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The Default Rule on Burden of Proof in Civil Cases

By Jeffrey A. Parness

In the recent case of *In re Parentage of Rogan M.*, a custodial parent sought to remove a child from Illinois over the objection of the child's other parent who "continued an active relationship" with the child pursuant to a three year old settlement which included "a basic parental arrangement."[1] In *Rogan M.*, the First District of the Illinois Appellate Court held that the requesting parent must only show that removal is in the child's best interests by a preponderance of the evidence, the standard burden of proof in civil cases.[2] Conversely, Illinois Supreme Court Chief Justice Rita B. Garman has suggested that a trial court's judgment as to a child's best interests may involve "identifying and weighing the values at stake" rather than "fact-finding" and thus require no burden of proof[3] However, the *Rogan M.* court reasoned that since the relevant Illinois statute on such removals[4] "does not set forth a quantum of proof for removal petitions,"[5] a preponderance of the evidence was the required quantum under an Illinois Supreme Court precedent where it was deemed applicable "absent a statutorily assigned evidentiary standard."[6]

While the court in *Rogan M.* recognized that the burden of proof in a proceeding to modify a prior custody judgment is "clear and convincing evidence," it reasoned that this was because of the explicit language in the relevant statute.[7] It concluded, again, that "a removal petition is not a petition to modify custody."[8] The First District's approach to burden of proof in child removal cases has since been employed by the Fourth District.[9]

But absent statutory authority, what is the default burden of proof for removal issues, or for other legal issues in civil cases? The *Rogan M.* court relied on an Illinois Supreme Court case that, upon further analysis, did not apply a default rule. The case of *In re Enis* involved the state's petition to terminate the parental rights of a mother and father whose six-year-old child was then in foster care.[10] The termination process was significantly controlled by United States Supreme Court

1. *In re Parentage of Rogan M.*, 2014 IL App (1st) 141214, ¶3; 19 N.E.3d 140 [*hereinafter Rogan M.*].
2. *Rogan M.*, at ¶5, 19 N.E.3d at 141.
3. *In re D.T.*, 212 Ill. 2d 347, 371-72, 818 N.E.2d 1214, 1230-31 (2004) (*Garman, C.J., dissenting*).
4. *Illinois Marriage and Dissolution of Marriage Act*, 750 ILCS 5/101 *et seq.*, §609(a) (2010) (2015, *repealed by Pub. Act 99-90, effective* Jan. 1, 2016).
5. *Rogan M.*, at ¶6, 19 N.E.3d at 141.
6. *In re Enis*, 121 Ill. 2d 124, 131-2, 520 N.E.2d 362, 365-66 (1988) [*hereinafter Enis*].
7. *Rogan M.* at ¶6, 19 N.E.3d at 141.
8. *Id.* at ¶8, 19 N.E.3d at 141-42, (citing *In re Marriage of Bednar*, 146 Ill. App. 3d 704, 496 N.E.2d 1149 (1st Dist. 1986) and *In re Marriage of Mueller*, 76 Ill. App. 3d 860, 395 N.E.2d 677 (5th Dist. 1979) (in each case, the two year wait on seeking modification of a child custody judgment was found inapplicable to a visitation or a child removal petition since neither involved an issue of custody).
9. *In re Marriage of Tedrick*, 2015 IL App (4th) 140773, ¶49, 25 N.E.3d 1233, 1240 (*citing Rogan M.*, at ¶5, 19 N.E.3d at 141) (petitioner seeking to move child from Illinois to South Carolina).
10. *Enis*, 121 Ill.2d at 125-26, 520 N.E.2d at 363.

precedent holding that the due process clause of the fourteenth amendment requires "at least clear and convincing evidence" of permanent parental neglect.[11] The trial court's termination of parental rights was reversed by the Illinois Supreme Court ruling in *Enis* under United States Supreme Court precedent because the trial court ruling was based on two findings of parental physical abuse, as well as a finding that the parents "failed to correct the conditions causing the court" to make the child "a ward of the court."[12] These findings on abuse were each supported only by a preponderance of the evidence.[13] Yet, in *Enis*, the court opined that a general rule defaulting to a preponderance of the evidence standard was previously established where a statute "did not specify whether the applicable standard is preponderance of the evidence or clear and convincing evidence."[14] Presumably this established, but unused, default rule noted in the *Enis* case was found applicable by the First District in child removal settings.

Yet, under United States Supreme Court precedent, does an order like that in *Rogan M.*–allowing removal by a parent of a child from Illinois to California–terminate the parental rights of a second, fit and "active" parent who remains in Illinois with long recognized and utilized childcare interests that have just become very difficult, if not impossible, to exercise? Lower Illinois appellate court decisions have suggested otherwise, holding that custody remains with the nonmoving parent though the visitation schedule and involvement in day-to-day parenting would likely change.[15] Further, beyond the federal constitutional due process issues, are there other federal (if not state) constitutional problems with such an order? Additional potential problems seemingly include the practical inequalities between effectively "childless" parents left behind in Geneva, Illinois when their children move to Los Angeles pursuant to a court order or without a court order to Carbondale.[16] For example, in *In re Marriage of Means*, the court held that the primary physical custodian, pursuant to a joint parenting agreement arising from a marriage dissolution, "may move anywhere in the State of Illinois without seeking the permission of the court".[17] However, the Illinois Marriage and Dissolution of Marriage Act provides that a court order modifying visitation rights "shall not restrict a parent's visitation rights" unless court finds "visitation would endanger seriously the child's physical, mental, moral or emotional health".[18]

So while a court order allowing an intrastate move of a child and the primary physical custodian is not always needed, the other parent may claim that his/her "visitation rights" are so altered by such an intrastate move that judicial review of the move is warranted, perhaps with the burden on the primary custodian to show serious health endangerment by a preponderance of the evidence if there is no move. This would promote the Illinois policy that "the welfare of the child usually requires that the parent who does not have custody . . . be given liberal visitation rights so the child will not be estranged from that parent."[19]

For lawyers and judges uninterested in making every burden of proof issue a constitutional one when the relevant statute is itself silent on the necessary quantum, the default rule to a preponderance of the evidence can be deemed nonabsolute. Thus, General Assembly intent as to quantum can be inferred from legislative intentions in very comparable settings. It seems reasonable to infer that the General Assembly desires the same burden of proof norm in certain parental removal/relocation cases, that is, cases involving residential moves that effectively, or very severely, limit the parent-child relationships of nonmoving parents. Individual statutes have been and should be interpreted, at times, by references to related statutes, especially if very undesirable results will otherwise follow.

11. *Santosky v. Kramer*, 455 U.S. 745, 747-8 (1982) (striking down a New York statute permitting termination of parental rights upon a finding of permanent neglect by "a fair preponderance of the evidence").
12. *Enis*, 121 Ill. 2d at 127 and 133-34, 520 N.E.2d at 364 and 366-67.
13. *Id.*
14. *Id.* at 131-32, 520 N.E.2d at 366 (citing *In re Urbasek*, 38 Ill. 2d 535, 543, 232 N.E.2d 716 (1967); *In re Simmons*, 127 Ill. App. 3d 943, 948, 469 N.E.2d 215 (5th Dist. 1984); In re Nitz, 76 Ill. App. 3d 15, 20, 394 N.E.2d 887 (3d Dist. 1979).
15. *In re Marriage of Bednar*, 146 Ill. App. 3d 704, 712, 496 N.E.2d 1149, 1155 (1st Dist. 1986).
16. *Illinois Marriage and Dissolution of Marriage Act*, 750 ILCS 5/101 *et seq.*, §600(g) (2015, *repealed by Pub. Act 99-90, effective* Jan. 1, 2016).
17. 329 Ill. App. 3d 392, 397, 771 N.E.2d 501, 505 (4th Dist. 2002).
18. 750 ILCS 5/607(c) (2015; *repealed by Pub. Act 99-90, effective* Jan. 1, 2016).
19. *McManus v. McManus*, 38 Ill. App. 3d 645, 646, 348 N.E.2d 508, 508 (5th Dist. 1976).

About the Author

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Thus in *People v. Trainor*, the Illinois Supreme Court found that the "legislature intended" for the clear and convincing evidence norm of the Sexually Violent Persons Act (the "Act") to apply to recovery proceedings under the Act.[20] Of course, legislators can always later choose to reject such judicial interpretations, assuming some degree of legislative rationality and no infringement of individual rights. But the default rule to a preponderance of the evidence should not automatically apply when statutes on burdens of proof are simply silent, even when there are no constitutional demands as to certain proof quantums.

More boldly, lawyers and judges might question whether the Illinois Supreme Court would fully support the First District's recognition of a rather absolute default to a preponderance of the evidence rule on burden of proof issues when there is no explicit statute. As noted, the First District cited but one Illinois Supreme Court ruling on the issue, which itself did not employ a default rule. This high court case cited but one Illinois Supreme Court ruling on defaults which also failed to employ any such default rule because of federal constitutional precedents.[21]

If statutory silence on the quantum of proof prompts no constitutional mandate, and if no reasonable inferences of General Assembly intent are decipherable, a rigid preponderance default norm presents problems. Beyond due process mandates, assessing the appropriate burden of proof requires a balancing of "the private interests affected by the proceeding," the "risk of error" created by the use of the preponderance norm, and the governmental interest supporting the use of a preponderance of the evidence. These assessments are also employed in federal constitutional procedural due process analysis, including explorations of burden of proof norms.[22] Sometimes the balancing indicates that more than a preponderance of evidence should be required, as when civil case resolutions require findings on quasi-criminal or criminal acts, or findings that will necessarily intrude significantly upon personal privacy interests. Upon such balancing, lawyers and judges have a variety of burden of proof standards from which to choose, including more than a preponderance of the evidence and clear and convincing evidence. For example, sometimes in civil cases courts employ a "clear preponderance" standard, or a beyond a reasonable doubt norm.[23]

A higher quantum than a preponderance of the evidence can be justified in a case like *Rogan M.* if the grant of a removal petition to one parent effectively ends a strong and loving parent-child relationship with the other parent which is then centered in Illinois. While parental interests are, of course, constitutionally protected, Illinois courts have long supported a child's interest in "a normal family home," "in a loving, stable and safe home environment," and in his or her own well-being"; courts have recognized that, at times, a child's interests do not always align with a parent's interests.[24]

"Absent statutory authority, what is the default burden of proof for removal issues, or for other legal issues in civil cases?

The absence of an explicit statutory guidance on a burden of proof should not necessarily prompt use of the preponderance norm in and outside of family law cases. Constitutional mandates on procedural due process have prompted higher standards. As well, an implicit General Assembly choice of a higher burden of proof in one setting has been gleaned from a legislative choice on the burden of proof in a related setting. Finally, Illinois judges should be able to employ a test involving a nonconstitutional balancing of competing interests that could lead them to forge a burden of proof going beyond preponderance where statues are silent, subject, of course, to some General Assembly oversight. □

20. 196 Ill. 2d 318, 337-38, 752 N.E.2d 1055, 1066-67 (2001).
21. *Enis*, 121 Ill. 2d at 132, 520 N.E.2d at 365-66 (*citing Urbasek*, 38 Ill. 2d at 543, 232 N.E.2d at 720).
22. *See, e.g., In re D.T.*, 212 Ill. 2d at 362-63, 818 N.E.2d at 1225-26 (employing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)) to explore the burden of proof for a child's best interest finding in a termination of parental rights proceeding).
23. *Urbasek*, 38 Ill. 2d at 543, 232 N.E.2d at 720 (clear preponderance standard for prosecuting violations of municipal ordinances and beyond a reasonable doubt standard for prosecuting acts of juvenile delinquency that would be crimes if committed by adults).
24. *See, e.g., In re D.T.*, 212 Ill. 2d at 363, 818 N.E.2d at 1226.