VI. The Adjudication

Fact-finding hearings under Article 10, like those under the other Articles of the Family Court Act, are held before a judge without a jury.[1] But the hearing itself must "measure up to the essentials of due process and fair treatment."[2] Moreover, "an indigent parent, faced with the loss of a child's society, as well as the possibility of criminal charges, is entitled to the assistance of counsel. A parent's concern for the liberty of the child, as well as for his care and control, involves too fundamental an interest and right to be relinquished to the state without the opportunity for a hearing, with assigned counsel if the parent lacks the means to retain a lawyer."[3]

The Standard of Proof

Family Court Act §1046(b)(i)(1983) provides that, in a fact-finding hearing, adjudications of child abuse (and child neglect) must be based on a "preponderance of the evidence." This is the usual standard of proof in civil proceedings. A preponderance of evidence is evidence which "is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact sought to be proved is more probable than not."[4] When an issue is proven by a preponderance of the evidence, this means that it is proven by the "greater weight of the evidence" or the "greater weight of the credible evidence."[5]

Family Court Act §622 (1962) used to apply the "preponderance of the evidence" standard to proceedings to terminate parental rights. However, in 1982, section 622 was held to be unconstitutional by the U.S. Supreme Court in *Santosky v. Kramer*.[6] The Court held that, because of the important issues at stake, the constitutionally required quantum of proof in proceedings to terminate parental rights is "clear and convincing evidence" rather than a "fair preponderance of the evidence." The Court described "clear and convincing evidence" as an "intermediate standard," between the high standard of "beyond a reasonable doubt," used in criminal proceedings, and "fair preponderance," used in ordinary civil proceedings. (As a result of this decision, section 622 was amended in 1982 to require "clear and convincing proof" before terminating parental rights.)

As of this writing, it appears that the *Santosky* case does not apply to the preponderance of the evidence standard established in Article 10 In its opinion, the Supreme Court seemed to distinguish between termination proceedings and child protective proceedings.[7] And, the Appellate Division of the Third Department has ruled unanimously that the preponderance standard is constitutionally permissible in Article 10 proceedings.[8] Nevertheless, the issue is far from settled. In a ruling apparently made without knowledge of the Appellate Division's decision, a Queens County Family Court Judge ruled that *Santosky* applies to child abuse proceedings – although not to neglect proceedings.[9] Further litigation should be expected until the question is decided by the Court of Appeals and, ultimately, by the U.S. Supreme Court.[10]

Some judges decide whether to make an adjudication based on whether they believe that the child should be removed from parental custody. However, these two decisions should not be equated. Many children who do not need to be

1. *See In the Matter of Walsh*, 64 Misc.2d 293, 315 N.Y.S.2d 59 (Fam. Ct., West. Co., 1970), holding that there is no constitutional or statutory right to a trial by jury in child protective proceedings.
2. *Application of Fisher*, 79 Misc.2d 905, 906, 361 N.Y.S.2d 596, 597 (Sup. Ct., Montgomery Co., 1974).
3. *In the Matter of Ella R.B.*, 30 N.Y.S.2d 352, 356, 334 N.Y.S.2d 133, 136, 285 N.E.2d 288 (1972).
4. *Black's Law Dictionary*, p. 1064 (5th Ed., 1979).
5. 22 N.Y. *Jurisprudence*, Evidence §641, p. 151 (1962)
6. 455 U.S. 745 (1982).
7. *Id.*, at p. 766, n. 16.
8. *In the Matter of Linda C.*, 86 A.D.2d 356, 451 N.Y.S 2d 268 (3rd Dept., 1982).
9. *In the Matter of Christine and Ann Marie H.*, 114 Misc. 2d 475, 451 N.Y.S.2d 983 (Fam. Ct., Queens Co., 1982).
10. For a fuller discussion of these cases, see Besharov, "Practice Commentary to McKinney's Family Court Act," §1046 (1983).

placed in foster care nevertheless need the protection that court ordered home supervision and treatment can provide. Therefore, as Judge Graney of the Genesee County Family Court points out: "Counsel should always make clear that the question of removal is separate and distinct from the establishment of abuse."[11]

Conforming the Petition to the Proof

If the proof presented at the fact-finding hearing does not "conform to the specific allegations of the petition," Family Court Act §1051(b)(1983) authorizes the judge to "amend the allegations to conform to the proof." Child protective petitions often must be amended after the hearing both because of the nature of the complex, ever-changing family situations and parent-child interactions which must be proved in court and because of the often weak pre-trial preparation of petitioners and the concomitant hasty drafting of petitions.

Because subsection 1051(b) places no limits on the court's authority to conform the petition to the proof, it could be considered an unconstitutional violation of due process if it had the effect of denying respondents adequate notice of the allegations against them. Hence, the last part of the subsection grants the respondent a likewise absolute right to a "reasonable time to prepare to answer the amended allegations."[12]

Abuse or Neglect?

Family Court Act §1031(c)(1983) authorizes judges, on their "own motion and at any time in the proceedings," to "substitute for a petition to determine abuse a petition to determine neglect if the facts established are not sufficient to make a finding of abuse." This provision is designed to give judges flexibility in resolving Article 10 proceedings. Because the definition of child neglect requires a lesser threshold of harm to a child than does child abuse – making neglect somewhat akin to a lesser included offense – almost every "abused child" is by definition a "neglected child." (The exceptions are described below.)

The phrase "if the facts established" does not require a hearing prior to the substitution. Sufficient basis for the substitution may be found in the wording of the petition itself, the parties' consent, or an oral exchange in open court. A neglect petition may be substituted "at anytime in the proceeding," from before a preliminary hearing to the conclusion of a dispositional hearing. When read in association with Family Court Act §1051(b)(1982), which allows the court to amend a petition to conform to the proof at a fact-finding hearing, this section seems to give the court authority to substitute the neglect petition (and finding) after a fact-finding hearing on an abuse petition *without another fact-finding hearing* so long as basic fairness and due process do not require that the respondent "be given a reasonable time to prepare to answer the amended allegations."[13]

Judges use this authority to make a finding of neglect when the proof is not sufficient to establish abuse. For example, because of the high threshold of harm needed to label an assault as "abusive," excessive corporal punishment that does not result in serious injury, or the substantial risk thereof, becomes a form of "neglect" under Family Court Act §1012(f)(i)(B).[14] Even when the proof establishes child abuse, judges sometimes make a finding of neglect to spare the parents the trauma of being labelled as "child abusers."

Substitutions are often the result of "plea bargaining" between the respondent and the petitioner or the court. The petitioner and court

11. Letter to the author, dated Nov 9, 1983.

12. *See, e.g., In re Terry S.*, 55 A.D.2d 689, 389 N.Y.S.2d 55, 57 (3rd Dept., 1976), stating: "Appellant's remaining contention that subdivision (b) of §1051 of the Family Court Act is unconstitutional because it denies her due process of law, is likewise without merit. While this enactment empowers the court to amend a petition to conform to the proof, it also protects the due process rights of respondents by guaranteeing them a reasonable time to answer amended allegations." For guidance as to the meaning of the term "reasonable time to prepare," see the caselaw under CPLR 3025(c)(1975).

13. Fam. Ct. Act §1051 (b) (1982).

14. *See In the Matter of Rodney C.*, 91 Misc.2d 677, 682, 398 N.Y.S.2d 511, 516 (Fam.Ct., Onondaga Co., 1977), holding that the child was "neglected" rather than "abused" because "the court does not find that the punishment was excessive as to be life threatening or likely to cause permanent disfigurement."

may feel that, since the dispositional remedies are largely the same for abuse and neglect, little would be gained by an adjudication of abuse rather than neglect, and that little is lost by an adjudication of neglect instead of abuse. From the respondent's point of view, a finding of neglect avoids the stigma of being found to be an "abuser." But, a finding of neglect rather than abuse has other advantages for the respondent, which are often overlooked or ignored by the other parties.

First, a finding of neglect instead of abuse makes placement less likely. Most Family Court professionals agree that official recognition or acknowledgment of serious, abusive conduct, either through a fact-finding or an admission, can have a devastating effect on the court's initial dispositional decision. Even if all participants in the court process suspect or even believe that a child has been seriously abused, there is a qualitative difference in how they will deal with that knowledge if there is a formal finding or admission. *Second*, a finding of neglect deprives the court of the special dispositional power to terminate parental rights granted to it in certain types of abuse cases.[15] *Third*, the court may dismiss neglect petitions (but not abuse petitions) even after a finding, if it "concludes that its aid is not required on the record before it."[16] *Fourth*, a finding of neglect frees the court (and the parties) of the rigid strictures concerning the handling of abuse cases.[17]

In any event, *not* every "abused child" is also a "neglected child." While the neglect definition establishes a lower threshold of harm, it also requires that there already has been harmful or potentially harmful parental behavior, which the abuse definition does not do. A child is considered to be abused if the parent "creates . . . a substantial risk of physical injury;" however, to be considered neglected, there already must have been a parental "failure to exercise a minimum degree of care."[18] Hence, in those cases in which the court makes a finding of neglect instead of abuse, unless the respondent consents, the court must be sure to have found that there was an actual failure to exercise parental care, not just the danger thereof.[19]

Stating the Reasons for the Finding

If the court makes a finding of child abuse (or child neglect), Family Court Act §1051(a)(1983) requires the judge to "state the grounds for the finding." Such a statement gives an appellate court a basis for intelligent review of the trial court's decision; this is particularly important since, in reviewing non-jury adjudications such as those made in Family Court, the appeals court may modify or reverse the trial court's findings of fact, if they are not supported by substantial evidence.

Requiring the Family Court to state the grounds for its decision is important for other reasons as well. As a process, it encourages thoughtful judicial decision-making by forcing an articulation of the basis of the decision. It reduces the possibility that judges will make a finding based upon some vague and amorphous sense that the parents are somehow not meeting the child's needs. This requirement can also aid in obtaining more orderly and appropriate dispositional decisions since it allows the dispositional inquiry to focus on the specific areas of parental inadequacy. Finally, the effect of stating the grounds for the decision on the parties cannot be minimized. The court gains much if the respondent, the child, and the petitioner understand the basis of the decision, even if they disagree with it.

15. *See* Fam. Ct. Act §1052(c)(1983) and Social Services Law §384-b(4) (1982).

16. Fam. Ct. Act §1051(c)(1983).

17. *Id.*

18. *Cf. In the Matter of Daryl Raymond L.*, 67 A.D.2d 948, 949, 413 N.Y.S.2d 216, 217 (2nd Dept., 1979), holding that, although there was some evidence of possible future neglect by the mother, section 1012(f) (1975) was not satisfied because there was "no evidence of *past* physical or emotional injury to the child." (Emphasis supplied.) *See also In the Matter of Millar*, 40 A.D.2d 637, 638, 336 N.Y.S.2d 144, 146 (1st Dept., 1972) (Murphy, J., dissenting), stating that "some connection must be shown between the conduct of the parent and the injury, or impending injury, to the child. It is not sufficient to merely show the mother's deficiencies without also establishing that the child is suffering or likely to suffer from neglect."

19. Note, however, that, by operation of Fam. Ct. Act §§ 1013, 1031, and 1046(a) (1983), the parental neglect or abuse need not have been directed at or affected the subject child.