In the ORIGINAL

Supreme Court of the United States

JOHN SANTOSKY, II AND ANNIE SANTOSKY,)
)
Petitioners,)
v.) NO. 80-5889
)
BERNHARDT S. KRAMER, COMMISSIONER,)
ULSTER COUNTY DEPARTMENT OF)
SOCIAL SERVICES, ET AL.)

Washington, D. C.

November 10, 1981

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SOCIAL SERVICES, ET AL. :

Washington, D. C.
Tuesday, November 10, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 o'clock a.m.

APPEARANCES:

MARTIN GUGGENHEIM, ESQ., New York, New York;
on behalf of the Petitioners.

STEPHEN SCAVUZZO, ESQ., Washington, D. C.;
on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Santosky against Kramer.

Mr. Guggenheim, you may proceed when you are ready.

ORAL ARGUMENT OF MARTIN GUGGENHEIM, ESQ.,

ON BEHALF OF THE PETITIONERS:

MR. GUGGENHEIM: Thank you.

Mr. Chief Justice, and may it please the Court, the issue in this case is whether the state may permanently destroy a family when it is not clear that the evidence justifies doing so. It is the Petitioners' position that the Constitution requires that the finder of fact be reasonably convinced that the result of permanent destruction of the family is appropriate before the state may force such an irrevocable and fundamental deprivation of liberty on an individual.

New York and eleven other states permit the permanent destruction of a family based on quality of evidence which is sufficient to prove liability in an automobile accident. This is offensive to basic notions of due process.

QUESTION: Well, Mr. Guggenheim, I realize that your point is certainly legally well taken, but do you think your client would have been better served by the rather searching family court inquiries in this case, albeit they

were said to be made upon the preponderance of the evidence rather than a very short hearing in the family court which announced that it found by "clear and convincing evidence" that parental rights should be terminated and it was affirmed by the appellate division?

MR. GUGGENHEIM: Absolutely, not only in this case but in the 1,200 other cases litigated in New York each year on this subject. It would of a measurable and real value, a benefit to parents because, as Justice Harlan indicated in Winship, what the standard of proof does, what the setting of a constitutional standard of proof does is impress upon the finder of fact the degree of confidence in the judgment which is to be rendered.

Now, if your question, Justice Rehnquist, is whether under any reading of this case a higher standard would have been met, the test for harmless error in constitutional adjudication is a reasonable doubt test set forth in Chapman against California. The question would be whether any reasonable person could have found that this did not amount to clear and convincing evidence.

QUESTION: No, my question was directed more to the practicality matter. The family court devoted considerable time, and wrote out its conclusions, and held more than one hearing on the matter, and the fact that it ended up concluding that it was by the preponderance of the

evidence strikes me as being a rather technical point which could have been obviated by a much shorter and less searching inquiry than simply a boilerplate finding at the end that we find this by clear and convincing evidence.

MR. GUGGENHEIM: Courts have regularly reviewed records upon a higher standard of proof, appellate courts have, and in this case, the test before the appellate division was merely whether the evidence did justify the result by a preponderance of the evidence.

There is both an impression to be made upon the finder of fact of the degree of confidence he or she should have in making the finding, as well as an entire change of the direction of the case, of the scope of the issue before an appellate court. The burden is more squarely placed upon the state, and the question for review is whether they have met that burden by convincing evidence.

I do think that this is a practical and meaningful right being sought, both for the 1,200 cases each year and for this one.

QUESTION: From the size of the record in this case, is it not quite clear that the judge gave it very close attention, and made an exhaustive inquiry?

MR. GUGGENHEIM: Absolutely. There is no challenge being made to the process attendant to the proceedings or to the judge's own careful analysis of his

opinion other than a steadfast refusal to both declare the statute unconstitutional insofar as it required a higher standard of proof and a refusal to rule that by that higher standard of proof this same result would have been effected. The trial court judge did not do that. The appellate court, the third department, appellate division, affirmed expressly finding that the evidence satisfied the preponderance standard, and expressly finding that a higher standard was not constitutionally mandated.

QUESTION: Mr. Guggenheim, if we were to agree with you about the standard, what should we do with this case? Send this record back and tell them, look at this record again and applying the correct standard, or to retry it?

MR. GUGGENHEIM: I think that the former alternative would not necessarily be impermissible. I am not certain of the answer. I think that at least remand --

QUESTION: This is the trial record.

MR. GUGGENHEIM: No, no, that is a very -- a bulky set of exhibits annexed to this case, most of which we regard, frankly, as unnecessary for consideration. The record is --

QUESTION: You don't suggest that the judge didn't consider them.

MR. GUGGENHEIM: I do suggest that, indeed.

QUESTION: That he didn't consider them?

MR. GUGGENHEIM: He did not. Some of those are simply reports issued after the case was decided, long after the case was decided. These are just exhibits submitted to the court by the Respondent. They were not -- Some of these are part of the record in earlier litigation, dating back to the time the children first entered the state's care, and some of the parts of Volumes 1 and 2 do contain -- I don't mean to suggest that anything submitted to this Court respecting a transcript was not part of a record in an earlier case. I don't mean that at all.

QUESTION: Given the amount of time, the whole record of this case, if you are correct on your standard, would not the appropriate -- would it not spare this family unit that you are concerned about, very properly, considerable trauma if they didn't have to go through the whole process again, if the judge would merely be directed to evaluate this evidence on the standard that you are suggesting if the court should happen to agree with that?

MR. GUGGENHEIM: Frankly, I find myself in a difficult position answering that question candidly, because there have been facts that have occurred after the trial that are not in this record, that I think speak favorably to the parents. I don't know how to bring it to the Court's attention without answering that a new trial, I think, would

be possibly appropriate, but I do think frankly that question should be considered by the appellate division upon remand for reconsideration in light of this Court's opinion were it to strike this standard.

QUESTION: The appellate division, not the --

MR. GUGGENHEIM: Or the trial court.

QUESTION: -- court of first instance?

MR. GUGGENHEIM: Fine. Remand to the trial court. At that point, we would be in a position not circumscribed by Supreme Court rules to advise that court of change of circumstances which we would regard as favorable that may bear upon the court's decision, and indeed, that leads to a point --

(Pause.)

QUESTION: Wait until the matter is cleared up. Perhaps a lightbulb.

(Pause.)

QUESTION: The first surmise was correct. Counsel, you may continue.

MR. GUGGENHEIM: I am certainly glad it was correct.

QUESTION: We will not deduct that time from Mr. Guggenheim's allotted 30 minutes.

MR. GUGGENHEIM: As I was saying, among the points to be made here is that the decision to terminate is for

speculative purposes. It is for purposes of hopefully leading to an adoption of a child. Whatever happens after the record is fixed is really for -- is beyond the capacity of a parent or the court to reopen.

QUESTION: May I ask, Mr. Guggenheim, under New York law, suppose the state fails to get an order terminating parental rights.

MR. GUGGENHEIM: Yes.

QUESTION: May it come back later and seek such an order?

MR. GUGGENHEIM: Absolutely, and I think --

QUESTION: Suppose -- the state may, but suppose the parents lose, and parental rights are terminated. Have they any way of getting parental rights restored?

MR. GUGGENHEIM: No, none whatsoever under New York law. There is in most American jurisdictions the right of a parent to reopen an adoption of a natural child based upon fraud or duress within a period of time after the adoption is fixed, but of course those standards would be inapplicable to these types of proceedings. Not only may the state relitigate when it loses, it did so in this very case, and it underscores one of the important advantages to the state on its side when it litigates against parents.

In this case, it tried first to terminate permanently in 1976. The court found by a preponderance of

the evidence they didn't have the ground sufficient under state law to terminate. The state then appealed to the appellate division, the same court from which we are now here on review, and that court affirmed, finding that the preponderance of the standard -- of the evidence wasn't met, and found for the parents in 1978; in that same year, they filed this lawsuit seeking to terminate a second time.

We are not suggesting that that is inappropriate. We are not suggesting that notions of res judicata are applicable, but merely to indicate one of the significant advantages the state has in this kind of proceeding.

We are, of course, here dealing with rights far more precious than property rights, our most significant and fundamental rights of all, the rights to be with our children, the rights to visit with our children, the rights of our children to be with our parents and to know our parents. At the very least --

QUESTION: Well, when was the last time your clients saw these three children?

MR. GUGGENHEIM: Until they finally lost parental rights, they never missed a visit. They loved their children. They were diligent in meeting with their children whenever possible. They haven't now seen their children since the court permanently terminated their rights.

QUESTION: I suppose you must concede, Mr.

Guggenheim, that New York does have some advantages in its system that other states do not have.

MR. GUGGENHEIM: I do make that concession.

QUESTION: I am speaking of the right to counsel, the right to a representative of the child. I forget what you call it.

MR. GUGGENHEIM: Yes, that's correct.

QUESTION: And yet this Court in Lassiter last year said that the right to counsel was not constitutionally mandated.

MR. GUGGENHEIM: Yes, but Lassiter flows from the Sixth Amendment right to counsel, and from an entirely different analytic framework. Lassiter is an opinion that follows logically from Scott against Illinois, in that in Scott this Court held --

QUESTION: Well, there were some of us who thought it didn't follow.

(General laughter.)

MR. GUGGENHEIM: Well, I respectfully suggest that. I am not sure I disagree with some of those views, but the point is that Scott held that the bright line is not even threat of imprisonment, as it might be in a jury case. It is actual imprisonment. So the presumption -- I think that, Justice Blackmun, even those who dissented might agree with the phrase that counsel cases come to this Court with a

presumption against application of counsel automatically except where there is a loss of liberty.

Where the Court may have disagreed, I think, was how to resolve the particulars in Lassiter, the dissent finding that counsel was necessary to meet due process overcoming the presumption, but at least for five members of this Court the presumption does follow logically, even if the result in Lassiter could be disputed, from Scott, and from Argesinger, and from Gideon. In standard of proof cases, that bright line has never existed.

This Court didn't utilize that reasoning in Vance against Terrazas. To the contrary, the Court examined quite carefully the heavy burden on the state to show voluntary, purposeful relinquishment of citizenship as a balancing question in determining what standard of proof was necessary, and so Lassiter, of course, for those states in which counsel is not required makes this case all the more important, but ultimately --

QUESTION: Mr. Guggenheim, what provision -- you are urging us to say a state must do something in this conext. What provision of the Constitution do you rely on?

MR. GUGGENHEIM: We rely on the Fourteenth Amendment, and on the --

QUESTION: On what part of it?

MR. GUGGENHEIM: -- the Mathews and Eldridge

analysis, asking what process --

QUESTION: This is a question of procedural due process?

MR. GUGGENHEIM: Yes, sir. Just the way this Court found that to be the case in Winship. The Court in Lassiter has already determined -- Justice Stevens in Lassiter suggested in his --

QUESTION: Well, you are not arguing, then, or are you arguing that there is some right to family, some family right that is being violated here?

MR. GUGGENHEIM: Well, the liberty rights being violated are --

QUESTION: Liberty?

MR. GUGGENHEIM: -- include -- could be said to include the substantive concept of family privacy, integrity of family rights, but one does not have to go off on substantive due process in this kind of case. Justice Stevens's dissent in Lassiter recognized the point that the Mathews and Eldridge test belittles constitutional analysis, or is mistaken constitutional analysis when we are concerned with fundamental, basic liberty rights, such as the right of parents and children to be related to each other.

QUESTION: You have spoken to the rights of the parents here, and of course that is very important, but is there not a right which is more important than the right of

the parents, namely, the right of the child, or the chidren?

MR. GUGGENHEIM: Absolutely, and this case is not at all to suggest that permanent destruction of a family is inappropriate. But permanent destruction of a family when it is unnecessary is inappropriate. Permanent destruction of a family which shouldn't be done by the state is offensive to the rights of children, at least as much so to the rights of parents. To be made a permanent ward of the state needlessly, to lose the love and affection of a family -- even to know that there are parents out there, as this Court recognized in Kabann, is a fundamental right, and this case doesn't suggest that children aren't entitled at some point to be severed from their parents. This case is merely to suggest that when that grave act is set out, that it be done so in a convincing manner.

QUESTION: What was the standard that was applied here? I mean, what was the substantive rule that was applied here?

MR. GUGGENHEIM: The question before the court that was litigated, although the test is a little broader than this, was whether the parents substantially, continuously, or repeatedly planned for the future of their child.

QUESTION: Well, now, is it your contention that the clear and convincing standard should apply to the

findings of historical fact, who did what to whom, or who said what, or what actions people take? Is that what you are talking about? Or are you talking about the conclusion from these facts that this standard has been violated? Or both?

MR. GUGGENHEIM: I think only the former. The question in the latter context, I think, embraces more directly the question of the scope of the substantive test, and I think a challenge to that ought to be made forthrightly.

QUESTION: By the latter, do you mean the conclusion that it is in the best interest of the child or the children to be separated from the parent? That is the ultimate conclusion, is it not?

MR. GUGGENHEIM: Well, except that New York bifurcates those questions, and makes the final revocation at a dispositional hearing where the standard is merely best interests.

QUESTION: As to which of these do you direct your claim of clear and convincing evidence standard?

MR. GUGGENHEIM: Whether the parents and the state engaged in conduct or failed to engage in conduct which justifies the termination itself. The condition precedent to the order terminating rights is a finding by the court based on an historical record that the parents did or did

not do something and that the agency or state did or did not do something, and I think Justice White's question embracing the second component goes more directly to a substantive challenge to a standard.

QUESTION: Well, I just wanted to know what your contention was.

MR. GUGGENHEIM: It is that the facts have to be --

QUESTION: You do not urge us to apply the clear and convincing standard to this mixed question of law and fact, as to whether or not the historical facts add up to --

MR. GUGGENHEIM: Enough.

QUESTION: -- to enough?

MR. GUGGENHEIM: No, that is not this case. That is not this case.

QUESTION: Tell me, Mr. Guggenheim, under the answer you have just given, would circumstantial evidence ever be enough under your standard of clear and convincing then?

MR. GUGGENHEIM: Yes. It is in a criminal proceeding.

QUESTION: I know.

MR. GUGGENHEIM: We have tests. Absolutely yes. But we want the finder of fact to be convinced. We want at least that much. This is fundamental to basic notions of American tradition, that you can't destroy a family forever

when you are not convinced that it is the right thing to do.

QUESTION: Mr. Guggenheim, isn't it utlimately perhaps more important to look at the overall scheme and requirements for severance of parental rights to determine whether it is a fundamentally fair scheme for handling the problem than to simply apply an artificial standard of proof, without an examination of the entire scheme?

MR. GUGGENHEIM: I think an examination of the entire scheme is appropriate, but I think that in any case where the finder of fact is convinced no more than the evidence is probably right, no more that would justify a showing that somebody struck somebody in an automobile and has to pay damages. It just isn't enough, and Justice Blackmun's question respecting the distinction in Lassiter, where that is exactly what the Court did, it said, we will look at each case as it comes, simply cannot be done in this context.

This case wouldn't be before this Court unless there was a substantial question that the Constitution requires a higher standard of proof. If the Court were to rule that there is no constitutional requirement of standard of proof, certiorari couldn't even be brought under -- to this Court to review the record, but even if it could, or if the appellate courts were to review records, you can't after the fact judge that, well, this did meet the preponderance

of the evidence standard, but somehow that is not enough here. That is not the way law is made. It is instead in this kind of context, the allocation of risk must be calibrated in advance. The degree to which we want the finder of fact to be convinced must be set out before the trial takes place so that the parties know in what framework they are litigating.

QUESTION: What in practice is the difference between the standard by a preponderance of the evidence and the standard by clear and convincing evidence?

MR. GUGGENHEIM: Chief Justice Burger, in Addington against Texas, I believe, wrote that we may never know the answer to that question, but we do know that there is a difference. We do know, as this Court in Sumner against Mather just last term, Justice Rehnquist's opinion pointed out that the difference between overturning a conviction based upon the preponderance of the evidence and overturning a conviction by convincing evidence, as Section 2254(D) of the habeas corpus statute requires, means something. It meant enough in that case to remand for the specific findings.

What does that do? That heightens the pressure or the critical moment, which is exactly what Justice Harlan in Winship was suggesting ought to be done, when you interfere with fundamental liberty, on the finder of fact to express

precisely what and how the judgment is justified, so that appellate courts and the finder of fact him or herself is satisfied.

We don't know precisely what it means, but we certainly know in the multifaceted ways in which it has been used that it means something.

QUESTION: But say in a charge to the jury in a fraud case, which is typically clear and convincing evidence --

MR. GUGGENHEIM: Yes.

QUESTION: -- do you think it really makes much difference whether they are charged that they must find fraud by clear and convincing evidence or by a preponderance?

MR. GUGGENHEIM: I have never been a juror, and I have frankly never tried a case of that kind, but I would think that it has potential to make a difference in every case. Now, it may be that a juror would say, I don't understand the difference, but I don't think judges say that. The judge certainly didn't say that in Winship. This Court didn't say that in Sumner against Monta. It does make a difference, I think. These cases are non-jury cases, and I think that impressing upon judges the obligation they have to be sure of their result is an important one and a meaningful one.

Comparing this kind of problem with the problem in

Vance against Terrazas also favorably indicates that a higher standard of proof is necessary. The agency only need show the everyday, ordinary facts of life to win its case, unlike in Terrazas, the heavy burden of showing purposeful, voluntary relinquishment of citizenship. Here, the question is, have the parents visited, and when I suggested that the standard, Justice White, for making the determination of termination includes a number of factors. One of them is whether they planned. That was the one in this case. Another is whether they visited. Another is whether the agency has utilized diligent efforts. These are all matters in the agency's knowledge, within the agency's records. Everyday, ordinary events.

And when we permit the permanent destruction without the certainty that it is appropriate, we have simply not measured up to constitutional rule.

If there are no further questions, I will reserve some time for rebuttal.

CHIEF JUSTICE BURGER: Very well, Mr. Guggenheim.

MR. GUGGENHEIM: Thank you.

CHIEF JUSTICE BURGER: Mr. Scavuzzo.

ORAL ARGUMENT OF STEPHEN SCAVUZZO, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. SCAVUZZO: Good morning. Mr. Chief Justice, and may it please the Court, Respondent requests that the

judgment of the New York State Supreme Court be affirmed. At issue before the Court is the constitutionality of a comprehensive state plan dealing with an important state interest in an area of domestic relations traditionally regarded as a matter of state law.

The New York permanent neglect statute is the result of a delicate balancing of competing and intertwined interests between multiple parties whose rights and relationships are affected by all the branches of government. We don't feel, in light of the record in this case, that a different standard of proof would vary the outcome. However, if the Court should raise the burden, it would frustrate a specific intent of the legislature.

In 1976, there was commissioned the Temporary Commission on Child Welfare. It undertook a year-long study. These results are published. They are cited extensively throughout Robert Abrams' brief, the Attorney General for New York. This extensive study was the basis for the present law. There is a risk of error here which Petitioners are challenging is incorrect. The legislature has evaluated this very risk of error. Its conclusion, based on that year-long study, was that under the preponderance standard, the risk of error ran considerably in favor of the parent.

It went farther than that. That was certainly the

main conclusion. However, it also determined that raising the burden would shorten the reach of the statute, which is precisely what the legislature did not want to do.

QUESTION: What do you mean by that?

MR. SCAVUZZO: The legislature extensively evaluated the case files throughout the jurisdiction. There were thousands of people languishing in foster care. The legislature -- of that set, the legislature identified a specific subset. These people, it felt, could not be reached by the statute under a clear and convincing standard. To adopt that standard --

QUESTION: So you really -- I take it the state's position is, yes, there is indeed a difference between preponderance and clear and convincing, in terms of actual results. At least that was the conclusion of your committee.

MR. SCAVUZZO: The main conclusion was that under the preponderance standard, the risk of error ran considerably in favor of the parent. However, it also felt that to adopt a higher standard would create a barrier to the freeing of adoption. That was precisely what it did not want to do.

Rather, it made the statute more specific, set out the grounds for permanent neglect in much greater detail, to ensure greater accuracy so that everyone would feel comfortable with the statute's application. The legislature

did feel that adopting the clear and convincing standard would create a barrier which they did not want. It cited in that report --

QUESTION: Do we know that from the legislative history?

MR. SCAVUZZO: From the temporary --

QUESTION: Or is it a post-legislative history analysis?

MR. SCAVUZZO: Oh, no. The legislature adopted the new law based upon the conclusions in that temporary commissions. As a result of that finding, they specifically decided to raise the standard to clear and convincing in cases where both parents, due to their mental illness, could not take care of their children in the foreseeable future, but they specifically decided not to raise the standard in permanent neglect cases, so that another barrier would not be raised to the adoption of these children.

QUESTION: Tell me again how you justified that distinction.

MR. SCAVUZZO: The legislature --

QUESTION: Where you ask clear and convincing evidence for a mental disability but a preponderance of the evidence otherwise.

MR. SCAVUZZO: The legislature felt that due to the scientific nature of the testimony involved in that type

of proceeding, it is also not mental illness such that they cannot care for themselves or care for their children in the foreseeable future. The legislature felt in that intance that the parents should be protected due to the nature of the scientific testimony by a higher standard of proof.

QUESTION: Let me ask another question. We are concerned primarily with three children here, aren't we?

MR. SCAVUZZO: Yes, Your Honor.

QUESTION: These people have two others, younger.

MR. SCAVUZZO: Yes, Your Honor, they do.

QUESTION: Has the state ever moved on them?

MR. SCAVUZZO: No, Your Honor, they have not.

QUESTION: Are you in a position then that they are unfit to handle the three older ones but not unfit to handle the two younger ones?

MR. SCAVUZZO: At this particular time, yes, Your Honor, they would be. I would like to point out to the Court that at the time of the dispositional hearing, parental rights cannot be terminated at the permanent neglect finding which Petitioners are suggesting now is unconstitutional. There is a dispositional hearing later on under New York law.

At that time, the parents had two children living in the home. They had the opportunity to demontsrate to the judge that notwithstanding the previous finding of permanent

neglect, the children could be returned home in the foreseeable future, that notwithstading the previous finding of permanent neglect, the children could be returned home in the foreseeable future. That is, conditions in the home had changed since that one-year period of permanent neglect. They had that opportunity to bring in the precise inference that the two children being in the home now would raise.

QUESTION: Of course, the parents are older, and the family is smaller with two than it would be with five. On the other hand, if one takes away -- if the state takes away a driver's license in the state of New York, it is on clear and convincing evidence, isn't it?

MR. SCAVUZZO: Yes.

QUESTION: That is more important than taking away children?

MR. SCAVUZZO: No, absolutely not. What you have to look at is the entire package, the entire package of rights which is guaranteed by the New York state statute. Petitioners are challenging only one particular aspect of that statute. The safeguard -- There are more safeguards under this type of permanent neglect statute than there would be in the the one hearing to take away a driver's license. There is in this case an initial removal proceeding, where, based upon a finding of abuse and neglect, the child is removed from the home.

Again, there is a permanent neglect finding which the Petitioners are challenging here, but rights cannot be terminated at that permanent neglect finding. There is another hearing. At that other hearing, known as the dispositional hearing, the government has the burden again to show that notwithstanding the previous finding, the children cannot be returned to the home.

There is also, I would like to point out, direct the Court's attention to Family Court Section 1061. Upon good cause shown, the parents may move to vacate any order of the family court. One of the grounds is precisely this newly discovered evidence that Petitioners are alluding to here, so they do have another opportunity. They certainly have the opportunity at the dispositional hearing to present further evidence.

QUESTION: But, Mr. Scavuzzo, once at the dispositional hearing there is an order terminating parental rights, that is the end of it, isn't it? Can the parents come back and attack that order?

MR. SCAVUZZO: Under 1061, they can move to attempt to vacate that order. The grounds, however, are much narrower. It would be newly discovered evidence, fraud. The statute spells it out.

QUESTION: But if the state loses, as I understand it, the state may initiate another termination proceeding.

MR. SCAVUZZO: That's correct. The procedure that I am suggesting would only --

QUESTION: So that if the parents have any attack at all open to them on a termination order, it is only this limited one that you mentioned --

MR. SCAVUZZO: Yes.

QUESTION: -- the newly discovered fraud or something like that?

MR. SCAVUZZO: It would be --

QUESTION: Have there been many like that under New York practice?

MR. SCAVUZZO: No.

QUESTION: Any?

MR. SCAVUZZO: Not in the cases of permanent neglect. No, Your Honor.

QUESTION: As you know, counsel, there has been a great deal of writing on this subject by people who purport to be students of it, and many of them have said that as a practical matter, judges do not remove custody in this way unless they are fully convinced, which certainly implies that the evidence is clear and it is convincing to the judge, and that it is probably more than a preponderance.

What do you have to say about that?

MR. SCAVUZZO: That was precisely one of the findings of the New York state legislature. They found that

the way the judges were applying this particular preponderance standard, the risk of error ran considerably in favor of the parents, and that to raise another barrier was not necessary since the parents were already protected, and Number Two, they felt, after review of the case files, it would eliminate some people from the reach, the umbrella, the protection of the statute, and they wanted the specific subset to be within the reach of such a statute.

QUESTION: Did the Commission look at the laws of other states? Did they make a survey of the practice?

MR. SCAVUZZO: No, they did not. It would be much too complicated to evaluate every particular safeguard of every particular statutory scheme. They evaluated --

QUESTION: Well, there are some 30 or more states with a clear and convincing standard in cases like this.

MR. SCAVUZZO: That's correct, Your Honor, but the legislature's job, the only job they could undertake with any type of certainty --

QUESTION: To deal with the New York situation.

MR. SCAVUZZO: The entire package, how does the statute operate as the whole, what is the risk of error in this particular jurisdiction --

QUESTION: Mr. Scavuzzo, may I ask a question here? In your brief, you suggest that the right at stake here is comparable to the right in a licensing procedure or

various property cases, and that one should weigh the burden of proof as part of the total package of procedures, and if the entire procedure is fair, burden of proof isn't very important.

Supposing the burden of proof for probable cause, that there was probable cause to believe the children would be better off in the foster home. Would that be constitutional in your judgment, if all the other procedures you can think of were given to protect the parents?

MR. SCAVUZZO: As I understand your question, Your Honor --

QUESTION: My question is, would that be constitutional in your view.

MR. SCAVUZZO: No, because that would place the burden on the parents.

QUESTION: Well, but it may well be -- well, anyway, you say that would be unconstitutional. What is wrong with placing the burden on the parents as a matter of constitutional law if they have all the other procedures and protections you talk about?

MR. SCAVUZZO: Certainly under New York law, as we would suggest should be the case, the burden should be on the state to prove that the family cannot be reunited in the foreseeable future. That is the essence of this law. That is where the state switches roles. The initial function of

the state under the statute is to reunite the family. They can do no other. At some point in time, however, the agency, checked by the trial judge, has to make a determination that that goal is no longer possible and that the children cannot be returned home in the foreseeable future. It is only at that point does the state have the right to go in and terminate those rights.

Again, the legislature evaluated how that precise standard operated under New York law, and came to the conclusion, the well-reasoned conclusion, that the risk of error still ran considerably in favor of the parents.

The substantive grounds based here, the failure to plan, are neither vague nor subjective. They are specifically defined by the law. That failure to plan for the child's future is merely the failure to utilize the programs and services which are available to the particular parent. The plan relates to the initial problem. There should be no question here there was an initial problem in the Santosky home. The plan, the services made available to the parents are then utilized to solve that problem.

I would like to point out that the parents can formulate a plan of their own. They need not adopt the agency's plan, utilize the services which the agency offers them. A good example is the facts and circumstances here. A problem in the Santosky home was economic. Mr. Santosky

was unemployed. Ulster County offered him vocational training, which he participated in for some period of time. Later on, it was his contention that he would be better served by working under the supervision of a relative as a car mechanic. The agency had no objection to that plan, the utilization of that service to solve his problem.

QUESTION: Mr. Scavuzzo, how do these cases originate?

MR. SCAVUZZO: Okay. The permanent neglect findings, the child has to be in the custody of the agency. That happens at an initial proceeding before the family court where the state proves beyond a preponderance of the evidence that abuse or neglect has transpired in the home. The child is then removed from the parents' custody.

QUESTION: But to go back one step, I mean, presumably 90 percent of the families in New York never get into this mill. What is the first step that gets them into this procedure?

MR. SCAVUZZO: It would be that -- that initial finding of abuse and neglect by the family court.

QUESTION: How do you find -- who detects that?

MR. SCAVUZZO: Well, the system operates in New York, these cases have to be reported to the agency. There was approximately 70,000 reports last year of abuse --

QUESTION: Well, who reported it in this instance?

MR. SCAVUZZO: The grandmother of Mr. Santosky.

QUESTION: That is the way the whole thing started? The grandmother complained?

MR. SCAVUZZO: That was Tina.

QUESTION: What initiated that was some injuries to the children, was it?

MR. SCAVUZZO: Yes. Tina was initially removed in 1972 based -- she had some severe welts on her backside. She was taken away from the parents for three weeks, returned back from the home. Approximately a year later, more problems developed. Another report from the grandmother. She was adjudicated to be neglected. There was a finding by the trial judge that abuse had transpired in the Santosky home. She was kept away for a period of approximately eight months, and returned home on a trial basis.

The agency recognized that there are specific problems when a child is removed for more than one year. They tried to avoid that problem here, returned Tina to the home on a trial basis. She was home for about two months when there were other abuse problems, which we have described in our brief, to John the second.

Ulster County in this case did everything possible, offered every service that could have been made available to the Santoskys, psychological counseling,

psychiatric counseling, educational service, vocational training, nutritional, homemaker service, family counseling, every possible service was urged upon them by Ulster County.

Not all of those services have to be accepted by the parent. A good indication of that is the first termination proceeding of parental rights, which the government lost, in November of 1976. It is a good indication of how well parental rights are protected by the trial judges in New York state. The legislature by that survey indicated they had a tremendous amount of confidence in our trial judges. This survey, this commission determined that under the preponderance standard, parental rights were more than adequately protected. It is evidenced here. One government witness testified after approximately three months of seeing the Santoskys. This was in 1976. The children had been away from the home for approximately two years.

The government witness testified that, yes, they were making some type of movement, they were benefitting from our service, and Mr. and Mrs. Santosky took the stand and felt, yes, they had received the benefit from the service. That was enough for the trial judge to say, yes, these people are utilizing the services. They are taking advantage of them, and thus planning for the future of their children under New York law.

That stands in stark contrast to the second termination proceeding in February of 1979. The government witness, the family counselor, who said in November of 1976, yes, there is hope that this family can be put back together, finally, even she gave up hope. And the Santoskys never took the stand themselves to testify. Certainly at that time they had the opportunity to offer any type of evidence that they would utilize these services, deriving some type of benefit from programs that were being offered to them, and they failed to do so.

QUESTION: Do you happen to know how much the New York state budget is to deal with all these problems?

MR. SCAVUZZO: No, Your Honor, I am not aware of that.

QUESTION: You said there were 70,000 complaints of maltreatment last year, so I suppose there is an enormous expense in the investigatory aspect of those complaints.

MR. SCAVUZZO: Well, of those complaints. Not all of those cases the agency has the funding to investigate. They open up a file in only some of them.

QUESTION: Well, 70,000 complaints means that someone has got to make some inquiry in those cases, does it not.

MR. SCAVUZZO: Yes, Your Honor, that is correct.

QUESTION: And you said about 1,200 a year are

cases where the children are taken away from the parents?

MR. SCAVUZZO: No. The agency acts in approximately 10 percent of those cases. We are talking about approximately -- I have laid out the statistics as well as we can determine them in our exhibits. We are speaking about approximately 7,000 initial custody or removal proceedings, which the agency indicates. The 1,200 number is the permanent neglect, the termination proceedings which the agency eventually decides to --

QUESTION: But you don't know the total cost of this care of these children, do you?

MR. SCAVUZZO: No, Your Honor, I don't. If the Court is interested, I would be happy to provide that information. The evidence, the failure to utilize those services, indicated a state of mind of the parents, that these parents had virtually abandoned their children at that termination proceeding in April of 1979. The trial court described their meetings between parent and child as devoid of any type of emotional contact. The children viewed those meetings as something merely to be endured. Throughout the course -- this is six years -- before the same trial judge, as -- that's the practice; once the initial removal proceeding is instituted, the case remains before the same trial judge, who takes judicial notice of all the prior proceedings -- the Santoskys never asked when their children

would be returned home permanently.

Judge Elwin based his decision, as he had to under New York law, on a preponderance of the evidence. However, the strength of his decision is not -- his decision is not one of a man who had any reservations about his factual findings. He asserted that the Santoskys' failure to utilize these services was total and complete. Their miniscule efforts had tapered off to the point where he could not even measure them as an experienced trial judge.

It has been nine years since the initial abuse of Tina, and this case cries out to be ended.

I would like to close with the contention that there is a logical fallacy in Petitioner's argument. They are isolating their whole challenge on a comprehensive, very well thought out state scheme on only one particular procedural protection in the entire statute. The statute, with all those protections, all those hearings, has to be evaluated as a whole. That is the essence of the procedural protections. The parents must come before a neutral and disinterested magistrate at least three times before their parental rights are terminated.

Again, the legislature evaluated precisely the risk of error under that package, and determined that it ran considerably in favor of the parent.

QUESTION: Mr. Scavuzzo, is it not still critical

to your argument that the termination of parental rights does not involve a fundamental liberty interest?

MR. SCAVUZZO: I don't think so.

QUESTION: That is where you start your main argument in your brief, at least.

MR. SCAVUZZO: Certainly it is --

QUESTION: Would you concede the termination is a fundamental liberty interest and nevertheless make the same argument?

MR. SCAVUZZO: No, I would suggest to the Court that this is not a fundamental liberty interest. However --

QUESTION: In fact, you rest your whole argument on that premise, I think.

MR. SCAVUZZO: No, Your Honor, I don't. Even if the right is viewed in the abstract as fundamental, it is mitigated. It is distinguished from those other fundamental liberty cases. It is distinguishable by the interests of the children here involved, that is across the country, and specifically under New York law the length of time that that child has been away from the home, that mitigates the parental interest.

QUESTION: The thing that puzzles me about your argument is that you stress the fact that it is New York policy to presume that the natural parent-child relationship is in the best interests of the child. There is that kind

of a presumption that runs throughout your statutory scheme.

MR. SCAVUZZO: Oh, yes. Oh, yes.

QUESTION: Doesn't that tend to support the notion that New York regards this as a rather important liberty interest?

MR. SCAVUZZO: Oh, New York regards this as an extremely important liberty interest.

QUESTION: But not fundamental.

MR. SCAVUZZO: Not fundamental. They feel it is protected adequately by the procedural safeguards which they have developed in their statutory package.

QUESTION: Well, New York could regard it as important both for the parents and for the children, and when they come to cross purposes, perhaps neither one would have a "fundamental right".

QUESTION: The issue is whether they are at cross purposes or not. That is the issue.

MR. SCAVUZZO: The issue at what point does the state determine when the family cannot be reunited in the foreseeable future, someone has to make that evaluation. The question is, under what standard. The agency, when it begins, when the child is initially removed from the home, must bring -- put that child -- do everything possible it can to put the child back in the home. It can act in no other fashion. If it does, the parents have a right to file

a petition to terminate placement. However, there is a balancing here of the interests of the child. Not in all cases can the statutory obligation be met.

QUESTION: No, but in all cases at the beginning of the proceeding, because you must meet a preponderance standard, there is a presumption that the interest of the child is to remain with his parents.

MR. SCAVUZZO: Yes. No question that the --

QUESTION: Does it make much difference whether we call it a fundamental right or use some other adjective if -- is not the question whether, taken as a whole, the procedure gives paramount status to the interest of the children?

MR. SCAVUZZO: Yes, Mr. Chief Justice, that is precisely the evaluation which New York State undertook in 1976. The question --

QUESTION: You think they do that with a preponderance standard then.

MR. SCAVUZZO: Yes, I do.

QUESTION: Plus the other protections.

MR. SCAVUZZO: Yes.

If there are no further questions, thank you.

CHIEF JUSTICE BURGER: Very well.

Mr. Guggenheim?

ORAL ARGUMENT OF MARTIN GUGGENHEIM, ESQ.,

ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. GUGGENHEIM: The question of the rights of the children and the rights of the parents here are, as Justice Stevens suggested just a moment ago, before the Court in the same context. It begs the question to suggest that their interests are different. They may be and they may not be. Chief Justice Burger indicated in questions to Mr. Scavuzzo that judges around the country, commentators have told us, frequently regard the decision to terminate of such a great moment that they want to be convinced that it is the right thing to do before they do it. That is because, if it is true, we have recognized as a society the social disutility of an erroneous permanent destruction of a family.

This case merely would suggest that that social disutility is of constitutional moment. If, as Chief Justice Burger has stated, the commentators correctly to be correct and people are doing this already, then very little is lost by it. But if people are not doing it, if children are being destroyed needlessly, then this case will protect them, and that should be done.

Even where, and the record shows this, permanent destruction is effected, adoption, which could be the only feasible benefit accruing to the children, is effected only about 40 percent of the time. So we have children -- 60 percent of the time. I am sorry. Forty percent of the

cases, permanent adoption is not effected for children freed for adoption by this route. So, we have a preponderance of the evidence terminating rights where it benefits children at best a preponderance of the time. The Constitution requires more.

If there are no further questions, I will stop at this point.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:00 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

JOHN SANTOSKY, II AND ANNIE SANTOSKY v. BERNHARDT S. KRAMER, COMMISIONER ULSTER COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL. No. 80-5889

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BY Sharon Lynn Connelly