

# **Unpacking the Package Theory: Why California’s Statutory Scheme for Terminating Parental Rights in Dependent Child Proceedings Violates the Due Process Rights of Parents as Defined by the United States Supreme Court in *Santosky v. Kramer***

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## I. Introduction

In 1982, by way of *Santosky v. Kramer* (*Santosky*), the United States Supreme Court held that allegations underlying an order to terminate parental rights in dependent child custody proceedings need to be supported by at least clear and convincing evidence to satisfy due process.<sup>1</sup> By the early 1990s, forty-nine states and the District of Columbia had integrated the clear and convincing burden into their parental rights termination schemes.<sup>2</sup> California, however, moved in the opposite direction. Although the state had been applying the clear and convincing burden when *Santosky* was decided, the California Legislature subsequently enacted new parental rights termination statutes that effectively *lowered* the burden of proof.<sup>3</sup> These statutes, which remain in effect today, allow a California court to move toward the termination of parental rights based on allegations supported by a mere preponderance of evidence.<sup>4</sup>

In 1993, the constitutionality of California's application of this low burden of proof was brought to the attention of the California Supreme Court in the case of *Cynthia D. v. Superior Court*.<sup>5</sup> The *Cynthia D.* court recognized the *Santosky* decision, but held the *Santosky* Court's reasoning did not apply to California parental rights termination proceedings because the hearing to terminate parental rights in California necessarily follows a variety of hearings aimed at family reunification.<sup>6</sup> In other words, the *Cynthia D.* court held that the package of findings made before the final parental rights termination hearing distinguished California's termination hearings from the termination hearing reviewed in *Santosky*, and therefore justified application of a lower burden of proof.

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<sup>1</sup> *Santosky v. Kramer*, 455 U.S. 745, 751 (1982).

<sup>2</sup> See Part III, *infra*.

<sup>3</sup> See CAL. WELF. & INST. CODE §§ 366.21 & 366.22 and accompanying discussion.

<sup>4</sup> *Id.*

<sup>5</sup> *Cynthia D. v. Superior Court*, 5 Cal.4th 242 (Cal. 1993).

<sup>6</sup> *Id.* at 248-254.

The reasoning of the *Cynthia D.* court is flawed for three reasons. First, California's procedure for terminating parental rights is *not* meaningfully different than the New York procedure reviewed in *Santosky*, or from any modern parental rights termination scheme being applied in other states. Indeed, since the enactment of the Adoption Assistance and Child Welfare Act of 1980 ("AACWA"), all states have implemented procedures which require extensive efforts to preserve the parent-child relationship before the termination of parental rights is considered.<sup>7</sup> Accordingly, *Santosky's* direction to apply the clear and convincing burden of proof to the ultimate findings underlying an order terminating parental rights controls, and the *Cynthia D.* court's deviation from the burden of proof requirement is not justified.

Second, even if differences did exist, the assertion that extra protections built into a procedure leading up to a termination hearing can excuse a constitutionally inadequate burden of proof was expressly rejected in *Santosky*. Specifically, the *Santosky* court explained that a state's statutory procedure for terminating parental rights could not be constitutionally evaluated as a "package."<sup>8</sup>

Third, even disregarding the controlling authority in *Santosky*, the actual application of the "package theory" in California termination proceedings has proved to offer incomplete due process protection to California parents. Several published cases now demonstrate that there are many ways in which a parent may arrive at the final termination without having been through all of the hearings contemplated

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<sup>7</sup> The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (now codified at 42 U.S.C. §§ 670-676 (2004)). The AACWA conditions funding in part on state efforts to keep children placed with their parents and to reunify the family when temporary removal is necessary to protect children. A complete discussion of the influence of the AACWA on state proceedings aimed at terminating parental rights is included in Part VI(a)(1), *infra*.

<sup>8</sup> *Santosky v. Kramer*, 455 U.S. 745, 759, n. 9 (1982). Specifically, the court stated it "would rewrite [its] precedents were [it] to excuse a constitutionally defective standard of proof based on an amorphous assessment of the cumulative effect of state procedures." *Id.*

in *Cynthia D.* Moreover, even when the hearings are held, the findings made at these preliminary hearings do not necessarily translate into evidence sufficient to support an order to terminate parental rights. The California scheme—as interpreted by *Cynthia D.*—unfairly ignores these due process problems.

This paper discusses the limited differences between California's parental rights termination procedure and the procedure followed in other states, including the New York procedure evaluated in *Santosky*. It reviews *Santosky*'s rejection of the procedure now actually followed in California, and provides support for the logic underlying the *Santosky* Court's decision by pointing to situations under the California Scheme where the alleged protections offered through the package of hearings leading up to a parental rights termination hearing fall short. It is the hope of the authors that this discussion will motivate the California legislature to reconsider parental rights termination statutes which: (1) are at odds with the termination schemes of every other state in the Union; (2) appear to conflict with the controlling precedent established in *Santosky*; and (3) do not provide uniform procedural protections to California parents involved in parental rights termination proceedings.

## **II. *Santosky v. Kramer*: The United States Supreme Court Holds that Findings Underlying an Order to Terminate Parental Rights Must be Supported by Clear and Convincing Evidence**

Traditionally, American law grants wide discretion to parents regarding how they raise their children.<sup>9</sup> The United States Supreme Court has recognized that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment,<sup>10</sup> and a

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<sup>9</sup> See Richard J. Gelles & Ira Schwartz, *Children and the Child Welfare System*, 2 U. PA. J. CONST. L. 95, 96 (1999) (citing JAMES KENT, COMMENTARIES ON AMERICAN LAW (O.W. Holmes Jr. ed., 1873)).

<sup>10</sup> *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 246, 255 (1977); *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977); *Cleveland Board of Education v. LaFleur*, 414 U.S.

parent's right to the care, custody, and management of children has been held to rank among the most basic of civil rights.<sup>11</sup>

Because the right to parent is so fundamental, a parent's interest in the correctness of orders terminating parental rights holds significant weight, and the United States Supreme Court has acknowledged crucial procedural protections due a parent when a state seeks to permanently sever the parent-child relationship.<sup>12</sup> Indeed, since the United States Supreme Court's decision in *Santosky v. Kramer*, the due process clause of the Constitution has been interpreted to require clear and convincing support for allegations underlying an order to terminate parental rights.<sup>13</sup>

A. *Statutory Background of the New York Termination of Parental Rights Scheme*

The *Santosky* case originated in New York, which, at the time, authorized its state social services agencies to temporarily remove a child from a parent's home if the child appeared "abused"<sup>14</sup> or "neglected,"<sup>15</sup> within the meaning of the New York Family Court Act.<sup>16</sup> To detain the child, even briefly, the court needed to find that the child had been abused or neglected in a way that placed the child's life or health in imminent danger.<sup>17</sup> And, once a child was removed, the social services agency's first obligation was to help the family

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632 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651-652 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>11</sup> *Lassiter v. North Carolina*, 452 U.S. 18, 32 (1981).

<sup>12</sup> *Id.*

<sup>13</sup> *Santosky v. Kramer*, 455 U.S. 745, 751 (1982).

<sup>14</sup> *Id.* (citing N.Y. FAM. CT. ACT § 1012(e) (definition of "abused child")).

<sup>15</sup> *Id.* (citing N.Y. FAM. CT. ACT § 1012(f) (definition of "neglected child")).

<sup>16</sup> *Id.* (citing N.Y. FAM. CT. ACT §§ 1021-1029). For a complete history of the Development of parental rights termination procedure in New York, see Sally K. Christie, *Foster Care Reform in New York City: Justice for All*, 36 COLUM. J. L. & SOC. PROBS. 1, 5-12 (2002).

<sup>17</sup> *Santosky v. Kramer*, 455 U.S. 745, 751 (1982) (citing N.Y. FAM. CT. ACT § 1022(a)).

reunify.<sup>18</sup> Only if reunification efforts failed, and the agency became convinced that a “positive, nurturing parent-child relationships no longer exist[ed],” could it initiate “permanent neglect” proceedings to free the child for adoption.<sup>19</sup>

The permanent neglect hearing was bifurcated into fact-finding hearing and a dispositional hearing.<sup>20</sup> At the fact-finding hearing, the social services agency was required to prove that it “made diligent efforts to encourage and strengthen the parental relationship” for more than a year,<sup>21</sup> and that the parents failed “substantially and continuously or repeatedly” to maintain contact with or plan for the minor’s future.<sup>22</sup> If the agency’s allegations were supported by “a fair preponderance of the evidence,”<sup>23</sup> the court had the authority to declare a minor permanently neglected.<sup>24</sup> At a subsequent dispositional hearing, the court could then terminate parental rights.<sup>25</sup>

### B. *Factual and Procedural History of Santosky*

In 1973, John and Annie Santosky had three of their children temporarily removed by the state of New York due to incidents reflecting parental neglect.<sup>26</sup> At the direction of the trial court, the county social services agency developed a reunification plan for the family which included extensive counseling and training services.<sup>27</sup> John and Annie participated only marginally with the plan and wholly disregarded some of the services provided to them.<sup>28</sup> As a result, in 1976, the social services agency asserted the minors

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<sup>18</sup> *Id.* (citing N.Y. SOC. SERV. LAW § 384-b(1)(a)).

<sup>19</sup> *Id.* at 748.

<sup>20</sup> *Id.* (citing N.Y. FAM. CT. ACT §§ 622-623).

<sup>21</sup> *Id.* (citing N.Y. FAM. CT. ACT § 614.1(c)).

<sup>22</sup> *Id.* (citing N.Y. FAM. CT. ACT § 614.1(d)).

<sup>23</sup> *Id.* (citing N.Y. FAM. CT. ACT § 622).

<sup>24</sup> *Id.* At 749 (citing N.Y. FAM. CT. ACT §§ 631(c) & 634).

<sup>25</sup> *Id.* (citing N.Y. FAM. CT. ACT §§ 631(c) & 634).

<sup>26</sup> *Id.* at 751.

<sup>27</sup> *Id.* at 781-82 (Rehnquist, J., dissenting).

<sup>28</sup> *Id.* at 782.

had been permanently neglected and petitioned the juvenile court to terminate the couple's parental rights.<sup>29</sup>

During a hearing on the termination petition, the court recognized that John and Annie's participation with social services was generally "non-responsive, even hostile."<sup>30</sup> However, it dismissed the petition because the parents had put forth some effort to reunify with their children.<sup>31</sup>

After the first termination hearing, John and Annie made no effort to participate in services aimed at reunification.<sup>32</sup> Accordingly, in 1978, the social services agency filed a second termination petition alleging permanent neglect.<sup>33</sup> At a hearing on this petition, the trial court found that the social services agency had made diligent efforts to encourage and strengthen the parental relationship, and that the parents had failed to take advantage of the offered services.<sup>34</sup> Although the parents had participated sporadically in visits, the court found the visits had been "superficial and devoid of emotional content," and that the visits alone did not show the parents had maintained contact with the minors or planned for the minors' future within the meaning of the New York Family Court Act.<sup>35</sup> The court concluded John and Annie were incapable, even with public assistance, of planning for the future of their children.<sup>36</sup> All of these findings were made under the fair preponderance of evidence standard.<sup>37</sup> And, based on the findings, the court moved to the dispositional phase of the permanent neglect hearing where it terminated John and Annie's parental rights.<sup>38</sup>

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<sup>29</sup>*Id.* at 751.

<sup>30</sup>*Id.* at 782 (Rehnquist, J., dissenting).

<sup>31</sup>*Id.*

<sup>32</sup>*Id.* at 782-783.

<sup>33</sup>*Id.*

<sup>34</sup>*Id.*

<sup>35</sup>*Id.* at 783.

<sup>36</sup>*Id.* at 752 .

<sup>37</sup>*Id.*

<sup>38</sup>*Id.*

*C. Majority Opinion: Findings Underlying a Parental Rights Termination Order Must be Supported by Clear and Convincing Evidence*

The trial court's decision was appealed all the way to the United States Supreme Court, where a divided panel held that the use of the "fair preponderance of the evidence" standard in a state action to involuntarily terminate parental rights failed to satisfy the requirements of due process.<sup>39</sup> The majority opinion, authored by Justice Blackmun, was based on a *Mathews v. Eldridge* analysis in which the court found that: (1) the private interest affected in termination proceedings was commanding; (2) the risk of error from using a preponderance of evidence standard was substantial; and (3) the countervailing state interest favoring the preponderance of evidence standard was comparatively slight.<sup>40</sup>

On the first *Mathews* factor, the court noted that a natural parent's desire for, and right to, the companionship, care, custody, and management of his or her children is an interest far more precious than any property right, and that accuracy and justice in the decision to terminate parental rights was vital because termination proceedings worked "a unique kind of deprivation."<sup>41</sup> The majority also explained that the interests of children involved in termination proceedings did not weigh against the parents' interests—at

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<sup>39</sup>*Id.* at 758.

<sup>40</sup>*Id.* at 745 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). This three-pronged test articulated in *Mathews v. Eldridge* "dominates" procedural due process law. See Katharine Ferguson & Guillermo A. Montero, "Oh Lord, Please Don't Let Me be Misunderstood!": *Rediscovering the Mathews v. Eldridge and Penn Central Frameworks*, 81 NOTRE DAME L. REV. 1, 4 (2005); see, e.g. *Lassiter v. North Carolina*, 452 U.S. 18, 32 (1981) (applying the three-pronged test to hold that the failure to provide indigent parents with appointed counsel in parental rights termination proceedings does not necessarily violate the parent's due process rights). The test is the ordinary mechanism for "balancing [] serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty, or property, without due process of law." *Hamdi v. Rumsfeld*, 542 U.S. 507, 528 (2004).

<sup>41</sup>*Id.* at 758-759 (citing *Lassiter v. North Carolina* 452 U.S. 18, 27 (1981)).

least during the fact-finding portion of the termination proceedings—because the state could not “presume that a child and his parents are adversaries.”<sup>42</sup> It reasoned that “until the state prove[d] parental unfitness, the child and his parents share[d] a vital interest in preventing the erroneous termination of their natural relationship.”<sup>43</sup>

On the second *Mathews* factor, the court explained that the fair preponderance standard improperly pitted the parent against the state,<sup>44</sup> and did not fairly allocate the risk of erroneous fact-finding between these two parties.<sup>45</sup> The permanent neglect proceedings employed imprecise substantive standards that left determinations unusually open to the subjective values of the judge.<sup>46</sup> For example, a New York court evaluating a social service agency’s “diligent efforts” to provide the parents with social services could excuse the agency’s failure to provide services on the ground that they would have been “detrimental to the best interests of the child.”<sup>47</sup> Similarly, in determining whether the parent “substantially and continuously or repeatedly” failed to maintain contact with the child, the court could discount actual visits or communications on the ground that they were “insubstantial or overtly demonstrated a lack of affectionate and concerned parenthood.”<sup>48</sup> The *Santosky* court also noted that the state’s ability to assemble its case “almost inevitably

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<sup>42</sup>*Id.* at 760.

<sup>43</sup>*Id.*

<sup>44</sup>The appellate court had approved the preponderance standard on the ground that it “properly balanced the rights possessed by the child with those of the natural parents. . . .” *Matter of John A.A.*, 427 N.Y.S.2d 319 (1980). The United States Supreme Court held that the view that risk needed to be allocated between child and parent was “fundamentally mistaken,” and reinforced the position that parent and child share an interest in avoiding the erroneous termination of parental rights until the parent has been shown to be unfit. *Santosky v. Kramer*, 455 U.S. 745, 765 (1982).

<sup>45</sup>*Santosky* 455 U.S. at 761.

<sup>46</sup>*Id.* at 762.

<sup>47</sup>*Id.* at 763, fn. 12.

<sup>48</sup>*Id.* at 751. In fact, the trial court in *Santosky* did just that. Although the parents had participated in visitation, the court disregarded the visits as being “superficial and devoid of emotional content.” *Id.*

dwarfed the parents' ability to mount a defense,"<sup>49</sup> and that the primary witnesses at the hearing were the agency's own professional caseworkers, whom the state empowered both to investigate the family situation and to testify against the parents.<sup>50</sup> Indeed, because the child would already be in agency custody when the termination proceedings were initiated, the state even had the power to shape the historical events that form the basis for termination.<sup>51</sup>

On the third *Mathews* factor, the court mentioned two state interests at stake in parental rights termination proceedings: a *parens patriae* interest in preserving and promoting the welfare of the child; and a fiscal and administrative interest in reducing the cost and burden of such proceedings.<sup>52</sup> It explained that while there was still a reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favored family preservation.<sup>53</sup> The state's interest in terminating parental rights arose only "when it [wa]s clear that the natural parent [could] not or [would] not provide a normal family home for the child."<sup>54</sup> Accordingly, the state's *parens patriae* interest weighed in favor of a burden of proof which would lead to more accurate determinations regarding the parent's ability to provide for the child.<sup>55</sup> As for the administrative burden imposed by the higher standard of proof, the court held that, especially in light of the gravity of the decision to terminate parental rights, any

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<sup>49</sup>*Id.* at 763.

<sup>50</sup>*Id.*

<sup>51</sup>*Id.* at 763-64. For example, in the *Santosky* case, the parents claimed that the state sought court orders denying the right to visit their children, which would have prevented them from maintaining the contact required by the Family Court Act. Similarly, in *Santosky*, the state cited the parents' rejection of social services, which they found to be offensive or superfluous, as proof of the agency's "diligent efforts" and the parents' "failure to plan" for the children's future. *Id.*

<sup>52</sup>*Id.* at 766. For an in depth discussion of the difficulty in determining the state's *parens patriae* interest in dependency proceedings generally, see Helen Cavanaugh Stauts, *The Federal Government's Growing Role of Parent to the Needy*, 2 J. CENTER FOR FAMILIES, CHILD & CTS. 139 (2000).

<sup>53</sup>*Santosky*, 455 U.S. at 766.

<sup>54</sup>*Id.* at 766-67.

<sup>55</sup>*Id.* at 767.

additional burdens associated with the higher standard were unremarkable.<sup>56</sup>

After completing its analysis under *Matthews v. Eldridge*, the majority noted that most of the states had already determined that the “clear and convincing evidence” standard of proof struck a fair balance between the rights of the natural parents and the state’s legitimate concerns.<sup>57</sup> It then expressly held that a finding of permanent neglect underlying an order to terminate parental rights needed to be made by clear and convincing evidence to satisfy due process.<sup>58</sup>

*D. Dissenting Opinion: The Procedure Used to Arrive at the Permanent Neglect Hearing Justifies Application of the Lower Evidentiary Burden*

Justice Rehnquist took issue with the majority’s reasoning and wrote a dissenting opinion joined by Chief Justice Burger, and Justices White and O’Connor.<sup>59</sup> This minority saw New York’s dependency scheme as an “exhaustive system to assist parents in regaining the custody of their children and to protect parents from the unfair deprivation of their parental rights.”<sup>60</sup> After reviewing the various findings that needed to be made against a parent to even arrive at a “permanent neglect hearing,” and pointing to the efforts required by the state social services agency,<sup>61</sup> the

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<sup>56</sup>*Id.* at 768. The court noted that New York demanded clear and convincing evidence to prove minor traffic infractions and commented: “[w]e cannot believe that it would burden the state unduly to require that its factfinders have the same factual certainty when terminating the parent-child relationship as they must have to suspend a driver’s license.” *Id.*

<sup>57</sup>*Id.* at 769.

<sup>58</sup>*Id.*

<sup>59</sup>*Id.* at 770 (Rehnquist, J., dissenting).

<sup>60</sup>*Id.*

<sup>61</sup> *Id.* at 770-71. The court referred specifically to the facts of the case at bar by noting that [a]fter four and one-half years of involvement with petitioners, more than seven complete hearings, and additional periodic supervision of the state’s rehabilitative efforts, the judge no doubt was intimately familiar with this case and the prospects for petitioners’ rehabilitation. *Id.* at 783.

dissent concluded that it was “inconceivable that these procedures were fundamentally unfair.”<sup>62</sup>

*E. The Majority’s Response to the Theory that the “Package” of Findings Leading Toward the Permanent Neglect Hearing Eliminates Due Process Concerns Relating to the Burden of Proof*

The *Santosky* majority directly addressed the assertion that the procedure leading up to the permanent neglect hearing eliminated any due process concerns associated with the burden of proof.<sup>63</sup> It reasoned that a “retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard,”<sup>64</sup> and expressly rejected the dissent’s implication that the constitutionality of New York’s statutory procedures should be evaluated as a “package.”<sup>65</sup> Using criminal procedure as an example, the majority explained it “would rewrite [its] precedents were [it] to excuse a constitutionally defective standard of proof based on an amorphous assessment of the cumulative effect of state procedures.”<sup>66</sup> Accordingly, the majority concluded that “multiple hearings before termination cannot suffice to protect a natural parent’s fundamental liberty interests if the state is willing to tolerate undue uncertainty in the determination of dispositive facts.”<sup>67</sup>

**III. With the Exception of California, All States Now Apply the Clear and Convincing Burden of Proof to Findings Underlying an Order to Terminate Parental Rights**

When *Santosky* was decided, thirty states, the District of Columbia, and the Virgin Islands already applied the “clear and convincing evidence” standard of proof to parental rights

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<sup>62</sup>*Id.*

<sup>63</sup>*Id.* at 757.

<sup>64</sup>*Id.*

<sup>65</sup>*Id.* at 757, n. 9.

<sup>66</sup>*Id.*

<sup>67</sup>*Id.*

termination hearings.<sup>68</sup> Two states—New Hampshire and Louisiana—required the allegations against a parent in parental rights termination proceedings be supported by evidence beyond a reasonable doubt.<sup>69</sup> Now, over the last thirty years, every state except for California has followed the direction of *Santosky* by enacting or maintaining parental rights termination statutes which apply the clear and convincing evidentiary burden.<sup>70</sup> A review of statutes from

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<sup>68</sup> Fifteen states, required clear and convincing evidence or its equivalent by statute. Fifteen states, the District of Columbia, and the Virgin Islands, required clear and convincing evidence or its equivalent by court decision. *Id.* at 751, n. 3.

<sup>69</sup>*Id.* (citing state v. Robert H., 393 A.2d 1387, 1389 (N.H. 1978), and LA. REV. STAT. ANN. § 13:1603.A (West Supp.1982)).

<sup>70</sup>Alabama, Alaska, Arkansas, Colorado, Connecticut, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, Tennessee, Texas, Virginia, and Wyoming require clear and convincing evidence by statute. ALA. CODE § 26-18-7(a) (2004); ALASKA STAT. § 47.10.088(a) (2004); ARK. CODE ANN. § 9-27-341(b) (2004); COLO. REV. STAT. ANN. § 19-3-602(1) (2004); CONN. GEN. STAT. § 45a-717(g) (2004); FLA. STAT. ANN. § 39.806 (2004); GA. CODE ANN. § 15-11-65 (2004); 705 ILL. COMP. STAT. ANN 405/2-29(2) (2004); IOWA CODE ANN. § 232.116 (West 2004); KY. REV. STAT. ANN. § 625.090 (2004); ME. REV. STAT. ANN. tit. 22, § 4055(1) (2004); MD. CODE ANN., FAM. LAW § 5-323 (2004); MONT. CODE ANN. § 41-3-609 (2004); NEB. REV. STAT. § 43-291 (West 2004); N.H. REV. STAT. ANN. § 170-C:10 (2004); N.M. STAT. ANN. § 32A-4-29(I) (West 2004); N.Y. SOC. SERV. LAW §384(3)(b)(g)(i) (McKinney 1999); N.C. GEN. STAT. ANN. § 7B-1111 (2004); N.D. CENT. CODE § 27-20-44(1) (2004); OHIO REV. CODE ANN. § 2151.414 (2004); OKLA. STAT. ANN. tit. 10, § 7006-1.1(A) (2004); R.I. GEN. LAWS § 15-7-7 (2004); TENN. CODE ANN. § 36-1-113(c) (2004); TEX. FAM. CODE ANN. § 161.001 (2004); VA. CODE ANN. § 16.1-283(A) (2004); WYO. STAT. ANN. § 14-2-309 (2004). Arizona, Delaware, the District of Columbia, Hawaii, Idaho, Indiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Jersey, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, and Wisconsin, require clear and convincing evidence by court decision. ARIZ. REV. STAT. ANN. § 8-533 (2004); DEL. CODE ANN. tit. 13, § 1103(a) (West 2004); Division of Family Services v. Hutton, 765 A.2d 1267 (Del. 2001); D.C. CODE ANN. § 16-2353(a) (2004); In re F.N.B., 1998, 706 A.2d 28 (D.C. 1998); HAW. REV. STAT. § 571-61(b)(1) (2004); In re Doe, 20 P.3d 616 (Haw. 2001); IDAHO CODE § 16-2005 (West 2008); In re Doe, 144 P.3d 597 (Idaho

states that come before California alphabetically provides a representative illustration of the various methods used to integrate the clear and convincing burden of proof:

*Alabama*

In Alabama, a state court may terminate a parent's parental rights at a hearing under Section 26-18-7 of its state Code "if the court finds *from clear and convincing evidence, competent, material, and relevant in nature*, that the parents of a child are unable or unwilling to discharge their responsibilities to and for the child, or that the conduct or condition of the parents is such as to render them unable to properly care for the child and that such conduct or condition is unlikely to change in the foreseeable future."<sup>71</sup> The statute explains that support for this finding can come from evidence that the parent: (1) has abandoned the child; (2) suffers from a mental illness; (3) cruelly abused or tortured the child; (4) was convicted of a felony and imprisoned; (5) cannot explain a serious injury suffered by the child; (6) has not benefitted from the social services agency's efforts to reunify the family;

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2006); IND. CODE ANN. § 31-35-2-4(b)(2) (2004); Matter of K.H., 688 N.E.2d 1303 (Ind. Ct. App. 1997); MASS. GEN. LAWS ANN. ch. 210, § 3(b) (2004); In re Adoption of Rhona 784 N.E.2d 22 (Mass. 2003); MICH. COMP. LAWS ANN. § 710.51 (2004); Matter of Hill, 562 N.W.2d 254 (Mich. Ct. App. 1997); MINN. STAT. ANN. § 260C.301 (2004); In re P.T., 657 N.W.2d 577 (Minn. Ct. App. 2003); MISS. CODE ANN. § 93-15-103(3) (2004); In re Adoption of Minor Child, 931 So.2d 566 (Miss. 2006); MO. ANN. STAT. § 211.447 (2004); In re C.F.C. 156 S.W.3d 422 (Mo. Ct. App. 2005); NEV. REV. STAT. Ann. § 128.105 (2004); In re Parental Rights of J.L.N., 55 P.3d 955 (Nev. 2002); N.J. STAT. ANN. § 9:2-19 (2004); 23 PA. CONS. STAT. ANN. § 2511 (2004); In re S.D.T., Jr., 934 A.2d 703 (Pa. Super Ct. 2007); S.C. Code Ann. § 20-7-1572 (2004); S.D. CODIFIED LAWS § 26-8A-26 (2004); Matter of N.S., 474 N.W.2d 96 (S.D. 1991); UTAH CODE ANN. § 78-3a-407 (West 2008); state ex rel. B.M.S., 65 P.3d 639 (Utah Ct. App. 2003); VT. STAT. ANN. tit. 33, § 5531 (2004); In re M.B., 647 A.2d 1001 (Vt. 1994); WASH. REV. CODE § 13.34.180 (2004); In re Welfare of C.B. 143 P.3d 846 (Wash. Ct. App. 2006); W. VA. CODE § 49-6-5(a) (2004); In re Samantha M. 518 S.E.2d 387 (W. Va. 1999); WIS. STAT. ANN. § 48.415 (2004); Interest of Kody D.V. 548 N.W.2d 837 (Wis. Ct. App. 1996). See also CAL. WELF. & INST. CODE § 366.26(c)(1) (2008) (discussed in depth in Part IV(B), *infra*).

<sup>71</sup>ALA. CODE § 26-18-7(a) (2004).

(7) has been convicted of murder or serious physical abuse of a sibling of the child; or (8) has had parental rights to a sibling of the child terminated.<sup>72</sup>

### *Alaska*

In Alaska, a state court may terminate parental rights at a hearing under Section 47.10.088<sup>73</sup> of its compiled state statutes where the court finds, *by clear and convincing evidence*, that: (1) the child has been abused or neglected;<sup>74</sup> (2) the parent has not remedied the conduct or conditions in the home that place the child at substantial risk of harm; or has failed, within a reasonable time, to remedy the conduct or conditions in the home that place the child in substantial risk so that returning the child to the parent would place the child at substantial risk of physical or mental injury; and (3) the social service agency has provided the parent with reasonable reunification services.<sup>75</sup>

### *Arizona*

The Arizona statute governing the termination of parental rights also specifically lists a number of allegations “sufficient to justify the termination of parent-child relationship.”<sup>76</sup> They include: (1) abandonment; (2) abuse or willful neglect of a child; (3) mental illness or drug abuse demonstrated over a “prolonged” period; (4) conviction of a felony proving unfitness; (5) failure to file a paternity action within thirty days of learning that a child’s mother has consented to adoption; (6) consent to adoption; (7) failure to

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<sup>72</sup>*Id.*

<sup>73</sup>ALASKA STAT. § 47.10.088(a) (2004).

<sup>74</sup>Section 47.10.011 of the compiled Alaska statutes allows the court to find a child “in need of aid” and take appropriate action—including temporarily removing the minor from parental care—when the child is found to fall within one of several definitions of abuse and neglect outlined in the Section. *Id.* at § 47.10.011.

<sup>75</sup>Section 47.10.086 of the compiled Alaska statutes implements the AACWA’s direction to make reasonable efforts to reunify the family before seeking permanency by way of adoption or any other form of permanent placement outside of parental care. *Id.* at § 47.10.086.

<sup>76</sup>ARIZ. REV. STAT. ANN. § 8-533(B) (2004).

file a notice of paternity; (8) temporary loss of custody of a child followed by a failure to address the problems which led to removal for at least nine months; (9) parent's whereabouts unknown for at least three months; and (10) parental rights to a sibling terminated within the last two years accompanied by a failure to address the problems which led to the termination.

Although the statute itself does not specify a burden of proof, Arizona case law clarifies that these allegations must be established by *clear and convincing evidence* to support an order to terminate parental rights.<sup>77</sup>

### Arkansas

Under Section 9-27-341 of Arkansas' state Code, a state court must make two distinct findings—both by *clear and convincing evidence*—before it may “forever terminate parental rights.”<sup>78</sup> First, the social services agency must establish that termination of parental rights serves the best interest of the child.<sup>79</sup> If the best interests test is met, the court must then find support for one or more of the following allegations: (1) the minor was temporarily removed from the care of the parent and has continued placed outside of parental care despite meaningful efforts for the social services agency aimed at rehabilitation and reunification; (2) the presumptive father is not the biological father of the minor and the minor's best interests are served by termination; (3) the parent has abandoned the minor; (4) the parent has consented to adoption; (5) the court has taken custody of a sibling of the child based on neglect or abuse that could endanger the life of the child or sexual abuse perpetrated by the parent; (6) the parent has manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate the parent's circumstances that prevent return of the juvenile to the custody

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<sup>77</sup>See *Matter of Appeal in Yuma County*, 833 P.2d 721 (Ariz. Ct. App. 1992), and *Matter of Maricopa County, Juvenile Action No. JA 33794*, 828 P.2d 1231 (Ariz. Ct. App. 1991) (both holding that conditions warranting severance of parent-child relationship must be proven by clear and convincing evidence).

<sup>78</sup>ARK. CODE ANN. § 9-27-341(b)(1)(B)(3) (2004).

<sup>79</sup>*Id.* § 9-27-341(b)(1)(B)(3)(A).

of the parent; or (7) the parent is sentenced in a criminal proceeding for a period of time that would constitute a substantial period of the child's life.<sup>80</sup>

#### *Other States*

The parental rights termination statutes in states that happen to follow California alphabetically are not meaningfully different from the statutes reviewed above.<sup>81</sup> Although the organization of state statutory schemes varies widely, every state except for California ultimately requires clear and convincing support for the findings of parental unfitness which allow a court to move toward the termination of parental rights.

#### **IV. California Has Moved Away from the Clear and Convincing Evidence Requirement and Now Applies the Preponderance of Evidence Burden of Proof to Findings which Allow the Court to Proceed Toward the Termination of Parental Rights**

While other states have uniformly adopted the clear and convincing evidentiary requirement in parental rights termination proceedings, California has, rather surprisingly, moved in the opposite direction. When *Santosky* was decided, California was among the majority of states that already applied the clear and convincing burden of proof to parental rights termination proceedings.<sup>82</sup> Then, in 1987, the California Legislature's enactment of Senate Bill No. 243 effectively *lowered* the burden of proof.<sup>83</sup> Under what are now Sections 366.21 and 366.22 of the California's Welfare and Institutions Code, the findings against a parent which allow the court to move toward the termination of parental

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<sup>80</sup>ARK. CODE ANN. § 9-27-341(b) (2004).

<sup>81</sup>See *supra*, note 70.

<sup>82</sup>See *Santosky v. Kramer*, 455 U.S. 745, 751, n. 3 (1982) (citing former CAL. CIV. CODE ANN. § 232(a)(7) (West Supp.1982)).

<sup>83</sup>See *Cynthia D. v. Superior Court*, 5 Cal.4th 242, 247 (1993) (citing stats.1987, ch. 1485, p. 5598).

rights are made only by a preponderance of evidence a standard found unacceptable to the *Santosky* court.<sup>84</sup>

A. *Pre-Senate Bill No. 243: The Termination of Parental Rights through Civil Code, Section 232*

In 1982, the California Legislature enacted Senate Bill No. 14.<sup>85</sup> The bill established a structured framework for the protection of abused, neglected, and abandoned children, and outlined the procedure for removing a minor from parental care and terminating parental rights.<sup>86</sup> Specifically, the bill required California state courts be presented with clear and convincing evidence of detriment before even temporarily removing a minor from parental care.<sup>87</sup> When a minor was removed, the bill required courts to implement social services aimed at reunifying the family,<sup>88</sup> and to hold review hearings evaluating the parent's progress toward reunification every six months.<sup>89</sup> Finally, if a temporarily removed child could not be returned to a parent within twelve to eighteen months, the bill required the court to hold a permanency planning hearing to select one of three possible permanent plans: adoption, guardianship, or long-term foster care.<sup>90</sup>

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<sup>84</sup>CAL. WELF. & INST. CODE §§ 366.21 & 366.22; *see also* CAL. WELF & INST. CODE § 366.26; *see also* in Part IV(c), *infra*.

<sup>85</sup>Cynthia D., 5 Cal.4th at 246 (citing stats. 1982, ch. 978, p. 3525). *See also* Everett Skillman, *The Adoption Assistance and Child Welfare Act and the Minor's Civil Rights Remedies*, 14 TRINITY L. REV. 1, 11-12 (discussing California's commitment to the AACWA federal grant program). A complete discussion of the influence of the AACWA on state proceedings aimed at terminating parental rights is included in Part VI(a), *infra*.

<sup>86</sup>Cynthia D., 5 Cal.4th at 246 (citing stats. 1982, ch. 978, p. 3525). For a complete discussion of the procedures applied to child welfare proceedings under Senate Bill No. 14, *see* *In re Johnny M.*, 279 Cal.Rptr 693, § 2(a) (Cal. Ct. App. 1991).

<sup>87</sup>Cynthia D., 5 Cal.4th at 246 (1993) (citing CAL. WELF. & INST. CODE § 361).

<sup>88</sup>*Id.* (citing former CAL. WELF. & INST. CODE § 361, subd. (e), now § 361.5).

<sup>89</sup>*Id.* (citing former CAL. WELF. & INST. CODE §§ 364, 366, now §§ 366.21, 366.22).

<sup>90</sup>*Id.* (citing former CAL. WELF. & INST. CODE § 366.25).

If adoption was selected, Senate Bill No. 14 directed that a separate proceeding in the superior court could be brought pursuant to Civil Code Section 232 to implement the plan.<sup>91</sup> Section 232 listed a number of parental inadequacies, which, *if proved by clear and convincing evidence*, allowed the court to terminate parental rights.<sup>92</sup> Specifically, an order terminating parental rights could be based on clear and convincing evidence showing a parent had: (1) abandoned the child;<sup>93</sup> (2) neglected or abused the child to a point requiring court intervention while simultaneously being deprived from custody of the child for at least one year;<sup>94</sup> (3) struggled with a drug or alcohol addiction to a point requiring court intervention while being deprived from custody of the child for at least one year;<sup>95</sup> (4) been convicted of a felony of such a nature so as to prove unfitness to have the future custody and control of the child;<sup>96</sup> (5) been declared to be developmentally disabled or mentally ill and unable to support or control the child in a proper manner;<sup>97</sup> or (6) failed to reunify with the minor for at least one year despite the provision of reasonable reunification services.<sup>98</sup>

*B. Post-Senate Bill No. 243: The Termination of Parental Rights through Welfare and Institutions Code, Section 366.26*

The procedure for terminating parental rights under

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<sup>91</sup>*Id.* (citing former CAL. CIV. CODE § 232).

<sup>92</sup>*See* *In re Angela P.*, 171 Cal. Rptr. 908 (Cal. 1981) (holding that, although Section 232 did not specify a burden of proof, the findings under the Section needed to be made by clear and convincing evidence); *see also* CAL. CIV. CODE § 232 (now codified at CAL. FAM. CODE § 7821).

<sup>93</sup>CAL. CIV. CODE § 232, subd. (a)(1) (now codified at CAL. FAM. CODE § 7822).

<sup>94</sup>CAL. CIV. CODE § 232, subd. (a)(2) (now codified at CAL. FAM. CODE § 7823).

<sup>95</sup>CAL. CIV. CODE § 232, subd. (a)(3) (now codified at CAL. FAM. CODE § 7824).

<sup>96</sup>CAL CIV. CODE § 232, subd. (a)(4) (now codified at CAL. FAM. CODE § 7825).

<sup>97</sup>CAL CIV. CODE § 232, subd. (a)(5) & (6) (now codified at CAL. FAM. CODE §§ 7826, 7827).

<sup>98</sup>CAL CIV. CODE § 232, subd. (a)(7) (now codified at CAL. FAM. CODE § 7828).

Civil Code Section 232 complied with the United States Supreme Court's direction in *Santosky*. However, the California Legislature felt that the framework established by Senate Bill No. 14 did not do enough to achieve the goal of quickly providing minors with permanency when reunification efforts failed.<sup>99</sup> Accordingly, it established a task force to review and coordinate child abuse reporting statutes, child welfare services, and dependency court proceedings.<sup>100</sup> In 1987, based on the work and recommendations of the task force, the Legislature passed Senate Bill No. 243 as a comprehensive revision of laws affecting children.<sup>101</sup>

Under Senate Bill No. 243—which was effective at the time *Cynthia D.* was decided, and remains in effect today—the procedure for terminating parental rights begins with Section 300 of California's Welfare and Institutions Code. That Section lists ten specific forms of parental neglect and abuse which bring a minor within the jurisdiction of the juvenile court.<sup>102</sup> Under Section 300, a peace officer or social worker who has reason to believe that a child falls within the definitions set forth in Section 300 may remove that child from a parent's physical custody.<sup>103</sup> After removal, a petition

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<sup>99</sup>*Cynthia D. v. Superior Court*, 5 Cal.4th 242, 247 (1993) (“[W]hen adoption was selected as the permanent plan, months, or even years could pass before the separate termination proceeding under Civil Code Section 232 would be completed”); see also *In re Micah S.*, 243 Cal.Rptr. 756, 761 (Cal. Ct. App. 1988) (Brauer, J., concurring) (“[T]he passage of five or more years from initial removal of the child from its home to ultimate resolution and repose [was] by no means unusual”).

<sup>100</sup>*Cynthia D.*, 5 Cal.4th at 247 (citing stats. 1986, ch. 1122, p. 3972). The task force was comprised of a broad-based group of experts appointed by the Senate Select Committee on Children and Youth. *Id.*

<sup>101</sup>*Id.* (citing stats. 1987, ch. 1485, p. 5598, and SEN. SELECT COM. ON CHILDREN & YOUTH, SB 1195 TASK FORCE REP. ON CHILD ABUSE REPORTING LAWS, JUVENILE COURT DEPENDENCY STATUTES, AND CHILD WELFARE SERVICES (1988)).

<sup>102</sup>CAL. WELF. & INST. CODE § 300; see *In re Marilyn H.*, 19 Cal.Rptr.2d 544, 548 (Cal. 1993) (explaining that one of the major changes affected by Senate Bill No. 243 was the replacement of the vague jurisdictional language of Section 300 with 10 specific grounds for declaring a child a dependent of the juvenile court).

<sup>103</sup>CAL. WELF. & INST. CODE §§ 305 & 306.

must be filed with the juvenile court within 48 hours, and a detention hearing must be held no later than the next judicial day.<sup>104</sup> At the detention hearing, the child must be released back into parental care unless the state Social Services Agency makes a prima facie showing that continuance in the parent's home is contrary to the child's welfare.<sup>105</sup> The court is also required to find that the social services agency made reasonable efforts to prevent or eliminate the need for removal.<sup>106</sup>

After the detention hearing, the matter proceeds to a jurisdictional hearing where the court determines whether the allegations in the social services agency's Section 300 petition are true.<sup>107</sup> If the agency is able to prove its allegations by a preponderance of evidence, the court assumes jurisdiction over the child, and the matter proceeds to a dispositional hearing where the court essentially decides how to solve the problems that have required court intervention.<sup>108</sup> The main questions addressed at the dispositional hearing are: (1) does the minor need to continue to be removed from parental care?;<sup>109</sup> and (2) exactly what efforts need to be made to reestablish permanency and stability in the minor's life?<sup>110</sup>

As was the case before the implementation of Senate Bill No. 243, the court is only permitted to remove a minor from parental care if it finds, by clear and convincing evidence, that "there is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removal from the parent's or guardian's physical custody."<sup>111</sup> Moreover, because of the

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<sup>104</sup>*Id.* § 313; *see also* Cal. Rules of Ct., rule 5.667(d).

<sup>105</sup>CAL. WELF. & INST. CODE § 319, subd. (b).

<sup>106</sup>*Id.* § 319, subd. (d)(1).

<sup>107</sup>*Id.* § 355, subd. (a).

<sup>108</sup>*Id.* §§ 358, subd. (a) & 361, subd. (c).

<sup>109</sup>*Id.* § 361.5.

<sup>110</sup>*Id.* § 361, subd. (c).

<sup>111</sup>*Id.* § 361, subd. (a); *see also* Cal. Rules of Ct., rule 5.695(c).

presumed benefit of maintaining the family intact,<sup>112</sup> the juvenile court is, in most cases, required to order the social services agency to provide the parents with social services aimed at family reunification.<sup>113</sup>

If reunification services are ordered, parents of dependent children are generally entitled to a minimum of twelve months of reunification services,<sup>114</sup> and the juvenile court is required to review the case at least once every six months.<sup>115</sup> At the review hearings—held under Welfare and Institutions Code, Sections 366.21 & 366.22—there is a presumption that the minors will be returned to parental care.<sup>116</sup> Continued removal is only justified if the state social services agency can show, *by a preponderance of evidence*, that the return of the child to his parents creates a substantial risk of detriment to the “safety, protection, or physical well being of the child.”<sup>117</sup>

The major difference between the statutory scheme applied before Senate Bill No. 243 and the scheme applied after is found in the procedure for moving toward a permanent plan once reunification efforts have failed. Senate Bill No. 243 eliminated the need to bring separate proceedings under Civil Code Section 232 to terminate parental rights and free a

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<sup>112</sup>See *In re Ethan N.*, 18 Cal.Rptr 3d 504 (Cal. Ct. App. 2004) (explaining that the requirement that the juvenile court order reunification services for a child whenever the child is removed from parental custody implements the law’s strong preference for maintaining the family unit whenever possible).

<sup>113</sup>CAL. WELF. & INST. CODE § 361.5, subd. (a). An exception to the provision of reunification services exists under Section 361.5, subdivision (b), where the court determines, by clear and convincing evidence, that one of several enumerated conditions made the parent’s ability to benefit from reunification services unlikely or impossible. *Id.* at § 361.5, subd. (a).

<sup>114</sup>CAL. WELF. & INST. CODE §§ 361.5, subd. (a)(1).

<sup>115</sup>*Id.* § 366, subd. (a).

<sup>116</sup>*Id.* §§ 366.21, subd. (e), 366.21, subd. (f), & 366.22, subd. (a); *see also* *Katie V. v. Superior Court* 30 Cal.Rptr.3d 504 (Cal. Ct. App. 2005) (“There is a presumption in child dependency proceedings that the child will be returned to parental custody at the 6-month and 12-month review hearings unless the court makes a detriment finding.”).

<sup>117</sup>CAL. WELF. & INST. CODE §§ 366.21, subd. (e), 366.21, subd. (f), & 366.22, subd. (a);

child for adoption.<sup>118</sup> Instead, the bill created a new parental rights termination statute under Welfare and Institutions Code, Section 366.26.<sup>119</sup> Now, at a twelve month review hearing where the court finds a minor cannot safely be returned home, the court is allowed to terminate reunification services and immediately place the minor on the path toward adoption under Section 366.26.<sup>120</sup> The court has discretion to extend reunification services if it finds a substantial probability that the minor can be returned to parental care within six months.<sup>121</sup> However, if a *preponderance of evidence* still exists to support allegations that the minor cannot be returned home safely at the eighteen-month review hearing, the court generally has no choice but to terminate reunification services and schedule a Section 366.26 permanency planning hearing.<sup>122</sup>

At the Section 366.26 hearing, the court only needs to find that it is likely the minor will be adopted, and that there has been a previous determination that reunification services should be terminated.<sup>123</sup> Unlike the parental rights termination proceedings under Civil Code Section 232, the parent's interest in the care and custody of the minor is no longer at issue at a Section 366.26 hearing.<sup>124</sup> Accordingly, the neglectful or abusive conduct which leads to the Section 366.26 termination hearing is not actually considered at the

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<sup>118</sup>Cynthia D. v. Superior Court, 5 Cal.4th 242, 247 (1993) (citing stats. 1987, ch. 1485, p. 5598).

<sup>119</sup>CAL. WELF. & INST. CODE § 366.26.

<sup>120</sup>*Id.* § 366.21, subd. (g)(2). Again, this is how a parent *generally* arrives at a parental rights termination hearing. Parents are not necessarily provided with twelve months of reunification services before the court may move toward the termination of parental rights. *See* Part VI(C)(1), *infra*.

<sup>121</sup>CAL. WELF. & INST. CODE § 366.21, subd. (g)(1).

<sup>122</sup>*Id.* § 366.22, subd. (a); *but see* In re Elizabeth R. 42 Cal.Rptr.2d 200, 214-216 (Cal. Ct. App. 1995) (holding that Welfare and Institutions Code, Section 352 may be utilized at an eighteen-month review hearing in rare instances in which the juvenile court determines the best interests of the child would be served by such action).

<sup>123</sup>CAL. WELF. & INST. CODE § 366.26.

<sup>124</sup>*Id.*; *see also* In re Sarah C., 11 Cal.Rptr.2d 414, 422 (Cal. Ct. App. 1992).

termination hearing itself.<sup>125</sup>

*C. Under the Scheme Established by Senate Bill No. 243, the Findings Underlying an Order to Terminate Parental Rights are Made at the Review Hearing where Reunification Services are Terminated and Only Need to be Supported by a Preponderance of Evidence*

Because California makes no findings against a parent at the final termination hearing under Section 366.26 it is a bit difficult to determine exactly what findings underlie the order terminating parental rights.<sup>126</sup> However, the task force that developed California's current statutory scheme named the final review hearing where reunification services are terminated and a Section 366.26 hearing is set as the last substantive evaluation necessary to support a parental rights termination order.<sup>127</sup> And several California courts now appear to recognize that the final finding that it would be detrimental to return a minor to parental custody essentially frees the child for adoption.<sup>128</sup> In many ways, the final review hearing mirrors the fact-finding portion of the bifurcated permanent neglect hearing reviewed by *Santosky*.<sup>129</sup>

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<sup>125</sup> In re Sarah C., 11 Cal.Rptr. 2d at 422 (a finding of parental unfitness is not part of the section 366.26 hearing).

<sup>126</sup> See In re Michaela C., 3 Cal.Rptr.2d 869, 873 (Cal. Ct. App. 1992) (noting that Section 366.26 is not a "model of clarity").

<sup>127</sup> See Cynthia D. v. Superior Court, 5 Cal.4th 242, 259 (1993) (citing SEN. SELECT COM. ON CHILDREN & YOUTH, SB 1195 TASK FORCE REP. ON CHILD ABUSE REPORTING LAWS, JUVENILE COURT DEPENDENCY STATUTES, AND CHILD WELFARE SERVICES 11 (1988) ("[T]hus, so long as the minor child is likely to be adopted, the actual court order terminating parental rights is essentially 'automatic' at the later Section 366.26 hearing. As the Task Force Report points out, the 'critical decision regarding parental rights' under the child dependency scheme is not made when the juvenile court actually terminates parental rights at the Section 366.26 hearing, but earlier, at the 12- or 18-month status review hearing, when the court decides that "the minor cannot be returned home and that reunification efforts should not be pursued.").

<sup>128</sup> See, e.g., In re James Q., 96 Cal.Rptr.2d 505, 600 (Cal. Ct. App. 2000) (noting that findings made at review hearings often form the basis of the termination order issued at a Section 366.26 hearing).

<sup>129</sup> Compare CAL. WELF. & INST. CODE §§ 366.21 & 366.22, with N.Y. FAM. CT. ACT § 614.1.

However, unlike the post-*Santosky* New York statute governing permanent neglect proceedings, the finding that a child cannot be safely returned to parental care at a review hearing under Welfare and Institutions Code section 366.21 or 366.22 only needs to be supported by a preponderance of evidence.<sup>130</sup>

### **V. *Cynthia D. v. Superior Court*: The California Supreme Court Distinguishes *Santosky***

Soon after the statutory modifications of Senate Bill No. 243 went into effect, California faced a challenge to the constitutionality of the state's procedure for terminating parental rights by way of *Cynthia D. v. Superior Court*.<sup>131</sup> California case law clearly recognizes the gravity of an order terminating parental rights.<sup>132</sup> However, as discussed below, the *Cynthia D.* court upheld termination orders under the new statutory scheme as constitutionally valid. In an opinion that seems almost intentionally patterned after the position of the dissent in *Santosky*, the *Cynthia D.* court held that the process leading up to the termination hearing under Welfare and Institutions Code Section 366.26 justified California's application of a lower burden of proof.<sup>133</sup>

#### *A. Procedural History*

Cynthia D. and her daughter, Sarah D., came to the attention of the California courts in 1989 when the San Diego Department of Social Services filed a dependency petition in the juvenile court on Sarah's behalf. The petition alleged that Cynthia was unable to protect the minor from molestation and non-accidental injury, and that the mother used illegal drugs.<sup>134</sup> The matter moved through detention, jurisdiction,

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<sup>130</sup>CAL. WELF. & INST. CODE §§ 366.21, subd. (f) & 366.22, subd. (a).

<sup>131</sup>*Cynthia D.*, 5 Cal.4th AT 249.

<sup>132</sup>*In re Amanda G.*, 231 Cal.Rptr. 372, 373 (Cal. Ct. App. 1986) (citing *Lassiter v. North Carolina*, 452 U.S. 18, 27 (1981) (“[A] parent’s interest in the accuracy of the decision to terminate his or her parental status is . . . a commanding one.”)).

<sup>133</sup>*Cynthia D.*, 5 Cal.4th at 248-254.

<sup>134</sup>*Id.* at 245.

and disposition hearings where Sarah was found to be described by Section 300, subdivision (b), and declared a dependent child of the court.<sup>135</sup> Sarah was temporarily removed from parental care and eventually placed with a non-relative foster family.<sup>136</sup>

The matter then proceeded through eighteen-months of reunification efforts and three review hearings.<sup>137</sup> At the eighteen-month review hearing, the court found, as it had twice before, that *a preponderance of evidence* showed that returning Sarah to Cynthia's custody would be detrimental to the minor.<sup>138</sup> The court then set the matter for a selection and implementation hearing under Welfare and Institutions Code, Section 366.26.<sup>139</sup>

Before the 366.26 hearing came on calendar, Cynthia filed a writ of prohibition seeking to prevent the juvenile court from taking further action to terminate parental rights.<sup>140</sup> Cynthia claimed that California's dependency scheme conflicted with the holding in *Santosky*, and violated her right to due process by allowing her parental rights to be terminated based on findings of detriment supported only by a preponderance of evidence.<sup>141</sup> The Court of Appeal denied relief,<sup>142</sup> and the California Supreme Court granted review.<sup>143</sup>

*B. Majority Opinion: No Finding of Parental Unfitness is Required at the Section 366.26 Hearing because California's Procedures for Terminating Parental Rights Provide More Protection to Parents than the Procedures Reviewed in Santosky*

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<sup>135</sup>*Id.*

<sup>136</sup>*Id.*

<sup>137</sup>*Id.*

<sup>138</sup>*Id.*

<sup>139</sup>*Id.*

<sup>140</sup>*Id.* at 246.

<sup>141</sup>*Id.* at 263 (Kennard, J., dissenting) (Cynthia's "argument is that a higher standard of proof by clear and convincing evidence must be applied to the dependency court's final decision not to return a child to parental custody.").

<sup>142</sup>Cynthia D. v. Superior Court, 4 Cal.Rptr. 909 (Cal. Ct. App. 1992)

<sup>143</sup>Cynthia D. v. Superior Court, 5 Cal.4th 242, 246 (1993).

After a detailed review of California's child welfare and parental rights termination statutes, the California Supreme Court distinguished California's procedure for terminating parental rights from the New York procedure reviewed in *Santosky*.<sup>144</sup> The court reasoned that California's hearing to terminate parental rights under Section 366.26 was different from New York's permanent neglect hearing because, "by the time dependency proceedings have reached the stage of a Section 366.26 hearing, there h[ad] been multiple and specific findings of parental unfitness."<sup>145</sup> The court concluded that this "difference" pushed the *Santosky* court's *Mathews v. Eldridge* analysis off point, and did not compel the use of the clear and convincing burden of proof in California.<sup>146</sup>

Performing its own *Mathews v. Eldridge* analysis, the *Cynthia D.* court held that the findings made through the detention, jurisdiction, disposition, and reunification phases of the dependency process defeated the presumption that a minor who has been removed from parental care shares an interest in reunification.<sup>147</sup> The court explained that, by the time of the Section 366.26 hearing, "the interests of the parent and the child had diverged."<sup>148</sup> Once diverged, the interests of the minor in "the opportunity to experience a stable parent-child relationship" outweighed the parent's "interest in maintaining familial bonds."<sup>149</sup>

On the second *Mathews* prong, the court reasoned that the process used to arrive at the Section 366.26 hearing "substantially diminished" the risk of erroneous fact-finding because it emphasized the preservation of the family whenever possible, and provided the petitioning agency with

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<sup>144</sup>*Id.* at 248-254.

<sup>145</sup>*Id.* For an alternative review of the *Cynthia D.* decision, see Jennifer L. Spaziano, *The Preponderance of Evidence Standard of Proof Utilized when Terminating Parental Rights Under California Child Dependency Statutes Does not Violate Due Process: Cynthia D. v. Superior Court*, 21 PEPP. L. REV. 1493 (1994).

<sup>146</sup>*Cynthia D.*, 5 Cal.4th at 248-254.

<sup>147</sup>*Id.*

<sup>148</sup>*Id.*

<sup>149</sup>*Id.* at 254.

“diminished power to shape the historical events that form the basis for termination.”<sup>150</sup> The court asserted that the risk of error was also diminished because “nowhere in [the] scheme ha[d] the [California] Legislature invited value judgments comparable to those described in *Santosky*.”<sup>151</sup> Finally, the court asserted that California’s statutes leveled the playing field between the parent and the state by providing the parent with legal counsel.<sup>152</sup>

Addressing the third *Mathews* factor, the *Cynthia D.* court again reasoned that, “in contrast to [the statutes reviewed in] *Santosky v. Kramer*, [California’s parental rights termination] statutes endeavored to preserve the parent-child relationship and to reduce the risk of erroneous fact-finding in so many different ways that it would be fanciful to think that these state interests require what in most cases would be a sixth inquiry into whether the severance of parental ties would be detrimental.”<sup>153</sup> The court held that “the number and quality of the judicial findings that are necessary preconditions to termination convey very powerfully to the fact finder the subjective certainty about parental unfitness and detriment before the court may even consider ending the relationship between parent and child.”<sup>154</sup> Accordingly, the *Cynthia D.* court determined that the *parens patriae* interest of the state favoring preservation of familial interests had also been extinguished by the time termination of parental rights was contemplated under the California scheme.<sup>155</sup>

### C. Justice Kennard’s Dissenting Opinion

Justice Kennard submitted the only dissenting opinion in *Cynthia D.*<sup>156</sup> She argued that the majority was unfairly focusing on the Section 366.26 hearing in its *Mathews v.*

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<sup>150</sup> *Id.* at 255.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 256.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 263 (Kennard J., dissenting.).

Eldridge analysis.<sup>157</sup> Justice Kennard pointed out that the Task Force that prepared Senate Bill No. 243 named the final review hearing as the “critical decision” in terminating parental rights.<sup>158</sup> By ignoring the decision critical to terminating parental rights, and instead focusing on a later phase of the dependency procedures—the Section 366.26 “selection and implementation hearing”—Kennard concluded that the majority had skewed its evaluation of the three-factor test outlined in *Mathews v. Eldridge*.<sup>159</sup>

#### D. *Cynthia D. Remains Good Law*

After the *Cynthia D.* decision was issued, Cynthia filed a Petition for Certiorari with the United States Supreme Court.<sup>160</sup> The petition was denied.<sup>161</sup> Since *Cynthia D.*, a handful of similar challenges to the constitutionality of the California’s procedure for terminating parental rights have also failed and *Cynthia D.* has remained “good law” for approximately fifteen years.<sup>162</sup>

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 262-263.

<sup>159</sup> *Id.* For an article analyzing, and ultimately agreeing with, Justice Kennard’s dissenting opinion, see Linda Lee Reimer Stevenson, *Fair Play or a Stacked Deck?: In Search of the Proper Burden of Proof in Dependency Hearings*, 26 PEPP. L. REV. 613 (1999).

<sup>160</sup> *Dobles v. San Diego Department of Social Services*, 510 U.S. 1178 (1994).

<sup>161</sup> *Id.*

<sup>162</sup> *See, e.g.*, *In re Brittany M.* 24 Cal.Rptr.2d 57 (Cal. Ct. App. 1993) (holding that Section 366.26 does not violate a parent’s right to due process in failing to mandate and express finding of parental unfitness because the detriment findings made at each review hearing preceding the Section 366.26 hearing sufficiently establish parental unfitness and satisfy due process requirements); *see, e.g.*, *In re Matthew C.* 24 Cal.Rptr.2d 765, 767, n.4 (Cal. Ct. App. 1993) (same); *see also* *In re Amanda D.* 64 Cal.Rptr.2d 108, 111 (Cal. Ct. App. 1997) (holding that *Cynthia D.* is “well established law”); *see also* *In re Vanessa W.*, 21 Cal.Rptr.2d 633, 637 (Cal. Ct. App. 1993) (holding that the fact that Welfare and Institutions Code, Section 366.2,6 does not require present evidence of parental unfitness by clear and convincing evidence like Civil Code Section 232 does not deny a parent in a Section 366.26 case equal protection under the law).

## VI. California's Procedure for Terminating Parental Rights is Unconstitutional

The procedure used to terminate parental rights in California, as interpreted by *Cynthia D. v. Superior Court*, is unconstitutional. This is so for three reasons. First, the procedure leading up to the final parental rights termination hearing is not meaningfully different from the procedures applied in other states, or even from the New York scheme reviewed in *Santosky*. Accordingly, by refusing to follow the direction in *Santosky* based on the "unique" procedure leading up to the final termination hearing, the *Cynthia D.* decision unconstitutionally fails to comply with controlling precedent. Second, even if California's parental rights termination scheme was unique, the *Santosky* court expressly rejected Cynthia D.'s suggestion that a package of findings can substitute for a lower burden of proof. Again, the California Supreme Court's failure to recognize and follow the United States Supreme Court's direction has allowed parental rights termination procedures which do not conform with established constitutional requirements to be applied in the state. Finally, even ignoring the precedent established by the United States Supreme Court, the application of the package theory in California has proven to provide parents incomplete due process protection in parental rights termination proceedings, which do not always follow the track discussed by the Cynthia D. court and which never directly address a parent's "parental fitness."

### A. *California's Procedure for Terminating Parental Rights is not Unique*

The *Cynthia D.* decision is dedicated, in large part, to an assertion that California's parental rights termination procedure is unique.<sup>163</sup> This is not surprising as the legitimacy of the decision depends on a finding that *Santosky* is not directly applicable in California.<sup>164</sup> However, a detailed

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<sup>163</sup>*Cynthia D. v. Superior Court*, 5 Cal.4th 242, 249-254 (1993).

<sup>164</sup>*Id.*; see Spaziano, *supra* note 145, at 1493 (discussing recently published *Cynthia D.* decision).

review of the “differences” between the California termination procedure and the procedures applied in New York and other states calls the strength of the “California is different” *Cynthia D.* premise into question. Like all states, California’s procedure for terminating parental rights is heavily influenced by the Adoption Assistance and Child Welfare Act of 1980, which conditions federal funding on compliance with federally mandated parental rights termination procedures.<sup>165</sup> Even when lined up against the New York statutes analyzed in *Santosky*, the *Cynthia D.* court’s contention that California parents are uniquely situated when they arrive at a parental rights termination hearing reveals itself to be remarkably exaggerated.

1. *The Influence of the Adoption Assistance and Child Welfare Act of 1980 on Modern State Parental Rights Termination Procedures*

In the mid-1970’s, the United States Congress came to believe that state child protection and foster care agencies were separating children from their parents too hastily, and that the separated children were suffering from a lack of stability as a result.<sup>166</sup> To address this problem, Congress enacted the AACWA, which created a contingent funding program aimed at reform.<sup>167</sup> The goal of the AACWA was simple. Congress wanted to “encourage greater efforts to find permanent homes for children either by making it possible for

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<sup>165</sup>The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272 (now codified at 42 U.S.C. §§ 670-676 (2004)).

<sup>166</sup>These concerns developed on the heels of the enactment of the Child Abuse Prevention and Treatment Act (“CAPTA”), which delineated the state’s authority to intervene in family affairs in order to protect children from neglect and abuse. Pub. L. No. 93-273 (codified at 43 U.S.C. §§ 5101-5119, amended and reenacted through the Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36). For a complete discussion of the history of child-welfare law in the United States, see CHILD WELFARE LAW AND PRACTICE, REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN AMUSE, NEGLECT, AND DEPENDENCY CASES ch. 7 (Marvin Ventrell & Donald N. Duquette, eds. 2005).

<sup>167</sup> 42 U.S.C. §§ 670-676 (2004).

them to return to their own families or by placing them in adoptive homes.”<sup>168</sup>

The process established to qualify for federal funding was also straightforward. States were simply required to develop child welfare and foster care programming consistent with three primary directives.<sup>169</sup> First, the state was required to make “reasonable efforts” to avoid removing children from their parents.<sup>170</sup> Second, if children could not be safely left in the care of their parents, the state was required to make “reasonable efforts” to reunify the children with their parents.<sup>171</sup> And third, if reunification efforts failed, the state was required to move children swiftly toward permanent placement (i.e. adoption).<sup>172</sup>

The influence of the AACWA has caused all states to gravitate toward a very similar procedure in child welfare proceedings. In fact, the AACWA and other modern federal child welfare legislation has resulted such pronounced uniformity of dependency laws between states that some commentators fear it has stifled innovation.<sup>173</sup> Currently, all fifty states have enacted legislation to comply with the AACWA’s three primary directives.<sup>174</sup> No state allows for the

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<sup>168</sup>*Id.*; see also S. Rep. No. 96-336, at 1 (1979).

<sup>169</sup> 42 U.S.C. §§ 670-676 (2004).

<sup>170</sup>*Id.*

<sup>171</sup>*Id.* Specifically, the AACWA provided that: “[i]n order for a state to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . . provides that . . . reasonable efforts shall be made to preserve and reunify families:(i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and (ii) to make it possible for a child to safely return to the child's home. 42 U.S.C. § 671(a)(15) (2000).

<sup>172</sup>*Id.*

<sup>173</sup> See Vivek S. Sankaran, *Innovation Held Hostage: Has Federal Innovation Stifled Efforts to Reform the Child Welfare System*, 41 U. MICH. J. L. REFORM, 281 (2007).

<sup>174</sup> See, e.g., J. Robery Lowenbach, *A Recent History of Colorado's Dependency and Neglect Court System: A View From the Bench*, 36-OCT COLO. LAW. 41 (2007) (reviewing the modern development of parental rights termination proceedings in Colorado, including Colorado's reaction to the AACWA). See, e.g. Sara VanMeter, *Public Access to Juvenile Dependency Proceedings in Washington state: An Important Piece of the*

involuntary termination of parental rights without hearings which serve to first detain and remove the minor from parental care,<sup>175</sup> and all states have statutes directing that parents who are involuntarily separated from their children should be provided with reunification services.<sup>176</sup> Yet—with the exception of California—all states have uniformly come to the conclusion that the ultimate finding supporting an order to terminate parental rights needs to be supported by clear and convincing evidence.<sup>177</sup> This pervasive influence of federal law severely undermines the *Cynthia D.* court's suggestion that California's procedure for termination of parental rights is in any way unique.

2. A Review of the “Differences” Between  
California’s Parental Rights Termination  
Scheme and the New York Scheme Analyzed in  
Santosky

The differences between the California scheme and the scheme analyzed in *Santosky* are also very limited. The *Cynthia D.* court pointed to five specific differences which allegedly make the California parental rights termination procedure Unique.<sup>178</sup> Specifically, the court asserted that California's procedure was not like the procedure reviewed in *Santosky* because: (1) required a variety of findings to be made against parents during removal and reunification hearings before the termination of parental rights was ever considered; (2) focused on family reunification; (3) limited the

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*Permanency Puzzle*, 27 SEATTLE U. L. REV. 859, 863-865 (2004) (reviewing current parental rights termination procedure in Washington state).

<sup>175</sup> See, e.g., Lowenbach, *supra* note 169; see also, e.g., VanMeter, *supra* note 169. See also Michael T. Dolce, *A Better Day for Children: A Study of Florida's Dependency System with Legislative Recommendations*, 25 NOVA L. REV. 547, 563 (discussing Florida's termination procedure and noting that when a minor is temporarily removed from parental care, there are “no less than eight hearings a year”).

<sup>176</sup> For example, in Hawaii, the state is required to “use every reasonable opportunity for reunification” in proceedings before the parental rights termination phase is reached. HAW. REV. STAT. § 587-1 (2004).

<sup>177</sup> See *supra*, note 70.

<sup>178</sup> *Cynthia D. v. Superior Court*, 5 Cal.4th 242, 253-256 (1993).

state's power to shape historical events; (4) afforded parents the right to legal representation at every stage of dependency proceedings; and (5) restricted the discretion of the judge.<sup>179</sup> These "differences" are discussed individually below.

i. Hearings Leading up to a Parental Rights Termination Hearing

The *Cynthia D.* decision repeatedly relies on the hearings leading up to the final termination hearing to distinguish the California parental rights termination procedure from the procedure applied in New York and other states.<sup>180</sup> Indeed, by asserting that these hearings effectively establish at least a degree of parental unfitness before the Section 366.26 hearing is even held, the *Cynthia D.* court was able to perform its own *Mathews v. Eldridge* analysis with a more limited concern for the parents' rights at a parental rights termination hearing.<sup>181</sup> However, the New York scheme reviewed in *Santosky* also included a specific statutory procedure for establishing jurisdiction and temporarily removing a minor from parental care.<sup>182</sup> And it required regular—albeit less frequent—review hearings before any parental rights termination hearing could occur.<sup>183</sup> Nevertheless, even after these hearings had taken place, the *Santosky* court held that the interests of the Santoskys and their children had not diverged, that the risk of erroneous fact finding remained high, and the state maintained a *parens patriae* interest in family preservation.<sup>184</sup> Accordingly, that a California parent cannot arrive at a parental rights termination hearing without first having gone through detention,

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<sup>179</sup>*Id.*

<sup>180</sup>*Id.*

<sup>181</sup>*Id.*

<sup>182</sup>*Santosky v. Kramer*, 455 U.S. 745, 751 (1982) (citing N.Y. FAMILY COURT ACT §§ 1012).

<sup>183</sup> N.Y. SOC. SERV. LAW § 392.2. (Required review hearings every eighteen months). Indeed, in his dissenting opinion, Justice Rehnquist noted that the parents in *Santosky* had been through *no less than seven complete hearings* over four and one-half years. *Santosky*, 455 U.S. at 783 (1982) (Rehnquist J., dissenting).

<sup>184</sup>*Id.* at 751.

jurisdiction, disposition, and review hearings does not make the California scheme unique. And it certainly does not justify the *Cynthia D.* court's departure from the *Mathews v. Eldridge* analysis in *Santosky*.

ii. Initial Focus on Reunification

The *Cynthia D.* court also implied that the purpose of the hearings leading up to a parental rights termination hearing under Section 366.26 distinguished California's parental rights termination procedure from the procedure reviewed in *Santosky*.<sup>185</sup> Specifically, the court noted that up until the termination hearing, the goal is family reunification, and the state is required to continually prove that returning the child to parental custody would be detrimental.<sup>186</sup> Based on this observation, the court asserted that the risk of erroneous fact finding was "substantially diminished," and that the state's *parens patriae* interest became clearly focused on severing the parent-child relationship when reunification efforts failed.<sup>187</sup>

However, the New York statutes reviewed in *Santosky* also made it clear that the state's first obligation was to help the family reunify.<sup>188</sup> Like the distinction based on the requirement of removal and reunification hearings before a Section 366.26 hearing is set, the *Cynthia D.* court's suggestion that a pre-termination focus on reunification limits the applicability of *Santosky* reads as uninformed if not disingenuous.

iii. Limitation of State's Power to Shape Historical Events

The *Cynthia D.* court's assertion that California social services agencies are limited in their ability to shape historical events is equally questionable.<sup>189</sup> The court claimed that the California scheme left the petitioning agency with diminished

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<sup>185</sup>*Cynthia D. v. Superior Court*, 5 Cal.4th 242, 253 (1993).

<sup>186</sup>*Id.*

<sup>187</sup>*Id.* at 254, 256.

<sup>188</sup>*Santosky v. Kramer*, 455 U.S. 745, 748 (1982) (citing N.Y. SOC. SERV. LAW §§ 384-b(1)(a)(iii).)

<sup>189</sup>*Cynthia D.*, 5 Cal.4th at, 255.

power to shape historical events because it was required to produce clear and convincing evidence that removal was necessary, and was then required to persuade the court that continued removal was necessary at review hearings.<sup>190</sup> As discussed above, the New York statutes analyzed in *Santosky* also required hearings aimed at family reunification.<sup>191</sup> In any event, the existence of additional hearings and requirements which must be met by a social services agency to maintain a minor removed from parental care are largely irrelevant to *Santosky*'s concern with the ability of social services agencies to shape historical events.

The *Santosky* court worried about the power of New York social services agencies because employees of these agencies both investigated the family situation and testified against the parents in dependency proceedings.<sup>192</sup> The dual role played by the agency created an increased risk of error because it allowed the agency to develop uniquely tailored evidence to use against a parent at every stage along the path toward the termination of parental rights.<sup>193</sup> The *Cynthia D.* court did not—nor could it—claim that California's parental rights termination procedure avoids the unique problems caused by the dual role of social service agencies in dependency proceedings.

Indeed, the due process concerns created by the state social services agency's role as both investigator and prosecutor are particularly pronounced in California. Decisions at every stage of the dependency process are based almost exclusively on the subjective reports of the social services agency.<sup>194</sup> Section 281 of the Welfare and Institutions Code "broadly authorizes the trial court to receive and consider social services reports in determining 'any matter involving the custody, status, or welfare of a minor.'"<sup>195</sup>

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<sup>190</sup> *Id.*

<sup>191</sup> See Part II(A), *supra*.

<sup>192</sup> *Santosky*, 455 U.S. at 763 (1982).

<sup>193</sup> Specifically, the court recognized that the state agency had "the unusual ability to structure the evidence." *Id.*

<sup>194</sup> See *In re Keyonie R.* 50 Cal.Rptr.2d 221, 223 (Cal. Ct. App. 1996).

<sup>195</sup> *Id.* (citing WELF. & INST. CODE § 281).

Additionally, Section 366.21 specifically directs the court to consider agency reports when evaluating whether returning a child to parental care would create a risk of detriment at review hearings.<sup>196</sup> Through the use of reports, a California social services agency is empowered make any allegation necessary to support removal, continued removal, the termination of reunification services, and the ultimate termination of parental rights.<sup>197</sup> It can then rely on its own subjective conclusions to make a case against the parent.<sup>198</sup>

One of the specific concerns discussed in *Santosky*—the state social services agency’s ability to petition the court for termination of visits—is clearly applicable in California. The New York statute discussed in *Santosky* provided courts with discretion to suspend visitation at the request of the agency.<sup>199</sup> Thus, if the agency could show that visits did not serve the best interests of the minor, it could prevent the parents from maintaining a relationship with their children, and thereby build evidence against the parents to support an order terminating parental rights.<sup>200</sup> California also allows its state social services agencies to seek the suspension of parental visitation.<sup>201</sup> And, although the Welfare and

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<sup>196</sup> *Id.* (citing WELF. & INST. CODE § 366.21, subd. (f)).

<sup>197</sup> *See* *In re Keyone R.* 50 Cal.Rptr.2d at 223 (Cal. Ct. App. 1996) (citing WELF. & INST. CODE § 281). The California scheme even permits social services agencies to introduce hearsay evidence through their reports. *See* *In re Malinda S.* 272 Cal.Rptr. 787 (Cal. 1990) (citing WELF. & INST. CODE § 355, subd. (b)) (“[A] social study and hearsay evidence contained in it are admissible and constitute competent evidence. . .”).

<sup>198</sup> *See* Nell Clement, *Do Reasonable Efforts Require Cultural Competence? The Importance of Culturally Competent Reunification Services in the California Child Welfare System*, 5 HASTINGS RACE & POVERTY L. J. 397, 416-418 (2008) (arguing that state Agencies in California—as in other states—make highly subjective decisions which influence the outcomes of child dependency proceedings from start to finish).

<sup>199</sup> *Santosky v. Kramer*, 455 U.S. 745, 763, fn. 13 (1982).

<sup>200</sup> *Id.*

<sup>201</sup> *See* *In re Luke L.*, 52 Cal.Rptr.2d 53, 58 (Cal. Ct. App. 1996) (agency may seek to terminate visits based on a showing that visits are detrimental). Notably, the burden of proof for the finding of detriment is not clear. *See* *In re Mark L.* 114 Cal.Rptr.2d 499, 504 (Cal. Ct. App. 2001).

Institutions Code mandates that visitation should be as frequent as possible,<sup>202</sup> California courts are left with the power to terminate visits at any time during dependency proceedings based on a discretionary finding that visits are detrimental.<sup>203</sup> California case law recognizes that an order terminating visitation “virtually assures the erosion of any meaningful relationship,” which, like the order analyzed in *Santosky*, effectively leaves state courts with almost complete discretion to terminate parental rights.<sup>204</sup>

Again, the power that state agencies have to shape the historical facts which form the basis for findings underlying an order to terminate parental rights is not uniquely limited in California. Accordingly, the “limitations” referenced by the *Cynthia D.* court do not justify the court its failure to follow the direction of *Santosky*.

iv. Right to Legal Counsel

The flaws in the *Cynthia D.* court’s efforts to distinguish *Santosky* are epitomized most clearly in the court’s discussion of the rights of California parents to legal counsel. Specifically, while discussing the ways in which the California parental rights termination scheme limited the risks of erroneous fact finding, the *Cynthia D.* court stated that “not only must the court appoint counsel for a parent unable to

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<sup>202</sup> See *In re Mark L.*, 114 Cal.Rptr.2d , at 503 (citing WELF. & INST. CODE § 362.1(a)) (“[I]t is ordinarily improper to deny visitation absent a showing of detriment.”).

<sup>203</sup> *In re Hunter S.*, 48 Cal.Rptr.3d 823, 827 (Cal. Ct. App. 2006). It could be argued that the statutorily required finding of detriment limits the discretion of the court. See *In re Dylan T.*, 76 Cal.Rptr.2d 684, 689 (1998) (holding that visitation “cannot be arbitrarily determined based on factors which do not show by clear and convincing evidence that visitation would be detrimental to the minor”). However, considering the fact that the New York statutes directed the state to make efforts to reunify the family before moving toward the termination of parental rights, there is no reason to believe that an order terminating parental rights could be arbitrary in that state either. Accordingly, the statutorily required detriment finding does not uniquely limit the discretion of California courts. See Part VII(b)(5), *infra*.

<sup>204</sup> *In re Dylan T.*, 76 Cal.Rptr.2d at 689 (citing *In re Brittany S.*, 22 Cal.Rptr.2d 50 (Cal. Ct. App. 1993)).

afford one whenever a petitioning agency recommends out of home care, but such counsel must represent the parent at all subsequent proceedings. . . .”<sup>205</sup> Yet the New York statutes reviewed in *Santosky* also unambiguously required the appointment of legal counsel for indigent parents whose children were removed from parental care.<sup>206</sup> And the *Santosky* decision provides no reason to believe that that the legal representation provided in New York was limited to an initial appearance before the court.<sup>207</sup> Like the other “distinctions” pointed to by the *Cynthia D.* court, the implication that California’s statutes governing the right to counsel provide parents in the state with unique protection is astonishingly baseless.<sup>208</sup>

*v. Restrictions on the Discretion of the  
Juvenile Court*

Indeed, the only differences that can be rationally argued involve restrictions that California statutes place on the

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<sup>205</sup> *Cynthia D. v. Superior Court*, 5 Cal.4th 242, 255 (1993) (citing CAL. WELF. & INST. CODE § 317).

<sup>206</sup> *Santosky v. Kramer*, 455 U.S. 745, 751 (1982) (citing N.Y. FAMILY COURT ACT § 1022(a)). In fact, after stating that New York provided parents with various procedural protections, the court included a footnote in the opinion referring to the statutory right to counsel. It is hard to believe that the court was not aware of the right to counsel in New York. *Id.* at 751, fn. 2.

<sup>207</sup> *Id.* at 751.

<sup>208</sup> Notably, although not specifically required by the AACWA, most modern state parental rights termination schemes now require counsel be appointed to indigent parents in dependency proceedings. *See, e.g.*, WASH. REV. CODE ANN. § 13.34.090 (2004) (“the child’s parent, guardian, or legal custodian has the right to be represented by counsel”), and 42 PA. CONS. STAT. § 6337 (2004) (“a party is entitled to representation by legal counsel at all stages of any proceedings”). The right to counsel in dependency proceedings is even recognized under some state constitutions; *See, e.g.*, *Danforth v. state Dep’t of Health & Welfare*, 303 A.2d 794, 800 (Me. 1973) (holding that procedural due process requires appointment of counsel at state’s expense to represent indigent parents in proceedings for removal of child from parental custody), and *S.B. v. Dept. of Children and Families*, 851 So.2d. 689, 691 (Fla. 2003) (same); *but see Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981) (holding that a parent does not have a constitutional right to counsel at all stages of child welfare proceedings).

discretion of the court in dependency proceedings. The *Cynthia D.* court asserted that, unlike the New York statutes, California's parental rights termination scheme does not invite value judgments comparable to those described in *Santosky*.<sup>209</sup> And it appears that California's statutory scheme does include statutory guidance not present in the New York statutes reviewed by the United States Supreme Court. However, the ultimate effect of these statutes is small, and does not justify the *Cynthia D.* court's complete deviation from the *Mathews v. Eldridge* analysis set forth in *Santosky*.<sup>210</sup>

For example, in its opinion, the *Santosky* court expressed concern with the New York court's ability to excuse a social services agency's failure to provide reunification services on the ground that such services would have been detrimental to the best interests of the child.<sup>211</sup> Unlike in New York, California's discretion to excuse a social services agency's provision of reunification services is clearly limited by statute.<sup>212</sup> However, the statute which limits the court's ability to terminate reunification services also allows it to bypass services entirely with a finding that a parent's neglect or abuse falls under Welfare and Institutions Code, Section 361.5.<sup>213</sup> Although the court's discretion to bypass reunification efforts is limited by the list of qualifying offenses

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<sup>209</sup>*Cynthia D. v. Superior Court*, 5 Cal.4th 242, 255 (1993).

<sup>210</sup> See Clement, *supra* note 184, at 416 (attributing disproportional representation of minorities in child welfare systems in all states—including California—to the juvenile court's authority to "make subjective decisions about the ability and fitness of a parent, as well as whether termination of parental rights is necessary").

<sup>211</sup> *Id.*

<sup>212</sup> See WELF. & INST. CODE § 361.5, subd. (a) (mandating the provision of reunification services in dependency proceedings generally), and 361.5, subd. (g) (directing that a juvenile court is barred from referring a case for permanency planning until it finds that reasonable services have been provided); see also, *In re Alvin R.*, 134 Cal.Rptr.2d 210, 219 (Cal. Ct. App. 2003) ("[T]he remedy for failure to provide reasonable reunification services is an order for the continued provision of services, even beyond the 18-month review hearing.").

<sup>213</sup> WELF. & INST. CODE § 361.5, subd. (b).

contained in Section 361.5, that list is expanding and is itself subject to discretionary interpretation.<sup>214</sup>

When *Cynthia D.* was decided, Section 361.5 only allowed the court to bypass services if it found that: (1) a parent's whereabouts were unknown; (2) the parent suffered from a mental disability rendering him or her incapable of using services; (3) the child, who previously was adjudicated a dependent as a result of physical or sexual abuse, was being removed from the home a second time because of additional physical or sexual abuse; (4) the parent had caused the death of another minor through abuse or neglect; or (5) the child was under the age of 5 and had suffered severe physical abuse.<sup>215</sup> Since the ruling in *Cynthia D.*, the enumerated conditions which allow the court to bypass reunification services have expanded from five to fifteen.<sup>216</sup> Section 361.5, subdivision (b) now allows the court to bypass reunification services where: (6) the child has been adjudicated a dependent pursuant to Section 300 based on a parent's severe sexual abuse of the child or the child's sibling; (7) the parent is not receiving reunification services for a child's sibling based on past physical or sexual abuse; (8) the child was conceived by rape as defined by Penal Code Section 288 or 288.5; (9) the parent abandoned the child and the abandonment itself placed the child in serious danger; (10) the court has terminated reunification services offered to a parent for one or more of the child's siblings based on the parent's failure to reunify with the siblings and the parent did not subsequently make an effort to correct the problems which led to the termination of services; (11) the court has terminated a parent's parental rights to one or more of the child's siblings and the parent did

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<sup>214</sup> Stats. 1986, ch. 1122 § 13, pp. 3984-3986.

<sup>215</sup> *Id.*

<sup>216</sup> *See, e.g., Karen S. v. Superior Court.*, 81 Cal.Rptr.2d 858, 861 (Cal. Ct. App. 1999) (holding that Section 361.5 subdivision (b)(12) represents the Legislatures recognition that providing reunification services to a drug addict may be "fruitless"); *See, e.g., In re Baby Boy H.*, 73 Cal.Rptr.2d 793, 796 (Cal. Ct. App. 1998) (holding that the provision was interpreted to reflect a legislative determination that an attempt to facilitate reunification between a drug-using parent and child is generally not in the minor's best interests).

not subsequently make an effort to correct the problems which led to the termination of services; (12) the parent has been convicted of a violent felony as defined by Penal Code section 667.5, subdivision (c); (13) the parent has a history of drug addiction and has resisted court-ordered treatment for the problem during the last three years; (14) the parent has advised the court that he or she is not interested in receiving family reunification services; or (15) the parent has, on one or more occasions, willfully abducted the child or one of the child's siblings.<sup>217</sup>

Many of the new exceptions to Section 361.5's reunification services requirement provide the court with clear boundaries and in fact do limit its discretion to bypass services in certain situations. However, exceptions which allow the court to bypass reunification services based on a parent making "reasonable efforts" to correct the problems which led to the termination of reunification services, or a parent "resisting" court-ordered drug treatment, require the court to make subjective evaluations identical to the "best interests" evaluation which concerned the Supreme Court in *Santosky*.<sup>218</sup> The question of whether a parent has a mental disability is also a discretionary inquiry.<sup>219</sup>

Moreover, even if reunification services are provided in accordance with Section 361.5, a 1997 statutory amendment now effectively gives the court discretion to terminate reunification services after six months based on a finding that

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<sup>217</sup> WELF. & INST. CODE § 361.5, subd. (b).

<sup>218</sup> See, e.g., *In re Harmony B.*, 23 Cal.Rptr.3d 207, 215 (Cal. Ct. App. 2005) (interpreting § 361.5, subd. (b)(10) to allow the court to bypass reunification services where a parent has previously had reunification services terminated for another child and has failed to make reasonable efforts to correct the problems that led to the termination of those services), and *In re Levi U.*, 92 Cal.Rptr.2d 648, 654-55 (interpreting § 361.5, subd. (b)(12) to allow the court to bypass reunification services where it finds a parent has "resisted" drug treatment in the past).

<sup>219</sup> See, e.g., *Curtis F. v. Superior Court*, 95 Cal.Rptr.2d 232 (Cal. Ct. App. 2000); see also Nina Wasow, *Planned Failure: California's Denial of Reunification Services to Parents with Mental Disabilities*, 31 N.Y.U. REV. L. & SOC. CHANGE 183 (2006) (discussing in detail the discretion afforded to courts in bypassing reunification services based on mental disabilities).

the parents have failed to take advantage of the services provided.<sup>220</sup> And since the enactment of the amendment, the effect of the statutory requirements relating to reunification services have been eroded further by case law which interprets the amendment to allow the court to terminate services at any time based on a finding that a parent has failed to take advantage of reunification services.<sup>221</sup> In the end, the statutory limitations referenced in *Cynthia D.* do very little to limit the court's exercise of discretion in California dependency proceedings.<sup>222</sup> Numerous factors" still "combine to magnify

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<sup>220</sup> Specifically, the court is allowed to terminate services at the six month review hearing if it finds that the parents failed to regularly participate in reunification services. Stats. 1997, ch. 793 § 18, p. 1544; see CAL.WELF. AND INST. CODE § 366.21, subd. (e). This assessment is very similar to the "value judgments" which concerned the *Santosky* court. See *Cynthia D. v. Superior Court*, 5 Cal.4th 242, 255 (1993) (citing *Santosky v. Kramer*, 455 U.S. 745, 762 (1982)).

<sup>221</sup> See *In re Aryanna C.*, 34 Cal.Rptr.3d 288, 293 (Cal. Ct. App. 2005) (holding that the court has discretion to terminate services at any time after it has ordered them where clear and convincing evidence shows a parent has failed to take advantage of the services offered).

<sup>222</sup> Indeed, even in light of the statutory guidance, there are still circumstances in California dependency proceedings where the court is left with the authority to discount actual parent-child contact to justify findings which propel a dependency case toward adoption. Compare *In re Tameaka M.* 40 Cal.Rptr.2d 64, 68 (Cal. Ct. App. 1995) (holding that a mother's "nominal" contact with a minor did not amount to contact or visitation for purposes of a statute allowing a court to move toward the termination of parental rights without moving through the full reunification period), with *Santosky v. Kramer*, 455 U.S. 745, 763, fn. 12 (1982) (expressing concern with the New York Juvenile Court's discretion to discount actual visits as being insubstantial in its evaluation of whether the parents had failed to maintain contact with the minors in a manner which justified the termination of parental rights). And again, most other states now implement statutory safeguards which limit the discretion of the dependency courts in a variety of situations. See Dale Margolin, *No Chance to Prove Themselves: The Rights of Mentally Disabled Parents Under the Americans with Disabilities Act and state Law*, 15 VA. SOC. POL'Y & LAW 112, 152 (2007) (noting that "the majority of states (thirty, as well as DC) statutorily require services for all parents, including mentally disabled parents," and only allow for the bypass of services under the aggravated circumstances delineated by the Adoption and Safe Families Act); See, e.g., *Brewer v. Arkansas Dept. of Human Services*, 43 S.W.3d 196, 200 (Ark. Ct. App. 2001) (citing ARK. CODE ANN. § 9-27-

the risk of erroneous fact finding in the California proceedings.”<sup>223</sup> Accordingly, slight statutory differences between California and New York do not make the California procedure unique enough to justify departure from the Supreme Court’s burden of proof direction.

*B. The Package Theory Embraced by Cynthia D. was Expressly Rejected in Santosky*

Even disregarding the controlling precedent in *Santosky*, the *Cynthia D.* decision is clearly not in line with *Santosky*’s holding that “an amorphous assessment of the cumulative effect of state procedures” cannot make up for a “constitutionally defective standard of proof.”<sup>224</sup> Indeed, *Cynthia D.* apparently adopts the reasoning of the *Santosky* dissent by holding that “multiple and specific findings” of unfitness made while family reunification efforts are being made can alter the necessity for a high burden of proof when findings underlying a termination order are made.<sup>225</sup> In fact, California case law now relies heavily on the idea that the constitutionality of termination orders should be reviewed in conjunction with “the entire dependency statutory scheme,” which is simply another name for the “package theory.”<sup>226</sup>

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303(45)(C), which requires courts to order reunification services unless the parent falls under one of six statutorily defined exceptions); *See., e.g.*, IND. CODE §§ 31-34-21-5.5, 31-34-21-5.6, & 31-35-2-4.5 (The first statute generally requires the state social services agency to make reasonable efforts to preserve and reunify families. The second statute sets out statutorily defined circumstances which allow the court to bypass reunification services. The third statute allows a party to move to dismiss a termination petition on grounds that the OFC failed to provide family services in accordance with a case plan.)

<sup>223</sup> *Santosky v. Kramer*, 455 U.S. 745, 762 (1982).

<sup>224</sup> *Id.* at 759, fn. 9.

<sup>225</sup> Compare *Id.* at 770 (Rehnquist, J. dissenting), with *Cynthia D. v. Superior Court*, 5 Cal.4th 242, 249-254 (1993).; see also Spaziano, *supra* note 145, at 1493 (arguing that the preponderance of evidence standard of proof is constitutional under the California scheme, but failing to address the *Santosky* court’s holding relating to the value of an “an amorphous assessment of the cumulative effect of state procedures”).

<sup>226</sup> See, e.g., *In re Hunter S.*, 48 Cal.Rptr.3d 823, 827 (Cal. Ct. App. 2006) (citing *In re Marilyn H.*, 19 Cal.Rptr.2d 544, 553 (Cal. 1993) (“the

Such a reliance on the procedure leading up to the termination of parental rights flatly contradicts the direction of the majority opinion in *Santosky* and therefore violates the principles of due process as articulated by the United States Supreme Court.<sup>227</sup>

*C. The Package Theory Embraced by Cynthia D. has Proven to be Constitutionally Inadequate*

Regardless of whether the *Cynthia D.* court legitimately distinguished California's scheme for terminating parental rights from the scheme analyzed in *Santosky*, subsequent application of a procedure which substitutes findings leading up to a termination hearing for a high burden of proof applied to the findings underlying a parental rights termination order has revealed itself to be constitutionally inadequate. As discussed below, not all California parents arrive at the final termination hearing by way of the twelve to eighteen-month procedural track analyzed in *Cynthia D.* Non-custodial parents come into the picture late, alleged fathers may not be immediately granted standing, and, even where parents are present and allowed to participate at the onset of a case, they may be denied reunification services and the accompanying hearings which normally follow such services. Even when a case does follow the reunification track analyzed in *Cynthia D.*, the findings amount only to static evaluations of the safety of returning a minor to parental care, and do not necessarily establish the more dynamic showing of parental unfitness presumed in *Cynthia D.* Indeed, since its inception, California's application of the reasoning in *Cynthia D.* has created strong support for the *Santosky* court's holding that a constitutionally defective standard of proof cannot be excused by an "amorphous assessment of the cumulative effect of state procedures."<sup>228</sup>

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statutory procedures used for termination of parental rights satisfy due process because of the demanding requirements and multiple safeguards built into the dependency scheme at the early stages of the process").

<sup>227</sup>*Santosky*, 455 U.S. at 759, n. 9.

<sup>228</sup>*Id.*

1. Not All California Dependency Cases  
Follow the Twelve to Eighteen-month  
Reunification Track Analyzed in Cynthia D

When the *Cynthia D.* court asserted that a finding relating to a parent's unfitness made at the section 366.26 hearing would be a "sixth inquiry into whether the severance of parental ties would be detrimental to the child," it necessarily made several assumptions.<sup>229</sup> Specifically, it assumed that: (1) parents were custodial parents who would be immediately aware of their child's detention; (2) unwed fathers would immediately have standing to participate in the dependency proceedings; and (3) the reunification period would not be limited by the minor's young age or by the parent's initial failure to participate with the offered reunification services.<sup>230</sup> But these assumptions do not always hold true. Indeed, while many parents are present through five hearings before the parental rights termination hearing is scheduled, there are a variety of ways that a parent may arrive at a termination hearing without having participated in these hearings. In these cases, the due process protection pointed to by *Cynthia D.* is conspicuously lacking because the "multiple. . . findings of parental unfitness," which supposedly substitute for a high burden of proof, are never actually made.

i. The "Multiple. . . Findings of Parental  
Unfitness" Relied on by Cynthia D.'s Package  
Theory are Bypassed where Notice Delays  
Prevent a Non-Custodial Parent from  
Becoming Involved in the Dependency  
Proceedings

One important problem with the application of *Cynthia*

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<sup>229</sup> *Cynthia D.*, 5 Cal.4th at 256.

<sup>230</sup> *Id.* If these assumptions hold true, a parent has findings made against him at: (1) the detention hearing; (2) the jurisdictional hearing; (3) the dispositional hearing; (4) the six-month review hearing; (5) the twelve month review hearing. Accordingly, if we assume, as the *Cynthia D.* Court did, that the findings made at all of these hearings are based on an evaluation of the parent-child relationship, an evaluation made at the Section 366.26 hearing would represent a sixth inquiry into whether the severance of the parental relationship would be detrimental to the child.

*D.*, as it is now interpreted, is that of the late-arriving non-offending, non-custodial parent. *Cynthia D.* involved a custodial parent who had her child removed based on her own shortcomings, and who was obviously aware of the state's intervention.<sup>231</sup> However, in many instances a non-offending, non-custodial parent may be unknowingly pulled into a dependency case based only on the actions of the custodial parent.<sup>232</sup> Section 291 of California's Welfare and Institutions Code outlines precise notice requirements for non-custodial parents when a Section 300 petition is filed.<sup>233</sup> And, at the time of the dispositional hearing, a non-offending parent is entitled to immediate custody of the detained minors in the absence of a finding that placement with the parent would be detrimental.<sup>234</sup> However, for various reasons, immediate notice is not always possible. Unwed mothers' misrepresentations of paternity are far from uncommon.<sup>235</sup> A contentious divorce may also motivate a custodial parent to actively hide the identity of the non-custodial parent. Moreover, many parents live in states or countries where notification is difficult, or impossible.<sup>236</sup> Indeed, in many

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<sup>231</sup>*Id.* at 245.

<sup>232</sup>*See* *In re Alysha S.*, 58 Cal.Rptr.2d 494, 496 (Cal. Ct. App. 1996) (holding that a jurisdictional finding against one parent is good against both).

<sup>233</sup>CAL. WELF. AND INST. CODE § 291, subd. (a).

<sup>234</sup>*Id.* at § 361.2, subd. (a); *In re Isayah C.*, 13 Cal.Rptr.3d 198, 206 (Cal. Ct. App. 2004).

<sup>235</sup>*See* *In re Zacharia D.*, 24 Cal.Rptr.2d 751, 753 (Cal. 1993) (where mother had sexual relations with minor's father while in a relationship with another man, and reported that the other man was the minor's father), *and* *Armando L. v. Superior Court*, 43 Cal.Rptr.2d 222, 223 (Cal. Ct. App. 1995) (where a mother was unsure who which of two alleged fathers was the father of a detained minor, and the biological father did not come forward to claim paternity until the minor was old enough to exhibit a physical resemblance to him); *see also* Stacia Gawronski, *Termination of the Absent or Unknown Putative Father's Rights*, 11 J. CONTEMP. LEGAL ISSUES 554, 557 (2000); *see also* David V. Chipman, *Legal Remedies for Misrepresentation of Paternity in Marriage: Day v. Heller*, 653 N.W.2d 475, 4 WHITTIER J. CHILD & FAM. ADVOC. 467, 468 (2005) (contending that it is probable that misrepresentations of paternity will increase).

<sup>236</sup>*See* *In re B.G.*, 114 Cal.Rptr. 444, 446-47 (Cal. 1974) (mother was in Czechoslovakia at time of minor's detention), *and* *Armando L. v. Superior*

instances, juvenile courts are forced to proceed through the dispositional hearing, and may even arrive at a termination of parental rights hearing, before a non-offending, non-custodial parent is even made aware that his children have been removed from parental care.<sup>237</sup>

Despite the seemingly obvious offense to due process, California case law has held that a non-custodial parent does not have an automatic right to custody if s/he enters the picture after the dispositional hearing has been held.<sup>238</sup> This means that, if a non-offending, non-custodial parent learns of a dependency case at any time after the dispositional hearing, the findings made against that parent will be limited to those findings made at review hearings. If the non-custodial parent does not come into the picture until after reunification services have been terminated, s/he could arrive at the Section 366.26 hearing without participating in any of the hearings contemplated by *Cynthia D.*<sup>239</sup>

ii. *The “Multiple. . . Findings of Parental Unfitness” may be Bypassed by the Court’s Discretionary Adjudication of Presumed Father Status*

In *Cynthia D.*, the state social services agency sought to terminate the parental rights of a mother who was, without question, the parent of the children from which she was being separated. However, the definition of parenthood is

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Court, 36 Cal.Rptr.2d at 223 (father was in Mexico at time of minor’s detention).

<sup>237</sup>See *Jeff M. v. Superior Court*, 66 Cal.Rptr.2d 343, 345-46 (Cal. Ct. App. 1997) (explaining that under California’s statutory scheme and related court rules, Section 300 petitions must be heard and decided quickly); see also CAL. WELF. & INST. CODE § 334, and California Rules of Court, rule 5.680(a) (both directing that a Section 300 petition must be set within thirty days of the date that it is filed).

<sup>238</sup>*In re Zacharia D.*, 24 Cal.Rptr.2d at 763-64 (interpreting CAL.WELF. & INST. CODE § 361.2).

<sup>239</sup>But see *In re Gladys L.*, 46 Cal.Rptr.3d 434 (Cal. Ct. App. 2006) (attempting to deal with the problem of parents who are not involved in the package of hearings which supposedly support applying a low burden of proof to an order terminating parental rights).

increasingly complex.<sup>240</sup> Particularly when dealing with fathers, the delay caused by the adjudication of fatherhood status has the potential to take away from the “numerous and specific” findings made before the final section 366.26 hearing.

California’s dependency scheme recognizes three different kinds of fathers: presumed, alleged, and biological.<sup>241</sup> An alleged father is a man who may be the father of a child but has not established biological paternity or presumed father status.<sup>242</sup> A biological father is one who has established a biological relationship with a child, but has not proved that he qualifies as a presumed father.<sup>243</sup> Finally, a presumed father is a father who meets one or more of the criteria set forth in California’s Family Code and distinguishes himself as a person who has entered into some kind of familial relationship with the mother.<sup>244</sup> Whether a biological father is a presumed father is critical to his parental rights in dependency proceedings, as only a presumed father is entitled to appointed counsel, custody in the absence of a finding of detriment, and reunification services.<sup>245</sup>

Where a father was married to a minor’s mother at or within 300 days of the date of conception,<sup>246</sup> or has signed a

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<sup>240</sup>See David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 125 (2006); see also Cynthia C. Siebel, *Defining Fatherhood: Emerging Case Law Reflections of Changing Societal Realities*, 2 WHITTIER J. CHILD & FAM. ADVOC. 125, 125 (2003).

<sup>241</sup>Compare CAL. WELF. AND INST. CODE § 361.5, and *In re Zacharia D.*, 24 Cal.Rptr.2d at 763-64, with *In re Crystal J.* 111 Cal.Rptr.2d 646, 648 (Cal. Ct. App. 2001) (recognizing a fourth category of “de facto fathers” for those who have assumed the role of parent on a day-to-day basis), and *In re Jerry P.*, 116 Cal.Rptr.2d 123, 128 (Cal. Ct. App. 2002) (same).

<sup>242</sup>*In re Zacharia D.*, 24 Cal.Rptr.2d at 761, n. 15.

<sup>243</sup>*Id.*

<sup>244</sup>*Id.*; see also CAL. FAM. CODE § 7611.

<sup>245</sup>Adoption of Kelsey S., 3 Cal.Rptr.2d 615, 617-18 (Cal. 1992); *In re Christopher M.*, 6 Cal.Rptr.3d 197, 200-01 (Cal. Ct. App. 2003); CAL. WELF. & INST. CODE §§ 317, subd. (a), 361.2, subd. (a) & 361.5, subd. (a).

<sup>246</sup>CAL. FAM. CODE §§ 7540-7541.

valid declaration of paternity,<sup>247</sup> the adjudication of fatherhood status is relatively automatic. However, if formal documentation is not in place, the determination of presumed fatherhood is left largely to the discretion of the trial court under the Family Code.<sup>248</sup> The court must make subjective determinations like whether a parent “received the child into his home,” and “openly held the child out to be his natural child.”<sup>249</sup> These evaluations resonate with a tone remarkably similar to the subjective value judgments pointed to, and rejected, by the Court in *Santosky*.<sup>250</sup> Nevertheless, even if the court exercises its discretion appropriately, the dependency process does not stop for the adjudication of fatherhood.<sup>251</sup> Nor does it return to stage one when paternity is established.<sup>252</sup> Under the current scheme, a father who cannot immediately establish presumed father status is essentially ignored while the “numerous and specific” findings are made against the mother.<sup>253</sup> Nevertheless, if the case proceeds to the Section 366.26 hearing, the findings made only against mother may be used to support the termination of both parents’ parental rights.<sup>254</sup>

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<sup>247</sup>*Id.* §§ 7570-7576, 7611.

<sup>248</sup>*See Id.* § 7611, subd. (d).

<sup>249</sup>*Id.*; *See, e.g.,* Adoption of Michael H., 43 Cal.Rptr.2d 445, 449 (Cal. 1995).

<sup>250</sup>*See* Part II(C), *supra* (explaining the *Santosky* Court’s concern with the subjective discretion afforded to the Juvenile court).

<sup>251</sup>*In re Jesusa V.*, 85 P.3d 2, 23 (Cal. 2004).

<sup>252</sup>CAL. WELF. & INST. CODE § 366.26, subd. (a); *see also* Denny H. v. Superior Court, 33 Cal.Rptr.3d 89, 95 (Cal. Ct. App. 2005) (“In mandatory, unequivocal terms, Section 366.26, subdivision (a) states that if the minor is not returned to parental custody at the 18-month review, the court shall order that a hearing be held pursuant to Section 366.26.”); *see also* *In re S.D.*, 121 Cal.Rptr.2d 518, 529 (Cal. Ct. App. 2004) (holding that a juvenile dependency case cannot be unwound under the assumption that circumstances have not changed in the interim).

<sup>253</sup>*See, e.g.,* Armando L. v. Superior Court, 42 Cal.Rptr.2d 222 (Cal. Ct. App. 1995).

<sup>254</sup>*Id.*

iii. The “Multiple Findings of Parental Unfitness” May be Bypassed When a Temporarily Removed Minor is Under Age Three or When the Court Shortens the Reunification Period

The mother in *Cynthia D.* was provided with the statutory maximum eighteen months of reunification services. Accordingly, three review hearings were held before the court issued the order to move toward adoption.<sup>255</sup> And findings were made against the mother at all three hearings.<sup>256</sup> However, the fact that reunification services may not always extend to the statutory limit before the case is set for a hearing under Section 366.26 was implicitly recognized by the *Cynthia D.* court,<sup>257</sup> and shortened reunification periods have become less of an oddity since the case was decided.<sup>258</sup>

As mentioned above, when *Cynthia D.* was decided, Section 361.5 generally entitled parents of dependent children to a minimum of twelve months of reunification services.<sup>259</sup> However, through an amendment effective January 1, 1997, the California state Legislature modified this practice.<sup>260</sup> The juvenile court is now barred from ordering services exceeding a period of six months if the child is under three years of age on the initial removal date, unless the it can find a substantial probability the child would be returned to the custody of the parents within an extended twelve-or eighteen-month period.<sup>261</sup> Moreover, an amendment to Section 366.21, also

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<sup>255</sup> *Cynthia D. v. Superior Court*, 5 Cal.4th 242, 245 (1993)

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 256.

<sup>258</sup> This is likely due, at least in part, to the national shift of the focus of dependency proceedings away from parental rights and toward permanency for children. This shift was sparked by the Adoption and Safe Families Act of 1997. See Sarah Ramsey, *Fixing Foster Care or Reducing Child Poverty: The Pew Commission Recommendations and the Transracial Debate*, 66 MONT. L. REV. 21, 29 (2005) (“[T]he ASFA focus was seen as a shift from the AACWA emphasis on parents’ rights to a new emphasis on children’s best interests.”).

<sup>259</sup> See Part IV(B), *supra*.

<sup>260</sup> Stats. 1997, ch. 793, § 18, p. 1544.

<sup>261</sup> *Id.*; see *Sara M. v. Superior Court*, 115 P.2d 550, 555, n. 4 (Cal. 2005)

effective January 1, 1997, gives juvenile courts discretion to terminate reunification efforts at the six-month review hearing regardless of the child's age if it finds, by clear and convincing evidence, that a parent has failed to regularly participate in reunification services.<sup>262</sup> Since these statutory amendments went into effect, there is no longer any presumption is that a parent may arrive at the Section 366.26 review hearing only after multiple review hearings and several months of reunification.<sup>263</sup> Consequently, the basis for California Supreme Court's finding that *Cynthia D.* was constitutional no longer exists.

The erosion of the reunification phase is arguably justified by the reality of shifting social opinion toward the rights and protection of children and away from parents.<sup>264</sup> However, regardless of society's stance, the constitutionality of California's "package" dependency scheme relies on a presumption that at least two review hearings, stretched out over at least an entire year, will be held.<sup>265</sup> Where reunification services are limited to six months or less, the "numerous and specific findings of parental unfitness" are reduced to the initial dispositional finding that the minor needs to be temporarily removed, and a single finding that a parent has not complied with reunification services at a review hearing.<sup>266</sup>

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(citing CAL. WELF. & INST. CODE, § 361.5, subd. & (a)(2)).

<sup>262</sup>Stats. 1997, ch. 793 § 18, p. 1544; see *In re Aryanna C.*, 34 Cal.Rptr.3d 288, 292 (Cal. Ct. App. 2005) (citing CAL. WELF. & INST. CODE § 366.21, subd. (e)).

<sup>263</sup>*In re Aryanna C.*, 34 Cal.Rptr.3d at 293 (holding that the court has discretion to terminate services at any time after it has ordered them where clear and convincing evidence shows a parent has failed to take advantage of the services offered).

<sup>264</sup>See generally Jeanine Lewis, *Chapter 417: The Welfare of Children – A Higher Priority Than Family Reunification*, 31 MCGEORGE L. REV. 561(2000), and Jennifer A. Meiselman, *Adding Insult to Injury: California's Cruel Indifference to the Developmental Needs of Abused and Neglected Children From Birth to Three*, 39 CAL. W. L. REV. 115 (2002).

<sup>265</sup>See *Cynthia D. v. Superior Court*, 5 Cal.4th 242, 255 (1993) and accompanying text.

<sup>266</sup>See, e.g., *In re Aryanna C.*, 34 Cal.Rptr.3d at 293.

In sum, even if *Cynthia D.* can be aligned with *Santosky*, the package theory as applied in California nevertheless has the potential to violate the constitutional rights of parents involved in dependency proceedings because the protections offered under the scheme do not extend uniformly to all parents.

2. *Even When a Parent Does Participate in All of the Hearings, the “Multiple . . . Findings” Made Against the Parent do not Necessarily Demonstrate “Parental Unfitness” or Create Constitutional Support for an Order to Terminate Parental Rights*

The previous subsection focused on situations in which parents are absent from hearings leading up to the termination of parental rights, or where the hearings do not take place because reunification services are cut short. In those cases, the findings relied on by the court in *Cynthia D.* to justify a deviation from *Santosky* are simply not made. However, even when a parent does participate in all stages of the dependency proceedings, the findings made against the parent do not necessarily support an order terminating parental rights as the *Cynthia D.* decision suggests.<sup>267</sup>

The United States Supreme Court has not expressly articulated exactly what allegations, if proved, support an order to terminate parental rights. However, the *Santosky* decision directs that the “fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because [parents] have not been model parents or have lost temporary custody of their child to the state.”<sup>268</sup> Accordingly it is clear that evidence that a minor simply needs to be temporarily removed from parental care does not support an order terminating parental rights.

Many states interpret the Supreme Court’s limited direction in this area to require parental rights termination

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<sup>267</sup> *Cynthia D.*, 5 Cal.4th at 255.

<sup>268</sup> *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

orders be supported by a showing a parent is “unfit.”<sup>269</sup> Indeed, even the *Cynthia D.* decision indirectly adopts the position that the state bears the burden of demonstrating “parental unfitness” before a parent’s parental rights may be terminated under Section 366.26.<sup>270</sup> However, under the California scheme, the hearings referenced by the *Cynthia D.* court do not evaluate a parent’s “fitness.” Rather, the findings made at hearings leading up to a parental rights termination hearing focus on the safety of placing a minor (or leaving a minor placed) in a parent’s care at a static point in time.<sup>271</sup> The dynamic question of whether a parent is willing or able to care for a minor in the long-run is never directly addressed.<sup>272</sup> Of course, evidence that a minor needs to be removed and that parents are not working to overcome the problems which led to removal sometimes will amount to evidence of parental unfitness. But, particularly when the low burden of proof applied to review hearings is considered, this assumption does not always hold true. It is therefore possible for California parents who have been temporarily unable to provide safe care for a child during the proceedings leading up to a termination hearing to have their parental rights terminated based on evidence showing they refused to attend counseling or refused to take the advice of a social worker, rather than evidence

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<sup>269</sup> See, e.g., *DKM v. RJS*, 924 P.2d 985 (Wyo. 1996), and *Craven v. Doe*, 915 P.2d 720 (Idaho 1996) (both holding that In order to terminate a parent's rights, the moving party must establish, by clear and convincing evidence, that a parent is unfit and that a termination of the parent's rights is in the child's best interests); see also 9 COA2d 483, § 2 (“[T]he action to terminate parental rights involves the court making a determination of the parents’ fitness to tend to the child’s long-term physical and emotional needs, and the likelihood that the parents will, in a reasonable period, be situated to provide for the child’s needs.”).

<sup>270</sup> *Cynthia D.*, 5 Cal.4th at 255.

<sup>271</sup> See *In re Mary S.*, 230 Cal.Rptr. 726, 728-29 (Cal. Ct. App. 1986) (holding that the paramount concern in dependency proceedings is the child’s welfare), and *In re Joshua G.*, 28 Cal.Rptr.3d 213, 223 (Cal. Ct. App. 2005) (holding that dependency proceedings are civil in nature and are designed to protect the child, not to punish the parent); see also Part IV(B), *supra*.

<sup>272</sup> See Part IV(B), *supra*.

demonstrating they are perpetually “unfit.”<sup>273</sup>

## VII. Conclusion and Recommendation

For fifteen years California Courts have ignored the direction of *Santosky* based on the theory that California’s procedure for terminating parental rights is somehow different than the procedure applied in other states. This is a false assertion. As explained above, any difference between California’s procedure for terminating parental rights and the procedures applied in other states is nominal. And, even if differences do exist, the *Santosky* decision makes it clear that a “package theory” of findings leading up to a termination hearing cannot substitute for the application of the clear and convincing burden of proof to findings underlying an order to terminate parental rights. Perhaps most importantly, California’s application of the “package theory” has now proved *Santosky*’s holding that amorphous assessment of the cumulative effect of state procedures cannot effectively substitute for a constitutionally inadequate burden of proof.<sup>274</sup> California parents can arrive at a Section 366.26 hearing without having participated in the hearings contemplated by

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<sup>273</sup> This package theory weakness was recently recognized in *In re P.C.*, 80 Cal.Rptr.3d 595 (Cal Ct. App. 2008). In that case, a mother was able to progress through all of the hearings leading up to the Section 366.26 hearing based only on her failure to secure living arrangements which satisfied the state social services agency. *Id.* Based on the package of findings made against her at those hearings, her parental rights were terminated. The appellate court reversed the termination order, finding that the social services agency had failed to demonstrate that the mother was unfit. This new recognition of the shortcomings of *Cynthia D.* is a step in the right direction. However, the case also contradicts a body of case law which suggests that any challenge to the adequacy of evidence built up against a parent is forfeited by the time the case arrives at the Section 366.26 hearing. *See, e.g.* *In re P.A.*, 66 Cal.Rptr.3d 783, 793-94 (Cal. Ct. App. 2007) (seeming to disagree with *In re P.C.*) Accordingly it is unclear whether the reasoning of the *P.C.* court will survive. Moreover, even if the logic in *In re P.C.* were applied universally, it does not address the burden of proof issue directly and does not correct the *Cynthia D.* court’s failure to follow the precedent established by the United States Supreme Court in *Santosky*. *See* Parts VII(A) & (B), *supra*.

<sup>274</sup> *Santosky v. Kramer*, 455 U.S. 745, 759, n. 9 (1982).

the *Cynthia D.* court. And even where parents do participate in all of the hearings leading up to the final termination hearing, the findings made at removal and review hearings do not necessarily demonstrate that a parent is perpetually unfit.

The problems with the California scheme are not incredibly difficult to fix. Ideally, Section 366.26 could be amended to require an express evaluation of parental unfitness, made at by clear and convincing evidence, at the termination hearing itself. Alternatively, Section 366.21 and section 366.22, which govern review hearings after a minor has been removed from parental care, could be amended to directly address a parent's "fitness" and to require the findings underlying an order to terminate reunification services to be supported by clear and convincing evidence. Regardless of which approach is taken, California's parental rights termination scheme should be amended to satisfy the demands of due process and bring the state in line with the United States Supreme Court and every other state jurisdiction.