*Constance Backhouse**

THE MOTHER FACTOR IN AUSTRALIAN CHILD CUSTODY LAW, 1900–1950

Faced with a hotly contested custody dispute waged before the Supreme Court of Victoria in 1947, Lowe J fashioned what he modestly described as 'a homely metaphor'. '[W]here two people ride on a horse', he declared, 'one must ride behind'.[1] Undeniably, there were winners and there were losers in the child custody litigation that raged across Australia during the first half of the twentieth century. The bitter parental discord over who was entitled to rear the offspring often found expression in the rhetoric of gender claims, with litigants, lawyers and judges basing their analysis upon beliefs and expectations about the 'nature' of women and men. Not surprisingly, the patterns and trends in child custody law reflect a great deal about the balance of gender power and the relative status of men and women.

Australian legal authorities generally suggest that the law of child custody has shifted dramatically over time. The early common law position, thought to have been dominant until the end of the nineteenth century, allocated all custody rights to fathers. Blackstone's *Commentaries on the Laws of England* explained that fathers had the right to the physical custody of their children, while mothers were 'entitled to no power, but only reverence and respect'.[2] Equitable jurisdiction, buttressed by

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1 *McKinley v McKinley* [1947] VLR 149, 162.

2 William Blackstone, *Commentaries on the Laws of England* vol 1 (1765) 441; P E Joske, *Joske's Marriage and Divorce* vol 2 (4th ed, 1961) 506; David Hambly and Neville Turner, *Cases and Materials on Australian*

legislation, started to encroach upon these sweeping paternal powers during the nineteenth century. Courts slowly began to deprive fathers of the custody of their children if their conduct was sufficiently egregious to warrant the forfeiture of their rights.[3] By the onset of the twentieth century, it is thought that the balance of power shifted dramatically, with mothers taking the ascendancy, particularly where young children were concerned. Commonly referred to as 'the mother factor', 'the mother principle', the 'preferred role of the mother' or the 'tender years doctrine', text writers assert that twentieth-century case law established something in the nature of a practical presumption that the mother was the preferable custodial parent 'especially if the child [was] still young'.[4] By mid-century, one commentator went so far as to state that 'the mother [was] *prima facie* entitled to custody, and the father [had] to show a special case

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Family Law (1971) 534; Anthony Dickey, *Family Law* (3rd ed, 1997) 333–4, citing *R v De Manneville* (1804) 102 ER 1054 to indicate that the father's custody rights could be enforced even against 'the child at its mother's breast'. See also *Re Agar-Ellis* (1878) 10 ChD 49.

3 Joske, above n 2, 506; Hambly and Turner, above n 2, 534; Dickey, above n 2, 334. For further discussion of this in the Canadian context, see Constance Backhouse, *Petticoats and Prejudice: Women and Law in 19th-Century Canada* (1991) and Constance Backhouse, 'Shifting Patterns in 19th-Century Canadian Custody Law' in David Flaherty (ed), *Essays in the History of Canadian Law* vol 1 (1981) 212.

4 See, for example, Henry Finlay, *Family Law in Australia* (1979) 184; Stephen Parker, Patrick Parkinson and Juliet Behrens, *Australian Family Law in Context: Commentary and Materials* (2nd ed, 1999) 829; Dickey, above n 2, 388–9, 393–5; Hambly and Turner, above n 2, 568–9; Annette Hasche, 'Sex Discrimination in Child Custody Determinations' (1989) 3 *Australian Journal of Family Law* 218, 221; Sandra Berns, 'Living Under the Shadow of Rousseau: The Role of Gender Ideologies in Custody and Access Decisions' (1991) 10 *University of Tasmania Law Review* 233, 234; Regina Graycar, 'Equality Begins at Home' in Regina Graycar (ed), *Dissenting Opinions: Feminist Explorations in Law and Society* (1990) 58–9; Anne Summers, *Damned Whores and God's Police: The Colonisation of Women in Australia* (1975) 335–6, where she notes that the passage of legislation expanding maternal custody rights in the first portion of the twentieth century 'gave the courts the power to override the common law rights of the father and award the mother custody of her children if it was considered, and it usually was, that it was in the children's interests to do so'.

to obtain custody'.[5] The pendulum is thought to have swung again by the 1970s, when courts firmly rejected the maternal presumption in favour of more egalitarian rhetoric.[6]

The 1999 text, *Australian Family Law in Context*, describes the perceived patterns well:

> Until the mid-1970s there were regular judicial suggestions that young children should be with their mother. This attitude was developed towards the end of the nineteenth century, when the father's right to custody of his legitimate children was increasingly challenged. The so-called 'mother principle' was initially described as a law of nature. It was then often said that it derived from human experience rather than a principle of law.[7]

The Australian High Court summed it up in similar terms in the 1979 decision of *Gronow v Gronow*:

> In earlier days, when there was no role for a father in the upbringing of children and in the running of the household, the care and the upbringing of children was left almost entirely to the mother who was able to devote the whole of her time and attention to that responsibility and to household affairs. In this situation, it was very natural that the so-called [mother] principle carried very considerable weight. ... But in recent times, particularly in the last twenty years, there has come a radical change in the division of responsibilities between parents. ... The consequence has been to diminish the

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5 Margaret James, 'Double Standards in Divorce: Victoria, 1890–1960' in Judy Mackinolty and Heather Radi (eds), *In Pursuit of Justice: Australian Women and the Law, 1788–1979* (1979) 203, 207.

6 See Dickey, above n 2, 387–8, 395–6, citing as one authority *In the Marriage of Raby* (1976) 27 FLR 412, 427: 'We are of the opinion that the suggested "preferred" role of the mother is not a principle, a presumption, a preference, or even a norm'. See also *In the Marriage of Sherridan* [1994] FLC 92-517; *McMillan v Jackson* [1995] FLC 92-610.

7 Parker et al, above n 4, 829.

strength of the principle or of the factual presumption as it has been applied by the courts.[8]

REPORTED CUSTODY AWARDS, 1900–1950: COMPILATION OF DATA

This article takes as its focus the first half of the twentieth century, the purported heyday of 'the mother factor'. Despite the consistency with which commentators claim that mothers were the primary beneficiaries of court-ordered child custody awards during this period, little detailed research has been completed to substantiate the claim.[9] The data for this study was compiled through a search of all the published law reports in Australia from 1900 to 1950.[10] The reported cases do not, of course,

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8 *Gronow v Gronow* (1979) 144 CLR 513, 526–7.

9 One of the few studies to touch upon the history of Australian child custody law in any detail is Heather Radi, 'Whose Child? Custody of Children in NSW, 1854–1934' in Mackinolty and Radi, above n 5, 119. Radi concludes that, despite the legislative efforts to increase maternal custody, the judges upheld the double standard, requiring women, but not men, to exhibit chastity, sobriety and attendance to household duties before extending them the right to child custody. Her article cites predominantly nineteenth-century judicial decisions. For a brief discussion regarding the nineteenth century, see Tess Moloney, 'A Consideration of the Divorce Legislation in Colonial Victoria and the Divorce Petitions in 1861 and 1891' (1984) 13 *Australia 1888* 60. Moloney notes at 67 that 'women were usually awarded custody', but then makes reference to two specific cases in which fathers obtained child custody. Research on the outcome of contested custody cases in the 1970s and 80s includes Berns, above n 4; Hasche, above n 4; and F M Horwill and S Bordow, *The Outcome of Defended Custody Cases in the Family Court of Australia* (Research Report No 4, Family Court of Australia, 1983).

10 The following volumes of law reports were examined: Weekly Notes (NSW) from 1900–1950; State Reports (NSW) from 1900–1950; Victorian Law Reports from 1900–1950; Argus Law Reports from 1900–1950; Tasmanian Law Reports from 1900–1940; Tasmanian State Reports from 1941–1950; Queensland Law Journal Reports from 1900–1901; Queensland Law Reporter (Queensland Weekly Notes) from 1902–1950; Queensland State Reports from 1902–1950; Queensland Justice of the Peace Reports from 1907–1950; South Australian Law Reports from 1900–1920; South Australian State Reports from 1921–

represent all of the legal decisions issued, but only the ones that the editors of the law reports deemed important enough to publish. This study cannot claim to be completely reliable in quantitative terms. However, initial efforts to pursue unreported child custody decisions in state archives have proven largely unsuccessful, due to the apparent loss and destruction of many court records.[11] Another drawback is that none of the reported cases appears to have dealt with custodial disputes involving Aboriginal parents, despite the unconscionable role of law in wresting Aboriginal children from their communities during this era. As a result, this study will be confined to a consideration of custody law relating to non-Aboriginal families.[12] The reported cases also appear to presume that all the litigating parties were heterosexual. Without comprehensive

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1950; Western Australian Law Reports from 1900–1950; Commonwealth Law Reports from 1903–1950. The Northern Territory judgments were not published until 1981, when a volume spanning 1951–76 was published as [1951–1976] Northern Territory Judgments. Some Northern Territory decisions prior to 1951 were published in the Argus Law Reports.

11 Initial attempts to access archival records of child custody cases in the State Records Office of the State Library of Western Australia and in the judicial archives of Victoria have proven remarkably unsuccessful. The cases are not indexed, many appear to have been misfiled or mislaid, and archivists admit that many records have been destroyed. The Prothonotary Office of Victoria advises that the files of the Practice and Full Courts are destroyed after seven years, and that existing files are not accessible due to confidentiality. When files are located, they often contain mere lists of the affidavits and records from the case, without more. The closure of remaining documents under privacy legislation also impedes historical research.

12 Aboriginal Protection Boards throughout Australia tore Aboriginal families apart by seizing the children for placement in foster homes or missions. For some discussion of the terrible cost of this racist dislocation, see Margaret Tucker, *If Everyone Cared* (1977) 90–3; Su-Jane Hunt, 'Aboriginal Women and Colonial Authority: Northwestern Australia, 1885–1905' in Mackinolty and Radi, above n 5, 32; Peggy Brock, 'Aboriginal Families and the Law in the Era of Segregation and Assimilation, 1890s to 1950s' in Diane Kirkby (ed), *Sex, Power and Justice: Historical Perspectives on Law in Australia* (1995) 133; Fiona Paisley, 'Feminist Challenges to White Australia, 1900–1930' in Kirkby, ibid 252.

analysis of the unreported cases, there is also no way of knowing what proportion of the full range of cases was actually reported, and what proportion remains lost to historical inquiry.

Despite its shortcomings, a study of reported decisions remains extremely valuable because it provides detailed documentation about judicial perspectives and rule making. The reported cases were highly influential, for they articulated the legal principles that governed how lawyers advised their clients, how litigants structured their arguments, and how judges made up their minds in the day-to-day workings of the courts. Scrutinising these historical records permits us to draw important conclusions about the shaping of Australian law.

The sample drew 135 reported cases dealing with child custody, of which eighty-six contained judicial analysis that pertained to maternal or paternal custody rights.[13] Sixty-two cases involved disputes directly between mothers and fathers. Of the sixty-two, mothers won 66.13 per cent, while fathers won 33.87 per cent. (See Table 1.) These numbers are surprisingly consistent with preliminary data drawn from the 1970s and 80s, showing fathers obtaining contested custody at around 33–40 per cent.[14]

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13 Where a case is reported initially as the trial decision and separately on appeal, I have considered it to be a single case only. The cases not among the eighty-six focused primarily upon such matters as procedure, maintenance, divorce or state welfare proceedings, with the maternal–paternal custodial discussion merely tangential and not dealt with sufficiently to be of relevance to the issues considered in this article.

14 Berns, above n 4, examined Australian reported cases from 1976 to 1990 and concluded at 235 that, where custody was fully contested, care and control was given to the father in about one-third of the cases. Horwill and Bordow, above n 9, based on admittedly slim data from Melbourne, found that when men actually contested custody over 40 per cent of the cases were resolved in their favour. See also Susan Maidment, *Child Custody and Divorce: The Law in Social Context* (1984) 66; Graycar, above n 4, 64. Further statistical research would be useful to confirm these results using larger samples.

*Table 1: Success Rates in Custody Litigation Between Mothers and Fathers**

	Number of Awards	Percentage of Awards
Mothers	41	66.13%
Fathers	21	33.87%
Total	62	100%

* Sample of 62 reported law cases across Australia between 1900–1950.

Table 2 illustrates the mother–father data broken down by decade. The maternal preference appears to have been strongest in the decades 1910–19 and 1930–39, and relatively weak from 1920–29. The numbers indicate that, while courts did seem to prefer mothers over fathers when two parents were litigating over child custody, they did not favour maternal rights overwhelmingly. For a period thought to represent the epitome of maternal preference, this study of custody litigation suggests somewhat less imbalance than one might anticipate.

*Table 2: Success Rates in Custody Litigation Between Mothers and Fathers: Breakdown by Decade**

	1900–09	1910–19	1920–29	1930–39	1940–50
Mothers	11 (61.1%)	7 (87.5%)	2 (40%)	6 (85.7%)	15 (62.5%)
Fathers	7 (38.9%)	1 (12.5%)	3 (60%)	1 (14.3%)	9 (37.5%)
Total	18 (100%)	8 (100%)	5 (100%)	7 (100%)	24 (100%)

* Sample of 62 reported law cases across Australia between 1900–1950.

The remaining twenty-four cases dealt with custody battles between parents and extended relatives such as grandparents, aunts, uncles and cousins. Of these, mothers litigated for custody in six, and won in two, or 33.33 per cent. Fathers litigated for custody in nine, and won in five, or 55.56 per cent.[15] This suggests that fathers were actually in the ascendancy over mothers when they contested custody against other relatives. Although the overall numbers are small, prior to 1930 fathers appear to have had a substantial margin of victory in comparison to mothers here. Table 3 illustrates these data as broken down by decade.

*Table 3: Success Rates in Custody Litigation Between a Parent and Extended Relations**

	1900–09	1910–19	1920–29	1930–39	1940–50	% Total
Mother wins	0	0	0	1	1	33.33%
Mother loses	1	0	2	0	1	66.67%
Father wins	1	3	1	0	0	55.56%
Father loses	1	1	0	1	1	44.44%
Total	3	4	3	2	3	100%

* Sample of 15 reported law cases across Australia between 1900–1950.

15 Of the 24 cases involving extended relations, only 15 involved one parent litigating against extended relations. Two cases involved both parents litigating against extended relations. The remaining seven cases involved extended relations litigating against extended relations. The latter have been included in the data pool for this article since the issues raised by the extended relations were grounded upon underlying maternal or paternal claims.

THE CONTEXT OF THE TIMES

Families, the nature of parenting, gender roles and the construction of childhood have all undergone considerable change over time. Some historians have suggested that the penal origins and gender imbalances that marked Australia's early colonisation bequeathed a 'masculinist social formation' and a 'history unusually steeped in misogyny' during the formative years.[16] As Miriam Dixson has noted, 'stable family life ... got off to a late start'.[17] In the early twentieth century, however, the Australian population achieved a more even gender balance, and the stage was set for the construction of the 'modern' Australian family.[18] The pre-industrial economy, in which all members of the family laboured on the land or within the home to meet the economic needs of the household and immediate neighbourhood, began to transform itself in line with capitalist structures. Production shifted away from private dwellings into factories and offices populated primarily by adult males.[19] Husbands went out to

16 See, for example, Miriam Dixson, *The Real Matilda* (1976) 11–13; Norman MacKenzie, *Women in Australia* (1962) xiv; Judith Allen, *Sex and Secrets: Crimes Involving Australian Women Since 1880* (1990) 4. For a divergent opinion, see Patricia Grimshaw, 'Women and the Family in Australian History' in Elizabeth Windschuttle (ed), *Women, Class and History: Feminist Perspectives on Australia, 1788–1978* (1980) 37, arguing at 38 that Australian women and mothers held an enhanced status within the family due to the 'early and widespread adoption in the Australian environment of modern patterns of family formation ... and with them the strong acceptance of modern ideologies surrounding family life'.

17 Dixson, above n 16, 49.

18 Jill Julius Matthews, *Good and Mad Women: The Historical Construction of Femininity in Twentieth-Century Australia* (1984) notes at 31 that in 1891 there was still an excess of fifteen men per hundred females, but that a more even balance was achieved and maintained from the outset of the First World War.

19 Patricia Grimshaw and Graham Willett, 'Women's History and Family History: An Exploration of Colonial Family Structure' in Norma Grieve and Patricia Grimshaw (eds), *Australian Women: Feminist Perspectives* (1981) 149; Matthews, above n 18, notes at 56–7 that until the 1890s goods for household consumption and local barter were made at home, but that such production slowly lessened as 'superior' replacements came up for sale in the marketplace.

work as 'family breadwinners', wives became 'housewives' and domestic servants disappeared.[20] These economic trends, which were experienced throughout the developing western world, were particularly pronounced in Australia, where few women escaped relegation to the home. Australia had relatively few labour-intensive manufacturing industries that were thought to require the paid employment of women. The country was also home to a striving trade union movement, which lobbied successfully for male wages high enough to support a whole family and valorised the concept of a one-pay-cheque family. Consequently, the percentage of women in the paid workforce was fairly constant from the 1890s to the 1950s at about 20 per cent.[21]

The transformation of the Australian family was also affected by the drop in the birthrate, which took a serious nosedive between the 1880s and mid-1930s. The declining number of children who were born were ordered by law to attend school and prohibited from participating in industrial work. They lost their economic status and came to represent financial liabilities upon their families throughout an extended age of dependency.[22] Parental responsibilities became more sharply defined and sex-differentiated. Fathers absented themselves from the home for long periods of the day to fulfil their new mission as the 'providers of financial security'. Mothers were assigned the role of 'keeper of the hearth' and expected to supervise the family's 'emotional' needs in a home setting that had become the affectionate centre of family life.[23] Child-rearing had previously been considered a matter of 'hygiene, feeding and dealing with simple illnesses'. All members of the family, including older children, had shared in such tasks. Now that the only people left at home were mothers and small children, responsibility for child care devolved entirely upon the former.[24] Standards of child care rose dramatically. Mothers were urged to be more conscientious about instilling civic virtues in the young, and

20 Grimshaw and Willett, above n 19, 136–54.

21 Summers, above n 4, 291; Grimshaw and Willett, above n 19, 154; Matthews, above n 18, 51.

22 Matthews, ibid 82–3; Beverley Kingston, *My Wife, My Daughter and Poor Mary Ann: Women and Work in Australia* (1975) 15; Robert van Krieken, 'State Bureaucracy and Social Science: Child Welfare in New South Wales, 1915–1940' (1990) 58 *Labour History* 17, 31–2.

23 Summers, above n 4, 337; Grimshaw and Willett, above n 19, 154.

24 Kingston, above n 22, 108; Matthews, above n 18, 84.

warned to attend to the child's psychological, educational and social needs. Legions of physicians, nurses and members of charitable women's organisations mounted campaigns to encourage breastfeeding, correct infant feeding habits, upgrade household sanitation, and medicalise pregnancy and childbirth. Motherhood took on the nature of a 'special vocation', an enhanced status that was presumed to require special training.[25]

During the First World War, when women of other westernised countries were pulled from their homes into the factories, Australian women experienced 'the mobilisation of mum'. Political, military and religious leaders exhorted married women to bear more children and to rear good soldiers, re-enforcing the view that a woman's main function was realised through her status as a mother.[26] The emphasis on women's domesticity intensified during the inter-war years. Women were urged to fulfil themselves within their 'separate sphere' where women's skills could be valued and acknowledged. The elevation of motherly status was held out to women as preferable to full economic independence, even touted as an inducement to acquiesce in lesser educational and vocational opportunities.[27] The optimism and economic expansion of the 1920s introduced modern technologies to lighten the load of housework, while at the same time heightening the standards of mother–child psychological relationships. The revolutionary new fashion and sexual mores of the 'roaring twenties' had just started to take hold when a wave of repression and conservatism swept over the country.[28] Professional experts and advertisers reconstructed women in the image of the perfect, capable, scientific, suburban housewife.[29] The 'mental hygiene' movement promulgated theories of 'normal child development' that stressed the 'inordinate influence' that mothers exercised over the mental health and psychological adjustment of the future generation.[30] During the severe

25 Summers, above n 4, 337; Matthews, above n 18, 78–9.
26 Summers, above n 4, 380–5.
27 Ann Game and Rosemary Pringer, 'The Making of the Australian Family' (1978) 10/11 *Intervention* 63, 68.
28 Kingston, above n 22, 108–10; Summers, above n 4, 388–95.
29 Kereen Reiger, *The Disenchantment of the Home: Modernising the Australian Family, 1880–1940* (1985).
30 Matthews, above n 18, 78–9.

depression that followed in the 1930s, sex-role prescriptions were underscored when unemployment relief rations were distributed exclusively to men.[31] With the advent of World War II, women were briefly recruited for industrial work, where they served as aircraft mechanics, X-ray technicians, meteorological assistants, instrument repairers and telegraph signallers, reimbursed on men's pay scales.[32] But the variation in sex roles lasted only as long as the war. After hostilities ceased, women were ushered back into full-time domesticity within burgeoning single-family suburban dwellings, and the birthrate rose spectacularly.[33]

Throughout the first half of the twentieth century, then, a pronounced new ideology of motherhood emerged. Women's familial decision making and disciplinary powers grew, while the role of men became increasingly nominal, until by 1950 sociologists were proclaiming the 'overwhelming dominance of mother as the heart of the Australian family'.[34] Summing up the position of women throughout this period, Jill Julius Matthews has stated:

> From the 1880s [to the 1960s] the core of the ideal of the good woman was mothering. Before the 1880s, a woman's social value was judged at least as much from her activity as wife, as sexual partner, economic assistant, companion, servant. By the 1960s, this aspect of woman was returning to high valuation. In the years between, mother reigned.[35]

In the words of Anne Summers, the first half of the twentieth century was a time when motherhood was elevated to 'almost reverential status' in Australian society.[36]

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31 Summers, above n 4, 398–410.
32 Ibid 413–19.
33 Ibid 419.
34 Matthews, above n 18, 99.
35 Ibid 88.
36 Summers, above n 4, 335–6.

THE LEGISLATIVE FRAMEWORK, 1844–1950

The law of child custody was substantially affected by a series of statutes passed prior to 1950.[37] Throughout this period, family legislation was treated as a matter of state jurisdiction, and the situation varied between different regions of the country.[38] However, the various statutes comprised several substantively distinct stages of reform. Although in some cases the stages overlapped each other, for the purposes of this discussion, it is useful to group the legislation into three separate waves of reform: 1) minimal intrusion on paternal rights; 2) parental equalisation; and 3) paramountcy of infant welfare.

The first wave of legislative reform brought only minimal intrusion on paternal rights. Enacted in the wake of an 1839 English law known as *Lord Talfourd's Act*, these statutes gave judges the discretion to award custody to non-adulterous mothers, so long as their children were not more than seven years old.[39] Examples of such early legislation include an

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37 This article will only depict the broad outlines of the legislative reform process as a framework for discussion of the judicial decisions. It does not attempt to chronicle fully all of the statutory provisions affecting child custody, and will not touch upon issues such as the appointment of legal guardians upon the death of one or both parents, parental misconduct or state wardship.

38 The Australian Constitution s 51(xxi) and (xxii) endowed the Commonwealth with powers to legislate in the fields of marriage, 'divorce and matrimonial causes, and in relation thereto, parental rights, and the custody and guardianship of infants'. The Commonwealth did not choose to enter the field until the middle of the twentieth century. Until then each state was 'left free to go its own way': H A Finlay and A Bissett-Johnson, *Family Law in Australia* (1972) 17; see also Malcolm Broun, 'Historical Introduction' in Paul Toose, Ray Watson and David Benjafield, *Australian Divorce Law and Practice* (1968) ci.

39 *Lord Talfourd's Act* was titled *An Act to Amend the Law Relating to the Custody of Infants 1839* (Eng) 2 & 3 Vict, c 54. Section 1 provided:

> it shall be lawful for the Lord Chancellor ... upon hearing the petition of the mother of any infant or infants, being in the sole custody or control of the father thereof ... if he shall see fit to make order for the access of the petitioner to such infant or infants, at such times and subject to such regulations as he shall deem convenient and just; and if such infant or infants shall be

1844 Western Australian statute,[40] an 1854 New South Wales statute[41] and an 1867 Queensland statute.[42] The provisions expanded maternal custody rights, but did not directly attack the primary paternal entitlement. The new maternal rights were hedged about by age restrictions and left entirely to the discretion of the all-male judiciary. There was a clear imbalance between mothers and fathers in that adultery disentitled the former but not the latter.

> within the age of seven years, to make order that such infant or infants shall be delivered to and remain in the custody of the petitioner until obtaining such age, subject to such regulations as he shall deem convenient and just.

Section 4 continued:

> Provided always ... that no order shall be made by virtue of this Act whereby any mother against whom adultery shall be established by judgment in an action for criminal conversation at the suit of her husband, or by the sentence of an ecclesiastical court, shall have the custody of any infant or access to any infant, anything herein contained to the contrary notwithstanding.

For a more detailed discussion of the genesis behind *Lord Talfourd's Act*, see Backhouse, *Petticoats and Prejudice*, above n 3, and Backhouse, 'Shifting Patterns', above n 3.

40 *An Act for Adopting Certain Acts of Parliament 1844* (WA) adopted the imperial statute titled *An Act to Amend the Law Relating to the Custody of Infants 1839* (Eng) 2 & 3 Vict, c 54.

41 *Act of 1854* (NSW). I have been unable to locate a copy of this statute (the State Library of New South Wales does not have statutes prior to 1862), but reference to it is given in *In re Harris* (1936) 37 SR (NSW) 17, 22.

42 *Equity Act 1867* (Qld) ss 148, 150. The Supreme Court was the judicial body stipulated in Queensland, and the adultery bar related to adultery 'established by the judgment decree or sentence of the court in its matrimonial jurisdiction'. The provisions are published in the *Public Acts of Queensland 1828–1936*, vol 3, under the title 'Practice' and it is unclear from the volume whether they were originally enacted in 1867, or in the statutes listed as amending the original act in 1895, 1899, 1903 or 1908.

England raised the age limit to sixteen in 1873,[43] inspiring Tasmania to do so in 1874[44] and New South Wales in 1875.[45] Victoria caught up in 1883[46]

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43 *Custody of Infants Act 1873* (Eng) 36 Vict, c 12. The revised statute removed the adultery bar, and enabled the legal enforcement of agreements in separation deeds granting custody to the mother provided they were of benefit to the children.

44 *Infants' Custody Act 1874* (Tas) s 1 authorised a judge

> upon hearing the petition, by her next friend, of the mother of any infant or infants under sixteen years of age, to order that the petitioner shall have access to such infant or infants at such times and subject to such regulations as the Court or Judge shall deem proper, or to order that such infant or infants shall be delivered to the mother and remain in or under her custody or control, or shall, if already in her custody or under her control, remain therein until such infant or infants shall attain such age, not exceeding sixteen, as the Court or Judge shall direct; and further, to order that such custody or control shall be subject to such regulation as regards access by the father or guardian of such infant or infants and otherwise as the said Court or Judge shall deem proper.

Section 2 provided:

> No agreement contained in any separation deed made between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother; but the said Court shall not be bound to enforce any such agreements if the Court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto.

There was no adultery bar included in the enactment.

45 *Custody of Infants Act 1875* (NSW). I have been unable to locate a copy of this statute, but reference to it is given in *In re Harris* (1936) 37 SR (NSW) 17, 22. Sections 1 and 11 were virtually identical to ss 1 and 2 of the Tasmanian enactment above. The provisions were re-enacted in the *Infants' Custody and Settlement Act 1899* (NSW) ss 5 and 11, which referred in the marginal notes to the 1875 provisions.

46 *Marriage and Matrimonial Causes Act 1883* (Vic) ss 2, 5. The provisions were virtually identical to the Tasmanian enactment above, except that maternal custody and access rights were limited to 'legitimate' infants.

and South Australia (and the Northern Territory) in 1884.[47] The Victorian statute expanded the adultery bar considerably, stipulating that judges could disentitle a mother proved guilty of 'adultery, habitual intemperance, or any misconduct' that in the court's opinion should bar her from exercising custody rights. Fathers were not under similar scrutiny.[48] With this exception, the early statutes appear to have been enacted in an effort to duplicate reforms passed in the mother country.

Much of the impetus for later revisions came from feminist initiatives. Australian women succeeded in securing the franchise well ahead of most of their North American and European counterparts.[49] Child custody and guardianship were topics of serious concern within the Australian feminist movement, along with divorce, sexual assault, child welfare and married women's property law.[50] Patricia Grimshaw has noted that egalitarian child custody law was one of the main goals of first wave feminism.[51] Rose Scott, a turn-of-the-century feminist activist from New South Wales, made concerted efforts to redress the overweening paternal powers over

47 *Custody of Infants Act 1883–84* (SA), placing the age limit at sixteen. Until 1911, when the Northern Territory became a territory under the authority of the Commonwealth of Australia, the acts of South Australia were in force in the territory. In Western Australia, *An Act to Amend the Ordinance to Regulate Divorce and Matrimonial Causes 1879* (WA) s 3 raised the age to ten, in cases where the husband was convicted of aggravated assault upon his wife and she had obtained a decree of judicial separation. By 1920, the age limit had dropped away; see *Guardianship of Infants Act 1920* (WA).

48 *Marriage and Matrimonial Causes Act 1883* (Vic) s 4 provided:

> Any such order as aforesaid may be discharged by the Court upon application by the father or guardian of such infant upon proof that the mother has since the making thereof been guilty of adultery, habitual intemperance or any misconduct which in the opinion of the Court disentitles her to the custody or control any longer of such infant.

49 South Australia became the first Australia jurisdiction to extend the franchise in 1894, and Victoria the last in 1908; see Norman MacKenzie, *Women in Australia* (1962) 36–52.

50 Summers, above n 4, 368–9; Grimshaw and Willett, above n 19; Kingston, above n 22, 12.

51 Grimshaw and Willett, above n 19; Grimshaw, above n 16, 44.

children.[52] Heather Radi has analysed the tenacious efforts of various women's organisations in New South Wales to obtain legislative endorsement of the equal status of mothers and fathers concerning child custody.[53] Constance Davey describes the lengthy campaign in South Australia waged by the Women's Non-Party Political Association and the League of Women Voters to obtain equal parental guardianship rights.[54]

Despite their substantial efforts, it would take some time before feminists convinced legislators across Australia to import another English statute passed in 1886. The English enactment heralded a second wave of child custody reform that purported to usher in parental equalisation. Judges were instructed to make custody decisions 'having regard to the welfare of the infant and the conduct of the parents, and to the wishes as well of the mother as of the father'.[55] This was an attempt to introduce some rough balance between mothers and fathers. However, the process was entirely subject to the courts' scrutiny of the conduct of each, an appraisal that could be significantly imbued with gender stereotypes and imbalance.[56] The provision also introduced the concept of the 'welfare of the infant',

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52 Rosalind Atherton, 'Feminists and Legal Change in New South Wales, 1890–1916: Husbands, Widows and "Family Property"' in Kirkby, above n 12, 172–7. Atherton quotes Scott's speech to the National Council of Women in 1904:

> Do most women recognise the fact that children belong virtually to fathers? That the father, who also as a rule has complete control over the purse, has also complete control over the children, their education, their religion, their domicile, the choice of preparation for their future life work—all is in the control of the father—and even when dead he can by his will leave them in the hand of guardians other than their mother.

53 Radi, above n 9.

54 Constance Davey, *Children and Their Law Makers: A Socio-Historical Survey of the Growth and Development from 1836 to 1950 of South Australian Laws Relating to Children* (1956) 93.

55 *Guardianship of Infants Act 1886* (Eng) 49 & 50 Vict, c 27. See Maidment, above n 14, for details regarding the origins of this legislation.

56 Radi, above n 9, notes at 120 that, despite the egalitarian rhetoric, 'the legacy of the double standard ensured the requirements for the mother would be different from, and more exacting than, those of the father, especially in sexual morality'.

whose interests now joined those of both parents. Despite the rhetoric of egalitarianism, this last factor had some potential to undermine parental equality. Judges who based their assessments of child welfare upon discriminatory gender assumptions could do much to diminish the force of the reform. Legislation of this nature was enacted in Tasmania and South Australia (along with the Northern Territory) in 1887.[57] Victoria followed suit in 1912[58] and Western Australia in 1920.[59] New South Wales did not enact a statute ushering in parental equalisation until 1934.[60] However,

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57 *Guardianship of Infants Act 1887* (Tas) s 6 provided that

> the Court may, upon the application of the mother of any infant (who may apply without next friend) make such Order as it may think fit regarding the custody of such infant, and the right of access thereto of either parent, having regard to the welfare of the infant and to the conduct of the parents, and to the wishes as well of the mother as of the father.

The *Guardianship of Infants Act 1887* (SA) s 7 was virtually identical. Section 10 of the same Act enabled agreements in separation deeds granting custody to the mother to be legally enforceable if they were of benefit to the children. The South Australian statute would also have been in force in the Northern Territory, since it was enacted before 1911.

58 *Custody of Infants Act 1912* (Vic) s 6 was virtually identical to the Tasmanian statute above. The Victorian statute was revised by the *Marriage Act 1915* (Vic) s 71 to include the earlier stipulation that adulterous, intemperate or misbehaving mothers ought not to benefit from such expanded rights. This had been initially enacted in the earlier *Marriage and Matrimonial Causes Act 1883* (Vic) s 4 and the *Marriage Act 1890* (Vic) s 33, but was left out of the 1912 version.

59 *Guardianship of Infants Act 1920* (WA) s 5 was virtually identical to the Tasmanian statute above. Section 8 enabled agreements in separation deeds granting custody to the mother to be legally enforceable if they were of benefit to the children.

60 *Guardianship of Infants Act 1934* (NSW) s 2, amending s 5 of the *Infants' Custody and Settlements Act 1899*. The provision added a unique additional statement: 'The fact that a parent contemplates leaving the State shall not of itself be regarded as a reason for denying such parent the custody of the child or depriving such parent thereof if the court is satisfied that the welfare of the child will best be served by allowing such parent to have or retain such custody.' The latter addition was based upon the publicly explosive custody litigation of Emelie Polini, a stage actress who sought to remove her daughter from the

New South Wales did enact a unique provision of its own in 1894, providing that the court might refuse to award custody to a parent where 'the tender age of the child or its state of health' rendered it 'expedient that it should remain with its mother or some other person'.[61] The latter provision appears to be an interesting departure from English legislation, with its overt recognition that mothers might be better suited to caring for children who were very young or ill.

The third wave of statutory reform proclaimed the paramountcy of infant welfare. The enactments enshrining paramountcy were modelled upon an English act of 1925, which directed that courts 'shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father ... is superior to that of the mother, or the claim of the mother is superior to that of the father'.[62] Parental equality was apparently on the minds of the legislators. The preamble to the English statute mentioned the 'expediency' of establishing 'equality in law between the sexes'. Parliament obviously wished to remind judges that fathers ought not to be privileged in any respect in the assessment of custody rights. The preference for paternal

country to tour England and America; for details, see Radi, above n 9, 126.

61 *Custody of Children and Children's Settlement Act of 1894* (NSW) s 1 provided:

> Where the parent of a child applies ... for a writ or order for the production of the child ... and the Court is of opinion that the parent has abandoned or deserted or neglected the child, or that he has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the child, or that the tender age of the child or its state of health render it expedient that it should remain with its mother or some other person, the Court may in its discretion decline to issue the writ or make the order.

This provision was continued in the *Infants' Custody and Settlements Act 1899* (NSW) s 6. It was not repealed by the *Guardianship of Infants Act 1934* (NSW).

62 *An Act to Amend the Law with Respect to the Guardianship, Custody and Marriage of Infants 1925* (UK) 15 & 16 Geo 5, c 45, s 1. See Maidment, above n 14, for details regarding the origins of this legislation.

custody under the common law was specifically abrogated. The provision added, almost as an afterthought, that mothers ought not to be deemed superior either, although it made no reference to what foundation might have supported such claims. However, the main focus of the legislation was the principle of infant welfare. This was not a new criterion. The second wave of legislation had specifically addressed this in articulating the factors that judges should bring to bear upon their custody decisions. However, the 1925 English statute proclaimed the 'welfare of the infant' to be the 'first and paramount' consideration. All else was secondary. These principles were enacted in Western Australia in 1926,[63] Queensland in 1928[64] and Victoria in 1928.[65] The same New South Wales statute that

63 *Guardianship of Infants Act 1926* (WA) s 2 provided:

> Where ... the custody or upbringing of an infant ... is in question, the court ... shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim by the father, or any right at common law possessed by the father ... is superior to that of the mother, or the claim of the mother is superior to that of the father.

See also s 3, which provided: 'The mother of an infant shall have the like powers to apply to the court in respect of any matter affecting the infant as are possessed by the father.' This provision was continued under slightly altered wording in the *Matrimonial Causes and Personal Status Code 1948* (WA) s 44(1), which provided: 'The Court may make such order as it thinks just ... for the custody of or access to or for the maintenance and education of any children but in all cases the guiding principle shall be the welfare of the child and neither party shall have any prior right against the other.'

64 The *Guardianship and Custody of Infants Act 1928* (Qld) contained provisions covering paramountcy of infant welfare and parental equalisation. The statute is published in the *Public Acts of Queensland 1828–1936*, vol 1 under the title 'Children'. This Act represents a consolidation of the *Guardianship and Custody of Infants Act of 1891* (Qld), the *Statute Law Revision Act 1908* (Qld) and the 1928 enactment. The published version does not indicate when precisely the provisions were passed, but sections 3 and 3A must have been enacted in 1928, since they duplicated the 1925 imperial precedent. Sections 3 and 3A are identical to ss 2 and 3 of the WA Act, set out above. Section 6, the parental equalisation provision which used the language of 'having regard to the welfare of the infant, and to the conduct of the parents, and

inaugurated the second wave of reform in 1934 also contained a section identical to the English 'paramountcy of infant welfare' law.[66] Collapsing the second and third waves of reform together, the statute appeared arguably contradictory internally, setting out two distinct sets of criteria at the same time.[67] South Australia's situation was similarly confusing, since its 1940 statute enacted the 'paramountcy' wording while retaining the earlier provision regarding parental equalisation.[68] Neither Tasmania nor

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to the wishes as well of the mother as of the father', may possibly have been enacted in 1891 or 1908.

65 *Marriage Act 1928* (Vic) ss 15 and 16 were virtually identical to the Western Australian enactment of 1926, ss 2 and 3. Section 17 provided: 'The powers of a court under section 69 of the Principal Act to make orders regarding the custody of an infant and the right of access thereto of either parent may be exercised upon the application of the father of an infant in like manner as those powers may be exercised upon the application of the mother of the infant.' The latter section cited as precedent the imperial *Administration of Justice Act 1928* (UK) 18 & 19 Geo 5, c 26, s 60.

66 *Guardianship of Infants Act 1934* (NSW) s 3, inserting ss 17 and 18 of the *Infants' Custody and Settlements Act 1899*.

67 For an interesting analysis of whether the introduction of 'paramountcy' overrode or simply fleshed out other enumerated considerations in a somewhat later time period, see Henry Finlay, '"First" or "Paramount"? The Interests of the Child in Matrimonial Proceedings' (1968) 42 *Australian Law Journal* 96.

68 The *Guardianship of Infants Act 1940* (SA) s 11(1) was essentially the same as s 2 of the WA Act (above n 63). The earlier criteria, which did not prioritise the interests of the child, remained in force in s 6(1): 'The court may, upon the application of the mother or the father of any infant, make such order as it may think fit regarding the custody of the infant, and the right of access thereto of either parent, having regard to the welfare of the infant and to the conduct of the parents, and to the wishes as well of the mother as of the father.' The 1940 statute also proclaimed the NSW parental relocation provision in s 6(2): 'The fact that a parent of an infant contemplates leaving the State shall not of itself be regarded as a reason for denying that parent the custody of the infant or depriving that parent thereof if the court is satisfied that the welfare of the infant will best be served by allowing that parent to have or retain such custody.'

the Northern Territory appear to have enacted paramountcy provisions during the first half of the twentieth century.[69]

The statutory framework suggests that Australian legislators did not endorse the unilateral thrust of child custody law that had given fathers virtually all control under the common law. As they moved to reduce paternal authority, they expressed an intention to equalise the rights of mothers and fathers. The impetus seems to have come in part from an effort to keep abreast of developments in the mother country, and in part as a response to the agitation of local feminist organisations. Some jurisdictions moved more quickly than others, but eventually all promulgated directions to the judiciary to treat maternal and paternal claims in a balanced manner. The legislators showed no inclination to tip the scales towards a maternal preference. Nor was there widespread endorsement of the doctrine of tender years. New South Wales was the sole exception, listing 'the tender age of the child or its state of health' as reasons why a judge might decide to grant custody to the 'mother or some other person' in its 1894 statute. Despite the purported 'reverential status' of motherhood in Australian society, no legislature opted to give mothers pre-eminence under child custody law. In fact, the legislators were far more interested in the 'welfare of the infant'. Whether listed as one of a series of parallel considerations or enshrined as the 'paramount' concern, this was a matter which legislators wanted to factor prominently in the resolution of child custody disputes.

JUDICIAL ARTICULATION OF CUSTODY LAW, 1900–1950

In the exercise of their discretion under these statutes, judges awarded approximately two-thirds of the reported custody decisions to mothers and one-third to fathers. As they tried to articulate the rationale for such

69 The *Guardianship and Custody of Infants Act 1934* (Tas) continued the parental equalisation clause in s 10 but contained no paramountcy provision. Under the *Northern Territory Acceptance Act 1910* all laws in force in the Territory prior to 1911 were continued in force, but provision was made for their alteration or repeal by or under any law of the Commonwealth. The *Consolidated Ordinances of the Northern Territory of Australia in Force on 1 January 1961* vols 1–3 do not indicate any provisions altering or repealing the law of child custody as enacted earlier by South Australia.

decisions, they sometimes spoke about the importance of the maternal role in child development and other times reverted to fathers' rights. As the numbers would suggest, there was no one overarching viewpoint. It is useful to explore in some detail how the members of the judiciary explained the impact of gender in their reasoning. When they elaborated upon the rationale for their custody awards, the judges appear to have been influenced by several themes, which were in turn affected by changing socio-cultural developments: the tender years doctrine, shifting standards of sexuality, the impact of world wars and the advent of psychological theories about child development.

The Tender Years Doctrine

The 1901 New South Wales case of *Donohue v Donohue*,[70] was one of the first to offer a ringing endorsement of the tender years doctrine upon the advent of the new century. The Donohues had been married for three years when they agreed to separate. Mrs Donohue took the two children of the marriage and moved back home with her father, a Canon of the Anglican Church in Goulburn. Eight years later, Mr Donohue sued for custody of the girls, then aged nine and ten. New South Wales had still not enacted the second or third stages of custody legislation to usher in parental equalisation and paramountcy of infant welfare. However the 1894 statute authorised courts to award custody where 'the tender age of the child or its state of health' rendered it 'expedient that it should remain with its mother or some other person'.[71] The trial court initially awarded custody to the father. The Full Court overturned this ruling. Emphasising the wide discretion available, the court examined a number of factors: the interests of the child, the character and conduct of the parents, and the religious differences between the parents.[72] But Owen J gave particular emphasis to the 'tender years' of the girls: 'I am clearly of opinion that it would best conduce to the welfare of these young girls, that they should remain under the charge of their mother. At that age, they specially need

70 (1901) WN (NSW) 14.

71 *Custody of Children and Children's Settlement Act of 1894* (NSW) s 1.

72 Despite the absence of paramountcy legislation in NSW at this time, Stephen J indicated at 15 that, in exercising judicial discretion in such matters, the benefit of the child was 'the paramount consideration for the court'.

the watchful and loving care which only a mother can give.'[73] Stephen J agreed:

> The children are girls, and very young. Read what the Master of the Rolls says in *Austin v Austin* (34 Beav 257). ... It is the notorious observation of mankind that the loss of a mother is irreparable to her children, and particularly so if young. The father does not profess to have any female relations to whose care he can consign his daughters. ... But no such care or love can supply that of a mother.[74]

The Full Court of Western Australia expressed similar views in 1907 in the case of *In re Watson*,[75] a custody dispute involving a Northam farming family. Elizabeth Watson had left her husband, Alfred, alleging cruelty and neglect. Alfred Watson brought a writ of *habeas corpus* to obtain custody of their young son. Elizabeth claimed that her son was 'of a nervous disposition' and needed a mother's care. Alfred responded that he would have a female relative come to lodge with him to supervise the boy. Burnside J refused to disrupt the mother's custody:

> For my part I should rather see the child in the custody of the mother, and unless there is some absolute reason for taking an infant of two and a half years out of the custody of the mother, and placing it in the custody of the father, I should not be inclined, under any circumstances, to interfere and do that which appears to me to be an act, at any rate, of moral cruelty if not of legal cruelty.[76]

Burnside's support for the tender years doctrine, even in the case of a male child, was tempered only by his recognition that paternal rights might take precedence as children grew older. He added the following

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73 *Donohue v Donohue* (1901) WN (NSW) 14, 19.

74 Ibid 17. The *Austin* case cited is an 1864 English decision.

75 (1907) 9 WALR 62. Additional details of the affidavits filed can be found in the press coverage: 'The Custody of a Child: Rival Claims by Parents', *West Australian* (Perth), 24 May 1907.

76 Ibid 65–6.

words of caution: 'When the child becomes more advanced in years it may be better for him to be under the control of the father.'[77]

A decision often cited as one of the strongest authorities for the tender years doctrine, *In re Mayo, an Infant*,[78] was delivered by the Full Court of New South Wales in 1917. Mr and Mrs Charles Frederick Mayo jointly ran a small tobacco shop until their marital differences prompted Mrs Mayo to leave and return to her parents' home, taking their two-year-old daughter with her. Charles Mayo pursued her there and regained possession of the child. Mrs Mayo brought an application to the court in equity, seeking custody of the infant. Her counsel argued that, with a girl so young, 'her welfare necessitate[d] her being left with her mother'.[79] At this point, New South Wales had yet to enact the statutory measures promoting parental equalisation or paramountcy of infant welfare, and Mr Mayo's counsel claimed that paternal rights remained largely sacrosanct. The Chief Justice was less convinced. Making reference to the 1854 and 1875 enactments,[80] which permitted at least some intrusion upon common law paternal rights, the Chief Justice indicated that the legislative framework had begun to dismantle the 'extreme right afforded by the common law to the father', while granting 'new rights' to mothers. In his

77 Ibid 66. Although Mrs Watson argued that her son was 'of nervous disposition', she did not characterise this as a full disability. For an interesting illustration of how 'disability' could impact upon custody, see *Rochfort v Rochfort* (1944) 44 SR (NSW) 238, where the custody of a fourteen-year-old boy, described by the court as 'deaf and dumb' was given to his mother. Paul Rochfort was living in a boarding school for 'deaf and dumb children' but was allowed to come home to live with his mother on the weekend and during school vacations. The court found that the boy's disability had nurtured a special bond between mother and child (at 240): 'Since the age of two, his mother has constantly endeavoured to teach him to lip-read. As she is a teacher by profession, she is able to assist him materially in his education, which, on account of his affliction, requires much skill, patience and perseverance.' The insensitive language of 'affliction' depicts Paul Rochfort's communication capacities in rather piteous terms, but the equation of the needs of children with disabilities and maternal devotion seems to have been quite emphatic.

78 (1917) 17 SR (NSW) 438.

79 Ibid 440.

80 *Act of 1854* (NSW); *Custody of Infants Act 1875* (NSW).

view, courts were left to evaluate three considerations: 'the paternal right, the marital duty, and the interest of the children'.[81] Apportioning blame for the marital breakdown equally between the spouses, he noted that 'in the case of so young a child' it would be 'improper' to grant custody to the father.[82] Gordon J agreed that the court should consider the welfare of the child, any breach of marital duties by either party, and who was responsible for the marital separation. The 'primary right of the father' only came into play when the welfare of the child could be 'promoted equally' by leaving the child with either parent.[83] Offering a strong antidote to the father's common law primacy, Gordon J put forward a distinct presumption that should hold sway in the case of young children:

> [N]obody can fill the place of the mother in the case of a child of tender years, especially a female child, and this Court in my opinion ought to leave such a child in the custody and care of the mother, acting thus undoubtedly in its best interests unless the mother ... is shown to be 'an unnatural or an immoral mother,' and therefore not fit to be trusted with the child. In such case the Court takes the child away from the mother, finding that a bad mother is worse than no mother at all. ... In my opinion, in the case of an infant of tender years, primarily the mother should have the custody of the child; and that custody will only be taken from her when it is shown that she is unfit to have the care of the child.[84]

Concluding that Mrs Mayo had not been proven 'unfit', the Full Court awarded her custody.[85]

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81 *In re Mayo, an Infant* (1917) 17 SR (NSW) 438, 441.

82 Ibid 445.

83 Ibid 446.

84 Ibid.

85 See also *Creighton v Creighton* [1918] VLR 487, covered in the press as 'Father Removes Child: Custody Given to Mother', *Argus* (Melbourne), 14 September 1918. Hanna Augustus Creighton was contesting the custody of her four-year-old son against her husband, Harold Marcus Creighton, a railway station master from Oakleigh. In an interim ruling, Hood J ruled definitively for the mother, stressing (at 488) the strength of the tender years doctrine: 'I have said before, and I say again now,

The tender years doctrine also found some acceptance in South Australia. *In re H, an Infant*,[86] a 1932 decision of the Supreme Court, involved a custody battle over a two-year-old boy. Mr H lived on a sheep station at Wompinie, fifty miles from Broken Hill. Mrs H had left the marital home to return to her mother's residence in Adelaide. South Australia was one of the first States to have passed a parental equalisation statute in 1887, a mere one year after the English Parliament had enacted the imperial precedent.[87] This did not deter Mr H's lawyer, Ligertwood KC, from arguing that 'a male child should be brought up with his father'. Ligertwood explained that Mr H was a pastoralist and 'in the natural course' the child would 'follow that calling'. What could be more desirable for the boy than to be brought up in the 'circumstances and surroundings' in which he would later have to live? Ligertwood contended that 'the conditions of life on a sheep station, under a father's influence' would be more conducive to the development 'of a manly character' than 'life in town with a mother and her relatives'. In contrast, Mrs H's counsel, O'Halloran KC, asserted that the mother was the 'natural custodian of any young child' and that, 'where the respective claims of the parents were equally balanced', she was the proper recipient of custody. O'Halloran pointed out that medical attention and schooling were difficult to come by at the remote sheep station, and urged the court to give preference to the mother's Adelaide setting.[88] Despite Ligertwood's retort that the 'sons of pastoralists all over Australia' lived in the 'conditions obtaining at Wompinie', Richards J seems to have found the urban surroundings of Adelaide somewhat more genial for young children:

> [I]t cannot be believed that this young child, not yet three years of age, can be as well cared for on his father's sheep station as in town. It is a lonely place; the child could have few, if any, companions of his own age; early school facilities cannot compare with those easily available in town; although the child is healthy and a doctor might be got from Broken Hill within two or three hours, little experience is needed to

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that in the interests of the infant, the mother is the proper custodian of a child of tender years.'

86 [1932] SASR 252.

87 *Guardianship of Infants Act 1887* (SA).

88 *In re H, An Infant* [1932] SASR 252, 254–8.

> learn that prompt attention is often important in children's illnesses.[89]

Tracing the history of child custody law, Richards J noted the progressive expansion of maternal rights. The 1887 SA statute had substantially eroded any paternal primacy found in common law. 'As to conduct', he noted, 'the parents are put on an equality'.[90] With respect to the rights of the father, 'there was no use mentioning the wishes of the mother if it was intended that the rights of the father were to override them'.[91] Richards J then quoted from the 1925 English enactment establishing the paramountcy of infant welfare, adding that the concept was not 'new law' but had originated from the principles of equity established before the Courts of Chancery. Despite the fact that South Australia had yet to promulgate any statute akin to the 1925 enactment, Richards J announced that in South Australia, as in England, 'the paramount matter' was 'the welfare of the child'. He then quoted extensively from earlier English, Australian and New Zealand cases espousing the doctrine of tender years, which he expressly adopted as 'a fact ascertained by experience'.[92] As for the argument that the child's male gender ought to override the sway of the tender years doctrine, Richards J was undeterred, at least in the case of children under the age of seven:

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89 Ibid 259. Another case in which the litigants argued about the geographic location of their domicile was *Rogers v Rogers* (1947) 64 WN (NSW) 207, 208–9. The father lived at Long Jetty, near Gosford, 'near the water in physically healthy surroundings and in a situation which [could] provide keen pleasures for a boy of nine, such as fishing, swimming, and so forth'. The mother lived in a cramped flat on William Street in Sydney. Awarding custody to the mother, Bonney J advised that 'not all city-bred children are bad and not all children who are brought up amongst popular waterside resorts are good'.

90 *In re H, An Infant* [1932] SASR 252, 256.

91 Ibid.

92 Ibid 261. The cases cited were *Austin v Austin* (1865) 34 Beav 257, *In re Mayo* (1917) 17 SR (NSW) 438 and *In re Thomson* (1911) 30 NZLR 168. Noting (at 263) that 'if necessary to fix a time for the mother's custody, I should say until a child is seven years of age or until further order', Richards J expressly declined to do so in this case, indicating that circumstances might arise to make it desirable to terminate maternal custody before the age of seven, or to continue it beyond such an age.

> It will be early enough to think of the child's becoming accustomed to his future life and calling when he is a few years older. I have no misgivings as to the child's care and upbringing if he is with his mother in his early years. ... Possibly there is some trend, with students of child psychology, against emphasis on the greater value of maternal care in the case of a male child, even at a comparatively early stage of his development; but there is not, so far as I am aware, as yet a body of opinion of sufficient weight to justify me in going contrary to the practice of the experienced Judges mentioned above.[93]

These cases illustrate resoundingly that notions such as the doctrine of tender years were highly influential in the Australian courts. Yet it would be a mistake to assume that the concept found complete acceptance. Despite the reification of motherhood in the society around them, many judges spoke the language of paternal control. One of the early instances was the Victorian decision of *Knipe v Alcock*[94] in 1907, a case decided while the State was still in the first stage of child custody legislation, with only minimal statutory intrusion upon paternal rights. The child in question was a nine-year-old girl. She was in the custody of her father, Mr Knipe, pursuant to an agreement reached during legal proceedings back in England. When Mr Knipe refused to allow his wife access to the girl, she came before the Victorian Supreme Court seeking assistance. The court refused to intervene, largely upon jurisdictional grounds, but made it clear that it endorsed father's rights over the tender years doctrine. Chief Justice Madden wrote:

> The little girl is approaching ten years of age, and it is certainly, one would think, most desirable that, being a female and of that particular age, she should have her mother's care and guidance. On the other hand, it is equally certain that, where the parents of a child of that age cannot give it their joint care and attention, which would be to its greatest

93 *In re H, an Infant* [1932] SASR 252, 260, 262.
94 [1907] VLR 611.

> advantage, the father *prima facie* is the proper custodian of the child. That is beyond question.[95]

South Australian judges could also evoke strong paternal rights language. In *Jobson v Jobson*,[96] a 1921 Supreme Court decision, a father was granted custody of a five-year-old girl and a three-year-old boy, despite their mother's most eloquent arguments regarding the doctrine of tender years. Due to the children's young age, Mrs Jobson's counsel had argued that their welfare 'demanded the care of their mother'. Gordon J disagreed. He traced the legislative history of child custody, noting that

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95 Ibid 612. When the parents separated initially, the mother took custody under an agreement that she would stay within Victoria. When she took the child with her to England, Mr Knipe followed and 'in some way or other not disclosed' obtained physical custody of his daughter. He then brought proceedings before the High Court in England, pursuant to which he undertook to take custody while giving Mrs Knipe access. He later refused this access and fled England. Mrs Knipe returned to Victoria and instituted proceedings to have the child named a ward of the court in connection with the administration of the child's grandparents' estate. The Victorian court determined that the child was not a party to the action, that the father was out of the jurisdiction, and refused to deal indirectly with the paternal rights to custody.

The case of *R v Waters* [1912] VLR 372, a dispute between a maternal aunt and a de facto stepfather over a ten-year-old girl, purported at 375–6 to lay out the historical rationale for paternal preference:

> The position was originally this, that the father was by nature the guardian. He was the person whose child it was, although in that point of view it would not be altogether inexcusable to suppose that the mother had some part. At any rate, in the times when the feudal system prevailed, the father had on that ground the charge of his child; though in reality a very strong reason why he should have it was that, if it were a male he should maintain it and train it up in arms to do its duty to the overlord, or if a girl that he might bestow her in marriage in a way to conserve the rights of the overlord. If the father died, the overlord had the wardship. ... In that case the wardship of the children went from the father to the overlord, and the mother had no right of guardianship, because she might not do her duty, but deprive the overlord of his dues.

96 [1921] SASR 88.

the reform measures had 'completely revolutionized the law as regards the rights of mothers',[97] but he was at pains to point out that the paternal right had 'not been entirely abrogated':

> The common law rule, which gave the paternal right a commanding influence over the discretion of the Court in such cases, has been almost swept away in favour of the mother where the contest for the custody of children is between mother and father. I use the expression 'almost swept away' to describe the greatly diminished importance of the paternal right in such cases, because it has not been entirely abrogated. 'The Court is not to forget the right of the father.' ... The paternal right is still, for instance, according to high authority, the deciding factor, even as to children of tender years, where neither the father nor the mother has been guilty of misconduct disentitling them to the custody, and the Court thinks that the welfare of the children may be as well served in the custody of the one as in the custody of the other.[98]

South Australia had enacted a parental equalisation statute decades earlier in 1887.[99] This was theoretically supposed to have eliminated any paternal presumption. Yet the court was prepared to assert in 1921 that, all else being equal, the father held the primary right to custody. Gordon J was even of the view that the tender years doctrine ought not to apply 'where a child is weaned and no longer requires the immediate attention of its mother'.[100] If a wife had left her husband without justification, she was not entitled to the custody of the children 'even though they be of tender years', he advised.[101]

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97 Ibid 90.

98 Ibid. The passage in quotes is from *In re A & B (infants)* [1897] 1 Ch 786, 793, which was based upon the English parental equalisation statute of 1886, legislation which Gordon J determined was 'exactly the same' as s 7 of the South Australian statute.

99 *Guardianship of Infants Act 1887* (SA).

100 *Jobson v Jobson* [1921] SASR 88, 91, quoting *AC v BC* (1902) 5 Sess Cas F 108, 111.

101 Ibid 92.

The Jobsons were a working-class family who had lived in the country for some years until Mrs Jobson's 'dissatisfaction with country life' brought them into a suburb of Adelaide in 1920. That spring Mr Jobson obtained permanent employment at McLaren Vale, twenty miles from Adelaide, but Mrs Jobson refused to leave the city. The court found that she had no 'valid ground' for her refusal to follow her husband, and attributed fault to Mrs Jobson for breaking up the marriage. Interestingly, this fact on its own did not render her unfit to be the custodian of children, according to the court. Gordon J was prepared to specify that she, as well as Mr Jobson, was eminently fit:

> I desire to make it clear that, although I think Mrs Jobson's conduct has been exceedingly unfair to her husband, I do not think she is unfitted thereby or for any other reason to have the custody of the children. She is, I am assured, a good mother, just as I am assured that her husband's conduct has not in any way unfitted him to have the custody and that he is a good father.[102]

This left the disputing parties at equilibrium; they were 'on a par' according to Gordon J. Based upon the formula articulated above, this should have been sufficient to issue the award to Mr Jobson. However, the court also cited two additional factors that lent even further force to its decision. Mrs Jobson had 'left her husband without justification' and her employment interfered with her ability to rear the children. Mrs Jobson appears to have been working at a back-breaking pace, cleaning in 'seven or eight different houses every week'.[103] Gordon J doubted whether she would be able to keep up the gruelling regimen, but, most importantly, he worried about the risk to the children, who had to play 'in the back yards of the houses, some of them, doubtless, adjoining public streets'.[104] Since Mrs Jobson could not complete her 'heavy tasks' at work and supervise the children at the same time, Gordon J was concerned that the youngsters might get out onto the highway and be injured. In comparison, Mr Jobson offered to bring the children to the home of his sister, which would put an

102 Ibid 93.
103 Ibid.
104 Ibid.

end to the 'wandering kind of life they [were] now leading'.[105] That the father's employment meant that he was no more capable of providing personal supervision of the children than his wife did not apparently disturb the court.[106]

Roth v Roth-Crossle[107] was a similar decision in New South Wales in 1929. The children were three girls, all under the age of nine. Both parents appeared to be 'fit'. The mother based much of her claim upon the tender years doctrine, and the court was not adverse to reiterating a number of statements confirming the importance of motherly care. 'We all know that very young children, and especially female children, ought if possible to be left in charge of the mother. She is their proper and natural guardian in their earliest years',[108] quoted Owen J. But the attention to tender years appears to have been more rhetorical than anything else. The judge was quick to point out that it could be overridden by other factors. The 'welfare of the children' was the 'main consideration', continued Owen J, and he then went on to quote from English case law that made reference to the 'paramount interests of the child'.[109] Once again, the distinctive legislative framework in England and New South Wales did not appear to be worthy of discussion. The judge made no mention of the fact that

105 Ibid.

106 For similar reasoning in a trial decision, see *Annie Moule v Arthur Moule* (1911) 17 ALR 446, 447–8 where Hodges J criticised the mother's choice of employment:

> A laundry in Latrobe Street, taking in lodgers, may be per se a very reputable place. I have no desire to suggest that the building itself is not conducted perfectly reputably. But within a very short time, it will not be possible to keep the child in the back yard, and she is in danger of seeing a great deal that is undesirable in the case of a female child especially.

He granted the father, a smelter by trade, custody of the three-year-old girl. The decision was overturned by the High Court on appeal: (1911) 13 CLR 267, when Griffith CJ concluded at 269–70 that there was 'nothing in the evidence to suggest that the mother [was] not a fit person'.

107 (1929) 46 WN (NSW) 105.

108 Ibid 105, quoting *Ex parte Richardson* (1874) 12 SCR (NSW) Eq 99, 102 and *In re Mayo* (1917) 17 SR (NSW) 438.

109 *Roth v Roth-Crossle* (1929) 46 WN (NSW) 105, 105–6, quoting *B v B* [1924] P 176, 181.

England was operating under a 'paramountcy' statute while New South Wales had yet to adopt parental equalisation or the paramountcy of infant welfare. He upheld infant welfare as paramount, then added that this factor ought to be juxtaposed with other concerns:

> If the welfare of the child may be promoted equally by leaving such child with either of the parents, then undoubtedly the court will take into consideration the primary right of the father, will take into consideration the question of any breach of marital duties by either party, and will consider who is responsible for the separation between father and mother.[110]

The primary right of the father appears to have been quite influential here. Equally persuasive was the fact that the mother had broken up the marriage by adulterous behaviour, an obvious breach of 'marital duty'. Although the court was prepared to acknowledge that 'matrimonial offence ... ought not to be regarded for all time and under all circumstances as sufficient to disentitle the mother',[111] Owen J was affronted by Mrs Roth's 'extremely low' standard of morality during the first marriage. Dismissing her tender years claim, the court granted custody to the father.

In 1947, the Victorian Supreme Court offered what appeared, at least at a rhetorical level, to be a fully fledged renunciation of the tender years doctrine. In *McKinley v McKinley*,[112] the trial judge had initially awarded custody of an eight-year-old boy to his father due to paternal religious preferences. Mr McKinley was Roman Catholic and wished his son to be brought up in that religion. Mrs McKinley was of the Church of England and deeply hostile to Roman Catholicism. The trial judge based his decision on the traditional common law right of the father to stipulate the

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110 *Roth v Roth-Crossle* (1929) 46 WN (NSW) 105, 106, quoting Gordon J in *In re Mayo* (1917) 17 SR (NSW) 438, 446.

111 *Roth v Roth-Crossle* (1929) 46 WN (NSW) 105, 106, quoting the English case of *Mozley Stark v Mozley Stark, Hitchins* [1910] P 190, 193. The court seems not to have been influenced by the fact that Mrs Roth had subsequently married Dr Crossle, the co-respondent to the divorce, or that they lived in a 'good and reputable' home in Bullie where her new husband practised medicine.

112 [1947] VLR 149.

religion of his children, noting: 'Where the welfare of the child is at least equally met by its being in the custody of either parent, then the parent who has the right to direct in what religion the child shall be brought up should, in my opinion, have the custody.' On appeal, Chief Justice Herring found this to be an error of law. Victoria had entered the third stage of legislative reform by this point. The governing statute included 'a negative direction' precluding the court from taking into consideration whether 'the claim of the father or any right at common law possessed by the father' was 'superior to that of the mother'. It also precluded the court from treating the 'claim of the mother' as 'superior to that of the father'.[113] Lowe J added that the enactment ought to be 'viewed as a further approach to effecting equality between husband and wife before the law'.[114] The law had historically permitted the father to direct the religion of his children. It had also established the doctrine of tender years. 'The claim of the mother to custody of very young children of either sex and of female children who are no longer in extreme infancy has often been allowed as against the father',[115] noted Lowe J. Neither principle could be allowed to withstand the force of the legislative revision. The legislature had enshrined the 'paramountcy of infant welfare' as the keystone for custody adjudication, and this had fully displaced any earlier presumptions or principles. The court ruled that neither parent was entitled to say, 'I have a *prima facie* right and it is for my opponent to displace it.' Neither 'paternal directions or wishes' nor 'tender years' was to be 'conclusive of the matter'.[116]

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113 Ibid 151–3. See *Marriage Act 1928* (Vic).

114 Ibid 165.

115 Ibid 166.

116 Ibid 166. *Besanko v Besanko* [1947] SASR 275 provided another judicial disavowal of the tender years doctrine. In a custody dispute over a six-year-old boy, Mayo J explicitly denounced the arguments of opposing counsel, who had both contended that their client was 'entitled' to custody based on prima facie principles. 'Can it be truly said that parents of an infant have *rights* to custody?' queried Mayo. The answer was unequivocally no (at 282–3):

> The paramount consideration in deciding claims for custody is always: what will be best for the child? ... Thus the parents have the right to invoke the authority of the Court, but in the exercise of that authority neither have any right other than to secure an order which will be for the welfare of the infant. No claim, nor

The boy under consideration had lived for the past three years with his mother at her family home in Bendigo, but his father proposed to send him to a Roman Catholic boarding school in Kilmore. Herring CJ was not enamoured of the latter plan. 'The proportion of boys in this community who go to boarding school is very small', he noted, 'and it cannot be said that a boy's welfare requires that he should be sent to one. ... There would certainly have to be some very good reason, such as does not exist here, before I would assent to the proposition that it is necessarily for the welfare of a boy of eight and a half that he should be sent to boarding school.'[117] In comparison with this option, the hands-on nurturing of a mother seemed substantially more secure:

> At what age a boy ceases to need his mother's care and attention is a question on which opinions may well differ. That it might be harmful to a boy of eight and a half years, who is very highly strung, to take him from his mother, I should be inclined to think it was almost self-evident in the absence of evidence that she did not look after him properly or that the boy was unhappy with her.[118]

The latter passage sounded suspiciously similar to traditional 'tender years' assumptions, but it was carefully set forth in the neutral language of the welfare of the child. That the mother was the party faulted for the marital dissolution did not upset the maternal preference here. The court refused to base custody decisions upon any desire 'to punish a parent'.[119] Marital misconduct was a subordinate matter at best, advised the court, to be considered only in so far as it touched 'the welfare of the infant'.[120]

> right, nor the necessity, nor wish of either parent, can be allowed to qualify or influence the answer to the all-important question, by suffering consideration of the child's welfare to be subordinated to any alien factor.

117 *McKinley v McKinley* [1947] VLR 149, 155.

118 Ibid.

119 Ibid 156

120 Ibid. Macfarlan J, in dissent at 160–1, would have granted custody to the father, on the basis that Mrs McKinley was the party responsible for the marital breakdown, that she suffered from tuberculosis, and that 'the boy's future lies with his father'.

The tender years doctrine appears to have been cited often in custody disputes, and argued persuasively in many cases by counsel appearing for Australian mothers. In some instances, it was clearly the deciding factor where custody was awarded to women. In other cases, however, judges were not prepared to accept the concept as authoritative. They may have given lip service to the importance of motherly care during childhood, but in practice they used principles such as paternal rights and marital misconduct to override the tender years doctrine and award custody to fathers. In the later decades, bolstered by legislation promulgating the 'paramountcy of infant welfare', some courts renounced the doctrine altogether.

Shifting Standards of Sexuality

Marriages frequently ran aground because of adulterous liaisons and lawyers often made reference to the opposing party's sexual misconduct when it came time to litigate over child custody. The first legislative intrusion on paternal rights explicitly adopted a double standard of sexuality, disentitling adulterous mothers but not fathers from obtaining custody. Later statutes instructed judges to pay attention to parental 'conduct' without distinguishing on the face of it between mothers and fathers. Yet the bulk of cases that specifically addressed the issue of parental adultery throughout the first half of the twentieth century considered the sexual behaviour of mothers. Mothers who sought to escape the stigma of extramarital sex tried to convince the courts that sexual mores were loosening. They argued that liberalising attitudes about sexual behaviour ought to be reflected in child custody law. Sometimes they were successful, and sometimes their arguments failed.

The decade of the 'roaring twenties' was pivotal in this regard. As legions of 'flappers' shortened their skirts, bobbed their hair, smoked in public and danced unchaperoned until dawn, some judges recognised that they ought to take a more relaxed attitude towards adulterous mothers.[121] The

121 For a more detailed description of the impact of the 'jazz age' and 'flappers' on Australian sexual culture during the 1920s, see Constance Backhouse, '"Her Protests Were Unavailing": Australian Legal Understandings of Rape, Consent and Sexuality in the "Roaring Twenties"', unpublished manuscript, November 1999.

New South Wales case of *In re an Infant*,[122] decided right after the close of the decade, exemplified such trends. The couple concerned had divorced in 1930 on the grounds of the wife's adultery with a married man. Custody of the eight-year-old boy was initially awarded to the father, but he did not actually take physical custody until he remarried in 1932. Several months later, the father died and, under the terms of his will, he appointed his new wife as guardian of the child. The boy's mother came to court, seeking custody of her son. Harvey CJ expressly recognised the changing moral climate when he found for the mother:

> I do not want in any way to suggest that the standards of morality have shifted in the eyes of the Court from what they were forty or fifty years ago, but the world has not stood still, and the question one asks one self is, is this child of eight likely to be deprived of an opportunity of learning morality and strict rules of conduct by his continued associations with the mother, notwithstanding that, apparently, the mother has not completely disassociated herself from the man with whom she committed adultery?[123]

Answering this question with a resounding 'yes,' the Supreme Court of New South Wales bowed to the evolving moral order.

Extramarital sexual couplings appear to have continued during the 1930s and increased during the Second World War, but not all courts were prepared to see such liaisons as immaterial to custodial welfare. One of the best examples of this was *R v R*,[124] a 1946 decision of the Victorian Supreme Court. Thomas and Virginia Ramsay had married in 1931, and their two boys were just four and one when Virginia took up an adulterous relationship with an architect friend, Roy Grounds, in 1938. In an effort to save his marriage, Thomas took the whole family off to England, but Roy followed and convinced Virginia to move into a London hotel with him. Virginia left her boys with their father in the care of 'a very competent

122 (1933) 50 WN (NSW) 85.

123 Ibid 86.

124 [1946] VLR 454. Further details are taken from the press coverage: 'Judge Refuses Mother Custody of Children', *Herald* (Melbourne), 5 April 1946.

nurse' and travelled around the world with Roy. The two eventually returned to Victoria, where they purchased a six-hundred acre farm in Buxton, sixty miles from Melbourne. Thomas secured a divorce in 1939, on the grounds of his wife's adultery. The court gave custody of the boys to their father, and access to the mother on the condition that she not expose them to Roy. After Virginia and Roy were married, Virginia came back to court seeking relief from this condition. The farm required that both she and her new husband be on the property nearly all the time, and it was practically impossible for her to see the children without Roy being present. She argued that it was 'of great importance for their welfare that they should maintain some contact with their mother'.[125] Her counsel 'strongly pressed the view' that there was no evidence to show any danger would come to the two boys from an association with their new stepfather.[126]

Fullagar J disagreed. He was more impressed with the fact that Thomas, 'an innocent father', desired that his children not be brought into contact with the man who had taken his wife from him. This sort of sentiment was 'not only natural but reasonable and proper',[127] declared the judge. Although he conceded that the legislation required him to consider the wishes of the mother as well as the father, and that the mother ought not to be disentitled merely because of her adultery, 'if it came to a choice' between the two, he was 'clearly of opinion that no Court could hesitate to prefer the father's'.[128] With respect to the interests of the children, a consideration he noted was 'paramount', Fullagar was almost dismissive of the 'mother factor':

> [F]rom the point of view of the children's welfare alone, I cannot be satisfied that there is any decisive advantage likely to accrue to them from frequent association with their mother. The children are both boys [now aged 11 and 7], and neither of them is a baby or a very young child. ... [T]here is no real interest of the children at this time to be served by an insistence on regular contacts with their mother. They are

125 Ibid 455.
126 Ibid.
127 Ibid.
128 Ibid 457.

> happy as they are. She has chosen her life and found, one hopes, her happiness, and they can never really share that life. ... What can she now do for them except to disturb them and confuse them?[129]

Alagich v Alagich and Zofrea,[130] a 1947 New South Wales decision, was similar. The parties were married in 1931 and four children were born to the couple. Mrs Alagich began an affair with Mr Zofrea, and left the marital home in Brookvale in 1945 to take up residence with her lover who lived about one mile away. The court awarded custody of the three girls (aged fourteen, eleven and nine) and the boy (aged seven) to the father because of the mother's adulterous conduct. Although Mrs Alagich was initially given access, Mr Alagich sought to have this rescinded because his ex-wife was living adulterously with the co-respondent and had born another child with her lover. Bonney J began by offering the pithy metaphor that 'avenues of pleasure only lead to the highways of sorrow for the party who has made the mistake'.[131] In custody law, he noted, the first consideration was the welfare of the children 'who should be launched in life with proper and, indeed, strict ideas, if possible, on morality, and proper and strict views of marriage and the relationship which marriage establishes'.[132] The mother had 'left the proper path of virtue'. She had linked up with Mr Zofrea at the hospital where she worked, and 'indulged in that association secretly and wrongfully'.[133] She had 'treated the bonds of marriage lightly'. This was a disastrous example to offer the eldest girl, who was 'on the threshold of womanhood' and particularly at risk. In contrast to Mrs Alagich, her husband was a 'clean-living man with strict ideas of morality and very sincere'. He 'no doubt wishe[d] to bring up his children with similar strict ideas of morality' and he was 'entitled to do so, and, moreover, should be encouraged to do so in every way possible'.[134] To avoid the 'sense of shame' that would certainly come to the children from having to associate with an adulterous mother, the court rescinded the order for access.

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129 Ibid 456.
130 (1947) 65 WN (NSW) 92.
131 Ibid 92.
132 Ibid.
133 Ibid 93.
134 Ibid.

Sexual patterns of conduct altered significantly during the first half of the twentieth century. Legislation that was explicitly hostile towards adulterous women slowly relaxed into more general admonitions for courts to consider the 'conduct' of both parties. Lawyers framed their arguments around the evolving sexual order, with some specifically claiming that earlier standards must loosen their grip. In some cases judges were persuaded by such reasoning. Yet other judges resisted, tenaciously attempting to stem the tide of sexual promiscuity, wielding child custody awards as weapons in the effort to forestall mothers who might be tempted to dally with sexual partners other than marital ones.

The Impact of the World Wars

Two world wars dominated Australian history during the first half of the twentieth century. Both had a discernible impact upon child custody decision making. During the First World War, the courts were deferential towards servicemen, taking great care to ensure that their active duties did not disadvantage them with regard to custody claims. Some judges also seem to have been influenced by the essential role that mothers were playing in keeping the home fires burning while their husbands and sons went off to battle. *R v Dunkin; Ex parte De Vries*,[135] a 1917 decision of the Victoria Supreme Court, suggests that both sentiments could be operative at the same time. The debate there concerned Victor Richard De Vries, a five-year-old boy then in the custody of the Methodist Homes for Children at Cheltenham. Victor's parents had separated some years earlier, and neither parent seems to have had physical custody of the boy. The mother, Hetty De Vries, was employed full-time and she had arranged for her son to reside with some friends in Dromana. Mr De Vries, the child's father, was a soldier on active service, scheduled to embark on a troopship from Melbourne. Prior to departing, he seems to have wanted to tie up loose ends by making permanent arrangements to look after his son. Without any consultation with his wife, he collected Victor Richard from Dromana and placed him in the Methodist Homes, allotting a portion of his military pay to the institution in reimbursement. Hetty De Vries brought *habeas corpus* proceedings to secure the return of her son, advising the court that she was now able to provide 'a good home for him'.

135 [1917] VLR 655.

Cussen J displayed obvious concern for the rights of the soldier who was absent from the jurisdiction in the service of his country. He ensured that contact was made with the solicitor who had formerly acted for Mr De Vries. When he learned that Mr De Vries had left a power of attorney in the hands of the child's paternal grandmother, he took care to see that she was given the opportunity to appear 'to say whatever might be said' on Mr De Vries's behalf. Cussen J emphasised that he had no quarrel with Mr De Vries's efforts to provide secure arrangements for Victor Richard, and declared that there was 'not the slightest doubt but that the child was well looked after in the institution'.[136] Ultimately, however, the judge decided that young Victor Richard's interests were better served in the custody of his mother. The wording of the 1912 statutory provision, ordering courts to have 'regard to the welfare of the infant and to the conduct of the parents and to the wishes as well of the mother as of the father' was determinative. It had placed 'the mother ... in many respects ... in substantially the same position as the father with regard to the custody of children' and gave 'greater rights to the mother than she formerly had'.[137] The 'mobilisation of mum', a slogan that so strongly accentuated women's status within the home during the Great War, would have provided an effective backdrop for the result. Mr De Vries was serving overseas and Hetty De Vries was carrying out her patriotic mission of caring for the children left behind.

R v Boyd; Ex parte Macpherson,[138] decided by the Full Court of Victoria in 1919, provides another example of the impact of the Great War. The

136 Ibid 658.

137 Ibid 657. See *Custody of Infants Act 1912* (Vic).

138 [1919] VLR 538. Additional details have been culled from the press coverage: 'Canadian Doctor's Child', *Argus* (Melbourne), 25 July 1919; 'Custody of Child Refused', *Herald* (Melbourne), 21 August 1919; 'Custody of Child Sought', *Argus* (Melbourne), 22 August 1919; 'Father to Get His Child', *Argus* (Melbourne), 3 September 1919; 'Dr Macpherson's Daughter', *Argus* (Melbourne), 3 September 1919; 'Doctor Claims Daughter', *Herald* (Melbourne), 5 September 1919; 'Doctor's Daughter', *Argus* (Melbourne), 6 September 1919; 'Doctor Secures Child', *Herald* (Melbourne), 12 September 1919; 'Doctor's Child Case', *Argus* (Melbourne), 17 October 1919; 'Dr Macpherson's Daughter, Remarkable Disappearance', *Argus* (Melbourne), 18 October 1919; 'Canadian Doctor's Child', *Argus* (Melbourne), 21 October 1919.

dispute over thirteen-year-old Mary Violet Macpherson was not a contest between two parents, as her mother had died one year after giving birth. The litigation involved Mary Violet's physician father, Dr James Macpherson, and her mother's relations. Shortly after the death of his wife, Dr Macpherson had given Mary Violet to his wife's family to raise. After he remarried, he moved to Canada and enrolled for active duty as a Lieutenant-Colonel with the Canadian Army Medical Corps. When released from service some years later, he travelled back to Melbourne to reclaim his daughter. At trial, Hood J initially refused to award custody to Dr Macpherson, concluding that Mary Violet's 'welfare' should take precedence over her father's 'feeling and rights'. Her father had not seen her in years. She had lived with her maternal relatives 'during some of the most impressionable years of her life'. She was 'contented and happy' in the home of her aunt, 'with an assured future amongst friends and relatives'. The young girl and her father were 'practically strangers', noted Hood J, and if uprooted and taken half way across the globe to Canada, she would be 'a stranger in a strange land'.[139]

The Full Court reversed this decision, ruling that there was 'no suggestion of any failure on the part of the claimant in the performance of his duty to the child'.[140] Mann J described Dr Macpherson as 'a gentleman of unblemished reputation' with an impressive record of allied war service. The court recounted how he had 'just completed with honour a long period of professional service in a responsible position connected with the Canadian military forces'.[141] This was explanation enough as to why he had not come seeking his daughter earlier, and the delay should not be held against him. Admiration for paternal military service clearly lent weight to the court's decision to grant custody to the father. That Mary Violet's maternal relations had shouldered the child-care responsibilities, filling in at home for her father during his war service, was less persuasive here. Although the court knew that Mary Violet had begged not to be sent away with her father and had threatened to run away if the court so ordered, the judges dismissed the probable rupture in Mary Violet's life:

139 *R v Boyd, Ex parte Macpherson* [1919] VLR 538, 542–3.
140 Ibid 546.
141 Ibid.

> We have by no means regarded as unimportant the child's own desire to remain where she is – a natural and almost inevitable desire on the part of a young child who is warmly attached to her aunt and who until recently has not seen her father for some years. ... [But] there is no sufficient reason for supposing that the sadness she will naturally feel on leaving her present home will lead to anything more than a temporary unhappiness.[142]

With a brief nod of recognition to the 'element of uncertainty' that the change of home and surroundings would undoubtedly create, the Full Court concluded: 'we do not think that the Court should enter upon speculations as to the future, or be deterred by fears of misfortune, which may attend the child alike in Victoria as in British Columbia'.[143]

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142 Ibid 547.

143 Ibid. This case can be compared with *R v Atkinson; R v Nickels* [1924] SASR 316, where somewhat similar circumstances did not result in an award of custody to a mother. There the mother had left the marital home, alleging spousal cruelty. The four children of the marriage were raised over the next seven years by their father and his paternal relatives. Upon the father's death, the mother brought application for custody. Angas Parsons J noted at 319–22 that there was strong legal foundation for acknowledging maternal custody upon the death of the father and that there was 'nothing in her present mode of life or conduct' that would dispose a court to refuse the order. However, he found that the children had been without their mother for some years and that they had 'formed ties of affection' with the paternal relatives. Unable to satisfy himself that they would be 'better cared for, better brought up, or be anything like as happy' with the mother as in their present surroundings, the court rejected the mother's claim. The decision was justified on the ground of desertion, for the judge found that the mother had not been able to prove cruelty. Even if her allegations were true, it would only make worse her desertion of the children. The children had been raised in the Protestant religion and the mother, a Roman Catholic, would potentially interfere with their religious upbringing. Several of the older children, who were mature enough to make their own decisions about where to live, had chosen the paternal relatives and the judge believed that the siblings ought not to be split apart (at 325): 'This conclusion may seem a harsh one towards the mother, but this case may prominently illustrate that a mother who leaves her husband and children

The Second World War seems to have had somewhat more of an impact on maternal custody rights. One illustration is the 1943 Queensland Supreme Court decision *In re McSwaine*.[144] The early history of the marriage was tumultuous, with Victor McSwaine gambling most of his money away and leaving his wife, Margaret McSwaine, and their two daughters to find their own means of support. Active service in the army seems to have improved his lifestyle. During the term of his enlistment from 1940 to 1943, Victor began to forward a regular allowance to his family. While Victor was overseas, Margaret and the children stayed in a flat in Brisbane, which they shared with a young barmaid named Miss Hart. Miss Hart seems not to have been the most selfless of flatmates, but the shared accommodation was a matter of necessity. The war had put severe pressure on the rental housing market and single flats were virtually non-existent. Miss Hart was alleged to 'drink to excess at times', and to invite American and Australian soldiers and sailors up to the flat where 'considerable quantities of drink' were consumed. On at least one occasion, one of the American visitors spent the night in the flat. Victor was posted to the Ninth Division in 1943, and returned to Brisbane hoping to resume marital relations with his wife. Margaret was not similarly inclined. Perhaps her exposure to the attentions of visiting military men had left her feeling that her husband no longer appealed to her as a marital partner. Perhaps she remembered too vividly Victor's refusal to support the family before the war. In any event, Margaret refused to have sexual intercourse with her husband or to sleep in the flat with him. This was conduct that the court found 'unjustified' and Margaret was faulted as the party responsible for the marital separation. The couple then came before the court to litigate over the custody of five-year-old Dawn and nine-year-old Margaret.

Douglas J noted that Margaret McSwaine's living situation raised 'some grounds for suspicion' about 'immoral conduct with American and Australian soldiers and sailors'.[145] Changing sexual mores and wartime realities made this rather less persuasive than it might have been in the past, however, and the court did not immediately disqualify Margaret

for no sufficient reason, and abandons them for some years, runs the risk of losing the society of her children altogether.'

144 [1943] QWN 38.

145 Ibid 39.

because of it. The Queensland enactment of 1928 contained child custody guidelines based upon parental equalisation and the paramountcy of infant welfare.[146] Grounding his decision upon the 'welfare of the children', Douglas J made the unusual order to separate the two girls. The younger girl was to remain with her mother at least temporarily, a decision the judge justified explicitly on the ground of 'tender years':

> I think the younger child, at present, should not be deprived of a mother's care and affection, and I have decided to allow her to remain in the custody of the mother for twelve months. ... I am not satisfied that the younger child will be affected or influenced by Miss Hart's example, and I feel that I should leave her with her mother in order that she may have a mother's affection and care in her tender years. I am also influenced by the fact that the presence of a child in the home may have a restraining influence on Mrs McSwaine. I am not satisfied that anything more than suspicion rests on Mrs McSwaine and I hope that the presence of a young child may have an influence for good upon her, whilst the child herself will, I feel sure, be tenderly and affectionately treated by her.[147]

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146 *Guardianship and Custody of Infants Act 1928* (Qld) ss 3, 6.

147 *In re McSwaine* [1943] QWN 38, 39–40. See also *In re Webb (Infants)* [1947] SR (Qd) 143, which involved a custody dispute over a boy aged six and a girl aged four. Arthur Butler Webb proved that his wife, Thelma, had gone out drinking and dancing with a female friend and two American officers. The foursome were later discovered in the back seat of a motor car in the remote suburbs of Brisbane. The dissenting judge, Philip J, would have awarded both children to their mother. He stated at 150–1 that it was 'contrary to the normal practice to take out of the custody of the mother a girl of four or even a boy of six unless the mother has been proved to be unfitted to have them. ... The welfare of the children of these ages primarily depends upon the care of the mother.' The majority of the court awarded custody of the girl to her mother on the basis of the tender years doctrine. But custody of the older boy ultimately went to the father. Stanley J noted at 153 that the boy was 'not far off seven years of age', and he took judicial notice of the fact that Thelma Webb would have difficulty finding accommodation. As

The elder daughter was to be relegated to her father's custody, to be looked after by Victor's mother on a day-to-day basis. The rationale was that she had been 'exposed to the danger of witnessing and being influenced by questionable drinking parties and the association of their mother and Miss Hart with other men'.[148] The divided custody award illustrates that the tender years doctrine had to some extent outweighed Margaret McSwaine's marital misconduct. The court awarded the mother custody of her youngest daughter, despite her having 'unjustifiably' provoked the separation, and despite her 'suspicious' intermingling with American and Australian soldiers and sailors. The *McSwaine* decision was indicative of just how far the courts had come in recognising maternal custody rights and accommodating themselves to the presence of the troops and the practicalities of living conditions in wartime Brisbane.

A similar decision was issued in *X v X*[149] in Victoria in 1946. The refusal to provide the real surname of the parties in the style of cause, even by way of initial, may be explained by the elite 'social position' of the family, something which was specifically adverted to by the sitting judge.[150] The dispute was over two girls, aged seven and five. Mr X claimed that his wife had behaved scandalously after his departure on military duties to northern areas. He accused her of associating 'with undue freedom' with a number of men, of 'indulging freely in drink', of 'smoking to excess', and of becoming 'infatuated' with a military officer. The court found that Mrs X had become 'as many thousands of women

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well, any subsequent employment must inevitably interfere with her ability to nurture her children (at 152):

> The absence of adequate housing in Brisbane, even for single individuals, is a matter so notorious at the present time that it cannot be overlooked. There is nothing to suggest that the appellant is a person of independent means. In the absence of an order for her maintenance, she will presumably have to earn her own living. There is no evidence that any of her relatives will keep her. In the circumstances it is open to question whether one would be deluded into thinking that her children would get that especial care during their very tender years which would be a reason for giving her custody of them.

148 *In re McSwaine* [1943] QWN 38, 39.

149 [1946] VLR 1.

150 Ibid 7.

have become, interested in the entertainment of servicemen'.[151] She had invited them to parties at her home and she had socialised with them at a service institution. 'If such activities are blameworthy', commented the judge, 'many others must share the blame'.[152] Making allowance for the temptations inherent to wartime circumstances, Lowe J continued:

> [S]uch activities are full of danger for a young wife whose husband is absent, and unless there is a definite sense of loyalty to the absent spouse she may soon be tempted to do wrong. Experience in these Courts only too clearly demonstrates that a percentage of the men so entertained are alert for amorous adventure, wherever they may find it, and are certainly not slow to take advantage of opportunities that offer.[153]

Although earlier cases seem to have adopted a double standard of sexual propriety, Lowe J appears to have been equally interested in the behaviour of Mr X here. He described him as a 'busy professional man'[154] who drank to excess himself at times. 'Fond of company', Mr X was reputed to entertain at his home frequently and to 'sing filthy songs' and 'make suggestive remarks to women guests'.[155] Trying to make sense of the couple's lifestyle, Lowe J mused that such conduct 'may be tolerated according to the freedom which ... modern young people have arrogated to themselves to discuss without restraint all sexual matters'.[156] Placing the two spouses on a rather equal footing vis-a-vis their sexual indiscretions, Lowe J, too, took refuge in the tender years doctrine. His ultimate conclusion was in favour of Mrs X: 'I have no real doubt, dealing as I am with young girls of tender years, that their mother is their best custodian.'[157]

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151 Ibid 4.
152 Ibid.
153 Ibid.
154 Ibid 7.
155 Ibid 4.
156 Ibid.
157 Ibid 7. Urging the parties to reconcile if at all possible, Lowe J added that as the children grew older, a different custody order might be required, facing the mother with an unfortunate 'growing estrangement from her daughters as they came to womanhood' (ibid).

Both world wars seem to have affected judicial decision making. The stark gender divisions enforced during wartime seem to have been reflected in child custody jurisprudence. When judges were required to balance competing parental claims, they gave serious weight to the military service of fathers, particularly during the First World War. Occasionally this was outweighed by mothers' claims for recognition as the patriotic custodian of the family home in the absence of adult males who were off at war. Wartime conditions created residential havoc in some port cities, and judges recognised that mothers could not always select accommodations that were most conducive to child welfare. The forced parting of husbands and wives during wartime also created marital disruption, extramarital liaisons and widespread suspicion of sexual misconduct. The inevitable social intermixing between visiting troops and Australian mothers on their own was a fact of life that some courts began to take into account in refusing to penalise wayward mothers with the denial of custodial rights. This, accompanied by the liberalising sexual mores that took hold during this era, meant a significant breakthrough for women seeking custody of their children.

The Advent of Psychological Theories of Child Development

From the 1920s on, 'scientific' experts from the fields of medicine, child psychology and social work began to promulgate revolutionary new ideas about the nature of childhood and the primary role of mothers in supervising the emotional growth and well-being of their offspring. During the 1940s, Australian courts started to accept newly emerging psychological theories of child development as influential in custody decision making. In some cases, the new expert evidence bolstered maternal claims. In others, the unprecedented focus on motherly behaviour had a detrimental impact on mothers seeking custody.

The Supreme Court of South Australia seems to have been the tribunal most captured by the modern fascination with psychological theories. It seized upon these ideas in *Hedges v Hedges*[158] in 1944, to overturn a trial decision that had split the custody of four children between the two parents. Mr Hedges was a farmer and grazier who carried on business at Bugle Ranges. His wife had obtained a divorce on the basis of her

158 [1944] SASR 266.

husband's habitual cruelty. Mr Hedges erupted into violent verbal and physical outbursts with some frequency. Mrs Hedges also exhibited outbursts, fewer in number than her husband, in which she smashed workroom windows, threw stones and struck her husband with a hoe in a fit of bad temper. The trial judge awarded the two eldest children, a boy aged eight and a girl aged seven, to the father. Relying upon the tender years doctrine, the trial judge placed the two youngest, a boy aged four and a girl aged one, with the mother. Mayo J stepped in to award all four children to the mother.

Mayo J noted that the legislative framework had shifted in South Australia in 1940, when the 'paramountcy of infant welfare' was introduced as the standard for child custody decisions.[159] It was now 'imperative to have regard [to the children's] comfort, their state of health, physical and mental, as well as their moral, intellectual and spiritual well-being'.[160] Attempting to appraise each parent's potential ability to foster such well-being, Mayo J stated that neither spouse 'nearly approximates the standard of a perfect custodian'.[161] With surprising frankness, he observed that it was nearly impossible to measure up to the elevated standards increasingly recommended by psychological experts. 'In all probability', he mused, 'only a small percentage of parents (if indeed there be any such paragon) can be regarded as passing so critical a test'.[162] However, knuckling under to the task at hand, Mayo J determined that Mrs Hedges posed less danger to her children than her husband did.

The court rationalised her isolated outbursts of temper as 'the doings of a woman of spirit disappointed in love and exasperated by the behaviour of her husband'.[163] Mayo J was less understanding about her husband's outbursts. That some of these had been witnessed by the children was a factor that 'exacerbated' the situation. The intensity and prolonged nature of Mr Hedges's violence made him psychologically unfit to parent children:

159 *Guardianship of Infants Act 1940* (SA).
160 *Hedges v Hedges* [1944] SASR 266, 267.
161 Ibid 271.
162 Ibid.
163 Ibid 270.

> [W]here cruel acts occur with such regularity as to be classed as habit, a matter almost of ordinary routine, it serves as a strong indication of the presence of something abnormal in the disposition in the mental or emotional equipment of the actor, something more than chronic bad temper. It is, at least, possible, if not probable, that he may be actuated by sadistic impulses.[164]

Although there was no evidence that Mr Hedges had visited his cruelty upon the children, Mayo J stated that he was 'far from satisfied' that the father had the qualities that would 'enable him to be a wise and prudent guardian'.[165] Mayo J was prepared to state that '[b]ad language, inadequate self-control, and constant, or even intermittent temperamental outbursts'[166] were more 'detrimental to children' than other acts of marital misbehaviour. Sexual misconduct, he noted, if not frequent or promiscuous, could 'sometimes take place in circumstances that do not adversely affect children'.[167] Provided the children did not witness sexual indiscretions, such conduct might 'not necessarily be incompatible with affectionate, devoted and efficient oversight'.[168]

Mayo J coupled the new theories of child development with language reminiscent of the tender years doctrine. All four children, he noted, were

> at stages of youth, or approaching adolescence, when constant supervision by kindly and judicious guardians is essential to their mental, moral and physical advancement. They are all at periods of development when that benefit that should accrue from a mother's solicitous care is of great importance.[169]

The eight-year-old boy might be 'approaching an age when a father's instruction and guidance' would be of 'increasing value', but Mayo J declined to separate him from his siblings. The dissolution of a marriage

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164 Ibid.
165 Ibid.
166 Ibid 269.
167 Ibid 270.
168 Ibid.
169 Ibid 268.

had an undeniably detrimental psychological impact upon the children. 'Where the family circle is irretrievably broken, it is still desirable to sustain what is left as a unit.'[170] Concluding that the children should be kept together, Mayo J awarded the lot to Mrs Hedges, a women he felt who 'may, or may not, be greatly endowed with the qualities of motherhood', but who was ultimately a 'lesser risk' than her husband.[171]

Besanko v Besanko,[172] another of Mayo J's rulings, also displayed judicial advocacy of very 'modern' mental hygiene perspectives. To begin, he felt quite free to pronounce the litigating parents to be inherently emotionally incompatible. Mr Besanko earned his living carting wood, was content to accept bed and board at his mother's home in the small country town of Terowie, and seemed to be 'lacking in ambition and probably in energy'.[173] Mrs Besanko was a different kettle of fish. She was ambitious, engaged 'in lucrative employment', and 'anxious to see the financial, and perhaps the social, status of the family improve'.[174] As for the child, he was 'an embryo citizen', whose 'preparation for the future' required the utmost of care. The court needed to examine 'the conjoined effect of the totality of external conditions, or such of them as may bear upon the development of the child as an objective organism'.[175] Scrutiny was required of 'the immediate surroundings of the home, the people who reside there, or who visit, the circumstances of those people ... the personal characteristics and habits of these frequenters and their daily occupations'.[176] Education and occupational guidance were essential:

> Control wisely exercised will take into account, for example, the advantage, or the inexpedience, of intense cultural effort, the problem of incipient tendency to overwork, or of incipient laziness, and so on. It is, I think, no unimportant aspect that a child should be prepared at an early age to comprehend, and to select wisely, a career or occupation. Parents may pride

170 Ibid.
171 Ibid 271.
172 [1949] SASR 275.
173 Ibid 279.
174 Ibid 279–80.
175 Ibid 284.
176 Ibid.

> themselves that such a choice is left entirely to the young person concerned, when in reality there is intensive propaganda of an indirect nature. Incidental to this aspect of the problem is the parent's ability, financial, social, and intellectual, to provide maintenance, and to superintend the education and advancement in life of the child.[177]

Psychological theory also factored into the proper understanding of the tender years principle. According to Mayo J, the 'tender years of a child's life' were the 'most impressionable'. During that period, 'without realizing what is happening, with a child of intelligence, the process of rationalizing his own individuality in relation to parents and the outside world is in train'.[178] This was a time of life, declared the court, when 'character should be moulded with a boy "at his mother's knee"'.[179] But the 'crisis of adolescence' could pose additional hurdles, with 'ill-advised intervention' liable to result in 'a lifelong handicap'. This was a time when 'instinctive tendencies innate in the species toward sexual association and experience' became an important factor. It was a period when 'wise, understanding and careful disclosure of knowledge, accompanied by experienced advice,' became 'all-important'.[180] With the passing of years of early infancy, it became 'necessary to allocate the greater part of the responsibilities of upbringing, of a boy, to the father, and of a girl to the mother'.[181] From the age of seven years and up, 'the expectation may well be that a child will be sufficiently advanced to require an increasing degree of association with a person of the same sex'.[182] In this case, Mayo J ruled that the six-year-old boy was best left with his mother. It was she who could provide her son with the 'advantages of residence in the metropolis' and imbue him 'with aspiration for advancement'.[183] This case represents a fulsome illustration of how novel mental hygiene theories had begun to impinge upon traditional legal values, fleshing out doctrines such as 'infant welfare' and

177 Ibid.
178 Ibid 287.
179 Ibid.
180 Ibid 284–5.
181 Ibid 286.
182 Ibid 288.
183 Ibid.

'tender years' with newfound psychological terminology and rhetoric.[184] In both *Hedges* and *Besanko*, it was the mothers who benefited from the psychological theorising.

This was not always the case. *In re Wilkinson*,[185] a 1941 decision, provides a good illustration of how emerging psychological theories could rebound to the credit of fathers, as well as mothers. The Supreme Court of South Australia granted Mr Wilkinson, a chemist, custody of his daughters aged nine and six, and his son aged seven. During the course of an unprecedented eighteen-day hearing, a host of 'experts' testified to the shortcomings of Mrs Wilkinson's parenting skills: a 'female diplomatist' in applied psychology of London University, who was also an assistant with the psychiatric clinic of the Adelaide Children's Hospital, a consulting psychologist from an institution for 'weak-minded children', a specialist in diseases of children and the family doctor. The evidence indicated that Mrs Wilkinson had subjected her children to behaviour that ranged from 'neglectful or teasing' to 'brutal' and occasionally 'not far short of torture'. One of the experts suggested that there were some people who gained 'pleasure by inflicting pain on others'. Another diagnosis was that the mother possessed 'the hate complex over-developed'. Still another was that she was merely 'eccentric'. Incidents of alleged emotional and physical abuse were itemised in detail. Mrs Wilkinson was alleged to have tied the children up to impede their movement, lifted them by their hair, and struck them on the hand with a leather strap.[186] To late twentieth-century observers, behaviour such as this seems to have been unquestionably abusive. Yet parents had traditionally been counselled to

184 One of the most influential texts was Dr John Bowlby, whose study *Forty-Four Juvenile Thieves* (1946) ascribed 'affectionless character' as a consequence of early maternal deprivation. Bowlby also produced 'Maternal Care and Child Health', a World Health Organisation monograph (Series No 2, 1951), in which he described the pathological processes set in train by early mother–child separation. For references, see Henry Finlay and Stanley Gold, 'The Paramount Interest of the Child in Law and Psychiatry' (1971) 45 *Australian Law Journal* 82, 92–3.

185 [1941] SASR 231. Other decisions affecting the same parties are reported as *In re W* [1941] SASR 188; *Wilkinson v Wilkinson* [1943] SASR 207; *Wilkinson v Wilkinson* [1944] SASR 39.

186 *In re Wilkinson* [1941] SASR 231, 233; *In re W* [1941] SASR 188, 189; *Wilkinson v Wilkinson* [1943] SASR 207, 208–9.

avoid 'spoiling' children at all costs. Some families would undoubtedly have countenanced such conduct as strict discipline for unruly children.[187]

From the perspective of the new psychological experts who testified, this type of chastisement was now understood to 'have a seriously detrimental effect' upon the children's 'nervous and bodily health' and their 'emotional and moral development, if not also upon their physical development'. The witnesses described the chastisements as transformative of personality. They suggested that the dispositions of the two older children had probably been 'warped to some extent'. When Mrs Wilkinson tried to rationalise her disciplinary measures as part of an effort to train selfish children who 'used to squabble amongst themselves', this received short shrift. Mrs Wilkinson's efforts to plead the doctrine of tender years also proved an abject failure. The judges acknowledged that the children were 'very young' and 'much in need of a mother's care'.[188] They admitted that it was a 'very serious thing to remove a young child from its mother', and advised that this was a course to adopt only if it were shown 'to be clearly necessary in the interests of the child'. But Angas Parsons J emphasised that the legislative framework adopted in South Australia in 1940 had promulgated 'statutory equality' between the two parents.[189] Assessing the evidence here, he concluded that 'things [were] far from equal'. Mrs Wilkinson had shown by her conduct that she could not 'safely be entrusted with the care and upbringing' of her children.[190]

What is most noticeable during the legal proceedings is how little scrutiny was directed towards Mr Wilkinson. Virtually no information was introduced about his disciplinary style and parenting capacity. Although he ran his chemist business from the family home, it was as if he was a phantom in the day-to-day supervision of children. Mrs Wilkinson's complaint that her husband had gone off to Sydney to play baseball with

187 See, for example, the comment of Richards J in *In re W* [1941] SASR 188, 190, where he is careful not to be overly critical of Mrs Wilkinson's conduct, and advises her to behave 'with affection and prudence', noting: 'I add "and prudence" because I do not wish it to be supposed that I would encourage "spoiling" the children.'

188 *In re Wilkinson* [1941] SASR 231, 232.

189 *Guardianship of Infants Act 1940* (SA).

190 *In re Wilkinson* [1941] SASR 231, 235; *In re W* [1941] SASR 188, 190.

his team, leaving her alone in the home to care for a growing brood of energetic children, seems to have had little influence on the court. And Mr Wilkinson's plan to place the children in charge of a nurse or his mother went unremarked, their respective parenting styles entirely unexamined.[191]

The new psychology fastened tenaciously upon mothers, while skimming capriciously over fathers and their surrogates. While rhetorically insistent upon the critical role played by mothers in the cultivation of the nation's youth, the ideology had a pernicious underside, and the potential to gravely undermine women's claims to their children. Mayo J's earlier aside that few parents could actually pass the tests demanded by child development experts worked to the practical disadvantage of mothers, who were the prime target of examination. In this case, Mr Wilkinson benefited additionally from the elaborate new theories when he later pleaded his right to divorce his wife. He claimed that, in consequence of Mrs Wilkinson's hostile behaviour, he had 'been driven to a state of nervous exhaustion approaching prostration', he had lost weight, he suffered from sinus trouble and was plagued by migraines. He was granted a divorce on account of his wife's cruelty towards him personally, and due to the pain he experienced indirectly from having witnessed his children's pain.[192]

CONCLUSION

Australian motherhood may have achieved 'reverential status' during the first half of the twentieth century, but child custody law never fully subscribed to the pre-eminence of maternal rights. The reported decisions reflect a surprising degree of judicial discord over how best to interpret legislation that gradually enshrined parental equality and child paramountcy. The doctrine of tender years was enthusiastically adopted by some courts and discounted by others. In the end, it failed to achieve the status of a fully fledged legal presumption. Mothers of young children were sometimes deprived of their custody due to marital misconduct and judicial partiality towards paternal authority. Other courts minimised maternal misconduct and bowed to shifting patterns of sexual behaviour, awarding children to indiscrete and adulterous mothers. The dislocations

191 *Wilkinson v Wilkinson* [1943] SASR 207, 208–9.
192 Ibid 207.

brought on by the two world wars exacerbated some of these trends. Some judges exhibited particular deference to the men who fought overseas, while others showed special sensitivity towards the women left behind. The introduction of psychological expertise into Australian courtrooms also divided the judiciary. Some of the judges used the new theories to prop up maternal claims, while others used them to place motherly behaviour under heightened critical scrutiny.

The uncertain state of child custody law at the mid-century mark can best be illustrated by two High Court decisions issued during the last years of the period under review: *Storie v Storie*[193] and *Lovell v Lovell*.[194] The majority of the High Court fell back on the 'mother factor' and 'tender years' doctrine to favour maternal custody in *Storie v Storie*, an appeal from the Supreme Court of Victoria in 1949. The majority of the same court spoke the language of fathers' rights in *Lovell v Lovell*, an appeal from the same court in 1950.

In the first case, Agnes and Eric Storie were fighting over the custody of a nine-year-old girl named Lynette. The father, a shop assistant in Melbourne, had placed his daughter with his female cousin in Noojee. The trial judge pronounced that Lynette was thriving, healthy and happy. The mother, who was employed as a secretary in Melbourne, had found accommodations there and wished to bring her daughter to join her. The trial judge refused to move the child from an environment in which she was so clearly content, relying upon the legislative dictate to hold 'paramount' the interests of the child's welfare. Williams J reversed the trial decision, and offered a quite different impression of the prevailing legislation:

> The effect of this section, like its prototype in English legislation, is to bring the law generally into accord with the principles which have always been applied by a Court of Equity. ... The section makes the welfare of the infant the paramount but not the sole consideration. By a long series of judicial decisions, most of which existed at the date of the Act, the Courts have made it clear that many factors enter into

193 (1949) 80 CLR 597.
194 (1950) 81 CLR 513.

> the consideration of what is best for the welfare of an infant. They have made it particularly clear that there are the strongest reasons, based on fundamental natural and social laws for holding that, in the absence of very special circumstances, the best interests of the child will be served by leaving it in the custody of one of its parents, and in the case of a female child of tender years in the custody of the mother.[195]

Rich J reiterated that the mother deserved to be awarded custody, noting that the child was

> a female child of tender years rising to puberty who particularly requires a mother's care. ... It is, I consider, of paramount importance that a female child of nine years of age should have her mother's attention, care and training and have the opportunity of winning her affection and for that purpose should be brought into intimate relation with her.[196]

Here were judicial pronouncements deliberately calculated to preserve the 'mother factor' and the 'tender years doctrine' despite the legislative enshrinement of 'child paramountcy'.

In contrast, paternal custody was ultimately given preference in *Lovell v Lovell*,[197] even where the child was female and three years old. Lorna Lovell had left her husband, Edward Lovell, because she was jealous over his relationship with a co-worker from his father's factory. She took Diana, their only child, and went home to Caulfield to live with her father, a retired printer who was 'comfortably off' and willing to take in his offspring. Edward agreed to pay for the upkeep of his wife and daughter provided that Lorna did not seek paid employment. Four months later he discovered that his wife had taken a position as a teleprinter operator with the post office, leaving Diana in care of an aunt who kept house for their father. At the same time Edward learned that Diana was ill, and he took her to the hospital where her tonsils were removed. After the operation,

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195 *Storie v Storie* (1949) 80 CLR 597, 620.
196 Ibid 605–6.
197 (1950) 81CLR 513.

Edward took Diana home with him against the wishes of her mother. Edward reported that when he attempted a marital reconciliation Lorna had retorted that 'she had her own life to lead as well as the child'.[198] When the pair came to court disputing custody, the trial judge took deep umbrage over Lorna's behaviour. He found no good reason for Lorna's anxiety regarding her husband's behaviour. She was 'suspicious, intolerant and obstinate',[199] he vowed, and had had 'no grounds' for leaving her husband. Equally upsetting was her penchant for paid employment. Coppel J stated that there was 'no financial necessity' for her to join the labour force, since her father had generously offered to keep her. Her selfish desire to work meant that she would have to be away from Diana 'during nearly the whole of the waking hours of the child'.[200] Edward's arrangement to have the child raised by his fifty-year-old mother was certainly preferable to this. Although he noted that it was unusual to give custody of a child of tender years to the father, Coppel J awarded custody of Diana to Edward Lovell.

The Full Court reversed the order, based primarily on the 'superior right of the mother in the case of young children'.[201] On appeal to the High Court, Lorna's counsel pleaded his case squarely upon the 'mother factor', claiming that there must be very 'strong reason' to displace the presumption that the mother was the best person to have custody of a female child of tender years. Edward's counsel disagreed, and argued that the Full Court had erred in treating *Storie v Storie* as establishing a 'rule of law or presumption in favour of the mother'.[202] The High Court restored custody to Edward Lovell, determining that the Full Court was wrong to have based its decision on the tender years doctrine:

> [T]he Full Court has based its judgment ... on the proposition that a mother has a superior right to the custody of an infant of tender years, more particularly in the case of a female infant, and that that right can only be displaced by the very strongest evidence that her custody would be detrimental to the child.

198 Ibid 516.
199 Ibid 517.
200 Ibid.
201 Ibid 520.
202 Ibid 514.

> ... [T]his approach involves a failure to apply [the statutory wording] which exclude[s] any suggestion of competitive superiority on the part of either the mother or the father. The provision means that the parents are to be on an equal footing as to rights or claims. Neither is to be regarded as superior to the other.[203]

It was a 'mistake' to approach the case thinking that the mother was 'entitled to custody' in the case of a child of tender years, emphasised Chief Justice Latham. It might be a matter of 'common sense' that 'as a general rule' children were better looked after by mothers, but there was 'no rule of law to that effect'.[204] Here the evidence showed that Lorna was 'a selfish person' who apparently preferred 'her own comfort to the interests of her child'.[205] Her misconduct in leaving the marital home for no good reason except that she was 'not happy' there, was sufficient ground to disqualify her from custody. To reward such women with custody was to imply that a wife 'could threaten to leave home and take the children with her', a principle which would undoubtedly produce 'disintegrating results in family life'.[206] McTiernan J added that whatever emphasis courts had given previously to the 'mother factor' must surely be displaced in cases where mothers abandoned their children for waged labour outside the home. The 'mother factor' had 'very great weight' when the mother 'remained at home and devoted herself to the child'. But the 'weight of this consideration on the mother's side in such a contest must be considerably diminished in a case in which she leaves home every

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203 Ibid 522. Webb J dissented on this point, stating at 531–2 that

> the best interests of a girl of three require that she should be with her mother, unless in all the circumstances the mother cannot be regarded as qualified to have the custody of even so young a child. ... [The] mother can be expected to supervise the child's physical and mental state with care and sympathy as only a mother can, and that her maternal affection will give it the necessary feeling of security.

204 Ibid 523.

205 Ibid 524.

206 Ibid 520–1.

day except Sunday to attend to business and ... leaves the child to the care and attention of another person.'[207]

The deep divisions in male judicial perspective spanning the fifty years under consideration are clearly evident in these two final decisions. Child custody law was an uncertain and amorphous body of principles and ideas. The metaphor crafted by Lowe J in 1947, of two people trying to ride a horse, posed a considerable dilemma for the bench. The judges knew that one parent had to ride in front on the saddle and the other behind, but they could not entirely agree who should sit first. Sometimes they could not even agree which horse should run the course or what the rules of the race were to be. The text writers who have asserted that 'the mother factor' formed something in the nature of a practical presumption in favour of maternal custody during the first half of the century may find their assumptions less firmly grounded than they anticipated.

This preliminary study, based upon the reported decisions between 1900 and 1950, does not bear out the suggestion that women were automatically presumed to be the parent of preference. It is true that the study reveals a two-thirds/one-third split in favour of mothers over fathers. However, in comparison with statistics culled from preliminary research on custody awards handed down in later periods, when maternal custody was purported to have come under greater critique, the numbers appear to be surprisingly similar. If the decisions themselves are examined for analysis regarding gender priority, the body of law reveals sustained contradictions. In the final assessment, the child custody cases examined here fail to demonstrate any consistent or concerted support for the notion of maternal preference.

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207 Ibid 527. Webb J dissented on this point, stating at 529 that the mother's decision to take paid employment ought not to disqualify her, or to be viewed as any 'lack of affection for the child' or illustrative of 'neglect'. He thought it was only 'reasonable' that she should 'take advantage of the opportunity, which might prove fleeting, of earning money'. It was not clear to Webb J that the grandfather, although of comfortable means, 'was prepared to provide' Lorna and Diana 'with all their needs and to do so indefinitely'. Furthermore, there was no evidence that the mother did not remain with her daughter when she was not working.