

## BRIEF COMMUNICATION

# SANTOSKY V. KRAMER: AN UNFORTUNATE MISUNDERSTANDING

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Last spring, in *Santosky v. Kramer*,<sup>1</sup> the U.S. Supreme Court ruled that there must be "clear and convincing" proof before parental rights can be terminated. In doing so, the Supreme Court overturned the laws of 17 states which allowed termination based on the less stringent standard of the "fair preponderance" of the evidence.

In essence, "clear and convincing" proof is an "intermediate standard,"<sup>2</sup> as the court called it, between the high standard of "beyond a reasonable doubt" used in criminal proceedings and the "fair preponderance" used in civil proceedings.

"Parents rights" advocates have applauded this decision. They see it as a much needed affirmation of the right of parents to be free from unwarranted state interference.

How should "children's rights" advocates feel about the ruling?<sup>3</sup> First of all, given the high stakes involved—for the parent and the child—no one can deny that courts should be quite sure of the need to terminate parental rights before doing so. As the Court stated: "The function of the standard of proof . . . is to 'instruct the factfinder concerning the degree of confidence he should have in the correctness of factual conclusions for a particular type of adjudication.'"<sup>4</sup>

Moreover, few observers believe that the higher required quantum of evidence will place an unmanageable burden on child welfare agencies. As the Court pointed out, "33 States already have adopted a higher standard by statute or court decision without apparent effect on the speed, form, or cost of their factfinding proceedings."<sup>5</sup>

Nevertheless, there is a great reason to be concerned about how the Court reached its decision, and the implications of its reasoning for future cases involving children's the rights of abused and neglected children.

In reaching its decision, the Court was called upon to assess the child's interest in termination proceedings. (This is because constitutional doctrine allows the preponderance of the evidence standard if both sides have a major, or roughly equivalent, interest in the outcome of the proceeding.) Unfortunately, the Court got its facts wrong—badly wrong, and seriously understated the child's interest. The Court concluded that the child had only a limited interest in prompt and effective termination decisions. In a footnote which is almost certain to be controversial, the Court stated:

... Even when a child's natural home is imperfect, *permanent* removal from that home will not necessarily improve his welfare. See, e.g., Wald, State Intervention on Behalf of "Neglected" Children: A Search For Realistic Standards, 27

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1. 8 *FAMILY LAW REPORTER* 3023 (March 23, 1982).

2. *Id.* at 3026.

3. Please excuse the use of this shorthand description of a more complicated dichotomy.

4. 8 *FAMILY LAW REPORTER* at 3025.

5. *Id.* at 3029.

Stan. L. Rev. 985, 993 (1975) ("In fact, under current practices, coercive intervention frequently results in placing the child in a more detrimental situation than he would be in without intervention.")

Nor does termination of parental rights necessarily ensure adoption. See Brief for Community Action for Legal Services, Inc., *et al.*, as *Amicus Curiae* 22–23 (in 1979; only 12% of the adoptable children in foster care in New York City were actually adopted, although some had been waiting for years, citing *Redirecting Foster Care, A Report to the Mayor of the City of New York* 69, 43 (1980)). Even when a child eventually finds an adoptive family, he may spend years moving between state institutions and "temporary" foster placements after his ties to his natural parents have been severed. See *Smith v. Organization of Foster Families*, 431 U.S., at 833–838 (describing the "limbo" of the New York foster care system).<sup>6</sup>

Anyone familiar with child welfare practices will recognize that the Court was badly confused about the difference between foster care and the termination of parental rights. The truth is that the termination of parental rights is often the *only way out* of foster care limbo.

In fact, the Court's reference to New York statistical data was incorrect. The actual passage on page 69 of the cited report (*Redirecting Foster Care*) reads as follows: "The discharge objective for a substantial number of Black youngsters (4,178) is adoption. Yet, during the year ending September 30, 1979, CWIS reported only 499 Black adoptions, roughly 50 percent of the total number of adoptions that year, or less than 12 percent of those for whom it is planned." Thus, the report refers to *black children for whom adoption "is planned."* The word "planned" does not refer only to children who have been freed for adoption by the termination of parental rights. It refers to all children for whom adoption is planned, no matter how remote the possibility. Moreover, according to the New York State Department of Social Services, over 70% of the children actually freed for adoption are adopted.<sup>7</sup> Many judges will not terminate parental rights until they are assured that the child is adoptable.

There is no way to know whether a correct knowledge of the facts would have lead the Supreme Court to a different ruling. The majority might have ruled as it did, anyway. However, it was a 5–4 decision. If only one justice had voted differently, the result would have been reversed. Furthermore, the New York State court, which had a more accurate view of the child's interests, had ruled against the clear and convincing standard.

One thing is sure, though. If the Court's assessment of the child's interest in being freed for adoption is accepted by policy-makers and other courts, recent efforts to reform foster care through more effective permanency planning will have been undermined. Also undermined will be the recent progress toward according children caught up in child welfare proceedings fundamental legal rights, such as the right to counsel and the right to be heard before their future status is decided.

One only hopes that legislators and judges recognize the Supreme Court's error, and that later decisions of the Supreme Court correct it.

6. *Id.* at 3028, note 15.

7. Personal communication with state officials.