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JURY INSTRUCTIONS—BURDEN OF PROOF— CASES REQUIRING PROOF BY CLEAR, COGENT, AND CONVINCING EVIDENCE

*Estate of Passman v. Graves*¹

The executor of the estate of Dr. Harold Passman, City National Bank & Trust Company, filed an affidavit in the Probate Court of Jackson County for the discovery of assets against Natalie Graves. The bank's interrogatories and Graves' answers constituted the pleadings under this special probate proceeding.² Graves' answers established that she had in her possession \$35,000 in bonds, a sofa, and an air conditioner which the bank claimed as a part of Dr. Passman's estate.

Graves claimed that the bonds and other personal property had been given to her by Dr. Passman. The probate court ruled against Graves on her defense of an inter vivos gift, and she appealed. At the trial de novo in circuit court, the jury returned a verdict finding Graves the owner of the property. Upon appeal to the Kansas City District of the Missouri Court of Appeals, Judge Turnage found that the trial court erred³ in giving the standard burden of proof instruction, Missouri Approved Jury Instruction (MAI) No. 3.01,⁴ without modification. He directed that on retrial MAI 3.01 should be modified to include a statement that the evidence must be "clear, [cogent] and convincing proof to convince the jury *beyond a reasonable doubt*."⁵ The Missouri Supreme Court adopted the opinion of Judge Turnage except for the requirement that proof be beyond a reasonable doubt. The court announced that the phrase "beyond a reasonable doubt" should no longer be used in civil cases.

The term "burden of proof" is used in two senses. It is used to describe the duty of a party to produce evidence on a certain issue. This is referred to as the duty of producing evidence.⁶ Burden of proof also is used to describe the burden on one party to convince the fact-finder that the facts asserted actually do exist. This is known as the risk of nonpersuasion.⁷ The term will be used hereafter in the second sense. This burden of proof has a dual function. First, it allocates the risk between the parties to a lawsuit, *i.e.*,

1. 537 S.W.2d 380 (Mo. En Banc 1976).

2. The discovery of assets procedure expedites the administration of estates by providing a quick method for determining title to personal property claimed to be an asset of the estate. The statutes providing for this procedure at the time the *Passman* action was begun were §§ 473.340-.357, RSMO 1969. Mo. Laws 1973, at 484, § 1, amended § 473.340 and repealed §§ 473.343-.357. The entire procedure is now set forth in § 473.340, RSMO (Supp. 1975).

3. 537 S.W.2d at 384.

4. MO. APPROVED INSTR. NO. 3.01 (1969 ed.).

5. 537 S.W.2d at 381.

6. 9 J. WIGMORE, EVIDENCE § 2487 (3d ed. 1940).

7. 9 J. WIGMORE, *supra* note 6, § 2485.

it determines which party loses if the burden of proof is not carried successfully. Second, it establishes the amount of persuasion needed before the party with the burden of proof can be found to have met this burden.

The amount of persuasion needed to meet the burden of proof varies according to the type of claim one is seeking to prove. In most jurisdictions, claims require one of three levels of persuasion.⁸ The highest level of persuasion is required in criminal cases. The burden is on the state to prove all elements of the crime of which the defendant is accused. Such proof must convince the jury beyond a reasonable doubt.⁹ A lower level of persuasion is needed in most civil cases. The party with the burden of proof traditionally is required to prove the facts necessary to support his claim by a preponderance of the evidence.¹⁰ In Missouri, the jury is no longer instructed on the meaning of preponderance. The burden of proof is met as to a particular claim if the evidence presented causes the jury to "believe" the propositions necessary to support that claim.¹¹ A limited number of civil cases require proof by clear and convincing evidence.¹² The claim of the inter vivos gift in *Passman* falls within this category. The requisite level of persuasion is lower than beyond a reasonable doubt but higher than a mere preponderance.

This higher level of persuasion for some civil cases was first required in equity. The Chancellor would sometimes grant relief on claims unenforceable at law for failure to comply with the Statute of Frauds or Statute of Wills. Because of the danger of fraud or loss of memory associated with these claims, relief was granted only if the evidence in support of the claim was clear and convincing.¹³ In modern civil cases, the requirement of clear and convincing evidence is applied to claims which are subject to special dangers of fraud or loss of memory, *e.g.*, a claim of an oral promise to

8. See McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 245 (1944).

9. 9 J. WIGMORE, *supra* note 6, § 2497. See MO. APPROVED INSTR.-CRIM. NO. 2.20 (1974 ed.) which reads in part:

The defendant is presumed to be innocent unless and until, during your deliberations upon your verdict, you find him guilty. This presumption of innocence places upon the state the burden of proving beyond a reasonable doubt that the defendant is guilty.

10. J. WIGMORE, *supra* note 6, § 2498 at 325.

11. MO. APPROVED INSTR. NO. 3.01 (1969 ed.).

12. C. MCCORMICK, EVIDENCE § 340 at 796 (2d ed. 1972). Numerous terms have been used to describe this level of persuasion in Missouri. See, *e.g.*, *Stein v. Mercantile Home Bank & Trust Co.*, 347 Mo. 732, 738, 148 S.W.2d 570, 573 (1941) (clear, cogent and convincing); *Jeude v. Eiben*, 338 Mo. 373, 394, 89 S.W.2d 960, 971 (1936) (clear and conclusive); *Gosney v. Costigan*, 326 Mo. 1215, 1229, 33 S.W.2d 947, 952 (1930) (clear and convincing evidence); *Albrecht v. Slater*, 233 S.W. 8, 11 (Mo. 1921) (evidence of clear and unequivocal probative force); *Manley v. Ryan*, 235 Mo. App. 45, 54, 126 S.W.2d 909, 914 (St. L. Ct. App. 1939) (forceful, clear and conclusive testimony). "Clear and convincing" seems to predominate and is a convenient label for referring to all of these phrases.

13. See Note, 60 HARV. L. REV. 111 (1946).

adopt or bequeath and a suit to change the terms of a written instrument.¹⁴

In Missouri many types of claims have been held to require clear and convincing proof because they are subject to the dangers of fraud or loss of memory.¹⁵ Most of these claims still arise in equity,¹⁶ and thus require no jury instruction. Those claims which do arise at law are most often claims of gift. A claim of an inter vivos gift must be supported by the putative donee with clear, cogent, and convincing proof.¹⁷ Although the courts often have stated that the claim of such a gift is especially suspect when first claimed after the alleged donor's death,¹⁸ the same level of proof apparently applies equally to gifts claimed during the donor's lifetime.¹⁹ As a practical matter, the donee is not likely to litigate such claims while the alleged donor is living.²⁰ However, a situation could arise in which the policy reasons for requiring this level of persuasion would be as strong as if the alleged donor had died, *e.g.*, if the donor became insane.²¹ The requirement of clear and convincing proof is also applied to gifts causa mortis.²²

The requirement of clear and convincing evidence is imposed upon other types of claims because they are disfavored as a matter of social policy, for example, a claim that property acquired during marriage is not community property.²³ In Missouri, a claim which would destroy the natural right of parents to the custody of their children is strongly disfavored.²⁴ Although section 211.441, RSMO 1969, provides a procedure by which a juvenile court may terminate the rights of a parent to his child, such

14. For a comprehensive listing of these claims see 9 J. WIGMORE, *supra* note 6, § 2498.

15. *E.g.*, Bland v. Buoy, 335 Mo. 967, 74 S.W.2d 612 (1934) (action on a contract to adopt); Hood v. Owens, 293 S.W. 774 (Mo. 1927) (suit to reform a deed); Albrecht v. Slater, 233 S.W. 8 (Mo. 1921) (action to cancel a deed of trust).

16. *Id.* These are all equitable actions.

17. Estate of Passman v. Graves, 537 S.W.2d 380, 383 (Mo. En Banc 1976); Stein v. Merchantile Home Bank & Trust Co., 347 Mo. 732, 738, 148 S.W.2d 570, 573 (1941).

18. *In re Peterson's Estate*, 295 S.W.2d 144, 150 (Mo. 1956); Cremer v. May, 223 Mo. App. 57, 68, 8 S.W.2d 110, 115 (Spr. Ct. App. 1928).

19. Missouri courts follow the general rule stated in 38 C.J.S. *Gifts* § 67 (1943): "A gift inter vivos must be established by clear and convincing evidence . . ." The rule does not distinguish between gifts claimed before and gifts claimed after death of the donor.

20. None of the Missouri inter vivos gift cases examined involved a claim brought while the donor was living.

21. The estate of an insane person may need protection just as much as the estate of a deceased. The need for this type of protection for the insane has been recognized by the Missouri Legislature. The Dead Man's Act, § 491.010, RSMO 1969, would protect the insane and deceased equally by foreclosing the testimony of alleged donees.

22. Genteman v. Sutter, 215 S.W.2d 477 (Mo. 1948); Foley v. Harrison, 233 Mo. 460, 136 S.W. 354 (1911).

23. See C. McCORMICK, *supra* note 12, § 340 n.81 and accompanying text.

24. Renfro v. Jackson Co. Juvenile Court, 369 S.W.2d 616, 621 (K.C. Mo. App. 1963).

termination is permitted only if certain statutory conditions are shown to exist "by clear, cogent and convincing evidence . . ." ²⁵ There are other civil claims requiring this higher standard of proof, especially in the domestic relations area, due to the strong social policy favoring preservation of marriage and the family. ²⁶ This note does not contain a comprehensive list of claims requiring proof by clear and convincing evidence. However, the reader should be alert for this type of claim in order to submit the proper form of instruction.

The Missouri Approved Jury Instructions were adopted pursuant to the rulemaking power of the Missouri Supreme Court ²⁷ and promulgated by court rule. ²⁸ If an applicable MAI exists, it must be submitted to the exclusion of any other instruction. ²⁹ However, an MAI may be modified when necessary to fairly submit the issues. ³⁰ The standard burden of proof instruction for civil cases, MAI 3.01, does not instruct the jury regarding the higher level of persuasion needed in some civil cases and, therefore, must be modified. The authors of MAI, the Missouri Supreme Court Committee on Jury Instructions, originally realized that MAI 3.01 would not apply to all cases, ³¹ but they did not draft an alternative instruction to cover the clear and convincing case. Such an instruction now has been written and is effective as of January 1, 1978. ³² Use of the new instruction is optional until that date and mandatory thereafter.

The modified instruction is to be used in any civil claim arising at law which requires this higher level of persuasion. The requirements this

25. § 211.441.1(2), RSMo 1969.

26. There are several presumptions which can be rebutted only by clear, cogent, and convincing evidence. Evidence that two parties cohabited and held themselves out as being husband and wife gives rise to a presumption of marriage which can be overcome only by "the most cogent and satisfactory evidence." *In re Estate of Tomlinson*, 493 S.W.2d 402, 403 (Mo. App., D. Spr. 1973). The presumption that children born during the term of a valid marriage are the legitimate children of the husband is also rebuttable only by clear, cogent, and convincing proof. *In re L. _____*, 499 S.W.2d 490, 492 (Mo. En Banc 1973). These presumptions should not create the need for a special burden of proof instruction. If the normal Missouri practice regarding procedural presumptions is followed, the presumption disappears once evidence sufficient to rebut is introduced. The existence or nonexistence of the presumed fact then is determined just as if the presumption had never been operative. *Id.*

27. MO. CONST. art. V, § 5.

28. MO. R. CIV. P. 70.01.

29. *Id.*, 70.01 (b).

30. *Id.*, 70.01 (e).

31. See MO. APPROVED INSTR. NO. 3.01 (Committee's Comment) (1969 ed.) in which the committee directs that "[t]his instruction is not to be used in those rare cases where the proof must be 'clear, cogent and convincing.'"

32. The new instruction will appear in the next edition of MAI, to be published in 1978. At the time this instruction was written, revisions also were made to several other civil burden of proof instructions, including MAI 3.01, the standard burden of proof instruction. The court ordered that all of these revisions be published in the July-August 1977 issue of the Journal of the Missouri Bar.

places on the form of the instruction may be illustrated by the inter vivos gift cases. Under the discovery of assets procedure involved in *Passman*, a personal representative may bring an action against someone who allegedly is withholding property belonging to the estate.³³ In this situation, the claim of a gift is an affirmative defense. The discovery of assets procedure also allows a purported donee to initiate an action against the estate for recovery of an alleged gift in possession of the estate.³⁴ In such a case, the gift must be proved as a part of the plaintiff's claim. Therefore, the instruction may be applicable either to a plaintiff's or a defendant's claim.

The discovery of assets procedure is designed to determine title to property. Where a gift is claimed in such a proceeding, it is usually the only issue to be tried. However, gift cases often are litigated outside the discovery of assets procedure because the probate court may not have jurisdiction over the contested property.³⁵ These claims may arise in replevin,³⁶ conversion,³⁷ or other actions.³⁸ The issue whether a gift was made could be one of several issues in the suit. Because different burden of proof instructions might be needed on the different issues, the instruction should identify the claim to which it applies.

The new burden of proof instruction, MAI 3.04, meets the foregoing requirements. As approved by the Missouri Supreme Court, the new instruction is as follows:

The burden is upon (insert name of alleged donee) to cause you to believe by clear and convincing evidence that the (describe the property such as "bonds") were a gift to [him, her] by the decedent. In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted or if you are unable to form a belief as to any such proposition, then you cannot return a verdict requiring belief of that proposition.

When the claim requiring proof by clear and convincing evidence is something other than a gift, the instruction may be modified by changing the first sentence. The party with the burden of proof, whether plaintiff or defendant, should be substituted for the alleged donee, and the proper claim substituted in place of the gift language.

It should be noted that the Committee has omitted the work "cogent" from the instruction in order to standardize and simplify the language. The new instruction should be used not only for claims requiring proof by "clear, cogent and convincing" evidence, but also for all civil claims requir-

33. § 473.340.1, RSMo (Supp. 1975).

34. *Id.*

35. The discovery of assets procedure applies only to personal property. An action also could arise after administration of the estate or the estate could be a small one not subject to probate.

36. *McCune v. Daniels*, 225 S.W. 1020 (St. L. Mo. App. 1920).

37. *Manley v. Ryan*, 235 Mo. App. 45, 126 S.W.2d 909 (St. L. Ct. App. 1939).

38. *Jones v. Falls*, 101 Mo. App. 536, 73 S.W. 903 (St. L. Ct. App. 1903) (action to recover on a note).

ing a higher level of persuasion than the usual preponderance standard.³⁹ The phrases describing this level of persuasion are used interchangeably by the courts,⁴⁰ but the standard phrase used by the authorities is "clear and convincing."⁴¹ The Missouri Supreme Court recently noted that "[t]he word 'cogent' adds little, if anything . . ."⁴² Its omission simplifies the instruction and thus advances one of the primary goals of MAI: to state instructions in language the average juror can understand.⁴³

The modified instruction still may create confusion for jurors. In criminal cases, jurors are instructed that they must be convinced beyond a reasonable doubt before the defendant may be found guilty. In civil cases, the jury may return a verdict for the party with the burden of proof if the evidence caused them to believe the facts necessary to prove his claim. These instructions tell the jurors what state of mind they should have to return a verdict for the party with the burden of proof. It has been argued that an instruction such as the new burden of proof instruction will confuse jurors because it focuses on the quality of evidence rather than on the state of mind the jury should have.⁴⁴ Under Missouri law, the judge cannot give additional instructions to clarify or explain the burden of proof instruction if the jurors should become confused.⁴⁵ This places an additional burden on attorneys to make certain that jurors understand that a higher level of persuasion is required compared to other civil cases.⁴⁶ Closing arguments

39. Despite the occasional substitution of different words, these phrases all describe the same level of persuasion—one which is intermediate between the reasonable doubt standard of criminal cases and the belief standard used in other civil cases. Clearly a different instruction should not be required for each slight variation used to describe this level of persuasion.

40. This is evident from an examination of the inter vivos gift cases which describe the level of persuasion required in varied terms. *In re Peterson's Estate*, 295 S.W.2d 144, 150 (Mo. 1956) (clear, cogent and convincing); *Manley v. Ryan*, 235 Mo. App. 45, 54, 126 S.W.2d 909, 914 (St. L. Ct. App. 1939) (forceful, clear and conclusive); *Cremer v. May*, 223 Mo. App. 57, 70, 8 S.W.2d 110, 115 (Spr. Ct. App. 1928) (clear and unequivocal); *Jones v. Falls*, 101 Mo. App. 536, 544, 73 S.W. 903, 905 (St. L. Ct. App. 1903) (clear and convincing). See also cases cited note 12 *supra*, which include phrases used in gift cases arising in equity as well as at law.

41. C. MCCORMICK, *supra* note 12, § 340; J. WIGMORE, *supra* note 6, § 2498.

42. *Grissum v. Reesman*, 505 S.W.2d 81, 86 (Mo. 1974).

43. See MO. APPROVED INSTR. at xxiii (1969 ed.).

44. See *McBaine*, *supra* note 8. It is argued that the jury ought to be instructed as to the state of mind, or degree of belief they should have, because this is more easily understood. *McBaine* points out that the jury is able to determine no more than what probably has happened, or what highly probably has happened, or what almost certainly has happened. To return a verdict in favor of a party required to prove his claim by clear and convincing evidence, the jury would have to believe the facts supporting the claim were highly probably true.

45. *Houston v. Northup*, 460 S.W.2d 572 (Mo. En Banc 1970).

46. In explaining the meaning of "clear, cogent and convincing," attorneys will have to rely largely on dictionaries and common sense. As noted by the Missouri Supreme Court in *Grissum v. Reesman*, 505 S.W.2d 81, 86 (Mo. 1974), "[t]he courts have seldom stopped to analyze that term." The court concluded that the phrase means that a court should be "clearly convinced." This was a case in equity where the