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Is the "Preponderance of the Evidence" Evidentiary Standard in an Abuse and Neglect Proceeding Unconstitutional? (November 2005)

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South Carolina's abuse and neglect statute was recodified in 2008. A more recent publication covering this material with the updated code citations can be found here in Tip 5: Advanced Tips on Representing Parents in Abuse and Neglect Cases

Is the evidentiary standard of S.C. Code Ann. § 20-7-650 (G)(1) & (L), § 20-7-736 (F) and § 20-7-738 (D), allowing a finding that a child is an abused or neglected child by the "a mere preponderance of the evidence," unconstitutional? Is a "clear and convincing evidence" evidentiary standard to find a parent has abused or neglected his child constitutionally mandated? The answer is quite possibly.

The issue of whether a "mere preponderance of the evidence standard" is allowable in abuse and neglect cases is part of a larger philosophical question: How do you balance the right of parents to parent their children with the State's interest in protecting those without power (i.e. children)?

One view is that the State can act in the best interests of the child. This standard seems to be ingrained in law, in thinking of lawyers, and in thinking of family court judges. The seminal case describing this best interest standard is Painter v. Bannister, 140 N.W.2d 152 (Iowa 1966). The best interests standard allows a family court judge to impose his or her own judgment regarding a child's best interests upon the child's parents. This standard is counterintuitive to parents, who rightfully wonder where the state gets off telling them how to raise their children.

The opposing view is that parent's rights should be intruded upon very lightly by the state. Parents have 14th amendment liberty interest in raising their children, established by a long line of United States Supreme Court cases: Myers v. Nebraska, 262 U.S. 390 (1923) (parent's right to teach child languages other than English); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (parent's right to enroll children in parochial school); Wisconsin v. Yoder, 406 U.S. 205 (1972) (parent's right to remove children from school at age 14 to begin apprenticeships); Troxel v. Granville, 530 U.S. 57 (2000) (fit parent's wishes entitled to great deference in grandparent visitation cases).

The United States Supreme Court seems to recognize (more so than family courts or lower appellate courts) that parents and children are not natural adversaries and that courts should intrude lightly on parental authority. The Supreme Court's opinions operate from a legal

presumption that a fit parent will act in the best interest of his or her child. Troxel, supra. Further, the Supreme Court has often held that laws allowing the court to issue orders based on its own view of a child's best interests may be constitutionally infirm. Troxel, supra; See also, Palmore v. Sidoti, 466 U.S. 429 (1984) (even the best interests of a child did not constitute a compelling state interest that would allow a state court to award custody to the father because the mother was in a mixed-race marriage).

One method the Supreme Court has for protecting parental rights is by sometimes requiring proof by a "clear and convincing evidence standard" rather than a "mere preponderance of the evidence standard." The United States Supreme Court "has mandated an intermediate standard of proof — 'clear and convincing evidence' — when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'"Santosky v. Kramer, 455 U.S. 745, 756 (1982). For example, in the context of a termination of parental rights case, a clear and convincing evidentiary standard is required. Id, at 758.

A finding of abuse or neglect carries substantial ramifications. Such a finding allows the removal of the child from the parent's custody. S.C. Code Ann. § 20-7-736 (F). Such a finding allows the court to authorize intervention and protective services. S.C. Code Ann. § 20-7-738(D). Such a finding allows the court to require a parent to complete a treatment plan before being reunified with his or her child. S.C. Code § 20-7-764. A finding of abuse or neglect can make it easier to terminate a parent's parental rights. S.C. Code Ann. § 20-7-1572 (1, 2 & 8).

Such a parent may and at times must be ordered listed in the Central Registry of Child Abuse and Neglect. S.C. Code Ann. § 20-7-650 (L). A person on the Central Registry cannot be appointed to a state or local foster care review board. S.C. Code Ann. § 20-7-2386. That parent cannot work at a licensed day care facility. S.C. Regs. § 114-590. Child placing agencies cannot place a child with that parent. S.C. Regs. §§ 114-4910 and 4980. That parent cannot work as a guardian ad litem in a private custody case. S.C. Code Ann. § 20-7-1547 (C). Inclusion in the Central Registry makes it more difficult for that person to obtain a name change. S.C. Code Ann.§ 15-49-20.

Given the ramifications of a finding of abuse or neglect, the "preponderance of the evidence" standard may constitute a constitutionally insufficient evidentiary burden upon the state and a denial of parents' due process rights. "[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible, and calls for such procedural protections as the particular situation demands." Mathews v. Eldridge, 424 U.S. 319, 334 (1976)

The factors that mandated a "clear and convincing" evidentiary standard in Santosky may mandate a similar requirement in abuse and neglect proceedings. "At the factfinding, the State cannot presume that a child and his parents are adversaries." Id, at 760. "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost

temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." Id, at 753.

The Supreme Court in Santosky further noted that "Since the factfinding phase of a permanent neglect proceeding is an adversary contest between the State and the natural parents, the relevant question is whether a preponderance standard fairly allocates the risk of an erroneous factfinding between these two parties." Id, at 761. The Supreme Court found, in the context of a termination of parental rights proceeding, that such an evidentiary standard did not fairly allocate these risks. Id, at 758. Its reasoning is equally applicable to abuse and neglect proceedings:

The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers, whom the State has empowered both to investigate the family situation and to testify against the parents.... A standard of proof that, by its very terms, demands consideration of the quantity, rather than the quality, of the evidence may misdirect the factfinder in the marginal case.

Id, at 763-64.

"So long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." Camburn v. Smith, 355 S.C. 574, 586 S.E.2d 565, 567 (2003), citing Troxel, supra, at 65-66. "Parental unfitness must be shown by clear and convincing evidence." Camburn , 586 S.E.2d at 568. The Santosky decision was not limited to termination of parental rights cases and the requirement of the State proving abuse and neglect by a "clear and convincing" evidence standard may be applicable whenever the state seeks to marshal its resources to intrude upon the parent/child relationship. While a termination of parental rights case does present permanency issues regarding the termination of the parental relationship, a parent's loss of certain rights enumerated above from a finding of abuse or neglect are similarly permanent.

The types of interests that the South Carolina courts have traditionally held require a higher evidentiary burden are no more important than abuse and neglect cases. Attorney discipline cases apply a clear and convincing evidence standard before the Court can impose discipline on an attorney. In Re Flom 588 S.E.2d 593 (2003). This is partially because attorney discipline findings can place a permanent blight upon an attorney's reputation and lead to more severe future sanctions. Abuse and neglect findings place a similar blight upon a

parent's reputation and make it easier for parents to lose parental rights and thus raise similar interests.

There are some areas of South Carolina family law where the higher, "clear and convincing," evidentiary burden is already required. In family court, "[c]ivil contempt must be proved by clear and convincing evidence." Durlach v. Durlach, 359 S.C. 64, 596 S.E.2d 908, 912 (2004); Poston v. Poston, 331 S.C. 106, 113, 502 S.E.2d 86, 89 (1998). To obtain a divorce one has "to prove adultery by clear and convincing evidence." Doe v. Doe, 324 S.C. 492, 478 S.E.2d 854, 856 (Ct.App. 1996); but see Perry v. Perry, 301 S.C. 147, 390 S.E.2d 480, 481 (Ct.App. 1990) (sustaining adultery finding on preponderance of the evidence standard).

"A ground for termination of parental rights must be proved by clear and convincing evidence." Greenville County Dep't of Soc. Servs. v. Bowes, 313 S.C. 188, 193, 437 S.E.2d 107, 110 (1993); Santosky, supra, 455 U.S. at 758. In visitation cases between parents and third-parties, a clear and convincing evidence standard is constitutionally mandated before the State can intrude upon parental decision making. Camburn, supra, 586 S.E.2d at 568.

The parental interests in an abuse and neglect proceeding are certainly no less important than the interest of family law litigants in situations where the court has required a higher evidentiary burden. State law already recognizes a parent's heightened interest in the outcome of an abuse or neglect proceeding. S.C. Code §20-7-110(B) mandates the appointment of counsel for an indigent parent in such cases. The areas of family law in which a higher evidentiary burdens are already required implicate the interests that Santosky held necessitated this higher burden: the interests of the individual litigant are both "particularly important" and "more substantial than mere loss of money." Santosky, 455 U.S. at 756. Yet, except for termination of parental rights cases, the interests of the parent charged with abusing or neglecting his or her child are arguably more substantial than the interests of any area of South Carolina family law in which this higher evidentiary burden is required.

Given a parent's and the minor child's interests that their relationship not be unduly intruded upon by State action, any statute allowing such an intrusion upon a finding made by the mere preponderance of the evidence arguably fails to comport with due process. In the context of an action brought by the State (as opposed to the other parent) a "clear and convincing" evidence standard may be constitutionally required before the State is allowed to intrude upon this relationship.

In representing parents in family court actions involving children, a practitioner should consider when a best interests standard or mere preponderance of the evidence standard may not be applicable. Is the contest between parent and third party? Does contest implicate fundamental parental liberty interest (such as disputes over religious practices)? By considering these factors, the family court attorney may prevent unwarranted intrusion into the parent-child relationship.