

Children's Rights and Best Interest of the Child

Children were once Considered as Property. Prior to 1839, English family law gave custody of the children to the father after a divorce because the father could provide for the child. During the early nineteenth century, women had few individual rights. English law defined the role of the wife as subordination to her husband, putting her under the control of her husband, unable to own any of her own property.



The Tender Years Doctrine became a legal principle in family law in the middle of the nineteenth century and remain in place until the latter part of the twentieth century. It presumes that children should be cared for by their mother in their *tender years*.

Early in the nineteenth century, Caroline Norton, a prominent social reformer, author and hostess, began to campaign for the rights of women to have custody of their children. Norton, who had

undergone a divorce and had been separated from her children, worked with politicians and eventually convinced the British Parliament to enact legislation to establish and protect mothers' rights.

The *Custody of Infants Act 1839* gave discretion to the judge in a child custody cases and established a *presumption of maternal custody* for children under the age of seven while maintaining the responsibility for financial support with their former husbands. In 1873 the English Parliament extended the *presumption of maternal custody* until a child reached sixteen.

Courts made exceptions in cases in which the father established that the mother had committed adultery. The *tender years doctrine* spread to many countries through the British Empire. Many courts and legislatures in the United States adopted the tender years doctrine. In the United States, to grant custody of a child to a father was "to hold nature in contempt, and snatch helpless, puling infancy from the bosom of an affectionate mother, and place it in the coarse hands of the father." The mother was considered "the softest and safest nurse of infancy".

The *tender years doctrine* was gradually replaced towards the end of the twentieth century in most countries. The *tender years doctrine* is now considered archaic and outdated. The *best interest of the child* has become the new principle of family law in much of the world.

The Best Interest of the Child is a child rights principle, which comes from Article 3 of the UN Convention on the Rights of the Child 1989, which says 'the best interests of children must be the primary concern in making decisions that may affect them'. Australia became a signatory to the *UN Convention on the Rights of the Child* in 1990.

The *Family Law Act* focuses on the *rights of the child*, and the *best interest of the child* is the paramount consideration. In family law parents have no rights, they have responsibilities towards their children. Since Family Law Act amendments in 2006, in place of the *presumption of maternal custody*, it is now *presumed joint parental responsibility*. However, *joint parental responsibility* does not mean equal time.

When it comes to what is in the *best interest of the child*? The primary considerations are that the children have meaningful relationships with both parents and keeping children safe is the priority.

**Be a parent that is:
Bigger, Stronger,
Wiser and Kind.**

See information sheet; **Family Law Information for Parents regarding Best Interest of the Child**