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Linda Lee Reimer Stevenson

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Fair Play or a Stacked Deck?: In Search of a Proper Standard of Proof in Juvenile Dependency Hearings

I. INTRODUCTION*

As a society, we want to protect children from abuse and neglect by their parents. Few news stories ignite such outrage as when an out-of-control parent beats a small child to death. We look to social workers and judges to intervene and prevent these kinds of atrocities. At the same time, innocent parents need protection from an uncontrolled bureaucracy. No one wants to needlessly dismantle families. The detestable act of removing children from parents should be reserved for situations of absolute necessity.

When courts place children in protective custody as a result of parental abuse or neglect, the question arises as to whether and when it is safe to return them to their parents. Sending children home before their parents have adequately addressed their problems further endangers the children. On the other hand, failing to allow rehabilitated parents to regain custody injures parents and children alike. Further complicating this difficult issue is the matter of time. Children should not languish in foster care, endlessly waiting for changes in their parents that may never materialize.

The federal and state Constitutions guarantee that no state shall deprive any person of life, liberty or property without due process of law. A parent's interest in the companionship, care, custody and management of his children is a compelling one, ranked among the most basic of civil rights. Likewise, natural children have a fundamental independent interest in belonging to a family unit, and they have compelling rights to be protected from abuse and neglect and to have a placement that is stable, permanent, and that which allows the caretaker to make a full emotional commitment to the child. The interests of the parent and the child, therefore, must be balanced.¹

* I would like to express my deep gratitude to my husband and son for their unfailing support.
1. *In re Marilyn H.*, 851 P.2d 826, 833 (Cal. 1993) (citations omitted).

This Comment will discuss the need for a revised standard of proof when a court discontinues efforts to reunify a family and instead makes a permanent plan for the child outside of the parents' home. Recent legislation reduces the time given to parents for compliance with court-ordered reunification plans and streamlines the adoption process of these children.² As it becomes easier for parents to forever lose their children to this system, the importance of fair and accurate court decisions increases dramatically. Thus, the standard of proof required in these proceedings is a critical safeguard to ensure careful deliberation over such decisions.

First, this Comment presents a recent history and current structure of the dependency court system.³ The next section discusses two major cases addressing the standard of proof required when terminating parental rights.⁴ The final section sets forth recommendations for change in the requisite standard of proof to be applied when terminating family reunification services.⁵

II. DEPENDENCY COURT HEARINGS

A. *Statutory History*

Nationwide, there are almost half a million children in foster care placement due to abuse or neglect by their parents.⁶ The recent national trend is toward expedited resolution of court intervention on behalf of these children.⁷ In 1979, Congress responded to years of studies and hearings regarding the effects of foster care placement on children by proposing an overhaul of child welfare systems across the country.⁸ Aiming to promote more permanent placements for children, Congress passed the Adoption Assistance and Child Welfare Act of 1980.⁹ The

2. For example, parents whose children were under the age of three at the time of initial removal from the home are limited (with some exceptions) to six months of family reunification services before facing possible termination of their parental rights and adoption of their children. See CAL. WELF. & INST. CODE § 361.5(a)(2) (West 1998); see also *infra* notes 37, 39.

3. See *infra* notes 6-47 and accompanying text.

4. See *infra* notes 48-138 and accompanying text.

5. See *infra* notes 139-164 and accompanying text.

6. See Raymond C. O'Brien, *An Analysis of Realistic Due Process Rights of Children Versus Parents*, 26 CONN. L. REV. 1209, 1242 (1994) (citing NATIONAL COMMISSION ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 283-84 (1991)); see also Jeanne Ambrose, *Beleaguered Children; After Deaths, Welfare Services Seek Safer Foster Care*, CHI. TRIB., July 24, 1994, at 1, available in 1994 WL 6475240 (projecting an estimated 480,000 children in the foster care system in 1994).

7. See, e.g., Adoption and Safe Families Act of 1997, 42 U.S.C. § 1305 (1997) (expanding circumstances that meet requirements for proceedings to terminate parental rights).

8. See *Cynthia D. v. Superior Ct.*, 851 P.2d 1307, 1308 (Cal. 1993) (citing Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 1980 U.S.C.C.A.N. (94 Stat. 500) 1450).

9. See 42 U.S.C. §§ 620-28, 670-79a (1994).

Act provides the following three methods for achieving a permanent plan: (1) family preservation efforts designed to safely keep the family together, (2) reunification efforts toward rehabilitating the parents and sending the child home from placement, and where reunification fails, (3) finding an appropriate long-term home for the child.¹⁰

In 1982, California passed legislation to comply with the Federal Act.¹¹ In addition to providing a structure for dependency court procedures, it required clear and convincing evidence of detriment to justify a child's removal from parental custody,¹² reunification services for parents,¹³ six month judicial reviews,¹⁴ and permanency planning hearings when parents fail to reunify with a child within twelve to eighteen months of detention.¹⁵ The permanent plans available to a court include adoption, legal guardianship and long-term foster care.¹⁶ California Civil Code section 232 required a separate action to terminate parental rights if the plan was for adoption.¹⁷ Unfortunately, the "232 action" frequently took several years to complete.¹⁸

Because of this delay, among other things, the Legislature passed Senate Bill No. 243 in 1987.¹⁹ This legislation changed the procedure for terminating parental rights for children who were dependents of the court.²⁰ The 232 action was no longer required.²¹ Instead, a brief "selection and implementation hearing" would occur within 120 days of the twelve or eighteen month review hearing.²² It was possible to terminate parental rights at this hearing if the court found that the child was adoptable and adoption was in the child's best interests.²³

10. See *id.* §§ 671(a)(15), 675(1)(B).

11. See *Cynthia D.*, 851 P.2d at 1308 (citing Act effective Sept. 12, 1982, Ch. 978, 1982 Cal. Stat. 3525).

12. See CAL. WELF. & INST. CODE § 361 (West 1998).

13. See *id.* § 361.5.

14. See *id.* §§ 364, 366.

15. See *id.* § 366.25.

16. See *Cynthia D.*, 851 P.2d at 1308.

17. See *id.*

18. See *id.* at 1308-09. "The passage of five or more years from initial removal of the child from its home to ultimate resolution and repose [was] by no means unusual." *Id.* (quoting *In re Micah S.*, 243 Cal. Rptr. 756, 761 (Ct. App. 1988) (Brauer, J., concurring)).

19. See *id.* at 1309.

20. See *id.*

21. See *id.*

22. See CAL. WELF. & INST. CODE §§ 366.21(g), 366.22(a), 366.26 (West 1998).

23. See *id.* § 366.26.

B. Current Procedures

California's child protection statutes have three objectives.²⁴ First, they protect children who are at risk or are currently suffering abuse, neglect, or exploitation.²⁵ Second, they strive to preserve the family to the extent possible.²⁶ Finally, they are designed to resolve cases without delay.²⁷

A juvenile dependency court intervenes in the life of a family when a police officer, probation officer or social worker takes a child into protective custody based on a belief that the child has been or is in immediate danger of abuse or neglect as defined by section 300 of the Welfare and Institutions Code.²⁸ Once a child is detained, a petition must be filed within forty-eight hours, excluding non-judicial days, alleging abuse or neglect that would bring the child within the juvenile court's jurisdiction pursuant to section 300 of the Welfare and Institutions Code.²⁹ A "detention hearing" must then be held no later than the end of the next judicial day.³⁰ At this hearing, a court will determine if the child shall remain detained or be released to the parents.³¹

The ensuing process has been described in four phases: (1) jurisdiction, (2) disposition, (3) reunification, and (4) selection and implementation of a permanent plan.³² If the permanent plan is adoption, the court will terminate the parents' rights.³³

24. See *In re Daniel G.*, 31 Cal. Rptr. 2d 75, 79 (Ct. App. 1994).

25. See *id.* (quoting CAL. WELF. & INST. CODE § 300(j)).

26. See *id.* (quoting CAL. WELF. & INST. CODE § 300, 300(j)).

27. See *id.* (citing *Cynthia D. v. Superior Court*, 851 P.2d 1307, 1309 (Cal. 1993)).

28. See CAL. WELF. & INST. CODE §§ 300, 305, 306 (West 1997). Section 300 enumerates the conditions that would bring the child under the jurisdiction of the juvenile dependency court. See *id.* § 300. For examples of statutes defining dependency court jurisdiction in other states, see COLO. REV. STAT. ANN. § 19-1-103 (West 1997), FLA. STAT. ANN. § 39.01 (11) (West 1997), MINN. STAT. ANN. § 260.191 (West 1997), OHIO REV. CODE ANN. § 2151.353 (Anderson 1997). It is possible to alert officials to an abusive situation in a variety of ways. Certain professionals who work with children are mandated by law to report suspected or known instances of child abuse or neglect. See, e.g., CAL. PEN. CODE § 11166 (West 1998). Additionally, private citizens such as friends, neighbors or family may call police or protective services if they know of or suspect child abuse or neglect. See *id.* § 11166(d).

29. See CAL. WELF. & INST. CODE § 313(a) (West 1997).

30. See *id.* § 315.

31. See *id.*

32. See *In re Matthew C.*, 862 P.2d 765, 768 (Cal. 1993).

33. See *id.* For a discussion of termination statutes throughout the country, see Maryann Zavez, *Rethinking Vermont's Termination of Parental Rights Laws: Guidelines for a Comprehensive Termination of Parental Rights Statute*, 19 VT. L. REV. 49, 64-78 (1994).

The jurisdiction phase involves the adjudication of the petition.³⁴ The court will determine whether the allegations in the petition are true, thus bringing the child within the court's jurisdiction.³⁵ If the petition is sustained, the court must then hold a disposition hearing to decide whether the parents will lose custody of the child.³⁶

If the court removes the child from the parents, it will order the parents to participate in a plan designed to resolve the issues that necessitated court intervention.³⁷ The case plan is based upon an evaluation of the problems that brought the family before the court and sets forth specific goals and services offered to accomplish family reunification.³⁸ The reunification phase may last from six to eighteen months.³⁹

Following the disposition hearing, the court must review the progress of the family at least every six months.⁴⁰ If the parents have failed to complete the plan that would enable the child to safely return home, the court will continue to supervise the family until the statutorily allotted period for reunification ends.⁴¹ If,

34. See *In re Matthew C.*, 862 P.2d at 768 (citing *Cynthia D. v. Superior Court*, 851 P.2d 1307, 1309-10 (Cal. 1993)).

35. See *id.* (citing *Cynthia D.*, 851 P.2d at 1309-10).

36. See *id.* (citing CAL. WELF. & INST. CODE §§ 358, 361); *Cynthia D.*, 851 P.2d at 1310). This comment will focus on the process involved when the court removes the child. See *infra* notes 39-167 and accompanying text. However, if the court finds the child to be a person described by § 300, but does not find that it would be detrimental for the child to live with the parents, the court may order the child to remain at home under court supervision and order family maintenance services. See CAL. WELF. & INST. CODE § 360(b) (West 1998).

37. See *In re Matthew C.*, 862 P.2d at 768 (citing CAL. WELF. & INST. CODE § 361.5); *Cynthia D.*, 851 P.2d at 1310). There are, however, thirteen listed circumstances under which the court will remove the child and make an order for no reunification services, thus moving directly from the disposition phase to the permanent plan phase. See CAL. WELF. & INST. CODE § 361.5(b). For example, if a parent severely sexually or physically abused the child or a sibling, or caused the death of another child through abuse or neglect, or has been convicted of a violent felony, no reunification services will be ordered unless the court finds by clear and convincing evidence that doing so would be in the child's best interests. See *id.* § 361.5(b)(4), (6), (11), (c).

38. See *id.* § 16501.1(f)(1), (2), (9).

39. See *id.* § 361.5(a). If on the date of the child's initial removal from the parents, the child was under age three, reunification services will be provided for a maximum of six months. See *id.* § 361.5(a)(2). If the child was age three or older upon removal, reunification will last for a period not exceeding twelve months. See *id.* § 361.5(a)(1). The court may, however, extend reunification services to a maximum of eighteen months, but only if there is a substantial probability that the child can be safely returned to a parent within that period or if the social services department has failed to provide the parents with reasonable services. See *id.* § 361.5(a).

40. See *id.* § 366. Additionally, federal funding requirements under the Adoption Assistance and Child Welfare Act mandate a review of each child, administratively or by the court, at least every six months. See 42 U.S.C. § 675(1), (5) (1994).

41. See CAL. WELF. & INST. CODE § 366.

at that time, the parents continue to pose a detriment to the child and the social services department has provided the family with reasonable services, the court will terminate reunification services and make a permanent plan for the child.⁴²

The permanent plan could be adoption, guardianship, or long-term placement in foster care.⁴³ The court, in determining which permanent plan to select, will choose the option that would be in the best interests of the child.⁴⁴ If adoption is the chosen alternative, the county begins proceedings to terminate the parental rights, thus freeing the child for adoption.⁴⁵ Once a court terminates a parent's rights, the parent permanently loses custody, visitation, and virtually any relationship with the child.⁴⁶ Therefore, courts must find by clear and convincing evidence that the child is adoptable before terminating the parents' rights.⁴⁷

42. See *id.* § 366.21 (g), (h); see also 42 U.S.C. § 675(5)(C) (1997).

43. See CAL. WELF. & INST. CODE § 366.26(b).

44. See *id.* § 366.26(c)(4), (h). For example, if a child has a strong bond with a parent despite lengthy placement outside of the parent's home, adoption would not likely be an appropriate permanent plan. See *id.* § 366.26(c)(1)(A). Moreover, for a teenager who is not adoptable and for whom there is no potential guardian, long-term foster care may be the most permanent plan available. See *id.* § 366.26(c)(1)(C).

This determination can be difficult and complicated when a child six years or older has a strong bond to a caretaker who is unwilling to pursue adoption or guardianship out of loyalty to the parent or for other reasons, but is willing to commit to long term care of the child. See *id.* § 366.26(c)(1)(D). The court must decide whether it is in the child's best interests to be uprooted again in search of an adoptive family or whether this would make the child hesitant to bond in future relationships, fearing further separation. See *id.* § 366.26(h). Experts have not resolved this dilemma, and policies that mandate selection of the most permanent available option can obfuscate a determination by the court of what is truly in the child's best interests. See generally Zavez, *supra* note 33 (discussing termination statutes throughout the country).

45. See CAL. WELF. & INST. CODE § 366.25(d)(1), 366.26(b)(1).

46. See *id.* § 366.26(b)(1); see also Santosky v. Kramer, 455 U.S. 745, 749 (1982). *But cf.* CAL. FAM. CODE §§ 8714.7, 8715 (West 1998) (creating "kinship adoption agreements"). A newly enacted statute, applicable to adoptions by relatives, allows the natural parents a limited role in the child's life. See *id.* Terms of the agreement regarding visitation and future contact with birth parents and other birth relatives are open to renegotiation in the future to accommodate changes in circumstances. See *id.* § 8714.7(h). In sum, this option may encourage many relatives to pursue adoption who might have otherwise rejected making such a commitment due to feelings of loyalty towards the parents.

47. See CAL. WELF. & INST. CODE § 366.26(c)(1). See generally Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121 (1995). Martin Guggenheim documents the results of policies aimed at expediting parental rights terminations in hopes of facilitating adoptions in Michigan and New York. See *id.* at 134-35. He concludes that many children have become legal orphans when adoptions fail to materialize and children are left in limbo because the terminations are irrevocable. See *id.* at 134. There is additional concern that these adverse effects fall disproportionately on the poor and those of color. See *id.*; see also Zavez, *supra* note 33, at 66-67. In response to the problem of legally orphaning children through unnecessary termination of parental rights, California now provides courts with the option of ordering efforts to locate an adoptive family for the child within 180 days when no adoptive family has been selected prior to the 366.26 hearing. See CAL. WELF. & INST. CODE § 366.26(b)(2).

III. THE STANDARD OF PROOF

Because of the serious nature of termination proceedings, courts have frequently given special consideration to due process safeguards.⁴⁸ When a dependency action reaches the stage of termination of parental rights, "the State's aim is not simply to influence the parent-child relationship but to extinguish it."⁴⁹ Furthermore, the termination of a parent's rights is comprehensive and permanent.⁵⁰ The *Santosky* Court noted that "[f]ew forms of state action are both so severe and so irreversible."⁵¹

The United States Supreme Court has held that parents have a liberty interest in their relationship with their children that is fundamental and therefore protected by the Fourteenth Amendment.⁵² As such, due process requires that termination of this relationship must include notice and an opportunity for an appropriate hearing.⁵³ "The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.'⁵⁴

In *Mathews v. Eldridge*, the Supreme Court set forth three factors for consideration when evaluating the specific requirements for procedural due process in any given type of case: first, the private interest affected by the action; second, the risk of error caused by the procedures used and the value of using additional procedural safeguards; third, the government's interest, taking into account the burdens that additional safeguards would impose.⁵⁵ In *Santosky v. Kramer*, the United States Supreme Court used these three factors from *Eldridge* to consider the appropriate standard of proof for terminating parental rights.⁵⁶

"[T]he standard of proof is a crucial component of legal process, the primary function of which is 'to minimize the risk of erroneous decisions.'" Notice, summons, right to counsel, rules of evidence, and evidentiary hearings are all

48. See, e.g., *Santosky*, 455 U.S. at 758; *Lassiter v. Department of Soc. Serv.*, 452 U.S. 18, 40 (1981).

49. See *Lassiter*, 452 U.S. at 39.

50. See *id.*

51. *Santosky*, 455 U.S. at 759.

52. See *id.* at 753.

53. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) ("[A]t a minimum [the Due Process Clause] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.").

54. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

55. See *id.* at 334-35.

56. See *Santosky*, 455 U.S. at 758.

procedures to place information *before* the fact finder. But only the standard of proof “instruct[s] the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions” he draws from that information.⁵⁷

The minimum allowable standard of proof is an indication of the importance of the interests involved.⁵⁸ Furthermore, the standard is “a societal judgment about how the risk of error should be distributed between the litigants.”⁵⁹

The application of a preponderance standard in civil actions between private litigants reflects society’s casual willingness to allocate the risks of an erroneous decision evenly among the parties.⁶⁰ In contrast, the “beyond a reasonable doubt” standard employed in criminal proceedings expresses society’s deep concern over the possibility of erroneous convictions.⁶¹ Thus, under the strict standard of reasonable doubt, society itself assumes the vast majority of risk for error.⁶²

In *Santosky*, the Supreme Court decided that the minimum burden of proof required in parental rights termination cases was clear and convincing evidence.⁶³ The Court used this intermediate standard of proof when “the individual interests at stake in a state proceeding are both ‘particularly important’ and ‘more substantial than mere loss of money.’”⁶⁴ For example, the Court imposed a clear and convincing standard for involuntary commitments to psychiatric facilities,⁶⁵ deportation hearings⁶⁶ and denaturalization proceedings.⁶⁷ Like termination of parental rights, the Court noted that all of these actions involve State-sponsored proceedings against individuals, carrying the daunting possibility of considerable loss of liberty.⁶⁸

The Court then applied the three *Eldridge* factors to parental rights termination proceedings and found that “the private interest is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight.”⁶⁹ Therefore,

57. *Id.* at 757 n.9 (internal citations omitted) (quoting *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 13 (1979); *In re Winship*, 397 U.S. 358, 370 (1970)).

58. *See id.*

59. *See id.* at 755.

60. *See id.* (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979) (holding that the standard of proof required by due process reflects not only the weight of the parties involved, but also a societal judgment about how the risk of error should be distributed)).

61. *See id.* (quoting *Addington*, 441 U.S. at 424, 427).

62. *See id.* (quoting *Addington*, 441 U.S. at 424).

63. *See id.* at 769-70. The Court rejected New York’s standard of “fair preponderance of the evidence” as constitutionally insufficient. *See id.* at 747-48.

64. *See id.* at 756 (quoting *Addington*, 441 U.S. at 424).

65. *See id.* at 756 n.8 (citing *Addington*, 441 U.S. at 427, 433).

66. *See id.* (citing *Woodby v. INS*, 385 U.S. 276, 285 (1966)).

67. *See id.* (citing *Chaunt v. United States*, 364 U.S. 350, 353 (1960)).

68. *See id.* (citing *Addington*, 441 U.S. at 425-26).

69. *See id.* at 758.

the Court rejected the preponderance standard in favor of the clear and convincing standard for termination proceedings.⁷⁰

Remarking that the preponderance standard by definition focuses on the quantity instead of the quality of evidence, the Court expressed concern that use of this standard may misdirect a court's decision on a borderline case.⁷¹ Because of the considerable importance of the private interests involved, the Court found the social consequences of even infrequent error to be substantial.⁷²

Furthermore, the Court stated that a heightened standard of proof would have "both practical and symbolic consequences."⁷³ As an example, the Court pointed out that the elevated standard of proof required in criminal prosecutions is an effective tool in reducing the number of erroneous convictions based on factual mistakes.⁷⁴ Accordingly, the Court concluded that an increased standard of proof would remind fact finders of the significance of pending decisions and thereby decrease the likelihood of unjust terminations.⁷⁵

At the time of the *Santosky* decision, thirty-five states and the District of Columbia already required a standard above preponderance for termination of parental rights hearings.⁷⁶ In fact, New Hampshire specified a standard of "beyond reasonable doubt" prior to *Santosky*.⁷⁷ Although the New Hampshire statute for parental-rights termination specified only a standard of clear and convincing evidence,⁷⁸ the New Hampshire Supreme Court held that the higher standard is

70. See *id.* at 758-59.

71. See *id.* at 764 (citing *In re Winship*, 397 U.S. 358, 371 n.3 (1970) (Harlan, J., concurring)).

72. See *id.*

73. See *id.* (citing *Addington*, 441 U.S. at 426).

74. See *id.* (citing *In re Winship*, 397 U.S. at 363).

75. See *id.* at 764-65 (citing *Addington*, 441 U.S. at 427).

76. See *id.* at 749 & n.3. By statute, the following fifteen states mandated a standard of, or comparable to, clear and convincing evidence: Alaska, California, Georgia, Iowa, Maine, Michigan, Missouri, New Mexico, North Carolina, Ohio, Rhode Island, Tennessee, Virginia, West Virginia, and Wisconsin. See *id.* at n.3.

Courts in the following fifteen states and the District of Columbia specified the standard of proof as clear and convincing evidence or the equivalent: Alabama, Arkansas, Florida, Kansas, Minnesota, Montana, Nebraska, New Jersey, North Dakota, Oklahoma, Pennsylvania, Texas, Utah, Washington, and Wyoming. See *id.*

Two other states, Illinois and New York, required clear and convincing evidence under certain circumstances, such as minor parents or mental illness. See *id.* New Hampshire and Louisiana had a heightened standard, requiring proof beyond a reasonable doubt. See *id.* Only one state, South Dakota, required a "clear preponderance" standard. See *id.*

77. See *State v. Robert H.*, 393 A.2d 1387, 1389 (N.H. 1978) (requiring proof beyond a reasonable doubt to terminate parental rights).

78. See N.H. REV. STAT. ANN. § 170-C:10 (1994).

necessary because of the possible termination of "liberty and natural rights of parents guaranteed under [the] New Hampshire Constitution."⁷⁹

Termination proceedings filed pursuant to the Indian Child Welfare Act also mandate the use of the reasonable doubt standard.⁸⁰ In order to terminate parental rights under this statute, evidence must prove beyond a reasonable doubt that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."⁸¹

One commentator urged lowering the standard in termination cases to a preponderance in order to facilitate freeing children for adoption.⁸² Arguing that the increased time and difficulty of presenting clear and convincing evidence create a delay that is harmful to children, the author stated that the best interests of the children are less valuable than the parents' rights when courts employ the higher standard.⁸³

Interestingly, ten years after *Santosky*, the California Supreme Court upheld a preponderance standard of proof in termination of parental rights hearings arising from dependency court cases.⁸⁴ In *Cynthia D.*, the court distinguished the current juvenile dependency system in California from the procedures that existed in New York at the time of *Santosky*.⁸⁵ New York's procedure required the state to prove parental unfitness at the termination hearing.⁸⁶ In contrast, the California statutory scheme requires no showing of parental fault at the time parental rights are terminated.⁸⁷ The *Cynthia D.* court noted that the question of parental inadequacy is repeatedly litigated prior to the termination hearing.⁸⁸

First, the petition filed against the parents alleging abuse or neglect is adjudicated under a preponderance standard.⁸⁹ If the petition is sustained and the court finds that the child comes within its jurisdiction, a disposition hearing must be held.⁹⁰ At the disposition hearing, in order to remove the child from the care and custody of the parents, the court must find by clear and convincing evidence that it would be detrimental to the child to return home.⁹¹ The court must then review the case at least every six months.⁹² Upon review, the court must return the child

79. See *Robert H.*, 393 A.2d at 1389.

80. See 25 U.S.C. § 1912(f) (1994).

81. See *id.*

82. See O'Brien, *supra* note 6, at 1243.

83. See *id.*

84. See *Cynthia D. v. Superior Ct.*, 851 P.2d 1307, 1315 (Cal. 1993).

85. See *id.* at 1313-15.

86. See *id.* at 1314.

87. See *id.*

88. See *id.* at 1315.

89. See *id.* at 1310 (citing Cal. Welf. & Inst. Code § 355); CAL. R. OF CT., rule 1450(f).

90. See *id.* (citing CAL. WELF. & INST. CODE § 358; CAL. R. OF CT., rules 1451, 1455).

91. See *id.* (citing CAL. WELF. & INST. CODE § 361(b); CAL. R. OF CT., rule 1456(c)); see also *In re Katrina C.*, 247 Cal. Rptr. 784 (Ct. App. 1988) (holding that clear and convincing evidence is necessary to remove a child from a custodial parent and place with a non-custodial parent).

92. See *Cynthia D.*, 851 P.2d at 1310 (citing CAL. WELF. & INST. CODE § 366).

to the parents unless the county proves by a preponderance of the evidence that so doing would "create a substantial risk of detriment to the physical or emotional well-being of the minor."⁹³ Furthermore, the court must find by a preponderance of the evidence at each of these review hearings that the social services department has made reasonable efforts towards providing reunification services to the family.⁹⁴

If the court is unable to safely return the child to the parents within the maximum allowable period for reunification, the court will terminate reunification services.⁹⁵ Before ending efforts to reunify the family, the court must make two findings: first, the court must find by a preponderance of the evidence that returning the child to a parent would create a substantial risk of detriment to the child's physical or emotional well-being; second, the court must find by clear and convincing evidence that the social services department has made reasonable efforts towards family reunification.⁹⁶

If the court terminates reunification services, it will then make a permanent plan for the child.⁹⁷ If the permanent plan selected is adoption, the court must find by clear and convincing evidence that the child is adoptable.⁹⁸ Finally, the court must consider whether it would be detrimental to the child to terminate parental rights.⁹⁹ A court may terminate parental rights only after making all of the above findings.

The court in *Cynthia D.* concluded that the three *Eldridge* factors, examined in *Santosky* and held to compel a heightened standard of proof in that case, do not justify the same standard under California's statutory scheme.¹⁰⁰ In *Santosky*, the Court found the first factor, the private interest that is impacted, to tip strongly toward the side of the parents when the State is attempting to prove that they have permanently neglected the child.¹⁰¹ In fact, the Court in *Santosky* likened the fact-finding stage of the New York permanent neglect hearing to a criminal trial.¹⁰² Furthermore, the *Santosky* Court stated that "until the State proves parental

93. See *id.* (quoting CAL. WELF. & INST. CODE §§ 366.21(e), 366.22(a)); CAL. R. OF CT., rule 1461). Failure by the parents to participate in a court-ordered treatment plan is prima facie evidence that continued court supervision is warranted. See CAL. R. OF CT., rule 1462(a)(2)(A).

94. See *Cynthia D.*, 851 P.2d at 1310 (citing CAL. WELF. & INST. CODE §§ 366.21(g)(1), 366.22(a)).

95. See *id.* (citing CAL. WELF. & INST. CODE § 366.21(g)).

96. See CAL. WELF. & INST. CODE § 366.22(a).

97. See *Cynthia D.*, 851 P.2d at 1310 (citing CAL. WELF. & INST. CODE §§ 366.21(g), 366.26).

98. See *id.* (citing CAL. WELF. & INST. CODE § 366.26(c)(1)).

99. See *id.* (citing CAL. WELF. & INST. CODE § 366.26(c)).

100. See *id.* at 1313.

101. See *Santosky v. Kramer*, 455 U.S. 745, 759 (1982).

102. See *id.* at 762.

unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.”¹⁰³

In contrast, the court in *Cynthia D.* noted that by the time of the termination hearing under the California procedure, the parents have been repeatedly held to be a danger to their child. The parents’ and child’s interests have diverged.¹⁰⁴ At this point, the court stated that the child’s interests predominate.¹⁰⁵ Because a court must find by clear and convincing evidence that the child is adoptable before terminating parental rights, the child has an interest in being freed for adoption.¹⁰⁶ Thus, the *Cynthia D.* court concluded that employing a higher standard of proof ultimately allocates greater risk to the child than to the parents.¹⁰⁷

Next, the court in *Cynthia D.* considered the second *Eldridge* factor examined in *Santosky*, the probability of erroneous judgment under the challenged procedure.¹⁰⁸ “The New York scheme employed ‘imprecise substantive standards that [left] determinations unusually open to the subjective values of the judge,’ thus allowing ‘unusual discretion to underweigh probative facts that might favor the parent.’”¹⁰⁹ In contrast, the court noted that California’s policy encourages family preservation when feasible.¹¹⁰ Furthermore, California courts are statutorily required to make repeated and specific findings regarding parental danger and risk to the child before ever reaching the termination proceeding.¹¹¹

In *Santosky*, the Court endeavored to equalize the disproportionate power between the State and the parents by requiring a heightened standard of proof.¹¹² “The State’s ability to assemble its case almost inevitably dwarfs the parents’ ability to mount a defense.”¹¹³ Unlike New York’s scheme, the court in *Cynthia D.* pointed out that parents in California have a significantly greater chance of a fair hearing because of mandatory appointment of counsel for parents unable to afford it, whenever out-of-home placement is involved.¹¹⁴

Moreover, California statute entitles the parents’ attorneys to see all pertinent records, including those of public and private agencies, medical personnel, and child care custodians.¹¹⁵ Additionally, the parents have a statutory presumption at review hearings that the child will be returned to their custody unless the State proves that placing the child with the parents would be detrimental to the child.¹¹⁶

103. See *id.* at 760; see also *Cynthia D.*, 851 P.2d at 1313.

104. See *Cynthia D.*, 851 P.2d at 1314.

105. See *id.*

106. See *id.*

107. See *id.*; see also *supra* text accompanying notes 82-83.

108. See *Cynthia D.*, 851 P.2d at 1314.

109. *Id.* (quoting *Santosky v. Kramer*, 455 U.S. 745, 762 (1982)).

110. See *id.* (citing CAL. WELF. & INST. CODE § 300(j)).

111. See *id.* (citing CAL. WELF. & INST. CODE §§ 300(a), 361(b)(1), 366.21(e), (f), 366.22(a)).

112. See *id.*

113. *Santosky*, 455 U.S. at 763.

114. See *Cynthia D.*, 851 P.2d at 1314 (citing CAL. WELF. & INST. CODE § 317(b)).

115. See *id.* (citing CAL. WELF. & INST. CODE § 317(f)).

116. See *id.* at 1314-15 (citing CAL. WELF. & INST. CODE §§ 366.21(e), (f), 366.22(a)).

Therefore, the court viewed the likelihood of an erroneous judgment against a parent involved in a California termination proceeding as remote under these circumstances.¹¹⁷

The third factor analyzed by the Court in *Santosky* was the governmental interest in using the procedure at issue to promote the best interests of the child and to contain administrative costs.¹¹⁸ The *Santosky* Court held that a higher standard would advance both of these goals.¹¹⁹ Regarding administrative costs, the Court observed the significant number of states that already required the higher standard of proof.¹²⁰ Furthermore, the Court noted that in New York the standard for proving traffic infractions was clear and convincing evidence.¹²¹ "We cannot believe that it would burden the State unduly to require that its fact finders have the same factual certainty when terminating the parent-child relationship as they must have to suspend a driver's license."¹²²

Nevertheless, the court in *Cynthia D.* countered that the California statutory scheme attempts to protect the parent-child relationship and to avoid the danger of erroneous judgments in such a variety of ways that "it would be fanciful to think that these state interests require what in most cases would be a sixth inquiry into whether the severance of parental ties would be detrimental to the child."¹²³

The court stated that the numerous findings that are necessary preconditions to terminating parental rights so clearly establish the detriment to the child from the parents that "there is no longer 'reason to believe that positive, nurturing parent-child relationships exist.'"¹²⁴ Therefore, the state interest in family preservation has ended by this stage of the proceedings.¹²⁵ To the contrary, the state now has an interest in locating a permanent and stable home for the child.¹²⁶

The court held that because previous court findings have unambiguously documented the parents' inability to reunify with the child, requiring a higher standard of proof would place an unnecessary burden upon efforts to permanently place the child.¹²⁷ Not only is a heightened standard inappropriate at the

117. *See id.*

118. *See id.* at 1315.

119. *See Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

120. *See id.* at 767; *see also supra* notes 76-81 and accompanying text.

121. *See Santosky*, 455 U.S. at 767-68 (citing N.Y. VEH. & TRAF. LAW § 227.1 (McKinney 1996); *In re Rosenthal v. Hartnett*, 326 N.E.2d 811 (1975)).

122. *Id.* at 768.

123. *See Cynthia D.*, 851 P.2d at 1315.

124. *See id.* (quoting *Santosky*, 455 U.S. at 766).

125. *See id.*

126. *See id.*

127. *See id.*

termination hearing, but any evidence of parental unfitness is superfluous at this point, the court commented.¹²⁸

Therefore, the court concluded that the statutory scheme in California for termination of parental rights satisfies the due process requirements of the Fourteenth Amendment.¹²⁹ The court found that the scheme sets forth “precise and demanding substantive and procedural requirements” with which the petitioning agency must comply prior to recommending termination.¹³⁰ The court described these requirements as “carefully calculated to constrain judicial discretion, diminish the risk of erroneous findings of parental inadequacy and detriment to the child, and otherwise protect the legitimate interests of the parents.”¹³¹ As such, the court held that the preponderance standard for terminating parental rights adequately satisfies the demands of due process set forth by the three *Eldridge* factors.¹³²

Unfortunately, the court took an optimistic view of judicial fact finding that fails to comport with reality. A court handling from forty to fifty cases in a single day, as some courts in large cities must, is unable to give every case a fresh look each time it is reviewed.¹³³ It is inevitable that the past findings made in the case influence its appearance to the court.

The requirement for repeated findings prior to termination does not necessarily diminish the risk of error. In fact, the United States Supreme Court, in *Santosky*, rejected the very reasoning that was subsequently adopted by the California Supreme Court in *Cynthia D.*¹³⁴ The *Santosky* Court specifically rejected the argument that the state’s procedural scheme must be considered as a “package.”¹³⁵ The Court explained:

Indeed, we would rewrite our precedents were we to excuse a constitutionally defective standard of proof based on an amorphous assessment of the “cumulative effect” of state procedures. In the criminal context, for example, the Court has never assumed that “strict substantive standards or special procedures compensate for a lower burden of proof.” . . . The statutory provision of *right to counsel* and *multiple hearings before termination* cannot suffice to protect a natural parent’s fundamental liberty interests if the State is willing to tolerate undue uncertainty in the determination of the dispositive facts.¹³⁶

128. *See id.*

129. *See id.*

130. *See id.*

131. *See id.*

132. *See id.*

133. *See* Jeff M. v. Superior Court, 66 Cal. Rptr. 2d 343, 346 (Ct. App. 1997). The *Jeff M.* court commented regarding Los Angeles County juvenile dependency court judges, “We are mindful that juvenile court judges, while diligent and caring, are overworked and doing their best to juggle ever-increasing caseloads while suffering grossly inadequate resources. The current judge in this case, alone, handles a daily calendar of 40 to 50 cases, including four or five trials . . .” *Id.*

134. *See* Santosky v. Kramer, 455 U.S. 745, 757 n.9 (1982).

135. *See id.*

136. *Id.* (quotations and citations omitted) (emphasis added).

Despite the *Cynthia D.* court's attempt to distinguish the California statutory scheme from that of New York, the *Santosky* opinion already responded to claims that existing procedures obviated the need for a heightened standard of proof.¹³⁷ The Court found this justification for a preponderance standard unacceptable.¹³⁸

IV. RECOMMENDATIONS FOR CHANGE

Although the rationale of the majority decision in *Cynthia D.* is questionable, its conclusion is sound insofar as neither a higher standard of proof nor further review of the parents' fitness at the parental rights termination hearing is the answer.¹³⁹ Instead, the standard of proof for the prior order terminating reunification services should be elevated to clear and convincing evidence of detriment to the child if returned to the parents.

Currently, the standard for this finding is a preponderance of the evidence.¹⁴⁰ The order to terminate reunification services, rather than the actual termination of parental rights, is the true death knell for the parents. It is the turning point in a dependency case.¹⁴¹

Furthermore, a parent can contest the recommendation by a social worker to terminate reunification services and request the return of the child prior to such an order being made.¹⁴² However, the court will not consider returning the child to the custody of the parent after terminating reunification services and ordering the child permanently placed.¹⁴³

"After the termination of reunification services, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point 'the focus shifts to the needs of the child for permanency and stability', and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child." "Hence, the proceeding terminating reunification services and setting a section 366.26 hearing is generally the party's last opportunity to

137. *See id.*

138. *See id.*

139. *See generally* *Cynthia D. v. Superior Ct.*, 851 P.2d 1307, 1307-15 (Cal. 1993) (discussing why neither a heightened standard of review nor additional review of parents' fitness is appropriate at the parental rights termination hearing).

140. *See* CAL. WELF. & INST. CODE §§ 366.21(e), (f), 366.22(a) (West 1998).

141. *See Cynthia D.*, 851 P.2d at 1317 (Kennard, J., dissenting).

142. *See In re Johnny M.*, 279 Cal. Rptr. 693, 699 (Ct. App. 1991).

143. *See In re Marilyn H.*, 4 Cal. Rptr. 2d 79, 83 (Ct. App. 1992) *aff'd*, 851 P.2d 826 (Cal. 1993) (holding that a court will not consider placement with a parent after termination of reunification services). An exception to this general rule applies when a parent proves prior to a 366.26 hearing that, pursuant to section 388, a change of circumstances exists and the court finds that modifying the plan is in the child's best interest. *See* CAL. WELF. & INST. CODE § 388.

litigate the issue of parental fitness as it relates to any subsequent termination of parental rights, or to seek the child's return to parental custody."¹⁴⁴

Thus, after the termination of reunification services, the termination of parental rights is almost certain to follow if the child is adoptable.¹⁴⁵ Therefore, this is the critical time when the second *Eldridge* factor, risk of erroneous decision, is of paramount importance to both the parent and the child. Justice Kennard, in her dissenting opinion in *Cynthia D.*, stated that the majority misapplied the three *Eldridge* factors by focusing on the order to terminate parental rights, rather than on the earlier order to terminate reunification services.¹⁴⁶ Moreover, Justice Kennard noted that the mother's argument, which the majority entirely failed to address, was that the lower standard of proof for terminating *reunification services* in California does not comport with the due process requirements set forth in *Santosky*.¹⁴⁷

Justice Kennard then applied the *Eldridge* factors to the more critical and relevant decision to terminate reunification services.¹⁴⁸ The dissent found the first factor, the private liberty interest, "just as 'fundamental' and 'commanding'" as it was in *Santosky*.¹⁴⁹ Furthermore, the deprivation of parental rights threatened by California's dependency laws is just as permanent as was New York's under *Santosky*.¹⁵⁰ Therefore, Justice Kennard concluded that the private interest impacted by this procedure justifies the same standard of proof required by *Santosky*: clear and convincing evidence.¹⁵¹

The second *Eldridge* factor is the risk that a preponderance standard will result in an "erroneous deprivation of parental rights."¹⁵² The Court in *Santosky* considered this risk to be significant because the state was better equipped to prosecute its case and due to the possibility of discrimination against parents who were generally "poor, uneducated, or members of minority groups."¹⁵³ While acknowledging differences between the current California dependency scheme and that of New York at the time of *Santosky*, the dissent found that California's system does not substantially reduce the risk of an erroneous decision regarding the return of a child to the custody of the parents.¹⁵⁴ Furthermore, a child will always be

144. *In re Elizabeth R.*, 42 Cal. Rptr. 2d 200, 208 (Ct. App. 1995) (internal citations omitted) (quoting *In re Stephanie M.*, 867 P.2d 706 (Cal. 1994); *In re Matthew C.*, 862 P.2d 765 (Cal. 1993)).

145. *See Cynthia D.*, 851 P.2d at 1311.

146. *See id.* at 1319-20 (1993) (Kennard, J., dissenting).

147. *See id.* (Kennard, J., dissenting).

148. *See id.* at 1320-21 (Kennard, J., dissenting).

149. *See id.* at 1320 (Kennard, J., dissenting).

150. *See id.* (Kennard, J., dissenting).

151. *See id.* at 1321 (Kennard, J., dissenting).

152. *See id.* (Kennard, J., dissenting).

153. *See id.* (Kennard, J., dissenting) (quoting *Santosky v. Kramer*, 455 U.S. 745, 763-64 (1982)).

154. *See id.* (Kennard, J., dissenting).

placed outside the parents' home when this question is considered.¹⁵⁵ Therefore, the state has an advantage in assembling its case.¹⁵⁶

Additionally, Justice Kennard observed that the probability of an adopting family having more adequate resources and being less subject to bias than the natural parents is just as likely to occur in California as in New York.¹⁵⁷ Moreover, raising the standard of proof alerts the fact finder to the importance of the decision and diminishes the risk of error.¹⁵⁸ Because of the significance of parental rights, Justice Kennard remarked that these rights should not be subjected to any needless risk.¹⁵⁹

Finally, the third *Eldridge* factor is the government's interest in maintaining the preponderance standard.¹⁶⁰ The two considerations discussed by *Santosky* are administrative costs and the state's interest in the child's welfare.¹⁶¹ First, "a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens on the State."¹⁶² Second, the dissent in *Cynthia D.* noted that increasing the accuracy of critical decisions regarding children by raising the standard of proof can only serve to advance children's welfare.¹⁶³

Justice Kennard concluded that an analysis under the *Eldridge* factors establishes that a heightened standard of proof "would best promote factual certainty in making the finding that is critical to terminating parental rights, while striking a fair balance between the competing interests of the parents and the state."¹⁶⁴

Because of the increased risk of erroneous decisions and the resulting gravity of harm created by the use of a preponderance standard, a finding of clear and convincing evidence of detriment to the child should be required prior to terminating reunification services.

V. CONCLUSION

This Comment offers no criticism regarding ongoing reforms designed to minimize the damaging effects of out-of-home placement on children. Limiting the

155. *See id.* (Kennard, J., dissenting).

156. *See id.* (Kennard, J., dissenting).

157. *See id.* (Kennard, J., dissenting).

158. *See id.* at 1320-21 (Kennard, J., dissenting) (citing *Santosky v. Kramer*, 455 U.S. 745, 764-65 (1982)).

159. *See id.* at 1321 (Kennard, J., dissenting).

160. *See id.* (Kennard, J., dissenting).

161. *See Santosky*, 455 U.S. at 766.

162. *Id.*

163. *See Cynthia D.*, 851 P.2d at 1321 (Kennard, J., dissenting).

164. *See id.*

parent of a child less than three years old to only six months of reunification is severe, but justified due to the fragile developmental needs of a small child. A young child who has not seen a parent in six months will scarcely remember her, much less retain an emotional connection to her as a parent. Instead, the child will have bonded with the caretaker and deserves permanence and stability if the parent fails to demonstrate a commitment to reunify with this child. The child's emotional needs are unquestionable.

In addition to allowing parents of children younger than three a maximum of six months of reunification,¹⁶⁵ no less than thirteen grounds now exist upon which courts at disposition may deny parents any opportunity to reunify with their children.¹⁶⁶ Under this statute, courts can move quickly towards irrevocably extinguishing parents' fundamental liberty interest in their relationship with their children.

Because of these changes in the law, the deck is now so clearly stacked against parents that the meager preponderance standard required for the termination of reunification services is shocking. In addition to this procedural imbalance that parents must overcome to prevent the dismemberment of their families, they may face the unfortunate reality of being but one of fifty cases on a judge's calendar for that day.¹⁶⁷

As a society, we want justice for both children and parents. If the proper course of action in a case is to terminate reunification services and pursue adoption for a child, it should be done swiftly. Our current statutory scheme accomplishes that objective.

But along the way, prior to the final act that will allow the irrevocable severing of a parental relationship, a sign for the judge to slow down and proceed with caution is needed. A heightened standard of clear and convincing evidence will instill in the fact finder society's expectation and mandate that this particular decision be given the careful deliberation it deserves.

Increasing the standard of proof at this precarious juncture would not derail efforts to protect children. To the contrary, it would simply ensure more accurate and diligent handling of the most critical decision in a dependency case. The social cost and personal risk of an erroneous decision in this area are too great to permit the casual application of a preponderance standard. Unless this standard is changed, society will ultimately suffer.

LINDA LEE REIMER STEVENSON

165. *See supra* note 39.

166. *See supra* note 37.

167. *See supra* note 133 and accompanying text.