Preponderance versa Clear and Convincing

The current evidentiary standard used by courts in determining custody awards in cases which involve divorced and never married parents is preponderance. This standard means that to be granted an advantage in having more custody of the child one need only sway the decision maker by 51% or just slightly more over the other parent.

Through the years many have called for this evidentiary standard to be changed and for good reason. Too many personal biases can enter the decision making[1] of the trier of fact that easily sway their final decision when making or awarding custody of a child. Decisions of this importance that determine the future participation of both parents in the life of a child must be taken and based upon the highest standards of law available, that standard is clear and convincing evidence. While the Family Court system is a civil court and operates under the terminology associated with other civil proceedings such as lawsuits, clear and convincing evidence is the civil equivalent of beyond a shadow of doubt that is used in criminal cases. It is the highest standard of review possible in a court of law.

In order to understand why this evidentiary standard needs to be changed we need to examine the case law on parental rights. Throughout the years there have been a long series of the United States Supreme Court decisions that have held that the right to be a parent is a fundamental right[2], which is one that is granted by God not one protected by the Constitution

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[1] The American BAR Association released the results of a survey that showed that the majority of the family court judges still made their custody decisions as though "tender years doctrine" (thoughts that only a mother could raise a child) was still in effect.
http://www.ohiofamilyrights.info/Newsletters/ohio_family_rights_judicial_survey_and_tender_years.htm

[2] Meyer v. State of Nebraska, 262 U.S. 390 (1923), Pierce v. Society of Sisters, 268 U.S. 510 (1925), Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944), Ginsberg v. New York, 390 U.S. 629 (1968), Wisconsin v. Yoder, 406 U.S. 205 (1972), Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), Moore v. East Cleveland, 431 U.S. 494 (1977), Smith v. Organization of Foster Families, 431 U.S. 816 (1977), Quilloin v. Walcott, 434 U.S. 246 (1978), Parham v. J. R., 442 U.S. 584 (1979), Santosky v. Kramer, 455 U.S. 745 (1982), Reno v. Flores, 507 U.S. 292 (1993), Washington v. Glucksburg, 521 U.S. 702 (1997), Troxel v. Granville, 530 U.S. 57 (2000)

or law. While the courts and the laws are instructing judges to make their decisions based on "***the best interest of the child***"[3], the laws themselves are lacking in a legal definition of the term that is peppered throughout all custody law. Without a clear definition of what is the ***best interest of the child***, decisions are often made that remove fit parents from the lives of their children every day.

In the Troxel v. Granville, 530 U.S. 57 (2000) decision the case of Parham v. J. R., 442 U.S. 584 (1979) was quoted. That quote really gives us the best guidance as to what is the best interest of the child.

> "[O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." [4]

In another US Supreme Court case, Santosky v. Kramer, 455 U.S. 745 (1982), the High Court found that to terminate parental rights courts must use the clear and convincing evidentiary standard. Santosky also recognized that the right to be a parent was a fundamental right and terminate or interfere with such a fund fundamental right required that the highest possible level of review be used. That level of review is clear and convincing evidence.

> Today we hold that the Due Process Clause of the Fourteenth Amendment demands more than this. Before a State may sever completely and irrevocably the rights of parents in 748*748 their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.[5]
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> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State

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[3] Ohio Family Rights has conducted an extensive study of family law statutes for the 50 states and has yet to find a single legal definition of best interests of the child in any of them. Yet on the converse we have found many states that recognize that parenting is a fundamental right.

[4] Parham v. J. R., 442 U.S. 584 (1979)

[5] Santosky v. Kramer, 455 U.S. 745 (1982)

> moves to 754*754 destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures[6]

In re Hayes which came before the Ohio Supreme Court, the court made note that to terminate a parents rights was the equivalent of the death penalty of a family.

> It is well recognized that the right to raise a child is an "essential" and "basic" civil right. *In re Murray* (1990), 52 Ohio St.3d 155, 157, 556 N.E.2d 1169, 1171, quoting *Stanley v. Illinois* (1972), 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551, 558. Furthermore, a parent's right to the custody of his or her child has been deemed "paramount." *In re Perales* (1977), 52 Ohio St.2d 89, 97, 6 O.O.3d 293, 297, 369 N.E.2d 1047, 1051-1052. Permanent termination of parental rights has been described as "the family law equivalent of the death penalty in a criminal case." *In re Smith* (1991), 77 Ohio App.3d 1, 16, 601 N.E.2d 45, 54. Therefore, parents "must be afforded every procedural and substantive protection the law allows." *Id.* With this in mind, we turn to the construction of former R.C. 2151.413(A).[7]

That statement alone highly suggests that the courts need the extra guidance that clear and convincing evidence provides when making determinations in regards to the custody of the child. Any limitation or restriction on the involvement of the parent In the life of their child is an encroachment upon a fundamental right. Based on all case law, for the state to take such action as to limit or restrict the involvement of a parent in the life of their child there must be a compelling interest by this state. Such compelling interest would be incidences where a parent is proven to be unfit to be involved with the child. Limitations or restrictions cannot, or should they ever be, taken lightly when done by the state. While it is the goal of every state to protect the vulnerable, these intrusions must be taken with an un-jaundiced eye. The only way for the courts to have an un-jaundiced eye is to consider all custody decisions by using the highest standard of review possible, clear and convincing evidence.

At present, the use of preponderance as an evidentiary standard has created a situation that can only be equated to walking into an unknown families home, that is one which you have no interest or no knowledge of, and telling them how, where and when every aspect of that families involvement with their own children is going to take place. Common sense tells us that as individuals we are not about to walk into an unknown neighbor's home and begin to tell them how to raise their family, nor should any court or judge ever be permitted to do the same

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[6] Santosky v. Kramer, 455 U.S. 745 (1982)

[7] IN RE HAYES. 79 Ohio St.3d 46 (1997)

without having full knowledge of that family. Again the only way to achieve that is by using the clear and convincing evidentiary standard.

Looking at the statistics, including the fact that 85% of all custodial parents are mother[8], one begins to see the scope of the failure to protect future society that the use of preponderance standard has created. If we are to begin the corrections to righting the wrongs of the past that have been created by poor family policies of the states that beginning must take place and start with of the review standard that we use for determining custody between two fit parents. When the courts of this country have told us that the rights to be a parent in a fundamental rights and the termination is the equivalent of the death sentence, even the common sense of a layman says that we have looked and approached the decision making improperly for too long.

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[8] US Census Bureau