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Domestic Relations

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DOMESTIC RELATIONS

Parental rights to children may be terminated or transferred if the court determines that it will substantially serve the welfare of the child.¹ To terminate or transfer these rights, most jurisdictions required that the petitioner prove, by a preponderance of the evidence, facts that justified this drastic action.² However, in the recent Supreme Court case of *Santosky v. Kramer*,³ the Court elevated the standard in termination suits to "clear and convincing" evidence.

Similarly, the preponderance of the evidence standard has been used to adjudge whether a child is neglected; such a determination may result in the temporary suspension or termination of parental rights.⁴ Jurisdictions usually adopt statutes that both define "neglect" and establish broad

1. The "best interests of the child" test achieved prominence in child custody cases after the landmark decision of Judge Brewer in *Chapsky v. Wood*, 26 Kan. 650 (1881). The test is now used in child custody cases between two parents or between parent and nonparent and in child neglect cases. Although an imprecise test, courts have delineated boundaries of concern which require the judge "recognizing human frailty and man's limitations with respect to forecasting the future course of human events, to make an informed and rational judgment, free of bias and favor, as to the least detrimental of the available alternatives." *In re J.S.R.*, 374 A.2d 860, 863 (D.C. 1977). Factors considered by the court depend on the nature of the action and vary from mistreatment of children, *Wood v. State*, 248 Ark. 109, 450 S.W.2d 537 (1970), to mental deficiency of the parents, *In re Bachelor*, 211 Kan. 879, 508 P.2d 862 (1973).

2. 43 C.J.S. *Infants* § 61 (1978). Some jurisdictions, however, had determined prior to *Santosky* that permanent deprivation of parental rights must be supported by a stricter standard of evidence such as "substantial evidence," *Sernaker v. Ehrlich*, 86 Nev. 277, 468 P.2d 5 (1970); "clear and convincing," *In re Lehmann*, 37 Ill. App. 3d 217, 345 N.E.2d 742 (1976), *In re Nelson*, 216 Kan. 271, 531 P.2d 48 (1975); or "akin to proof beyond a reasonable doubt," *In re Pitts*, 535 P.2d 1244 (Utah 1975).

3. *Santosky v. Kramer*, 102 S. Ct. 1388 (1982). The Court in *Santosky* held that the "clear and convincing" standard of proof was constitutionally required, under the due process test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), in New York's "permanent neglect" proceedings where parental rights to children are permanently terminated. The Court emphasized throughout the opinion the severity of termination of parental rights and the corresponding need for a higher standard of proof.

4. New York employs a two-tier system, differentiating between a child who is adjudged "neglected" and one who is adjudged "permanently neglected." Parental rights can only be terminated once a child is adjudged "permanently neglected."

Section 371(4)(a) of the Social Services Law of New York, defines a "neglected" child as one under eighteen years of age

(i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care

(A) in supplying the child with adequate food, clothing, shelter, education, medi-

guidelines for the courts to follow in making these determinations. Factors considered include the current and continuing unfitness of the parent, physical abuse, and the failure of the parent to provide an adequate home for the child.⁵

The District of Columbia has the authority to remove neglected children from the custody of their parents under D.C. Code sections 16-2301 through 16-2320. Section 16-2317 establishes the requirements for neglect hearings and uses the preponderance of the evidence standard as the standard of proof necessary to determine that a child is neglected.⁶ Under the District of Columbia statute, if a child is determined to be neglected, the court has a number of dispositional options. It may allow retention of cus-

cal or surgical care, though financially able to do so or offered financial or other reasonable means to do so; or

(B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court . . . or,

(ii) who has been abandoned by his parents or other person legally responsible for his care.

N.Y. SOC. SERV. LAW § 371 4(a) (McKinney 1976 & Supp. 1981).

"Permanent neglect" is a more serious determination which requires findings beyond ordinary "neglect" and establishes additional criteria. As defined in New York's Social Services Law § 384-b(7)(a), a "permanently neglected" child

shall mean a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child. In the event that the parent defaults after due notice of a proceeding to determine such neglect, such physical and financial ability of such parent may be presumed by the court.

N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney Supp. 1981)

This two-tier approach is similar to the District of Columbia model. Section 16-2301 of the D.C. Code defines a "neglected" child in terms substantially similar to New York § 371, 4(a). Similarly, under District of Columbia law, parental rights can only be terminated after further proceedings pursuant to §§ 16-2351 to 16-2365. Section 16-2354 stipulates that a motion can only be filed to terminate parental rights after a child has been adjudged neglected for at least six months and is in the custody of an authorized agency or person other than his or her parent, or, if the child is abandoned and the parent has not been located within three months prior to the termination proceeding. D.C. CODE ANN. §§ 16-2301, 16-2351 to 16-2365, 16-2354 (1981).

Thus, under *Santosky*, only the standard of evidence employed in the second-tier termination proceedings under both New York and District of Columbia laws is elevated to clear and convincing.

5. See 43 C.J.S. *Infants* § 61, at 250-51.

6. D.C. CODE ANN. § 16-2317(c) (1981) provides in pertinent part:

tody with the parents, placement of the child under protective services or with a public agency, transfer of legal custody to a relative or individual other than the parent, commitment to an institution for mental, physical or other treatment, transfer of the child to a placement agency, or termination of parental rights to enable adoption. Termination suits may only be undertaken pursuant to sections 16-2351 through 16-2365, which require findings beyond ordinary neglect and establish more stringent criteria to justify termination of parental rights.⁷ Except for permanent termination of custody to enable adoption,⁸ the dispositional order which vests legal custody of a neglected child in an agency, institution, department, or individual other than the parent, is effective for a maximum of two years. Within the two year period, the court may terminate the temporary placement. A protective services disposition expires after one year.⁹

In *In re B.K.*, decided in 1981,¹⁰ the father of a child adjudged neglected and placed in the temporary custody of her maternal grandparents, challenged both the finding and the constitutionality of the District of Columbia's neglect statute. The appellant's argument that the statutory definition of neglect was unconstitutionally vague was summarily dismissed by the court. The court stated that although broad, the statute was not vague and that proceedings of this kind necessarily had to be flexible and decided on a case by case basis.¹¹

The appellant also challenged the standard of proof employed in section

(c) If the Division finds in a fact-finding hearing that —

. . . .

(2) the allegations in a need of supervision or neglect petition have been established by the preponderance of the evidence, the Division, after giving the notice required by subsection (e) of this section, shall proceed to hold a dispositional hearing.

7. D.C. CODE ANN. § 16-2320 (1981).

8. D.C. CODE ANN. §§ 16-2351 to 16-2365 (1981). These sections, constituting a recently adopted subchapter III, set out criteria which are far more stringent than ordinary neglect standards in order to justify the drastic action of permanently terminating parental rights.

9. D.C. CODE ANN. § 16-2322 (1981).

10. *In re B.K.*, 429 A.2d 1331 (D.C. 1981).

11. *Id.* at 1334. The court did recognize that it had to tread carefully in the area of family relations, quoting from *In re J.S.R.*, that:

The right of a natural parent to raise one's child is a fundamental and essential one which is constitutionally protected. However, it is not an absolute one. The state has both the right and the duty to protect minor children through judicial determinations of their interest. To this end, the state has a substantial range of authority to protect the welfare of a child, and the state's legitimate interest in the child's welfare may be implemented by separating the child from the parent. 374 A.2d 860, 863 (D.C. 1977) (citations omitted).

16-2317(c)(2) for a finding of neglect,¹² contending that a standard of "clear and convincing" is constitutionally required in neglect determinations because of the threat to the sanctity of the family.¹³ The District of Columbia Court of Appeals upheld the constitutionality of the preponderance of the evidence standard. It stated that the interests involved in the temporary removal of a child from a parent's custody in most neglect proceedings are much less compelling than those involved in a permanent termination proceeding which results in adoption. However, even in the latter proceeding, a "clear and convincing" standard of proof was not constitutionally required at the time of the decision.¹⁴ The appellate court reasoned that since the "clear and convincing" standard was not constitutionally required in an adoption case where the consequences are much more severe than those involved in a temporary transfer of parental rights, it followed that the "clear and convincing" standard was not constitutionally required in the latter neglect proceeding.

Although the court's analogy to the standard of proof for adoption cases is no longer accurate under the recent *Santosky* decision, the standard of "preponderance of the evidence" employed in ordinary neglect cases remains constitutionally valid. The United States Supreme Court in *Santosky* stressed that the higher "clear and convincing" evidence standard was necessary in suits to terminate parental rights, a result that can-

12. See *supra* note 4.

13. *In re* B.K., 429 A.2d at 1333. See *supra* note 4.

14. 429 A.2d at 1333. See D.C. CODE ANN. §§ 16-2351 to 16-2365 (1981). The court cited *In re* J.S.R., 374 A.2d 860 (D.C. 1977), in support of its conclusion. There, the Superior Court had granted a petition for adoption of a minor child over the objections of his natural mother, the appellant. The appellant had tried without success to arrange to have the child adopted before his birth. After giving birth, the appellant was found to have multiple sclerosis and was unable to care for the child. The child remained at the hospital and was subsequently put in a series of foster homes. When the child's foster parents petitioned to adopt the child, however, the appellant objected. The trial court found that the appellant's consent to the adoption was withheld against the best interests of the child and granted the adoption petition as the "least detrimental alternative."

The appellant challenged the decision, asserting that: (1) the "best interests of the child" test was unconstitutionally vague; (2) that approval of adoption over her objection without a finding that she was unfit violated constitutional mandates; and (3) that a clear and convincing standard of proof was constitutionally required to determine if parental consent was being withheld contrary to the child's best interests. The appellate court upheld the lower court decision, holding that, though warranted in this case, the clear and convincing standard was not constitutionally required in adoption proceedings.

Thus, although the result in *In re* J.S.R. remains valid, *Santosky* reduces to incorrect dicta the appellate court's determination that a "clear and convincing" standard is not constitutionally required in adoption cases involving the termination of parental rights.

not occur in ordinary neglect actions under D.C. Code section 16-2317.¹⁵

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15. *See supra* note 4.