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The "Tender Years" Doctrine in Virginia

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RECENT DEVELOPMENTS

THE "TENDER YEARS" DOCTRINE IN VIRGINIA

I. INTRODUCTION

In several recent decisions in the domestic relations area, the Virginia Supreme Court has significantly altered the "tender years" doctrine to afford fathers more rights in custody of their young children. This aspect of child custody litigation is actually a corollary of the overall maternal preference rule in resolving custody disputes between natural parents. Specifically, the doctrine purports that the mother is the natural custodian of her children of "tender years,"[1] and that she should not be denied custody if she is a fit and proper person. This comment will focus primarily upon the evolution of this concept in Virginia. These recent judicial modifications will be compared with national trends and criticisms in this area.

II. HISTORY

The antithesis of the modern tender years doctrine was firmly embedded in the common law through judicial attempts at resolving child custody disputes between parents. Contrary to the current maternal preference rules, the common law awarded custody of minor children to the father as a steadfast legal right. This principle was deeply ingrained in the legal reasoning of Virginia courts as evidenced by *Latham v. Latham*,[2] in which the court awarded custody of a four year old boy to his father. In espousing the long recognized paramount interest of the father in maintaining custody of his children, the court reasoned:

> The father is the legal guardian of the infant; the law gives it to him against all the world. The right of the father (say all the cases) to the custody of his

1. The courts have never defined the precise age range which constitutes "tender years." Generally, the rationale of this doctrine is that very young children require special care and attention from the mother. Certainly, an unweaned or newborn child would qualify as being of tender years; however, as the child becomes older, the courts are reluctant to affix a maximum age limit. In McCray v. McCray, 56 Wash. 2d 73, 350 P.2d 1006 (1960), involving the custody of a seven year old girl, the court expressly ruled that the tender years doctrine was inapplicable to school children. However, the Virginia Supreme Court has evoked the tender years doctrine in custody disputes of children over ten years of age. Moore v. Moore, 212 Va. 153, 183 S.E.2d 172 (1971) (seven and eleven year old girls). *See also* Annot., 70 A.L.R.3d 262, § 9 (1976).

2. 71 Va. (30 Gratt.) 307 (1878). *See also* Carr v. Carr, 63 Va. (22 Gratt.) 168 (1872).

> legitimate minor children, of whatever age they may be, is perfectly clear—too well settled to admit of dispute.[3]

In applying this legal precept to maternal custody claims, the courts did not examine the fitness and appropriateness of the mother for custody of her children, but rather investigated the personal attributes of the father to discover whether his qualifications were sufficiently harmful to justify depriving the father of custody.[4]

This common law cornerstone in Virginia child custody litigation was explicitly modified by legislative enactment.[5] The statute clearly abrogated the paternal right to custody and supplanted a position of neutrality in regard to the competing parental claims. By negating the judicial device of a legal presumption in favor of either parent, the legislature enunciated the fundamental and essential consideration to be the best interests of the child in resolving custody disputes.

Notwithstanding the apparent clarity of the statutory language in ascribing neutrality between conflicting parental claims, the Virginia Supreme Court adopted the tender years doctrine in the landmark case of *Mullen v. Mullen*.[6] The court commenced its legal reasoning by reaffirming the Virginia criterion in custody matters as being the welfare of the child. The court proceeded to determine to which parent custody should be awarded in order to promote the best interests of the child. In addressing the factors to be considered in evaluating the respective parents, the court stated:

> In considering their qualifications and fitness, we must look to their adaptability to the task of caring for the child; their adaptability to control and direct it; the age, sex, and health of the child; its temporal and moral wellbeing, as well as the environment and circumstances of its proposed home; and the influences likely to be exerted upon the child.[7]

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3. Latham v. Latham, 71 Va. (30 Gratt.) 307, 331 (1878).

4. Specifically, the court dealt with the conflicting parental claims and judicial analysis in its statement:

> The question is not whether the appellant [mother] may be properly entrusted with the custody of the child, but whether there is anything in the conduct, habits, and opinions, of the appellee [father] which will justify this court in depriving him of the custody of the child, and in conferring it upon the mother.

Id. at 337.

5. VA. CODE ANN. § 31-15 (Repl. Vol. 1973), reading as follows: "[T]he court or judge . . ., in awarding the custody of the child to either parent . . ., shall give primary consideration to the welfare of the child, and as between the parents there shall be no presumption of law in favor of either."

6. 188 Va. 259, 49 S.E.2d 349 (1948).

7. *Id.* at 270, 49 S.E.2d at 354.

Despite this theoretical framework of individual assessment, the court nevertheless concluded by instituting the maternal preference rule when dealing with children of "tender years."

In *Mullen,* the parents of a five year old girl were petitioning the court for custody of the child following a divorce suit instituted by and awarded to the husband. After affirming the superior consideration to be the welfare of the child, the court carefully established that either parent was "fit" to have custody. However, in order to facilitate the burdensome process of determining the best interests of the child, the court formulated a judicial device encompassing the tender years doctrine. In effect, the court presumed the interest of a child of tender years would be best served by awarding custody to the mother, providing she is a fit person and all other things are equal.[8]

It is important to note that the majority opinion in *Mullen* virtually ignored the explicit statutory language invalidating any legal presumption in favor of either parent in child custody controversies. In practical application, the effect of the doctrine was that of a presumption.

In litigation involving adverse parental custody claims immediately subsequent to *Mullen,* the courts religiously relied upon the tender years rationale in awarding custody to the mother.[9] The repeated recitation by the courts of the same language utilized in the *Mullen* decision indicates its precedential impact. Exemplifying this adherence to the tender years concept, the supreme court in *Brooks v. Brooks*[10] reversed the lower court and awarded custody of a three year old boy to his mother. In so ruling, the

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8. The original language of the court's reasoning is frequently cited in subsequent Virginia cases:

> It is now generally recognized 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 order that the child may receive the attention, care, supervision, and kindly advice, which arise from a mother's love and devotion, for which no substitute has ever been found. Human experience supports the policy that young children should not be deprived of the care of their mothers and of their love and tenderness, which may be counted upon most unfailingly.

Id. at 270-71, 49 S.E.2d at 354.

The reader should note that this doctrine is expressly premised upon the notion that *only* the mother can perform in the nurturing and loving capacity necessary for early child development. This sexual stereotype will be compared with recent psychological developments at a later point in this article. *See* notes 42 and 43 *infra,* and accompanying text.

9. Monahan v. Monahan, 212 Va. 406, 184 S.E.2d 812 (1971); Lundean v. Struminger, 209 Va. 548, 165 S.E.2d 285 (1969); Meyer v. Meyer, 206 Va. 899, 147 S.E.2d 148 (1966); Campbell v. Campbell, 203 Va. 61, 122 S.E.2d 658 (1961); Brooks v. Brooks, 200 Va. 530, 106 S.E.2d 611 (1959); DeMott v. DeMott, 198 Va. 22, 92 S.E.2d 342 (1936).

10. 200 Va. 530, 106 S.E.2d 611 (1959).

court stated: "Generally, where the child is of tender years and will be equally well cared for by either the mother or father, the mother, in preference to the father, should be awarded its custody."[11] In other cases following *Mullen*, the court awarded custody to the father of a young child only after recognizing the tender years doctrine and negating its application by a finding that the mother was unfit to receive custody.[12]

III. Recent Judicial Modifications

In recent case law, the Virginia Supreme Court has questioned the weight given to maternal preference in determining decisions with such a crucial impact upon a child's life. The first indication of the court's wavering from strict adherence to the tender years doctrine was manifested in *Portewig v. Ryder*,[13] in which the court affirmed a custody decree in favor of the father. The court recognized the Virginia precedent but expressed a somewhat different aspect of its application in the statement: "This rule, however, is a flexible one and it is not to be applied without regard to the surrounding circumstances."[14] The circumstances which negated strict compliance with the tender years doctrine were the affectionate and stable ties shown to exist between the children and the father's household, which had developed over a three year period. Although the mother was not shown to be unfit, the court was sensitive to the fact that a change in the children's secure living environment could result in their "emotional maladjustment."[15]

The subsequent case of *Moore v. Moore*,[16] involving two daughters, ages seven and four, appeared strongly to reaffirm and support the traditional application of the tender years doctrine. In reversing the custody decree in favor of the mother, the court explained that the principle is justified by "universal" recognition of the mother as the "natural guardian" of her

11. *Id.* at 539, 106 S.E.2d at 617-18 (citations omitted).

12. Higgins v. Higgins, 205 Va. 324, 136 S.E.2d 793 (1964); Semmes v. Semmes, 201 Va. 117, 109 S.E.2d 545 (1959). *But see* Clark v. Clark, 209 Va. 390, 164 S.E.2d 685 (1968) where the court found the mother was fit, but awarded custody to the father because the presence of an illegitimate half-brother in the mother's household sufficiently negated the child's best interests being served in the mother's home.

13. 208 Va. 791, 160 S.E.2d 789 (1968). In this case, the mother was originally awarded custody of the three children until she was hospitalized for mental illness, at which time the father assumed custody. After the mother's complete recovery, she reasserted her right to custody of the children as their "natural custodian." At this time, the children had been residing in their father's home for three years.

14. *Id.* at 794, 160 S.E.2d at 792.

15. *Id.* at 795, 160 S.E.2d at 792.

16. 212 Va. 153, 183 S.E.2d 172 (1971).

children of tender years.[17] The court referred to the status of this practice in Virginia as being "settled."[18] The inference from this case was that the mother would have to be adjudged "unfit" by clear and convincing evidence to preclude the application of the maternal preference.[19]

This view was qualified in *White v. White,*[20] in which the Virginia Supreme Court affirmed a custody award to the father of his six year old son without adjudication that the mother was unfit. The court recited the familiar language of the tender years doctrine but altered the result of the case by emphasizing the qualifying phrase, "if other things are equal."[21] This phrase had previously been recited superfluously but carried little or no impact in practical application. Nonetheless, the court attached new significance to these words by stating that "[i]f the evidence shows that the mother's home and the father's home are equally suitable for the child, then 'other things are equal' within the meaning of the rule."[22] By failing to apply the maternal preference in a case involving a child of tender years with a mother deemed not "unfit" to have custody, the court modified the usual result by ruling that the mother's home was less suitable for the child than the father's home.[23] Mr. Justice Carrico, in his dissenting opinion,[24] recognized this case as a deviation from the long established *Mullen* rule.

As an affirmation of this new approach to custody disputes involving young children, the court utilized the same reasoning process in *Burnside v. Burnside*[25] to award custody of a seven year old boy to his father. The court recognized the "strikingly similiar" factual situation to *White,* where the mother was not adjudicated unfit to have custody of her young child. However, rather than applying the tender years presumption, the court again examined all of the surrounding circumstances and determined that the child's best interests would be served by awarding custody to the father. Again, Mr. Justice Carrico dissented[26] for the same reasons as expressed in his *White* dissenting opinion.

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17. *Id.* at 155, 183 S.E.2d at 174.

18. *Id.*

19. *Id.* at 156, 183 S.E.2d at 174. *See also* Rowlee v. Rowlee, 211 Va. 689, 179 S.E.2d 461 (1971), where the court cited the tender years doctrine in the custody award of two children, ages three and one to the father; however, the court carefully denied its application due to a finding in the record of the mother's unfitness to have custody.

20. 215 Va. 765, 213 S.E.2d 766 (1975).

21. *Id.* at 767, 213 S.E.2d at 768.

22. *Id.*

23. *See* 62 VA. L. REV. 1431 (1976).

24. White v. White, 215 Va. 765, 768, 213 S.E.2d 766, 769 (1975) (Carrico, J., dissenting).

25. 216 Va. 691, 222 S.E.2d 529 (1976).

26. *Id.* at 694, 222 S.E.2d at 531 (Carrico, J., dissenting).

The Virginia Supreme Court completed its transition away from the tender years presumption in *Harper v. Harper.*[27] In this case, the court directly confronted the tender years doctrine embedded in *Moore* and the application of the statutory language in section 31-15 of the Virginia Code. Specifically, the lower court had awarded custody of a six year old boy to his mother, while he was residing with his father. After determining that both parties were fit and proper persons to have custody, the lower court evoked the tender years doctrine enunciated in *Moore* and consequently held in favor of the mother. On appeal, the Virginia Supreme Court attempted to clarify the inconsistencies in Virginia law:

> 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.[28]

Moreover, the court held that the evidence did not fail to support a finding that other things were equal; and therefore, the lower court did not commit reversible error in awarding custody to the mother.

Thus, the Virginia Supreme Court has reduced the legal significance of the tender years doctrine from a presumption in application[29] to a rebuttable inference, and in doing so has reconciled the diluted tender years doctrine with express statutory language.

The next decision in this series of Virginia cases regarding the tender years doctrine is *Clark v. Clark,*[30] in which the court affirmed, without difficulty, the award of custody to the father, utilizing the *Harper* rationale. The lower court ruling was premised upon the finding that other things were not equal between the parental homes, because the father's home, in which the children had resided happily for two years, was more suitable than the present or proposed home of the mother. Upon ruling that evidence existed to support this finding, the supreme court affirmed the failure to apply the tender years concept. An important aspect of this case involved analyzing the suitabilities of the respective parental homes, which in turn determined whether "other things are equal." From this conclusion, the court decided whether the tender years concept was applic-

27. 217 Va. 477, 229 S.E.2d 875 (1976).
28. *Id.* at 479, 229 S.E.2d at 877.
29. *See* cases cited, *supra* note 9.
30. 217 Va. 924, 234 S.E.2d 266 (1977).

able, thus permitting a maternal preference. In discussing the factors of suitability to be considered, the court noted: "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."[31]

In *McCreery v. McCreery*,[32] a case just recently decided, the Virginia Supreme Court unveiled its most elaborate clarification regarding the application of and rationale for the tender years doctrine. This case involved the custody award of two daughters, ages two and four, to the father, after the chancellor had construed *Burnside* as overruling *Mullen* and its progeny to the extent of the existence of a presumption in favor of the mother. The court easily corrected this mistaken interpretation by making reference to *Harper*, decided subsequent to the chancellor's decision, which demonstrated "[o]n the contrary, *Burnside* fully acknowledged the *Mullen* rule."[33] In seeking to clarify the "confusion" surrounding the tender years doctrine, the court delineated two conflicting societal values underlying custody disputes between natural parents as "the right of a parent to custody of its minor child and the right of a child to the custodial care of a parent."[34] The court explained that the latter of these rights is superior because the duty owed by society to one of its dependent members is greater than the duty owed to a self-sufficient member. Accordingly the court concluded that the tender years doctrine deals with this right of the child, irrespective of the parental rights, and infers "that such right is best served when a child of tender years is awarded the custodial care of its mother."[35]

The court basically reiterated its view in previous opinions regarding the application of the doctrine; specifically, that the tender years "inference" controls when the mother is fit and other things are equal. However, the court explicitly defined this term, "other things," in the following passage:

> These "other things" are things which affect the quality of the custodial care received by the child. Quality is determined not only in terms of the training, talents, and resources of the custodian but also in terms of the motivation of the custodian to make proper provision for the physical needs of the child, its psychological and emotional health, its intellectual and cultural growth, and its moral development. Although fully qualified in other respects, a person may be too ill-suited by temperament or too preoccupied with per-

31. *Id.* at 926, 234 S.E.2d at 268.
32. 218 Va. 352, 237 S.E.2d 167 (1977).
33. *Id.* at 354, 237 S.E.2d at 168.
34. *Id.*
35. *Id.*

> sonal pursuits to administer proper care to a child. Comparing the quality of care offered by two parents, the courts are guided by histories of past performance and prospects for future performance. If the comparison results in equipoise, the inference that the right of the child is best served by awarding the child the custodial care of the mother controls.[36]

In affirming the custody award to Mr. McCreery, the court held that notwithstanding the erroneous interpretation of *Burnside*, the chancellor considered the proper *Mullen* criteria regarding the respective custodial quality of the parents. Additionally, the court ruled that the chancellor's findings of fact were tantamount to holding that other things were not equal, and thus, the tender years doctrine, though valid, was not applicable to the case.

As the reader can depict from this series of cases, the Virginia Supreme Court has modified its application of the tender years doctrine from its origin in *Mullen* through its dilution in *Harper* and *McCreery*. Although the court paid lip service throughout this entire period to the concept that the welfare of the child was the paramount and controlling factor in its custody determination, the *Mullen* case and its direct descendents[37] clearly applied the doctrine with the legal weight of a presumption, although not labelling it as such. In its struggle to reflect modern day social change, the

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36. *Id.* at 355, 237 S.E.2d at 168-69.

The reader should note the reference in this McCreery passage to a child's "moral development" in conjunction with a Virginia Supreme Court case decided on the same date, Brown v. Brown, 218 Va. 196, 237 S.E.2d 89 (1977). In *Brown*, the mother appealed from a custody award of her two sons, ages seven and four, to the father, and specifically from the lower court's finding that she was not a fit person for custody by virtue of an adulterous relationship. The lower court found that Mrs. Brown had maintained a man in her home, together with her children, on a permanent basis over an extended period of time and that an adulterous relationship existed between them. The supreme court, in affirming the lower court's decision, stated:

> In all custody cases the controlling consideration is always the child's welfare and, in determining the best interest of the child, the court must decide by considering all the facts, including what effect a nonmarital relationship by a parent has on the child. The moral climate in which children are to be raised is an important consideration for the court in determining custody, and adultery is a reflection of a mother's moral values. An illicit relationship to which minor children are exposed cannot be condoned. Such a relationship must necessarily be given the most careful consideration in a custody proceeding.

Id. at 199, 237 S.E.2d at 91. The court recognized that adultery, alone, is insufficient to render a parent unfit. In its ruling, the court appeared to emphasize the particularity of the situation in which: "there was testimony that the relationship between Mrs. Brown and Mr. Leith [her paramour] had an adverse impact on the parties' two children. Their adulterous relationship was admitted. They were openly cohabiting in the presence of her two young sons . . . over an extended period of time." *Id.* at 200, 237 S.E.2d at 92.

37. *See* cases cited, *supra* note 9.

court has diluted the application of the doctrine to the point where factors truly indicative of the child's best interest are given priority over the mechanical application of the maternal preference. However, the court has stopped short of total abandonment of the tender years concept, while achieving a comparable result through the indirect means of re-emphasizing standard language ("other things being equal"). Upon realistic analysis of factual situations, it appears that the incidents of total equality existing between the parental homes and their respective suitability for the welfare of the child occur rarely. And yet, this is the threshold finding which triggers the permissible inference of maternal preference.[38] Thus, considering the improbability that parental qualities will balance, the courts should utilize infrequently the tender years doctrine as a consideration in child custody resolutions. Nor does the court view the rebuttable inference status as incompatible with section 31-15 of the Virginia Code.[39]

IV. NATIONAL TRENDS

Generally, the majority of courts have recognized and applied the tender years doctrine in some manner, despite the fact that the vast majority of statutes mandate the best interests of the child to be the ultimate test in custody matters.[40] However, there is evidence that support for the automatic operation of this doctrine is declining by means of judicially imposed limitations rather than by outright rejection.[41] In this respect, the current status of Virginia law is comparable in that the effect of the tender years presumption has been diluted in application rather than rejected in theory.

The tender years doctrine has elicited much criticism in recent years due to the changing concepts of sexual roles in modern society.[42] Basically, the attacks on this concept have been aimed at the preference for a mechanical formula which automatically presumes that the best interests of the child are determined by the parental gender rather than a more objective fact-

38. *See* Annot., 70 A.L.R.3d 262, 269 (1976).

39. *See* 62 VA. L. REV. 1431 (1976).

40. *See, e.g.*, Weber v. Weber, 256 Ark. 549, 508 S.W.2d 725 (1974); Linderman v. Linderman, 19 Ala. App. 662, 275 So. 2d 342 (1973); Mollish v. Mollish, 494 S.W.2d 145 (Tenn. App. 1972); Loveless v. Loveless, 128 Ill. App. 2d 297, 261 N.E.2d 732 (1970); DiBiano v. DiBiano, 105 N.J. Super. 415, 252 A.2d 735 (1969); Annot., 70 A.L.R.3d 262, §§ 3, 9 (1976). *See also* cases cited, *supra* note 38; Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAMILY L. 423 (1977) [hereinafter cited as Roth].

41. *See generally*, cases cited in Annot., 70 A.L.R.3d § 2, 262 (1976).

42. Roth, *supra* note 40, at 423; Comment, *The Tender Years Presumption: Do the Children Bear the Burden?* 21 S.D.L. REV. 332 (1976); Podell, Peck, and First, *Custody—To Which Parent?* 56 MARQ. L. REV. 51 (1972) [hereinafter cited as *Custody—To Which Parent?*].

finding analysis and individual determination. The critical psychological impact of child custody dispositions has a far-reaching influence on a person's life.[43] Therefore, considering the significant consequences of an omnipotent custody decree, a critical examination of the means by which these decisions are formulated is extremely important.

A. *Policy Considerations*

The most articulate attacks on the tender years doctrine dispute the validity of the reasoning behind the doctrine. The policy in granting a preference to one parent at the expense of the other is unrealistic and unsound in the context of the reasoning behind the doctrine. As exemplified in the previously discussed Virginia cases,[44] the tender years doctrine is premised upon the mother's being the "natural" custodian and upon a reluctance to deprive the child of a mother's "unfailing love." A recent commentator articulated the erroneousness of this logic, which focuses upon the importance of the mother rather than the "mothering function," which is equally capable of being performed by either parent.[45] This notion is further developed in a recent book,[46] which presents the concepts of the "psychological parent" in relation to basic child development theories. This "psychological parent" acts in a capacity that is crucial to the nurture and development of a child. The authors purposely divorce the concept of the "psychological parent" from the biological parent in terms of analyzing child-parent relationships.[47]

Another commentator has attacked the policy behind the tender years doctrine from another angle.

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43. J. GOLDSTEIN, A. FREUD, A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973) [hereinafter cited as GOLDSTEIN, FREUD, AND SOLNIT].

44. *See* notes 6-12 *supra*, and accompanying text.

45. A considerable amount of research supports the proposition that what a child needs during the "tender" years is a certain quality of affectionate relationship with someone *in loco parentis*, and this can be provided by the father as well as the mother. "The word 'mothering' in this context denotes a function, rather than a person; this function does not necessarily reside in the biological mother."

Roth, *supra* note 40, at 449, *citing* P. ALLEN, *et. al.*, READINGS IN LAW AND PSYCHIATRY, 319, 320 (1968).

46. GOLDSTEIN, FREUD, and SOLNIT, *supra* note 43.

47. *Id.* at 19.

> Whether any adult becomes the psychological parent of a child is based thus on day-to-day interaction, companionship, and shared experiences. The role can be fulfilled either by a biological parent or by an adoptive parent or by any other caring adult—but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be.

Id.

> The assumption that the mother is a better custodian was and is wrong from an historical, economic, sociological, and philosophical point of view. The notion is unfounded because it fails to project the family unit into the post-divorce reality where the mother must assume both a mother's and a father's role. A look at the contemporary role of the mother and the difficulties encountered when she alone runs the family unit supports the current egalitarian viewpoint.[48]

B. *Constitutional Challenges*

Notwithstanding these refutations of the reasoning behind the tender years doctrine, there have been recent questions raised as to the constitutionality of the tender years presumption based upon equal protection and due process analysis.[49] The effect of the tender years presumption is to impose an unfair burden upon the father in custody disputes to prove that the mother is unfit or that "other things are not equal."[50] The most explicit denunciation of the tender years doctrine as unconstitutional sexual discrimination is in *Watts v. Watts*,[51] decided by a lower New York court. By directly confronting the equal protection issue, the court held that the tender years doctrine resulted in differential treatment of parents as custodians based on sex. Thus, the analysis proceeded by applying strict judicial scrutiny to the suspect classification of sex.[52] The court held that

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48. *Custody—To Which Parent?*, *supra* note 42, at 53. Mr. Chief Justice Hudgins also recognized the same flaw in the tender years theory by examining post-divorce reality in his dissenting opinion in *Mullen*. After recognizing that the mother's lack of alimony would impose financial hardships on the mother and her child, he stated:

> Under these circumstances necessity will compel her to seek employment, in which event it will be necessary to employ a nurse to look after the six-year-old child. Therefore, the mother will be in no position to give any more personal care to the child during business hours than the father.

Mullen v. Mullen, 188 Va. 259, 281, 49 S.E.2d 349, 359 (1948) (Hudgins, C.J.)

49. Roth, *supra* note 40, at 442-8 (1977); 21 S.D.L. REV. 332, 337-49 (1976).

50. This is the language utilized by the Virginia Supreme Court in Clark v. Clark, 217 Va. 924, 234 S.E.2d 266 (1977); Harper v. Harper, 217 Va. 477, 229 S.E.2d 875 (1976); Burnside v. Burnside, 216 Va. 691, 222 S.E.2d 529 (1976); White v. White, 215 Va. 765, 213 S.E.2d 766 (1975).

51. 77 Misc. 2d 178, 350 N.Y.S.2d 285 (Fam. Ct. 1973). For an extensive equal protection analysis concluding that the tender years doctrine is unconstitutional regardless of the different standards of judicial review applied see 21 S.D.L. REV. 332, 337-47 (1976).

52. Although a majority of the Supreme Court has not ruled that sex is a suspect classification subject to strict scrutiny, there has been much uncertainty regarding the precise standard of review for gender distinctions in recent Supreme Court case law. Regardless of the exact standard utilized, the Supreme Court has demonstrated an increased sensitivity to sex classifications. Craig v. Boren, 97 S. Ct. 451 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973). For a complete analysis of each standard of review see 21 S.D.L. Rev. 332, 337-47 (1976).

the best interests of the child might well qualify as a compelling state interest in order to justify the discrimination; however, the tender years doctrine was not deemed to serve the best interests of the child.[53]

Another possible constitutional violation involves due process considerations, in that the right to raise one's children is an interest protected by the fourteenth amendment.[54] The judicial presumption of the tender years doctrine deprives a father of this right and arguably contradicts the notion of due process, which requires a more individualized determination of the child's best interest. The authority that is most commonly cited by analogy to invalidate the tender years presumption is the United States Supreme Court case of *Stanley v. Illinois*,[55] involving a state statute which denied putative fathers custody of their children upon the death of the mother. The Supreme Court held that to conclude that unwed fathers were unfit parents without the benefit of a hearing to determine individual qualifications was a denial of due process.

V. Conclusion

The Virginia Supreme Court has followed the recent trend of a majority of jurisdictions by limiting the effect of the tender years doctrine. By diluting the weight of the maternal preference from a presumption in application to a "permissible and rebuttable inference," the court has supposedly reconciled the tender years doctrine with the express statutory language of section 31-15,[56] which negates a presumption at law in favor of either parent. This evolving process has also allowed the courts to make a more individualized assessment of the opposing parental homes for the purpose of making the crucial decision of which parent and his or her respective home would serve the best interest of the child. In reducing the burden of proof on the father (although not totally eliminating it), the court's approach is more aligned with modern egalitarian sex roles.

Although the definite trend is to limit the tender years doctrine by judicial restraints, recent commentaries have provided valid and persuasive arguments for its complete abolishment. These arguments are premised upon either the outdated rationale for the doctrine or the constitutional violation of the equal protection and/or due process clauses of the fourteenth amendment. Regardless of whether the presumption is diluted

53. Watts v. Watts, 77 Misc. 2d 178, 350 N.Y.S.2d 285, 291 (Fam. Ct. 1973).

54. For an analysis of the conclusive presumption test derived from the due process clause see 21 S.D.L. Rev. 332, 347-49 (1976). For a comparison with the equal protection line of reasoning see Roth, *supra* note 40, at 442-48.

55. 405 U.S. 645 (1971).

56. Va. Code Ann. § 31-15 (Repl. Vol. 1973).

out of practical existence or is expressly rejected, the courts will have to supplant its function with some other device to aid in resolving the complex best interests test. The courts should incorporate into the decision-making process involving very young children the concept of "mothering" as a function capable of being performed by either parent. This approach should facilitate a more equitable and efficient means of custody determination.

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