The Tender Years Doctrine in Kansas Child Custody Cases

by John C. Peck

> "It is an elementary rule in this state that if children are of tender age they almost of necessity must be entrusted to their mother's care, without weighing unduly what may be some possible short comings in her character of conduct."[1]

Kansas lawyers practicing in the domestic relations area have long recognized the "tender years doctrine." Depending upon which side of the case the lawyer has had at a given time, he or she has probably either praised it or damned it to the client. The doctrine has undergone some scrutiny and change in the last several years by both the legislature and the supreme court. And, the recent popular film *"Kramer v. Kramer"* publicized the issue to the general public.[2] This article assesses the current status of the tender years doctrine in Kansas in light of these changes.

I. Judicial Treatment

At the time the Kansas constitution was being drafted, the framers were faced with a common law rule that a father, both when the family was living together and when the father and mother separated, had custody rights to the children.[3] Our framers chose not to follow that rule and instead adopted Article 15, Section 6, which requires the legislature to provide for the equal rights of women in the possession of their children. This part of Article 15, Section 6, has apparently not been cited or construed by the Kansas Supreme Court in a case involving contested custody between divorcing or already divorced parents.[4]

The first mention of the tender years doctrine by the Kansas Supreme Court was in 1875 in the case of *Brandon v. Brandon*.[5] The court affirmed the trial court's awarding the young children to the mother despite her being a habitual drunkard. "The children were of tender years, and needed a mother's care, and if she was at all suitable she ought to have the care of them during their infancy."[6] The court went on to point

1. *St. Clair v. St. Clair*, 211 Kan. 468, 479, 507 P. 2d 206, 216 (1973).

2. In *"Kramer v. Kramer,"* the wife left her husband and tender-aged child to "find herself." She sought through the New York courts to regain custody two years later. The New York law stated in the movie was that the father had the burden to show the mother unfit before he could retain custody. This rule would be even harsher on the father than the tender years doctrine.

3. *State v. Stigall*, 22 N.J.L. 286 (1849); Johnstone, *Child Custody*, 1 KAN. L. REV. 37, 38 (1952).

4. The most recent case citing Ks. Const. Art. 15, § 6, was *State v. Al-Turck*, 220 Kan. 557, 552 P. 2d 1375 (1976), which involved a criminal charge against a father who absconded with his child. The mother, though separated from the defendant, had not obtained a temporary custody order from the court. The supreme court held that neither parent has a prior custody right until such a custody order is signed.

5. 14 Kan. 342 (1875).

6. *Id.* at 346.

out, however, that as the children got older, the mother's habits would militate more against her.

Soon thereafter, however, the court stated another test, the "best interests of the children." This test was first mentioned in *In re Bort,*[7] a review of a habeas corpus proceeding by a husband to regain custody. One year later in *Chapsky v. Wood,*[8] the court stated that this test was the "paramount consideration." The *Chapsky* case has often been cited in cases even outside of Kansas perhaps partly because it was written by Justice Brewer who later became an associate justice of the United States Supreme Court. The "best interest" rule was followed in later cases involving fathers and mothers, even though the facts in *Chapsky* actually involved a challenge by a father to his X-wife's sister's custody of his child.

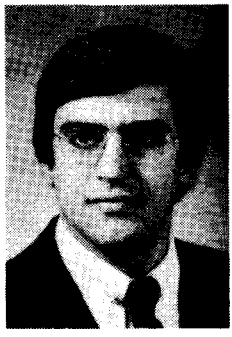
Herein lies part of the difficulty in ascertaining the "true" test used by the Kansas Supreme Court in the past. In numerous cases from 1875 to the present, the court has jumped from one test to the other, sometimes seemingly to justify whatever outcome it desired at the time.[9] If it wanted to affirm the trial court's awarding custody to the father, it would apply the "best interests test."[10] Conversely, an affirmance of a grant of custody to the wife generally has a strong dose of "tender years" and some "motherly love" thrown in.[11] In both of these kinds of cases, the court has generally made passing reference and deference to the one rule before applying the other.

In addition, the supreme court has reversed the lower court in the application of the tests. Despite the general rule that the trial court is in a better position to make findings because it sees and hears the witnesses directly,[12] the court has reversed to give the mother custody[13] and to give the father custody.[14]

One of the more troublesome tender-years cases decided by the court is *St. Clair v. St. Clair,*[15] decided in 1973. *St. Clair* represents perhaps the high point (or low point, depending on the point of view) of the tender years doctrine in Kansas. The court, in a 34 page, 4-3 majority opinion, reversed the trial judge's granting of custody to the father. The trial

7. 25 Kan. 308 (1881).
8. 26 Kan. 650, 654 (1881).
9. This can also be said of trial courts.
10. *See Bierce v. Hanson,* 171 Kan. 422, 233 P. 2d 478 (1951), and *Lyerla v. Lyerla,* 195 Kan. 259, 403 P. 2d 989 (1965).
11. *See Lamer v. Lamer,* 170 Kan. 579, 228 P. 2d 718 (1951).
12. *Lewis v. Lewis,* 217 Kan. 366, 537 P. 2d 204 (1975).
13. *Wilkinson v. Wilkinson,* 147 Kan. 485, 77 P. 2d 746 (1938), and *Lindbloom v. Lindbloom,* 177 Kan. 286, 279 P. 2d 243 (1955).
14. *Dalton v. Dalton,* 214 Kan. 805, 522 P. 2d 378 (1974).
15. 211 Kan. 468, 507 P. 2d 206 (1973).

About the Author:



JOHN C. PECK *received his B.S. degree in civil engineering from Kansas State University in 1968, and his J.D. degree in 1974 from the University of Kansas. Following graduation from law school, he practiced law for four years with the Manhattan, Kansas, firm of Everett, Seaton and Peck, where his work included domestic relations cases. He joined the faculty at KU in 1978 and teaches contracts, water law, land transactions, and legal aid clinic.*

itself had been the longest contested divorce trial in Johnson County history. The mother had had psychological problems exhibited by a one month hospitalization for evaluation and therapy, followed by out-patient treatment. Moreover, the father testified that she had demonstrated bizarre behavior such as collecting trash and waste paper which had to be periodically cleaned out by the husband and his employees. During one of the several cleanups he testified he had also found spoiled food and molded clothes in the refrigerator, soiled sanitary napkins lying in the bathtub and wrapped in shirts on the closet shelf, and women's undergarments covered with diarrhea and vomit stains.

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In overturning the trial court's custody award to the father, the Kansas Supreme Court found the trial court had erred in accepting certain expert testimony favoring the father while it had systematically rejected that same expert's testimony that favored the mother. The court relied heavily on the tender years doctrine, especially since the mother here testified that she would be home full time with the children, while the father would have to hire a full time babysitter. The dissenting opinion in *St. Clair* objected to the majority's assuming the role of the trial court in weighing the evidence.

A year later the Kansas Supreme Court had to back off its strong stance in *St. Clair*. In *Dalton v. Dalton*,[16] the trial court had expressly relied on the *St. Clair* tender years rule in granting custody of the children to the mother, despite her deviate sexual behavior. The court reversed in favor of the father, pointing to the word "almost" in the rule that tender aged children *almost* of necessity must be entrusted to their mother's care. In fairness to the court, it must be pointed out that Mrs. Dalton had had liasons with a 16-year old neighbor boy and had exhibited a lack of love and concern for her children. Mrs. St. Clair, however, while exhibiting perhaps a lack of personal hygiene, was apparently morally above reproach and unquestionably loved her children.

Shortly after *Dalton*, the supreme court again downplayed the significance of *St. Clair*. In *Patton v. Patton*,[17] the mother won custody of the 8- and 6-year old children at trial. During that same year, the father filed for a change of custody, alleging that his ex-wife drank, took pills, had threatened suicide, and had sexual relations with several different men since the divorce. The trial court overruled the motion and in doing so stated that the husband's burden was "to show a change of circumstances which demonstrated 'complete unfitness of the mother to have custody of her children.' "[18] The supreme court, while affirming the lower court's order, stated that the trial court had made too much of the *St. Clair* holding. It pointed out its "almost" argument in *Dalton*, and concluded that the best interests test was appropriate. Even after stating the proper test, however, the court again made reference to the tender years rule:

> "Thus the real issue is which parent will do a better job of

16. 214 Kan. 805, 522 P. 2d 378 (1974).
17. 215 Kan. 377, 524 P. 2d 709 (1974).
18. *Id.*, at 378.

> rearing the children and provide a 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."[19]

Since 1974, the supreme court has decided five more relevant custody cases and the court of appeals, one.[20] It is interesting to note that in each of these the court affirmed custody awards to fathers, either from a divorce hearing or from a hearing on a motion to change custody. The gist of these recent cases is that the best interest test and not the tender years doctrine is now 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.

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II. Legislative Treatment

Historically, the Kansas legislature has given the courts little guidance in custody matters. Under the territorial laws passed prior to statehood in 1859, the district courts had the power to make such custody orders "as shall be right and proper" and the power to change the orders "where circumstances render them expedient."[21] An 1860 Amendment changed the test from "right and proper" to "just and reasonable."[22] Then, in 1868, even the broad standard was removed and the district courts were simply ordered to make custody provisions.[23]

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However, this lack of statutory guidance was apparently good enough for the courts, attorneys, ligants, and the public for 108 years, because it was not until 1976 that any change in custody criteria took place —the addition of *Kan. Stat. Ann.* § 60-1610(b) (hereafter cited as 1610(b)):

> *Child custody where parental rights are not terminated.* In all cases involving the custody of any minor children, the court shall consider the best interests of such children to be paramount. Where parental rights have not been terminated, neither parent shall be considered to have a vested interest in the custody of any such child as against the other parent, regardless of the age of the child.

But, although this subsection be-

19. *Id.*, at 379.
20. *Hardenburger v. Hardenburger*, 216 Kan. 322, 532 P. 2d 1106 (1975); *Schreiner v. Schreiner*, 217 Kan. 337, 537 P. 2d 165 (1975); *Lewis v. Lewis*, 217 Kan. 366, 547 P. 2d 204 (1975); *Parish v. Parish*, 220 Kan. 131, 551 P. 2d 792 (1976); *Simmons v. Simmons*, 223 Kan. 639, 576 P. 2d 589 (1978); and *Neis v. Neis*, 3 Kan. App. 2d 589, 599 P. 2d 305 (1979).
21. Gen. Laws of the Terr. of Kan., Ch. LXIV, § 10 (1859).
22. Gen. Laws of the Terr. of Kan., Ch. LXII, § 11 (1860).
23. Gen. Stat. of Kan., Art. XXVIII, § 645 (1868).

came effective on July 1, 1976, it has not been cited or referred to by either Kansas appellate court. This omission is curious, since, as shown above, these courts have moved during this same period toward much the same rule that the statute appears to suggest—the best interest test.

That 1610(b) was enacted to substitute the best interests test for the tender years doctrine seems clear, at least on the surface. The change followed closely after *St. Clair* and appears to be a reaction to that case. Since the original bill was introduced by an individual legislator,[24] there is no *prior* interim study to provide the reason for the change. Representative Brewster, however, states that his purpose was to abolish the tender years doctrine, and that he explained this to the House Judiciary Committee and to the House.[25] An interim study prepared *after* the bill was passed corroborates Representative Brewster by stating: "The 1976 legislature, in passing H.B. 2909, did away with the 'tender age' doctrine."[26] And, all of this activity was being carried on during a time when there was a trend across the country to abolish or severely limit the use of the doctrine.[27]

However, there may be several good reasons why the courts have not yet expressly relied on the change in 1610(b). First, there was a printing error the first time the new subsection appeared in the statute books. This misprint appeared first in the hardbound edition to K.S.A. Vol. 4A, copyright 1976. The second sentence of 1610(b) read ". . . *either* parent shall be considered to have a vested interest . . ." instead of ". . . *neither* parent. . . ." This mistake was ostensibly corrected in the 1977 pocket part supplement to Vol. 4A by a revisor's note in fine print as follows: "Word 'either' in line 6 of subsection (b) should read 'neither.'" Finally, the 1978 pocket part supplement to Vol. 4A carried the corrected subsection (b), but only because 1610 had been amended in other respects and thus required full publication in the supplement. It is easy to excuse the practicing attorneys (myself included), the district court judges, and the law clerks and justices of the Kansas appellate courts for not knowing that 1610 had been amended.

Secondly, the language in the new section itself does not clearly show an intent to abolish the tender years doctrine. While courts are to consider "the best interests of the children to be paramount," considerations such as age of the child, and the availability of the mother in the home would surely be factors in deciding "best interests." Furthermore, the legislature could have simply and clearly stated that the tender years doctrine was abolished, had it so intended, as it has done with other common law property doctrines such as the doctrine of worthier title,[28] the rule in Shelley's case,[29] and the rule in Wild's case.[30]

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Nor does it appear that the second

24. Representative Richard Brewster of Topeka.
25. Personal conversations with Representative Brewster.
26. The REPORT ON LEGISLATIVE INTERIM STUDIES TO THE 1977 KANSAS LEGISLATURE, Part 1 (of 2 parts), December 1976.
27. *See,* Freed & Foster, *Divorce in the Fifty States: An Overview as of August 1, 1978,* 4 BNA *Fam. Law Rep.*, No. 41, Monogr. No. 6 (Aug. 22 1978).
28. KAN. STAT. ANN. § 58-506 (1976) states: ". . . the common law doctrine of worthier title is abolished. . . ."
29. KAN. STAT. ANN. § 58-502 (1976) states: "The rules of common law, known as the rule in Shelley's case . . . shall not be applied in this state. . . ."
30. KAN. STAT. ANN. § 58-505 (1976) states: ". . . the doctrine of the common law known as the rule in Wild's case shall not hereafter apply. . . ."

sentence of 1610(b) clearly abolishes the tender years doctrine. It states that neither party has a vested interest in the custody as against the other party regardless of the age of the children. But has either party ever had a *vested* interest as against the other party? The mother, all other things being equal, has had a presumption or preference which in certain cases resulted in giving her custody of tender aged children, but she has never had a vested right as against the father. "Vested" implies that the right is settled and not subject to defeasance. Custody rights are never totally vested. A person having previously been awarded custody in the divorce hearing may lose custody to his or her X-spouse in a modification hearing.[31] Or a parent may lose custody if the state finds that the child is "deprived,"[32] or that parental rights should be terminated.[33] So, saying neither party has a vested custody interest as against the other party is not saying anything new.

Attempts at correcting the vagueness of the present 1610(b) are being considered by the legislature. House Bill 2349, introduced in the 1979 legislative session by Representative Heinemann,[34] would have cleaned up the language in two respects, such that 1610(b) would read as follows:

> "B. *Child custody where parental rights not terminated.* In all cases involving the custody of any minor children, the court shall consider the best interests of such children to be paramount. Where parental rights have not been terminated, neither parent shall be given preference because of the age of the child to the custody of the child as against the other parent. The tender years doctrine is hereby abolished."

That bill remained in committee through the 1979 legislative session, and was considered again in 1980, but died in committee. Representative Brewster introduced House Bill 2790 in the 1980 session. That bill would add the following clause to the end of the second sentence of the current 1610(b):

> ". . . , and there shall be no presumption that it is in the best interest of an infant or young child to give custody to the mother."[35]

31. KAN. STAT. ANN. § 60-1610 (a) (Supp. 1979).
32. KAN. STAT. ANN. § 38-824 (b) (Supp. 1979).
33. KAN. STAT. ANN. § 38-824 (c) (Supp. 1979).
34. Representative David Heinemann of Garden City.
35. At the time this article went to press, House Bill 2790 was tied up in a conference committee pending the final clean-up session of the legislature.

III. Summary and Postscript

A case law review of the tender years doctrine thus reveals almost a century of use culminating in *St. Clair*, the ultimate application or misapplication of the tender years doctrine. Following *St. Clair*, there has been a clear change away from the doctrine toward favoring the best interests test. On the statutory side, Kansas had a vague "just and reasonable" standard for a few years, followed by a century of no explicit legislative standard. In 1976, the legislature amended K.S.A. 60-1610 to require that the best interests test be paramount, but its meaning is in doubt and the appellate courts have yet to cite or respond to it.

This discussion has treated the status of the tender years doctrine; it has not analyzed the merits of the doctrine, nor will it attempt to do so. However, perhaps a personal opinion may be offered—one not supported by published psychological or sociological data[36] nor in the mainstream of current legal thought concerning the doctrine. My opinion, based solely on experience and observation and admittedly old fashioned, is that it is not the doctrine itself that is wrong; what is wrong is the blanket and blind adherence to the idea that the doctrine means that the mother, unless totally unfit, should always get custody of any tender aged child. Thus, I favor rentention of the doctrine, but only if applied to those factual situations where the doctrine was meant to apply. The rule, as stated in *Patton v. Patton*[37] and quoted above, suggests three requirements to trigger application: 1) the child should be of tender age, i.e., kindergarten age or less, since the child would then be home with the mother part or all of the time; 2) the mother must in fact be able to be at home with the child; and 3) the evidence on which parent will do a better job of rearing the child and who will provide a better home environment must be in balance.

Thus, I favor retention of the doctrine, but only if applied to those factual situations where the doctrine was meant to apply.

My suggested age requirement is younger than the 12 or less found by one writer[38] to be the ages to which the supreme court has historically applied the doctrine, but it is based on the rationale that it is the mother's presence that gives her the right to the preference. That situation is, of course, becoming less common today with recent societal changes in women's employment. The requirement that the evidence on parental quality be in balance is not an exact requirement; this kind of evidence is never perfectly equal. This balance, however, is commonly found, i.e., in many situations the parents appear to have roughly equal good and bad qualities on their parental balance sheets.

The ultimate question, however, is not mine to answer, and it seems clear that both the legislature and the courts are moving towards completely discarding the doctrine. Tender age of children, then, becomes merely one factor a court is to consider in determining the best interests of the child.

36. *See*, Mead, M., *Some Theoretical Considerations of the Problems of Mother-Child Separation*, 24 AM. J. ORTHOPSYCHIATRY 24 (1954); *see also* various authorities cited in Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423 (1976-77).

37. 215 Kan. 377, 379 (1974).

38. Note, *The Best Interest of the Child in Custody Controversies Between Natural Parents: Interpretations and Trends*, 18 *Washburn L. J.* 482, 487 (1979).