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Clear and Convincing Evidence: A Broadly Applicable Standard of Proof

Two cases now before Tennessee appellate courts are adding contour to the concept of clear and convincing evidence. In both, plaintiffs have invoked this heightened standard for proof. They illustrate the extensive reach of a doctrine whose application is not limited, as sometimes supposed, to constitutional issues or matters of broad social interest.

One case, *Teter v Republic Parking Sys.*,[1] involved the refusal by an employer to honor a severance pay provision. In justifying its action, the employer tried to use evidence of allegedly gross misconduct that was acquired after the dismissal of an executive. The executive successfully argued in the trial court and the Court of Appeals that such evidence must meet the clear and convincing standard but did not. The case is pending in the Tennessee Supreme Court.

The other case, *Chapman v. H&R Block Mortgage Corp.*,[2] concerned a borrower who sought to rescind a mortgage loan. The lender successfully asserted in the trial court an arbitration provision although the borrower claimed that she was not obligated to give up a judicial forum and a jury trial. In the Court of Appeals, she cited earlier cases that make the lender prove that the parties had bargained about arbitration or that the provision was a reasonable one. She also claimed that, because arbitration involves the surrender of constitutional rights, the burden could only be met by clear and convincing proof. The case is before the Eastern Section of the Court of Appeals.

Both cases manifest judicial skepticism embedded in a doctrine that is founded not only on constitutions and statutes but also on common law. It conceivably reaches into every case where the controversy visibly transcends the parties before the court. Because of cases like *Teter,* it also extends to situations where deep judicial suspicions are aroused, even if money is the only issue. This article will examine the purpose, meaning, and scope of the doctrine.

The measure of proof required to prevail is a function of the importance of the issue. The greater the consequences, the greater must be the believability of the proof. It is only fair to require the state to demonstrate near certainty when a crime has been charged and life, liberty, or a fine is at stake. It is unfair to impose the same burden on a person who seeks recompense for a broken back or a dishonored promise; proof that is more likely correct than not is all that is needed.

Not every situation fits this familiar distinction. Some cases, and especially some issues, are in-between. In these instances of high but not critical importance, courts say that the proof must be both clear and convincing. This standard is more than a preponderance of the evidence and less than proof beyond a reasonable doubt. The evidence must lead to a conclusion that is highly probable,[3] rather than one that is more probable than not or one that is beyond a reasonable doubt. In perhaps the most cogent phrase of all, evidence satisfying the clear-and-convincing standard "produces in a factfinder's mind a firm belief or conviction regarding the truth of the facts sought to be established."[4] The caution embedded in this phrase seems to especially motivate judges resting their decisions on common law grounds, rather than constitutions and statutes.

Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusion derived from it.[5] The definition is plain enough. The words seem to have elasticity, though, depending upon whether there is a constitutional, statutory or common law basis for the imposition of this standard. In common law cases, Tennessee courts have

manifested a tendency to expand the usage of this standard to situations where the consequences are less severe than those in which the basis is constitutional or statutory.

To illustrate, Art. I, § 8 of the Tennessee Constitution protects the fundamental right of natural parents to have custody of their children.[6] Thus, in a custody dispute between a father and grandparents when the mother has died, the grandparents have the burden of establishing by clear and convincing evidence that the child will be exposed to substantial harm if placed in the care of the father.[7] It takes a scathing indictment of the father's behavior to meet this standard.

Statutes yield a similar result when they require clear and convincing proof. Tenn. Code Ann. § 36-1-113(c)(1) creates a high barrier to termination of parental rights, and the Department of Children Services has been notably unsuccessful[8] in overcoming it, despite the frequency and severity of abuse and neglect that the Department almost certainly encounters regularly. Likewise, "because of the value our society places on individual autonomy and self-determination,"[9] Tenn. Code Ann. § 34-1-126 requires use of the higher standard of proof that the person for whom a conservator is sought is truly disabled. While conservatorships are seldom contested strenuously, the guardian ad litem has a formidable statutory weapon against family members seeking an early inheritance or to overrule a person's choice about health care.

Tennessee judges have applied the heightened standard of proof for at least four reasons. Profound suspicion is most often at work. For example, when one is a fiduciary or the dominant party in a confidential relationship, he or she has the burden of proving the fairness of a transaction with the other person, and the proof must be clear and convincing.[10] At other times deference to another branch of government seems to motivate judges. Thus, to overturn a tax assessment, the taxpayer not only has the burden of proof but must meet the heightened standard of proof.[11] Finally, two other rationales are expressed in *Hodges v. S. C. Toof & Co.*,[12] the case that sets the rules for an award of punitive damages: "This higher standard of proof is appropriate given the twin purposes of punishment and deterrence: fairness requires that a defendant's wrong be clearly established before punishment, as such, is imposed; awarding punitive damages only in clearly appropriate cases better effects deterrence."

Numerous other decisions, frequently reported only in Lexis and Westlaw, manifest the willingness of judges to apply one of these rationales. Examples are cases where: a document has been lost;[13] a party seeks to prove that a trust has been created orally;[14] one party asserts that the other has abandoned an easement;[15] a confidential relationship exists between a child and an incompetent parent, and the child creates a joint bank account with right of survivorship using the parent's money;[16] attorneys-in-fact benefit personally from a transaction at the expense of the person for whom they act;[17] a confidential relationship exists between a client and an attorney who drafts his will and is the principal beneficiary and executor;[18] and an attorney in his capacity as executor may benefit from an exculpatory clause which he or a member of his firm has drafted.[19]

The two recent cases manifest judicial distrust. *Teter* is the more notable of the two because money was the only issue. *Chapman* entailed the loss of constitutional rights. The argument made in the latter case is that of *Cruzan v. Director*,[20] the U.S. Supreme Court case that governs proceedings where life support is sought to be withdrawn or withheld: "This Court has mandated an intermediate standard of proof -- clear and convincing evidence -- when the individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money."

One concludes that, in Tennessee courts, a great many issues can be subjected to the clear-

and-convincing standard of proof. Even if money rather than a constitutional right is involved, the heightened standard will likely be applied whenever a judge is deeply suspicious about the motives of a party or what it stands to gain. Other rationales – deference, deterrence, and fairness – are more likely to prompt use of the standard only when matters of broad social importance are at stake.

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[1] 2004 Tenn. App. LEXIS 706 at p. 28, *app. grntd.* 2005 Tenn. LEXIS 246 (Mar. 21, 2005).

[2] No. E2005-00082-COA-R3-CV. I am counsel for Mrs. Chapman. The case may be decided on one or more other issues instead of the one discussed here.

[3] *Lettner v. Plummer,* 559 S.W.2d 785, 787 (Tenn. 1977); *Brandon v. Wright,* 838 S.W.2d 532, 536 (Tenn. App. 1992).

[4] *In the Matter of Groves,* 109 S.W.3d 317, 331 (Tenn. App. 2003).

[5] *In re M.W.M., W.W.M., S.M.M., & A.M.M*, 2005 Tenn. App. LEXIS 449 at *10.

[6] *Blair v. Badenhope,* 77 S.W.3d 137, 141 (Tenn. 2002).

[7] *Hall v. Bookout,* 87 S.W.3d 80, 86 (Tenn. 2002).

[8] *In the Matter of: C.M.C., C.L.C., and D.A.M.*, 2005 Tenn. App. LEXIS 458.

[9] *In the Matter of Groves*, *supra.*

[10] *Fell v. Rambo,* 36 S.W.3d 837, 847-48 (Tenn. App. 2000).

[11] *Louis Dreyfus Corp. v. Huddleston,* 933 S.W.2d 460, 467-68 (Tenn. App. 1996).

[12] 833 S.W.2d 896, 901 (1992).

[13] *W. M. Barr & Co., v. Commercial Union*, 1997 Tenn. App. LEXIS 71 at * 7-10.

[14] *Norwood v. Pressley*, 1995 Tenn. App. LEXIS 85 at *2; *Moore v. Bryant*, 1996 Tenn. App. LEXIS 94 at *5.

[15] *Watson v. Ball*, 2003 Tenn. App. LEXIS 148 at * 7-8.

[16] *Maupin v. Holmes*, 1998 Tenn. App. LEXIS 213 at *14-15.

[17] *Stewart v. Sewell,* 2005 Tenn. App. LEXIS 222 at *31-32.

[18] *Matlock v. Simpson,* 902 S.W.2d 384, 385 (Tenn. 1995) .

[19] *Petty v. Privette,* 1991 Tenn. App. LEXIS 811 at *11-12; *In re Estate of Wakefield*, 2001 Tenn. App. LEXIS 905 at *42.

[20] 497 U.S. 261, 282 (1990) (citations and internal quotation marks omitted).

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