

FATHER'S RIGHTS TO CUSTODY

Historically- Best Interests of the child- Women prevail under Tender Years Doctrine

At common law the father had an absolute right to custody of his children, derived from his legal obligation to support and the mother's legal disability by reason of her sex. Today, custody determinations are to be made in accordance with the best interests of the child.

The term ***the best interests of the child*** first appeared in American jurisprudence in 1813 in a Pennsylvania case as a means to avoid the absolute common law rule that the father was entitled to custody of his minor children. The father's rights were cast in the nature of property rights, a perfectly reasonable approach since children were viewed as chattels at common law. The mother, being similarly situated with her children as a nonperson at common law, could not be awarded custody unless her husband had died or was otherwise disqualified, thereby destroying the fiction of coverture. During coverture, mother and children were *under cover of* the husband/father, and he reigned supreme. The concept of *the best interests of the child* was the rationale for the *Tender Years Doctrine* which shifted the focus of custody from paternal prerogatives to a view which was theoretically, if not in actual practice, child-focused.

In England, it took an act of Parliament to carve out an exception to the rule that fathers were always entitled to custody of their minor children. Unlike the American courts, King's Bench judges were unwilling to deviate from precedent and contravene the father's right to custody even in a very compelling case. The decision in *Rex v. Greenhill* generated a tidal wave of sentiment in favor of changing the law and ultimately resulted in the passage of Lord Talfourd's Act, which permitted an award of custody to the mother consistent with the best interests of children of tender years.

Notwithstanding the ruling in *Addicks*, Pennsylvania courts continued in some instances to consider themselves bound by the English principle that the father had a superior right to custody unless he was unfit. The issue was eventually resolved by passage of the Act of June 26, 1895, which provided that in custody disputes between parents, mothers and fathers have equal standing and the determination must be made with reference to the fitness of the individual parent and the best interests of the child.

The ***Tender Years Doctrine*** gained a life of its own and became one of the most pervasive and firmly entrenched presumptions in American law. It was not until 1977 that the tender years doctrine was voided for all purposes as **an unconstitutionally stereotypic** view of the respective roles of mothers and fathers. ***Custody awards to fathers are no longer a rarity.***

Today's Standard- Best Interests of the Child- NO LONGER A WOMAN'S WORLD

It is the public policy of Pennsylvania to assure continuing contact with **both** parents and the sharing of rights and responsibilities of childrearing by both parents. Parents begin with an equal right to custody, and custody proceedings are, at least in theory, presumption-free. Traditional burdens of proof and presumptions are all subservient to the determination of the child's best interests, and failure to ground a custody decision in the best interests of the child is reversible error. Even the presumption that parents have a *prima facie* right to custody as against third parties is under siege, although parenthood remains a strong factor that must weigh in the custody determination. The Pennsylvania Supreme Court has specifically rejected the standard that a biological parent will always prevail over a third party unless the parent is unfit or has abandoned the child. ***The court must look to all of the evidence to determine the child's best interests, including the physical, intellectual, moral and spiritual well-being of the child.***

The real problem with the term ***the best interests of the child*** today is that these exact words are used to mean completely divergent concepts. As a legal term, ***the best interests of the child*** is not defined by what might be good for a particular child at a given time but also embraces various policy considerations. Consequently, children may be wrenched from the only parents they have ever known and delivered to virtual strangers because the adults failed to follow the law. The best interests of the child may never be reached because of other considerations, such as the wrongdoing of adults. Lay people do not understand custody decisions that appear to be contrary to a particular child's best interests, hence the endless expressions of outrage in the media when the Baby Jessicas and Baby Richards are found in these unfortunate situations. The reality is that the ***best interests of the child is subordinated to overarching public policy*** considerations with the result that an individual child may be sacrificed to a greater good.