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Procedural Due Process: Creating a Presumption of Heightened Protection

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CASE COMMENT

PROCEDURAL DUE PROCESS: CREATING A PRESUMPTION OF HEIGHTENED PROTECTION*

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Petitioners' three children were removed from petitioners' custody and placed in a foster home following incidents of abuse and neglect.[1] After efforts to reunite petitioners' family were unsuccessful,[2] respondent filed an action in New York's Family Court requesting termination of petitioners' parental rights.[3] During the fact-finding stage of the termination proceeding,[4] the Family Court found permanent neglect,[5] and

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* *Editor's Note*: This case comment received the *Huber C. Hurst Award* for the outstanding case comment for Spring 2003. *See* Symposium, *Defending Childhood*, 14 U. FLA. J.L. & PUB. POL'Y 125 (2003) (analyzing children and family law issues).

** The author would like to dedicate this case comment to the memory of his grandfather, Richard K. Elmore.

1. Santosky v. Kramer, 455 U.S. 745, 751 (1982). Petitioners were John Santosky II and Annie Santosky of Ulster County, N.Y. *Id.* The instant case related to three of petitioners' five children — Tina Santosky, John Santosky III, and Jed Santosky. *Id.* at 751, 781 n.10. Tina, petitioners' oldest child, was removed from the petitioners' custody in November 1973 following allegations of physical abuse. *Id.* at 781 n.10. John, petitioners' second oldest child, was removed the following summer due to signs of abuse and malnutrition. *Id.* Jed was removed from petitioners' custody when only three days old. *Santosky*, 455 U.S. at 781 n.10. Jed's removal was the result of the petitioners' treatment of Tina and John. *Id.*

2. *See id.* at 782. The Department of Social Services developed a written plan designed to reunite the family. *Id.* The plan provided parental training, counseling at a family planning clinic, psychiatric treatment, vocational training for John Santosky II, and family services counseling for Annie Santosky. *Id.* Between 1976 and 1979, the state spent more than $15,000 on these and other efforts to rehabilitate petitioners. *Id.*

3. *Id.* at 782-83. The Department of Social Services initially filed a termination petition in 1976. *Id.* at 782. This petition was dismissed on the grounds that there was still hope of further improvement. *Id.* The instant case concerns the Department's second termination petition, filed in October 1978. *Id.* The Family Court granted this second petition on the grounds that, among other things, petitioners had failed to take advantage of the social and rehabilitative services, had superficial, infrequent visits with their children, and had failed to become financially self-sufficient. *Santosky*, 455 U.S. at 783.

4. *See id.* at 748. Under New York's statutory and regulatory scheme, state officials may initiate a temporary removal of a child if the child is "neglected." *Id.* (*citing* N.Y. Fam. Ct. Act §§ 1012(f), 1021-29 (McKinney 1975 and Supp. 1981-82)). Upon removal, the child is placed in the care of either a state institution or a foster home. *Id.* (*citing* N.Y. Soc. Serv. Law § 384-b.7.(a) (McKinney Supp. 1981-82)). If the State is convinced that "positive, nurturing parent-child

rejected petitioners' constitutional challenge to New York's application of the preponderance of the evidence standard of proof.[6] At the ensuing "dispositional hearing,"[7] the Family Court terminated petitioners' parental rights on the basis that termination was in the children's best interests.[8] On appeal, the New York Supreme Court affirmed, holding that the preponderance of the evidence standard of proof was constitutional because it balanced the natural parents' rights with those of the children.[9] The New York Court of Appeals dismissed petitioners' subsequent appeal on the ground that a substantial constitutional question was not directly involved.[10] The U.S. Supreme Court granted certiorari, vacated and remanded the appellate court decision, and HELD, that in termination of parental rights proceedings, the clear and convincing evidence standard of proof is the minimum adequate standard comporting with the Due Process Clause of the Fourteenth Amendment.[11]

The Fourteenth Amendment prohibits a state from depriving any person of "life, liberty, or property, without due process of law."[12] The

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relationships no longer exist," it may initiate a termination proceeding in Family Court. *Id.* (*citing* N.Y. Soc. Serv. Law § 384-b.1.(b) (McKinney Supp. 1981-82)). New York's termination proceeding, or "permanent neglect" proceeding, is split into a fact-finding hearing and a dispositional hearing. *Santosky*, 455 U.S. at 748 (*citing* N.Y. Fam. Ct. Act § 622, 623 (McKinney 1975 and Supp. 1981-82)). At the fact-finding stage, the state must prove that the child was "permanently neglected" by a "fair preponderance of the evidence." *Id.* (*citing* N.Y. Fam. Ct. Act §§ 614.1(a)-(d), 622 (McKinney 1975 and Supp. 1981-82) and N.Y. Soc. Serv. Law § 384-b.7.(a) (McKinney Supp. 1981-82)). If the Court finds permanent neglect, the proceeding enters the dispositional phase where the judge attempts to determine what course of action is in "the best interests of the child." *Id.* at 748-49 (*citing* N.Y. Fam. Ct. Act §§ 611, 622, 631(c), and 634 (McKinney 1975 and Supp. 1981-82)). The judge has three options at the dispositional phase: dismiss the petition for termination, suspend the judgment to give the family another chance to reunite, or terminate the parents' rights to the custody and care of the child. *Id.* (*citing* N.Y. Fam. Ct. Act §§ 631-634 (McKinney 1975 and Supp. 1981-82)).

5. *Id.* at 751-52. A finding of permanent neglect requires the State to have made "diligent efforts to encourage and strengthen the parental relationship." *Id.* at 748-49 (*citing* N.Y. Fam. Ct. Act §§ 611, 614.1(d) (McKinney 1975 and Supp. 1981-82)). In addition, permanent neglect requires the State to prove that the natural parents neglected "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." *Id.* at 748 (*citing* N.Y. Fam. Ct. Act §§ 611, 614.1(d), 622, 631(c), 634 (McKinney 1975 and Supp. 1981-82)).

6. *Id.* at 751.

7. *Id.* at 752; *see also supra* text accompanying note 4.

8. *Santosky*, 455 U.S. at 752.

9. *Id.*

10. *Id.*

11. *See id.* at 769-70.

12. U.S. CONST. amend. XIV, § 1. The full text provides:

Court has historically recognized that the Due Process Clause not only protects one's fundamental rights from being limited,[13] but also guarantees a fundamentally fair level of process.[14] Determining at what level of process a fundamental right is due, however, has been problematic for the Court.[15]

In *Smith v. Organization of Foster Families*, the Court answered the question of what process is due by applying a three-pronged balancing test set forth in *Mathews v. Eldridge*.[16] The *Eldridge* test balances three factors in establishing the fundamentally fair level of process: the private interests affected by the proceeding, the risk of erroneous deprivation of a fundamental right (or risk of error), and the countervailing state interests in the use of the challenged procedure.[17]

In *Smith*, petitioners challenged a district court ruling that foster parents have an unconditional right to a hearing prior to the removal of their foster child.[18] The specific issue before the Court was whether New York's removal procedures, which did not provide for an automatic hearing, violated respondents' due process rights.[19] The Court reversed, holding that the existing procedures were constitutionally adequate in light of the three *Eldridge* factors.[20] To arrive at this conclusion, the Court weighed the three private interests involved, identified several procedures that minimized the risk of error, and discussed the potential burdens a different procedure would place on the state.[21] Overall, the Court's analysis of the

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> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

13. *See Santosky*, 455 U.S. at 770 (Rehnquist, J., dissenting).

14. *See id.* at 774 (Rehnquist, J., dissenting); *see also* Smith v. Org. of Foster Families, 431 U.S. 816, 842 (1977).

15. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981) (5-4 decision) (Blackmun, J. and Stevens, J., dissenting). *Lassiter's* three concurring opinions and two dissenting opinions illustrate the Court's differing views regarding a proper procedural due process analysis. *Id.*

16. *Smith*, 431 U.S. at 848-49 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

17. *Id.*

18. *Id.* at 822.

19. *Id.* at 838-39. In *Smith*, respondents challenged the adequacy of the procedures on four different grounds. *Id.* at 850-55.

20. *Id.* at 849-55.

21. *Smith*, 431 U.S at 850-55. The Court discussed the interests of the foster parents, the child, and the natural parents. *Id.* at 850. The latter two were not parties to the action. *Id.* Under its

three *Eldridge* factors was broad and inclusive, consistent with the notion of a balancing test.

The Court revisited the issue of whether a state's parental termination procedures were constitutional in *Lassiter v. Department of Social Services*.[22] Petitioner argued that North Carolina's termination procedures violated the Due Process Clause by denying indigent parents an absolute right to counsel.[23] The Court applied the *Eldridge* test, and held that natural parents are not entitled to appointed counsel in every termination proceeding.[24] A key aspect of the Court's reasoning was the presumption that individuals have a right to appointed counsel only if their physical liberty is in jeopardy.[25] The Court explained that the net weight of the *Eldridge* factors was not sufficient to overcome this presumption.[26] As it did in *Smith*, the Court in *Lassiter* seemed to preserve the comprehensive nature of the *Eldridge* balancing test.[27]

In the instant case, the Court again employed the *Eldridge* test to decide whether a given procedure comported with due process.[28] The instant Court held that the minimum adequate standard of proof in a parental rights termination proceeding was the clear and convincing evidence standard.[29] First, the instant Court found that the balance of private interests favored a stricter standard of proof than the preponderance of evidence standard.[30] The instant Court reasoned that petitioners' fundamental interest in the care, custody, and management of their children was the most significant right implicated at the fact-finding

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countervailing state interests analysis, the Court identified the potential fiscal and administrative burdens arising under an automatic hearing. *Id.* at 851.

22. 452 U.S. 18, 24, 31 (1981).

23. *See id.* at 24. Petitioner was served with notice of the hearing to terminate her parental rights while in prison for a murder conviction. *Id.* at 21. Petitioner failed to bring counsel to the termination hearing although she had counsel to appeal her murder conviction. *Id.* at 21-22.

24. *Id.* at 31.

25. *See id.* at 26, 31-32. The Court hypothesized that this presumption would be overcome when the private interests were at their strongest, the risk of error was at its peak, and the State's countervailing interests were at their lowest. *Id.* at 31-32.

26. *See id.*

27. Although the Court mentioned only one of the private interests concerned with the outcome (right to companionship, care, custody, and management of their children), it presumably did not intend to limit the scope of the test. *Lassiter*, 452 U.S. at 27. The Court most likely gave the *Eldridge* factors less attention than they did in *Smith* because of the presumption against an absolute right to counsel. The Court probably withheld further elaboration because *Lassiter's* circumstances were not similar to those the Court suggested would surmount this presumption.

28. Santosky v. Kramer, 455 U.S. 745, 754 (1982).

29. *Id.* at 769-70.

30. *Id.* at 758-59.

stage.[31] The instant Court described this fundamental right as "far more precious"[32] than any property interest, and observed that the preservation of this right was even more compelling in this context.[33]

Though the instant Court recognized that the natural parents, their children, and the foster parents could have divergent interests at the fact-finding stage, it de-emphasized the importance of these divergent interests.[34] The instant Court noted that this stage pitted the natural parents directly against the State, and therefore the focus was "emphatically" on the petitioners' parental rights.[35] The instant Court also justified prioritizing petitioners' rights by claiming that other divergent interests would be considered at the dispositional phase of the termination proceeding.[36]

Next, the instant Court reasoned that the fact-finding stage's risk of error was great enough to warrant increased procedural protection.[37] The instant Court discussed a variety of factors that amplified the risk of an incorrect finding at this stage.[38] To the instant Court, the judge's role as the sole fact-finder,[39] and the State's vast array of resources,[40] contributed most to the danger of an erroneous deprivation.[41] The instant Court also emphasized that a heightened standard of proof would have practical and symbolic advantages.[42] Absent from the instant Court's analysis was consideration of factors that potentially mitigate the risk of error.[43]

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31. *Id.*

32. *Id.* at 758.

33. *See Santosky*, 455 U.S. at 759.

34. *See id.* at 760-61.

35. *Id.* at 759.

36. *Id.* at 760-61. The instant Court explained that the divergent interests of both the children and the foster parents would be taken into account at the dispositional hearing. *Id.*

37. *See id.* at 763-65.

38. *Santosky*, 455 U.S. at 762-63; *see infra* text accompanying note 39.

39. *Santosky*, 455 U.S. at 762-63. The instant Court noted that because the judge was the sole finder of fact, the fact-finding stage was vulnerable to the judge's statutory right to undervalue or dismiss evidence deemed unreliable. *See id.* at 763 n.12. The instant Court also expressed concern over the possibility that factual determinations would be colored by economic or cultural bias. *Id.* at 763.

40. *Id.* at 763-64. The resource that most disturbed the instant Court was the State's ability to construct evidence. *See id.* at 763.

41. *Id.* at 762-63. The instant Court observed that the following factors increase the risk of error in New York's termination proceeding: the imprecise standards of law, the types of evidence involved, the poor, uneducated status of most litigants, and the lack of a "double jeopardy" defense. *Id.*

42. *Id.* at 764.

43. *See id.* at 762-65; *but see* Smith v. Org. of Foster Families, 431 U.S. 816, 849-52 (1977).

After describing the State's countervailing interests, the instant Court found that they too were consistent with a higher standard of proof.[44] The instant Court identified two parens patriae interests that the State had in the termination proceeding. The instant Court remarked that the State's parens patriae interest in providing the child with a permanent home deserved increased procedural protection because that was the State's principal objective at the fact-finding stage.[45] The instant Court implied that the State's parens patriae interest in terminating parental rights should not receive increased protection because the interest does not arise until the dispositional phase of the proceeding.[46]

The *Eldridge* factors led the instant Court to conclude that the preponderance of the evidence standard violated petitioners' due process rights.[47] Based on this conclusion, the Court determined that the appropriate standard of proof in termination proceedings was the clear and convincing evidence standard.[48] The instant Court chose this standard of proof because it was hesitant to apply the reasonable doubt standard in a civil context.[49]

In an ardent dissent, Justice Rehnquist, joined by Chief Justice Burger, Justice White, and Justice O'Connor, portrayed the instant Court's application of the *Eldridge* test as "myopic."[50] The dissent opposed the majority's methodology, maintaining that its evaluation of the termination proceeding lacked the flexibility typical of a due process analysis.[51] The dissent also opposed the outcome of the *Eldridge* test.[52] The dissent argued

44. *Santosky*, 455 U.S. at 766.
45. *Id.*
46. *Id.* at 767.
47. *Id.* at 768.
48. *Id.* at 769.
49. *See Santosky*, 455 U.S. at 768-69.
50. *Id.* at 771 (Rehnquist, J., dissenting).
51. *See id.* at 774-75 (Rehnquist, J., dissenting).
52. *Id.* at 771-72 (Rehnquist, J., dissenting).

that the instant holding "conflicted with federalist principles"[53] because it threatened states' traditional authority in the realm of family law.[54]

While the instant Court's statement of the *Eldridge* test was facially identical to previous articulations,[55] its application of the test was a dramatic departure from precedent. First, the instant Court significantly narrowed the scope of relevant private interests.[56] By repeatedly emphasizing that the petitioners and the State were the focus of the fact-finding stage,[57] the instant Court implicitly defined the relevant private interests as the interests of the parties to the proceeding in question. In contrast, the Court in *Smith* considered a pair of non-party interests in determining the procedural adequacy of a foster home transfer hearing.[58]

The Court's view of the relevant private interests in the instant case likely disposed of some interests that should have a role in the Court's due process analysis. The instant Court first set aside the children's interest in avoiding an erroneous continuation of petitioners' parental rights.[59] In similar fashion, the instant Court dismissed the foster parents' "substantial" interest in establishing legal custody.[60] Because of this restrictive definition, the instant Court's private interests prong is biased toward increased due process protection.

The instant Court also changed the substance of the risk of error prong of the *Eldridge* test. By disregarding New York's procedural safeguards,[61] the instant Court implied that the risk of error is the probability of an erroneous factual determination, unmitigated by factors that could

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53. *Id.* at 772 n.2 (Rehnquist, J. dissenting). The dissent maintained that the instant holding conflicted with federalist principles for two reasons. *See id.* at 771-72 (Rehnquist, J., dissenting). First, the dissent believed that the instant Court threatened states' traditional autonomy in the sphere of domestic law. *Id.* (Rehnquist, J., dissenting). Second, the dissent argued that "this Court simply has no role in establishing the standards of proof that States must follow" in judicial proceedings they provide to their citizens. *Id.* at 772 n.2 (Rehnquist, J., dissenting). In support of this latter contention, the dissent argued that the instant Court's holding was "wholly unsupported" by precedent. *Santosky*, 455 U.S. at 772 n.2 (Rehnquist, J., dissenting).

54. *Santosky*, 455 U.S. at 771 (Rehnquist, J., dissenting). The dissent observed that in the past the Court has "scrupulously refrained from interfering with state answers to domestic relations questions." *Id.* The dissent added that because of this policy, states have been free to experiment and have developed novel approaches to domestic problems. *Id.*

55. *Compare id.* at 754, *with* Smith v. Org. of Foster Families, 431 U.S. 816, 848-49 (1977).

56. *Santosky*, 455 U.S. at 758-61.

57. *Id.* at 759-61.

58. *See Smith*, 431 U.S. at 846-47.

59. *Santosky*, 455 U.S. at 760-61.

60. *Id.* at 761.

61. *See supra* text accompanying note 43.

decrease this probability.[62] This definition is a striking departure from that employed in *Lassiter*. In *Lassiter*, the Court acknowledged the probability of an erroneous deprivation of a fundamental right, but recognized the importance of a number of procedural protections that tempered this risk.[63]

The instant Court's version of the risk of error artificially inflates the threat of a faulty factual determination. This inflated threat results from the analytical exclusion of procedural safeguards that are components of the true risk of error.[64] Since the instant Court's conception of the risk of error will exceed the true risk of error,[65] the possibility that this *Eldridge* factor will encourage heightened procedural protection is inevitable.

The instant Court, thus, fundamentally changed the nature of the *Eldridge* test. By eliminating factors that might influence the outcome of the test, the instant Court skewed the balance in favor of increased procedural protection.[66] In essence, the instant Court created a modified *Eldridge* test featuring a rebuttable presumption of heightened procedural due process protection.[67]

The instant Court's modification of the *Eldridge* test spawned a variety of undesirable results. For example, the modified *Eldridge* test departed from the due process concept of fundamental fairness.[68] The private interests prong of the test likely excludes some interests that should be evaluated in deciding the fairness of a procedural scheme. In addition, the risk of error prong ignores some procedural safeguards, undermining the flexibility typically stressed in due process analyses.[69] The *Eldridge*

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62. *See Santosky*, 455 U.S. at 612-14.

63. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 450-51 (1981).

64. *See supra* text accompanying note 43.

65. *See Santosky*, 455 U.S. at 762-65. Due to the instant Court's exclusion of factors that could mitigate the risk of error, the instant Court's conception of the risk of error will always exceed the true risk of error. *Id.* The instant Court's definition of risk of error will only equal the true risk of error when then the proceeding in question lacks any discernible factor that could reduce the possibility of an erroneous factual determination. Because of the numerous procedures involved in any given proceeding, the likelihood that a proceeding would lack any factors mitigating the risk of error seems small. Under its definition, the instant Court's risk of error will never be less than the true risk of error.

66. *See id.* at 758-68.

67. *See id.* Through its definition of the relevant private interests and its conception of the risk of error, the instant Court tipped the Eldridge balancing test in favor of increased procedural protection before any factors are put on the scale. *See id.* In substance, a balancing test that inherently favors one outcome is a test with a rebuttable presumption favoring that outcome.

68. *See id.* at 774-75 (Rehnquist, J., dissenting). The dissent, citing Mathews v. Eldridge, 424 U.S. 319, 343 (1976), maintained that the only way the Court can determine whether a challenged governmental action is fundamentally fair is through a broad due process inquiry. *Id.* at 775.

69. *Id.* at 774-75.

balancing test is more consistent with the idea of fundamental fairness because it takes into account a broader set of facts and circumstances.

The instant Court's modified *Eldridge* test also creates tension in the federal balance of power. Since it adopted a role traditionally reserved to the states, the instant Court expanded its powers of judicial review.[70] This action necessarily improved the judiciary's power relative to the other federal branches. The extent of this improvement may have been slight, but the instant Court nonetheless threatened the delicate federal balance of power.

Likewise, the instant Court disrupted the relationship between New York's three branches of government. The result of the modified *Eldridge* test detracted from the New York Legislature's power to establish standards of proof in state proceedings.[71] At the same time, the instant Court diminished the federal judiciary branch's power of judicial review.[72] These reductions in power seem far from cataclysmic, but they undoubtedly affected the balance of power in New York.

Furthermore, the modified *Eldridge* test is difficult to rationally limit. Restricting its application to cases involving petitioners' fundamental rights may create a slippery slope problem. Courts may struggle in confining the application of the test to specific fundamental rights. In this event, the modified test might confer heightened procedural protection on an array of liberty interests, overburdening legislatures with statutes needing revision.

Similarly, limiting the application of the modified *Eldridge* test to family law disputes is not a practical solution. This limitation could result in increased due process protection for all fundamental rights arising in this context. A limitation of this nature would conflict with the notion that some Fourteenth Amendment rights are more valued than others.[73]

Finally, narrowing the application of the modified *Eldridge* test to standards of proof might interfere with various legislative determinations. The problem with this restriction lies in the test's presumption of increased procedural protection. If the modified test were applied to statutory

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70. *See id.* at 772 n.2 (Rehquist, J., dissenting). The dissent criticized the instant Court's reliance on *Woodby v. INS*, 385 U.S. 276, 284 (1966), for the proposition that the standard of proof is the kind of question traditionally left to the judiciary to resolve. *Santosky*, 455 U.S. at 772 (Rehnquist, J., dissenting). The dissent noted that the Court in *Woodby* sought to determine the proper standard of proof under a federal statute, not a state statute. *Id.*

71. *See Santosky*, 455 U.S. at 771-73.

72. *See id.* The instant Court's ruling on the adequacy of the standard of proof applied in a state proceeding logically diminishes the federal judicial branch's role as the final arbiter of state procedural due process matters.

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

standards of proof, its presumption could work as a bar against these legislative enactments.[74] Thus, in light of these problems, the most realistic way to limit the modified *Eldridge* test is to confine its application to the discrete facts and circumstances of the instant case.

The instant facts revealed the Court's struggle to define procedural due process rights.[75] Its efforts to protect one fundamental right created a test that favors heightened protection for numerous liberty interests. While this judicial multi-tasking might have caught the attention of state legislatures,[76] it also disrupted the federal balance of power, encroached upon states' rights, and retreated from the longstanding notion of fundamental fairness. Since the modified test yielded these unsavory results and is difficult to practically limit, the Court should have narrowly confined its application to the instant facts. Although the *Eldridge* balancing test might not always produce a desirable outcome, the instant Court should recognize that this test is a lesser evil in future procedural due process disputes.

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74. The instant case is an excellent example of this scenario. The modified test's presumption favoring increased protection became, in essence, a presumption against New York's legislative determination that the preponderance of the evidence standard was appropriate in termination proceedings.

75. *See also* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

76. *See Santosky*, 455 U.S. at 749. An underlying motive of the instant Court may have been to prod the New York legislature to conform to recent legislative trends. *Id.* As the Court noted, thirty-five states, the District of Columbia, and the Virgin Islands had enacted more stringent standards of proof in termination proceedings before the instant case was decided. *Id.*