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Clear and Convincing Evidence Standard of Proof Will Be Required in All Proceedings for Involuntary Termination of the Parent-Child Relationship.

John William Wester

Court's recent definition of interrogation, some of the protection afforded suspects in Texas will be lost as more statements are classified as voluntary. If Texas wishes to continue the protection it now offers, article 38.22 of the Texas Code of Criminal Procedure must be amended to disallow *all* oral admissions, whether volunteered or prompted by interrogation.[124]

Janice L. Jenning

FAMILY LAW—Standard of Proof—"Clear and Convincing Evidence" Standard of Proof Will Be Required in all Proceedings for Involuntary Termination of the Parent-Child Relationship.

In re G.M.,
596 S.W.2d 846 (Tex. 1980).

The Texas State Department of Public Welfare (TSDPW)[1] instituted proceedings to terminate involuntarily the parent-child relationship between G.M. and B.G.C. and their natural mother pursuant to the involuntary termination provision of the Texas Family Code.[2] TSDPW alleged the mother knowingly allowed G.M. and B.G.C. to remain in surroundings dangerous to the children's well-being and termination of the parent-child relationship would be in the children's best interest.[3] The trial court, applying the preponderance of the evidence standard of proof pursuant to section 11.15 of the Texas Family Code, terminated the parent-

752 (Tex. Crim. App. 1974) (in-custody oral statements not admissable); Garner v. State, 464 S.W.2d 111, 112 (Tex. Crim. App. 1971 (oral confession must produce fruits of crime to be admissable).

124. States must follow minimum guidelines to protect suspects from self-incrimination, but may employ even greater safeguards if desired. *See* Miranda v. Arizona, 384 U.S. 436, 467-68 (1966).

1. This action was instituted by the Texas State Department of Public Welfare (TSDPW). Subsequently, the name was changed to the Texas Department of Human Resources. *See* TEX. HUMAN RESOURCES CODE ANN. § 11.001 (Vernon 1979).

2. *See* TEX. FAM. CODE ANN. § 15.02 (Vernon Supp. 1980).

3. *In re* G.M., 596 S.W.2d 846, 846 (Tex. 1980). The facts of the case are not reported in the Texas Supreme Court opinion, but may be found in the court of civil appeals opinion. *See In re* G.M., 580 S.W.2d 65, 67 (Tex. Civ. App.—Amarillo 1979), *rev'd*, 596 S.W.2d 846 (Tex. 1980). The mother of G.M., a six year old girl, allegedly had known G.M.'s stepfather had sexually abused G.M. for 1½ years prior to the mother's reporting the incidents to any authorities. *See id.* at 67.

child relationship.[4] The mother appealed to the Court of Civil Appeals in Amarillo contending the trial court erred in terminating the parent-child relationship based upon a preponderance of the evidence, rather than the clear and convincing evidence standard of proof.[5] The court of civil appeals affirmed the trial court and appeal to the Supreme Court of Texas followed.[6] Held—*Reversed and remanded.* The "clear and convincing evidence" standard of proof will be required in all proceedings for involuntary termination of the parent-child relationship.[7]

The right to family unity is a fundamental right recognized by the United States Supreme Court and protected from unwarranted state intrusion by the Due Process Clause of the fourteenth amendment.[8] The source of the family right is derived from the "natural" rights of parents to have custody and control over their children.[9] The parental right to family unity, however, is subordinated to the welfare of the child, when the principal concern of a public policy determination is the welfare of the child.[10] Certain rights personal to the child are constitutionally pro-

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4. *See In re* G.M., 596 S.W.2d 846, 846 (Tex. 1980) (trial court applied preponderance of evidence); TEX. FAM. CODE ANN. § 11.15 (Vernon 1975) (all findings of fact by preponderance of the evidence).

5. *See In re* G.M., 580 S.W.2d 65, 69 (Tex. Civ. App.—Amarillo 1979), *rev'd*, 596 S.W.2d 846 (Tex. 1980).

6. *See id.* at 70.

7. *In re* G.M., 596 S.W.2d 846, 847 (Tex. 1980).

8. Stanley v. Illinois, 405 U.S. 645, 651-52 (1972). The fundamental right to family unity has been recognized by the United States Supreme Court as a myriad of parental rights over the control and custody of their children sufficiently important to warrant due process prior to any state interference. *See id.* at 651-52; *cf.* Pierce v. Society of Sisters, 268 U.S. 510, 535-36 (1925) (right of parents to educate children in private schools protected by due process); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (due process protects parental right to have child learn foreign language in public schools). The right to family unity also has been embraced in the Equal Protection Clause of the fourteenth amendment. *See* Cohen v. Mohammed, 441 U.S. 380, 394 (1979) (gender-based classification for veto power in adoption proceedings violates Equal Protection Clause); Trimble v. Gordon, 430 U.S. 762, 775-76 (1977) (illegitimate children protected against discrimination by Equal Protection Clause).

9. Wiley v. Spratlan, 543 S.W.2d 349, 352 (Tex. 1976); *see, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 232-35 (1972) (right of parental control over religious upbringing and education of minor children); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (right of father of illegitimate children to procedural due process); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (right of parents to educate children in private schools). *See generally* Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383, 1386-87 (1974).

10. *See* Prince v. Massachusetts, 321 U.S. 158, 168-70 (1944) (rights of parents secondary to state's right to protect child through child labor statute); *cf.* Parham v. Hughes, 441 U.S. 347, 352-53, 358 (1979) (intent of Georgia statute to promote legitimacy of children; right of family unity not available to father of unacknowledged child to claim wrongful death of son).

tected and independent of the rights of parents and the state.[11]

The purpose of an involuntary termination suit is to sever the parent-child relationship.[12] By its inherent nature, a suit to terminate a parent-child relationship is a three-party suit involving: the parental right to have custody of the child;[13] the state's right and duty to protect the child;[14] and the child's right to be free from abuse and neglect.[15] The interests of each party in this trilogy, therefore, must be protected by the court in a termination proceeding.[16] The state's right to protect children within its jurisdiction[17] must be balanced against the parent's natural and fundamental right to custody and control over his children.[18] A parent

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11. *See, e.g.,* Bellotti v. Baird, 443 U.S. 622, 650-51 (1979) (minor's right to abortion not subject to parental consent); Parham v. J.R., 442 U.S. 584, 603-04 (1979) (child's right to due process in involuntary commitment proceeding independent of parental rights, although not in conflict with rights of parents); *In re* Gault, 387 U.S. 1, 33, 41, 55-57 (1967) (juveniles' rights to notice of government charges, to counsel, to remain silent, and to cross-examine and confront adverse witnesses). *See generally Developments in the Law — The Constitution and the Family,* 93 HARV. L. REV. 1156, 1177-79 (1980).

12. *See* TEX. FAM. CODE ANN. § 15.02 (Vernon Supp. 1980).

13. *See* Stanley v. Illinois, 405 U.S. 645, 651-52 (1972) (parental right to custody and control over their children); Herrera v. Herrera, 409 S.W.2d 395, 396 (Tex. 1966) (parent's right to surround child with proper influences).

14. *See* Stanley v. Illinois, 405 U.S. 645, 649 (1972) (state has right and duty to protect children through judicial proceedings if parents fail to provide suitable care).

15. *See* Holley v. Adams, 544 S.W.2d 367, 370 (Tex. 1976) (child's right to home and environment promotes his best interests); TEX. FAM. CODE ANN. § 15.02 (Vernon Supp. 1980) (abuse or neglect of child grounds for termination of parent-child relationship).

16. *See* Smith, *Texas Family Code: Title 2: Parent and Child,* 5 TEX. TECH L. REV. 389, 437 (1974).

17. *See* Stanley v. Illinois, 405 U.S. 645, 649 (1972) (state has right and duty to protect children though judicial proceedings if parents fail to provide suitable care); *accord,* Mitchell v. Davis, 205 S.W.2d 812, 815 (Tex. Civ. App.—Dallas 1947, writ ref'd). The state's power to regulate the family is derived from the *parens patriae* doctrine and the state's police power. The *parens patriae* doctrine is the paternalistic power of the government to protect the welfare of young children and mental incompetents. *See* Addington v. Texas, 441 U.S. 418, 426 (1979) (state's right to protect mental incompetents); Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944) (state's right to protect the child). Police power is the governmental power to promote the general welfare. *See* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (state's power to regulate individual's life to promote health, safety, and general welfare); Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) (compulsory vaccination of persons against smallpox valid exercise of police power).

18. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205, 231-35 (1972) (parent's fundamental right to educate children versus a state regulation); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (custody, care, and nuture of child lies first with parents); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (individual's right to conceive and raise children). *But cf.* Parham v. Hughes, 441 U.S. 347, 358 (1979) (Georgia law denying wrongful death benefits to father of unacknowledged child not violative of Equal Protection Clause); Prince v. Massachusetts, 321 U.S. 158, 164 (1944) (state's interest in protecting children by child labor statute outweighs claim of parental rights asserted under fourteenth amendment and Free Exercise

will lose his fundamental right if the state determines the parent has neglected or abused the child, and severance of the parent-child relationship is in the child's best interest.[19] There is a strong presumption in Texas that the best interest of the child is served when he remains in the custody of his natural parents.[20] The child, however, possesses a right to be free from abuse and neglect.[21] The child's right not only makes him the focus of a termination suit, but the most interested party to it.[22]

Jurisdictions are split as to the manner and requisites of termination proceedings.[23] Many states provide for permanent termination of the parent-child relationship only in conjunction with an adoption of the child.[24] Other states, including Texas, have provisions for a separate termination proceeding to protect the child even though no adoption may have been contemplated.[25] The burden of proof in termination proceedings also var-

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Clause of first amendment).

19. *See* Brooks v. DeWitt, 178 S.W.2d 718, 723 (Tex. Civ. App.—San Antonio), *rev'd on other grounds*, 143 Tex. 122, 182 S.W.2d 687, *cert. denied*, 325 U.S. 862 (1944).

20. *E.g.*, Wiley v. Spratlan, 543 S.W.2d 349, 352 (Tex. 1976); Herrera v. Herrera, 409 S.W.2d 395, 396 (Tex. 1966); Mumma v. Aguirre, 364 S.W.2d 220, 221 (Tex. 1963). It is incumbent upon the petitioner in a termination suit to rebut the custodial presumption. *See, e.g., In re* R.E.W., 545 S.W.2d 573, 581 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.) (petitioner must carry burden of proof in termination proceeding); *In re* R.P.D., 526 S.W.2d 135, 137 (Tex. Civ. App.—Dallas 1975, no writ) (burden of proof on petitioner in involuntary termination proceeding); Potter v. Charlow, 454 S.W.2d 214, 215 (Tex. Civ. App.—Eastland 1970, writ ref'd n.r.e.) (in termination suit petitioner has burden of proof).

21. *See* TEX. FAM. CODE ANN. § 12.04 (Vernon Supp. 1980) (duties parents owe to child); *id.* § 15.02 (proscribed acts and omissions of parents against a child warranting severance of parent-child relationship); *cf.* Ronk v. State, 544 S.W.2d 123, 124-25 (Tex. Crim. App. 1976) (failure to provide care to child, as provided in section 12.04 of Texas Family Code, resulting in death of child punishable under Texas Penal Code section 22.04: Injury to a Child).

22. *See, e.g., In re* K., 535 S.W.2d 168, 171 (Tex.) (child's right in termination suit is paramount), *cert. denied*, 429 U.S. 907 (1976); Herrera v. Herrera, 409 S.W.2d 395, 396 (Tex. 1966) (most interested person is child); Legate v. Legate, 87 Tex. 248, 252, 28 S.W. 281, 282 (1894) (most interested party in termination proceeding is child). The Texas Family Code provides for procedures whereby a child can be the petitioner in a termination suit. *See* TEX. FAM. CODE ANN. § 11.03 (Vernon 1975) (child may be petitioner in involuntary termination suit); *id.* § 11.10(d) (Vernon Supp. 1980) (attorney appointed for child who is subject matter of termination suit).

23. *Compare* ILL. ANN. STAT. ch. 4, § 9.1-.8 (Smith-Hurd Supp. 1980-81) (termination of parent-child relationship in conjunction with adoption) *with* N.M. STAT. ANN. § 22 (Supp. 1975) (no adoption proceeding necessary to terminate parent-child relationship).

24. *Cf.* ILL. ANN. STAT. ch. 4, § 9.1-.8 (Smith-Hurd Supp. 1980-81) (termination of parent-child relationship in conjunction with adoption); IND. CODE ANN. § 31 (Burns 1977) (only provision for termination of parent-child relationship in adoption statute); N.Y. DOM. REL. LAW § 111 (McKinney 1977) (adoption provision only means to terminate parent-child relationship).

25. *Cf.* N.M. STAT. ANN. §22 (Supp. 1975) (termination provision separate from adop-

ies among the jurisdictions.[26] Some jurisdictions require the party seeking the termination of the parent-child relationship to prove by clear and convincing evidence that the child has been abandoned, abused, or neglected, and the best interest of the child is served by severance.[27] Other jurisdictions require proof of the same factors by preponderance of the evidence.[28]

Clear and convincing evidence is the intermediate standard of proof.[29]

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tion provision); TEX. FAM. CODE ANN. § 15.02 (Vernon Supp. 1980) (no adoption proceeding necessary to terminate parent-child relationship); WIS. STAT. ANN. § 48.40 (West 1979) (provision for termination of parent-child relationship separate from adoption statute).

26. *Compare* Freeman v. Settle, 393 N.E.2d 1385, 1386 (Ill. App. Ct. 1979) (termination only for adoption; clear and convincing quantum of proof) *and* Young v. Young, 366 N.E.2d 216, 218 (Ind. Ct. App. 1977) (termination only through adoption; clear and convincing evidence) *with In re* Kegel, 271 N.W.2d 114, 116 (Wis. 1978) (separate termination statute; preponderance of the evidence).

27. *See, e.g.*, Freeman v. Settle, 393 N.E.2d 1385, 1386 (Ill. App. Ct. 1979) (termination only in conjunction with adoption proceeding; evidence must be clear and convincing); Young v. Young, 366 N.E.2d 216, 218 (Ind. Ct. App. 1977) (termination only for adoption purposes; clear and convincing evidence); Huey v. Lente, 514 P.2d 1093, 1095 (N.M. 1973) (separate termination proceeding independent of an adoption proceeding; clear and convincing evidence).

28. *See In re* Kegel, 271 N.W.2d 114, 116 (Wis. 1978) (independent termination statute; proof of allegations by preponderance of evidence).

States allowing termination of parent-child relationships in conjunction with adoption proceedings require parental consent. *See* ILL. ANN. STAT. ch. 4, § 9.1-.8 (Smith-Hurd Supp. 1980-81); IND. CODE ANN. § 31 (Burns 1977). These adoption statutes, however, provide for termination without consent if the parent is proved unfit by clear and convincing evidence. *See* Freeman v. Settle, 393 N.E.2d 1385, 1386 (Ill. App. Ct. 1979) (court interpreting burden of proof required to terminate parent-child relationship under adoption statute; clear and convincing evidence); Young v. Young, 366 N.E. 2d 216, 218 (Ind. Ct. App. 1977) (clear and convincing evidence required to prove parents unfit under adoption statute). States providing for involuntary termination of the parent-child relationship independent of an adoption proceeding are not concerned with parental consent; instead the concern is for the child. *See* TEX. FAM. CODE ANN. § 15.02 (Vernon Supp. 1980) (separate termination provision from adoption statute; best interest of child); WIS. STAT. ANN. § 48.40 (West 1979) (involuntary termination of parent-child relationship independent of adoption statute; child's best interest). The burden of proof under such statutes varies between preponderance of the evidence and clear and convincing evidence. *Compare* Freeman v. Settle, 393 N.E.2d 1385, 1386 (Ill. App. Ct. 1979) (clear and convincing evidence required under adoption statute) *and* Young v. Young, 366 N.E.2d 216, 218 (Ind. Ct. App. 1977) (termination only through adoption; clear and convincing evidence required) *with* Huey v. Lente, 514 P.2d 1093, 1095 (N.M. 1973) (separate termination proceeding; clear and convincing evidence required to terminate) *and In re* Kegel, 271 N.W.2d 114, 116 (Wis. 1978) (preponderance of evidence standard required to terminate under separate termination statute).

29. State v. Addington, 588 S.W.2d 569, 570 (Tex. 1979) (clear and convincing evidence intermediate standard of proof between preponderance of the evidence and beyond a reasonable doubt). *See generally* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 340 (2d ed. 1972); J. WIGMORE, TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2498 (3d ed. 1940).

This intermediate standard is applied whenever the interests at stake are more than monetary, but less than penal incarceration.[30] The United States Supreme Court in *Addington v. Texas*[31] concluded due process requires the clear and convincing evidence standard of proof when a civil proceeding may affect an individual's fundamental right to liberty.[32] Unlike the burden of proof required in criminal cases, permitting a guilty man freedom if the factfinder has any reasonable doubt,[33] the factfinder in a termination proceeding protects the interests of both parties when instructed he must be clearly convinced of the truthfulness of the evidence.[34] Furthermore, the scope of appellate review is expanded when the trial court applies the clear and convincing evidence rule.[35] The reviewing court has more discretion in determining whether there was sufficient evidence to support a fact found by the trial court.[36]

The Texas Family Code provides for involuntary termination of the parent-child relationship[37] when the parent has provided insufficient care for the child,[38] and the court finds termination to be in the child's best

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30. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 424 (1979) (involuntary civil commitment to mental institution); Woodby v. INS, 385 U.S. 276, 285 (1966) (deportation); Chaunt v. United States, 364 U.S. 350, 353 (1960) (denaturalization).

31. 441 U.S. 418 (1979).

32. *Id.* at 423.

33. *See id.* at 423-24; *In re* Winship, 397 U.S. 358, 362 (1970). *See generally* C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 341 (2d ed. 1972).

34. Addington v. Texas, 441 U.S. 418, 425 (1979) (clear and convincing evidence protects interests of both parties in an involuntary commitment proceeding). *See generally* C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 340 (2d ed. 1972).

35. *See* State v. Turner, 556 S.W.2d 563, 565 (1977) (clear and convincing evidence is standard for determining factual sufficiency). *See generally* Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEXAS L. REV. 361, 369-71 (1960); Garwood, *The Questions of Insufficient Evidence on Appeal*, 30 TEXAS L. REV. 803, 813 (1952).

36. *See* Shapley v. Texas Dep't of Human Resources, 581 S.W.2d 250, 254 (Tex. Civ. App.—El Paso 1979, no writ) (appellate court using clear and convincing evidence standard overruled trial findings of fact by theorizing what the facts *may* have been).

37. *See* TEX. FAM. CODE ANN. § 15.02 (Vernon Supp. 1980). The code provides for voluntary termination of parental rights in section 15.01 and termination upon an affidavit of relinquishment in section 15.03. *See id.* §§ 15.01, .03. There is also a provision for conservatorship in section 14.06. *See id.* § 14.06. Conservatorship provides for child custody and not the permanent termination of the parent-child relationship. *See* Wiley v. Spratlan, 543 S.W.2d 349, 351 (Tex. 1976).

38. TEX. FAM. CODE ANN. § 15.02(1) (Vernon Supp. 1980). Section 15.02(1) provides:

> A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that (1) the parent has:
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> (A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return; or
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> (B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate sup-

interest.[39] An involuntary termination suit may be brought by either parent against the other or by a third party.[40] Once termination is ordered all legal rights, duties, and privileges between the parent and child are irrevocably severed except for the child's right to inherit.[41]

Texas Family Code section 11.15 requires the findings in an involuntary termination suit be based upon a preponderance of the evidence.[42] Under the preponderance of the evidence standard, the factfinder is instructed to ascertain the greater weight of the evidence.[43] This standard is applied primarily in civil litigation involving monetary disputes be-

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port of the child, and remained away for a period of at least three months; or

(C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months; or

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; or

(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child; or

(F) failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition; or

(G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence; or

(H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth; or

(I) contumaciously refused to submit to a reasonable and lawful order of a court under Section 34.05 of this code; or

(J) been the major cause of:

(i) the failure of the child to be enrolled in school as required by the Texas Education Code; or

(ii) the child's absence from his home without the consent of his parents or guardian for a substantial length of time or without the intent to return; or

(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by Section 15.03 of this code.

See id.

39. *Id.* § 15.02(2) (termination must be in child's best interest).

40. *See id.* § 11.03 (Vernon 1975) (suit may be brought by any party with interest in child; including child, state agency, or any political subdivision of the state); Smith, *Texas Family Code: Title 2: Parent and Child*, 5 TEX. TECH L. REV. 389, 437 (1974).

41. Wiley v. Spratlan, 543 S.W.2d 349, 352 (Tex. 1976); TEX. FAM. CODE ANN. § 15.07 (Vernon Supp. 1980).

42. TEX. FAM. CODE ANN. § 11.15 (Vernon 1975).

43. *See* Mutual Reserve Life Ins. Co. v. Jay, 109 S.W. 1116, 1120 (Tex. Civ. App. 1908, writ ref'd). *See generally* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 339 (2d ed. 1972).

tween parties in which society has minimal concern in the outcome.[44] Inasmuch as the burden of proof is a mere preponderance, each litigant is viewed as equally sharing the risk of error.[45] Contrary to section 11.15 of the Family Code several Texas courts of civil appeals have held the determinations in involuntary termination proceedings must be by more than a mere preponderance of the evidence.[46] Recognizing the finality of the termination and the natural right to family unity, these courts have placed a more onerous burden upon the petitioner in proving the allegations and rebutting the presumption that the best interest of the child is served when he is with his natural parents.[47] The burden of proof required by these courts has been a version of the clear and convincing standard.[48]

The Supreme Court of Texas in *In re G.M.*[49] reviewed the burden of proof required in a section 15.02 termination proceeding in light of the holdings in *Stanley v. Illinois*[50] and *Addington v. Texas*.[51] The court recognized *Stanley* established the family unit as a constitutional right,[52] while *Addington* involved balancing the fundamental rights of liberty and freedom against the state's duty to protect the public and the mentally ill.[53] Balancing the fundamental right of the family with the state's right and duty to protect children within the state, the court, in *In re G.M.*, held the preponderance of the evidence standard required by section 11.15 was not applicable to involuntary termination proceedings.[54] The

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44. *See* Addington v. Texas, 441 U.S. 418, 423-24 (1979).

45. *See id.* at 423-24.

46. *See In re* G.M., 596 S.W.2d 846, 846-47 (Tex. 1980). The Texas Supreme Court stated that *Brokenleg v. Butts*, 559 S.W.2d 853 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.), *cert. denied*, 442 U.S. 946 (1979) and *In re R.E.W.*, 545 S.W.2d 573 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.) required more than a mere preponderance of the evidence to rebut the presumption that the best interest of the child is served when left with his parents. *See In re* G.M., 596 S.W.2d 846, 846-47 (Tex. 1980); *cf.* Addington v. Texas, 441 U.S. 418, 421-22 (1979) (examples of various forms of the clear and convincing evidence standards).

47. *See, e.g.*, Shapley v. Texas Dep't of Human Resources, 581 S.W.2d 250, 254 (Tex. Civ. App.—El Paso 1979, no writ) (solid and substantial); *In re* R.E.W., 545 S.W.2d 573, 581 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.) (clear and substantial); Martin v. Cameron County Child Welfare Unit, 326 S.W.2d 31, 36 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.) (clear evidence).

48. *See In re* G.M., 596 S.W.2d 846, 846-47 (Tex. 1980); *cf.* Addington v. Texas, 441 U.S. 418, 421 (1979) (listing versions of the clear and convincing evidence standard). *See generally* C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 340 (2d ed. 1972).

49. 596 S.W.2d 846 (Tex. 1980).

50. 405 U.S. 645 (1972).

51. 441 U.S. 418 (1979).

52. *In re* G.M., 596 S.W.2d 846, 846-47 (Tex. 1980).

53. *See id.* at 846-47.

54. *Id.* at 847.

court concluded the more onerous burden of clear and convincing standard of proof would be used.[55] The Texas Supreme Court reasoned this standard would make it more difficult to sever the parent-child relationship, thereby protecting the fundamental right of family unity.[56] The espoused standard, however, would not be so onerous a burden as to permit an abused or neglected child to remain with his natural parents.[57]

There has been a need for uniformity among Texas courts of civil appeals on the applicable burden of proof required in a section 15.02 termination proceeding.[58] The Texas Supreme Court in *In re G.M.* by requiring the clear and convincing evidence standard of proof in an involuntary termination suit has protected the parental right to retain custody of the child.[59] The court, however, has failed to consider the effect the standard will have upon the child's due process rights.[60] Because the child is both the subject of the termination suit and the most interested party,[61] his rights may not be subordinated to the rights of his parents.[62] The question arising from the court's decision in *In re G.M.* is whether the child's rights have been undermined by the rights of his parents in an involuntary termination suit through the use of the clear and convincing evidence standard.[63]

The child's interests in a termination suit are separate from those of his parents and, therefore, protection afforded the family will not *ipso facto* protect the child's interests.[64] In fact, the protection granted the parents

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55. *Id.* at 847.

56. *See id.* at 847.

57. *See id.* at 847.

58. *Compare* Crawford v. Crawford, 569 S.W.2d 505, 508 (Tex. Civ. App.—San Antonio 1978, no writ) (preponderance of the evidence) *with In re* R.E.W., 545 S.W.2d 573, 581 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.) (clear and substantial).

59. 596 S.W.2d 846, 847 (Tex. 1980) (the more onerous burden makes termination more difficult).

60. *Cf. id.* at 847 (child's due process rights not considered; court concerned only with parent's right to custody).

61. *See, e.g., In re* K., 535 S.W.2d 168, 171 (Tex.) (child's right paramount in termination proceeding), *cert. denied,* 429 U.S. 907 (1976); Herrera v. Herrera, 409 S.W.2d 395, 396 (Tex. 1966) (most interested person is child); Legate v. Legate, 87 Tex. 248, 252, 28 S.W. 281, 282 (1894) (most interested party in termination proceeding is child).

62. *See In re* K., 535 S.W.2d 168, 171 (Tex.) (child's interests are paramount), *cert. denied,* 429 U.S. 907 (1976); *cf.* Belloti v. Baird, 443 U.S. 622, 650-51 (1979) (minor's right to abortion protected by due process from statute requiring parental consent); Parham v. J.R., 442 U.S. 584, 603-04 (1979) (child's due process rights separate from parent's rights when parents have neglected or abused child).

63. *See In re* G.M., 596 S.W.2d 846, 847 (Tex. 1980) (clear and convincing evidence standard must be used in involuntary termination proceedings).

64. *See* Parham v. J.R., 442 U.S. 584, 603-04 (1979) (due process rights of parents and child not same in child abuse or neglect cases); Herrera v. Herrera, 409 S.W.2d 395, 398 (Tex. 1966) (child and parent have separate interests).

by the clear and convincing evidence standard burdens the child as well as the state, as either may bring a termination suit,[65] thereby carrying the burden of proof.[66] This inequitable burdening occurs due to the misapplication by the court in *In re G.M.* of the clear and convincing evidence standard applied in *Addington*.[67] While the Court in *Addington* balanced the interests of only two parties, the state and the individual,[68] the proceeding in *In re G.M.* also involved the interest of a third party, the child.[69] By applying the clear and convincing evidence standard, the Texas court only balanced the right of the parents against the interests of the state, failing to consider the effect of the balancing on the rights of the child.[70] The blanket protection granted to the parent's right to family unity places the child in the same position as the state.[71] Although the United States Supreme Court has held the right of the parents may not be superior to the best interests of the child,[72] the effect of the *G.M.* decision is to place the parent's rights above those of the child by requiring the child to prove his allegations in a termination suit by clear and convincing evidence.[73] Moreover, the application of the clear and convincing

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65. *See* TEX. FAM. CODE ANN. § 11.03 (Vernon 1975) (child as well as state may be petitioner).

66. *See, e.g., In re* R.E.W., 545 S.W.2d 573, 581 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.) (petitioner in termination proceeding must carry burden of proof); *In re* R.P.D., 526 S.W.2d 135, 137 (Tex. Civ. App.—Dallas 1975, no writ) (burden of proof is on petitioner in involuntary termination proceeding); Potter v. Charlow, 454 S.W.2d 214, 215 (Tex. Civ. App.—Eastland 1970, writ ref'd n.r.e.) (in termination suit, burden of proof is on petitioner).

67. *See In re* G.M., 596 S.W.2d 846, 847 (Tex. 1980) (adopting *Addington* reasoning for use of clear and convincing evidence).

68. *See* Addington v. Texas, 441 U.S. 418, 423-24 (1979) (applied clear and convincing evidence standard to involuntary commitment proceeding).

69. *See* Holley v. Adams, 544 S.W.2d 367, 370 (Tex. 1976) (listing rights of child and parent); Brooks v. DeWitt, 178 S.W.2d 718, 723 (Tex. Civ. App.—San Antonio) (state's interest in children permits regulation of parental conduct), *rev'd on other grounds*, 143 Tex. 122, 182 S.W.2d 687, *cert. denied*, 325 U.S. 862 (1944). *See generally* Smith, *Texas Family Code: Title 2: Parent and Child*, 5 TEX. TECH L. REV. 389, 437 (1974).

70. *Cf. In re* G.M., 596 S.W.2d 846, 846 (Tex. 1980) (court only balanced parental and state rights).

71. *See id.* at 846-47. The court in *In re G.M.* held that clear and convincing evidence would protect the parental right to family unity by creating a heavier burden on the state in a termination proceeding. Furthermore, it was held that in *all* involuntary termination proceedings the espoused burden of proof would be required. *See id.* at 846-47. The Texas Family Code, however, provides the child also may be a petitioner in an involuntary termination suit; therefore, the burden would fall equally on the state and the child. *See* TEX. FAM. CODE ANN. § 11.03 (Vernon 1975).

72. *See* Prince v. Massachusetts, 321 U.S. 158, 164 (1944) (right of parents secondary to state's right to protect child by child labor law); *cf.* Belloti v. Baird, 443 U.S. 622, 642-43 (1979) (parental consent to minor's abortion not required).

73. *Compare In re* G.M., 596 S.W.2d 846, 847 (Tex. 1980) (all involuntary termination

evidence standard must be viewed in light of the strong presumption the best interest of the child is served when he is left in the custody of his natural parents.[74] When this presumption is considered in conjunction with the espoused burden of proof, an imbalance is created in favor of the right of family against the child's right to be free from abuse and neglect.[75] In order to terminate the parent-child relationship the child must not only rebut the custodial presumption in favor of the parent,[76] but must also prove the facts necessary to rebut the presumption by the onerous clear and convincing evidence standard.[77] The problem with the court's determination becomes apparent when the state proves the parents have abused the child, yet fails to rebut the custodial presumption, causing the abused child to remain in the custody of his parents.[78]

The decision in *In re G.M.* was premised entirely on the conflict between parental rights to family unity and the state's interest in the family.[79] The decision to require clear and convincing evidence in *all* proceedings for involuntary termination of parent-child relationships[80] fails to provide for the situation when the state is not the petitioner and only the child seeks termination.[81] Adoption of the statutory burden of proof by a preponderance of the evidence,[82] would allocate the risk of error equally between the child or state, and the parents.[83] Such an allocation would

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suits require clear and convincing standard of proof) *with* TEX. FAM. CODE ANN. § 11.03 (Vernon 1975) (child may be petitioner) *and In re* R.P.D., 526 S.W.2d 135, 137 (Tex. Civ. App.—Dallas 1975, no writ) (burden of proof on petitioner in involuntary termination suit).

74. *See, e.g.*, Wiley v. Spratlan, 543 S.W.2d 349, 352 (Tex. 1976); Herrera v. Herrera, 409 S.W.2d 395, 396 (Tex. 1966); Mumma v. Aguirre, 364 S.W.2d 220, 221 (Tex. 1963).

75. *Compare* Addington v. Texas, 441 U.S. 418, 423-27 (1979) (clear and convincing evidence required to protect individual's right to liberty against state) *and In re* G.M., 596 S.W.2d 846, 847 (Tex. 1980) (clear and convincing evidence required in all involuntary termination proceedings) *with* TEX. FAM. CODE ANN. § 11.03 (Vernon 1975) (child may also be petitioner in involuntary termination suit).

76. *See In re* R.E.W., 545 S.W.2d 573, 581 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.) (petitioner in a termination suit has burden of proof and must rebut custodial presumption).

77. *See In re* G.M., 596 S.W.2d 846, 847 (Tex. 1980) (clear and convincing evidence standard of proof required in *all* involuntary termination proceedings).

78. *See* Holley v. Adams, 544 S.W.2d 367, 371-73 (Tex. 1976); Brokenleg v. Butts, 559 S.W.2d 853, 857-58 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.), *cert. denied*, 442 U.S. 946 (1979).

79. *See In re* G.M., 596 S.W.2d 846, 846-47 (Tex. 1980).

80. *Id.* at 847.

81. *See* TEX. FAM. CODE ANN. § 11.03 (Vernon 1975) (child may be petitioner); *id.* § 11.10 (Vernon Supp. 1980) (whenever child is subject of termination attorney may be appointed).

82. *See id.* § 11.15 (Vernon 1975) (finding of fact by preponderance of the evidence).

83. *Cf.* Addington v. Texas, 441 U.S. 418, 423 (1979) (preponderance of the evidence allocates the risk equally between adverse parties).