. App. 3rd 5, 312 NE2d 847 (1974). It is reasonable to expect that courts in awarding child custody will take judicial notice of the changing social and economic conditions of women. The factual basis, if there was one, for the so called 'tender years doctrine' is gone."


Although in the past courts have invoked a "tender years" doctrine whereby custody of a child of tender years would be awarded to the mother, the doctrine appears to be of questionable current validity; and in any event it would not apply to a 14-year-old girl. (*Pratt v. Pratt*, 29 Ill. App. 3d 214, 330 N.E.2d 244 (4th Dist. 1975); *Patton v. Armstrong*, 16 Ill. App. 3d 881, 307 N.E.2d 178 (5th Dist. 1974).) Moreover, no natural equities exist in favor of a mother who will be working and will not remain full-time in the home. *Patton v. Armstrong*.

The mother also contends that the trial court failed to give full weight to "the tender years doctrine" which recognizes that where all things are equal, the best interest of a young child of tender years requires the care and custody of the mother. (E.g., Nye v. Nye (1952), 411 Ill. 408, 105 N.E.2d 300.) This doctrine is no longer universally accepted (e.g., Jines v. Jines (1978), 63 Ill. App. 3d 564, 380 N.E.2d 440), but even if it were invoked in this case, the result here would not be changed. The trial court specifically mentioned the tender years of the child in its memorandum which indicates that the fact of the child's infancy was considered. Moreover, all things are not equal between the father and mother, according to the record, and we can see no justification for reversing the judgment of the trial court.

_In re Marriage of Ramer, 84 Ill. App. 3d 213, 405 N.E.2d 401 (1980)._ 

Stated differently, the tender years doctrine has been deemphasized and applies, if at all, only where all things are equal between father and mother (In re Custody of Melear (1979), 76 Ill. App. 3d 706, 395 N.E.2d 208, 210), or it is simply one factor to be considered by the court in determining the best interest of the child. Randolph v. Dean (1975), 27 Ill. App. 3d 913, 917, 327 N.E.2d 473; Strand v. Strand (1976), 41 Ill. App. 3d 651, 657, 355 N.E.2d 47.

The tender years doctrine was only one facto to consider because they were not equally fit parents.

_In re Marriage of Stevens, 183 Ill. App. 3d 160, 538 N.E.2d 1279 (1989)._
The "tender years presumption," while of questionable current validity (see *Jines*, 63 Ill. App. 3d at 569, 380 N.E.2d at 443), is at most only one factor to be taken into account by the court in determining the best interests of the child. (See *Ramer*, 84 Ill. App. 3d at 217, 405 N.E.2d at 404.) Moreover, no natural equities exist in favor of a mother who will be working and will not remain full time in the home. *Jines*, 63 Ill. App. 3d at 569, 380 N.E.2d at 443.

**Indiana**

Indiana, by statute, provided that there should be no presumption favoring either parent in child custody disputes: "In determining the best interests of the child, there shall be no presumption favoring either parent." (Ind. Code Ann. § 31-1-11.5-21, Burns Supp. 1977).


That the wife, as an adoptive parent, occupies the same position toward the child that she would if she were the natural parent is established by IC 1971, 31-3-1-9 (Burns Code Ed.). However, Indiana law does not hold that the wife, whether a natural or an adoptive parent, is to be preferred in custody disputes. To the contrary, IC 1971, 31-1-11.5-21 (Burns Code Ed., Supp. 1975) provides, in pertinent part:

"The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there shall be no presumption favoring either parent." (Emphasis added.).

In Franklin v. Franklin (1976), 169 Ind. App. 537, 349 N.E.2d 210, 212-213, Judge Lybrook set forth the considerations which are relevant in a case such as the one at bar:

"Examination of Indiana's new Dissolution of Marriage Act . . . is of some assistance in assessing the scope of the trial court's discretion. This Act specifically delineates the factors to be considered by the trial court in determining the best interests of the child. These factors are:

(1) the age and sex of the child;

(2) the wishes of the child's parent or parents;

(3) the wishes of the child;

(4) interaction and interrelationship of a child with his parent or parents, his siblings, and "any other person who may significantly affect the child's best interests;

(5) the child's adjustment to his home, school and community; and

(6) the mental and physical health of all individuals involved . . .

"No cases have yet been reported interpreting these provisions of the Dissolution of Marriage Act. The section dealing with child custody does not specifically provide that a change of conditions must be present before the court can modify the
custody decree. The guiding principle in this Act, as under prior decisions, is the best interests of the child. In determining what is in the best interests of the child it is unnecessary to find that the mother is unfit, for the father's position may have improved to the degree that the best interests of the child would dictate that the father have custody of the child . . .


When initially determining the custodian of a child in a dissolution, Ind. Code § 31-1-11.5-21(a) (1979) requires the trial court make its determination in accordance with the best interests of the child. At that point, there is no presumption favoring either parent, the statute requiring certain factors to be considered by the trial court, all focusing on the child's welfare. Once the initial determination has been made pursuant to these guidelines, a petition seeking modification must establish a substantial and continuing change in the original conditions necessitating the modification. Ind. Code § 31-1-11.5-22(d) (1979).

Iowa

Iowa explicitly abandoned maternal preference in the Supreme Court case *In re Marriage of Bowen* [219 N.W.2d 683, 688 (Iowa 1974)]:

The inference that the best interests of younger children are served by placing them in their mother's custody is no longer wise.
Two relevant questions are presented. They are: (1) should we abandon the inference that the best interests of children of tender years are better served by awarding custody to their mother and (2) should custody have been awarded to the father in this case?

We do not think either parent should have a greater burden than the other in attempting to obtain custody in a dissolution proceeding. It is neither necessary nor useful to infer in advance that the best interests of young children will be better served if their custody is awarded to their mothers instead of their fathers. We previously emphasized the weakness of the inference; we now abandon it.

Many later cases cited the above case as the one that abandoned maternal preference.


Of course, the inference that a mother's custody best serves the interest of children of tender years no longer applies. _In re Marriage of Bowen_, 219 N.W.2d 683, 688 (Iowa 1974); see _Baker v. Baker_, supra, 243 N.W.2d at 235.

_Petition of Ferguson_, 244 N.W.2d 817 (Iowa 1976).

The principal problem in the appeal is this: which parent does the evidence show will more effectively minister to Persephone's long-range interests? Our review of the evidence discloses that in this particular situation the result is affected by the decision of _In re Marriage of Bowen_, 219 N.W.2d 683 (Iowa)--no automatic preference is given to the mother.
We set forth the various relevant factors in controversies of this kind in the case of *In re Marriage of Winter*, 223 N.W.2d 165 (Iowa). We have placed those factors beside the evidence before us. When under Bowen we give the father an even start in the contest and then place the evidence on the scales, we think the balance tends to tip in the father's favor for two reasons.


We no longer give mothers an automatic preference to custody. *In re Marriage of Bowen*, supra.

*In re Marriage of Stom*, 226 N.W.2d 797, 799 (Iowa 1975).

We no longer infer the best interests of children of tender years are better served by awarding custody to their mother. *In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974).

*In re Fynaardt*, 545 N.W.2d 890 (Iowa 1996).

However, we "no longer infer the best interests of children of tender years are better served by awarding custody to their mother." *In re Marriage of Stom*, 226 N.W.2d 797, 799 (Iowa 1975)
Kansas

According to Foster and Freed (1978a), Kansas had had statute equalizing parental rights by 1978: "Where parental rights have not been terminated, neither parent shall be considered to have a vested interest in the custody of any . . . child as against the other parent, regardless of the age of the child." Kan. Stat. Ann. § 60-1610(b).

Evidence from cases suggests that tender years doctrine was still in use despite of the statute. In Grubbs v. Grubbs [5 Kan. App. 2d 694, 623 P.2d 546, rev. denied 229 Kan. 669 (1981)], a father appealed a judgment from the district court which applied the tender years doctrine in awarding custody of a minor child to the mother. The court affirmed the previous decision and the custody remained with the mother.

The 1976 enactment of language now appearing in K.S.A. 1980 Supp. 60-1610(b) did not "abolish" the tender years doctrine in custody cases. It did endorse the "best interests" of the child as the paramount issue, but did not prohibit judicial consideration of the age of the child and the benefits of maternal care in determining whether the best interests of the child would be served by custody with the mother or the father.

The Supreme Court of Kansas has made clear that the age of the child is but one factor to be considered in determining what is in the "best interests" of the child. The best interest test and not the tender years doctrine is the paramount test. The tender years doctrine is not on equal status with the best interest test; rather, in deciding what is in the best interests of the children, one factor to consider and to
give weight is the tender age of the children and the necessity for maternal love --
but it is not an absolute rule that tender aged children should always go to their
mothers.

In child custody cases the real issue is which parent will do a better job of rearing
the children and provide the better home environment. Where the evidence on that
issue is in balance, tender age of the children will normally tip the scales in favor
of the mother, simply because in most cases she is more available in the home.

Now I recognize the law, but nonetheless there was a great deal of common sense
behind the concept that a mother, if she is not unfit, generally is more needed by a
two-year old child than a father. And, I think in this case that at this age and at this
time in the child's life that the mother is the more appropriate person to have
custody.

there shall be no presumption that it is in the best interests of any child to give custody to
the mother.

In 1991, in case In the matter of the marriage of Kathy M. ECK [820 P.2d 419 (1991)], the
(Supp. 1990) states that there shall be no presumption that it is in the best interests of any
child to give custody to the mother."
Kentucky

The time when Kentucky discarded the maternal preference in awarding custody is uncertain. In *Casale v. Casale* [Ky., 549 S.W.2d 805 (1977)] the judge used the ambiguous language that "We are not prepared to define precisely the quantum of proof necessary to overcome the preference that the mother should be the custodian of children of tender years. This is a value judgment that has to be decided on a case-by-case basis. Here the evidence is so close, we are of the opinion that the natural preference for the mother should prevail."


The tender years presumption, on the other hand, applies in disputes between the child's natural parents. Often criticized, this doctrine expresses a preference for the mother as a custodian of young children. *Moore v. Moore*, Ky.App., 577 S.W.2d 613 (1979). The presumption applies only where both parents are equally fit to raise the child. *Casale v. Casale*, Ky., 549 S.W.2d 805 (1977). If the father is better suited as custodian, the presumption is not only inapplicable, but the father may be awarded custody even though the mother is not found to be unfit. *Hamilton v. Hamilton*, Ky., 458 S.W.2d 451, 452 (1970).

At this juncture, the March 17, 1978 amendment to KRS 403.270 should be noted. The statute now requires that each parent in a custody dispute be given equal consideration. This amendment, which appears to abrogate the tender years presumption, became effective June 17, 1978. However, the amendment is not
applicable to the instant appeal because the decree herein was entered March 31, 1978.

In *Stafford v. Stafford* [618 S.W.2d 578, 1981 Ky. App. LEXIS 256 (Ky. Ct. App. 1981)], the court stated that the maternal preference had been eliminated by statute:

> It is evident to us, in the trial court's granting of temporary custody and then in its award of permanent custody, that it gave preference to the mother because she was the mother under a standard expressed in *McLemore v. McLemore*, Ky., 346 S.W.2d 722 (1961) and *Casale v. Casale*, Ky., 549 S.W.2d 805 (1977). However, the legislature has eliminated the maternal preference standard by the readoption, effective in 1980, of K.R.S. 403.270(1), with the addition that "equal consideration shall be given to each parent."

Also, *McLemore and Casale* were limited to children of tender years, not the case here.

According to the Notes to Decisions of the statute KRS § 403.270 (2013):

> The quantum of proof necessary to overcome the preference that the mother should be the custodian of children of tender years is a value judgment that must be decided on a case-by-case basis. *Casale v. Casale*, 549 S.W.2d 805, 1977 Ky. LEXIS 411 (Ky. 1977). (Decision prior to 1978 amendment).

Where all things are equal, the preference is for the mother to have custody of a young child. *Casale v. Casale*, 549 S.W.2d 805, 1977 Ky. LEXIS 411 (Ky. 1977). (Decision prior to 1978 amendment).

The only conclusion to be drawn from subsection (2) (now subsection (3)) of this section is that there must be proof that sexual misconduct of the parent affects the relationship of the parent to the child; otherwise, the evidence of such misconduct is irrelevant and should not be admitted into evidence, and where there was no showing or even a suggestion that the child was aware of the mother's misconduct or that the relationship of the child and the mother was in any way affected by the incident, the testimony should have been excluded, without which the parties were in substantially equal positions with regard to fitness to have custody of the child, and the natural preference for the mother was in the best interest of the child. *Moore v. Moore*, 577 S.W.2d 613, 1979 Ky. LEXIS 219 (Ky. 1979).

It was improper for a trial court to grant temporary custody and then permanent custody to the mother where it gave preference to the mother solely because she was the mother, since the legislature has eliminated the maternal preference standard through the readoption, effective in 1980, of subsection (1) (now subsection (2)) of this section, with the additional requirement that "equal consideration shall be given to each parent." *Stafford v. Stafford*, 618 S.W.2d 578, 1981 Ky. App. LEXIS 256 (Ky. Ct. App. 1981).
The tender years doctrine was still in use in *Cleeton v. Cleeton* [383 So.2d 1231 (La.1979)]. The case opinion stated that "In matters of child custody trial courts are vested with considerable discretion; the mother is preferred as custodian of children of tender years, unless she is unfit and her conduct affects the children adversely; the paramount consideration is the welfare of the children; decisions must be based upon the particular facts and circumstances of each case".

According to *Thornton v. Thornton* [377 So. 2d 417 (La. 1979)], Louisiana established gender neutrality in the statute in the same year:

In *Coltharp v. Coltharp*, 368 So.2d 793 (La.App. 2d Cir. 1979), writ denied 370 So.2d 578 (1979), this court noted that the amendment to LSA-C.C. Art. 157 "could be construed to have legislatively eliminated the maternal preference rule", but that "(T)he amendment to the Article probably makes no change in the law since the maternal preference rule was always based upon the notion that it was to the best interest of a child of young and tender age to be placed in the custody of his mother at the time of the initial custody determination."

LSA-C.C. Art. 157 was amended again, along with LSA-C.C. Art. 146, by Act 718 of 1979, effective September 7, 1979. The two articles, as amended, provide:

Art. 146
"If there are children of the marriage, whose provisional keeping is claimed by both husband and wife, the suit being yet pending and undecided, it shall be granted to the husband or wife, in accordance with the best interest of the children. In all cases, the court shall inquire into the fitness of both the mother and the father and shall award custody to the parent the court finds will in all respects be in accordance with the best interest of the child or children. Such custody hearing may be held in private chambers of the judge."

Art. 157

"A. In all cases of separation and divorce, and changes of custody after an original award, permanent custody of the child or children shall be granted to the husband or the wife, in accordance with the best interest of the child or children, without any preference being given on the basis of the sex of the parent. Such custody hearing may be held in private chambers of the judge. The party under whose care the child or children is placed, or to whose care the child or children has been entrusted, shall of right become natural tutor or tutrix of said child or children to the same extent and with the same effect as if the other party had died."

It could hardly be more clear that the legislative intent is to do away with any legal preference or presumption in favor of the mother in custody disputes. The father and the mother stand on equal footing at the outset and the role of the court is to determine the best interest of the child based on the relative fitness and ability of the competing parents in all respects to care for the child.
The legislative amendments do not, however, do away with the real life fact, based on human experience, that it is often, in many if not most family circumstances, in the best interest of young children to be cared for by their mother. This nonmaterial concept remains a factor to be considered, along with many others, and will often compete with more materialistic factors that favor the father. It is correct, however, that this concept does not create a preference or presumption in favor of the mother that must be overcome by proof of the mother's unfitness or incapability.

According to Hawkins (1982):

The Louisiana Legislature reacted to this trend by amending article 157 in 1977 to specifically permit permanent custody awards to either the husband or wife." This rejected by implication the prior "fault-based" criteria" and made it appear that the "best interest of the child" standard was to be the sole criterion for custody awards. In Act 718 of the 1979 regular session, the legislature strengthened the "equal right to custody" provision in article 157 by adding the words "without any preference being given on the basis of the sex of the parent." This act also amended the provisional custody article to eliminate the maternal preference it had expressed. Subsequent Louisiana decisions interpreted these changes as clear signals of the legislative intent to overturn the maternal preference rule. (p. 92)


We concluded that the following legal principles were relevant to a determination of child custody: (1) The paramount consideration in determining to whom custody
should be granted is always the welfare of the children. (2) The general rule is that it is in the best interest of the children to grant custody to the mother, especially when they are of tender years, unless the mother is morally unfit or otherwise unsuitable. (3) When a trial court has made a considered decree of permanent custody, the party seeking a change of custody has a heavy burden of proving that the present custody is deleterious to the children as to justify removing them from the environment to which they are accustomed. (4) The decision of the trial judge is entitled to great weight.

We need not decide, as the appellate court chose, whether the 1979 amendment to C.C. art. 157, eliminating the maternal preference aspect of Fulco, is retroactive or not since it is nothing more than a clarification of the language of the statute as amended in 1977 and it tells us nothing more than what we have already indicated the 1977 amendment accomplished. Further, the addition of language expressly requiring application of the "best interest" test to changes of custody merely codifies the interpretive jurisprudence, *Black v. Black*, supra, which was neither expressly nor impliedly altered by the 1977 amendment.


After these judicial precepts had become well settled, the legislature in 1977 amended and reenacted Civil Code Article 157 to establish the best interest principle by law and to expressly reject the maternal preference presumption.
Article 157 was amended by Act No. 448 of 1977 to read, in pertinent part, as follows:

A. In all cases of separation and divorce, permanent custody of the child or children shall be granted to the husband or the wife, in accordance with the best interest of the child or children . . ."

The legislative aim of this act seems clear -- simply to codify the jurisprudential best interest principle and to reject statutorily the jurisprudential maternal preference presumption. Nevertheless, recent decisions of this court have failed to produce a consistent and satisfactory analysis of the legislative intention.

This court in *Bordelon v. Bordelon*, 390 So. 2d 1325 (La. 1980) declared that the legislature by the 1977 act adopted the best interest principle and rejected not only the maternal preference presumption but also the heavy burden of proof required to change custody. The court's rationale was that because the act adopted the jurisprudential best interest principle as the substantive criterion for granting and changing custody, the lawmakers must have intended to reject all other jurisprudential precepts having a material influence upon the application of the substantive principle. The court reasoned that because the heavy burden of proof requirement for changing custody limited the application of the best interest principle, it therefore had been rejected tacitly by the act. The *Bordelon* opinion did not make clear whether the change of circumstances rule and the appellate review
standard, both of which may be said to strongly influence application of the best interest principle, are also considered to have been rejected. The opinion does not mention the change of circumstances rule, and its treatment of the appellate review standard is equivocal.

According to the case notes of La. C.C. Art. 131 (2013):

187. Award of provisional custody of two young children to their father was proper where the maternal preference rule had been abolished in Louisiana and the father had family support available to help him with the care of the children, while the mother did not. *Cooley v. Cooley*, 411 So. 2d 750, 1982 La. App. LEXIS 6978 (La.App. 3 Cir. 1982).

189. In a child custody dispute no legal preference could be given the mother in a custody determination, the maternal preference rule having been abrogated by amendments to former La. Civ. Code Ann. arts. 146 and 157 (now La. Civ. Code Ann. arts. 131 and 134, respectively); however the trial court could consider as a factor the real life fact based on human experience that it was often in the best interest of young children to be cared for by their mother. *Jowers v. Jowers*, 393 So. 2d 790, 1981 La. App. LEXIS 3432 (La.App. 2 Cir. 1981).

190. Custody of the parties' children could not be granted to their mother based on the maternal preference rule; rather, the best interests of the children was the governing standard under amendments to former La. Civ. Code Ann. arts. 146 and 157(A) (now La. Civ. Code Ann. arts. 131 and 134, respectively). *Lemoine v.*
**Maine**

Only one case has been found in Maine that mentioned the tender years doctrine [*Lane v. Lane*, 446 A.2d 418, 419 (Me. 1982)]:

*Costigan v. Costigan*, Me., 418 A.2d 1144, 1146 (1980). See also *Huff v. Huff*, Me., 444 A.2d 396, slip op. at p. 3 (1982). This Court has never sanctioned the
application of a rebuttable presumption in favor of the mother in custody cases and we see no reason to do so at this time. Sensitive to the current changes in societal perceptions of gender roles generally and in parenting specifically, we see no sufficient reason to accept the plaintiff's suggestion that we adopt a presumption in favor of the mother. We remain convinced that the best rule is the one we have followed for many years, i.e. the best interests of the child should be the primary consideration.

Some jurisdictions do apply a presumption in favor of the mother in varying situations. See Foster and Freed, "Life With Father: 1978", 4 Fam. L.A. 321, 332 (1978). However, the trend is clearly towards abolishing or limiting the scope of application of the doctrine. See, e.g., Ex Parte Devine, Ala., 398 So.2d 686 (1981); State ex rel. Watts v. Watts, 77 Misc.2d 178, 350 N.Y.S.2d 285 (Fam. Ct. 1973); Annot., 70 A.L.R.3d 262. We do not feel compelled to consider each of the various permutations of the tender years doctrine, since we reject the assumptions on which the doctrine must rest.

The paramount consideration in deciding the question of custody is the well being, or best interest, of the child.

The plaintiff's argument on appeal is that the decision below was clearly erroneous. First, she contends that the evidence does not support a finding that the child's best interests would be served by awarding custody to the father. Second, she urges this Court to adopt the "tender years doctrine", which vouchsafes to the mother the
presumption that, all things being equal, she is presumed to be best fitted to guide and care for children of tender years, asserting that the defendant in this case failed to rebut such a presumption.

We first reiterate our oft-stated holding that the paramount consideration in deciding the question of custody is the well being, or best interest, of the child. See Ziehm v. Ziehm, Me., 433 A.2d 725, 729 n. 5 (1981); Cyr v. Cyr, Me., 432 A.2d 793, 796 (1981); Harmon v. Emerson, Me., 425 A.2d 978 (1981); Osier v. Osier, Me., 410 A.2d 1027, 1030 (1980); Buzzell v. Buzzell, Me., 235 A.2d 828, 831 (1967); Grover v. Grover, 143 Me. 34, 37, 54 A.2d 637, 638-39 (1947); Merchant v. Bussell, 139 Me. 118, 27 A.2d 816 (1942). This Court has recently stated that the following factors, as well as others, may be considered in deciding which parent or other person should receive custody of a child:

the age of the child, the relationship of the child with his parents and any other persons who may significantly affect the child's best interests, the wishes of the parents as to the child's custody, the preference of the child (if old enough to express a meaningful preference), the duration and adequacy of the current custodial arrangement and the desirability of maintaining continuity, the stability of the proposed custodial arrangement, the motivation of the competing parties and their capacity to give the child love, affection and guidance, and the child's adjustment to his present home, school and community.
The above case cited Costigan v. Costigan [Me., 418 A.2d 1144, 1146 (1980)], in which court stated that: "Finding that Sandie was no longer an unfit mother, the District Court judge concluded that even though some disruption would result from changing custody, that fact 'cannot justify maintaining a status quo which deprives a young child of the nurture and loving care of her mother where the mother has shown herself to be ready and able to discharge her parental responsibilities.'" Maternal preference was in consideration in this case.

Best Interests of the Child doctrine can be found in Statute 19 M.R.S.A. § 1507. Neither the statute nor the case provides clear evidence regarding when the transition took place.

**Maryland**

In 1974, the case Cooke v. Cooke [21 Md. App. 376, 319 A. 2d 841 (1974)] displayed some, though very subtle, evidence that the maternal preference was being questioned. In that case, the judge awarded the custody to the mother, but stated that:

> However, the court took issue with the trial court's consideration of the preference to be afforded the natural mother when a young and immature child was involved. The child's best interest was not a principle to be placed upon the balance scales, but rather was the measure by which all else was to be decided. No factor was to be given weight that was not homogeneous with that principle. It was unlikely that litigants would have parental qualities so equally balanced that resort to the maternal preference would be necessary. It was therefore not to be expressed as a
consideration at all, except in those limited instances where it would be impossible
to decide upon the evidentiary facts.

In *McAndrew v. McAndrew* [39 Md. App. 1, 382 A.2d 1081 (1978)], the court established
gender neutrality:

The parents shall have equal powers and duties, and neither parent has any right
superior to the right of the other concerning the child's custody.

A 1974 amendment to Md. Code Ann. art. 72A, § 1, makes explicit the legislature's
desire that in any custody proceeding, neither parent shall be given preference
solely because of his or her sex. The title to that act states: Custody of Children --
No Preference to either spouse for the purpose of providing that neither spouse shall
be given preference because of sex in a court custody proceeding.

At the time this Act was passed, there was no preference of either spouse in a
custody proceeding, based on sex, other than the maternal preference. It was,
therefore, that maternal preference, being the only sex based preference then
established in the law, that the General Assembly intended to abolish. Unless the
1974 amendment had that effect, it had none at all; and we will not presume that
the Legislature intended to enact a meaningless statute in so important an area.
Accordingly, we conclude that, since July 1, 1974, the maternal preference has been
abolished by statute in child custody cases.

The so called "preference" for the mother as the custodian particularly of younger
children is simply a recognition by the law, as well as by the commonality of man,
of the universal verity that the maternal tie is so primordial that it should not lightly be severed or attenuated. The appreciation of this visceral bond between mother and child will always be placed upon the balance scales, and all else being equal or nearly so, will tilt them. As heavy a factor as it may be, however, it is still but a factor. Every statement of the preference is hedged about by the context all else being equal. If, after giving due weight to the maternal preference, the scales nonetheless demonstrate the better suitability of the father or, indeed, of some third person to serve the interests of the child, the path for the chancellor is clearly indicated. The "better interests" of the child is always the paramount consideration.

This is not to suggest that the best interests of the child may not require a consideration of the biological and psychological differences between the parents (or other potential custodians) to the extent that they bear upon their ability to provide the care needed by the child at the time. The inquiry here must concern the needs of the particular child and each of the parties' relationship with the child. A parent is no longer presumed to be clothed with or to lack a particular attribute merely because that parent is male or female.

To the extent that we postulated in Cooke that a preference of any type could be a tie-breaker, we disaffirm that theory. Our choice of that term in retrospect, like the use of the term maternal preference, was ill advised. There can be no tie-breaker in a custody case because, as we indicated in Cooke, supra, there should never be a tie. The determination of custody is an area in which discretion is vested in a judge and in which appellate review of his exercise of that discretion is limited. Davis v.
Davis, 280 Md. 119, 372 A. 2d 231 (1977); Ross v. Hoffman, supra. He has at his command not only the evidence offered by the parties but a full panoply of social service and other extrajudicial agency resources. From all of that he is required to make a decision. If, in a petition for modification, he is unable to conclude that custody should be changed, then it ought not to be changed. Vernon v. Vernon, supra. This is nothing more than a recognition of the principle that a person seeking some court action has the burden of showing why the court should take that action, and that, if he fails to meet that burden, whatever it is, the action should not be taken.

We conclude that the chancellor, in this case, erred in applying the heretofore recognized maternal preference principle. We are required to remand the case for further proceedings. We express no opinion as to the ultimate determination of the controversy as we perceive that additional information will undoubtedly be available to the chancellor when the issue of custody of this child is again considered.

My finding that the above case abolished maternal preference is supported by the evidence from a subsequent case in 1984, statutory notes, and secondary source.

In Elza v. Elza [300 Md. 51, 475 A.2d 1180 (1984)], it cited the above case as abolishing the maternal preference in Maryland.

Despite the clear and unambiguous language of Art. 72A, § 1 mandating equal treatment of parents with respect to determining who is to have custody, Maryland
courts have consistently expressed a preference for awarding the custody of young children to the mother. This phenomenon is known as the "maternal preference" doctrine. The Court in Oberlander v. Oberlander, 256 Md. 672, 261 A.2d 727 (1970), delineated the principle as follows: "In determining what is the best interest of the child, it is entirely proper for the trial court to consider . . . the general rule that the custody of a child of tender years should ordinarily be awarded to the mother."@ 256 Md. 676, 261 A.2d 727. To similar effect is the Court's statement in Kauten v. Kauten, 257 Md. 10, 11, 261 A.2d 759 (1970), that "it will be a rare occurrence when a young child will be taken from its mother if she is a fit person and all other things are equal."@ Numerous other decisions of this Court have at least recognized, if not applied, this presumption. See, e.g., Cornwell v. Cornwell, 244 Md. 674, 678-79, 224 A.2d 870 (1966); Palmer v. Palmer, 238 Md. 327, 331, 207 A.2d 481 (1965); Glick v. Glick, 232 Md. 244, 248, 192 A.2d 791 (1963); Alden v. Alden, 226 Md. 622, 624, 174 A.2d 793 (1961); Hild v. Hild, 221 Md. 349, 357, 157 A.2d 442 (1960); McCabe v McCabe, 218 Md. 378, 383, 146 A.2d 768 (1958); Oliver v. Oliver, 217 Md. 222, 228, 140 A.2d 908 (1958); Casey v. Casey, 210 Md. 464, 473-74, 124 A.2d 254 (1956); Townsend v. Townsend, 205 Md. 591, 596, 109 A.2d 765 (1954); Trudeau v. Trudeau, 204 Md. 214, 218, 103 A.2d 563 (1954).

This Court has not had occasion to consider the efficacy of the maternal preference doctrine since the General Assembly amended Art. 72A, § 1 in 1974. The Court of Special Appeals, however, in McAndrew v. McAndrew, 39 Md. App. 1, 382
A.2d 1081 (1978), determined that the effect of the 1974 amendment was to *abolish the presumption*. In *McAndrew*, the court noted that the legislation embodying the amendment was entitled "An Act concerning Custody of Children - - No Preference to Either Spouse."@ 39 Md. App. at 8, 382 A.2d 1081. See Acts of 1974, ch. 181, § 1. The court then reasoned as follows:

"At the time this Act was passed, there was no preference of either spouse in a custody proceeding, based on sex, other than the maternal preference. It was, therefore, that maternal preference, being the only sex based preference then established in the law, that the General Assembly intended to abolish. Unless the 1974 amendment had that effect, it had none at all; and we will not presume that the Legislature intended to enact a meaningless statute in so important an area. Accordingly, we conclude that, since July 1, 1974, the maternal preference has been abolished by statute in child custody cases."@ 39 Md. App. at 8, 382 A.2d 1081 (footnote omitted).

After noting that a determination of the child's best interests requires an evaluation of biological and psychological differences between the parents, the needs of the particular child, and the relationship of each parent to the child, the court stated that the impact of its holding merely was as follows: "A parent is no longer presumed to be clothed with or to lack a particular attribute merely because that parent is male or female."@ 39 Md.App. at 9, 382 A.2d 1081. In conclusion, the court in *McAndrew* rejected the notion that the maternal preference doctrine should be
used as a "tie-breaker" when the chancellor is confronted with two fit and proper parents. 39 Md.App. 9, 382 A.2d 1081.

We find the reasoning of the court in McAndrew persuasive. Further, in construing a statute, courts are bound to ascertain and promote the legislative intent. To discharge this duty a court must consider the legislative language given its natural and ordinary meaning. If there is no ambiguity in the language of a statute, then there generally is no need to look beyond that language to determine the legislative intent. See, e.g., Hurst v. V & M of Virginia, 293 Md. 575, 578, 446 A.2d 55 (1982); Rome v. Lowenthal, 290 Md. 33, 41, 428 A.2d 75 (1981); Department of State Planning v. Hagerstown, 288 Md. 9, 14-15, 415 A.2d 296 (1980); Police Commissioner v. Dowling, 281 Md. 412, 418-19, 379 A.2d 1007 (1977). The 1974 amendment to Art. 72A, § 1, by providing that "neither parent shall be given preference solely because of his or her sex," clearly states the intent of the General Assembly to eradicate sex as a factor in child custody proceedings. There is neither ambiguity nor obscurity with respect to the meaning of any words in this phrase. Therefore, we hold that the maternal preference doctrine is abolished in this State because it permits an award of custody to be made solely on the basis of the mother's sex.

It follows from the above analysis that, in awarding custody to Mrs. Elza, the chancellor below applied an invalid legal principle. A review of the record of the hearing demonstrates that the chancellor believed each parent would be a proper and fit custodian. Nevertheless, he granted custody to Mrs. Elza because "it's a five
year old... all other factors being equal... that in that case, the child should go with the mother."@ Indeed, the record establishes that this was the only reason expressed for awarding custody of Shannon to Mrs. Elza. Therefore, it is clear that the error in this case is not harmless and the case must be remanded for further proceedings in the trial court.

On remand, the chancellor shall explicate more fully the reasons for his decision. In evaluating what would be in the child's best interests, the chancellor shall consider, among other factors, Shannon's needs, the relationship of each of her parents to her, and the effect of the biological as well as psychological differences between her parents on her welfare. Given that additional information will undoubtedly be available to the chancellor when he again presides over this custody proceeding, we express no opinion concerning the ultimate resolution of this controversy.

Statutory notes of Md. FAMILY LAW Code Ann. § 5-203 also supports that the maternal preference was abolished by the case *McAndrew v. McAndrew*: "MATERNAL PREFERENCE ABOLISHED. --Since 1974, the maternal preference has been abolished in child custody cases. *McAndrew v. McAndrew*, 39 Md. App. 1, 382 A.2d 1081 (1978)."

Similarly, according to Foster and Freed (1978a): "Tender years presumption abandoned. See *McAndrew v. McAndrew*, 4 F.L.R. 2297 (Md. Ct. Spec. App. 2-28-78)."
Massachusetts

The Massachusetts statute (Mass. Gen. Laws Ann. Ch. 208, § 31, West Supp. 1977-78) provided that the rights of parents to custody of their children shall be equal, "and the happiness and welfare of the children shall determine their custody or possession."

Michigan

The Michigan custody statues (Mich. Comp. Laws Ann. § 722.25, Supp. 1977-78) established the best interests of the child as the controlling consideration in custody disputes. Among the factors that determine the best interests of the child, the gender of the parents was not mentioned.

Notes to decisions of MCLS § 722.23:

It is an abuse of discretion for a circuit court to make an award of joint custody on the basis that the child was a female and that a "biological preference" thereby existed in favor of custody by the mother where there was no evidence before the court to substantiate the existence of any such biological preference or that any such biological preference was in the best interests of the child and where all the other factors weighed in favor of the father. *Freeman v. Freeman*, 163 Mich App 493, 414 NW2d 914, 1987 Mich App LEXIS 2777 (1987).

Although trial court may properly consider child's age and sex as indicia of need for particular custodial parent in child custody proceedings, such factor cannot of

**Minnesota**

In 1974, the case *Erickson v. Erickson* [220 N.W.2d 487 (Minn. 1974)] showed that the maternal preference still played a very small role in custody decisions. The judge stated that "Although we have indicated that normally, other things being equal, the interests of young children are better served by placing them in their mother's custody rather than their father's custody, the paramount and overriding consideration must be the welfare of the children."

*Pikula v. Pikula* [374 N.W.2d 705 (Minn. 1985)] established the primary caretaker presumption as the rule to determine custody when "both parents sought custody of a child too young to express a preference":

The best interests of the child as delineated by the statutory factors set out in Minn. Stat. § 518.17, subd. 1 (1984), require that when both parents seek custody of a child too young to express a preference for a particular parent, and one parent has been the primary caretaker of the child, custody should be awarded to the primary caretaker absent a showing that that parent is unfit to be the custodian.
The primary parent rule is gender neutral. Either parent may be the primary parent.

In establishing which natural or adoptive parent is the primary caretaker, the trial court shall determine which parent has taken primary responsibility for, inter alia, the performance of the following caring and nurturing duties of a parent: (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e. babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e. teaching general manners and toilet training; (9) educating, i.e., religious, cultural, social, etc.; and, (10) teaching elementary skills, i.e., reading, writing and arithmetic.

The primary parent preference, while in accord with the tender years doctrine insofar as the two rules recognize the importance of the bond formed between a primary parent and a child, differs from the tender years doctrine in significant respects. Most importantly, the primary parent rule is gender neutral. Either parent may be the primary parent; the rule does not incorporate notions of biological gender determinism or sex stereotyping. In addition, the rule we fashion today we believe will encourage co-parenting in a marriage unlike the tender years doctrine.
which, for fathers, meant that whatever function they assumed in the rearing of their children would be deemed irrelevant in a custody contest.

In subsequent cases, the primary caretaker presumption was often cited as the Pikula rule (or Pikula presumption).

(Maxfield v. Maxfield, 452 N.W.2d 219, 221 (Minn. 1990).

Until about 20 years ago, the law in Minnesota child custody cases was that, in almost all cases, the mother received custody of the parties' young children unless she was unfit. See, e.g., Bennett v. Bennett, 277 Minn. 227, 152 N.W.2d 187 (1967); In re Alsdurf, 270 Minn. 236, 133 N.W.2d 479 (1965); Eisel v. Eisel, 261 Minn. 1, 110 N.W.2d 881 (1961). The rule in these cases rested on the stereotypical notion that it was automatically in the best interests of a young child to live with the mother. See Meinhardt v. Meinhardt, 261 Minn. 272, 276, 111 N.W.2d 782, 784 (1961) ("Other things being equal, the welfare of children of tender years is best served by their being left in the care of their mother."). This maternal presumption has become known as the "tender-years doctrine." See Note, A Step Backward: The Minnesota Supreme Court Adopts a "Primary Caretaker" Presumption in Child Custody Cases; Pikula v. Pikula, 70 Minn. L. Rev. 1344, 1348 n. 18 (1986) (hereinafter "A Step Backward").

Starting in the late 1960's, no-fault divorce advocates and various equal rights groups insisted that divorce statutes be amended to discard the tender-years doctrine and codify the rule that the best interests of the child be the
test. See A Step Backward, supra at 1349 & n.21. In 1969, the Minnesota Legislature codified the "best-interests-of-the-child" standard and prohibited consideration of the proposed custodian's gender. Act of June 6, 1969, ch. 1030, § 1, 1969 Minn. Laws 2081, 2081-82. This court, however, basically ignored the legislature's first attempt to eliminate the tender-years doctrine. See Reiland v. Reiland, 290 Minn. 497, 500, 185 N.W.2d 879, 881 (1971) ("This amendment does no more than express views contained in prior decisions of this court."). In 1974, the legislature amended Minn. Stat. § 518.17, subd. 1 in order to provide specific guidelines and require the courts to consider several factors. See Act of Mar. 28, 1974, ch. 330, § 2, 1974 Minn. Laws 555, 555-56; see also A Step Backward, supra at 1351. However, when lower courts actually started to award custody to the father in certain cases, the people who originally favored the objective statutory factors began arguing that the law should move in the opposite direction. See A Step Backward, supra at 1373 n. 142 (noting that, in the early 1980's, some studies indicated that mothers were losing two-thirds of all contested custody cases). Finally, this court adopted the Pikula rule, which provides that the primary caretaker has a presumption in his or her favor. The Pikula presumption basically instructs trial courts to substitute a list of homemaking duties for "all relevant factors" expressly provided in Minn. Stat. § 518.17, subd. 1. See id. at 1359. The Pikula presumption, although neutral on its face, has a readily apparent disparate impact on fathers. In other words, we seem to have completed a full cycle and are attempting to get the tender-years doctrine in through the back door so that, once again, it will be the mother who is invariably
granted custody of the children unless she is found to be unfit. Whether we favor such a rule or not, that is not the law in Minnesota. See *Sefkow v. Sefkow*, 427 N.W.2d 203, 212 (Minn. 1988). The recent amendments to Minn. Stat. § 518.17, subd. 1 are the legislature's third attempt to force this court to abandon inflexible presumptions about who is best able to care for a young child. It seems to me that, in refusing to let go of the *Pikula* presumption, the majority, by judicial fiat, is ignoring the intent of the legislature and reviving the tender-years doctrine. See majority opinion at 222 ("the aim [of *Pikula*] was to place the child too young to express a preference where that child might best have the emotional security and nurturing environment so vital to the child's life and development").

At least one commentator has argued for an overt resurrection of the tender-years doctrine on the grounds that, "in a society which continues to discriminate against women in every other aspect of life, a mother's preferred status regarding custody of her children is not unlike the 'reverse discrimination' and preferred status urged on behalf of historically disadvantaged groups in a variety of other contexts." Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisted*, 1 Harv. Women's L.J. 107, 130 (1978). While I do not support the idea that "reverse discrimination" is the best way to correct past wrongs, at least this approach would have the benefit of candor.

According to Freed and Walker (1988):
The tender years doctrine was judicially abandoned many years ago. It is legislatively discarded with the adoption of the present custody statute, Minn. Stat. § 518.17 (Supp. 1987). However, in *Pikula v. Pikula*, 374 N.W.2d 705 (Minn. 1985), the requirement that the trial courts look to the primary parent, where a child is too young to express a preference, seems to mark a modest return to that doctrine. Nonetheless, many cases have determined that the father was the primary nurturing parent and awarded him custody. See, e.g., *Wolter v. Wolter*, 382 N.W.2d 896 (Minn. Ct. App. 1986). (p. 523)

According to Freed and Walker (1991):

Maxfield v. Maxfield, 452 N.W.2d 219 (Minn. 1990). Although the tender years, or primary caretaker, presumption has been discarded by the legislature, a custody award to a father supported by sixty-six findings of fact was reversed by the Supreme Court. (p. 347)

**Mississippi**

Mississippi courts still used the tender years doctrine, though the doctrine has been weakened over time.

The case *Albright v. Albright* [437 So. 2d 1003 (Miss. 1983)] described the complete history of the evolvement of the "tender age rule" in Mississippi until 1983. The principle was first established in an 1897 case, which had been used in many cases since then. In
two cases in the 1970s and 1980s, the principle was used as a rule, not a presumption. In this case, the court would not discard the tender years doctrine, but stated that the primary consideration in determining child custody should be "the best interest and welfare of the child". It also listed the factors to be considered.

The question before the Court is whether the "tender age rule" in custody awards is violative of the father's right to equal protection of the law under Fourteenth Amendment to the United States Constitution. However, it is not necessary to reach the United States constitutional question since there is Mississippi statutory law upon which this case can be decided. The applicable statute is Miss. Code Ann. § 93-13-1(1972) which states in part that "Neither parent has any right paramount to the right of the other parent concerning the custody of the minors. . . ."

A history of the development of the "tender years doctrine" is significant. At common law, a father had the absolute proprietary right to the custody of his legitimate minor children, and this right was incorporated into the jurisprudence of our country. Gradually, enlightened attitudes changed from the traditional common law rule of absolute paternal custody to an acknowledgment of maternal preference in custody awards of young children. In some jurisdictions this doctrine has taken the form of a legal evidentiary presumption; while in other jurisdictions, it is expressed as a rule or natural presumption.

In Mississippi jurisprudence the early case of Johns v. Johns, 57 Miss. 530 (1879) established the rule that: "In all cases where any child is of such tender age
as to require the mother's care for its physical welfare it should be awarded to her custody, at least until it reaches that age and maturity where it can be equally well cared for by other persons."

This principle has been followed in numerous cases since it was first enunciated. *Brown v. Brown*, 237 Miss. 53, 112 So.2d 556 (1959); *Kennedy v. Kennedy*, 222 Miss. 469, 76 So.2d 375 (1955); *Scott v. Scott*, 219 Miss. 614, 69 So.2d 489 (1954); *Bland v. Stoudemire*, 219 Miss. 526, 69 So.2d 225 (1954); *Mitchell v. Mitchell*, 218 Miss. 37, 65 So.2d 265 (1953); *Kyzar v. Kyzar*, 248 Miss. 59, 157 So.2d 770 (1963); Bunkley and Morse's Amis, Divorce and Separation in Mississippi § 805, p. 217.

These cases refer to this principle as a rule, not a presumption. *Cf. Sistrunk v. Sistrunk*, 245 So.2d 845 (Miss. 1971). However, the rule is not absolute, and where unfitness of the mother is found, then the rule is not applied. *Hodum v. Crumpton*, 329 So.2d 667 (Miss. 1976); *Buntyn v. Smallwood*, 412 So.2d 236 (Miss. 1982).

Notwithstanding the reiteration of this maternal preference rule, our decisions have always stated the cardinal principle to be applied to custody decisions is that which is in the best interests and welfare of the minor child. *Brown v. Brown*, *supra*; *Buntyn v. Smallwood*, *supra* and the cases cited therein. Even now it is a principle which is weaker than in past years. *Cheek v. Ricker*, 431 So.2d 1139 (Miss. 1983). "It hardly seems rational that the age of a child should per se lead to any particular result."
The "tender age doctrine" has been undergoing re-evaluation in recent years. Two states have held that the maternal presumptive favoring mothers in custody cases violates state as well as United States Constitutional guarantees of the Fourteenth Amendment. *Watts v. Watts*, 77 Misc. 2d 178, 350 N.Y.S.2d 285 (1973). The tender years presumption was held an unconstitutional gender-based classification which discriminates between fathers and mothers in child custody cases solely on basis of sex. *Devine v. Devine*, 398 So.2d 686 (Ala. 1981).

However, since Miss. Code Ann. section 93-13-1 (1972) affords us an independent and adequate remedy upon which to base this opinion, we decide it upon state statutory grounds and not federal constitutional ones.

We reaffirm the applicability of section 93-13-1. We are aware that the "tender years" doctrine has undergone a weakening process in many jurisdictions as well as in this state. *Cheek v. Ricker*, *supra*. To abandon the rule, however, would discard a factor worthy of weight in determining the best interest of a child in a particular case.

We reaffirm the rule that the polestar consideration in child custody cases is the best interest and welfare of the child. The age of the child is subordinated to that rule and is but one factor to be considered. Age should carry no greater weight than other factors to be considered, such as: health, and sex of the child; a determination of the parent that has had the continuity of care prior to the separation; which has the best parenting skills and which has the willingness and capacity to provide
primary child care; the employment of the parent and responsibilities of that employment; physical and mental health and age of the parents; emotional ties of parent and child; moral fitness of parents; the home, school and community record of the child; the preference of the child at the age sufficient to express a preference by law; stability of home environment and employment of each parent, and other factors relevant to the parent-child relationship.

In later cases, the factors to determine child custody stated in the case *Albright v. Albright* were often cited as the *Albright* factors. See, e.g., *Mercier v. Mercier*, 717 So. 2d 304, 307 (Miss. 1998), *Copeland v. Copeland*, 904 So. 2d 1066 (Miss. 2004). In subsequent years, tender years doctrine was still a factor in the determination of child custody.

*Pellegrin v. Pellegrin* [478 So. 2d 306 (Miss. 1985)] stated that "The best interest of the child is paramount in the consideration of the court and the "Tender Years Doctrine" is merely a factor worthy of weight in determining the best interest of a child." Therefore, tender years doctrine is still a factor in consideration.

*Chamblee v. Chamblee*, 637 So. 2d 850 (Miss. 1994).

Appellant Sheila attempts to bolster her case for custody by using the "tender years" doctrine. This rule dates back over a century to the case of *Johns v. Johns*, 57 Miss. 530 (1879), where this court stated, "In all cases where any child is of such tender age as to require the mother's care for its physical welfare it should be awarded to her custody, at least until it reaches that age and maturity where it can be equally well cared for by other persons." *Id.* Recent jurisprudence, however, has weakened
The court concluded that the tender years doctrine was no longer a rule and that the age of a child was simply one of the factors to be considered in determining the best interests of the child. The court determined that the trial court sufficiently addressed the tender years doctrine by finding that it did not apply. The court found that the trial court properly weighed the remaining Albright factors in determining the custody arrangement that was in the best interests of the child.

P13. The tender years doctrine on which Margaret relies was established by this Court in 1879 in *Johns v. Johns*, 57 Miss. 530 (1879) and is stated as follows:

'In all cases where any child is of such tender age as to require the mother's care for its physical welfare it should be awarded to her custody, at least until it reaches that age and maturity where it can be equally well cared for by other persons.'

P14. The tender years doctrine has been gradually weakened in Mississippi jurisprudence to the point of now being only a presumption. Law v. Page, 618 So. 2d 96, 101 (Miss. 1993). Today, the age of a child is simply one of the factors that we consider in determining the best interests of the child. Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983). In this case, Dusty was within weeks of her seventh birthday at the time of trial. The cases cited by Margaret in support of the proposition that, as a female in her tender years Dusty should reside with her mother, are all pre-Albright cases when the tender years doctrine was a rule rather than one of several factors to consider in determining custody. Furthermore, in each of these cases, the child was younger than Dusty, or there were several siblings, with at least one of them being younger than Dusty.

P15. Margaret further alleges that the chancellor summarily dismissed the tender years doctrine without inquiry. We disagree. The chancellor addressed this issue when he noted that Dusty was no longer of tender years since she was nearly seven at the time of hearing. As stated supra, a child is no longer of tender years when that child can be equally cared for by persons other than the mother. We have held that a child of seven is long past the age that requires this type of special care from her mother. Torrence v. Moore, 455 So. 2d 778, 780 (Miss. 1984) (citing Duncan v. Duncan, 119 Miss. 271, 80 So. 697 (1919)). Not only can other people care for Dusty as well as her mother, but the record reflects that Steve Mercier does care for Dusty as well as or better than her mother. We are satisfied that the chancellor sufficiently addressed the tender years doctrine by finding that it did not apply.
P16. Not only do we find that the chancellor correctly evaluated the tender years doctrine, but we also find that he properly weighed the remaining Albright factors. The chancellor noted that Steve has a steady job and significant income while Margaret is a student living on a Pell grant, student loans, and part time jobs. In fact, Margaret has admitted that she is forced to rely upon the kindness of her kin to sustain Dusty and herself. While the income is certainly in Steve's favor, the record shows numerous other reasons why the Albright factors are weighted in Steve's favor. The chancellor found that Steve Mercier had better parenting skills and ability to provide primary child care, that his employment and responsibilities were more suited to the care of Dusty, that he could provide a more stable home environment for Dusty, and that Dusty's home, school and community record indicate that she should be with Steve.

*Bower v. Bower, 758 So. 2d 405 (Miss. 2000).*

In all cases where any child is of such tender age as to require the mother's care for its physical welfare, it should be awarded to her custody, at least until it reaches that age and maturity where it can be equally well cared for by other persons." Amis, Divorce and Separation in Mississippi § 8.05, at 217 (1957) A child of 7 has been held by this Court to be long past the age prior to which it requires attention of such character from the mother. *Torrence v. Moore*, 455 So. 2d 778, 780 (Miss. 1984).
P16. Cindy testified that Austin has had tubes and continues to have chronic and ongoing ear infections, and that Lauren has had sinus surgery, been diagnosed with asthma, and has a prescribed nebulizer machine. Being a registered nurse, she is more qualified to meet the children's medical needs. Although the tender-years doctrine is not solely determinative of custody, this factor was viable and favored Cindy.

In all cases where any child is of such tender age as to require a mother's care for its physical welfare, it should be awarded to her custody, at least until it reaches the age and maturity where it can be equally well cared for by other persons. A child of seven-years-old is held to be long past the age prior to which it requires attention of such character from the mother.

_Copeland v. Copeland_, 904 So. 2d 1066 (Miss. 2004).

**If the mother of a child of tender years is fit, then she should be awarded custody.** A child is no longer of tender years when that child can be equally cared for by persons other than the mother. However, this doctrine has been weakened in recent years and now is only a presumption to be considered along with the other Albright factors.

The tender years doctrine seems less controlling, especially when considering a child's male gender.

P 34. In _Buntyn v. Smallwood_, 412 So. 2d 236, 238 (Miss. 1982), this Court noted that if the mother of a child of tender years is fit, then she should be
awarded custody. "[A] child is no longer of tender years when that child can be equally cared for by persons other than the mother." *Mercier v. Mercier*, 717 So. 2d 304, 307 (Miss. 1998). However, this doctrine has been weakened in recent years and now is only a presumption to be considered along with the other *Albright* factors. *Hollon*, 784 So. 2d at 947.

P35. The age factor slightly weighed in favor of the Kelly; however, this alone does not rise to the level of manifest error and certainly does not warrant reversal. This Court has stated:

In the present case, the chancellor simply stated, "at the present time, neither Belinda nor Jason enjoy a distinct advantage in regard to any of these three factors." While neither party may not have enjoyed a "distinct advantage" as to this issue, the tender years presumption is still a viable consideration. Consequently, this factor probably should have weighed slightly in favor of Belinda, unless there was some evidence to the contrary which a review of the record did not readily reveal. However, this minor error alone does not rise to the level of manifest error and certainly does not warrant reversal. In addition, there is the practical consideration that Lauren is presently over four years old and may not be subject to the tender years idea any longer.

*Lee v. Lee*, 798 So. 2d 1284, 1289 (Miss. 2001). However, in *Law v. Page*, 618 So. 2d 96, 101 (Miss. 1993), this Court held that "the tender years doctrine seems less controlling, especially when considering [the child's] male gender."
In a very recent case *Jordan v. Jordan* [963 So. 2d 1235 (Miss. Ct. App. 2007)], the judge agreed that the maternal presumption still existed in Mississippi, but the child of concern was eligible to begin pre-school, which was an age where she "could be cared for by someone other than her mother."

**Today, the age of a child is merely one of the many factors that the court considers in determining the best interests of the child.** What actually constitutes a child of tender years, however, has not been clearly defined in the courts. A child is no longer of tender years when that child can be equally cared for by persons other than the mother. A child over four years may not be subject to the "tender years" doctrine.

P7. Secondly, Robin says this factor should favor her since her youngest child, Summer, who had just turned five years old at the time of the trial, was of "tender years." Citing *Hollon* and *Sobieske v. Preslar*, 755 So. 2d 410, 413 (P10) (Miss. 2000), Robin argues that the chancellor abused his discretion in finding that this factor favored neither parent since there is a presumption in Mississippi that a mother is generally better suited to raise a child of tender years. The *Sobieske* court also stated, however, that this presumption has been significantly weakened. Today, the age of a child is merely one of the many factors that the court considers in determining the best interests of the child. *Albright*, 437 So. 2d at 1005. What actually constitutes a child of tender years, however, has not been clearly defined in the courts. "[A] child is no longer of tender years when that child can be equally cared for by persons other than the mother." *Mercier v. Mercier*, 717 So. 2d 304,
307 (P15) (Miss. 1998). In Lee v. Lee, 798 So. 2d 1284, 1289 (P18) (Miss. 2001), the court stated that a child over four years may not be subject to the "tender years" doctrine. Although Summer was barely five, it was likely she was eligible to begin pre-school, indicating she was of an age where she could be cared for by someone other than her mother. Even though the lower court did not give a thorough explanation of its analysis of this particular factor, we find no error based on the evidence given.

Missouri

In 1972, the Missouri custody law (Miss. Code Ann. § 93-5-23, 1972) provides that custody shall be determined according to the child's best interests. The statute also specifies that "There shall be no presumption that it is in the best interest of a child that a mother be awarded either legal or physical custody" (Miss. Code Ann. § 93-5-24, 1972).

However, several cases in the 1970s still mentioned and used maternal preference during child's tender years when other things are equal. For example:

SGE v. R LJ, 527 S.W.2d 698 (Mo. App. 1975).

Let us assume, therefore, that both of these homes are equal and that neither of the parents is disqualified on personal grounds. On that assumption, the rule then becomes applicable that a mother is deemed to be the one best able to care for a child of tender years, especially when the child is a girl. Eissler v. Eissler, 468

Any departures from that usual award of custody have been described by this court in *Baker v. Baker*, 475 S.W.2d 130, 133 (Mo. App. 1972) as "aberrations from normalcy." That case further holds that where such variance occurs "there must be a finding, evidentially supported, that the best interests and welfare of the children are served by a departure from the normal pattern of family relationships."

*In Re Marriage of Zigler*, 529 S.W.2d 909 (Mo. App. 1975).

Having in mind the age of the minor child and the absence of special reasons for changing custody, we find the interests of this child would best be served by placing him with the mother; being mindful that ordinarily "a mother is deemed to be the one best able to care for a child of tender years." *S.G.E. v. R.L.J.*, 527 S.W.2d 698 (Mo.App. 1975) (K.C.D. No. 27516, p. 7); *Eissler v. Eissler*, 468 S.W.2d 217, 222 [6] (Mo.App. 1971). "This is not a presumption of law but a recognized fact of life based on human experience." *McCallister v. McCallister*, 455 S.W.2d 31, 34 [2] (Mo.App. 1970). "Any departures from that usual award of custody have been described as 'aberrations from normalcy.' . . . [Where] such variance occurs, 'there must be a finding, evidentially supported, that the best interests and welfare of the children are served by a departure from the normal pattern of family relationships."


*In Re Marriage of Carmack*, 550 S.W.2d 815 (Mo. App. 1977).
Where, as here, the record shows no abnormal family patterns or unequal circumstances between parents, and neither parent is demonstrably unfit to be custodian, the principle that the mother is the better custodian for a child of tender years is applicable. *In re Marriage of Zigler*, 529 S.W.2d 909 (Mo.App. 1975); *S.G.E. v. R.L.J.*, 527 S.W.2d 698 (Mo.App. 1975). This is particularly true where the child is a girl. *S.G.E. v. R.L.J.*, *supra* at 703; *Horst v. McLain*, 466 S.W.2d 187 (Mo.App. 1971). The rule is merely a judicial statement of a common understanding of normal family relationships which foster the best interests of young children, and is not a conclusive presumption. *Johnson v. Johnson*, 526 S.W.2d 33, 37 (Mo.App. 1975); *McCallister v. McCallister*, 455 S.W.2d 31, 34 (Mo.App. 1970). However, when the rule is not followed, there must be some evidentiary support for the court to find that a young child's best interests are served by placement with the father. *S.G.E. v. R.L.J.*, *supra* at 703; *Baker v. Baker*, 475 S.W.2d 130, 133 (Mo.App. 1972).

Freed and Foster (1981) also suggested that in Missouri the "tender years" doctrine is in effect and gives preference to a "fit" mother, other factors being equal, as of 1980.

It was not until 1982, when Mo. Rev. Stat. § 452.375.2 abolished the tender years presumption.

This can be confirmed by the case *Stoutimore v. Stoutimore* [684 S.W.2d 344 (Mo. Ct. App. 1984)].
After citing to the above authorities and others, the husband points out that the "tender years presumption" has been abrogated or repealed by the enactment of § 452.375.2 above and any decision made pursuant to "tender years presumption" must be vacated and held void. There is no doubt that § 452.375.2 has abolished the "tender years presumption" in our state (as the husband contends). That factor alone, however, is not determinative of the question in this case. The real question is whether the trial court herein applied that presumption as claimed by the husband. The entirety of the husband's argument on this one "basis" is his repeated assertion that the trial court did not find him unfit or less fit than his wife, and therefore, the court, in its custody award, must have applied the "tender years presumption." A careful search of the record discloses absolutely no basis to support this assertion by the husband. What the trial court did disclose was its awareness that, at the time this case was heard, it was without authority to enter a joint custody award. There is nothing herein to show, nor has the husband revealed to this court, that the trial court based the award of custody in the wife on any consideration of the "tender age" of the minor child. The husband's assertion is not supported by the record.

According to the case notes of Mo. Rev. Stat. § 452.375.2:

362. Father's challenge to an award of sole custody to the wife on equal protection grounds was without merit where he alleged that the trial court relied upon the "tender years" presumption and the "sole parent" doctrine because the "tender years" presumption was abolished by the enactment of Mo. Rev. Stat. § 452.375.2,
and joint custody was made available under Mo. Rev. Stat. § 452.375.3 during the

366. Although there is a legal presumption that it is in the best interests of a child
of tender years to be in the custody of his mother, the presumption is not conclusive
and the circuit court properly refused custody to the mother whether there was
evidence of flagrant misconduct on her part; the circuit court properly determined
custody in accordance with the best interests of the children, pursuant to Mo. Rev.
(Mo. Ct. App. 1980).

652. Record did not establish father's contention on appeal that the trial court
rendered a child custody order in a divorce action based on the "tender years
presumption" in favor of the mother, which was prohibited by Mo. Rev. Stat. §
452.375. *In re Marriage of Bell*, 796 S.W.2d 130, 1990 Mo. App. LEXIS 1444

Montana

According to Freed and Foster (1981), the "tender years" doctrine is in effect and gives
preference to a "fit" mother, other factors being equal, in the state of Montana. From
examining the cases, I found that the transition was made in the year of 1980. In *In re the
marriage of Merrie Dawn Markegard* [189 Mont. 374, 616 P2d 323 (1980)], the court ruled
that "The presumption that a mother is entitled to custody of a child of tender years is no longer statutory in Montana. The presumption should not exist in the absence of a particular statute so declaring. There is not a sound theory or rationale in support of a judicial declaration that such a presumption exists. This presumption is outdated in light of the enactment of the Uniform Marriage and Divorce Act in Montana. The presumption serves only to confuse the parties and to burden the courts."

Subsequent cases cited this case as clearly rejecting the tender years doctrine in Montana. For example, in *In re the marriage of Teri Di Pasquale* [220 Mont. 497, 716 P.2d 223 (1986)], the court stated that "We also find Getz's contention that the District Court based its custody award on the "tender years" doctrine which this Court expressly rejected in *Markegard v. Markegard* (Mont. 1980), 616 P.2d 323, 325, 37 St.Rep. 1539, 1541, is based wholly on conjecture. We therefore decline to address the issue further."

Mont. Code Ann. § 40-4-212 provides that "The court shall determine the parenting plan in accordance with the best interest of the child." The statute also specifies factors to be considered which do not include the gender of the parent. The case notes of Mont. Code Ann. § 40-4-212 also supports that the 1980 case abolished the tender years presumption in Montana:

Award of Custody Contrary to Child's Wishes Upheld -- No "Tender Years Presumption" Applied: In an action for dissolution of the parties' marriage in which the custody of all of the children was awarded to the father, despite the wishes of at least one of the children, the court did not err in making
its custody decree, as the wishes of the children are only one factor to be considered by the court. Additionally, the mother is not to be considered the "preferred" parent in cases involving young children, as the Supreme Court previously held in In re Marriage of Markegard, 189 M 374, 616 P2d 323 (1980), that the "presumption of tender years" is no longer to be followed in the courts of this state. Bier v. Sherrard, 191 M 215, 623 P2d 550, 38 St. Rep. 158 (1981).

Nebraska

The case Knight v. Knight [196 Neb. 63, 241 N.W.2d 360 (1976)] clearly shows that the Nebraska Supreme Court has strictly applied the equal treatment rule. In this case, the District Court awarded the child's custody to the mother with the tender years doctrine. The Supreme Court declined that, and stated that:

Appellant is urging us to read subsection (2) of section 42-364, R. S. Supp., 1974, out of the statute. This we decline to do. This subsection provides preference shall not be given to either parent based on the sex of the parent, and no presumption shall exist that either parent is more fit to have the custody of the child than the other. The presumption at most would be only one element of the many considerations involved in child custody cases. We adhere to what we said in Kockrow v. Kockrow (1974), 191 Neb. 657, 217 N.W.2d 89: "As we interpret our no-fault divorce statute, under all ordinary circumstances the father and mother of
minor children born in lawful wedlock have an equal and joint right to their custody and control, and neither has a superior right over the other."

R.R.S. Neb. § 42-364 specifies factors to be considered to determine child custody. Subsection (2) of this statute, as mentioned by the above case, provides that:

(2) In determining legal custody or physical custody, the court shall not give preference to either parent based on the sex of the parent and, except as provided in section 43-2933, no presumption shall exist that either parent is more fit or suitable than the other. Custody shall be determined on the basis of the best interests of the child, as defined in the Parenting Act. Unless parental rights are terminated, both parents shall continue to have the rights stated in section 42-381.

The statutory notes also provide evidence regarding the abandonment of the tender years doctrine in Nebraska:

The "tender years" doctrine is not controlling in matters of custody; such matters are now controlled by this section. *Vance v. Vance*, 231 Neb. 334, 436 N.W.2d 177 (1989).

The "tender years" doctrine has been abolished. *Cohee v. Cohee*, 210 Neb. 855, 317 N.W.2d 381 (1982).

Ordinarily the interests and welfare of a child of tender years will be best served by placing the child in the custody of the natural mother if she is a fit and suitable person. *Harding v. Harding*, 174 Neb. 371, 117 N.W.2d 800 (1962).
In awarding custody of minor children the court looks to the best interests of the children, and those of tender age are usually awarded to the mother if she is a fit and proper person to have their custody. *Goodman v. Goodman*, 173 Neb. 330, 113 N.W.2d 202 (1962).

Children of tender years are usually awarded to the mother unless it is shown that she is unsuitable or unfit to have such custody. *Koerwitz v. Koerwitz*, 162 Neb. 411, 76 N.W.2d 264 (1956).

For a case discussing the presumption that the best interests of a child of tender years will be served by granting custody to its mother, see *Swolec v. Swolec*, 122 Neb. 834, 241 N.W. 771 (1932); *Carlson v. Carlson*, 135 Neb. 569, 283 N.W. 214 (1939); *Dier v. Dier*, 141 Neb. 685, 4 N.W.2d 731 (1942).

In divorce actions, in making disposition of the custody of a child of tender years, the policy of the law was to look to the welfare and best interests of the child. *Feather v. Feather*, 112 Neb. 315, 199 N.W. 533 (1924); *Voboril v. Voboril*, 115 Neb. 615, 214 N.W. 254 (1927).

In a controversy for the custody of an infant of tender years, the court will consider the best interests of the child and will make such order for its custody as will be for its welfare, without reference to the wishes of the parties. *West v. Ofe*, 110 Neb. 443, 194 N.W. 464 (1923); *Schwartzkopf v. Cover*, 149 Neb. 460, 31 N.W.2d 294 (1948).
Generally speaking, it is for the best interest of the child that it should be in the care of its natural parents, and the right of a parent to the custody of a minor child of tender years is not lightly to be set aside, and it should not be done where unfitness is not affirmatively shown, or a forfeiture of such right clearly established. *Terry v. Johnson*, 73 Neb. 653, 103 N.W. 319 (1905).

**Nevada**

Prior to 1979, the tender years doctrine was often cited and applied to determine child custody in custody cases in Nevada. Below are three examples of such application.


The court held that neither parent was morally unfit or unsuitable to parent the children. The court held that, pursuant to the tender years doctrine, custody of children in their tender years should have been awarded to the mother if all other factors were equal.

Tender Years Presumption. Nev. Rev. Stat. § 125.140 provides the policy of Nevada as to custody of minor children. A court, in granting the divorce, shall make such disposition of, and provision for the children, as shall appear most expedient under all the circumstances, and most for the present comfort and future well-being of such children. Many states, including California, set forth as their legislative policy the "tender years" doctrine, which provides that as between parents, other
things being equal, if the child is of tender years, custody should be given to the mother.

The implication in Nev. Rev. Stat. § 125.140 is that legislative policy directs that children of tender years belong to their mother in the absence of particular circumstances establishing that she is unfit.

Although the exercise of discretion by the trial court will not be disturbed unless in a clear case of abuse (Cosner v. Cosner, 78 Nev. 242, 371 P.2d 278 (1962); Timney v. Timney, supra; Atkins v. Atkins, supra; Sanchez v. Sanchez, 10 Cal. Rptr. 261, 358 P.2d 533 (1961)), the key to this issue is the best interests of the children which must be expressed by the trial court in order that we know that the weight of the "tender years" principle has been applied.

In Harris v. Harris, supra, the trial court stated that its determination was based on the best interests of the child. While a digest of the facts was not recited in that opinion the record nevertheless amply supported the trial court's finding whereas in this case the record balances the scales between the mother and father. Neither parent is morally unfit or otherwise unsuitable. Absent a finding of the mother's unfitness, we choose to apply the tender years doctrine in meeting the statutory command of NRS 125.140.


The court affirmed the amended judgment because the trial court, after an opportunity to observe the witnesses, determined that the intimate relationship of
the mother and her paramour in the close proximity of children of tender years was a harmful influence upon the children.

The intimate relationship of appellant and her paramour in the close proximity of children of tender years may be deemed a harmful influence upon those children by a trial court. Where that court has had the opportunity to observe the parties and their demeanor on the witness stand, to appraise their relative fitness for custody of the minor children, along with substantial evidence in the record to support its findings of fact and conclusions of law, the award of custody will be affirmed on appeal. *Timney v. Timney*, 76 Nev. 230, 351 P.2d 611 (1960).

In *Nichols v. Nichols* [(91 Nev. 479, 537 P.2d 1196 (1975))], although in this case the court denied the mother's custody right because of her adultery and immaturity, the court mentioned that "The law favors the mother if she is a fit and proper person to have custody of the children, other things being equal, and this is taken into consideration in determining if the trial court abused its discretion."

The 1979 case of *Arnold v. Arnold* [95 Nev. 951, 604 P.2d 109 (1979)] marked the elimination of the tender years doctrine from Nevada's custody decisions. In the case, the court carefully reexamined several previous cases, and overruled the opinion in previous cases that supported the tender years doctrine. The court stated that:

This court does not stand alone in its disillusionment with the "tender years" doctrine. During the past decade, many jurisdictions have either eliminated the rule or greatly reduced its weight. *See generally* 70 A.L.R.3d 262. Most important, the
legislature, just this year, in expressing the public policy of Nevada, has now prohibited the courts of this state from utilizing a rule of sexual preference in determining the custody of minor children:

In determining custody of a minor child . . . the sole consideration of the court is the best interest of the child, and no preference may be given to either parent for the sole reason that the parent is the mother or father of the child. . . .


Upon careful reexamination of Peavey, it is clear to us that the "tender years" doctrine, whether in its pristine form or as it has been reinterpreted in Nichols, runs afoul of the standards this court and the legislature have announced with respect to child custody determinations, and that it is nothing more than an expression of a culturally enforced bias favoring rigidly and unrealistically defined societal sex roles. The touchstone of all custody determinations is the best interests of the child; the foundation of these determinations is the particular facts and circumstances of each case. A preference for one parent over the other, solely on the basis of the parent's sex, has no place in this scheme. We, therefore, expressly overrule Peavey v. Peavey.

According to the Notes to Decisions of Nev. Rev. Stat. Ann. § 125.510 (2013), the above case indeed abolished the maternal preference:

Preference based solely on parent's sex prohibited.
The Legislature, in expressing the public policy in this section, has now prohibited the courts of this state from utilizing a rule of sexual preference in determining the custody of minor children. *Arnold v. Arnold*, 95 Nev. 951, 604 P.2d 109, 1979 Nev. LEXIS 702 (1979).

The touchstone of all custody determinations is the best interests of the child; the foundation of these determinations is the particular facts and circumstances of each case. A preference for one parent over the other, solely on the basis of the parent's sex, has no place in this scheme. *Arnold v. Arnold*, 95 Nev. 951, 604 P.2d 109, 1979 Nev. LEXIS 702 (1979).

**New Hampshire**

New Hampshire custody law (N.H. Rev. Stat. Ann. § 458:17, Supp. 1975) provided that the courts shall make custody decrees "as shall be most conducive to the benefit" of the children and directs that the court shall not prefer either parent on the basis of sex.


The "Notes: Amendments" section of the statute N.H. Rev. Stat. Ann. § 458:16 provides evidence regarding which year the custody statute was desexed:

1975.
Paragraph IV: Added "provided, however, that no preference shall be given to either parent in awarding such custody because of the parent's sex" following "the children".

New Jersey

New Jersey has long had gender-neutral custody statute.

N.J. Rev. Stat. Ann. § 9:2-4 (2013) provides that, absent misconduct, the rights of parents under the New Jersey custody statute are held to be equal and the happiness and welfare of the children shall be determinative in custody disputes.

Evidence from the case law shows that the gender-neutral statute already existed in 1944. 


Best Interests of Child

N.J. Rev. Stat. § 9:2-4 gives both parents equal rights to their children's custody and makes the criterion of the award the best interests of the children.

However, maternal preference was still applied in cases in the 1970s and the 1980s.


New Jersey courts have long recognized that custody of a child of tender years ordinarily is awarded to the mother if she is a fit and proper person. The
theory is that the mother will take better and more expert care of the small child than the father can. These considerations must always be considered subordinate, however, to what is truly in the child's best interest.

Several factors are said to affect the decision to award joint custody. Among these are the wishes of the parents. Another important factor is the age of the child, the general rule being that the courts should not divide the custody of a child of tender years. Even this rule is not absolute.

To which parent, then, should custody be awarded? Our courts have long recognized that custody of a child of tender years ordinarily is awarded to the mother if she is a fit and proper person. Esposito v. Esposito, 41 N.J. 143, 145 (1963). The theory is that the mother will take better and more expert care of the small child than the father can. Matflerd v. Matflerd, supra, 10 N.J. Super. at 137; Seitz v. Seitz, 1 N.J. Super. 234, 240 (App. Div. 1949). These considerations must always be considered subordinate, however, to what is truly in the child's best interest. Vannucchi v. Vannucchi, infra, 113 N.J. Super. at 47; DiBiano v. DiBiano, supra.


In modifying custody the trial judge rejected the "tender years" doctrine as "an obsolete, untenable, antediluvian theory." We disagree that he was free to disregard in this manner the ages of the children as a factor in determining where custody should lie. Although our personal views may be contrary, the Supreme Court has
still not displaced the doctrine that custody of a young child "is normally placed with the mother, if fit." *Esposito v. Esposito*, 41 N.J. 143, 154 (1963). Also see *Mayer v. Mayer*, 150 N.J. Super. 556, 563-64 (Ch. Div. 1977). That the children were still of tender years was something which should have been weighed in this case in favor of preserving the custodial arrangement, and the trial judge erred in failing to do so.


At common law the rights of women were so fragile that the husband generally had the paramount right to the custody of children upon separation or divorce. *State v. Baird*, 21 N.J.Eq. 384, 388 (E. & A. 1869). In 1860 a statute concerning separation provided that children "within the age of seven years" be placed with the mother "unless said mother shall be of such character and habits as to render her an improper guardian." L.1860, c. 167. The inequities of the common-law rule and the 1860 statute were redressed by an 1871 statute, providing that "the rights of both parents, in the absence of misconduct, shall be held to be equal." L.1871, c. 48, § 6 (currently codified at N.J.S.A. 9:2-4). Under this statute the father's superior right to the children was abolished and the mother's right to custody of children of tender years was also eliminated. Under the 1871 statute, "the happiness and welfare of the children" were to determine custody, L.1871, c. 48, § 6, a rule that remains law to this day. N.J.S.A. 9:2-4.
Despite this statute, however, the "tender years" doctrine persisted. See, e.g., Esposito v. Esposito, 41 N.J. 143, 145 (1963); Dixon v. Dixon, 71 N.J.Eq. 281, 282 (E. & A.1906); M.P. v. S.P., 169 N.J. Super. 425, 435 (App.Div.1979). This presumption persisted primarily because of the prevailing view that a young child's best interests necessitated a mother's care. Both the development of case law and the Parentage Act, N.J.S.A. 9:17-40, however, provide for equality in custody claims. In Beck v. Beck, 86 N.J. 480, 488 (1981), we stated that it would be inappropriate "to establish a presumption . . . in favor of any particular custody determination," as any such presumption may "serve as a disincentive for the meticulous fact-finding required in custody cases." This does not mean that a mother who has had custody of her child for three, four, or five months does not have a particularly strong claim arising out of the unquestionable bond that exists at that point between the child and its mother; in other words, equality does not mean that all of the considerations underlying the "tender years" doctrine have been abolished.


The Legislature clearly has ended gender-based differences in marital and parental rights, whether rooted in law or custom, and instead determined that parental disputes about children should be resolved in accordance with each child's best interests. Sex-based presumptions, such as the "tender years" doctrine, that had survived as a matter of custom for decades, have been replaced by an inquiry focused on the happiness and welfare of the child. See
In re Baby M, supra, 109 N.J. at 453 n.17, 537 A.2d 1227. Courts are required to engage in meticulous fact-finding to determine the "best interests" of the child. See N.J.S.A. 9:2-4(c); In re Baby M, supra, 109 N.J. at 453 n. 17, 537 A.2d 1227. "The 'best interests' doctrine is applied in almost every legal disposition involving minors: custody, adoption, abuse and neglect, guardianship, termination of parental rights, and even disposition following juvenile court proceedings." Seng, supra, 70 Va.L.Rev. at 1313-14 (footnote omitted). Today, "the best interests of the child" is the applicable standard governing most decisions affecting the welfare of children. See In re Baby M, supra, 109 N.J. at 453, 537 A.2d 1227.

New Mexico

Tender years doctrine was cited in Ettinger v. Ettinger [72 N.M. 300, 383 P.2d 261 (1963)]:"The welfare of the child is a matter, of course, of primary interest. A child of tender years, such as this one, its normal place is with its mother."


In a custody dispute where the opposing parties are the natural parents, or one of them, versus grandparents or other persons having no permanent or legal right to custody of the minor child the "parental right" doctrine is to be given prominent, though not controlling, consideration. Parents have a natural and legal right to custody of their children. This right is prima facie and not an absolute right. This rule creates a presumption that the welfare and best interests of the minor
child will best be served in the custody of the natural parents and casts the burden of proving the contrary on the non-parent. The rule also requires that the trial court make express findings, if the natural parent is to be denied custody, not only that the parent is unfit, but that the third person seeking to obtain or retain custody is fit and the welfare and best interests of the child would best be served by giving custody to that third person. These findings must be supported by substantial evidence.

At the outset, Mrs. Shorty asserts that New Mexico recognizes the "parental right" doctrine while Mrs. Scott argues the "welfare and best interests of the minor child" doctrine prevails. The stalemate is understandable. Our cases fail to maintain a clear distinction between the two concepts. In practice, they have served as broad policy statements to guide trial judges in exercising their unquestionably broad discretion in deciding custody disputes. The New Mexico cases seem to bear out the proposition that these maxims have been loosely applied and that the real determinate in each case has been the particular facts, substantial evidence and whether the trial judge has abused his discretion. It is not surprising therefore that several of our decisions stating the rule have inserted minor variations, apparently intending to tailor them to the particular case. The resulting murkiness in the status of child custody law has brought this case here for clarification of the guiding standards in this difficult and emotionally charged field.
New York

New York State was one of the first states that ruled the tender years doctrine to be unconstitutional. In the widely cited 1973 case *Watts v. Watts* [77 Misc. 2d 178, 350 N.Y.S.2d 285 (1973)], the court abolished the tender years doctrine. This case has been regarded by legal researchers as the milestone case that first discarded the tender years doctrine in a state.

Application of a presumption favoring the mother violates the law of New York State. Both N.Y. Dom. Rel. Law § 240, dealing with custody of children in matrimonial actions, and N.Y. Dom. Rel. Law § 70, dealing with habeas corpus for a child detained by a parent, provide in relevant part: In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness.

Differential treatment on the basis of sex of the kind created by the tender years' presumption is "suspect" and, therefore, subject to the strictest judicial scrutiny. The United States Supreme Court makes explicit the incurable flaw in rules of law which accord different treatment to men and women on the basis of rigid and outdated sexual stereotypes: Since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should
bear some relationship to individual responsibility. And what differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or to contribute to society.

Classifications subject to "strict scrutiny" under the Fourteenth Amendment pass constitutional muster only if a compelling state interest requires their existence. The best interests of the child might well qualify as such a compelling state interest if, in fact, it were served by the tender years presumption. But since, the presumption does not in fact serve the child's interests, it does not constitute a compelling state interest justifying the different treatment of parents on the basis of sex. Thus, the tender years' presumption in addition to its other faults, works an unconstitutional discrimination against the respondent.

North Carolina

The North Carolina statute (N.C. Gen. Stat. § 50-13.2, Supp. 1977) provides that a custody order shall be entered as will "best promote the interest and welfare of the child. Provided, between the mother and father, there is no presumption as to who will better promote the interest and welfare of the child." This is confirmed by the case below. The case also describes the history of the evolvement and abandonment of the tender years doctrine in North Carolina.

The "tender years" doctrine is no longer the law in North Carolina. In 1977, the General Assembly amended N.C. Gen. Stat. § 50-13.2 to eliminate any presumption in favor of either the mother or the father so that only a best interests of the child test would be applied. The statute now states in pertinent part that in order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child. Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child. Joint custody to the parents shall be considered upon the request of either parent.

These beliefs cannot be distinguished from the "tender years presumption" that was abolished in 1977 by an amendment to N.C. Gen. Stat. § 50-13.2(a) (2003). It has been the law for 30 years that a court may not base a custody decision, as between parents, on any presumption in favor of either the mother or the father, but instead must focus only on the best interests of the child as determined from the actual evidence before the court. We reverse and remand so that the trial court may make a "best interests" determination based on the evidence presented at trial.
Early common law first recognized a maternal preference in custody disputes concerning illegitimate children, with the mother having a right to custody unless it was clearly and manifestly in the best interest of the child to award custody to another person, including the father. Suzanne Reynolds, *Lee's North Carolina Family Law* § 13.6b(b)(ii), at 13-29 (5th ed. 2002). This maternal preference was eventually extended to all custody disputes involving young children. Courts presumed "that, at least for a child of tender years, the mother served the best interest of the child" -- a doctrine that became known as "the tender years presumption." *Id.* § 13.6b(b)(iii), at 13-30. This presumption "appears to have shaped North Carolina custody law for most of the twentieth century." *Id.* § 13.6b(b)(iii), at 13-31.

The presumption was described by our Supreme Court:

[I]t is said: "It is universally recognized that the mother is the natural custodian of her young. . . . If she is a fit and proper person to have the custody of the children, other things being equal, the mother should be given their custody, in order, that the children may not only receive her attention, care, supervision, and kindly advice, but also may have the advantage and benefit of a mother's love and devotion for which there is no substitute. A mother's care and influence is regarded as particularly important for children of tender age and girls of even more mature years."

As, however, recognized by this Court in 1994, "[t]his 'tender years' doctrine is no longer the law in North Carolina." Westneat v. Westneat, 113 N.C. App. 247, 251, 437 S.E.2d 899, 901 (1994). In 1977, the General Assembly amended N.C. Gen. Stat. § 50-13.2 to eliminate any presumption in favor of either the mother or the father so that only a best interests of the child test would be applied. The statute now states in pertinent part:

An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child. Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest
and welfare of the child. Joint custody to the parents shall be considered upon the request of either parent.

N.C. Gen. Stat. § 50-13.2(a) (emphasis added). See also Reynolds, supra § 13.6b(c), at 13-32 ("Out of fear that the tender years presumption would remain the standard in practice, in 1977, the General Assembly underscored that the court was not to presume that either mother or father was the better custodian.").

Our Supreme Court has, relatively recently, re-emphasized that trial courts must decide custody as between the parents based solely on the best interests of the child, which is to be determined from the actual facts without reference to any presumptions. In Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41 (2003), cert. denied, 540 U.S. 1177, 158 L. Ed. 2d 78, 124 S. Ct. 1407 (2004), the trial court had awarded custody to the father of an illegitimate child after applying the best interests test. The Court of Appeals reversed, holding that the presumption in favor of the mother survived the enactment of N.C. Gen. Stat. § 50-13.2(a) when the child at issue was illegitimate. Rosero v. Blake, 150 N.C. App. 250, 260, 563 S.E.2d 248, 256 (2002), rev'd, 357 N.C. 193, 581 S.E.2d 41 (2003). The Supreme Court, however, reversed yet again, holding that the statute abrogated the common law presumption in favor of the mother both as to legitimate and as to illegitimate children. Rosero, 357 N.C. at 207, 581 S.E.2d at 49. Instead, "the best interest of the child, illegitimate or legitimate, not the relationship, or lack thereof, between natural or adoptive parents, is the district court's paramount concern. For, as between natural or adoptive parents, '[t]he welfare of the child has always been
the polar star which guides the courts in awarding custody." Id. at 207, 581 S.E.2d at 49-50 (quoting Pulliam v. Smith, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998)). The Court emphasized:

[T]he father's right to custody of his illegitimate child is legally equal to that of the child's mother, and, as dictated by section 50-13.2, if the best interest of the child is served by placing the child in the father's custody, he is to be awarded custody of that child.

Id. at 208, 581 S.E.2d at 50.

In this case, however, the trial court did not view the father as equal to the mother and did not evaluate the evidence independent of any presumptions in favor of the mother. Instead, the trial court used language in the order that cannot be distinguished from the abolished presumption and that is eerily reminiscent of language used in early cases applying the presumption such as Spence. The court in Spence held that "the mother is the natural custodian of her young" and "other things being equal, the mother should be given their custody, in order that the children may not only receive her attention, care, supervision, and kindly advice, but also may have the advantage and benefit of a mother's love and devotion for which there is no substitute." Spence, 283 N.C. at 687, 198 S.E.2d at 547. Similarly, the trial judge in the present case remarked that "the law of nature dictates that early in the life of a child, the mother has a distinct advantage in the opportunity to care for that child" and "that by the very nature of the age and gender
of the minor child (28-month-old female), as it relates to the Defendant, that placement with the Defendant would be a negative aspect in the weighing of the positives and negatives." These "findings," not based on the actual evidence of the case, cannot be meaningfully distinguished from the abrogated tender years presumption.

The trial court -- and the mother on appeal -- invoke the doctrine of "judicial notice" to justify the trial court's reliance on his view of "the natural law of birthing." Once, however, a presumption or doctrine has been abolished, a court does not have the authority to resurrect that doctrine under the guise of taking judicial notice of the assumptions underlying the doctrine.

Rule 201(b) of the North Carolina Rules of Evidence specifies that "[a] judicially noted fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." With respect to natural phenomena, our courts have been permitted to take notice of the fact it takes time for a hedge to grow four feet, Gaffney v. Phelps, 207 N.C. 553, 559, 178 S.E. 231, 234 (1934), and that pregnant women sometimes miscarry or have stillborn births, State v. Hall, 251 N.C. 211, 212, 110 S.E.2d 868, 869 (1959). Such facts are not subject to dispute.

TENDER YEARS PRESUMPTION ABOLISHED. --Trial court erred in entering a custody order concerning the parties' child; the trial court improperly relied on the tender years presumption in granting custody to the mother, as that presumption had been abolished, and G.S. 50-13.2(a) required that the custody decision be based solely on the best interests of the child, and G.S. 8C-1, Rule 201(b) did not allow the trial court to take judicial notice of the assumptions underlying an abolished doctrine in order to resurrect the doctrine. *Greer v. Greer*, 175 N.C. App. 464, 624 S.E.2d 423 (2006).

Trial court did not apply tender years presumption in awarding a mother primary physical and legal custody of the parties' child because there was nothing in the record to suggest the trial court relied on a psychologist's affidavit or the mother's testimony regarding a "special bond" in awarding the mother custody, and, in fact, the trial court specifically noted the child was securely bonded to the father. *Dixon v. Gordon*, -- N.C. App. --, 734 S.E.2d 299 (2012), review denied, 743 S.E.2d 191, 2013 N.C. LEXIS 552 (2013).

North Dakota

Before 1973, North Carolina had a maternal preference statute which stated that "Other things being equal, preference is to be given the mother in awarding custody of a child of tender years." (Sec. 30-10-06, N.D.C.C.) In 1973, this statute was repealed in 1973.
However, court still recognized that mother is better for the caring of young children in custody cases following the repeal of the statute.

According to the statutory notes of the North Dakota statute N.D. Cent. Code, § 30.1-27-06 (2013), tender years doctrine was still being applied in North Dakota in 1974 and 1975.

In custody proceedings neither parent is entitled to custody as of right, but other things being equal, if the child is of tender years, it should be given to the mother. *Silseth v. Levang*, 214 N.W.2d 361 (N.D. 1974), followed, *Matson v. Matson*, 226 N.W.2d 659 (N.D. 1975).

In *Odegard v. Odegard*, 259 N.W.2d 484 (N.D. 1977), the court recognized that the tender years doctrine has been abolished by statute in 1973, but stated that "the repeal of the statute setting forth the 'tender years' doctrine does not alter the observed fact that mothers of infants are most often better able to care for them than the fathers are."

The mother asserts that the findings are clearly erroneous, that it is unfair to take custody of the child from her merely because she was a poor housekeeper, and that it was improper to give the custody to "strangers," the grandparents. She also asserts that the grandparents are too old to raise a pre-school child, and that the "tender years" doctrine is being ignored.

Ever since *Ferguson v. Ferguson*, 202 N.W.2d 760 (N.D. 1972), this court has treated the finding that the best interest of the child requires custody in one parent or the other as a finding of fact which we will not reverse unless clearly erroneous. Rule 52(a), N.D.R.Civ.P.; *Silseth v. Levang*, 214 N.W.2d 361 (N.D. 1974).
We have also held frequently that custody, once granted, should not be changed for light or transient reasons, since children should not be bandied about, subject as they are to psychological damage in case of frequent changes of custody. See, generally, *Filler v. Filler*, 219 N.W.2d 96 (N.D. 1974), majority and concurring opinions; *Silseth v. Levang, supra*.

We have recognized that temporary-custody orders have a tendency to become permanent-custody orders, partly because of the reluctance of the courts to make changes in custody for the reason stated. *Kostelecky v. Kostelecky*, 251 N.W.2d 400 (N.D. 1977).

The present case resembles in many ways *Silseth v. Levang, supra*. In that case, as in this one, neither parent was found to be unfit and custody of a child of tender years was involved. The award was ultimately given to the father, who lived with his parents. That case differed from the present one in that both parties had remarried, and a statute was in existence giving preference to the mother where the child in question was of "tender years." Sec. 30-10-06, N.D.C.C.

That statute has now been repealed. The repeal was included in Chapter 257, Session Laws of 1973, North Dakota's version of the Uniform Probate Code, which contains no language equivalent to the former Section 30-10-06. See Article V, Uniform Probate Code, Chapters 30.1-26 and 30.1-27, N.D.C.C.

The mother asserts that other States have held that grandparents are considered as strangers in awarding custody, citing 27B C.J.S. Divorce § 308, page 446.
See Blow v. Lottman, 75 S.D. 127, 59 N.W.2d 825 (1953). Be that as it may, this court has not done so and has granted custody to grandparents, either alone or jointly with a parent, on several occasions. In Interest [Custody] of D.G., 246 N.W.2d 892 (N.D. 1976); McKay v. Mitzel, 137 N.W.2d 792 (N.D. 1965); Borg v. Anderson, 73 N.D. 95, 11 N.W.2d 121 (1943).

Of course, the repeal of the statute setting forth the "tender years" doctrine does not alter the observed fact that mothers of infants are most often better able to care for them than the fathers are. But that fact is only one of the many considerations to be weighed by the trial court in making its finding as to the best interest of the child, and to be considered by us in determining whether the finding was clearly erroneous. Under the circumstances here, we cannot say that the finding was clearly erroneous. It is possible that we might have made a different determination if we had tried the case in the first instance, but we did not.

Gravning v. Gravning [389 N.W.2d 621 (N.D. 1986)] also shows that Odegard v. Odegard had not completely abolished the maternal preference:

Recognizing that the "tender years" doctrine is no longer valid, see Odegard v. Odegard, 259 N.W.2d 484 (N.D. 1977), Nancy asserts that the trial court overlooked her role as "primary caretaker" and abused its discretion in separating the children without articulating sufficient reasons. While the trial court's findings are not elaborate, its oral findings cover as many pages in the transcript as Nancy's
entire appellate brief contains. And, we conclude that the appellate arguments advanced do not effectively counter the trial court's reasoning.

Some courts have made the "primary caretaker" factor into a presumptive rule, see *Pikula v. Pikula*, 374 N.W.2d 705 (Minn. 1985), but in North Dakota the concept inheres in the statutory factors and has not yet been accorded elevated status. "The observed fact that mothers of infants are most often better able to care for them than the fathers are . . . is only one of the many considerations to be weighed by the trial court in making its finding as to the best interest of the child, and to be considered by us in determining whether the finding was clearly erroneous." *Odegard v. Odegard*, 259 N.W.2d at 486.

A later case in 1979 reinterpreted the above case, and affirmed that the tender years doctrine had been abolished [*Gross v. Gross*, 287 N.W.2d 457 (N.D. 1979)].

North Dakota formerly had a statute [§ 30-10-06, NDCC] which gave a preference to the mother in a custody determination where the child in question was of "tender years." This statute was repealed by Ch. 257, § 82, 1973 Session Laws, North Dakota's version of the Uniform Probate Code. The superseding statute contained no language equivalent to the former "tender years" preference. See Article V, Uniform Probate Code, Chapters 30.1-26 and 30.1-27, NDCC.

Linda argued that although the former statute was repealed, the "tender years" concept has been judicially retained in North Dakota. In *Odegard v. Odegard*, 259 N.W.2d 484 (N.D. 1977), we said that the statutory repeal of the "tender years"
Doctrine did not alter the observed fact that mothers of infants are most often better able to care for them than fathers. This statement does not constitute a retention of the "tender years" doctrine. The proper interpretation of Odegard is that the observed fact of a mother's caring ability is only one of the many considerations to be weighed by the trial court in making its findings as to the best interests of the child, and to be considered by us in determining whether or not that finding was clearly erroneous. 259 N.W.2d at 486.

Freed and Walker (1991) also provides some information regarding the usage of the primary caretaker doctrine in North Dakota: "Heggen v. Heggen, 452 N.W.2d 96 (N.D. 1990). The "primary caretaker" doctrine enjoys no paramount or presumptive status under the majority view in North Dakota, but it is a factor to be considered."

Ohio

Ohio had long recognized the tender years doctrine. For example, in the 1974 case Beaber v. Beaber [41 Ohio Misc. 95, 322 N.E.2d 910, 70 Ohio Op. 2d 213 (1974)], the court mentioned that "In most cases, courts award the custody of young children, especially girls, to the mother. It is thought that the mother can better care for her young female children. This case is further complicated by the fact that the plaintiff has had the custody of the young girls during the entire pendency of the suit, and if they had a choice at this tender age they would choose to live with their mother. The court is aware of this truth and would expect it to be nothing less."

The General Assembly has spoken on this issue through R.C. 3109.03 by indicating: "When husband and wife are living separate and apart from each other, or are divorced, and the question as to the parental rights and responsibilities for the care of their children and the place of residence and legal custodian of their children is brought before a court of competent jurisdiction, they shall stand upon an equality as to the parental rights and responsibilities for the care of their children and the place of residence and legal custodian of their children, so far as parenthood is involved."

The statute R.C. 3109.03 mentioned in the above case provides equality between the two parents in case of separation and divorce. It was not clear which year this statute was added.

§ 3109.03. Equal parental rights of father and mother

When husband and wife are living separate and apart from each other, or are divorced, and the question as to the parental rights and responsibilities for the care of their children and the place of residence and legal custodian of their children is brought before a court of competent jurisdiction, they shall stand upon an equality as to the parental rights and responsibilities for the care of their children and the place of residence and legal custodian of their children, so far as parenthood is involved.
The Ohio Statute that governs custody assignment is § 3109.04. (Allocation of parental rights and responsibilities for care of children; shared parenting.) According to the Case Notes of the Ohio Statute ORC Ann. 3109.04 (2013):

A child's tender years, like the role of the primary caretaker, is a relevant factor in a custody determination. An award based on future possibilities is contrary to the purpose of R.C. 3109.04 which is to award custody based on present circumstances: Seibert v. Seibert, 66 Ohio App. 3d 342, 584 N.E.2d 41, 1990 Ohio App. LEXIS 898 (1990).

In adopting the "Divorce Reform Act" (H.B. 233, effective September 23, 1974), the Ohio General Assembly mandated the best interest of the child test as the sole test for selecting a custodial parent. Accordingly, application by a trial judge of a presumption that a mother is entitled to custody of a child of tender years may constitute reversible error: Charles v. Charles, 23 Ohio App. 3d 109, 491 N.E.2d 378 (1985).

According to the Case Notes above, the case Charles v. Charles [23 Ohio App. 3d 109, 491 N.E.2d 378 (1985)] interpreted the "Divorce Reform Act" as abolishing the tender years doctrine. Below are excerpts from the case:

In adopting the "Divorce Reform Act" (H.B. 233, effective September 23, 1974), the Ohio General Assembly mandated the best interest of the child test as the sole test for selecting a custodial parent. Accordingly, application by a trial judge of a
presumption that a mother is entitled to custody of a child of tender years may constitute reversible error.

The General Assembly, in adopting the "Divorce Reform Act" (H.B. 233, effective September 23, 1974), mandated the best interest of the child test as the sole test for selecting a custodian. R.C. 3105.21; 3109.04; see In re Perales (1977), 52 Ohio St. 2d 89, at 96-98 [6 O.O.3d 293]. Accordingly, the General Assembly manifested its intent to discard any remaining vestige of the common-law "tender years" doctrine that had been adhered to by some Ohio courts. Norris, Divorce Reform, Ohio Style (1974), 47 Ohio Bar 1031, at 1035. See, e.g., Lawyer v. Lawyer (App. 1933), 14 Ohio Law Abs. 33. See, also, McVay v. McVay (1974), 44 Ohio App. 2d 370, at 374 [73 O.O.2d 415]. Adherence to the "tender years" doctrine, then, would amount to reversible error, under the circumstances posited by defendant.

Oklahoma

Oklahoma had gender preference written in statute that was very different from other states. The statute gave preference for the mother when the child is of tender age, and gave preference for the father when the child is of an "age to require education and preparation for labor or business." (Okla. Stat. tit. 30, § 11)

In awarding the custody of a minor, or in appointing a general guardian, the court or judge is to be guided by the following considerations: 1. By what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare; and if the child be of sufficient age to form an intelligent preference, the
court or judge may consider that preference in determining the question. 2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, 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.


According to statutory notes, this statute was repealed by Laws 1983, c. 269, § 4, operative July 1, 1983.

The repeal of the statute was confirmed in the case *Manhart v. Manhart* [1986 OK 12, 725 P.2d 1234, 1986 Okla. LEXIS 113 (Okla. Apr. 2 1986)]:

…the statutory guidelines for awarding child custody - contained in 30 O.S. § 11 (the "tender years doctrine") -- were repealed and replaced by 12 O.S. § 1275.4(A), which states:

A. In awarding the custody of a minor unmarried child or in appointing a general guardian for said child, the court shall consider what appears to be in the best interest of the physical and mental and moral welfare of the child.

The Case Notes of the Oklahoma custody statute 43 Okl. St. § 109 provides further evidence that the maternal preference has been abolished:

**Oregon**

There is evidence in the case *Kightlinger v. Kightlinger* [249 Or 521, 439 P2d 614 (1968)] that the Oregon had started questioning the validity of the maternal preference. The court stated that the best interests of the child should be used to determine child custody. However, the court also admitted that past case decisions had still favored the mothers, and that "We have no follow-up procedure to indicate whether these decisions have accurately predicted the future."

Under Or. Rev. Stat. § 19.125(3), an appellate court is required to consider suits de novo upon the record. Or. Rev. Stat. § 107.100 (1) provides as follows: In determining custody the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties. No preference in custody shall be given to the mother over the father for the sole reason that she is the mother.

The trial court disposed of the custody question on the apparent assumption that children of tender years are ordinarily better off with their mother than with their father. Prior to the amendment of ORS 107.100 in 1961 this assumption had support in many decisions of this court. See cases commented upon in Larson, *Trends in*
Oregon Family Law, 43 Or L Rev 97, 113 (1964). In each case the decision had been rationalized as one that was best for the children. Frequently since 1961 decisions have favored the mothers. We have no follow-up procedure to indicate whether these decisions have accurately predicted the future. In each case the trial court has attempted to place custody where the least harm would befall the children. Juvenile-court cases and change-of-circumstance cases appealed to this court are not a sample from which trustworthy generalizations can be drawn. The trial courts are still confronted with a decisional problem that defies standardized solution. In most cases we affirm out of deference to the superior intuitive position of the judge who sees the witnesses.

The case Ray v. Ray [11 Or App 246, 502 P2d 397 (1972)] clearly states that the maternal preference had been abrogated:

The preference in a divorce proceeding of awarding custody of a child to the mother has been abrogated by statute, ORS 107.105(1)(a), and is subordinate to the best interests of the child.

The Case Notes of the Oregon custody statute ORS § 107.105 supports that the above case indicates the repeal of the preference for the mother:

The statute, Or. Rev. Stat. § 107.100 mentioned in the case *Kightlinger v. Kightlinger* was repealed in 1971 by 1971 c.280 § 28. In *Ray v. Ray*, the court mentioned that the maternal preference was abrogated by the statute ORS § 107.105(1)(a).

**Pennsylvania**

In the early 1970s, the Pennsylvania courts still applied a strong maternal preference. For example, in *Commonwealth ex rel. Lucas v. Kreischer* [450 Pa. 352, 299 A.2d 243 (1973)], the court stated that:

In Pennsylvania, supported by the wisdom of the ages, it has long been the rule that in the absence of compelling reasons to the contrary, a mother has the right to the custody of her children over any other person, particularly so, where the children are of tender years. See *Commonwealth ex rel. Fox v. Fox*, 216 Pa. Superior Ct. 11, 260 A. 2d 470 (1969); *Commonwealth ex rel. Kraus v. Kraus*, 185 Pa. Superior Ct. 167, 138 A. 2d 225 (1958); and *Commonwealth v. Addicks*, 5 Binn. 520 (1813). In fact, that the best interests of children of tender years will be best served under a mother's guidance and control is one of the strongest presumptions in the law. *Commonwealth ex rel. Logue v. Logue*, 194 Pa. Superior Ct. 210, 166 A. 2d 60 (1960). In the instant case, the record is completely barren of any evidence that the children here involved will suffer from living with the mother under the existing circumstances. Significantly, the children have evidenced no ill will towards the mother or concern over her second marriage,
and no social problems, such as bias or prejudice, ensued while they were under her care from September 1969 to June 1970. The real issue posed by this appeal is, whether a subsequent interracial marriage by the mother, in and of itself, is such a compelling reason as will warrant a court in denying her the custody of her children. We rule it is not.

Several cases in 1977 questioned the tender years doctrine, and eventually eliminated it.

In *Commonwealth ex rel. Spriggs v. Carson* [*470 Pa. 290, 368 A.2d 635 (1977)*], the court stated that courts should be "wary of" using the tender years doctrine, and that the doctrine "is offensive to the concept of the equality of the sexes."

Courts should be wary of deciding matters as sensitive as questions of custody by the invocation of presumptions such as the "tender years doctrine" and the rule of preference to a resident guardian over a non-resident guardian. Instead, courts should inquire into the circumstances and relationships of all the parties involved and reach a determination based solely upon the facts of the case then before the court.

Finally, we note that in reaching its conclusion that custody should be awarded to the mother, the majority in the Superior Court relied heavily upon the "tender years doctrine" and the rule of preference to a resident guardian over a non-resident guardian. The latter principle was obviously more tenable in the days of a less mobile society. In today's accessible and communicative world the validity of this proposition is open to serious question. It would be presumptive to believe that the
care and concern of the Pennsylvania Courts for the best interest and the welfare of a child is not shared by our sister States. To the contrary, the thoroughness and the interest exhibited in this case by the Florida Court demonstrates the fallacy of this argument.

We also question the legitimacy of a doctrine that is predicated upon traditional or stereotypic roles of men and women in a marital union. Whether the tender years doctrine is employed to create a presumption which requires the male parent to overcome its effect by presenting compelling contrary evidence of a particular nature; *Commonwealth ex rel. Lucas v. Kreischer*, 450 Pa. 352, 299 A.2d 243 (1973); *Commonwealth ex rel. Logue v. Logue*, 194 Pa.Super. 210, 166 A.2d 60 (1960), or merely as a makeshift where the scales are relatively balanced; *Commonwealth ex rel. Parikh v. Parikh*, 449 Pa. 105, 296 A.2d 625 (1972); *Commonwealth ex rel. Veihdeffer v. Veihdeffer*, 235 Pa.Super. 447, 344 A.2d 613 (1975), such a view is offensive to the concept of the equality of the sexes which we have embraced as a constitutional principle within this jurisdiction. See Pa.Const., art. I, § 28; *Conway v. Dana*, 456 Pa. 536, 318 A.2d 324 (1974). Courts should be wary of deciding matters as sensitive as questions of custody by the invocation of "presumptions". Instead, we believe that our courts should inquire into the circumstances and relationships of all the parties involved and reach a determination based solely upon the facts of the case then before the Court.
Whether the language in *Spriggs* has abolished the tender years doctrine is questionable. Radcliff (1977) considered the court's criticism of the tender years doctrine as "not a binding precedent", but that "following *Spriggs* the doctrine is certain to encounter increasing opposition":

Justice Nix's criticism suggests grounds for challenging the doctrine, but it accomplishes little more. Since less than a majority of the justices joined in the opinion, it is not a binding precedent. Nonetheless, following *Spriggs* the doctrine is certain to encounter increasing opposition, drawing not only on the dicta in *Spriggs* but also on developments in other areas of Pennsylvania domestic relations law, in other states' child custody litigation, and in the field of psychology.

In *Commonwealth ex rel. Lee v. Lee* [248 Pa.Super. 155, 374 A.2d 1365 (1977)], the role of tender years doctrine was further diminished:

The "tender years presumption" must be regarded as not a right of the mother but merely a procedural device for allocating the burden of proof. Only if the judge determined after a full hearing that the child's best interest would be equally served by living with either parent, could a child of "tender years" be placed in the mother's custody.

The "tender years" presumption is merely the vehicle through which a decision respecting the infant's custodial well-being may be reached where factual considerations do not otherwise dictate a different result.
Recently, in *Commonwealth ex rel. Spriggs v. Carson*, 470 Pa. 290, 368 A.2d 635 (1977), a plurality of the Supreme Court expressed the opinion that the "tender years presumption," should be eliminated even as a procedural device. There two children, a boy and a girl, were involved. A Florida court awarded custody of both children to the father. The mother, however, in violation of the Florida court's order, took the boy with her to Lancaster County. In a custody proceeding initiated there by the father, the court of common pleas awarded custody of the boy to the father. A majority of this court reversed. On further appeal, the Supreme Court reinstated the order of the court of common pleas.

Finally, *McGowan v. McGowan* [248 Pa.Super. 41, 374 A.2d 1306 (1977)] stated that Lee noted that *Spriggs* had eliminated the tender years doctrine. The doctrine was completely eliminated in Pennsylvania.

The tender years doctrine, that the best interests of children of tender years will be best served under a mother's guidance and control, is offensive to the concept of the equality of the sexes. Pa. Const. art. I, § 28.

In his original brief in our Court, appellant argued that the tender years doctrine, relied upon by the lower court, is violative of equal protection and due process under the Fourteenth Amendment of the United States Constitution, and the Equal Rights Amendment to the Pennsylvania Constitution, Pa.Const., Art. I, § 28. In a supplemental brief, appellant contends that the Supreme Court's recent decision in
Commonwealth ex rel. Spriggs v. Carson, 470 Pa. 290, 368 A.2d 635 (1977), requires that we reverse the order of the lower court and award custody to appellant.

In a plurality opinion, Justice NIX raised serious questions concerning the continued vitality of the tender years' doctrine:

"We also question the legitimacy of a doctrine that is predicated upon traditional or stereotypic roles of men and women in a marital union. Whether the tender years doctrine is employed to create a presumption which requires the male parent to overcome its effect by presenting compelling contrary evidence of a particular nature; Commonwealth ex rel. Lucas v. Kreischer, 450 Pa. 352, 299 A.2d 243 (1973); Commonwealth ex rel. Logue v. Logue, 194 Pa.Super. 210, 166 A.2d 60 (1960), or merely as a makeshift where the scales are relatively balanced; Commonwealth ex rel. Parikh v. Parikh, 449 Pa. 105, 296 A.2d 625 (1972); Commonwealth ex rel. Veihdeffer v. Veihdeffer, 235 Pa.Super. 447, 344 A.2d 613 (1975), such a view is offensive to the concept of the equality of the sexes which we have embraced as a constitutional principle within this jurisdiction. See Pa.Const., Art. I, § 28; Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974). Courts should be wary of deciding matters as sensitive as questions of custody by the invocation of 'presumptions'. Instead, we believe that our courts should inquire into the circumstances and relationship of all the parties involved and reach a determination based solely upon the facts of the case then before the Court." We have recently noted that Spriggs has eliminated the doctrine, even as a

In Lee, we remanded the case because the lower court misapplied the law under both Spriggs and the tender years doctrine prior to Spriggs. Although we did not rely squarely on the Spriggs decision, we gave strong indication that in the proper case we would do so. We find that the instant appeal is such a case and, therefore, hold that Justice NIX's opinion in Spriggs is controlling.

In the instant case, the lower court considered numerous factors before it awarded custody to the mother. However, the court's opinion makes clear its heavy reliance on the tender years doctrine: "... [The Supreme Court] stated that in Pennsylvania, supported by the wisdom of the ages, it has long been the rule that in the absence of compelling reasons to the contrary, a mother has the right to the custody of her children over any other person, particularly so, where the children are of tender years: Commonwealth ex rel. Lucas v. Kreischer, 450 Pa. 352, [299 A.2d 243] (1973). In fact, that the best interests of children of tender years will be best served under a mother's guidance and control is one of the strongest presumptions in the law: Commonwealth ex rel. Logue v. Logue, 194 Pa. Super. 210, [166 A.2d 60] (1960)." This reliance is clearly misplaced in light of Spriggs. See also Commonwealth ex rel. Tobias v. Tobias, 248 Pa.Super. 168, 374 A.2d 1372 (1977); Commonwealth ex rel. Cutler v. Cutler, 246 Pa.Super. 82, 369 A.2d 821 (1977).
Once we conclude that the lower court impermissibly relied on the tender years doctrine, we must determine the proper remedy. Appellant requests that we award custody of the child to him. That would be premature. It is well-settled that the paramount concern in a custody dispute between parents is the best interest of the child. Commonwealth ex rel. Spriggs v. Carson, supra; Commonwealth ex rel. Parikh v. Parikh, 449 Pa. 105, 296 A.2d 625 (1972); Cochran Appeal, 394 Pa. 162, 145 A.2d 857 (1958); Commonwealth ex rel. Tobias v. Tobias, supra. That the mother has had a history of emotional problems does not preclude a finding that the child's best interest requires that custody be awarded to the mother. The court must award custody on present conditions, rather than on consideration of past unfitness. Commonwealth ex rel. Tucker v. Salinger, 244 Pa.Super. 1, 366 A.2d 286 (1976).

Therefore, we reverse the order of the lower court and remand for further proceedings consistent with this opinion.

Regardless of which one of the three cases eliminated the tender years doctrine, there is no doubt that the doctrine was abolished in 1977. This was also supported by both statute and future cases.


§ 28. Prohibition against denial or abridgment of equality of rights because of sex.

Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.
According to the Case Notes of this statute:


60. "Tender years presumption," which favored an award of custody to a mother rather than to a father, has been eliminated as violating the concept of equality of the sexes as embodied in Pa. Const. art. I, § 28.


61. Tender years doctrine, relied upon by the lower court in the parties' custody dispute, was violative of equal protection and due process under USCS Const. Amend. 14, § 1, and the Equal Rights Amendment of the Pennsylvania Constitution, Pa. Const. art. I, § 28.


62. Trial court incorrectly applied the "tender years" doctrine by presuming that a child's mother should have custody and placing upon the child's father the burden of proving that the mother was unfit because such a view was offensive to the concept of the equality of the sexes as contemplated by Pa.Const. art. I, § 28.


It is no longer the law that a mother is presumed more fit to care for a child than a father. Thus, a court must base its custody on sexually-neutral grounds. Once custody of a very young child is awarded, the custodial parent, father or mother, must decide whether the child's welfare is better served by the parent's presence in the home or by the parent's full-time employment. Hence, permitting the nurturing parent to remain at home until a child matures does not run afoul of the Equal Rights Amendment, Pa. Const. art. I, § 28. Such a holding is based on sexually-neutral considerations and on the best interests of the child.

We believe that the lower court in the instant case abused its discretion when it held, in effect, that appellant had to secure employment. It is no longer the law that a mother is presumed more fit to care for a child than a father. Commonwealth ex rel. Spriggs v. Carson, supra; McGowan v. McGowan, 248 Pa.Super. 41, 374 A.2d 1306 (1977). Thus, a court must base its custody on sexually-neutral grounds. Once custody of a very young child is awarded, the custodial parent, father or mother, must decide whether the child's welfare is better served by the parent's presence in the home or by the parent's full-time employment. Hence, permitting the nurturing parent to remain at home until a child matures does not run afoul of the E.R.A. -- our holding is based on sexually neutral considerations and on the best interests of the child. Of course, a court is not strictly bound by the nurturing parent's assertion that the best interest of the child is served by the parent's presence in the home. It is for the court to determine the child's best interest. But the court must balance several factors before it can expect the nurturing parent to
seek employment. Among those factors are the age and maturity of the child; the availability and adequacy of others who might assist the custodian-parent; the adequacy of available financial resources if the custodian-parent does remain in the home. We underscore that, while not dispositive, the custodian-parent's perception that the welfare of the child is served by having a parent at home is to be accorded significant weight in the court's calculation of its support order.


A concurring opinion by this author, joined by Mr. Justice, now Chief Justice, Nix, questioned the legitimacy of recognizing "a prima facie presumption that parents have a right to custody of their children as against third parties." 490 Pa. at 371-72, 416 A.2d at 516 (emphasis in original)(Flaherty, J., concurring). The opinion explained the vulnerability of the presumption as follows:

In Commonwealth ex rel. Spriggs v. Carson, where we overruled the "tender years" presumption that custody should be awarded to mothers rather than fathers, we stated: "Courts should be wary of deciding matters as sensitive as questions of custody by the invocation of 'presumptions'. Instead, we believe that our courts should inquire into the circumstances and relationships of all the parties involved and reach a determination based solely upon the facts of the case before the Court." The same reasoning should apply where the custody dispute is between parents and third parties.
The underlying tenor of the "presumption" reflects an archaic concept that children are proprietary assets of parents. Serious question may be posed with respect to the soundness of the apriorism that mere biological relationship assures solicitude, care, devotion, and love for one's offspring. Where a third party better fulfills these needs, or where other circumstances indicate third party custody to be preferable, the courts, when exercising judgment as to a child's welfare, should not be restrained solely by a presumption.

Two cases in the 1980s and 2000s show that the primary caretaker doctrine was used in Pennsylvania to determine custody.


After the parties separated, mother had to move to California due to her employment. The parties shared custody until mother moved, then she visited the child twice a month. The superior court upheld the primary physical custody award to father and held that the tender years doctrine did not apply. After mother's move, father became the primary caretaker. The court applied the child's-best-interest test

Mother's first argument is not an attempt to bring back the "tender years" doctrine. Rather, she is asserting the potentially valid argument that Aidan's interests would best be served by living with her since she was Aidan's primary caretaker during his first years of life. In this case, however, the argument falls short. As we have stated:
where two natural parents are both fit, and the child is of tender years, the trial court must give positive consideration to the parent who has been the primary caretaker. Not to do so ignores the benefits likely to flow to the child from maintaining day to day contact with the parent on whom the child has depended for satisfying his basic physical and psychological needs.


The role of the primary caretaker, without regard to the sex of the parent, is a substantial factor which the trial judge weighs in adjudicating a custody matter where the child is of tender years.

**Rhode Island**

Rhode Island had a long history of recognizing the tender years doctrine.

For example, in *Loebenberg v. Loebenberg* [85 R.I. 115, 127 A.2d 500 (1958)], the judge stated that:

"Courts recognize as a general guide in making a decision that the mother, being fit, should have custody of the young children, especially girls, but the controlling factor in cases between parents is always the best interest of the child for the time being."
Also, according to the Notes to Decisions of the Rhode Island Statute R.I. Gen. Laws § 15-
5-16:

The well-being of a child is a primary consideration in awarding custody, and a female child of tender years could be awarded to the mother despite any superior right of the father and despite fault on the part of the mother. *McKim v. McKim*, 12 R.I. 462, 34 Am. Rep. 694 (1879).

The controlling factor in determining custody of children is always the best interest of the child, although as a general guide the mother, if fit, should have custody of young children, especially girls. *Loebenberg v. Loebenberg*, 85 R.I. 115, 127 A.2d 500 (1956).

Until 2000, in the case *Berard v. Berard* [749 A.2d 577, 579 (R.I. 2000)] the court cited *Loebenberg* and stated that the maternal preference was "merely a general guide." Therefore, the maternal preference still has not been rejected in the case law, though it was not an important rule.

It is well-settled that the best interests of the child remain the "lode-star principle" for determining child custody awards. *Sammataro v. Sammataro*, 620 A.2d 1253, 1254 (R.I. 1993). In support of her argument that she should have been awarded custody of the children, defendant relies upon *Loebenberg v. Loebenberg*, 85 R.I. 115, 127 A.2d 500 (1956), for the proposition that a mother who is "fit" should have custody of young children, especially girls. We stated in *Loebenberg* that
this was merely a "general guide," and that the best interests of the child ultimately governed custody disputes. Id. at 120-21, 127 A.2d at 503.

According to Slepkow (2011), "In Berard v. Berard, 749 A.2d 577, 579 (R.I. 2000) The Supreme Court of Rhode Island again had another chance shut the door on the 'tender years Doctrine.'"

Rhode Island R.I. Gen. Laws § 15-5-16 provides factors to determine child custody. Evidence shows that the statute was first introduced in 1956.


The justices of the Family Court are vested with broad discretion as they seek to fairly divide marital property between the parties in divorce proceedings. It is well settled in Rhode Island that trial justices responsible for equitably distributing property in a divorce action must engage in a three-step process. First, the trial justice must determine which assets are "marital property" and which are "non-marital property." Next, the trial justice must consider the several factors set forth in R.I. Gen. Laws § 15-5-16.1 (1956) before then distributing the estate in accordance with those factors.
South Carolina

South Carolina was one of the latest states that discarded the tender years doctrine. The most recent case I have found that used the tender years doctrine was *Epperly v. Epperly* [312 S.C. 411, 440 S.E.2d 884 (1994)]:

The best interests of the child are paramount in custody disputes. The Family Court should consider "the character, fitness, attitude and inclinations on the part of each parent" as they impact on the child. *Gandy v. Gandy*, 297 S.C. 411, 414, 377 S.E.2d 312, 314 (1989). Further, the "tender years doctrine," which creates a preference for the mother of young children, should also be a factor weighed by the Family Court in determining custody. *Collins v. Collins*, supra.

We find that the preponderance of the evidence supports awarding custody to Wife. Wife has been the primary caretaker of the children throughout their lives. Although the Guardian Ad Litem made no recommendation as to custody, he did find that the children were well cared for by the Wife. Further, the tender years doctrine militates in favor of awarding custody to Wife.

In the same year, the doctrine was abolished by statute S.C. Code Ann. § 20-7-1555. The elimination of the tender years doctrine was confirmed by the sources below.


The "tender years doctrine", in which there is a preference for awarding a mother custody of a child of tender years, was abolished effective May 18,
1994. However, when custody of Son was determined on September 30, 1993, the health, age, and sex of a child -- often referred to as the "tender years doctrine" -- were factors to be considered in awarding custody of a young child. See Wheeler v. Gill, supra.

The welfare and best interests of the child are paramount in custody disputes. The family court must consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child. Epperly v. Epperly, 312 S.C. 411, 440 S.E.2d 884 (1994). In addition, psychological, physical, environmental, spiritual, educational, medical, family, emotional and recreational aspects of the child's life should be considered. Wheeler v. Gill, 307 S.C. 94, 413 S.E.2d 860 (Ct. App. 1992). Thus, when determining to whom custody shall be awarded, all the conflicting rules and presumptions should be weighed together with all of the circumstances of the particular case, and all relevant factors must be taken into consideration. Ford v. Ford, 242 S.C. 344, 130 S.E.2d 916 (1963).


We find no merit to Father's contention the family court applied the functional equivalent of the tender years doctrine in awarding custody to Mother. The "tender years doctrine," in which there is a preference for awarding a mother custody of a child of tender years, was abolished effective May 18, 1994. S.C. Code Ann. § 20-7-1555 (Supp. 1997). Here, it is evident from the family court's order that the court considered factors such as which parent evolved
as the children's primary caregiver and the conduct, attributes, and resources of each parent. These are proper considerations in making child custody determinations. See, e.g., *Parris v. Parris*, 319 S.C. 308, 460 S.E.2d 571 (1995) (primary caretaker versus primary wage earner status is a factor to be considered in custody determinations).

Elrod and Spector (1996): "The tender years doctrine was officially abolished by statute in South Carolina. 105. S.C. Code Ann. § 20-7-1555 (Law Co-op. 1994)."

According to the statutory notes of the South Carolina statute S.C. Code Ann. § 63-15-10:


The "Tender Years Doctrine" in which there is a preference for awarding a mother custody of a child of tender years is abolished.

**South Dakota**

Prior to July 1, 1977, maternal preference was written in the South Dakota Statute (SDCL 30-27-19). The following cases cited this statute:


In contests between parents for the custody of minor children of tender years, our law favors the mother in recognition of the universal rule that, if she is a fit and proper person, there is ordinarily no substitute for her care, guidance,
love, and devotion. *Wiesner v. Wiesner, supra.* The trial court has a broad discretion in matters of this nature but it is a judicial discretion, not an uncontrolled one, and its exercise must have sound and substantial basis in the testimony.

The final issue is, did the court abuse its discretion in granting custody of the children to the defendant. In awarding custody of any minor child, a court must be guided by what appears, from all the facts and circumstances, to be for the best interests of the child relative to its temporal, mental, and moral welfare. *Wiesner v. Wiesner,* 80 S.D. 114, 119 N.W.2d 920. The children in this case are of tender years within the custodial direction contained in SDCL 30-27-19(2):

As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child be of tender years, it should be given to the mother."


Plaintiff mother sought review of a judgment and decree of the Circuit Court of the Seventh Judicial Circuit (South Dakota) granting custody of her three-year-old child to defendant father under South Dakota's "tender years" statute. S.D. Codified Laws § 30-27-19.

SDCL 30-27-19(2) reads as follows: As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child be of tender years, it should be given to the mother.
A trial court has a broad discretion in matters of awarding custody of children of tender years, but it is a judicial discretion, not an uncontrolled one, and its exercise must have sound and substantial basis in the testimony.


In contests between parents for the custody of minor children of tender years, South Dakota statutes favor the mother in recognition of the universal rule that if she is a fit and proper person there is ordinarily no substitute for her care, guidance, love and devotion. S.D. Codified Laws § 30-27-19(2).

Three children were born to this marriage, namely, Lori, Traci and Jason. Their ages at the time of trial were 13, 10 and 6, respectively.

The trial court found that 6-year-old Jason was of tender years based upon his age and his physical and mental development. In contests between parents for the custody of minor children of tender years, our statutes favor the mother in recognition of the universal rule that if she is a fit and proper person there is ordinarily no substitute for her care, guidance, love and devotion. SDCL 30-27-19(2); *Masek v. Masek*, supra. Accordingly, the trial court awarded custody of Jason to Jean, and we conclude that such award was not an abuse of discretion.

The trial court also awarded the two girls to their mother reasoning that one of the girls, Traci, was close to tender years, that the children should be kept together, and that the two oldest children were girls. We agree with such reasoning.
It was not until 1979, when the maternal preference statute was repealed through an amendment of the law. The cases below mentioned the repeal of this statute:


The tender years doctrine had been abolished by S.D. Codified Laws § 30-27-19(2).

The mother contends that she should be granted custody of the children due to their tender age. **Effective July 1, 1979, however, SDCL 30-27-19(2) was amended to read: "As between parents adversely claiming the custody or guardianship, neither parent shall be given preference over the other in determining custody."** Notwithstanding the Legislature's repeal of the tender years doctrine, the mother would apparently have the judiciary continue to apply it. This we decline to do. The purpose of the Legislature in amending SDCL 30-27-19(2) is clear: It desired that neither parent be given custodial preference due to their respective sex.


Prior to July 1, 1977, the law provided that, all things being equal, the mother was entitled to custody of a child of tender years. However, the law was amended so neither parent would be given preference over the other in determining custody. SDCL 30-27-19(2). The legislature desired neither parent to be given custodial preference due to their sex. *Martin v. Martin*, 306 N.W.2d 648 (S.D. 1981). Now the court is to be guided by what appears to be in the best interests
of the child with respect to its temporal, mental, and moral welfare. If the child be of a sufficient age to form an intelligent preference, the court or judge may consider that preference in determining the question. SDCL 30-27-19(1).

The Case Notes of the South Dakota custody statute S.D. Codified Laws § 25-4-45 cited the relevant cases:

55. In an action to modify custody of children, ages two and four years old, mother was not entitled to custody simply because of the children's tender age because the tender years doctrine had been abolished; neither parent was entitled to a custodial preference due to their respective sex. Martin v. Martin, 306 N.W.2d 648, 1981 S.D. LEXIS 288 (June 10, 1981).

63. Trial court erred in granting custody of a three-year-old child to her father under the former "tender years" statute, S.D. Codified Laws § 30-27-19, where the trial court's findings that the mother refused to fix breakfast for the child, that the child would be "brought up" in the home of the mother's paramour, and that the child showed a preference for the father were not supported by the evidence; moreover, the proof of the mother's immoral conduct was very weak and the conclusion that the child was harmed in any way by being present during the times when the mother was allegedly observed with her paramour was also unsubstantiated in the record. The mother had her own apartment, a steady job, and babysitting arrangements while the father stayed with friends or relatives while working at a temporary job; all things were not equal but, rather, strongly balanced in favor of the mother.

64. Trial court's discretion in awarding custody of children of tender years was a judicial discretion, not an uncontrolled one, and its exercise had to have a sound and substantial basis in the testimony. *Kester v. Kester*, 257 N.W.2d 731, 1977 S.D. LEXIS 183 (Sept. 28, 1977).

67. Trial court erred in modifying a divorce decree to change custody of the minor child from the mother to the father because the child was of "tender years" for purposes of former S.D. Codified Laws § 30-27-19 and the father failed to show that there had been a substantial change of circumstances. *Hershey v. Hershey*, 85 S.D. 85, 177 N.W.2d 267, 1970 S.D. LEXIS 93 (May 14, 1970).

106. In an action to modify custody of children, ages two and four years old, mother was not entitled to custody simply because of the children's tender age because the tender years doctrine had been abolished; neither parent was entitled to a custodial preference due to their respective sex. *Martin v. Martin*, 306 N.W.2d 648, 1981 S.D. LEXIS 288 (June 10, 1981).

116. Trial court erred in modifying a divorce decree to change custody of the minor child from the mother to the father because the child was of "tender years" for purposes of former S.D. Codified Laws § 30-27-19 and the father failed to show that there had been a substantial change of circumstances. *Hershey v. Hershey*, 85 S.D. 85, 177 N.W.2d 267, 1970 S.D. LEXIS 93 (May 14, 1970).
Tennessee

Tennessee still recognized the tender years doctrine until the 1990s.

In *Bah v. Bah* [668 S.W.2d 663 (Tenn. App. 1983)], the court stated that the tender years doctrine was "only one factor" to be considered.

*Weaver v. Weaver,* 37 Tenn.App. 195, 261 S.W.2d 145 (1953), sets forth the tender years doctrine in these terms:

A mother, except in extraordinary circumstances, should be with her child of tender years. The courts have repeatedly recognized this as a primary doctrine.

Normally, such a child will not be taken away from its mother unless it is demonstrated that to leave the child with its mother would jeopardize its welfare, both in a physical and in a moral sense.

This court believes that the so-called "tender years doctrine" is a factor -- but only one factor -- to be considered in the overall determination of what is in the best interests of the child.

Freed and Walker (1985) mentioned the above case and concluded that the tender years presumption was only a tiebreaker in South Dakota:

Trial court properly awarded custody of two-year-old to father without finding mother unfit. Although the tender years doctrine is one factor to consider in determining the best interest of the child, the presumption is only a tiebreaker in

In 1992, the tender years doctrine was still considered [*Malone v. Malone*, 842 S.W.2d 621, 623 (Tenn. Ct. App. 1992)]:

Apparently the trial court failed to give due consideration to the fact that the mother had been the primary source of care for these children throughout their life and particularly failed to give some consideration to the "tender years" doctrine for the girls ages four and three. While the "tender years" doctrine is not a controlling factor, it is certainly something that should be considered by the court in making an award of custody. See *Bah v. Bah*, 668 S.W.2d 663 (Tenn. App. 1983).


First of all, the *Rogero* opinion indicates that "the desire of the wife [sic] to remarry was a legitimate reason for removal." *Id.* at 111. We also noted that even though the parents had been awarded joint custody, "the children [had] spent most of their time with their mother, and that she had the responsibility of most of the major decisions concerning their regular activities and their education." *Id.* In addition to finding that the mother was the children's primary caretaker, the Court also noted that "she had been shown to be a fit person in every respect." *Id.* at 112. **We also set out the provision in T.C.A. § 36-6-101(d) that permits the courts to consider the "tender years doctrine" in examining questions of custody.** Further, we noted that the parents had no extended family in the Knoxville area. *Id.* at 110-11.
Finally, we noted that "there was nothing in the record to suggest that [the mother's] conduct was vindictive or that she was in any way deliberately attempting to interfere with his normal and close relationship with his children." *Id.* at 112.

It is not entirely clear what the provision means, given the ambiguity of its language:

It is the legislative intent that the gender of the party seeking custody shall not give rise to a presumption of parental fitness or cause a presumption in favor of or against the award of custody to such party; provided, however, that in the case of a child of tender years, the gender of the parent may be considered by the court as a factor in determining custody after an examination of the fitness of each party seeking custody.

Tender years doctrine was questioned in the case *Varley v. Varley* [934 S.W.2d 659, 1996 Tenn. App. LEXIS 459 (Tenn. Ct. App. 1996)].

Finally, as these children are of "tender years," we derive additional guidance from the legislature's enactment of T.C.A. § 36-6-101(d), providing:

Tenn. Code Ann. § 36-6-101(d) provides as follows: It is the legislative intent that the gender of the party seeking custody shall not give rise to a presumption of parental fitness or cause of presumption in favor or against the award of custody to such party; provided, that in the case of a child of tender years, the gender of the parent may be considered by the court as a factor in determining custody after an examination of the fitness of each party seeking custody.
Wife contends that the trial court's "prejudgment" of the case along with the "great emphasis" it placed on Wife's admitted adultery accounts for the custody award. She asserts that custody is properly with her when the comparative fitness of the parties and the "tender years" doctrine are given adequate consideration.

We first note the fallacy in Wife's argument that Husband failed to rebut the "tender years" presumption. As heretofore noted, a mother of a child(ren) of tender years is no longer afforded such presumption. See T.C.A. § 36-6-101(d); Bah, 668 S.W.2d at 666.

The case In re Skyler J. H. [S.W.3d, 2011 Tenn. App. LEXIS 98 (Tenn. Ct. App. Feb. 28, 2011)] describes the history of the usage of the tender years doctrine in Tennessee. Between 1987 and 1997, the statute "prohibited consideration of gender in custody decisions, but made a specific exception when children of tender years were involved." The tender years exception was removed in 1997.

The Tender Years Doctrine

Mother also contends that the trial court erred by not giving her the benefit of the tender years doctrine, which presumes that a young child should remain in the custody of its mother. "A mother, except in extraordinary circumstances, should be with her child of tender years. The courts have repeatedly recognized this as a primary doctrine. Normally, such a child will not be taken away from its mother unless it is demonstrated that to leave the child with its mother would jeopardize its

In Bah v. Bah, however, this court questioned the continuing relevance of the tender years doctrine in light of societal changes in the role of women:

To the extent the "tender years" doctrine has continued efficacy it is simply one of many factors to be considered in determining custody, not an unyielding rule of law. The only rigid principle is and must be that the best interests of the child are paramount in any custody determination. Times have changed. Many mothers now work, either by necessity or choice, and no longer assume the primary nurturing role for small children. We believe the "presumption of tender years" espoused in Weaver is no substitute for an individualized investigation involving custody in every case. Such factors as the warmth, consistency, and continuity of the relationship between parent and child and not the sex of the parent actually govern a child's best interest. These things can be provided by the father as well as the mother.

668 S.W.2d at 666. See also Varley v. Varley, 934 S.W.2d 659, 666 (Tenn. Ct. App. 2006); Ruyle, 928 S.W. 2d at 442; Shelby v. Shelby, 696 S.W.2d 360, 361 (Tenn. Ct. App. 1985).

In 1987, perhaps in reaction to this court's decision in Bah v. Bah, our legislature added a section to the child custody statute, Tenn. Code Ann. § 36-6-101(d), which prohibited consideration of gender in custody decisions, but made a specific
exception when children of tender years were involved [Acts 1987, ch. 266, § 1].

In 1997, the legislature removed the tender years exception from that section [Acts 1997, ch. 208, § 1]. Tenn. Code Ann. § 36-6-101(d) now reads in its entirety, "[i]t is the legislative intent that the gender of the party seeking custody shall not give rise to a presumption of parental fitness or cause a presumption or constitute a factor in favor or against the award of custody to such party."

Since the tender years doctrine is no longer a viable rule of law, we can find no fault in the trial court's conclusion, after its "individualized investigation" in this case, that it was in the best interest of Skyler to remain in Father's custody.

According to the Notes to Decisions of the Tennessee statute Tenn. Code Ann. § 36-6-101:

Child of Tender Years.


According to the Notes to Decisions of the Tennessee statute Tenn. Code Ann. § 36-6-106:

Granting of the father's petition to be awarded custody of the parties' child was proper under T.C.A. § 36-6-101(d) because the tender years doctrine was no longer a viable rule of law and the appellate court was not able to find fault in the trial court's conclusion, after its individualized investigation in the case, that it was in

In a child custody case, the trial court did not abuse its discretion in awarding primary parenting responsibility to the mother; there was no evidence that the trial court applied the tender years doctrine, and the evidence did not preponderate against the trial court's finding that the mother had repented of her prior attempts to interfere with the relationship between the father and the child. The trial court gave careful attention to the proof presented and reached its decision after appropriate analysis of such proof in the context of all relevant factors, including those set forth at T.C.A. § 36-6-106(a); the trial court found that, while both the mother and the father were comparatively fit, the child had resided with the mother since he was born, and the mother had provided a stable and satisfactory environment for the child and he had thrived in her home. *Hodson v. Griffin*, 210 S.W.3d 568, 2006 Tenn. App. LEXIS 399 (Tenn. Ct. App. 2006), appeal denied, -- S.W.3d--, 2006 Tenn. LEXIS 1021 (Tenn. 2006).

**Texas**

The case *Erwin v. Erwin* [505 S.W.2d 370 (Tex.Civ.App. 1974)] stated that the maternal preference was destroyed by statute TEX.FAM.CODE ANN. sec. 14.01 (b) (Supp. 1974).

As a general rule, a mother should be awarded the custody of children of tender years when she is found to be fit and all other factors are equal. *Liska v. Hall*, 357 S.W.2d 601 (Tex.Civ.App.-Dallas 1962, no writ). However, this general rule states no more than a preference for the mother and not a legal presumption. *Lynch v. Wyatt*, 191 S.W.2d 499 (Tex.Civ.App.-Texarkana 1945, no writ). Rather than automatically apply a preference for the mother or determine what we would have done below, this Court must affirm unless it appears from a review of all the testimony, viewed as to the children's best interests, that the trial judge abused his discretion. *Watts v. Watts*, 390 S.W.2d 30 (Tex.Civ.App.-El Paso 1965, writ ref'd n.r.e.). The trial judge in a custody case is afforded a wide discretion and its abuse must be clear in order to warrant a reversal, for he alone is able to judge the credibility and temperament of the parents as well as other intangibles which do not appear in the statement of facts before an appellate court. *Rauh v. Rauh*, 267 S.W.2d 584 (Tex.Civ.App.-Galveston 1954, no writ).

*It should be noted that the current Family Code provides that the court in a custody proceeding shall view the qualifications of each parent "without regard to the sex of the parent,"* TEX.FAM.CODE ANN. sec. 14.01 (b) (Supp. 1974), and thus effectively destroys the preference for the mother under consideration here.

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The judge below was able to view all of these factors, and he also had before him the confidential report of the Juvenile Probation Department, which is not a part of the record. Appellant's counsel in oral argument before this Court pointed out that this report might be wholly composed of hearsay statements. However, a trial judge does not commit error by considering such a report in a custody case when the complaining party has consented to the reception and consideration of the report. *Crawford v. Crawford*, 256 S.W.2d 875 (Tex.Civ.App.-Amarillo 1952, no writ). After a review of the testimony in the record, it is clear that the trial judge did not abuse his discretion in finding that Mr. Erwin was a fit person for custody or in finding that the best interests of the children were with their father. An award of custody which contravenes the preference for the mother is not by itself an abuse of discretion. All that has been said above as to the wide discretion of the trial judge applies with equal force to Mrs. Erwin's argument that a double preference exists as to a child of tender years who is female, even if there were not a countervailing preference against the divided custody of siblings.

*Adams v. Adams* [519 S.W.2d 502, 503, Tex. Ct. App. 1975] confirms the abandonment of maternal preference:

In many cases, the Courts of this State have held that there is a preference for the mother in awarding the custody of young children. *Spitzmiller v. Spitzmiller*, 429 S.W.2d 557 (Tex.Civ.App. -- Houston (1st Dist.) 1968, writ ref'd n.r.e.); *Longoria v. Longoria*, 324 S.W.2d 244 (Tex.Civ.App. -- San Antonio), writ dism'd w.o.j., 160 Tex. 134, 327 S.W.2d 453 (1959). But such preference does not have

**This case was decided under the provisions of the Texas Family Code, and Section 14.01(b), in part, provides:**

"In determining which parent to appoint as managing conservator, the court shall consider the qualifications of the respective parents without regard to the sex of the parent."

One of the reasons given for such provision in the Statute was a concern by the Legislature that fathers were disfavored in custody cases in Texas. 5 Tex. Tech L. Rev. 425. The Court in a footnote in the Erwin case suggests that the new code provision effectively destroys the preference for the mother in a child custody case. Without having to conclude that this is necessarily good or a step forward, we agree that the effect of the new code provision is to put both parents on an otherwise equal plane in a child custody case, and thus remove a preference for the mother. But in any event, Section 14.07, Tex. Family Code Ann., provides that the best interest of the child shall always be the primary consideration of the Court. This, of course, has always been the basic consideration in child custody cases.

Certainly the trial Court is afforded a wide discretion in child custody cases, and its judgment will not be disturbed on appeal unless a clear abuse of discretion is shown. *Renfro v. Renfro*, 497 S.W.2d 807(Tex.Civ.App. -- Waco 1973, no writ); *Harrison v. Harrison*, 495 S.W.2d 1 (Tex.Civ.App. -- Tyler 1973, no writ).
Even before passage of the provision which prohibits a preference for the mother, it was not error to award custody to the father where the mother was not an unfit person to have custody of the children. Erwin v. Erwin, supra; Minjarez v. Minjarez, 495 S.W.2d 630 (Tex.Civ.App. -- Amarillo 1973, no writ); Watts v. Watts, 390 S.W.2d 30 (Tex.Civ.App. -- El Paso 1964, writ ref'd n.r.e.). Even as to a third party, a natural parent may be denied custody of children, without a determination that such parent is unfit, where such is in the best interest of the children. De La Hoya v. Saldivar, 513 S.W.2d 259 (Tex.Civ.App. -- El Paso 1974, no writ).


The effect of Tex. Fam. Code Ann. § 14.01(b) (1975) is to put both parents on an otherwise equal plane in a child custody case, and thus remove a preference for the mother.

In awarding custody of a minor child in a divorce proceeding the courts of this State may not indulge any preference towards the mother. TEX. FAMILY CODE ANN., § 14.01(b) (1975) states:

A parent shall be appointed managing conservator of the child unless the court finds that appointment of the parent would not be in the best interest of the child. In determining which parent to appoint as managing conservator, the court shall consider the qualifications of the respective parents without regard to the sex of the parent." (Emphasis supplied.)
In *Adams v. Adams*, 519 S.W.2d 502 (Tex.Civ.App. -- El Paso 1975, no writ), it was held that the effect of the above-quoted section of the Family Code "is to put both parents on an otherwise equal plane in a child custody case, and thus remove a preference for the mother". See also *Erwin v. Erwin*, 505 S.W.2d 370 (Tex.Civ.App. -- Houston [14th Dist.] 1974, no writ). TEX. FAMILY CODE ANN. § 14.07, provides, in part:

"(a) The best interest of the child shall always be the primary consideration of the court in determining questions of managing conservatorship, possession, and support of and access to the child . . .

(b) In determining the best interest of the child, the court shall consider the circumstances of the parents."


Tex. Fam. Code Ann. § 14.01 (1972) expressly provides that in determining which parent to appoint as managing conservator, the court shall consider the qualifications of the respective parents without regard to the sex of the parent. This


In determining the question of managing conservatorship, the welfare and best interest of the children shall always be paramount and the primary consideration of the court. Tex.Fam.Code Ann. § 14.07 (1972), provides in part:

"(a) The best interest of the child shall always be the primary consideration of the court in determining questions of managing conservatorship, possession, and support of and access to the child. . . .

(b) In determining the best interest of the child, the court shall consider the circumstances of the parents."
The Case Notes of the Texas statute Tex. Fam. Code § 153.003 also quote cases that disapproved the maternal preference.

5. Child custody award that favored the wife due to the trial judge's own gender bias was reversible error, because the husband was deprived of his right under former Tex. Fam. Code Ann. § 14.01(b) to have his qualifications as custodian of the children be considered without regard to his sex. Glud v. Glud, 641 S.W.2d 688, 1982 Tex. App. LEXIS 5297 (Tex. App. Waco 1982).

6. Trial court's suggestion that its decision to award managing conservatorship of two children to the children's mother was based in part upon a preference for the mother over the father when the children were young because of sex alone was harmless error, under former Tex. Fam. Code Ann. § 14.01 where there was other evidence to support the trial court's decision. Gary v. Gary, 631 S.W.2d 781, 1982 Tex. App. LEXIS 4220 (Tex. App. El Paso 1982).

7. Former Tex. Fam. Code Ann. § 14.01 expressly provides that in determining which parent to appoint as managing conservator, the court shall consider the qualifications of the respective parents without regard to the sex of the parents; this section is to put both parents on an otherwise equal plane in a child custody case, and thus remove a preference for the mother. Altamirano v. Altamirano, 591 S.W.2d 336, 1979 Tex. App. LEXIS 4425 (Tex. Civ. App. Corpus Christi 1979).

8. Trial court did not abuse its discretion in naming the father the managing conservator of the parties' two young children and the mother the possessory
conservator with specified visitation privileges on the ground that the evidence was sufficient to support the finding that it was in the best interest of the children; the mother was not entitled to preference under former Tex. Fam. Code Ann. § 14.01, the father had a steady income, vocational education, and a more stable family environment and support system, and the mother was uneducated and totally unskilled. Altamirano v. Altamirano, 591 S.W.2d 336, 1979 Tex. App. LEXIS 4425 (Tex. Civ. App. Corpus Christi 1979).

Utah

Utah had maternal preference written in the statute before 1977. According to *Pusey v. Pusey* [728 P.2d 117, 120 (Utah 1986)]:

The original statute passed in 1903 specifically awarded the mother custody of minor children. 1903 Utah Laws, ch. 82, § 1. In 1969, this outright award of custody was changed, but the language of the statute still took cognizance of "the natural presumption that the mother is best suited to care for young children." 1969 Utah Laws, ch. 72, § 7.

Maternal preference was removed from the statute in 1977. According to Foster and Freed (1978a), "Laws 1977, Ch. 122 § 5 deleted that part of Utah Code Ann. § 30-3-5 providing for the "tender years" maternal preference. Maternal preference discarded."
However, courts continued to recognize the maternal preference as a judicial policy. This was described in the case below.


There is a judicial preference for the mother in child custody matters, all other things being equal.

Since the preference in favor of the mother where custody of a minor child is in issue is a creature of judicial policy, it must yield to the legislative mandate in U.C.A., 1953, 30-3-10 (Utah) that the best interests of the child be given primary consideration. Whenever, pursuant to a consideration of such interests, any circumstances in the case preponderate in favor of the husband, all things are not equal.

In fact, the preference operates to give custody to the mother all other things being equal. Since the preference is a creature of judicial policy however, it must yield to the legislative mandate that the best interests of the child be given primary consideration.

Plaintiff relies on U.C.A., 1953, 30-3-10, which states that: "In any case of separation of husband and wife having minor children, or whenever a marriage is declared void or dissolved the court shall make such order for the future care and custody of the minor children as it may deem just and proper. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated morals of each of the parties." While the above section was
amended in 1977 to destroy the statutory presumption that the mother is best suited to care for younger children, plaintiff correctly points to the continued vitality of a judicial preference for the mother in child custody matters, all other things being equal.


As to the issue of child custody, both parties rely on and cite substantially the same cases previously decided by this Court, and while _those cases do stand for the proposition that everything being equal preference should be given to the mother in determining custody_, they also say that the best interests and welfare of the children is the controlling factor.


We have long expressed a preference for placing very young children in the mother's custody. _Jorgensen v. Jorgensen_, Utah, 599 P.2d 510 (1979). However, the preference operates only when all other things are equal. The rule established by the Legislature in U.C.A., 1953, 30-3-10 requires that the best interest of the child be given primary consideration. "Whenever . . . . any circumstances in the case preponderate in favor of the husband, all things are not equal." _Jorgensen_, at 511.

In _Pusey v. Pusey_ [728 P.2d 117, 120 (Utah 1986)], the court abolished the maternal preference.
Plaintiff cross-appeals from that portion of the divorce decree awarding custody of the older son of the marriage to defendant and requests that both children be awarded to her. This Court's judicial preference for the mother, reaffirmed in Nilson v. Nilson, 652 P.2d 1323 (Utah 1982), and Lembach v. Cox, 639 P.2d 197 (Utah 1981), is cited in support. We acknowledged in dictum the continued vitality of that preference in Jorgenson v. Jorgenson, 599 P.2d 510, 511 (Utah 1979), "all other things being equal." We believe the time has come to discontinue our support, even in dictum, for the notion of gender-based preferences in child custody cases. A review of the cases cited by plaintiff shows that "all other things" are rarely equal, and therefore this Court has not treated a direct challenge to the maternal preference rule in over five years. In the unlikely event that a case with absolute equality "of all things" concerning custody is presented to us, the provisions of article IV, section 1 of the Utah Constitution and of the fourteenth amendment of the United States Constitution would preclude us from relying on gender as a determining factor.

Several courts have declared the maternal preference, or "tender years presumption," unconstitutional. As early as 1973, the New York Family Court, Kooper, J., held that "application of the 'tender years presumption' would deprive [the father] of his right to equal protection of the law under the Fourteenth Amendment to the United States Constitution." State ex rel. Watts v. Watts, 77 Misc. 2d 178, 350 N.Y.S.2d 285, 290 (1973). Citing several studies which determined that a child needs "mothering" rather than a mother, id., the court
determined that the presumption does not serve a compelling state interest. *Id.* at 291. Although Watts used a strict scrutiny test, it is equally doubtful that the maternal preference can be sustained on an intermediate level of review. See Hyde, *Child Custody in Divorce*, 35 Juv. & Fam. Ct. J. 1 at 10 (Spring 1984). This is particularly true when the tender years doctrine is used as a "tie-breaker," as it is in Utah, because in that situation the Court is "denying custody to all fathers who . . . . are as capable as the mother . . . . While over inclusiveness [sic] is tolerable at the rational basis level of review, it becomes problematic at the heightened level of scrutiny recognized in gender discrimination cases." *Id.* at 11(emphasis added; footnotes omitted).

Even ignoring the constitutional infirmities of the maternal preference, the rule lacks validity because it is unnecessary and perpetuates outdated stereotypes. The development of the tender years doctrine was perhaps useful in a society in which fathers traditionally worked outside the home and mothers did not; however, since that pattern is no longer prevalent, particularly in post-separation single-parent households, the tender years doctrine is equally anachronistic. See Hyde, *supra*, at 6. Further, "by arbitrarily applying a presumption in favor of the mother and awarding custody to her on that basis, a court is not truly evaluating what is in the child's best interests." *Id.* at 10.

We believe that the choice in competing child custody claims should instead be based on function-related factors. Prominent among these, though not exclusive, is the identity of the primary caretaker during the marriage. Other factors should
include the identity of the parent with greater flexibility to provide personal care for the child and the identity of the parent with whom the child has spent most of his or her time pending custody determination if that period has been lengthy. Another important factor should be the stability of the environment provided by each parent. See generally Atkinson, Criteria for Deciding Child Custody in the Trial and Appellate Courts, 18 Fam. L. Q. 1 (Spring 1984).

In accord with those guidelines, we disavow today those cases that continue to approve, even indirectly, an arbitrary maternal preference, thereby encouraging arguments such as those made by the cross-appellant in this case.

The maternal preference existed in one form or another as a matter of legislative policy in Utah from 1903 to 1977, when section 30-3-10 of the Code was repealed by the legislature. See Jorgensen v. Jorgensen, 599 P.2d 510, 511 (Utah 1979). Despite the repeal of this statute, this Court has stated in dicta that as a matter of judicial policy we will continue to recognize a maternal preference when all other factors are equal. Id.; Henderson v. Henderson, 576 P.2d 1289, 1290 (Utah 1978); Smith v. Smith, 564 P.2d 307, 309 (Utah 1977). To date, we have not been presented with a case where all other factors have been equal.

The original statute passed in 1903 specifically awarded the mother custody of minor children. 1903 Utah Laws, ch. 82, § 1. In 1969, this outright award of custody was changed, but the language of the statute still took cognizance of "the
natural presumption that the mother is best suited to care for young children." 1969 Utah Laws, ch. 72, § 7.

The original justification for the use of a maternal preference was that it would be in the best interest of the child to be with the mother. *Steiger v. Steiger*, 4 Utah 2d 273, 276, 293 P.2d 418, 420 (1956). This was probably based on two assumptions which were current in 1903 when the presumption was enacted: first, that the mother almost invariably served as a child's primary caregiver prior to divorce; and second, that biologically a child was simply better off with a mother.

**Vermont**

Vermont had a gender-neutral custody statute 15 V.S.A. § 665(c) "The court shall not apply a preference for one parent over the other because of the sex of the child, the sex of a parent or the financial resources of a parent."

According to the History section of this statute, it was added in 1985. The statute was frequently cited in custody cases.


We offer a final word of caution regarding the custody issue. In rendering its decision, the family court suggested that Cole had a natural affinity for his father, who teaches him "things a young boy should know." Within the context of all of the court's findings and conclusions, we do not interpret its comments in this regard.
as an indication it applied a preference that Cole remain with his father because he was a boy. If we did, we would be compelled to reverse the custody determination. See 15 V.S.A. § 665(c) ("court shall not apply a preference for one parent over the other because of the sex of the child [or] the sex of a parent"); cf. *Nickerson*, 158 Vt. at 98, 605 A.2d at 1338 (Dooley, J., dissenting) (citing law review article on point that purpose of primary caretaker preference, among other things, is to preserve gender-neutrality).


In a divorce action involving a child, the trial court must award parental rights and responsibilities to one parent when the parties cannot agree to divide or share these responsibilities or when the court determines that a parental agreement is not in the child's best interests. Vt. Stat. Ann. tit. 15, §§ 665(a), 666(c). The award of parental rights and responsibilities must be based on the best interests of the child, reflecting a consideration of all relevant evidence, including the enumerated statutory factors. § 665(b). A proper decision requires a complete and balanced analysis, comparing the relevant attributes of each parent as they relate to the best interests of the child. Although the trial court has broad discretion in awarding parental rights and responsibilities, it may not rest its decision entirely on improperly admitted evidence.

We agree that the court erred by considering the sex of the child and remand for reconsideration of parental rights and responsibilities without regard to this factor. In all other respects, the decision is affirmed.

Vt. Stat. Ann. tit. 15, § 665(c) states that the court shall not apply a preference for one parent over the other because of the sex of the child, the sex of a parent or the financial resources of a parent.

**Virginia**

Va. Code Ann. §31-15 (1973) stated that, "there shall be no presumption of law in favor of either parent." Despite of the statute, the Virginia courts had applied a "permissible and rebuttable inference" that prefer mother, when other things are equal, in the determination of the custody of a child of tender years.


Va. Code Ann. § 31-15 (1973) provides that a court, in a child custody case, shall give primary consideration to the welfare of the child, and expressly states that there shall be no presumption of law in favor of either parent. At most the principle of certain case law stands for no more than a *permissible and rebuttable inference*, that when the mother is fit, and other things are equal, she, as the natural custodian, should have custody of a child of tender years.
After hearing the evidence *ore tenus* the trial court, by letter opinion dated May 19, 1975, stated that both parties were fit and proper persons to have custody, that Harper was an excellent father, who had "performed beyond expectation the role of both father and mother", but that "the rule" enunciated in *Moore v. Moore*, 212 Va. 153, 183 S.E.2d 172 (1971), that the best interests of a child of tender years are served by being with his mother, was controlling, and that transfer of custody to the mother should be effected at the conclusion of the school year.

The *Moore* "rule", referred to by the trial court, is not a rule of law. Indeed, Code § 31-15 (Repl. Vol. 1973), which provides that a court, in a child custody case, shall give primary consideration to the welfare of the child, expressly states that there shall be no presumption of law in favor of either parent. At most the principle for which *Moore* stands is no more than a permissible and rebuttable inference, that when the mother is fit, and other things are equal, she, as the natural custodian, should have custody of a child of tender years.


The legal guidelines applicable in this case are firmly established. Code § 31-15 (Repl. Vol. 1973) provides that the court, in a child custody case, shall give primary consideration to the welfare of the child and that there shall be no presumption of law in favor of either parent. There is a rebuttable inference, however, that when both parents are fit and other things are equal the mother, as the natural custodian, should be awarded legal custody of an infant of tender years. *Harper*
v. Harper, 217 Va. 477, 229 S.E.2d 875 (1976). When the mother's home and the father's home are equally suitable for raising the children, we have held that "other things are equal" and that custody should be given to the mother. Lundeen v. Struminger, 209 Va. 548, 550, 165 S.E.2d 285, 287 (1969). But if the mother's home, evaluated on the basis of warmth and stability, rather than material advantages, is not as suitable as that of the father, then custody should be awarded to the father. White v. White, 215 Va. 765, 768, 213 S.E.2d 766, 768 (1975). See Burnside v. Burnside, 216 Va. 691, 222 S.E.2d 529 (1976), where we affirmed the award of custody to the father where there was evidence that the best interests of his infant son would be served by having the child continue to reside with him.


The crucial question raised by Mrs. McCreery is: "Did the chancellor err in expressly holding that this Court has abolished the 'tender years presumption' and in failing to find it controlling in this case?" This question posits two issues, viz., whether the "presumption" has been abolished, and, if not, whether it is controlling here.

In Mullen v. Mullen, 188 Va. 259, 270-71, 49 S.E.2d 349, 354 (1948), we held that"the mother is the natural custodian of her child of tender years, and that if she is a fit and proper person, other things being equal, she should be given the custody". In his letter opinion, the chancellor construed our decision in Burnside v. Burnside, 216 Va. 691, 222 S.E.2d 529 (1976), "to overrule Mullen and all earlier
cases in Virginia to the extent that there exists any presumption in favor of the mother as being the natural custodian."

As appears from our decision in Harper v. Harper, 217 Va. 477, 229 S.E.2d 875 (1976) (decided after the date of the chancellor's letter opinion) affirming the chancellor's application of the presumption, and as the husband concedes on brief, Burnside did not overrule Mullen and its progeny. On the contrary, Burnside fully acknowledged the Mullen rule. Analyzing the circumstances disclosed by the evidence, quoting the chancellor's conclusion that "all things are not equal in this case", and citing Portewig v. Ryder, 208 Va. 791, 794, 160 S.E.2d 789, 792 (1968), where we said that the rule "is not to be applied without regard to the surrounding circumstances", we invoked the maxim that, notwithstanding the "presumption" and other "secondary" matters, "the primary and controlling consideration is the child's welfare." Burnside v. Burnside, supra, 216 Va. at 692-93, 222 S.E.2d at 530-31.

Confusion about the nature and function of the so-called "tender years presumption" results from confusion between two important societal values -- the right of a parent to custody of its minor child and the right of a child to the custodial care of a parent. In the scale of values, society gives priority to the latter. This is so principally because society owes one of its dependent members a duty superior to the duty it owes a self-sufficient member.
The "tender years presumption" is relevant only in custody disputes between natural parents. Yet, it has nothing to do with the respective rights of the two parents. Rather, it has to do with the right of the child. The "presumption" is, in fact, an inference society has drawn that such right is best served when a child of tender years is awarded the custodial care of its mother. See *Harper v. Harper*, supra, 217 Va. at 479, 229 S.E.2d at 877. The courts, acting in the interest of society at large, apply that inference irrespective of the rights of the parents. And that inference controls unless, in a particular case, it is overcome by evidence that the right of the child will be better served by awarding the child the custodial care of its father.

In 1983, Va. Code Ann. § 31-15 was amended to state that "there shall be no presumption or inference of law in favor of either parent." The only difference between the new statute and the previous one is the addition of the words "or inference." However, this small difference had a significant impact in court practices. The "inference", in the Virginia courts, had implied the maternal preference during a child's tender years. The addition of "or inference" in the statute completely removed the judicial preference in favor of the mother in Virginia. This was confirmed by the case below.


Trianatafillos Visikides seeks reversal of an order that transferred the custody of his six year old child to the mother, Melanie Derr (Visikides). He contends that there was no proof of a material change of circumstances and that the trial court
erroneously applied a "tender years inference" in favor of the mother. We reverse because the tender years inference has been abolished by statute. Code § 31-15.

Va. Code Ann. § 31-15 (1983) reads, in part: The court in awarding the custody of the child to either parent or to some other person, shall give primary consideration to the welfare of the child, and as between parents there shall be no presumption or inference of law in favor of either. It is clear that any use of such an inference in determining what is in the best interests of the child is reversible error.

Next we turn to the so-called "tender years inference" in favor of the mother. In considering the best interests of the child, the trial court stated that, all things being equal, the court could rely upon such an inference. We disagree. Prior to its 1983 amendment, Code § 31-15 stated that when a trial court awarded custody of a child to one parent, "there shall be no presumption of law in favor of either" parent. The Supreme Court of Virginia, interpreting this statute in 1982, stated "that the 'tender years' maxim 'is no more than a permissible and rebuttable inference,' not a rule of law." Durrette v. Durrette, 223 Va. 328, 332, 288 S.E.2d 432, 434 (1982). The following year, the General Assembly amended Code § 31-15 to read, in part:

[T]he court . . . in awarding the custody of the child to either parent or to some other person, shall give primary consideration to the welfare of the child, and as between parents there shall be no presumption or inference of law in favor of either.
It is clear that any use of such an inference in determining what is in the best interests of the child is reversible error.

Therefore, the judgment appealed from is reversed and the case is remanded for a new hearing upon principles not inconsistent with this opinion.

Reversed and remanded.

According to Freed and Walker (1988):

*Visikides v. Derr*, 3 Va. App. 69, 348 S.E.2d 20 (1986). For many years, the Virginia legislature has been trying to abolish the tender years presumption, and the Virginia appellate courts have been defying the legislature by stating various rationales for adhering to the presumption. However, the Virginia Court of Appeals acknowledged the final death of the presumption, in its opinion in *Visikides*, as a result of the legislature's latest action.

**Washington**

Maternal preference was still in use in the late 1960s.


Problems involving the custody of small children in divorce cases are usually best solved by the superior court and that court's decision will not be disturbed except where an abuse of discretion has been shown. Of course, the primary consideration
governing the court's determination must be the welfare and best interests of the child. *Applegate v. Applegate*, 53 Wn.2d 635, 335 P.2d 595 (1959). It is quite possible that the evidence may clearly establish that the child's best interests and welfare require that the custody be placed in the father. *Munroe v. Munroe*, 49 Wn.2d 453, 302 P.2d 961 (1956). In determining custody, all facts and circumstances affecting the child's interests should be considered by the trial court, including the age and sex of the child, character and emotional traits of the spouses, physical care and moral and emotional environment to be provided the child by the respective parents, and such other factors as may reasonably bear upon the child's welfare. *Silverton v. Silverton*, 71 Wn.2d 276, 427 P.2d 1001 (1967). The same considerations control the decision in modification proceedings except that modification does not lie unless based on substantial changes which have occurred since the divorce or last order of modification in the conditions and circumstances of the parties directly affecting the child's best interests and welfare.


In the case *In re Marriage of Janovich* [30 Wn. App. 169, 632 P.2d 889 (1981)], the court questioned the tender years doctrine, but did not reject it.

Custody awards based solely on the "tender years doctrine" undermine the statutory scheme that affords no preferential right of custody to either parent in determining the best interests of the child. Wash. Rev. Code § 26.09.190. However, a trial court making a child custody award may give significant consideration to the child's need
for a warm and loving relationship and to each parent's unique ability to fulfill that need, so long as it also gives weight to the statutory custodial factors.

Tender Years Doctrine — Effect A trial court's reference to young children's need for maternal influence does not invalidate a child custody award if the record is clear that the court considered and applied the factors set forth in RCW 26.09.190 for awarding custody of children.

In *In re Marriage of Murray* [28 Wn. App. 187, 622 P.2d 1288 (1981)], the court cautioned trial courts not to base custody awards solely on the tender years doctrine. However, the case again failed to clearly reject the doctrine.

Pursuant to a divorce proceeding, the trial court awarded custody of the parties' one-year-old child to the mother. The father sought review, and the court found that while there was sufficient evidence on the record with regard to the statutory factors under Wash. Rev. Code § 26.09.190 to be considered in a custody determination, the trial court's findings of fact and conclusions of law failed to indicate a proper consideration of those factors and instead indicated that the trial court based its decision solely on the tender years doctrine. The court held that while the tender years doctrine was relevant, it could not displace the trial court's consideration of the § 26.09.190 factors. In so holding, the court noted that such a procedure undermined the statutory scheme, encouraged the trial court to interject its personal beliefs into the case, and contributed to cursory fact finding.
The court held that while the tender years doctrine was relevant, it could not displace the trial court's consideration of the §26.09.190 factors. In so holding, the court noted that such a procedure undermined the statutory scheme, encouraged the trial court to interject its personal beliefs into the case, and contributed to cursory fact finding.

In making the award the trial court discussed the child's young age and his need for a maternal influence, or in the vernacular, the tender years doctrine. Although not necessary to our disposition, we address the role of the doctrine in the child custody cases to guide the trial court on remand. Briefly stated, the doctrine is based on the premise that "[a] mother's care and influence is regarded as particularly important for children of tender age . . ." *Horen v. Horen*, 73 Wn.2d 455, 460, 438 P.2d 857 (1968). In the past, Washington courts have considered it a factor in determining "the best interests of the child," and it had significant importance in custody awards concerning very young children. *Chatwood v. Chatwood*, 44 Wn.2d 233, 266 P.2d 782 (1954); *Patterson v. Patterson*, 51 Wn.2d 162, 316 P.2d 902 (1957); *In re Palmer*, 81 Wn.2d 604, 503 P.2d 464 (1972). Since the passage of the marriage dissolution act of 1973 and the State's equal rights amendment, Washington courts have not addressed the doctrine's continued viability.

In his brief appellant contended that application of the tender years doctrine violated the State's equal rights amendment, Const. art. 31, § 1:
Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.

At oral argument, however, appellant argued solely that the court erred in considering only the tender years doctrine in making its award and by failing to consider the statutory factors. Furthermore, appellant conceded the doctrine may have a role as a tiebreaker in some cases. Accordingly, we deem the asserted constitutional error has been abandoned.

A trial court making a child custody award may give significant consideration to the child's need for a warm and loving relationship and to each parent's unique ability to fulfill that need, so long as it also gives weight to the statutory custodial factors. We are mindful of the disconcerting fact that resolution of child custody problems often "tax the wisdom of Solomon." In re Walker, 43 Wn.2d 710, 719, 263 P.2d 956 (1953). Nevertheless, we caution trial courts not to resort to short-cut phraseology which includes deteriorating presumptions. Custody awards based solely on the tender years doctrine shorthand undermine the statutory scheme, lend to cursory fact finding, and encourage judges to interject their own personal beliefs on family life and sex roles. See Roth, The Tender Years Presumption in Child Custody Disputes, 15 J. Fam. L. 423, 457 (1977). Instead, each case should be based on a thoughtful, individualized determination.

No subsequent case has been found that discussed the tender years doctrine.
West Virginia

In the 1970s, the West Virginia courts still applied the tender years doctrine. The two cases below are examples of the application of maternal preference.


Although this Court has long held that in a contest over the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided, _Lipscomb v. Joplin_, 131 W. Va. 302, 47 S.E.2d 221 (1948), it has just as firmly subscribed to the proposition that where the child will be equally well cared for by either parent, the mother, in preference to the father, is entitled to its custody. The latter is especially so where the child is of tender years. _Beaumont v. Beaumont_, 106 W. Va. 622, 146 S.E. 618 (1929). See, _Campbell v. Campbell_, 203 Va. 61, 122 S.E.2d 658 (1961); 24 Am. Jur. 2d, _Divorce and Separation_, Section 785. In the case at bar the child was four years of age when the final hearing was conducted.

As noted earlier in this opinion the case at bar is not a change of custody case. Although the best interest of the child must always be a prime consideration, a mother's natural right to the custody of a child of tender years is of equal importance. The court wrongfully treated this as change of custody case and in so doing placed an undue burden on the plaintiff. By reason of the strong precedent in this jurisdiction under which a mother, if fit, is preferred over the father in a custody
contest between them, we are of the opinion that the trial court erroneously applied the law of the *Holstein* case.


The court found that the presumption of maternal preference was constitutional whether measured under an important governmental interest or a rational relationship to a legitimate state purpose standard.

That the United States Supreme Court is examining gender based distinctions under more stringent standards than the "rational basis" standard of review ordinarily applied to non-suspect categories. The emerging middle level standard is that classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives. Under the West Virginia Constitution, the presumption's validity would depend upon whether it bears a rational relationship to a legitimate state purpose. Should the presumption of maternal preference be measured by either the applicable state or federal standard, or even a strict scrutiny standard, should one be adopted in the future, it would be constitutional.

The presumption of maternal preference in the awarding of child custody is be measured by either the applicable state standard, a rational relationship to a legitimate state purpose, or federal standard, important governmental objectives and be substantially related to the achievement of those objectives, or even a strict scrutiny standard, should one be adopted in the future, it would be constitutional.
In 1981, maternal preference was abolished in the case *Garska v. McCoy* [167 W.Va. 59, 278 S.E.2d 357 (1981)]. The judge interpreted the 1980 legislative amendment as having eliminated "any gender based presumption in awarding custody." The case stated that the court should award child custody to the primary caretaker if he or she achieves the minimum standard.

In a divorce proceeding where custody of a child of tender years is sought by both the mother and father, the court must determine in the first instance whether the primary caretaker is a fit parent, and where the primary caretaker achieves the minimum, objective standard of behavior which qualifies him or her as a fit parent, the trial court must award the child to the primary caretaker.

If the primary caretaker parent is the father, then under W. Va. Code § 48-2-15 (1980) he will be entitled to the alimony and support payments exactly as a woman would be in similar circumstances.

The appellant, Gwendolyn McCoy, appeals from an order of the Circuit Court of Logan County which gave the custody of her son, Jonathan Conway McCoy, to the appellee, Michael Garska, the natural father. While in many regards this is a confusing case procedurally, since the mother and father were never married, nonetheless it squarely presents the issue of the proper interaction between the 1980 legislative amendment to W. Va. Code, 48-2-15 [1980] which eliminates any gender based presumption in awarding custody and our case of *J.B. v. A.B.*, 161
W.Va. 332, 242 S.E.2d 248 (1978) which established a strong maternal presumption with regard to children of tender years.

Furthermore, the case was tried below on the theory that Code, 48-2-15 [1980] applies to this case to the extent that it obliterates the presumption of J.B. v. A.B., supra, that children of tender years should be awarded to the mother.


W. Va. Code, 48-2-15 (1980) (West Virginia) provides a sex-neutral standard for custody determinations based on the best interests of the child. With reference to the custody of very young children, the law presumes that it is in the best interests of such children to be placed in the custody of their primary caretaker, if he or she is fit. The primary caretaker is that natural or adoptive parent who, until the initiation of divorce proceedings, has been primarily responsible for the caring and nurturing of the child.

The law governing initial custody determinations was established in Garska v. McCoy, 167 W.Va. 59, 278 S.E.2d 357 (1981). Syllabus points 1, 2, 3 and 6 of Garska state:

"2. With reference to the custody of very young children, the law presumes that it is in the best interests of such children to be placed in the custody of their primary caretaker, if he or she is fit.

"3. The primary caretaker is that natural or adoptive parent who, until the initiation of divorce proceedings, has been primarily responsible for the caring and nurturing of the child.

"6. In a divorce proceeding where custody of a child of tender years is sought by both the mother and father, the court must determine in the first instance whether the primary caretaker is a fit parent, and where the primary caretaker achieves the minimum, objective standard of behavior which qualifies him or her as a fit parent, the trial court must award the child to the primary caretaker."

_Garska v. McCoy_ has been cited by many other later cases, such as _Lowe v. Lowe_ [179 W. Va. 536, 370 S.E.2d 731 (1988)] and _Reynolds v. Reynolds_ [189 W. Va. 566, 433 S.E.2d 277 (1993)].

**Wisconsin**

In the 1975 case _Scolman v. Scolman_ [66 Wis.2d 761, 226 N.W.2d 388 (1975)], the court was applying maternal preference for children of tender years.

Although the husband challenges the trial court's decision on both of these grounds, only the latter ground need to be considered here because the trial court made its
award on the basis of an incorrect view of the law and gave an undue preference to the wife. We have stated many times that "other things being equal, preference will ordinarily be given to the mother if she is not unfit." Here there is no question that the trial court found both of the parties fit. However, the preference for the mother is not a rule of law but is only an important element to be considered. The crucial and controlling factor is the welfare of the child.

We conclude that sec. 247.24 (3), Stats., does not strike down the holdings of this court indicating that, other things being equal, there is usually a preference for the mother. The trial court may properly find that young children are better off with their mother. The statute merely decrees what the law in Wisconsin is already, that the trial court's decision cannot solely be based on the sex of the parent. Our interpretation of sec. 247.24 (3) is consistent with the interpretation placed on the identical language in a Minnesota statute by the Minnesota Supreme Court in three recent cases. In Petersen v. Petersen and Ryg v. Kerkow the Minnesota court indicated that sec. 518.17, Minn. Stats., was not inconsistent with the rule that, other things being equal, custody should be awarded to the mother. The court emphasized in each case, however, that the paramount issue in custody cases is what is in the best interests of the child. In the very recent case of Erickson v. Erickson, the court indicated that the statute means that the trial court should not give the mother an "absolute or arbitrary preference" on the basis of her sex.

Sec. 247.24 (3), Stats., makes it clear that sex alone cannot be used as the sole basis for making a custody award. The preference to be given to a mother in the award
of custody of a minor child is only one element to be considered. The determination must be entirely on the basis of what is in the best interests of the child. We are not satisfied that the trial court gave enough detailed consideration to the question of what was in the best interests of John.

According to *Groh v. Groh* [110 Wis. 2d 117, 327 N.W.2d 655 (1983)], maternal preference was abolished in 1977.

Under common law the father was entitled to the custody of the children unless a valid court decree declared otherwise. Wisconsin changed the rule by statute and provided that "Women shall have the same rights and privileges under the law as men in the . . . care and custody of children . . ." (see discussion of this change in the law in *Dovi v. Dovi*, 245 Wis. at 56).

The rule then became that mothers were favored over fathers in the award of custody. As this court said in 1966 in *Larson v. Larson*, 30 Wis. 2d at 299: "The rule that the law favors the mother as to the custody of the minor child is a strong and fundamentally a natural consideration in determining custody, . . ." But legislative perceptions change and in 1977 the legislature enacted section 767.24(2), Stats., that eliminated the maternal preference in custody determinations by providing: "In making custody determination, the court . . . shall not prefer one potential custodian over another on the basis of the sex of the custodian. . . ."
In *Fink v. Fink*, 685 P.2d 34 (Wyo. 1984), the court stated that the maternal preference had been abolished by § 20-2-113, W.S.1977.

In light of the evidence of record in this case, we are unable to say that the district court in any way abused its discretion or violated any legal principle applicable in such an instance when it awarded primary custody of the daughter to the father. The mother points to statements by this court which indicate a preference that custody of a minor child, particularly a daughter, remain with the mother if all other factors are equal. *Butcher v. Butcher, supra; Burt v. Burt*, 48 Wyo. 19, 41 P.2d 524 (1935). The status of such a preference, particularly if it is invoked as a principle of law, is increasingly doubtful. Annotation 70 A.L.R.3d 262 (1976), and the cases cited therein. *Our legislature has articulated a contrary policy in § 20-2-113, W.S.1977, in which it is stated in part:*

"* * * * The court shall consider the relative competency of both parents and no award of custody shall be made solely on the basis of gender of the parent. * * * *

In 1986, the case *Fanning v. Fanning* [717 P.2d 346 (Wyo. 1986)] confirmed the abandonment of the maternal preference.

Issues stated by the litigants are:
1. Did the trial court err as a matter of law by failing to consider the best interests of the children in a child custody dispute, and by considering instead only the best interests of the mother?

"2. Did the trial court erroneously apply the Maternal Preference Rule, which was abrogated by this Court in *Fink v. Fink*, 685 P.2d 34 (Wyo. 1984), and award custody solely on the basis of gender in violation of W.S. § 20-2-113(a)?"

The trial court, by opinion letter written prior to the custody order from which this appeal was taken, discussed his decision inter alia as follows:

Subsequent cases such as *Basolo v. Basolo* (907 P.2d 348; 1995 Wyo. LEXIS 213) confirmed that the statute has abolished the tender years doctrine.

Wyo. Stat. § 20-2-113(a) provides "no award of custody shall be made solely on the basis of gender of the parent." See *Fanning v. Fanning*, 717 P.2d 346, 348-49 (Wyo. 1986). Invocation of the "tender years doctrine" of maternal preference in custody awards is a mistake of law, requiring reversal.
Chapter 2: Do Gender-Neutral Custody Laws Increase Divorce Rates?

2.1 Introduction

Between 1960 and 1990, divorce rates in the United States increased dramatically. Numerous factors have been linked to the rising divorce rates—increasing female labor force participation, changes in social attitudes, and decreasing gains to marriage. Researchers have also looked at divorce policy, in particular, the adoption of unilateral divorce laws, to explain the increase in divorce rates (see, for example, Peters, 1986, 1992; Allen, 1992; Friedberg, 1998; Gruber, 2004; Wolfers, 2006). Prior to the divorce law reform, a divorce required the mutual consent of both spouses or a showing of fault by one spouse (such as adultery, abandonment, felony, etc.). The movement to unilateral divorce in the 1970s allowed one to obtain a divorce without spousal consent (Gruber, 2004). By 2004, 34 states had adopted unilateral divorce. The correlation of the two trends (see Figure 2.1) raises the question of whether the introduction of unilateral divorce caused the increase in divorce rates (flow of divorce) and in the number of divorced people (stock of divorce).
While many scholars have looked at divorce law changes, few have paid attention to another major trend in the United States family law in the past few decades: changes in child custody laws. Between the 1970s and 1990s, states moved from explicit maternal preference to gender-neutral custody assignment. Although child custody laws are intimately related to divorce, the effect of this policy change on divorce and other marital outcomes is unknown.

Like divorce, child custody is governed by the custody law in each state. Until the 1970s, maternal preference had been the rule governing child custody assignment in divorce cases (Klaff, 1982; Buehler and Gerard, 1995; Jones, 1978). According to Jones (1978), courts awarded custody of minor children to mothers in more than 95% of all divorce cases prior to this legal change. In many states, maternal preference took the form of the "tender years doctrine"—a formal legal doctrine that presumes the mother is the more suitable custodian for children in the case of parental separation.

Legal practice changed between the 1970s and 1990s. In the benchmark case, *Watts v. Watts*, in 1973, Judge Sybil Hart Kooper of the Family Court of New York ruled that any presumptive preference in favor of maternal custody violated the father's right to equal protection under the Fourteenth Amendment of the U.S. Constitution. This invalidated the "tender years doctrine" in New York State. Other states soon followed the reform either by legislative action or judicial ruling. Since *Watts*, courts moved to the "best interests of the child" doctrine (BIOC), which consists of several criteria to determine which parent is more

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suitable to be the custodian. The doctrine makes no reference to the gender of the parent, and may include a decision of joint custody. The reform of custody laws was as swift and dramatic as the divorce law reform; by 1990, 39 states had completed the transition to gender-neutral custody laws. As shown in Figure 2.2, the movement towards gender-neutral custody laws also coincided with the increasing prevalence of divorce.

Since most marriages involve children, the assignment of children in the case of marital dissolution is an overlooked, and potentially important, factor in divorce trends. Under the "tender years doctrine" the majority of mothers went through divorce without having to worry about losing the custody of their children. Similarly, fathers would be nearly certain to lose primary custody of their children in a divorce. The transition to gender-neutral custody assignment increased the likelihood of father custody or joint custody in both contested and uncontested custody cases. Changes in the legal doctrine will not only result in higher likelihood of father custody after divorce, but also change the relative bargaining power between husbands and wives in marriages. Under the new regime, wives have more to lose in the case of divorce, which might decrease their incentive to divorce. The opposite applies to husbands.

Since the transition in the child custody law works in different directions for women and men regarding their expected gain from divorce, the net impact of the custody law reform on divorce is ambiguous. Changes in custody laws could induce some marriages to break

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8 Bianchi (1995) used census data and calculated that the percentage of single-father households in all single-parent households has increased by 48.8% between 1970 and 1990. Garasky and Meyer (1996) broke down the single-parent households and found that the largest share of the increase in single-father households came from formerly-married fathers. My own calculations using census data support their calculations.
up, but it could also alter the relative bargaining power within marriage while leaving the marriage intact. There is no literature to date which empirically analyzes the net effect of gender-neutral custody laws on divorce. Moreover, the previous analysis of unilateral divorce is potentially biased without considering child custody laws. The effects that we have previously attributed to divorce may in fact be partially due to changes in other policies related to marital dissolution, which include child custody arrangements. As such, the analysis of divorce is not complete without examining the laws governing custody assignment.

One reason for the lack of empirical evidence is the dearth of a comprehensive coding for when each state underwent a transition to the gender-neutral custody law. The major difficulty with constructing a legal coding is the inconsistency between state statutes and actual court practices. While several states had gender neutrality written into their statutes in the 1970s, courts still practiced explicit maternal preference in child custody cases. This is due to the fact that the tender years doctrine was very often in the form of an implicit presumption used in custody cases rather than a formal legal statute. A coding that takes into account one aspect of the legal change without considering the other would be incomplete. Such mechanical coding would not reflect the timing of changes in actual practices.

To accurately measure changes in custody practices, I construct a custody law coding in an innovative way. I define a state to have completed the change in custody laws if the state has met the following criteria: (1) it has added statutes equalizing parental rights, and (2) maternal preference is clearly no longer in use in court practice. This method of coding
utilizes the information from both state statutes and court practices to determine when states completed the change from maternal preference to gender-neutral custody assignment. That is, my coding is directly related to the actual likelihood that a custody dispute in a given year would be settled in a gender-neutral way. My legal coding is the first to record each individual state's year of transition into gender-neutral custody assignment in a systematic and transparent way. This coding is an important contribution to our ability to describe the effects of custody assignment in empirical research.

Even with the coding, it is important to establish that changes in custody laws and changes in divorce laws are uncorrelated with each other. If states that first liberalized divorce were also the first to reform child custody laws, it will not be possible to disentangle the effects. Not only is this important for estimating the effect of child custody law changes, but also for the empirical analysis of unilateral divorce laws. If the changes in the two laws are highly correlated, the estimates of the impact of unilateral divorce laws on divorce in the previous literature are likely to be biased by the influence of custody laws, as argued by Peters (1992).

In the first part of my empirical analysis, I establish that the transition to gender neutrality is not correlated with changes in divorce laws. Knowing when a state adopted the unilateral divorce law does not predict when it changed its child custody law. Also, whether a state adopted one of the new laws is not correlated with whether or when the state changed the other law. The independence of the two legal trends allows me to estimate the effects of both changes on divorce separately and jointly.
I next turn to analyzing the effect of gender-neutral custody laws on state divorce rates. My identification strategy exploits the variation from the different timing of child custody law reforms across states. I find that the gender-neutral custody law has a positive impact on divorce rates in the long term. State divorce rates start to rise, on average, seven years after the adoption of the gender-neutral custody law in the state. The increase persists after that time. The magnitude of increase is between 0.1 and 0.2 divorces per 1,000 people. The results are still positive and significant when I control for the adoption of unilateral divorce laws in the specification. Moreover, the effect is robust to alternative specifications such as examining only the married population and only the states that have reformed both laws.9

Besides examining divorce rates, I also estimate the impact of custody law changes on individuals' marital decisions. I find that the new custody law increases the likelihood of marital separation, but has statistically insignificant effect on the likelihood of being divorced or married. Changes in custody laws increase the likelihood of being separated by about 0.5 percentage points for women, and by about 0.3 percentage points for men.

Both the lack of immediate increase in divorce flow and the increase in separation suggest that the adoption of gender-neutral custody laws might not induce marriages to break up immediately after the legal change. Instead, it may lead to redistribution of bargaining power within marriages immediately following the legal reform. As shown by the divorce

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9 The results are much larger and more significant when I use Wolfers' shorter sample period from 1968 to 1988.
rate analysis, it took several years until the number of new divorces increased in response to the new custody law.

Overall, my analysis shows that changes in child custody laws have a large long-term impact on the flow of divorce in the second half of the twentieth century that is independent of the impact of unilateral divorce laws. Compared to the changes in divorce regime, child custody laws have a longer-term impact on divorce rates. Results suggest that the child custody law is an important aspect of divorce legislation, and empirical analysis of divorce should include this important factor.

2.2 Overview of Custody Law Changes

2.2.1 Brief History of Child Custody Laws

For over a century the dominating rule in assigning child custody in divorce was the "tender years doctrine", which was an explicit preference for maternal custody. In most states, the doctrine "establishes a presumption that children of their tender years should be placed in the custody of their mother, because she is best equipped to provide for the physical, emotional, and psychological needs of a young child" (Jones, 1978, p. 696). The doctrine was not always explicitly written in state statutes. It was also an implicit judicial presumption employed in case practice and cited by judges in decisions, whether there was a statute or not (Klaff, 1982).
The movement from maternal preference to gender-neutral custody assignment began in the 1970s. The feminist and the fathers' rights movements started to question the validity of the presumption that mothers are naturally superior to and more suitable for rearing children. In place of the tender years doctrine, courts began to determine children's custody assignment using a new guideline, the "best interests of the child" (BIOC) doctrine. BIOC is the dominant rule followed by most states today. It is usually written in the state statutes, and consists of several criteria, such as the emotional ties between children and parents, capacity of parents to meet children's physical, emotional, and educational needs, stability and desirability of environment, and wishes of the child.

2.2.2 Defining Custody Law Transitions

One of the main contributions of this study is the documentation of the transition from maternal preference to gender neutrality in each state. The major difficulty in constructing a legal coding is the inconsistency between state statutes and actual court practice. While quite a few states had gender neutrality written into their statutes in the 1970s, courts continued to practice maternal preference in child custody cases. This is due to the fact that the tender years doctrine was very often in the form of an implicit presumption rather than a legal statute.

The evolution of maternal preference in Utah is a typical example of the inconsistency between state statutes and case law. Maternal preference had long existed in Utah in the
form of an explicit statute. In 1977, the statutory presumption that the mother is the preferred custodian was repealed by the legislature. However, the court continued to recognize a judicial preference in favor of the mother, all other things being equal. Several custody decisions in the late 1970s and early 1980s cited the tender years presumption or maternal preference and awarded child custody to mothers. It was not until 1986 that the judicial preference towards mothers was explicitly abolished in the case, *Pusey v. Pusey*. After this case, maternal preference ceased to appear in judicial decision making in Utah.

States like Utah present a serious issue of measurement in the coding of custody law changes. Simply relying on the custody statute would not give an accurate description of the case practice. It is entirely likely that a custody dispute decided in Utah would explicitly depend on maternal preference even with a state statute abolishing the practice. In other words, simply relying on the statute would not reflect the reality of custody assignment.

To measure the actual changes in custody cases, I construct custody law transitions in a uniform way. I apply a consistent rubric to determine states' year of transition—I look for the year after which a custody dispute, if contested in court, would be decided on a gender-neutral basis. This way of coding utilizes information from both state statutes and court

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10 The statute passed in 1903 required the custody of minor children to be awarded to mother (1903 Utah Laws, ch. 82, § 1). The statute later used the language "the natural presumption that the mother is best suited to care for young children" (1969 Utah Laws, ch. 72, § 7).
13 See *Pusey v. Pusey*, 728 P.2d 117 (Utah 1986)
14 Different methodologies usually result in different versions of legal codings. One example is the controversies over the legal coding of early legal access to the birth control pill (Bailey, Guldi and Hershbein, 2013; Joyce, 2013).
practices to accurately determine when each state completed the change from maternal preference to gender-neutral custody assignment. The rubric assures that my coding of legal transition reflects the actual likelihood of a child custody dispute being resolved on gender-neutral terms.

I carefully read through contested custody cases and state statutes during the transition period to identify the exact year when states completed the transition.\textsuperscript{15} I develop consistent criteria and apply them systematically to all states. For example, most states had gender neutrality or best interests of the child written into legal statutes before they were mentioned in custody cases. For case rulings that simply upheld a gender-neutral state statute which was introduced earlier, I code the year when the statute was passed as the year of change. For case rulings that clarified, disavowed, or reinterpreted the previous statutes, on the other hand, the year when the case was decided would be used to code the year of transition.\textsuperscript{16} I was able to determine the exact year of custody law changes for 48 states and Washington, D.C.\textsuperscript{17}

Compared with the legal summaries prior to this study, my coding makes several contributions. First, I capture a more complete picture of the custody law changes as I look at both aspects of custody laws: statutes and case law. Most of the previous taxonomies only emphasize one aspect, which leads to inaccurate information about the timing of the

\textsuperscript{15} I use LexisNexis Academic Dataset as the source of case law. I also compiled information from several secondary sources that summarize the development in custody laws. Information on my sources are available in the legal coding.
\textsuperscript{16} Chapter 1 records detailed information about how each state's time of transition is determined.
\textsuperscript{17} Timing of custody law changes was indeterminate for two states: Maine and Washington. I am not able find sufficient evidence of either maternal preference or gender neutrality in the past few decades.
legal changes. Second, my coding is transparent and conservative. I start from a definition not of policy but of *practice*. My coding is directly related to the actual likelihood that a custody dispute in a given year would be settled in a gender-neutral way. Third, much of the previous literature covers only a short period of time. Most existing studies summarize custody law development in the 1970s, when the removal of maternal preference first brought attention to the issue. My coding updates and extends the legal transition to the present, allowing one to see the full transition.

### 2.2.3 Joint Custody

One issue worth noting is the introduction and development of joint custody. Joint custody, sometimes called shared custody, is the custodial arrangement where parents share the decision making (joint legal custody) or residential care (joint physical custody) of their children (Melli and Brown, 1995). Like gender-neutral custody assignment, joint custody is also a relatively new development in custody laws. Prior to 1975, joint custody was not an option when parents divorced.\(^{18}\) Since then, joint custody laws started to be introduced in many states. Currently, joint custody is not available in only two states, Washington and West Virginia (Halla, 2013).

The adoption of joint custody and gender-neutrality are technically two separate aspects of the custody law. These two custody guidelines do not contradict each other in nature or in

\(^{18}\) Jacob (1988) recorded that, prior to 1975, only North Carolina had a statutory authorizing joint custody which focused only on situations involving abuse and neglect.
practice. Joint custody is gender-neutral by design, as the two parents share the decision making and physical care responsibility of their children. Indeed, some family court judges and parents perceive joint custody as an "easy out" solution when parents cannot reach an agreement on custody assignment (Miller, 1979).

Theoretically, the establishment of gender neutrality in custody laws is what alters the bargaining within marriage, not the establishment of joint custody. There are a small number of studies that have analyzed the effect of joint custody on divorce and child outcomes (Brinig and Buckley, 1998a; Leo, 2008; Halla, 2013). What these studies fail to account for, however, is the fact that gender-neutral custody assignment is a necessary legal precondition for the establishment of joint custody. Only after maternal preference was destroyed in a state's custody law would joint custody be possibly considered as an option for child custody assignment. Also, there is no standard time lag between the abolition of maternal preference and the introduction of joint custody. The recognition of joint custody after the removal of maternal preference was not an automatic movement. On average, the time interval between the two is 5.04 years. States varied in the length of time between the two. The standard deviation of the time interval is 8.24 years.

Since gender neutral custody assignment does not automatically imply joint custody, the two need not have the same effect in empirical analysis. Indeed, joint custody is found to

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19 Halla (2013) and Leo (2008) studied the empirical effect of joint custody legislation on divorce rates and child outcomes. Brown and Flinn (2011) developed a continuous time model of marriage, fertility and parenting to study the effect of family policies on outcomes for husbands, wives and children. They included the share of paternal custody after divorce as one of the model parameters.

20 This calculation is based my legal coding of gender-neutral custody laws and Halla's (2013) coding of joint custody.
be negatively associated with divorce rates in one study (Brinig and Buckley, 1998a), and have no significant effect on divorce rates in another study (Halla, 2013). My analysis on the relationship between gender-neutral custody laws and joint custody laws reconciles the differences between those findings and my findings. The missing component in the previous literature is the establishment of gender-neutral custody assignment.

Joint custody, in essence, is a special case of gender-neutral custody assignment. With maternal preference, it was not possible to assign a portion of custody to each parent. In this study, I focus on the transition from maternal preference to gender-neutral custody laws. The reason is that "gender neutrality" is a more general concept than joint custody. It includes not only joint custody, but also other aspects of equal gender treatment, such as the possibility of the father gaining sole custody if he is qualified as a suitable custodian. Similar reasoning applies to other recent development in custody assignment such as the improvement of the rights of unwed fathers (Weitzman and Dixon, 1979). Gender neutrality is a necessary prerequisite for joint custody assignment and other related legal development, but not the other way around. The passage of gender-neutrality shapes the fathers' rights landscape in state custody laws and leads to changes in bargaining power within marriage before joint custody was introduced.

2.2.4 Marital-Property Laws

Property division upon divorce has its own development in history. They also affect bargaining in marriage and divorce. Economists have looked at the changes of marital-
property laws and various outcomes such as women’s labor supply (Gray, 1998; Voena, 2012). In my study, I will not control for changes in marital-property laws for the simple reason that children have never been perceived as property in divorce cases. Child custody laws and marital-property laws are two separate bodies of the family law that have developed independently in legal history. The two issues are always separately determined in divorce cases.

2.3 Independence of Custody Law Reform and Unilateral Divorce Reform

Before analyzing the effect of custody law changes, it is important to establish that the movement away from the "tender years" doctrine to the gender-neutral custody laws and the movement to unilateral divorce laws are uncorrelated with each other. If the two movements are related they could have been jointly determined, and disentangling the effects would be difficult. In this section, I will divide the states into two groups: states that have completed both legal reforms and states that have not changed one of the laws. For the former group, I test the correlation between the time of custody law reform and divorce law reform. For the latter group, I show that there is no particular pattern in when or whether states changed one law while they have not changed the other law.
Figure 2.3 plots the states that have completed both transitions. There are 31 such states. The vertical axis shows when each state adopted unilateral divorce\textsuperscript{21} and the horizontal axis plots when each state changed its child custody law. If there is a strong positive or negative correlation between the timing of the two legal transitions, we would expect to see states clustered in a linear pattern in the graph. However, there is no such pattern. Indeed, when a line is fit to the relationship, the slope of the fitted line is 0.054 (std. err. = 0.08). This suggests that the correlation between the times of changes in two laws is very weak. Knowing \textit{when} a state adopted the unilateral divorce law does not tell us \textit{when} it changed its child custody law.

Similarly, knowing \textit{whether} a state has adopted unilateral divorce does not tell us \textit{when} or \textit{whether} the state adopted the gender-neutral custody law either. Panel A of Table 2.1 lists the states that have not yet adopted unilateral divorce laws. If there is a strong positive correlation between the two legal changes, we should expect to see that most of these states would have custody laws unchanged. However, this is not the case. There is no pattern of states clustering in a certain year. In fact, states are quite spread out with respect to when they changed custody laws. Panel B of Table 2.1 lists states that have not yet changed custody laws. Similarly, there is no pattern in when these states adopted unilateral divorce laws.

In fact, if one takes a closer look at each individual state's family law history in the past few decades, it is easy to reach the conclusion that divorce regulations and custody laws

\textsuperscript{21} I use Gruber's (2004) coding for states' adoption of unilateral divorce laws.
indeed developed independently. A typical example is the state of New York. It was the first state to remove the tender years doctrine and establish the gender-neutral custody law in the United States. In the benchmark case, *Watts v. Watts*, in 1973, Judge Sybil Hart Kooper of the Family Court of New York ruled that any presumptive preference in favor of maternal custody violated the father's right to equal protection under the fourteenth amendment.\(^{22}\)

The case has been regarded as the milestone case that discarded the tender years doctrine from custody dispute cases by legal researchers. On the other hand, New York was the last state to adopt no-fault divorce. In August 2010, New York's Domestic Relations Law §170 permits divorce where "[t]he relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath." However, New York still lacks unilateral divorce regulations in its divorce laws.

Another example is the state of Oklahoma. Contrary to New York, Oklahoma was one of the first states that adopted unilateral divorce. It passed a unilateral divorce bill in 1953. However, Oklahoma was behind most states in the transition to the gender-neutral custody law. In 1980, when more than half of the states had outlawed the use of the tenders year doctrine, the Oklahoma court, in the case, *Boyle vs. Boyle*, stated that the Oklahoma's tender years-maternal preference statute is to be used as a "tie-breaker".\(^{23}\) It was not until 1986,


\(^{23}\) See *Boyle vs. Boyle*, 615 P.2d 301 (Oklahoma 1980).
in the case, *Manhart v. Manhart*, that Oklahoma moved away from maternal preferences in determining custody. 24

2.4 Empirical Analysis: Divorce Rates

In this section, I examine the impact of adopting gender-neutral custody laws on state divorce rates, number of new divorces per 1,000 persons within a state each year. I use the data from the *Vital Statistics of the United States* (National Center for Health Statistics) between 1956 and 2010. The time-series of divorce rates is long enough to cover the years when states transitioned in both child custody laws and unilateral divorce laws.

I present my analysis in three sections. First, I estimate the impact of legal changes on state divorce rates *in the same time period* – the contemporaneous effect of the legal changes. The empirical approach used here is similar to Friedberg's (1998) and Wolfers' (2006) analyses. The second section extends the analysis, and looks at the dynamic adjustment path of state divorce rates in the years following legal transitions. This part of the analysis extends Wolfers' (2006) focus on dynamic divorce trends. The third section estimate the dynamic effects using several alternative specifications.

Previous studies show mixed results regarding the relationship between unilateral divorce laws and divorce. Using women observed in the 1979 Current Population Survey, Peters (1986) found that divorce rates were not higher in states that adopted no-fault divorce.

Allen (1992), however, found that no-fault divorce laws increased divorce rate, while Peters (1992) showed that states might have other unobserved characteristics related to divorce rates. Friedberg (1998) used a panel data of state divorce rates and concluded that unilateral divorce accounted for 17 percent of the increase in divorce rates between 1968 and 1988. Gruber (2004) examined the stock of divorce and confirmed that unilateral divorce regulations significantly increased the incidence of divorce. Wolfers (2006) reconciled the previous findings, arguing that the divorce rates exhibit a dynamic pattern following the adoption of unilateral divorce. It rises immediately after the change in divorce laws, but reverses within about 10 years.

In all regressions below, my own coding is used for state transitions in child custody laws.\textsuperscript{25} The transitions in unilateral divorce laws are based on Gruber's (2004) coding, where he incorporates and updates Friedberg's (1998) coding using both primary and secondary sources. This is the most up-to-date coding of unilateral divorce law changes in the literature.\textsuperscript{26}

\subsection*{2.4.1 Contemporaneous Effects of Custody Law Changes}

To estimate the contemporaneous effect of the laws on divorce rate, I estimate:

\begin{footnotesize}
\begin{enumerate}
\item Coding for two states (Maine and Washington) is indeterminate. They are thus dropped from all analyses below.
\item Other versions of the coding include, for example, Friedberg (1998), Brinig and Buckley (1998b), Nakonezny, Shull and Rodgers (1995), Ellman and Lohr (1998), and Johnson and Mazingo (2000).
\end{enumerate}
\end{footnotesize}
\textit{Divorce rate}_{st} = \beta_1 \text{Custody Law}_{st} + \beta_2 \text{Unilateral}_{st}

+ \sum_s \text{State fixed effects}_s + \sum_t \text{Time fixed effects}_t

+ \sum_s \text{State}_s \times \text{Time}_t + \sum_s \text{State}_s \times \text{Time}^2_t + \varepsilon_{st}

The variable \textit{Custody law}_{st} is a dummy variable which is equal to one when the state, s, has adopted the gender-neutral custody law, at time t, zero otherwise. Similarly, the variable \textit{Unilateral}_{st} is a dummy that equals one when the state has a unilateral divorce law in states at time t, and equals zero otherwise.

Equation (1) is estimated separately in three different specifications: controlling only for state and year fixed effects (\( \sum_s \text{State fixed effects}_s + \sum_t \text{Time fixed effects}_t \)), adding state-specific linear trends (\( \sum_s \text{State}_s \times \text{Time}_t \)), and adding state-specific quadratic trends (\( \sum_s \text{State}_s \times \text{Time}^2_t \)). Results are shown in Panels A, B, and C of Table 2.2, respectively.

Within each panel, three specifications are estimated: one that only includes the status of the child custody law, one that only includes the status of the unilateral divorce law, and one that incorporates both. Comparisons of the coefficients show that the coefficients on one law are very similar with or without controls of the other law. This is further evidence of the lack of strong correlation between the two legal changes.

Columns 1, 4, and 7 present results from estimating gender-neutral custody laws alone. The effect custody law changes on the contemporaneous divorce rates are not significantly
different from zero, no matter what controls are included in the specifications. Columns 2, 5, and 8 report results from estimating unilateral divorce laws alone, similar to Wolfers (2006), which itself was a replication of Friedberg (1998). While the estimates are substantially similar, my results from unilateral divorce differ from theirs for two reasons. First, I use Gruber's (2004) coding of divorce, which may contribute to a small set of differences. Second, and more important, I use an extended time period, 1956 to 2010, compared to the shorter sample used in their analysis, 1968 to 1988. I have re-estimated Table 2.2 using the shorter sample as in their analysis, and have obtained very similar results as those in Wolfers and Friedberg.  

My results confirm the conclusions of Wolfers and Friedberg: adding state-specific trend increases the magnitude and significance level of the estimated coefficient on unilateral divorce. The point estimate rises from -0.32 to 0.35 when state-specific linear trends are included, and to 0.19 with state-specific quadratic trends. Underneath each regression I report the F test statistics of whether the controlled fixed effects are jointly significant. As shown in the table, all trends are jointly significant. The estimated coefficients on child custody laws are not significantly different from zero in all regressions in Table 2.2.

There are have different interpretations regarding the increase in the law estimates brought about by the inclusion of state-specific trends. Friedberg believes that controlling for state-specific trends is necessary, as it takes into account unobserved state factors affecting divorce. Wolfers questions this omitted variable interpretation. He argues that if the state-

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27 Those results are presented in Table A.1 in Appendix A.
specific trend controls did capture the omitted variables then adding the controls increases the unilateral divorce estimate if the omitted factors are negatively correlated with the divorce rate. However, "one might expect factors associated with a rising divorce rate to have increased the pressure for reform" (p. 1805).

Wolfers' reasoning can also be applied to child custody laws. My results display a similar pattern that state-specific trends increase the estimated coefficients on changes in custody laws in some cases. Instead of capturing omitted variables such as preexisting trends in state divorce rate, the state-specific trends may pick up the actual effect of the legal changes. If this is the case, simply estimating the contemporaneous effect of laws on divorce rate will be flawed. For this reason, additional specifications are needed to estimate the effect of divorce. I next turn to estimating the dynamic response to legal transitions.

2.4.2 Dynamic Effects of Custody Law Changes

Regressions using only one dummy for adopting unilateral divorce laws are known to be flawed (Wolfers, 2006). Divorce rates respond to the adoption of divorce laws via a dynamic process. For the unilateral divorce law, the divorce rate increased right after the legal reform, and increased further due to the thicker remarriage market. Eventually, the divorce rate moved to a new steady state. A single dummy for the adoption of unilateral divorced does not reflect the full adjustment path. A specification which includes dummies for the each year after the adoption of unilateral divorce laws captures the dynamic
response in a non-parametric way. The same applies to child custody. The dynamic effects of child custody law changes will not be captured by the previous specifications.

Although the divorce rate may respond to the change in custody laws in a different way than to the adoption of unilateral divorce, the dynamic process could still hold for custody laws. Earlier, I showed that when estimating the contemporaneous effect of changes in custody laws, the coefficient on the custody law is not significantly different from zero in most specifications. Below, I will explore whether there is any effect of custody law changes on state divorce rates over time.

In equation (2) below, I use a specification that controls for the dynamics of the response of divorce rates to changes in unilateral divorce and child custody assignment:

\[
\text{Divorce rate}_{st} = \sum_{k \geq 1} \beta_k \text{Unilateral divorce has been in effect for } k \text{ periods}_{st} \\
+ \sum_{k \geq 1} \beta_k \text{Custody law has changed for } k \text{ periods}_{st} \\
+ \sum_s \text{State fixed effects}_s + \sum_t \text{Time fixed effects}_t \\
\left[ + \sum_s \text{State}_s \times \text{Time}_t + \sum_s \text{State}_s \times \text{Time}_t^2 \right] + \epsilon_{st}
\]

This specification enables the estimation of the full adjustment path of divorce rate without imposing much structure.
Table 2.3 reports the results from the dynamic analysis. Similar to Table 2.2, panels (A), (B) and (C) report results with only state and year fixed effects, with state-specific linear trend, and with state-specific quadratic trend. Within each panel, the first column (columns 1, 4, and 7) estimates only the dynamic effect of adoption of gender-neutral child custody laws. The second column (columns 2, 5, and 8) estimates only the effect of unilateral divorce. The last column (columns 3, 6, and 9) estimates both legal changes together.

Columns 1, 4, and 7 of Table 2.3 report my new results: the dynamic response to the adoption of gender-neutral custody laws. Figure 2.4 plots the results from columns 1, 4 and 7 of Table 2.3, with the 95% confidence interval displayed for the specification with state-specific quadratic trends. When only controlling for state and year fixed effect, and when controlling for state-specific linear trends, the custody law has little effect on the divorce rate for years following its change. However, when I control for state-specific quadratic trends (column 7), the positive effect of custody law changes on the divorce rates is seen seven years after the legal change, and it persists for at least the following eight years. The increase in divorce rates ranges between 0.1 and 0.2 divorced per 1,000 people. This pattern is shown in Figure 2.4.

The different results from three specifications can be reconciled by the divorce rate trends over the past few decades. As shown in Figure 2.1, national divorce rate went through a dramatic increase between the mid-1960s and 1980, but gradually went down afterwards. The divorce rate trends in most states went through the similar pattern. My sample covers the period between 1956 and 2010, which covers the complete period of divorce rates first increasing then decreasing. Therefore, controlling for the underlying quadratic pattern of
divorce rate is particularly important to capture other unobserved quadratic trends that might affect divorce rates, apart from state fixed effect controls, year fixed effect controls, and state-specific linear time trend. Wolfers' analysis covers a shorter sample, 1968 to 1988, during which divorce rates were monotonically increasing most of the time. That explains why his results were not very different whether he controls for state-specific quadratic trend or not. In summary, in the longer sample I use, it is important to control for both state-specific linear and quadratic trends in the dynamic analysis. In my following analysis, I will focus on the dynamic analysis that controls for both trends.

To be positive that I am indeed picking up the effects of custody laws, and not estimating the effect of unilateral divorce laws, I add unilateral divorce controls to the regressions (column 9). The positive long-term effect of custody laws in the divorce rates remains positive and statistically significant. Similarly, the unilateral divorce law estimates are robust to controlling for child custody laws (columns 8 and 9).

My estimates on unilateral divorce laws are similar to Wolfers’ results despite of the differences in sample years and legal coding used. Divorce rates increased immediately following the adoption of unilateral divorce laws. Figure 2.5 plots the effect of unilateral divorce laws from column 9, where the two laws are estimated together, and controlled for state-specific quadratic trends. The effect of unilateral divorce laws dominates in the first eight years after its adoption, but becomes small and statistically insignificant afterwards.

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28 Wolfers extended Friedberg's original sample from 1968-1988 to 1956-1988, in order to better control for preexisting states trends. I extend the data further to 1956-2010, to better control for the divorce trend before and after the period of legal changes. I report the regression results using Wolfers' sample in Table A.2 in Appendix A for comparison purpose.
When putting the dynamic response to both laws together, the difference between the adjustment path following the change in custody laws and the path following the adoption of unilateral divorce laws becomes very obvious. Figure 2.6 below plots the dynamic responses to the two law changes from column 9 of Table 2.3. In this specification, I control for state-specific linear and quadratic trend to control for unobservable trends in states over years that might affect divorce rates.

The difference is quite striking: while unilateral divorce laws increase divorce rates for the first eight years following the adoption, gender-neutral custody laws' effect is delayed by nearly a decade. This provides some clues to why custody law changes appear to have insignificant effects on divorce rates earlier: the adoption of gender-neutral custody laws does not have a strong contemporaneous effect on divorce rates. In the next section, I specify a number of different specifications attempting to figure out the factors behind such a pattern.

2.4.3 Dynamic Effects Using Alternative Specifications

A. Divorces Among Married Population

Apart from affecting the dissolution of marriage, the change in custody laws might also influence people's decision of entering into marriage. For example, if gender-neutral custody laws reduce the married population, the number of annual divorces will go up even with a constant divorce rate among the married population. Therefore, it is meaningful to
estimate the impact of the law changes on the divorce rate among those who are married, to get a picture of what contributes to the increasing divorce rate that was presented earlier. Table 2.4 reproduces the same specifications estimated in Table 2.3 with a new dependent variable, the number of new divorces per 1,000 married adults.\textsuperscript{29}

With the new dependent variable, all coefficients increase in magnitude, with almost no change in significance level. This is consistent with Wolfers' findings for unilateral divorce. Column 3 displays the p-values from the wald tests on whether the coefficients from the two regressions are equal. All the dummies for year 7 and afterwards following custody law changes are statistically different from those in the original regression. In other words, in the long term, gender-neutral custody laws cause an even larger increase in the divorces per 1000 \textit{married} adults than the increase in the overall population divorce rate. This suggests that, with the new custody law, the married population is shrinking from a decreasing flow into marriage. Custody law changes not only induce marriages to break up, it also appears to prevent people from entering into marriage. Moreover, both effects only show up in the long run (year 7 and beyond). This further underlies the dynamic nature of the effect of custody law changes on divorce.

B. States that Have Reformed One or Both Laws.

In this section, I examine only states that have reformed both laws and at least one of the laws. It is possible that the reform states are different from the non-reform states in terms of how the divorce rate responds to changes in the two laws. Table 2.5 presents the results.

\textsuperscript{29} Estimation results from other specifications and other sample are presented in Appendix A.
Column 1 reprints column 9 of Table 2.3. Column 2, 3, and 4 reports result for states that have at least reformed the child custody laws, states that have reformed at least unilateral divorce laws, and states that have reformed both laws, respectively. For states that have at least reformed the child custody laws (column 2), there is not much difference in the response of divorce rate following the two law changes.

However, the dynamic effects of custody laws become much larger when I restrict the sample to states that have reformed unilateral divorce laws as well (columns 3 and 4). Moreover, the effects of unilateral divorce laws are less pronounced in these states. The comparisons in Table 2.5 provide us with important implications regarding the effect of custody law changes. The responses to custody law changes are not systematically affected if only the custody reform states are examined. However, whether states have reformed unilateral divorce laws strongly affect the effect of custody law changes. In states that have adopted some form of unilateral divorce by now, the increase in divorce rate following child custody law reform is much higher. As unilateral divorce laws make it easier to divorce, it also magnifies the effect of custody law reform by allowing marriage to end as one partner desires it.

2.5 Empirical Analysis: Stock Analysis

Apart from affecting the flow of divorce, custody law changes could also have implications for individual's marriage decisions. I now turn to analyzing micro-level data to see how people's divorce decisions are affected by custody law changes. My earlier analysis focuses
on state divorce rate, which is the flow out of the married population each year. This section
examines individual's likelihood of being divorced, separated, and married, which looks at
the custody law's influence on the stock of people with a certain marital status.

I estimate a specification first proposed by Gruber (2004) and later replicated by Wolfers
(2006). Both of them examine how the unilateral divorce law in the state affected people's
marriage decisions. The data source for this analysis is the U.S. census and the American
Community Surveys (ACS) data from 1960 to 2010 from the Integrated Public Use
Microdata Series (IPUMS-USA).30

Following Gruber and Wolfers, I use adults of child-rearing age (25-50), as they are the
population related to the child custody law. I collapse the sample into cells by state, year,
age and sex, as the variation in divorce and custody laws only exist across state-year level.
Summary statistics of the collapsed data are presented in Table 2.6.

For each gender, I estimate the following:

\[
Marital Status_{sta} = \beta_1 \text{Custody law}_{st} + \beta_2 \text{Unilateral}_{st} \\
+ \sum_r \text{Race}_{sta} + \sum_s \text{State fixed effects}_{s} + \sum_a \sum_t \text{Age}_a * \text{Time}_t
\]

30 The ACS is conducted every year since 2000, and gathers information previously contained only
in the long form of the U.S. census. IPUMS-USA consists of the sample of American population
drawn from federal censuses and from ACS. For years before 2000, I use the 1960 and 1970 1-
percent sample census, and the 1980 to 2000 5-percent sample census. For years after 2000, I use
the annual sample from the 2001 to 2010 ACS (sample percentage varied each year). In total there
are 16 years of data.
\[ + \sum_{s} State_{s} \times Time_{t} + \varepsilon_{sta} \]

Custody law_{st} and Unilateral_{st} indicate whether the state has had gender-neutral custody laws and unilateral divorce laws, respectively, in the census year before. Race controls for the percentage of white and black in the cell. Other controls include state fixed effect, age fixed effect, year fixed effect and full interactions between age and year fixed effects. I also run a set of regressions that control for state-specific trends to control for possible preexisting trends in marital status. In all regressions, standard errors are clustered within state to correct for possible serial correlation within a state over time.

I run three set of the above regressions on three dependent variables: the probability of being divorced, separated and married. Table 2.7 reports the regression results for females and males respectively. Columns (1), (4), (7) and (10) report results from specifications that estimate only the effect of custody law changes. Columns (3), (5), (8) and (11) include only unilateral divorce laws. The rest of the columns estimate regressions with both custody laws and unilateral divorce laws. All the coefficients and standard errors are multiplied by 100, so the coefficients can be interpreted as the change in percentage point of the probability of being in each marital status.

The main finding is that the gender-neutral custody law increases the likelihood of being separated for both females and males. This is true both with and without state-specific time trend controls. The effect is still positive and statistically significant when the status of the

---

31 Both census and ACS are conducted in the early part of each year. Therefore, I use the law status of the previous year.
unilateral divorce law is also controlled. Females who live in a state that has transitioned to the gender-neutral custody law are more likely to be separated by about 0.4 percentage points, and males' likelihood is increased by about 0.3 percentage points. Custody law changes do not have a significant impact on individual's other marital choices.\textsuperscript{32} The estimated coefficients on unilateral divorce laws are similar to those found by Gruber and Wolfers.

\textit{Discussion}

The results from the stock analysis help to understand how custody law changes influence marriage. The results are consistent with the flow analysis earlier, that custody law changes increase the flow of divorce in the long term, but there is no contemporaneous effect. In this section, I find that, instead of inducing people to divorce right away, gender-neutral custody laws make individuals more likely to be separated. Overall, custody law changes have a more indirect effect on marriage in the short run, by inducing separation within marriage. In the long run, some separations lead to increased divorce rates.

\subsection*{2.6 Conclusion}

Studies have explored the link between the movement to unilateral divorce laws and the increasing divorce rates over the past few decades. However, people have overlooked

\textsuperscript{32} Table A.4 in Appendix A reports the regression results using the same sample years (1960 to 1990) as Gruber and Wolfers. In regressions using the shorter sample, gender-neutral custody laws also have a negative impact on individual's likelihood of being married.
another legal reform that is essential to people's divorce decisions: changes in child custody laws. Most states completed the transition from maternal preference to gender-neutral custody assignment between the 1970s and 1990s. How this change altered trends in divorce is unknown.

This paper showed that changes in child custody laws play an overlooked role in divorce trends. The movement from maternal preference to gender neutrality increases divorce rates in the long run and increases the likelihood of marital separation. The effects of custody law changes on both outcomes are robust to controlling for the adoption of unilateral divorce.

To empirically analyze the impact of custody law reform, I created the first comprehensive coding of when each state changed custody laws. I established that the pattern of custody laws changes across states is independent of the movement towards unilateral divorce laws. The independence made it possible to estimate the two laws in one equation, so I could compare my results with previous studies that only estimated the effect of unilateral divorce laws.

My identification came from the differential timing in adopting gender-neutral child custody laws across states. I first analyzed the impact of child custody laws on state divorce rates. Following the dynamic framework proposed by Wolfers (2006), I found that the divorce rate starts to increase seven years after the adoption of the gender-neutral custody law in the state. I then studied how changes in custody laws affect individual's marital
decisions. My results showed that adults living in states with gender-neutral custody laws have a higher likelihood of marital separation.

The empirical results suggest that, the response of divorce rates to changes in child custody laws is a dynamic process. Instead of divorcing immediately, couples may have responded to the custody law change by re-bargaining within marriage. The results have implications for future research. Changes in child custody laws play an important and overlooked role in trends in divorce and separation. Future analysis of trends in divorce, marriage and household economics should account for the role of changes in child custody assignment.
Figure 2.1 – National Divorce Rate and the Adoption of Unilateral Divorce Law
Figure 2.2 – National Divorce Rate, Divorce Laws, and Custody Laws
Figure 2.3 - Years When States Changed Two Laws
Figure 2.4 - Response of Divorce Rate to Custody Law Changes, 1956-2010
Figure 2.5 - Response of Divorce Rate to Unilateral Divorce Law
Figure 2.6 - Response of Divorce Rate to Unilateral Divorce Law and Child Custody Law
Table 2.1 - States that Have Reformed Only One Law

<table>
<thead>
<tr>
<th>Year of Custody Law Reform</th>
<th>No. of States</th>
</tr>
</thead>
<tbody>
<tr>
<td>1973</td>
<td>1</td>
</tr>
<tr>
<td>1976</td>
<td>1</td>
</tr>
<tr>
<td>1977</td>
<td>2</td>
</tr>
<tr>
<td>1978</td>
<td>2</td>
</tr>
<tr>
<td>1979</td>
<td>2</td>
</tr>
<tr>
<td>1982</td>
<td>1</td>
</tr>
<tr>
<td>1983</td>
<td>1</td>
</tr>
<tr>
<td>1985</td>
<td>2</td>
</tr>
<tr>
<td>1994</td>
<td>1</td>
</tr>
<tr>
<td>1995</td>
<td>1</td>
</tr>
<tr>
<td>1997</td>
<td>1</td>
</tr>
</tbody>
</table>

A. States without unilateral divorce law

<table>
<thead>
<tr>
<th>Year of Adopting Unilateral Divorce</th>
<th>No. of States</th>
</tr>
</thead>
<tbody>
<tr>
<td>1971</td>
<td>1</td>
</tr>
<tr>
<td>1975</td>
<td>1</td>
</tr>
</tbody>
</table>

B. States without custody law changes

Note: I use Gruber’s (2004) coding for states’ adoption of unilateral divorce laws.
<table>
<thead>
<tr>
<th></th>
<th>(A) Basic Specification</th>
<th>(B) State-specific linear trends</th>
<th>(C) State-specific quadratic trends</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Child Custody</td>
<td>-0.045</td>
<td>-0.005</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.059)</td>
<td>(0.059)</td>
<td></td>
</tr>
<tr>
<td>Unilateral</td>
<td>-0.320**</td>
<td>-0.319**</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.060)</td>
<td>(0.061)</td>
<td></td>
</tr>
</tbody>
</table>

** Controls **

- **Year effects**: Yes, F=64.3 Yes, F=64.6 Yes, F=59.0 Yes, F=182.3 Yes, F=135.2 Yes, F=129.1 Yes, F=62.8 Yes, F=48.3 Yes, F=47.2
- **State effects**: Yes, F=150.9 Yes, F=131.2 Yes, F=129.0 Yes, F=406.4 Yes, F=335.1 Yes, F=332.0 Yes, F=733.8 Yes, F=597.5 Yes, F=593.6
- **State trend, linear**: No No No Yes, F=110.5 Yes, F=112.0 Yes, F=112.0 Yes, F=69.4 Yes, F=70.3 Yes, F=70.2
- **State trend, quadratic**: No No No No Yes, F=41.8 Yes, F=40.6 Yes, F=40.6

Adjusted $R^2$: 0.825 0.827 0.827 0.945 0.946 0.946 0.970 0.970 0.970

** Notes **

- Samples: 1956-2010. n = 2545. With state population weights. Robust standard errors are in parentheses.
### Table 2.3 - Dynamic Effects of Two Laws

**Dependent variable:** Annual divorces per 1,000 persons. Cell mean = 3.96.

<table>
<thead>
<tr>
<th></th>
<th>(A) Basic Specification</th>
<th>(B) State-specific linear trends</th>
<th>(C) State-specific quadratic trends</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>First 2 years</td>
<td>-0.042</td>
<td>-0.091</td>
<td>0.003</td>
</tr>
<tr>
<td></td>
<td>(0.083)</td>
<td>(0.0811)</td>
<td>(0.047)</td>
</tr>
<tr>
<td>Years 3-4</td>
<td>-0.048</td>
<td>-0.107</td>
<td>0.011</td>
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<tr>
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<td>(0.085)</td>
<td>(0.084)</td>
<td>(0.049)</td>
</tr>
<tr>
<td>Years 5-6</td>
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<td>-0.122</td>
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<td>(0.088)</td>
<td>(0.087)</td>
<td>(0.051)</td>
</tr>
<tr>
<td>Years 7-8</td>
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<td>-0.092</td>
<td>0.042</td>
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<tr>
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<td>(0.090)</td>
<td>(0.054)</td>
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<td>Years 9-10</td>
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<td>-0.011</td>
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<td>(0.093)</td>
<td>(0.092)</td>
<td>(0.056)</td>
</tr>
<tr>
<td>Years 11-12</td>
<td>-0.159†</td>
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<td>0.005</td>
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<td>(0.095)</td>
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<td>Years 13-14</td>
<td>-0.156</td>
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<td>(0.097)</td>
<td>(0.061)</td>
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<td>Years 15 onwards</td>
<td>-0.317**</td>
<td>-0.191*</td>
<td>0.011</td>
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<td>(0.095)</td>
<td>(0.093)</td>
<td>(0.065)</td>
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**Child custody law**

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<th>State-specific linear trends</th>
<th>State-specific quadratic trends</th>
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<tr>
<td></td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>First 2 years</td>
<td>0.265*</td>
<td>0.267*</td>
<td>0.372**</td>
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<tr>
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<td>(0.115)</td>
<td>(0.115)</td>
<td>(0.070)</td>
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<tr>
<td>Years 3-4</td>
<td>0.176</td>
<td>0.197†</td>
<td>0.340**</td>
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<tr>
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<td>(0.116)</td>
<td>(0.117)</td>
<td>(0.072)</td>
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<tr>
<td>Years 5-6</td>
<td>0.185</td>
<td>0.218†</td>
<td>0.402**</td>
</tr>
<tr>
<td></td>
<td>(0.114)</td>
<td>(0.116)</td>
<td>(0.074)</td>
</tr>
<tr>
<td>Years 7-8</td>
<td>0.137</td>
<td>0.171</td>
<td>0.416**</td>
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<tr>
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<td>(0.114)</td>
<td>(0.116)</td>
<td>(0.077)</td>
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**Unilateral divorce**

<table>
<thead>
<tr>
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<th>Basic Specification</th>
<th>State-specific linear trends</th>
<th>State-specific quadratic trends</th>
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</thead>
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<tr>
<td></td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Years 9-10</td>
<td>-0.033</td>
<td>-0.008</td>
<td>0.313**</td>
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<tr>
<td></td>
<td>(0.113)</td>
<td>(0.115)</td>
<td>(0.079)</td>
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<tr>
<td>Years 11-12</td>
<td>-0.196†</td>
<td>-0.169</td>
<td>0.231**</td>
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<tr>
<td></td>
<td>(0.112)</td>
<td>(0.114)</td>
<td>(0.082)</td>
</tr>
<tr>
<td>Years 13-14</td>
<td>-0.336**</td>
<td>-0.314**</td>
<td>0.193**</td>
</tr>
<tr>
<td></td>
<td>(0.110)</td>
<td>(0.112)</td>
<td>(0.086)</td>
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<tr>
<td>Years 15 onwards</td>
<td>-0.651**</td>
<td>-0.632**</td>
<td>0.310**</td>
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<tr>
<td></td>
<td>(0.065)</td>
<td>(0.066)</td>
<td>(0.090)</td>
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</table>

**Adjusted R^2**

- 0.826
- 0.837
- 0.837
- 0.944
- 0.946
- 0.946
- 0.970
- 0.970
- 0.970

**Notes:** Samples: 1956-2010. n = 2545. With state population weights. Robust standard errors are in parentheses.

**AC**

**R^2**

- p<0.01, * p<0.05, † p<0.10
Table 2.4 - Results for all Population and Married Population

<table>
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<tr>
<th></th>
<th>Divorce per 1000 people</th>
<th>Divorces per 1000 married adults</th>
<th>H0: two coefficients are equal</th>
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<tr>
<td></td>
<td>cell mean = 3.96</td>
<td>cell mean = 5.78</td>
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<td><strong>Child custody law</strong></td>
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<td></td>
<td></td>
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<tr>
<td>First 2 years</td>
<td>0.017</td>
<td>0.030</td>
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<td>0.061</td>
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<td>(0.041)</td>
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<tr>
<td>Years 5-6</td>
<td>0.042</td>
<td>0.078</td>
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<td>(0.045)</td>
<td>(0.071)</td>
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<td>Years 7-8</td>
<td>0.124*</td>
<td>0.215**</td>
<td>p = 0.0016</td>
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<td>(0.049)</td>
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<td>Years 9-10</td>
<td>0.104*</td>
<td>0.185*</td>
<td>p = 0.0103</td>
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<td>(0.083)</td>
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<td>0.249**</td>
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<td>(0.057)</td>
<td>(0.089)</td>
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<tr>
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<td>0.183**</td>
<td>0.316**</td>
<td>p = 0.0002</td>
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<tr>
<td></td>
<td>(0.061)</td>
<td>(0.096)</td>
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</tr>
<tr>
<td>Years 15 onwards</td>
<td>0.206**</td>
<td>0.341**</td>
<td>p = 0.0008</td>
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<tr>
<td></td>
<td>(0.068)</td>
<td>(0.107)</td>
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</tr>
<tr>
<td><strong>Unilateral divorce</strong></td>
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<td></td>
</tr>
<tr>
<td>First 2 years</td>
<td>0.224**</td>
<td>0.327**</td>
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<td>0.228*</td>
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<td>0.289**</td>
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<td>0.301**</td>
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<td>Yes, F=452.6</td>
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<td>Yes, F=50.1</td>
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<td>Yes, F=33.5</td>
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<td>Adjusted R&lt;sup&gt;2&lt;/sup&gt;</td>
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<td>0.973</td>
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** p<0.01, * p<0.05, † p<0.10

Notes: Samples: 1956-2010. n = 2545. With state population weights. Robust standard errors are in parentheses.
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<tr>
<td>First 2 years</td>
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<tr>
<td></td>
</tr>
<tr>
<td>Years 3-4</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Years 5-6</td>
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<tr>
<td>Years 15 onwards</td>
</tr>
<tr>
<td></td>
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<tr>
<td>First 2 years</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Years 3-4</td>
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<td>Years 5-6</td>
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<td>Years 7-8</td>
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<td>Unilateral divorce</td>
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<td>Years 9-10</td>
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<tr>
<td>Years 11-12</td>
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<tr>
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** Controls **

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<td>Yes</td>
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<td>State * time</td>
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<td>Yes</td>
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** p<0.01, * p<0.05, † p<0.10
Notes: Samples: 1956-2010. With state population weights. Robust standard errors are in parentheses.
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<td>Divorced</td>
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</tr>
<tr>
<td>Separated</td>
<td>0.035</td>
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</tr>
<tr>
<td>Married (excluding separated)</td>
<td>0.650</td>
<td>0.645</td>
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### Table 2.7 - Stock Analysis

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<tbody>
<tr>
<td>Divorced</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Custody</td>
<td>0.393</td>
<td>0.357</td>
<td>0.158</td>
<td>0.047</td>
</tr>
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<td></td>
<td>(0.320)</td>
<td>(0.321)</td>
<td>(0.211)</td>
<td>(0.177)</td>
</tr>
<tr>
<td>Unilateral</td>
<td>0.987**</td>
<td>0.946*</td>
<td>1.204*</td>
<td>1.190*</td>
</tr>
<tr>
<td></td>
<td>(0.364)</td>
<td>(0.376)</td>
<td>(0.572)</td>
<td>(0.565)</td>
</tr>
<tr>
<td>Separated</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Custody</td>
<td>0.486*</td>
<td>0.475*</td>
<td>0.378**</td>
<td>0.396**</td>
</tr>
<tr>
<td></td>
<td>(0.222)</td>
<td>(0.226)</td>
<td>(0.109)</td>
<td>(0.097)</td>
</tr>
<tr>
<td>Unilateral</td>
<td>0.332</td>
<td>0.278</td>
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<td>-0.198</td>
</tr>
<tr>
<td></td>
<td>(0.233)</td>
<td>(0.234)</td>
<td>(0.346)</td>
<td>(0.308)</td>
</tr>
<tr>
<td>Married (excluding separated)</td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Custody</td>
<td>-0.728</td>
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<td>-0.753</td>
<td>-0.617</td>
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<td>(0.430)</td>
<td>(0.477)</td>
<td>(0.411)</td>
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<tr>
<td>Unilateral</td>
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<td>-0.477</td>
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<tr>
<td></td>
<td>(0.816)</td>
<td>(0.792)</td>
<td>(1.341)</td>
<td>(1.260)</td>
</tr>
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</table>

** Controls

| Year FE | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| State FE | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| State * time | No | No | No | Yes | Yes | No | No | Yes |

No. of cells: 19,110, 19,110, 19,110, 19,110, 19,110, 19,110, 19,110, 19,110, 19,110, 19,110, 19,110, 19,110

** p<0.01, * p<0.05, † p<0.10

Chapter 3: Is the "Best Interests of the Child" Best for Every Child?

The Long-Term Implications of Gender-Neutral Custody Laws

3.1 Introduction

Many studies have examined the impact of divorce on child outcomes. The general consensus is that children in divorced families tend to have lower academic performance. They are more likely to drop out of school, are less likely to attend or complete college, and are more likely to be unemployed and on public assistance (see, for example, Krein and Beller, 1988; Amato and Keith, 1991a, 1991b; Zill, Morrison and Coiro, 1993). In recent years, researchers have also been interested in how divorce laws and policies affect all children, including those of intact families. For example, Gruber (2004) examined the implications for children of growing up in states with unilateral divorce laws, which make divorce easier by not requiring the explicit consent of both partners. He found that adults exposed to unilateral divorce laws as children have lower levels of education.

While scholars have looked at divorce law changes, few have looked at another important legal reform related to divorce: changes in child custody laws. In the United States, the assignment of child custody is governed by the custody law of each state, just like divorce.
Between the 1970s and 1990s, states moved from explicit maternal preference to gender-neutral custody assignment. Prior to this change, the dominating rule in assigning child custody in divorce was the "tender years doctrine" which presumes that the mother is the more suitable custodian for children in the case of parental separation (Klaff, 1982; Buehler and Gerard, 1995; Jones, 1978). According to Jones (1978), courts awarded custody of minor children to mothers in more than 95% of all divorce cases under the tender years doctrine.

It was not until the 1970s that states started to question the validity of maternal preference. In the benchmark case, *Watts v. Watts*, in 1973, Judge Sybil Hart Kooper of the Family Court of New York ruled that any presumptive preference in favor of maternal custody violated the father's right to equal protection under the Fourteenth Amendment of the U.S. Constitution. This invalidated the "tender years doctrine" in New York State. Other states followed the reform either by legislative action or judicial ruling. Since *Watts*, courts have moved to the "best interests of the child" doctrine, which consists of several criteria to determine which parent is more suitable to be the custodian. The doctrine makes no reference to the gender of the parent, and may include a decision of joint custody. The reform of custody laws was significant and dramatic. By 1990, 39 states had completed the transition to gender-neutral custody laws. At present, only three states still use some sort of maternal preference in custody laws: Idaho, Mississippi and Rhode Island. The movement towards gender-neutral child custody laws coincided with increasing divorce

---

rates and the movement towards unilateral divorce laws (see Figure 3.1).

Despite the significant changes in custody laws, there has been little empirical analysis of the impact of these changes on children. Since most marriages involve children, the assignment of children in marital dissolution is an overlooked, and potentially important, factor in divorce trends. Custody assignment plays an important part before, during and after the divorce process. Changes in legal doctrine will not only result in increasing father custody after divorce, but more importantly, they also change the relative bargaining power between husbands and wives *ex ante*.

With maternal preference in custody laws, the majority of mothers went through divorce without the concern of losing child custody. The transition to gender-neutral custody assignment increases the possibility that child custody is assigned to fathers or jointly to both parents in contested custody cases.\(^{34}\) Under the new regime, wives have more to lose in the case of divorce, which might decrease their incentive to divorce. The opposite applies to husbands.

I develop an intra-household Nash bargaining model (McElroy and Horney, 1981) to consider the implications of gender-neutral custody assignment for household bargaining. In the model, a spouse stays married if the utility gain from marriage exceeds the external threat point—each party’s best option outside marriage. The comparative statics of the

\(^{34}\) Bianchi (1995) used census data and calculated that the percentage of single-father households in all single-parent households has increased by 48.8% between 1970 and 1990. Garasky and Meyer (1996) broke down the single-parent households and found that the largest share of the increase in single-father households came from formerly-married fathers. My own calculations using census data support their calculations.
model yield straightforward empirical predictions: the change in the prospect of child
custody assignment increases the external threat point for the husband, and decreases that
for the wife.

Importantly, the unambiguous increase in fathers' bargaining position applies to all couples
with children, whether divorce occurs or not. The aggregate effect on child outcomes,
however, is theoretically ambiguous. Within marriage, the custody law reform increases
the husband's bargaining position and his share of resources in the household. While we
have empirical evidence found in developing countries which shows that increased
bargaining power for husbands is negatively related to child outcomes, there is relatively
little analysis of such effects for the United States.

For those couples that divorce, the removal of maternal preference also empowers fathers
during the divorce negotiation. Weitzman and Dixon (1979) provided evidence that fathers
might use custody as a threat in the negotiations over property or support awards. When
"bargaining in the shadow of the law," the wife's bargaining position is worse off with the
higher risk of losing custody, which leads to unfavorable settlement in property division,
alimony, child support, etc. Since most children in divorced families still spend the majority
of their time with mothers (Garasky and Meyer, 1996), this might lead to worse child
outcomes.

As such, the analysis of divorce and children's development would not be complete without
examining the laws governing custody assignment as they have implications for both intact
and divorced families. It is possible that some of the effects that we have previously
attributed to divorce may, in fact, be due to changes in child custody policies.

One reason for the dearth of empirical evidence is the lack of a comprehensive coding for when each state underwent a transition to gender-neutral custody laws. The major difficulty with constructing a legal coding is the inconsistency between state statutes and actual court practices. While several states had gender neutrality written into their statutes in the 1970s, courts still practiced explicit maternal preference in child custody cases. This is due to the fact that the maternal preference was often in the form of an implicit presumption used in custody cases rather than a formal legal statute. Any definition that takes into account one aspect of the legal change without considering the other would be incomplete. Such a mechanical definition would not reflect the timing of changes in actual practices.

To accurately measure changes in custody practices, I construct the custody law coding in an innovative way. I define a state to have completed the change in its custody law if the state has met the following criteria: (1) it has added statutes equalizing parental rights in custody assignment, and (2) maternal preference is no longer in use in court practices. This method utilizes information from both state statutes and court practices to determine when each state completed the change from maternal preference to gender-neutral custody assignment. That is, my definition is directly related to the actual likelihood that a custody dispute in a given year would be settled in a gender-neutral way.

My legal coding is the first to record each individual state's year of transition into gender-neutral custody assignment in a systematic and transparent way.\footnote{Chapter 1 provides the legal coding.} This coding enables the
empirical analysis of the effect of custody law changes. Using the coding, I establish that states' movement to gender-neutral custody laws is independent of the adoption of unilateral divorce laws.\textsuperscript{36} I can therefore disentangle the effects of each legal reform in the empirical estimation.

In my empirical analysis, I estimate the long-term implications of growing up in a gender-neutral custody law regime. My empirical strategy exploits the variation across states in the timing of the legal changes. Using data from the U.S. Census and the American Community Survey from 1960 to 2010, I find that childhood exposure to gender-neutral custody laws has a negative and significant effect on educational outcomes. For example, a man exposed to the new custody law as a child is less likely to graduate from high school by, on average, 2.04 percentage points. With a high school graduation rate of 86.86% in the sample, this effect is substantively large. The results are robust to inclusion of state-specific time trends.

The negative effect of gender-neutral custody laws increases with the length of exposure in childhood. I find that each additional year of exposure to the new custody law reduces the probability of high school graduation by 0.24 percentage points for men. The negative impact of being exposed before age five is the largest in magnitude. I also perform a placebo test which shows that exposure as a young adult (age 18 to 25) has much smaller negative effect on child outcomes than the exposure during childhood.

In addition, I estimate a specification that takes into account changes in both custody laws

\textsuperscript{36} See Chapter 2.3 for how I establish the independence between the two law changes.
and divorce laws. I incorporate Gruber's (2004) analysis on unilateral divorce laws, controlling for whether one lived under the unilateral divorce law regime as a child. I find that all my results are robust to the addition of the unilateral divorce law controls. That is, child custody law regime has an effect on children that is independent of divorce legislation.

This article proceeds as follows. Section 3.2 presents the conceptual framework. In Section 3.3, I introduces the data. Section 3.4 and Section 3.5 present my empirical strategy and estimation results. Section 3.6 concludes.

3.2 Conceptual Framework of Custody Laws and Child Outcomes

This section develops a simple Nash-bargaining framework to illustrate the effect of custody law changes on households. As with other divorce legislation, the adoption of gender-neutral custody laws has important implications for couples with children, whether they divorce or not. With the abrogation of maternal preference in custody cases, mothers lose their absolute advantage in receiving custody in the case of divorce, which decreases their expected valuation of potential divorce. The less desirable outside option alters the mothers' bargaining power position within marriage.

The Nash-bargained household decision framework is developed in the spirit of McElroy and Horney (1981). In this framework, the married couple bargain in a two-person, non-

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37 There have been a number of previous studies that studied the effect of family law on household bargaining (see, for example, Peters, 1986; Gray, 1998; Voena, 2013).
zero-sum, cooperative game with a Nash solution. Another important aspect of the model is that parents value child custody after divorce. Even if a spouse does not desire child custody, per se, he or she can use the possibility of child custody as a threat. Evidence from custody cases suggest that each party may threaten or pretend to want custody in order to gain advantage in the bargaining process (Weitzman and Dixon, 1979; Mnookin and Kornhauser, 1979). What matters in the model is the effect of the custody regime on each spouse' bargaining position.

3.2.1 Model Setup

Assume there is a household with only two people: male and female. Their objects of choice are \( x = (x_m, x_f)' \), with given market prices \( p = (p_m, p_f)' \), where \( x_m \) is the consumption by the husband, and \( x_f \) is the consumption by the wife. For simplicity, I do not define public good consumption. I also ignore the consumption of leisure. Neither of the above would alter predictions of the model. Also, in this model, children are not needed to reach the theoretical predictions.\(^{38}\)

If the two individuals were not married, each of them would maximize a twice continuously differentiable, nondecreasing, quasiconcave utility function, subject to that individual's budget constraint, \( p_k = I_k \), for \( k = m, f \). I \( I_k \) is the nonwage income. Each person has a well-

\(^{38}\) For simplicity, children are not directly modeled into the household utility function and budget constraint. The existence of children creates a channel through which the change in custody laws influences spouses' threat points.

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defined continuous, strictly quasiconvex indirect utility function which gives the maximum attainable utility level as a function of prices and nonwage income:

\[ V_0^k = V_0^k(p_k, I_k), \quad \text{for } k = m, f. \]

Following McElroy and Horney's (1981) model, I assume that, when married, the utility of each spouse depends not only on own consumption, but also on that of the other spouse. Their individual utility functions are defined as:

\[ U^k = U^k(x), \quad \text{for } k = m, f. \]

Therefore, the gain from being married compared to single is:

\[ U^k(x) - V_0^k(p_k, I_k), \quad \text{for } k = m, f. \]

This term is assumed to be non-negative for the marriage to exist. When married, two spouses pool resources together, so the budget constraint for marriage is:

\[ p_m x_m + p_f x_f = I_m + I_f. \]

I assume that bargaining over the allocation of \( x \) achieves the Nash solution that satisfies the following axioms: (1) invariance to linear transformations of individual utility functions, (2) Pareto efficiency, (3) independence of irrelevant alternatives, and (4) symmetry with respect to the roles of the players.

The couple chooses \( x \) to maximize the utility-gain product function subject to (4), what McElroy and Horney called the "utility-gain product function," which is a special case of the Nash product function,
\[N = [U^m(x) - V_0^m(p'_m, I_m; \alpha_m)][U^f(x) - V_0^f(p'_f, I_f; \alpha_f)].\]

Each term in the bracket is the gain from marriage compared to being single. McElroy and Horney interpreted \(V_0^k\) as the threat point of each spouse, which is the best each could expect to get if the couple divorced. As outside situations change, the threat points may shift. The "relevant shift parameter" \(\alpha_k\) represents the possible changes to the opportunities outside of the marriage. In the comparative statics of the model, I will discuss how the custody law reform affects the equilibrium by influencing \(\alpha_k\).

Setting the first partial derivatives of the Lagrangian function equal to zero gives the necessary conditions for maximization:

\[
\begin{align*}
N_k &\equiv U_k^m(U^f - V_0^f) + (U^m - V_0^m)U_k^f = \lambda p_k, \quad k = m, f, \\
-N_\lambda &\equiv p_m x_m + p_f x_f - I_m - I_f = 0,
\end{align*}
\]

where \(N_k = \frac{\partial N}{\partial x_k}\), \(U_k^j = \frac{\partial U^j}{\partial x_k}\) for \(j = m, f\) and \(k = m, f\); \(N_\lambda = \frac{\partial N}{\partial \lambda}\), and \(\lambda\) is the Lagrange multiplier. Solving (6) and (7) gives the optimal solutions:

\[
\begin{align*}
x_k &= h_k(p', I_m, I_f) \quad k = m, f, \\
\lambda &= h_\lambda(p', I_m, I_f)
\end{align*}
\]

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3.2.2 Comparative Statics

To analyze the comparative statics of the effect of custody law changes, I use McElroy and Horney's definition of "iso-gain product curves" and "family rate of substitution". An iso-gain product curve (IGPC) is defined by the locus of bundles, \( x \), for which the utility-gain product function, \( N \), is constant. IGPCs have the standard properties of neoclassical indifference curves: (a) two curves never intersect; (b) an IGPC located further northeast has a higher value; (c) there is an IGPC going through every point in the space where the \( x \) is nonnegative; (d) IGPCs are convex.

The family rate of substitution (FRS) of \( x_f \) for \( x_m \) is defined as the negative slope of the IGPC at \( x \):

\[
FRS_{fm} = -\frac{dx_m}{dx_f} \bigg|_{\bar{N}} = \frac{N_f}{N_m}
\]

Equilibrium is reached at the point at which the family rate of substitution equals the slope of the family budget constraint, as illustrated in Figure 3.2. At \( x \), the \( FRS_{fm} \) depends on \( p \), \( I_m \), \( I_f \), \( \alpha_m \) and \( \alpha_f \). Custody law reform enters the model by altering the levels of \( \alpha_m \) and \( \alpha_f \), which changes the equilibrium resource allocation by influencing \( FRS_{fm} \).

In my analysis, the changes in the parameter \( \alpha_k \) come from custody law changes. With the new custody assignment rule, females have a much higher risk of losing custody if divorce occurs, which lowers the expected valuation of divorce, i.e. the threat point. Custody law reform increases \( \alpha_m \), the relative shift parameter for males, and decreases \( \alpha_f \), the shift parameter for females. Later in the analysis, I will show how the change in \( \alpha_k \) alters the
resource allocation in equilibrium.

I evaluate the impact of custody law changes on $FRS_{fm}$ by taking partial derivatives of $FRS_{fm}$ with respect to $\alpha_m$ and $\alpha_f^{39}$:

$$\frac{\partial FRS_{fm}}{\partial \alpha_m} = \frac{U_m^m U_{mf}^f}{N_m^2} \left( \frac{U_{mf}^f}{U_m^m} - \frac{U_{fm}^m}{U_{mf}^f} \right) \left[ \frac{\partial V_0^f}{\partial \alpha_m} (U_m^m - V_0^m) - \frac{\partial V_0^m}{\partial \alpha_m} (U_f^f - V_0^f) \right]$$

$$\equiv \frac{U_m^m U_{mf}^f}{N_m^2} (\Delta MRS_{fm}) [W]$$

The first term in (3), $\frac{U_m^m U_{mf}^f}{N_m^2}$, is positive. The second term, $\Delta MRS_{fm}$, is the difference between female and male in the individual marginal rate of substitution of $x_f$ for $x_m$. I assume individuals to be selfish, which implies that the female places a higher relative value on her own consumption than her husband does. Hence $\Delta MRS_{fm} > 0$.

The sign of the third term, $W$, is determined by the signs of $\frac{\partial V_0^f}{\partial \alpha_m}$ and $\frac{\partial V_0^m}{\partial \alpha_m}$, since $(U_m^m - V_0^m)$ and $(U_f^f - V_0^f)$ are assumed to be nonnegative. With the change in custody laws, $\alpha_m$ increases. The value of being single decreases for the female, and increases for the male. Therefore, $\frac{\partial V_0^f}{\partial \alpha_m} < 0$, $\frac{\partial V_0^m}{\partial \alpha_m} > 0$, and $W$ is negative. Therefore, $\frac{\partial FRS_{fm}}{\partial \alpha_m}$ is negative. The increase in $\alpha_m$ decreases $FRS_{fm}$. By symmetry, $\frac{\partial FRS_{fm}}{\partial \alpha_f} > 0$.

$$\frac{\partial FRS_{fm}}{\partial \alpha_m} = \frac{\partial (N_f^{nf})}{\partial \alpha_m} + \frac{\partial N_f^{mf}}{\partial \alpha_m} - \frac{\partial N_m^{mf}}{\partial \alpha_m} - \frac{\partial N_m^{fm}}{\partial \alpha_m}$$

Substituting in (1) and $\frac{\partial N_k}{\partial \alpha_m} = -\frac{\partial V_0^m}{\partial \alpha_m} U_f^f - \frac{\partial V_0^f}{\partial \alpha_m} U_m^m$ gives (3).
The adoption of gender-neutral custody laws raises $\alpha_m$ and decreases $\alpha_f$, both of which will lead to a decrease in the family rate of substitution of $x_f$ for $x_m$. With the family budget constraint unchanged, this will alter the allocation of resources in the household. As illustrated by the example in Figure 3.3, when $FRS_{fm}$, or the slope of the IGPC decreases, the optimal consumption bundle moves from $(x_f^0, x_m^0)$ to $(x_f^1, x_m^1)$. The wife's consumption decreases and the husband's consumption increases due to the change in bargaining power. Note that, when defining consumption $x$, I do not differentiate between physical goods consumption and leisure consumption. This reallocation within the couple might have implications for both physical resources, time input into home production, and other types of consumption.

### 3.2.3 Implications for Child Outcomes

The theoretical framework above predicts that movement to gender-neutral custody laws unambiguously improves the husbands' bargaining position within marriage. As a result, husbands enjoy a higher share of resources within marriage. Previous studies have shown that an increase in the women's share of resources in households leads to better child outcomes and higher consumption by children (see, for example, Thomas, 1990; Duflo, 2003; Lundberg, Pollak and Wales, 1997; Bobonis, 2009). Since the model predicts that fathers are unambiguously empowered by the new custody law, we would expect that children living in intact families would have fewer resources devoted to them under the new gender-neutral custody regime. One problem with the empirical evidence on women's
share of resources and child outcomes is that most of them are from developing countries. It is unclear whether this finding holds for U.S. families.

For those couples that divorce, the removal of maternal preference also increases fathers' bargaining position during the divorce negotiation. Mnookin and Kornhauser (1979) provided a useful framework to understand divorce negotiation from a bargaining perspective. When divorce, couples bargain over two aspects: children and money. Children refer to child custody, and money refers to divorce settlement such as property division, alimony, debt, and child support. While most divorce cases are not contested in court, couples "bargain in the shadow of the law." As a result, the wife's bargaining position is worse off with the higher risk of losing custody. Weitzman and Dixon (1979) suggested that fathers might use custody as a threat in the negotiations over property or support awards. The removal of the maternal preference might lead to unfavorable settlement for mothers in property division, alimony, child support, etc. Since most children in divorced families still spend the majority of their time with mothers (Garasky and Meyer, 1996), this could be negatively associated with child outcomes.

Apart from the implications from bargaining power change, changes in custody laws could also affect children through other channels. One the one hand, custody law changes will affect the divorce rate. Chen (2013) finds that state divorce rates increase approximately seven years after states' adoption of the new custody law and persist thereafter. It is well known that divorce has negative impacts on child outcomes in many dimensions. For example, Amato and Keith (1991) found that children of divorce have more difficulties adjusting both socially and psychologically. Guidubaldi, Cleminshaw, Perry, and

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Mcloughlin (1983) found that adolescents whose parents have divorced are more likely to have low academic performance and to drop out of school even after one controls for socioeconomic status. Overall, divorce is often found to be correlated with adverse outcomes for children; although it is unclear whether children would be worse off had their parents remain married.

On the other hand, the gender-neutral custody law is directly related to children's living arrangement after divorce. Its adoption can lead to a higher probability that children are assigned to a custodian (or joint custody of two parents) that is more conducive to their best interests, compared to the case where maternal presumption dominates. Therefore, it is possible that some children are negatively affected by the additional divorces if their states have adopted gender-neutral custody laws, but other children could be better off.

Overall, the aggregate effect on child outcome is theoretically ambiguous, as it depends on the degree of bargaining power change within marriage and the effect of divorce on children whose parents divorce. Investigating only the outcomes for children with divorced parents would be misleading. Indeed, children from intact families are still the majority of the population. According to the statistics from the Survey of Income and Program Participation (SIPP), in 2009, 60% of the children live with both biological parents. In my empirical estimation, I will test the net effect of custody laws on all children.

I focus on educational attainment since it is an outcome directly related to parental investment in children and is an important factor determining well-being later in life. In particular, I concentrate on the extensive margin of high school graduation and the
intensive margin of years of education. A substantial body of the literature on family structure and children's educational outcomes has also focused on these two outcomes. Studies have shown that high school completion depends crucially on the financial and time input from one's family (see, for example, Shaw, 1982; Krein and Beller, 1988; Astone and McLanahan, 1991).

3.3 Data

The data for this analysis come from the U.S. Census and the American Community Survey (ACS). The ACS is conducted every year since 2000, and collects information previously contained only in the long form of the U.S. Census. For years before 2000, I use the decennial sample from the 1960 to 2000.\textsuperscript{40}

To examine children's adult educational outcomes, I use individuals age 20 to 50. I collapse the data into cells by year, age, state of birth, state of residence and sex. Cells are used since variation in individuals' exposure to laws exists only at this level. Previous studies of unilateral divorce laws (Gruber, 2004; Wolfers, 2006) use a similar methodology. The data are also divided by sex as child custody law reform may have a different impact on boys and girls.\textsuperscript{41} Regressions are run at the cell level, weighted by cell size.

\textsuperscript{40} I use the 1\% sample from 1960 and 1970 census, the 5\% sample from 1980 to 2000 census, the 0.4\% sample from 2001 to 2004 ACS, the 1\% sample from 2005-2010 ACS.

\textsuperscript{41} Empirical evidence shows that fathers are more likely to contest a custody case if there is higher ratio of sons in the family (Weitzman and Dixon, 1979). Divorced fathers are much more likely to obtain custody of sons compared to daughters (Moretti and Dahl, 2008). Also, maternal preference
The data report each person's age and place of birth, which I use to match to the time of legal changes in each state. This yields the key variables in the analysis: exposure to the gender-neutral custody law before age 18. I am able to compute both extensive and intensive measures of childhood exposure to gender-neutral custody laws. The details of the computation of these variables are discussed below.

Since the majority of states reformed their divorce laws and custody laws between the 1970s and 1990s, the data I use cover the period before and after both legal reforms. Individuals' exposure to both gender-neutral custody laws and unilateral divorce laws in the sample ranges from zero years to 18 years. Table 3.1 presents the sample means. On average, around 45% of my sample has been exposed to gender-neutral custody laws before they were 18. Furthermore, I separate the sample by the length of exposure in the summary statistics. There is a relatively even distribution of individuals across different lengths of exposure. The sample provides sufficient variation in the main explanatory variable—the childhood exposure to gender-neutral custody laws—to study its impact on educational outcomes as adult.

3.4 Empirical Strategy

To assess the impact of being exposed to gender-neutral custody laws as a youth on adult

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42 The data I use in the empirical analysis excludes Maine and Washington, as their years of custody law changes are indeterminate in my legal coding.
outcomes, I employ an estimation strategy similar to that of Gruber (2004). The baseline specification is of the form:

\[
\text{Outcome}_{sbta} = \beta_1 \text{ChildCustody}_{abt} + \sum_s \text{State of residence}_s \\
+ \sum_b \text{State of birth}_b + \sum_r \text{Race}_{sbta} + \sum_a \text{Age}_a \times \text{Time}_t + \epsilon_{sbta}
\]

where, \(a\) indexes age, \(s\) indexes state, \(b\) indexes state of birth and \(t\) indexes year. \(Outcome\) is a measure of educational attainment. \(Race\) consists of two variables for the percentage of white and percentage of black in the cell. The regression also contains indicators for state of residence, state of birth, year, and interaction of age and year, in order to control for other factors that might be correlated with children's educational outcomes. In all specifications, standard errors are clustered by state of residence to correct for possible serial correlation within a state over time.

One potential concern with this specification is that there might be trends in child outcomes that are specific to each state. Moreover, these trends might be correlated with the legal reforms. I address this concern by estimating regressions which control for state-specific trends for both state of birth and state of residence in addition to state fixed effects. The state specific time trends control for time-varying factors within states that are correlated with legal reforms or changes in educational attainment by cohorts within a state. For example, if one state sees an increase in its school quality that does not occur in other states, state-specific time trends will be able to control for the effect of such increase on educational attainment. Similar reasoning applies to any state-specific trends that might
influence states' adoption of gender-neutral custody laws. This allows me to identify the changes in educational outcomes that are only due to different exposure to custody laws.

\( \text{ChildCustody}_{abt} \) is the measure of the exposure to the gender-neutral custody law before 18, which is the main variable of interest in this analysis. In my analysis, I use two different measures of the exposure in different specifications, a dichotomous and continuous measure. The two measures focus on different aspects of the influence of legal exposure. The dichotomous measure equals one if the individual has ever been exposed to gender-neutral custody law regime before he or she was 18, and equals zero otherwise. This variable measures the exposure to the new custody law at the extensive margin.

The second measure is a continuous variable, which measures the length of exposure to the gender-neutral custody law before 18. For example, if a child's birth state adopted the gender-neutral custody law when he or she was 6 years old, his or her length of exposure is 12 years. This measure looks at the exposure to the new custody law on the intensive margin.

In census and ACS surveys, there is information about individuals' birth place and state of current residence, but they do not ask where people have lived during their youth. In my analysis, I assume that individuals stay in the same state from birth to 18 years old.\(^\text{43}\) This might potentially cause bias in the estimation results. In Section 3.5.5, I address this problem and check the robustness of my results to using sample with the same state of birth.

\(^\text{43}\) Similar assumptions are made in other studies with similar data constraints, see, for example, Gruber (2004) and Goldin and Katz (2002).
3.5 Estimation Results

3.5.1 Baseline Specification

In the baseline specification, I estimate the effect of childhood exposure to gender-neutral custody laws. Estimation results for men and women are presented in Table 3.2A and Table 3.2B, respectively. Each column reports results from a separate regression.

I estimate the effect of childhood legal exposure on two educational outcomes: the likelihood of graduating from high school and the average years of education. For the outcome of high school graduation, the coefficients are multiplied by 100 for easy interpretation as percentage changes. Within each outcome, the two measures of exposure to the law are used in separate regressions. In both tables, column (1), (2), (5), and (6) report the estimated coefficients on the dichotomous measure: being ever exposed to the new law before 18. Columns (3), (4), (7) and (8) report coefficients on the continuous measure: years of exposure before 18. As discussed in the empirical strategy section, I also control for state-specific trends for both state of birth and state of residence in a separate set of regressions. In each table, columns (2), (4), (6), (8) report results from specifications with trends.

In both Tables 3.2A and 3.2B all estimated coefficients are negative and statistically significant. Overall, exposure to the gender-neutral custody law before 18 has a negative
impact on educational attainment, for both men and women. For example, being exposed to the new child custody law decreases the probability of graduating from high school by 2.04 percentage point for males. This result is *substantively* large: it is about 2.34% of the sample mean, and one sixth of the standard deviation. Being exposed to the gender-neutral custody law also decreases men's years of education by 0.123 years. The results are of similar magnitude for women. Exposure to the gender-neutral custody law as a child lowers women's likelihood of high school completion by 1.85 percentage points.

Not only does exposure to the new custody law matter for educational outcomes, the length of exposure determines the magnitude of the effect, as well. For men, one additional year of exposure to the gender-neutral custody law decreases the likelihood of high school completion by 0.239 percentage points, and reduces the years of education by 0.013 years. Again, I find similar results for women.

The negative coefficient on years of exposure confirms the negative impact of the gender-neutral custody law on the intensive margin. While the magnitude of one year's impact is rather small, the accumulation effects are large, given that the average length of exposure in the sample is 4.72 years for men and 4.68 years for women.

One should note, however, that the negative effect associated with years of exposure can have two potential implications. One is that the younger the child is first exposed to the gender-neutral custody law, the worse his or her educational outcome would be, holding other things equal. The other is that longer amount of time the child is exposed to the law negatively affects his or her outcome. Because the years of exposure is constructed using
both year of birth and state's legal reform status in each year, it is impossible to disentangle these two effects. The negative coefficients could be due to younger age of first exposure, longer length of exposure, or a combination of the two.

Another finding from the Tables 3.2A and 3.2B is that estimation results are quite robust to the inclusion of state-specific trends. Columns (2), (5), (8), and (11) display results from regressions that control for linear trends for state of residence and state of birth. Columns (3), (6), (9), and (12) control for state quadratic trends, in addition to the linear trends. Controlling for state-specific trends decreases the estimated coefficients in all regressions. However, the differences between coefficients with trends and without trends are quite modest. Since state-specific trends control for time-varying factors within states that might be correlated with custody law reforms or influence educational attainment, the robustness to the inclusion of trends indicates that such factors do not significantly bias the estimates of the effect of child custody.

My estimation results show that the aggregate effect of the gender-neutral custody law on children's educational attainment is negative. Exposure to the gender-neutral custody law as a child is associated with lower likelihood of graduating from high school and reduced years of education on average. The negative effect increases with additional years of exposure. In my conceptual framework, I illustrate that gender-neutral custody laws increase the bargaining power of fathers in marriages, which has negative impacts on

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44 In Tables B.1A and B.1B in Appendix B, I present the estimation results for two additional educational outcomes: obtaining some college education and being a college graduate. The results are mostly negative for these two outcomes.
children in married households. However, theoretically, the net effect for all children is ambiguous. These results suggest that the net effect on all children is negative and large.

3.5.2 Results by Length of Exposure

In the baseline specification, one of the measures of exposure as a child that I examine is the years of exposure to the gender-neutral custody law. By regressing educational outcomes on years of exposure, I find that an additional year of exposure to the new custody law had a negative impact on educational outcomes for both men and women. One issue with the specification is that the amount of exposure may not necessarily affect children in a linear way. Longer length of exposure implies that the child is first exposed at a younger age, which can have a systematically different impact on the child compared to those who are exposed at a much later stage of development. Besides the effect of age first exposed, the amount of exposure itself can affect children in a nonlinear pattern. Chen (2013) illustrates the possibility of a dynamic linear response to changes in custody laws. State divorce rates do not begin to increase until the seven years after the adoption of gender-neutral custody laws in states.

To allow the effect of exposure to vary non-linearly, I estimate a more flexible specification. I define three dummy variables for one to five years of exposure, six to thirteen years of exposure, and fourteen to eighteen years of exposure.\textsuperscript{45} The cutoffs are chosen so that

\textsuperscript{45} Gurber (2004) and Johnson and Mazingo (2000) used a similar specification to estimate the effect of childhood exposure to unilateral divorce laws on outcomes.
individuals are divided into three groups by the age first exposed: first exposed after age thirteen, first exposed between age five and age thirteen, and first exposed before age five. These three age groups are often deemed by courts as development stages of children that are distinctly different (Klaff, 1982).

Instead of regressing educational outcomes on the single measure of years of exposure, I now estimate the three dummy variables in the specification. Table 3.3 reports the estimation results. Overall, the results are consistent with those from the baseline specifications. The coefficients on the exposure variables in most regressions are negative and statistically significant. Being exposed for 14 years and above has the largest negative impact on educational outcomes in all but one regression. For example, men exposed to gender-neutral custody laws for more than 14 years as children are 4.3 percentage points less likely to graduate from high school. The differences between six to thirteen years of exposure and one to five years of exposure are relatively small.

Overall, the reduction in educational outcomes is greater for longer exposure time. While one to five years and six to thirteen years of exposure have similar effects, being exposed for 14 years and above has the largest negative impact on outcomes. This also implies that first being exposed to gender-neutral custody laws before school age is strongly related to negative educational outcomes.46

46 Tables B.2A and B.2B in Appendix B report results from alternative specifications where I estimate the effect of ever been exposed before age 5 and exposed before age 13, individually. Coefficients on the two variables are also negative and significant.
3.5.3 Placebo Tests

Estimation results from the previous two sections show that exposure to the gender-neutral custody laws during childhood had a negative impact on long-term educational outcomes. Moreover, the earlier the child was first exposed, the larger the negative effects are.

One remaining question is whether the negative impacts of the law indeed works through the exposure to child custody laws and not other omitted factors. To answer this question, I perform a placebo test where I estimate the effect of exposure to gender-neutral custody laws as a young adult (age 18 to 25). In other words, individuals who live in a state where the custody law changes between their age 18 and 25 are perceived to have received a "placebo treatment." Given the framework, these individuals should have outcomes which differ from those exposed as children.

Table 3.4A displays the results from the regressions where I compare the effects of exposure as a child and as an adult. Results confirm that the exposure to the new law during childhood has a significant negative effect relative to the exposure after 18. The coefficient on exposure between 18 and 25 is much larger (less negative) than the coefficient on exposure before 18. This is true for all regressions, including both men and women, both educational outcomes, and with no trend, linear trends and quadratic trends.

The table also displays the ratio of the placebo coefficient to the childhood exposure coefficient for each regression. All ratios are less than 0.5, or even negative. This implies that exposure as an adult has a much smaller negative effect (less than half) compared to childhood exposure. In some regressions, the coefficients on adult exposure are even
positive, though not statistically significant. I also report the results from the one-sided F tests which show that the coefficients on adult exposure are significantly larger (smaller in absolute values) than the coefficients on childhood exposure in all regressions.

Next, I disaggregate the exposure during childhood. Table 3.4B reports result from an alternative specification, where I further divide childhood exposure into three groups according to the age of first exposure, as what I did in section 3.5.2. In addition to three different childhood exposure dummies, I also control for the placebo treatment (exposure between 18 and 25). The estimation results reaffirms the conclusion that adult exposure has a much weaker effect than childhood exposure. Even when comparing with the exposure as a teenager (between 13 and 18), the coefficients on the exposure between 18 and 25 are significantly larger (less negative). The ratio of the two coefficients are either less than 0.46 or negative.

In both placebo tests, the exposure as young adult has a much smaller negative effect on child outcomes compared to the exposure during childhood. The differences in all specifications are statistically significant. With the control for placebo exposure, any effect that remains would be the treatment effect of childhood exposure to gender-neutral custody laws.

3.5.4 Unilateral Divorce Laws

I carry out additional checks to verify the results from the baseline specification. I
investigate whether the effect of exposure to gender-neutral custody laws holds when I control for the exposure to unilateral divorce laws. Gruber (2004) and Johnson and Mazingo (2000) find that childhood exposure to unilateral divorce laws negatively affects adults' educational outcomes. Chen (2013) examines the correlation between the divorce law reform and child custody law reform, and shows that states' movement to gender-neutral custody laws is independent of the adoption of unilateral divorce laws. Therefore, I am able to estimate the childhood exposure to both unilateral divorce laws and gender-neutral custody laws in one specification.

To verify that I am not capturing any negative effect from unilateral divorce laws, I include an additional variable $\text{ChildUnilateral}_{abt}$ in the specification, indicating whether the child has ever been exposed to unilateral divorce laws before 18. The transitions in unilateral divorce laws are based on Gruber's (2004) coding, where he incorporates and updates Friedberg's (1998) coding using both primary and secondary sources. This is the most up-to-date coding of unilateral divorce law changes in the literature.\footnote{Other versions of the coding include, for example, Friedberg (1998), Brinig and Buckley (1998b), Nakonezny, Shull and Rodgers (1995), Ellman and Lohr (1998), and Johnson and Mazingo (2000).}

Tables 3.5A and 3.5B report the results from specifications controlling for childhood exposure to unilateral divorce laws for men and women respectively. For simplicity, I show only regressions without state-specific trends. Tables B.3A and B.3B in Appendix B present results with state-specific trends. Results are similar.

For each educational outcome and exposure measure in Tables 3.5A and 3.5B, I present
results from three regressions. The first columns reproduce the results from Table 3.2A and 3.2B, which estimates only the effect of exposure to child custody laws. The second columns present results from estimating only the effect of exposure to unilateral divorce laws, which is similar to the strategy used by Gruber (2004). The third regression simultaneously considers both unilateral divorce laws and child custody laws. Comparing the coefficients on exposure to custody laws in the first columns and the third columns, I find that they are very similar. When the control for unilateral divorce is added, the coefficient on custody laws is decreased by only a modest amount. The negative impact of gender-neutral custody laws is robust to the control of unilateral divorce laws.

I also obtain similar findings when comparing the second columns with the third columns. My estimation results for exposure to unilateral divorce laws are similar to those found by Gruber (2004). Moreover, they are robust to the control of child custody laws. Overall, the results suggest that the negative impact of the gender-neutral child custody laws is independent of the effect of unilateral divorce laws. Both legal changes have negative impacts on educational outcomes.

3.5.5 Robustness Check for Migration

As discussed in the empirical strategy section, I assume one's state of birth to be the state of residence between age zero and eighteen when constructing measures of childhood exposure to the gender-neutral custody law. Unless no one in the sample had ever migrated across states before turning 18, this measure will not be able to capture the true treatment
status for everyone in the sample. This is a common problem with repeated cross-section data. For example, in the study on childhood exposure to unilateral divorce laws, Gruber (2004) assumes that the state of birth is the state of residence as youth. Similarly, Goldin and Katz (2002) use state of birth as a proxy for state of residence between 18 and 21 years old.

If children's migration was random, i.e., independent of states' custody law changes or their future educational outcomes, the estimated coefficients I obtained above would potentially be an underestimation of the true impact of gender-neutral custody laws. Some sample in the treatment group is mistakenly classified as a control group, and vice versa, which introduces standard measurement error. Furthermore, there is a concern that migration might be correlated with state custody laws or states' average educational attainment, which would further bias the estimation.

As a robustness check, I restrict the sample to individuals with the same state of birth and the current state of residence. For such individuals, it is still possible that they moved to other states during their childhood before moving back to the state of birth, but the possibility of migration is much smaller compared to those who are living in a different state from their state of birth. Table 3.6 presents the summary statistics of the restricted sample. Out of the original sample, 64.42% of the individuals have the same state of birth and state of residence. The sample means of all variables are similar to those in Table 3.1.

Tables 3.7A and 3.7B report the results from regressions using the restricted sample. Instead of collapsing into cells by year, age, state of residence, state of birth and sex, I now
collapse the sample by year, age, state of birth and sex. Compared with Tables 3.2A and 3.2B, the estimation results using the restricted sample are very close to those in regressions using the original sample. Most coefficients are slightly larger than those in the original estimation, which is consistent with my earlier prediction that migration might bias coefficients toward zero. The results from the robustness check suggest that potential migration does not cause serious issues in estimations using the whole sample.

3.6 Conclusion

Between the 1970s and 1990s, state custody laws moved from maternal preference, also known as the "tender years doctrine", to the "best interests of the child" doctrine which gives fathers and mothers equal treatment in child custody cases. While the custody law reform intends to improve the welfare of the children who suffer from parental separation, it also induces changes in household bargaining for couples with children. This article attempts to evaluate the legal changes in custody assignment. I examine the implications of childhood exposure to gender-neutral custody laws for future educational outcomes as adults.

To empirically analyze the impact of the custody law reform, I created the first comprehensive coding of when each state changed its custody laws. I established that the pattern of custody law changes across states is independent of the movement towards unilateral divorce laws. The independence made it possible to estimate the two laws in one equation. I could compare my results with previous studies that only estimated the effect
of unilateral divorce laws.

In my conceptual framework, I developed an intra-household Nash bargaining model which predicts that the new, gender-neutral custody regulations give fathers greater bargaining power. Importantly, the change in the custody law alters the bargaining power for all married couples with children. The aggregate effect on child outcomes, however, is theoretically ambiguous, as it depends on the degree of bargaining power change within marriage and the effect of marital dissolution on children whose parents divorce.

Using the Census and the American Community Survey data, I estimated the effect of growing up in a gender-neutral custody law regime for children. My source of identification was the time difference in adopting the new custody laws across states. I found that being exposed to the gender-neutral custody law as a child reduces the likelihood of high school graduation and decreases average years of education. The negative effects have a larger magnitude when the years of exposure are longer, i.e., when the child is first exposed to the new custody law at a younger age. Furthermore, placebo tests show that the exposure as a young adult has a much smaller effect than the exposure during childhood. My results were robust to various checks, which includes controlling for childhood exposure to unilateral divorce laws, implying that changes in child custody laws have an effect on children that is independent of divorce legislation.

My empirical findings provide evidence that the increased bargaining power of fathers due to the adoption of gender-neutral custody laws negatively affects child outcomes. Living under a gender-neutral custody law regime has negative implications, on average, for
children, which seems to contradict with the welfare-improving goal of the legal reform. The custody law reform not only affects children in divorced families, but has an impact on those in intact families as well. Overall, changes in child custody laws have negative effects that were previously unnoticed on the educational outcomes of all children.

The findings in this paper have notable implications for future research. Changes in child custody laws play an important and overlooked role in child outcomes. The externalities of the legal reform are large and negative. Future analysis of trends in divorce, marriage and household economics should account for the role of changes in child custody assignment.
Figure 3.1 – Custody Law Reform, Divorce Law Reform and National Divorce Rate
Figure 3.2 – Equilibrium: Tangent Point Between IGPC and Family Budget Constraint
Figure 3.3 – Effect of FRS Change on Equilibrium
### Table 3.1 - Sample Means

<table>
<thead>
<tr>
<th></th>
<th>Men</th>
<th>Women</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exposed to new custody law before age 18 (%)</td>
<td>45.93</td>
<td>45.75</td>
</tr>
<tr>
<td>1 to 5 years of exposure (%)</td>
<td>13.27</td>
<td>13.31</td>
</tr>
<tr>
<td>6 to 13 years of exposure (%)</td>
<td>16.10</td>
<td>16.10</td>
</tr>
<tr>
<td>14 + years of exposure (%)</td>
<td>16.56</td>
<td>16.34</td>
</tr>
<tr>
<td>Years of exposure under 18</td>
<td>4.72</td>
<td>4.68</td>
</tr>
<tr>
<td>Exposed to Unilateral divorce before age 18 (%)</td>
<td>36.09</td>
<td>35.96</td>
</tr>
<tr>
<td>Age</td>
<td>34.86</td>
<td>34.96</td>
</tr>
<tr>
<td>White (%)</td>
<td>86.50</td>
<td>86.35</td>
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<tr>
<td>Black (%)</td>
<td>8.84</td>
<td>8.84</td>
</tr>
<tr>
<td>High school graduate (%)</td>
<td>86.86</td>
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</tr>
<tr>
<td>Years of education</td>
<td>13.00</td>
<td>13.08</td>
</tr>
<tr>
<td>No. of cells</td>
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<td>613,753</td>
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<td>No. of samples (before collapsing)</td>
<td>11,393,687</td>
<td>11,837,667</td>
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</tbody>
</table>

Notes: Data collapsed into cells by year, age, state of birth, state of residence and sex. IPUMS data from 1960 to 2010: 1960 1-percent state samples, 1970 1-percent state sample, 1980-2000 5-percent state samples, 2001-2004 0.4-percent ACS sample, 2005-2010 1-percent ACS sample. Restricted to population age 20-50. Excludes Maine and Washington. Sample means are weighted by number of observations in each cell.
### Table 3.2A - The Effect of Custody Laws on Educational Outcomes, Men

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>Dependent variable: High school graduate</th>
<th>Dependent variable: Years of education</th>
</tr>
</thead>
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<tr>
<td>Ever exposed</td>
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<td>No trend Linear Trends Quadratic Trends No trend Linear Trends Quadratic Trends</td>
</tr>
<tr>
<td>Years of exposure</td>
<td>-2.036** (0.328) -1.678** (0.240) -1.655** (0.232) -0.239** (0.051) -0.181** (0.032) -0.186** (0.0314)</td>
<td>-0.148** (0.036) -0.123** (0.031) -0.123** (0.0298) -0.013** (0.004) -0.007* (0.003) -0.008* (0.004)</td>
</tr>
<tr>
<td>Controls</td>
<td>√ √ √ √ √ √ √ √ √ √ √</td>
<td>√ √ √ √ √ √ √ √ √ √ √</td>
</tr>
<tr>
<td>Year effects</td>
<td>√ √ √ √ √ √ √ √ √ √ √</td>
<td>√ √ √ √ √ √ √ √ √ √ √</td>
</tr>
<tr>
<td>State of residence effects</td>
<td>√ √ √ √ √ √ √ √ √ √ √</td>
<td>√ √ √ √ √ √ √ √ √ √ √</td>
</tr>
<tr>
<td>State of birth effects</td>
<td>√ √ √ √ √ √ √ √ √ √ √</td>
<td>√ √ √ √ √ √ √ √ √ √ √</td>
</tr>
<tr>
<td>State of residence trends</td>
<td>√ √ √ √ √ √ √ √ √ √ √</td>
<td>√ √ √ √ √ √ √ √ √ √ √</td>
</tr>
<tr>
<td>State of birth trends</td>
<td>√ √ √ √ √ √ √ √ √ √ √</td>
<td>√ √ √ √ √ √ √ √ √ √ √</td>
</tr>
<tr>
<td>State of residence quadratic trends</td>
<td>√ √ √ √ √ √ √ √ √ √ √</td>
<td>√ √ √ √ √ √ √ √ √ √ √</td>
</tr>
<tr>
<td>State of birth quadratic trends</td>
<td>√ √ √ √ √ √ √ √ √ √ √</td>
<td>√ √ √ √ √ √ √ √ √ √ √</td>
</tr>
<tr>
<td>Age &amp; cohort effects</td>
<td>√ √ √ √ √ √ √ √ √ √ √</td>
<td>√ √ √ √ √ √ √ √ √ √ √</td>
</tr>
<tr>
<td>% of black &amp; white</td>
<td>√ √ √ √ √ √ √ √ √ √ √</td>
<td>√ √ √ √ √ √ √ √ √ √ √</td>
</tr>
<tr>
<td>Adjusted $R^2$</td>
<td>0.617 0.643 0.645 0.617 0.642 0.645</td>
<td>0.455 0.473 0.475 0.454 0.472 0.475</td>
</tr>
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<td>No. of cells</td>
<td>607,653 607,653 607,653 607,653 607,653 607,653</td>
<td>607,653 607,653 607,653 607,653 607,653 607,653</td>
</tr>
</tbody>
</table>

** $p<0.01$, * $p<0.05$, † $p<0.10$

Notes: With state population weights. Robust standard errors adjusted for heteroskedasticity are in parentheses. Coefficients on high school graduate are multiplied by 100. Restricted to population age 20-50. Excludes Maine and Washington.
Table 3.2B - The Effect of Custody Laws on Educational Outcomes, Women

<table>
<thead>
<tr>
<th>Independent Variables</th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
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</tr>
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<td>(8)</td>
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<td>(11)</td>
<td>(12)</td>
</tr>
<tr>
<td>Ever exposed</td>
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<td>Linear Trends</td>
<td>Quadratic Trends</td>
<td>No trend</td>
<td>Linear Trends</td>
<td>Quadratic Trends</td>
<td>No trend</td>
<td>Linear Trends</td>
<td>Quadratic Trends</td>
<td>No trend</td>
<td>Linear Trends</td>
<td>Quadratic Trends</td>
</tr>
<tr>
<td></td>
<td>-1.849**</td>
<td>-1.412**</td>
<td>-1.393**</td>
<td>-0.241**</td>
<td>-0.186**</td>
<td>-0.193**</td>
<td>-0.068*</td>
<td>-0.051*</td>
<td>-0.052*</td>
<td>-0.005</td>
<td>-0.001</td>
<td>-0.002</td>
</tr>
<tr>
<td></td>
<td>(0.360)</td>
<td>(0.217)</td>
<td>(0.202)</td>
<td>(0.053)</td>
<td>(0.025)</td>
<td>(0.024)</td>
<td>(0.029)</td>
<td>(0.024)</td>
<td>(0.023)</td>
<td>(0.004)</td>
<td>(0.003)</td>
<td>(0.003)</td>
</tr>
<tr>
<td>Years of exposure</td>
<td>No trend</td>
<td>Linear Trends</td>
<td>Quadratic Trends</td>
<td>No trend</td>
<td>Linear Trends</td>
<td>Quadratic Trends</td>
<td>No trend</td>
<td>Linear Trends</td>
<td>Quadratic Trends</td>
<td>No trend</td>
<td>Linear Trends</td>
<td>Quadratic Trends</td>
</tr>
<tr>
<td></td>
<td>-0.241**</td>
<td>-0.186**</td>
<td>-0.193**</td>
<td>-0.068*</td>
<td>-0.051*</td>
<td>-0.052*</td>
<td>-0.005</td>
<td>-0.001</td>
<td>-0.002</td>
<td>-0.005</td>
<td>-0.001</td>
<td>-0.002</td>
</tr>
<tr>
<td></td>
<td>(0.053)</td>
<td>(0.025)</td>
<td>(0.024)</td>
<td>(0.029)</td>
<td>(0.024)</td>
<td>(0.023)</td>
<td>(0.004)</td>
<td>(0.003)</td>
<td>(0.003)</td>
<td>(0.004)</td>
<td>(0.003)</td>
<td>(0.003)</td>
</tr>
</tbody>
</table>

** Controls **

- Year effects
- State of residence effects
- State of birth effects
- State of residence trends
- State of birth trends
- State of residence quadratic trends
- State of birth quadratic trends
- Age & cohort effects
- % of black & white

<table>
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<tr>
<th>Adjusted R²</th>
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<th>0.686</th>
<th>0.688</th>
<th>0.652</th>
<th>0.686</th>
<th>0.689</th>
<th>0.550</th>
<th>0.563</th>
<th>0.565</th>
<th>0.550</th>
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<td>613,753</td>
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<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
</tr>
</tbody>
</table>

** p<0.01, * p<0.05, † p<0.10

Notes: With state population weights. Robust standard errors adjusted for heteroskedasticity are in parentheses. Coefficients on high school graduate are multiplied by 100. Restricted to population age 20-50. Excludes Maine and Washington.
Table 3.3 - Amount of Exposure to Custody Laws on Educational Outcomes

<table>
<thead>
<tr>
<th></th>
<th>Men</th>
<th>Women</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>High school graduate</td>
<td>Years of education</td>
</tr>
<tr>
<td></td>
<td>Mean = 86.86%</td>
<td>Mean = 13.00 years</td>
</tr>
<tr>
<td>Independent variables:</td>
<td>(1)</td>
<td>(2)</td>
</tr>
<tr>
<td>Length of exposure</td>
<td>No trend</td>
<td>Trend</td>
</tr>
<tr>
<td>1 to 5 years</td>
<td>-2.200**</td>
<td>-1.984**</td>
</tr>
<tr>
<td></td>
<td>(0.288)</td>
<td>(0.222)</td>
</tr>
<tr>
<td>6 to 13 years</td>
<td>-2.509**</td>
<td>-1.998**</td>
</tr>
<tr>
<td></td>
<td>(0.520)</td>
<td>(0.389)</td>
</tr>
<tr>
<td>14+ years</td>
<td>-4.347**</td>
<td>-3.506**</td>
</tr>
<tr>
<td></td>
<td>(0.830)</td>
<td>(0.503)</td>
</tr>
</tbody>
</table>

Controls

- Year effects: ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓
- State of residence effects: ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓
- State of birth effects: ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓
- State of residence trends: ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓
- State of birth trends: ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓
- Age & cohort effects: ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓
- % of black & white: ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓

Adjusted R^2 0.618 0.643 0.456 0.474 0.652 0.686 0.551 0.564
No. of cells  607,653  607,653  607,653  607,653  613,753  613,753  613,753  613,753

** p<0.01, * p<0.05, † p<0.10

Notes: With state population weights. Robust standard errors adjusted for heteroskedasticity are in parentheses. Coefficients on high school graduate are multiplied by 100. Restricted to population age 20-50. Excludes Maine and Washington.
Table 3.4A - Placebo Tests

<table>
<thead>
<tr>
<th>Dependent variable:</th>
<th>Men</th>
<th>Years of education</th>
<th>Men</th>
<th>Years of education</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mean = 86.86%</td>
<td>Mean = 13.00 years</td>
<td>Mean = 88.46%</td>
<td>Mean = 13.08 years</td>
</tr>
<tr>
<td>Independent variables:</td>
<td>(1)</td>
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<td>(3)</td>
<td>(4)</td>
</tr>
<tr>
<td>Age of first exposure</td>
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<td>Linear Trends</td>
<td>Quadratic Trends</td>
<td>No trend</td>
</tr>
<tr>
<td>Between 18 and 25</td>
<td>-1.069**</td>
<td>-1.070**</td>
<td>-1.070**</td>
<td>-0.099**</td>
</tr>
<tr>
<td></td>
<td>(0.290)</td>
<td>(0.250)</td>
<td>(0.263)</td>
<td>(0.035)</td>
</tr>
<tr>
<td>Before 18</td>
<td>-2.946**</td>
<td>-2.622**</td>
<td>-2.613**</td>
<td>-0.232**</td>
</tr>
<tr>
<td></td>
<td>(0.422)</td>
<td>(0.268)</td>
<td>(0.263)</td>
<td>(0.046)</td>
</tr>
<tr>
<td>Ratio: $\beta_{18-25}/\beta_{Before18}$</td>
<td>0.36</td>
<td>0.41</td>
<td>0.41</td>
<td>0.43</td>
</tr>
<tr>
<td>F test: $\beta_{18-25} &gt; \beta_{Before18}$</td>
<td>34.66</td>
<td>38.25</td>
<td>40.09</td>
<td>14.31</td>
</tr>
<tr>
<td>P-value</td>
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<td>Year effects</td>
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</tr>
<tr>
<td>State of residence effects</td>
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</tr>
<tr>
<td>State of birth effects</td>
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</tr>
<tr>
<td>State of residence trends</td>
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<td>√</td>
<td>√</td>
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<td>√</td>
</tr>
<tr>
<td>State of residence quadratic trends</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>State of birth quadratic trends</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>Age &amp; cohort effects</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>% of black &amp; white</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>Adjusted $R^2$</td>
<td>0.617</td>
<td>0.643</td>
<td>0.645</td>
<td>0.455</td>
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<td>No. of cells</td>
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<td>607,653</td>
<td>607,653</td>
<td>607,653</td>
</tr>
</tbody>
</table>

** p<0.01, * p<0.05, † p<0.10

Notes: With state population weights. Robust standard errors adjusted for heteroskedasticity are in parentheses. Coefficients on high school graduate are multiplied by 100. Restricted to population age 20-50. Excludes Maine and Washington.
### Table 3.4B - Placebo Tests, Different Length of Exposure During Childhood

<table>
<thead>
<tr>
<th>Dependent variable:</th>
<th>High school graduate</th>
<th>Years of education</th>
<th></th>
<th></th>
<th></th>
<th>Women</th>
<th>Years of education</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mean = 86.86%</td>
<td>Mean = 13.00 years</td>
<td></td>
<td></td>
<td>Mean = 88.46%</td>
<td>Mean = 13.08 years</td>
<td></td>
</tr>
<tr>
<td>Independent variables:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Age of first exposure</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Between 18 and 25</td>
<td>-1.614** (-1.575** -1.574**)</td>
<td>-1.26** (-0.122** -0.123**)</td>
<td>-1.313** (-0.370) (-0.243)</td>
<td>-0.126** (-0.036) (-0.036)</td>
<td>-0.010* (-0.034) (-0.034)</td>
<td>-0.122** (-0.036) (-0.036)</td>
<td>-0.027 (0.030) (0.030)</td>
</tr>
<tr>
<td></td>
<td>(0.348) (0.285) (0.293)</td>
<td>(0.0403) (0.036) (0.036)</td>
<td>(0.370) (0.243) (0.243)</td>
<td>(0.036) (0.036) (0.036)</td>
<td>(0.034) (0.034) (0.034)</td>
<td>(0.036) (0.036) (0.036)</td>
<td>(0.030) (0.030) (0.030)</td>
</tr>
<tr>
<td>Between 13 and 18</td>
<td>-3.549** (-3.397** -3.398**)</td>
<td>-0.301** (-0.287** -0.290**)</td>
<td>-2.957** (-0.577) (-0.349)</td>
<td>-0.126** (-0.0492) (-0.037)</td>
<td>-0.100* (-0.037) (-0.037)</td>
<td>-0.287** (-0.037) (-0.037)</td>
<td>-0.070* (0.044) (0.044)</td>
</tr>
<tr>
<td></td>
<td>(0.474) (0.328) (0.327)</td>
<td>(0.0492) (0.037) (0.037)</td>
<td>(0.577) (0.349) (0.332)</td>
<td>(0.037) (0.037) (0.037)</td>
<td>(0.044) (0.044) (0.044)</td>
<td>(0.037) (0.037) (0.037)</td>
<td>(0.033) (0.033) (0.033)</td>
</tr>
<tr>
<td>Between 5 and 13</td>
<td>-4.133** (-3.741** -3.761**)</td>
<td>-0.238** (-0.202** -0.209**)</td>
<td>-3.902** (-0.825) (-0.449)</td>
<td>-0.126** (-0.0644) (-0.045)</td>
<td>-0.115 (-0.059) (-0.059)</td>
<td>-0.202** (-0.045) (-0.045)</td>
<td>-0.070* (0.044) (0.044)</td>
</tr>
<tr>
<td></td>
<td>(0.704) (0.470) (0.457)</td>
<td>(0.0644) (0.045) (0.045)</td>
<td>(0.825) (0.449) (0.448)</td>
<td>(0.045) (0.045) (0.045)</td>
<td>(0.059) (0.059) (0.059)</td>
<td>(0.045) (0.045) (0.045)</td>
<td>(0.044) (0.044) (0.044)</td>
</tr>
<tr>
<td>Before 5</td>
<td>-6.363** (-5.740** -5.784**)</td>
<td>-0.439** (-0.380** -0.392**)</td>
<td>-5.828** (-1.525) (-1.640)</td>
<td>-0.126** (-0.099) (-0.069)</td>
<td>-0.115 (-0.089) (-0.089)</td>
<td>-0.380** (-0.069) (-0.069)</td>
<td>-0.040 (0.068) (0.068)</td>
</tr>
<tr>
<td></td>
<td>(1.098) (0.668) (0.653)</td>
<td>(0.099) (0.069) (0.072)</td>
<td>(1.525) (0.640) (0.626)</td>
<td>(0.069) (0.069) (0.072)</td>
<td>(0.089) (0.089) (0.089)</td>
<td>(0.069) (0.069) (0.069)</td>
<td>(0.068) (0.068) (0.068)</td>
</tr>
<tr>
<td>Ratio: $\beta_{18-25}/\beta_{13-18}$</td>
<td>0.45</td>
<td>0.46</td>
<td>0.46</td>
<td>0.42</td>
<td>0.43</td>
<td>0.42</td>
<td>0.44</td>
</tr>
<tr>
<td>F test: $\beta_{18-25} &gt; \beta_{13-18}$</td>
<td>54.65</td>
<td>64.94</td>
<td>67.84</td>
<td>31.17</td>
<td>35.24</td>
<td>38.09</td>
<td>39.20</td>
</tr>
<tr>
<td>P value</td>
<td>0.000</td>
<td>0.000</td>
<td>0.000</td>
<td>0.000</td>
<td>0.000</td>
<td>0.000</td>
<td>0.000</td>
</tr>
</tbody>
</table>

** Controls
- Year effects
- State of residence effects
- State of birth effects
- State of residence trends
- State of birth trends
- State of residence quadratic trends
- State of birth quadratic trends
- Age & cohort effects
- % of black & white

<table>
<thead>
<tr>
<th>% of black &amp; white</th>
<th>0.619</th>
<th>0.644</th>
<th>0.646</th>
<th>0.457</th>
<th>0.475</th>
<th>0.477</th>
<th>0.653</th>
<th>0.687</th>
<th>0.689</th>
<th>0.551</th>
<th>0.564</th>
<th>0.566</th>
</tr>
</thead>
<tbody>
<tr>
<td>No. of cells</td>
<td>607,653</td>
<td>607,653</td>
<td>607,653</td>
<td>607,653</td>
<td>607,653</td>
<td>607,653</td>
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<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
</tr>
</tbody>
</table>

** p<0.01, * p<0.05, † p<0.10

Notes: With state population weights. Robust standard errors adjusted for heteroskedasticity are in parentheses. Coefficients on high school graduate are multiplied by 100.

Table 3.5A - The Effect of Custody Laws and Unilateral Divorce on Educational Outcomes, Men

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>Dependent variable: High school graduate</th>
<th>Dependent variable: Years of education</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mean = 86.86%</td>
<td>Mean = 13.00 years</td>
</tr>
<tr>
<td></td>
<td>(1) (2) (3) (4) (5) (6) (7) (8) (9) (10) (11) (12)</td>
<td></td>
</tr>
<tr>
<td>Ever exposed</td>
<td>-2.036**</td>
<td>-0.148**</td>
</tr>
<tr>
<td>(Custody laws)</td>
<td>(0.328)</td>
<td>(0.036)</td>
</tr>
<tr>
<td>Ever exposed</td>
<td>-2.201**</td>
<td>-0.212**</td>
</tr>
<tr>
<td>(Unilateral divorce law)</td>
<td>(0.690)</td>
<td>(0.060)</td>
</tr>
<tr>
<td>Years of exposure</td>
<td>-0.239**</td>
<td>-0.223**</td>
</tr>
<tr>
<td>(Custody laws)</td>
<td>(0.051)</td>
<td>(0.048)</td>
</tr>
<tr>
<td>Ever exposed</td>
<td>-2.201**</td>
<td>-0.212**</td>
</tr>
<tr>
<td>(Unilateral divorce law)</td>
<td>(0.690)</td>
<td>(0.060)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Controls</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Year effects</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>State of residence effects</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>State of birth effects</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>State of residence trends</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>State of birth trends</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>Age &amp; cohort effects</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>% of black &amp; white</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>Adjusted R²</td>
<td>0.617 0.617 0.618 0.617 0.617 0.619 0.619</td>
<td>0.455 0.456 0.456 0.456 0.456 0.456 0.456</td>
</tr>
<tr>
<td>No. of cells</td>
<td>607,653 607,653 607,653 607,653 607,653 607,653</td>
<td>607,653 607,653 607,653 607,653 607,653</td>
</tr>
</tbody>
</table>

** p<0.01, * p<0.05, † p<0.10

Notes: With state population weights. Robust standard errors adjusted for heteroskedasticity are in parentheses. Coefficients on high school graduate are multiplied by 100. Restricted to population age 20-50. Excludes Maine and Washington. Specifications do not control for state of residence trends or state of birth trends. Results from specifications with trends are reported in Appendix Table B.2A.
Table 3.5B - The Effect of Custody Laws and Unilateral Divorce on Educational Outcomes, Women

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>Dependent variable: High school graduate</th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th>Dependent variable: Years of education</th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mean = 88.46%</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td>6</td>
<td>Mean = 13.08 years</td>
<td>7</td>
<td>8</td>
<td>9</td>
<td>10</td>
</tr>
<tr>
<td>Ever exposed</td>
<td>-1.849**</td>
<td>-1.604**</td>
<td>(Custody laws)</td>
<td>0.360</td>
<td>(0.360)</td>
<td>0.323</td>
<td>(0.323)</td>
<td>-0.069*</td>
<td>-0.046†</td>
<td>(0.029)</td>
<td>(0.027)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(Unilateral divorce law)</td>
<td>-1.688*</td>
<td>-1.359†</td>
<td>(Unilateral divorce law)</td>
<td>0.824</td>
<td>(0.824)</td>
<td>0.810</td>
<td>(0.810)</td>
<td>-0.131**</td>
<td>-0.121**</td>
<td>(0.046)</td>
<td>(0.045)</td>
</tr>
<tr>
<td>Years of exposure</td>
<td>-0.241**</td>
<td>-0.230**</td>
<td>(Custody laws)</td>
<td>0.053</td>
<td>(0.053)</td>
<td>0.050</td>
<td>(0.050)</td>
<td>-0.005</td>
<td>-0.004†</td>
<td>(0.004)</td>
<td>(0.003)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(Unilateral divorce law)</td>
<td>-1.688*</td>
<td>-1.515†</td>
<td>(Unilateral divorce law)</td>
<td>0.824</td>
<td>(0.824)</td>
<td>0.783</td>
<td>(0.783)</td>
<td>-0.131**</td>
<td>-0.128**</td>
<td>(0.046)</td>
<td>(0.045)</td>
</tr>
<tr>
<td>** Controls **</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Year effects</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
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<td>√</td>
<td>√</td>
</tr>
<tr>
<td>State of residence</td>
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<td>√</td>
<td>√</td>
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<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>State of birth</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
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<tr>
<td>State of residence</td>
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<tr>
<td>State of birth</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Age &amp; cohort effects</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>% of black &amp; white</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>Adjusted R²</td>
<td>0.651</td>
<td>0.651</td>
<td>0.652</td>
<td>0.652</td>
<td>0.651</td>
<td>0.653</td>
<td>0.653</td>
<td>0.550</td>
<td>0.551</td>
<td>0.551</td>
<td>0.551</td>
<td>0.550</td>
</tr>
<tr>
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<td>613,753</td>
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<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
</tr>
</tbody>
</table>

** p<0.01, * p<0.05, † p<0.10

Notes: With state population weights. Robust standard errors adjusted for heteroskedasticity are in parentheses. Coefficients on high school graduate are multiplied by 100. Restricted to population age 20-50. Excludes Maine and Washington. Specifications do not control for state of residence trends or state of birth trends. Results from specifications with trends are reported in Appendix Table B.2B.
Table 3.6 - Sample Means for Individuals with the Same State of Birth and State of Residence
A direct comparison with Table 3.1

<table>
<thead>
<tr>
<th></th>
<th>Men</th>
<th>Women</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exposed to new custody law before age 18 (%)</td>
<td>47.22887</td>
<td>47.01159</td>
</tr>
<tr>
<td>Exposed to Unilateral divorce before age 18 (%)</td>
<td>37.18503</td>
<td>36.87589</td>
</tr>
<tr>
<td>Age</td>
<td>34.4213</td>
<td>34.51598</td>
</tr>
<tr>
<td>White (%)</td>
<td>10.90243</td>
<td>12.79763</td>
</tr>
<tr>
<td>Black (%)</td>
<td>84.35505</td>
<td>82.45939</td>
</tr>
<tr>
<td>Years of education</td>
<td>12.69659</td>
<td>12.85333</td>
</tr>
<tr>
<td>High school graduate (%)</td>
<td>85.29866</td>
<td>87.39243</td>
</tr>
<tr>
<td>No. of cells</td>
<td>22781</td>
<td>22772</td>
</tr>
<tr>
<td>No. of samples (before collapsing)</td>
<td>7341530</td>
<td>7625136</td>
</tr>
</tbody>
</table>

Table 3.7A - Robustness Check for Migration. The Effect of Custody Laws on Educational Outcomes, Men
Restricted to individuals with the same state of birth and state of residence. A direct comparison with Table 3.2A.

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>Dependent variable: High school graduate</th>
<th>Dependent variable: Years of education</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1) (2) (3) (4)</td>
<td>(5) (6) (7) (8)</td>
</tr>
<tr>
<td>Ever exposed</td>
<td>No trend Trend No trend Trend</td>
<td>No trend Trend No trend Trend</td>
</tr>
<tr>
<td>Control</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Year effects</td>
<td>√ √ √ √</td>
<td>√ √ √ √</td>
</tr>
<tr>
<td>State of birth effects</td>
<td>√ √ √ √</td>
<td>√ √ √ √</td>
</tr>
<tr>
<td>State of birth trends</td>
<td>√ √ √ √</td>
<td>√ √ √ √</td>
</tr>
<tr>
<td>Age &amp; cohort effects</td>
<td>√ √ √ √</td>
<td>√ √ √ √</td>
</tr>
<tr>
<td>% of black &amp; white</td>
<td>√ √ √ √</td>
<td>√ √ √ √</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>(1) Mean = 85.30%</th>
<th>(2)</th>
<th>(3)</th>
<th>(4)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ever exposed</td>
<td>-2.393** (0.616)</td>
<td>-2.025** (0.466)</td>
<td>-0.182** (0.065)</td>
<td>-0.155* (0.059)</td>
</tr>
<tr>
<td>Years of exposure</td>
<td>-0.257** (0.079)</td>
<td>-0.225** (0.054)</td>
<td>-0.012* (0.006)</td>
<td>-0.008† (0.004)</td>
</tr>
</tbody>
</table>

| Adjusted R²    | 0.887 0.915 0.887 0.915                   | 0.779 0.811 0.777 0.809       |
| No. of cells   | 22,781 22,781 22,781 22,781               | 22,781 22,781 22,781 22,781   |

** p<0.01, * p<0.05, † p<0.10
Notes: With state population weights. Robust standard errors adjusted for heteroskedasticity are in parentheses. Coefficients on high school graduate are multiplied by 100. Restricted to population age 20-50. Excludes Maine and Washington.
Table 3.7B - Robustness Check for Migration. The Effect of Custody Laws on Educational Outcomes, Women
Restricted to individuals with the same state of birth and state of residence. A direct comparison with Table 3.2B.

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>Dependent variable: High school graduate</th>
<th>Dependent variable: Years of education</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mean = 87.39%</td>
<td>Mean = 12.85 years</td>
</tr>
<tr>
<td></td>
<td>(1)</td>
<td>(2)</td>
</tr>
<tr>
<td>Ever exposed</td>
<td>No trend</td>
<td>Trend</td>
</tr>
<tr>
<td></td>
<td>-2.010**</td>
<td>-1.567**</td>
</tr>
<tr>
<td></td>
<td>(0.618)</td>
<td>(0.411)</td>
</tr>
<tr>
<td></td>
<td>(3)</td>
<td>(4)</td>
</tr>
<tr>
<td>Years of exposure</td>
<td>No trend</td>
<td>Trend</td>
</tr>
<tr>
<td></td>
<td>-0.260**</td>
<td>-0.223**</td>
</tr>
<tr>
<td></td>
<td>(0.085)</td>
<td>(0.047)</td>
</tr>
<tr>
<td>Controls</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Year effects</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>State of birth effects</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>State of birth trends</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>Age &amp; cohort effects</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>% of black &amp; white</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>Adjusted R²</td>
<td>0.889</td>
<td>0.930</td>
</tr>
<tr>
<td>No. of cells</td>
<td>22,772</td>
<td>22,772</td>
</tr>
</tbody>
</table>

** p<0.01, * p<0.05, † p<0.10

Notes: With state population weights. Robust standard errors adjusted for heteroskedasticity are in parentheses. Coefficients on high school graduate are multiplied by 100. Restricted to population age 20-50. Excludes Maine and Washington.
References


Brown, Meta, and Christopher Flinn. (2011). Family Law Effects on Divorce, Fertility and 283


Appendix A: Appendix Tables of Chapter 2
### Table A.1 - A Direct Comparison with Table 2.2, Using Shorter Sample

Dependent variable: Annual divorces per 1,000 persons. Cell mean = 4.59.

<table>
<thead>
<tr>
<th></th>
<th>(A) Basic Specification</th>
<th>(B) State-specific linear trends</th>
<th>(C) State-specific quadratic trends</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Child Custody</td>
<td>0.041</td>
<td>0.039</td>
<td>0.071†</td>
</tr>
<tr>
<td></td>
<td>(0.046)</td>
<td>(0.046)</td>
<td>(0.037)</td>
</tr>
<tr>
<td>Unilateral</td>
<td>0.024</td>
<td>0.017</td>
<td>0.309**</td>
</tr>
<tr>
<td></td>
<td>(0.061)</td>
<td>(0.062)</td>
<td>(0.054)</td>
</tr>
<tr>
<td>Controls</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Year effects</td>
<td>Yes,F=72.1</td>
<td>Yes,F=80.2</td>
<td>Yes,F=59.5</td>
</tr>
<tr>
<td>State effects</td>
<td>Yes,F=273.3</td>
<td>Yes,F=212.3</td>
<td>Yes,F=207.0</td>
</tr>
<tr>
<td>State trend, linear</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>State trend, quadratic</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Adjusted R²</td>
<td>0.941</td>
<td>0.941</td>
<td>0.941</td>
</tr>
</tbody>
</table>

** p<0.01, * p<0.05, † p<0.10

Notes: Samples: 1968-1988, n = 2545. With state population weights. Robust standard errors are in parentheses.
Table A.2 - A Direct Comparison with Table 2.3, Using Shorter Samples

Dependent variable: Annual divorces per 1,000 persons. Cell mean = 3.88.

<table>
<thead>
<tr>
<th></th>
<th>(A) Basic Specification</th>
<th>(B) State-specific linear trends</th>
<th>(C) State-specific quadratic trends</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>First 2 years</td>
<td>0.001</td>
<td>-0.046</td>
<td>0.096*</td>
</tr>
<tr>
<td></td>
<td>(0.068)</td>
<td>(0.067)</td>
<td>(0.048)</td>
</tr>
<tr>
<td>Years 3-4</td>
<td>-0.0180</td>
<td>-0.064</td>
<td>0.102†</td>
</tr>
<tr>
<td></td>
<td>(0.070)</td>
<td>(0.070)</td>
<td>(0.055)</td>
</tr>
<tr>
<td>Years 5-6</td>
<td>0.002</td>
<td>-0.025</td>
<td>0.155*</td>
</tr>
<tr>
<td></td>
<td>(0.076)</td>
<td>(0.076)</td>
<td>(0.065)</td>
</tr>
<tr>
<td>Years 7-8</td>
<td>-0.022</td>
<td>0.0551</td>
<td>0.166*</td>
</tr>
<tr>
<td></td>
<td>(0.082)</td>
<td>(0.083)</td>
<td>(0.077)</td>
</tr>
<tr>
<td>Years 9-10</td>
<td>-0.109</td>
<td>-0.082</td>
<td>0.097</td>
</tr>
<tr>
<td></td>
<td>(0.088)</td>
<td>(0.088)</td>
<td>(0.090)</td>
</tr>
<tr>
<td>Years 11-12</td>
<td>-0.095</td>
<td>0.032</td>
<td>0.070</td>
</tr>
<tr>
<td></td>
<td>(0.096)</td>
<td>(0.096)</td>
<td>(0.105)</td>
</tr>
<tr>
<td>Years 13-14</td>
<td>-0.157</td>
<td>0.083</td>
<td>-0.027</td>
</tr>
<tr>
<td></td>
<td>(0.112)</td>
<td>(0.113)</td>
<td>(0.127)</td>
</tr>
<tr>
<td>Years 15 onwards</td>
<td>-0.358*</td>
<td>-0.066</td>
<td>-0.158</td>
</tr>
<tr>
<td></td>
<td>(0.125)</td>
<td>(0.127)</td>
<td>(0.149)</td>
</tr>
</tbody>
</table>

** p<0.01, * p<0.05, † p<0.10

Notes: Samples: 1956-1988. n = 2545. With state population weights. Robust standard errors are in parentheses.
Table A.3 - Dynamic Effects of Two Laws, on Married Population. Column 9 is shown in Table 2.4.
Dependent variable: Annual divorces per 1,000 married persons age 18 plus. Cell mean = 6.26.

<table>
<thead>
<tr>
<th></th>
<th>Basic Specification</th>
<th>State-specific linear trends</th>
<th>State-specific quadratic trends</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>First 2 years</td>
<td>-0.031</td>
<td>-0.097</td>
<td>0.036</td>
</tr>
<tr>
<td></td>
<td>(0.114)</td>
<td>(0.113)</td>
<td>(0.071)</td>
</tr>
<tr>
<td>Years 3-4</td>
<td>-0.016</td>
<td>-0.099</td>
<td>0.071</td>
</tr>
<tr>
<td></td>
<td>(0.118)</td>
<td>(0.116)</td>
<td>(0.074)</td>
</tr>
<tr>
<td>Years 5-6</td>
<td>-0.036</td>
<td>-0.110</td>
<td>0.081</td>
</tr>
<tr>
<td></td>
<td>(0.121)</td>
<td>(0.120)</td>
<td>(0.077)</td>
</tr>
<tr>
<td>Years 7-8</td>
<td>0.015</td>
<td>-0.036</td>
<td>0.162*</td>
</tr>
<tr>
<td></td>
<td>(0.126)</td>
<td>(0.125)</td>
<td>(0.080)</td>
</tr>
<tr>
<td>Years 9-10</td>
<td>-0.095</td>
<td>-0.106</td>
<td>0.090</td>
</tr>
<tr>
<td></td>
<td>(0.129)</td>
<td>(0.128)</td>
<td>(0.083)</td>
</tr>
<tr>
<td>Years 11-12</td>
<td>-0.110</td>
<td>-0.069</td>
<td>0.125</td>
</tr>
<tr>
<td></td>
<td>(0.133)</td>
<td>(0.132)</td>
<td>(0.087)</td>
</tr>
<tr>
<td>Years 13-14</td>
<td>-0.088</td>
<td>0.014</td>
<td>0.181*</td>
</tr>
<tr>
<td></td>
<td>(0.137)</td>
<td>(0.135)</td>
<td>(0.091)</td>
</tr>
<tr>
<td>Years 15 onwards</td>
<td>-0.349**</td>
<td>-0.196</td>
<td>0.149</td>
</tr>
<tr>
<td></td>
<td>(0.131)</td>
<td>(0.129)</td>
<td>(0.098)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>(A)</th>
<th>(B)</th>
<th>(C)</th>
</tr>
</thead>
<tbody>
<tr>
<td>First 2 years</td>
<td>0.363*</td>
<td>0.367*</td>
<td>0.556**</td>
</tr>
<tr>
<td></td>
<td>(0.160)</td>
<td>(0.160)</td>
<td>(0.104)</td>
</tr>
<tr>
<td>Years 3-4</td>
<td>0.246</td>
<td>0.270†</td>
<td>0.529**</td>
</tr>
<tr>
<td></td>
<td>(0.161)</td>
<td>(0.163)</td>
<td>(0.108)</td>
</tr>
<tr>
<td>Years 5-6</td>
<td>0.284†</td>
<td>0.316†</td>
<td>0.646**</td>
</tr>
<tr>
<td></td>
<td>(0.159)</td>
<td>(0.161)</td>
<td>(0.111)</td>
</tr>
<tr>
<td>Years 7-8</td>
<td>0.252</td>
<td>0.281†</td>
<td>0.700***</td>
</tr>
<tr>
<td></td>
<td>(0.158)</td>
<td>(0.161)</td>
<td>(0.114)</td>
</tr>
<tr>
<td>Years 9-10</td>
<td>0.025</td>
<td>0.037</td>
<td>0.568**</td>
</tr>
<tr>
<td></td>
<td>(0.157)</td>
<td>(0.160)</td>
<td>(0.118)</td>
</tr>
<tr>
<td>Years 11-12</td>
<td>-0.195</td>
<td>-0.182</td>
<td>0.460**</td>
</tr>
<tr>
<td></td>
<td>(0.155)</td>
<td>(0.158)</td>
<td>(0.123)</td>
</tr>
<tr>
<td>Years 13-14</td>
<td>-0.390*</td>
<td>-0.381*</td>
<td>0.406**</td>
</tr>
<tr>
<td></td>
<td>(0.153)</td>
<td>(0.156)</td>
<td>(0.129)</td>
</tr>
<tr>
<td>Years 15 onwards</td>
<td>-0.809**</td>
<td>-0.788**</td>
<td>0.581**</td>
</tr>
<tr>
<td></td>
<td>(0.090)</td>
<td>(0.091)</td>
<td>(0.134)</td>
</tr>
</tbody>
</table>

Adjusted $R^2$ 0.870 0.877 0.877 0.952 0.953 0.954 0.972 0.972 0.973

** p<0.01, * p<0.05, † p<0.10
Notes: Samples: 1956-2010. n = 2545. With state population weights. Robust standard errors are in parentheses.
Table A.4 - A Direct Comparison with Table 2.7, Using Shorter Sample

<table>
<thead>
<tr>
<th></th>
<th>Adult Female</th>
<th>Trend</th>
<th>Adult Male</th>
<th>Trend</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Divorced</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Custody</td>
<td>0.103</td>
<td>-0.025</td>
<td>0.203</td>
<td>0.138</td>
</tr>
<tr>
<td></td>
<td>(0.221)</td>
<td>(0.197)</td>
<td>(0.181)</td>
<td>(0.176)</td>
</tr>
<tr>
<td>Unilateral</td>
<td>1.073**</td>
<td>1.078**</td>
<td>0.583</td>
<td>0.533</td>
</tr>
<tr>
<td></td>
<td>(0.32)</td>
<td>(0.324)</td>
<td>(0.387)</td>
<td>(0.376)</td>
</tr>
<tr>
<td><strong>Separated</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Custody</td>
<td>0.508**</td>
<td>0.497**</td>
<td>0.515**</td>
<td>0.559**</td>
</tr>
<tr>
<td></td>
<td>(0.121)</td>
<td>(0.115)</td>
<td>(0.151)</td>
<td>(0.144)</td>
</tr>
<tr>
<td>Unilateral</td>
<td>0.183</td>
<td>0.087</td>
<td>-0.152</td>
<td>-0.357</td>
</tr>
<tr>
<td></td>
<td>(0.179)</td>
<td>(0.169)</td>
<td>(0.331)</td>
<td>(0.266)</td>
</tr>
<tr>
<td><strong>Married (excluding separated)</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Custody</td>
<td>-0.679</td>
<td>-0.587</td>
<td>-1.196**</td>
<td>-1.137**</td>
</tr>
<tr>
<td></td>
<td>(0.449)</td>
<td>(0.395)</td>
<td>(0.427)</td>
<td>(0.395)</td>
</tr>
<tr>
<td>Unilateral</td>
<td>-0.881</td>
<td>-0.768</td>
<td>-0.902</td>
<td>-0.484</td>
</tr>
<tr>
<td></td>
<td>(0.955)</td>
<td>(0.916)</td>
<td>(1.075)</td>
<td>(0.967)</td>
</tr>
</tbody>
</table>

| Controls       | Year FE       | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
|                | State FE      | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
|                | State * time  | No  | No  | No  | Yes | Yes | No  | No  | Yes | Yes | Yes | Yes |
|                | No. of cells  | 5,096| 5,096| 5,096| 5,096| 5,096| 5,096| 5,096| 5,096| 5,096| 5,096| 5,096|

** p<0.01, * p<0.05, † p<0.10

Appendix B: Appendix Tables of Chapter 3
Table B.1A - The Effect of Custody Laws on Other Educational Outcomes, Men

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>Dependent variable: Some college Mean = 52.84%</th>
<th>Dependent variable: College and above Mean = 23.19%</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1) No trend</td>
<td>(2) Trend</td>
</tr>
<tr>
<td>Ever exposed</td>
<td>-1.903** (0.544)</td>
<td>-2.042** (0.559)</td>
</tr>
<tr>
<td>Years of exposure</td>
<td>-0.004 (0.065)</td>
<td>0.027 (0.069)</td>
</tr>
</tbody>
</table>

Controls

- Year effects: √ √ √ √ √ √ √ √
- State of residence effects: √ √ √ √ √ √ √ √
- State of birth effects: √ √ √ √ √ √ √ √
- State of residence trends: √ √ √ √ √ √ √ √
- State of birth trends: √ √ √ √ √ √ √ √
- Age & cohort effects: √ √ √ √ √ √ √ √
- % of black & white: √ √ √ √ √ √ √ √

Adjusted R^2 | 0.411 0.417 0.410 0.416 | 0.276 0.284 0.276 0.284 |
No. of cells  | 607,653 607,653 607,653 607,653 | 607,653 607,653 607,653 607,653 |

** p<0.01, * p<0.05, † p<0.10

Notes: With state population weights. Robust standard errors adjusted for heteroskedasticity are in parentheses. All coefficients are multiplied by 100. Restricted to population age 20-50. Excludes Maine and Washington.
Table B.1B - The Effect of Custody Laws on Other Educational Outcomes, Women

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>(1) Ever exposed</th>
<th>(2) Ever exposed</th>
<th>(3) Ever exposed</th>
<th>(4) Ever exposed</th>
<th>(5) Years of exposure</th>
<th>(6) Years of exposure</th>
<th>(7) Years of exposure</th>
<th>(8) Years of exposure</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No trend</td>
<td>Trend</td>
<td>No trend</td>
<td>Trend</td>
<td>No trend</td>
<td>Trend</td>
<td>No trend</td>
<td>Trend</td>
</tr>
<tr>
<td>Ever exposed</td>
<td>-0.645†</td>
<td>-0.785*</td>
<td>0.376</td>
<td>0.146</td>
<td>0.376 (0.339)</td>
<td>0.146 (0.397)</td>
<td>0.133*</td>
<td>0.121†</td>
</tr>
<tr>
<td>Years of exposure</td>
<td>-0.020 (0.067)</td>
<td>-0.016 (0.064)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Controls</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Year effects</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>State of residence effects</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>State of birth effects</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>State of residence trends</td>
<td>√</td>
<td>√</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>State of birth trends</td>
<td>√</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Age &amp; cohort effects</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>% of black &amp; white</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>Adjusted R²</td>
<td>0.597</td>
<td>0.601</td>
<td>0.597</td>
<td>0.601</td>
<td>0.321</td>
<td>0.334</td>
<td>0.322</td>
<td>0.335</td>
</tr>
<tr>
<td>No. of cells</td>
<td>613,753</td>
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<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
</tr>
</tbody>
</table>

** p<0.01, * p<0.05, † p<0.10

Notes: With state population weights. Robust standard errors adjusted for heteroskedasticity are in parentheses. All coefficients are multiplied by 100. Restricted to population age 20-50. Excludes Maine and Washington.
<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
<th>(4)</th>
<th>(5)</th>
<th>(6)</th>
<th>(7)</th>
<th>(8)</th>
</tr>
</thead>
<tbody>
<tr>
<td>No trend</td>
<td>-1.134**</td>
<td>-0.529†</td>
<td>0.010</td>
<td>0.064*</td>
<td>0.010</td>
<td>0.064*</td>
<td>0.010</td>
<td>0.064*</td>
</tr>
<tr>
<td>Trend</td>
<td>-0.529†</td>
<td>0.010</td>
<td>0.064*</td>
<td>0.010</td>
<td>0.064*</td>
<td>0.010</td>
<td>0.064*</td>
<td>0.010</td>
</tr>
<tr>
<td>Ever exposed before 13</td>
<td>-1.134**</td>
<td>-0.529†</td>
<td>0.010</td>
<td>0.064*</td>
<td>0.010</td>
<td>0.064*</td>
<td>0.010</td>
<td>0.064*</td>
</tr>
<tr>
<td>Ever exposed before 5</td>
<td>-1.400**</td>
<td>-0.873**</td>
<td>-0.121**</td>
<td>-0.084**</td>
<td>-0.121**</td>
<td>-0.084**</td>
<td>-0.121**</td>
<td>-0.084**</td>
</tr>
</tbody>
</table>

** p<0.01, * p<0.05, † p<0.10

Dependent variable: High school graduate
Mean = 86.86%

Dependent variable: Years of education
Mean = 13.00 years

Notes: With state population weights. Robust standard errors adjusted for heteroskedasticity are in parentheses. Coefficients on high school graduate are multiplied by 100. Restricted to population age 20-50. Excludes Maine and Washington.
Table B.2B - The Effect of Exposure Before Age 13 and Age 5, Women

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>Dependent variable: High school graduate</th>
<th>Dependent variable: Years of education</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mean = 88.46%</td>
<td>Mean = 13.08 years</td>
</tr>
<tr>
<td></td>
<td>(1) (2) (3) (4)</td>
<td>(5) (6) (7) (8)</td>
</tr>
<tr>
<td>Ever exposed before 13</td>
<td>No trend Trend No trend Trend</td>
<td>No trend Trend No trend Trend</td>
</tr>
<tr>
<td>Ever exposed before 5</td>
<td>-1.424** -0.849**</td>
<td>0.047 0.081**</td>
</tr>
<tr>
<td></td>
<td>(0.388) (0.193)</td>
<td>(0.031) (0.024)</td>
</tr>
<tr>
<td>Ever exposed before 5</td>
<td>-1.283** -0.798**</td>
<td>-0.077* -0.060†</td>
</tr>
<tr>
<td></td>
<td>(0.368) (0.124)</td>
<td>(0.031) (0.030)</td>
</tr>
</tbody>
</table>

** Controls
- Year effects
- State of residence effects
- State of birth effects
- State of residence trends
- State of birth trends
- Age & cohort effects
- % of black & white

Adjusted R² | 0.650 0.685 0.650 0.685 | 0.550 0.563 0.550 0.563
No. of cells | 613,753 613,753 613,753 613,753 |

** p<0.01, * p<0.05, † p<0.10

Notes: With state population weights. Robust standard errors adjusted for heteroskedasticity are in parentheses. Coefficients on high school graduate are multiplied by 100. Restricted to population age 20-50. Excludes Maine and Washington.
<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>Ever exposed</th>
<th>Ever exposed</th>
<th>Years of exposure</th>
<th>Years of exposure</th>
<th>Controls</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Custody laws)</td>
<td>-1.678**</td>
<td>-1.353**</td>
<td>-0.181**</td>
<td>-0.176**</td>
<td>Year effects</td>
</tr>
<tr>
<td>(Unilateral divorce law)</td>
<td>-2.284**</td>
<td>-1.937**</td>
<td>-2.284**</td>
<td>-2.248**</td>
<td>State of residence effects</td>
</tr>
<tr>
<td></td>
<td>(0.240)</td>
<td>(0.225)</td>
<td>(0.378)</td>
<td>(0.375)</td>
<td>State of birth effects</td>
</tr>
<tr>
<td></td>
<td>-1.236**</td>
<td>-0.236**</td>
<td>-0.007*</td>
<td>-0.007*</td>
<td>State of residence trends</td>
</tr>
<tr>
<td></td>
<td>(0.378)</td>
<td>(0.375)</td>
<td>(0.043)</td>
<td>(0.043)</td>
<td>State of birth trends</td>
</tr>
<tr>
<td></td>
<td>-2.087**</td>
<td>-0.214**</td>
<td>-0.236**</td>
<td>-0.235**</td>
<td>Age &amp; cohort effects</td>
</tr>
<tr>
<td></td>
<td>(0.378)</td>
<td>(0.375)</td>
<td>(0.043)</td>
<td>(0.042)</td>
<td>% of black &amp; white</td>
</tr>
</tbody>
</table>

**Adjusted R^2**

|                      | 0.643 | 0.643 | 0.644 | 0.642 | 0.643 | 0.644 | 0.647 | 0.474 | 0.478 | 0.473 | 0.472 | 0.474 | 0.474 |

** p<0.01, * p<0.05, † p<0.10

Notes: With state population weights. Robust standard errors adjusted for heteroskedasticity are in parentheses. Coefficients on high school graduate are multiplied by 100. Restricted to population age 20-50. Excludes Maine and Washington.
### Table B.3B - The Effect of Custody Laws and Unilateral Divorce on Educational Outcomes, Women

**All specifications include trends for state of residence and state of birth. A direct comparison to Table 3.5B, which has no trend.**

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>Dependent variable: High school graduate Mean = 88.46%</th>
<th></th>
<th>Dependent variable: Years of education Mean = 13.08 years</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1)</td>
<td>(2)</td>
<td>(3)</td>
</tr>
<tr>
<td>Ever exposed</td>
<td>-1.412**</td>
<td>-1.207**</td>
<td>-0.0512*</td>
</tr>
<tr>
<td>(Custody laws)</td>
<td>(0.217)</td>
<td>(0.195)</td>
<td>(0.024)</td>
</tr>
<tr>
<td>Ever exposed</td>
<td>-1.538**</td>
<td>-1.227**</td>
<td>-0.112**</td>
</tr>
<tr>
<td>(Unilateral divorce law)</td>
<td>(0.435)</td>
<td>(0.425)</td>
<td>(0.035)</td>
</tr>
<tr>
<td>Years of exposure</td>
<td>-0.186**</td>
<td>-0.183**</td>
<td>-0.001</td>
</tr>
<tr>
<td>(Custody laws)</td>
<td>(0.025)</td>
<td>(0.024)</td>
<td>(0.003)</td>
</tr>
<tr>
<td>Ever exposed</td>
<td>-1.538**</td>
<td>-1.498**</td>
<td>-0.112**</td>
</tr>
<tr>
<td>(Unilateral divorce law)</td>
<td>(0.435)</td>
<td>(0.412)</td>
<td>(0.035)</td>
</tr>
</tbody>
</table>

**Controls**

- Year effects
  - √
- State of residence effects
  - √
- State of birth effects
  - √
- State of residence trends
  - √
- State of birth trends
  - √
- Age & cohort effects
  - √
- % of black & white
  - √

<table>
<thead>
<tr>
<th>Adjusted R²</th>
<th>0.686</th>
<th>0.685</th>
<th>0.686</th>
<th>0.686</th>
<th>0.685</th>
<th>0.686</th>
<th>0.563</th>
<th>0.563</th>
<th>0.563</th>
<th>0.563</th>
<th>0.563</th>
<th>0.563</th>
</tr>
</thead>
<tbody>
<tr>
<td>No. of cells</td>
<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
<td>613,753</td>
</tr>
</tbody>
</table>

**p<0.01, * p<0.05, † p<0.10**

Notes: With state population weights. Robust standard errors adjusted for heteroskedasticity are in parentheses. Coefficients on high school graduate are multiplied by 100. Restricted to population age 20-50. Excludes Maine and Washington.