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66th Montana Legislature

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### Memo

To: Law and Justice Interim Committee  
From: Julianne Burkhardt, Staff Attorney  
Date: May 19, 2020  
Re: Standards of Proof for Civil Cases

### The Burden of Proof

The burden of proof determines which party is responsible for putting forth evidence and the level of evidence they must provide in order to prevail on their claim. In most civil cases, the petitioner or plaintiff (the party bringing the claim) has the burden of proof. In the current draft of HJ-36-1, the petitioner/exoneree has the burden of proof.

The burden of proof has two components. First, the petitioner must satisfy the burden of producing evidence. §26-1-401, MCA. As the terms suggest, this burden requires the petitioner to put forth evidence in the form of witness testimony, documents, objects, or other kinds of evidence. After the petitioner presents their case, the burden of producing evidence shifts to the respondent or defendant, who then has the opportunity to provide evidence either rebutting the petitioner's evidence or supporting the respondent's own arguments. The current draft of HJ-36-1 uses the terms petitioner and respondent to indicate the parties.

### Evidentiary Standards in Civil Cases

#### **Preponderance of the Evidence**

Second, the petitioner must satisfy the burden of persuasion. §26-1-402, MCA. This burden determines which standard of proof the petitioner must meet in presenting evidence to the judge or jury. A standard of proof determines the amount of evidence the petitioner or respondent needs to provide for the jury to reach a particular determination. In civil cases in Montana, the general burden of proof for civil cases is preponderance of the evidence. This standard requires the trier of fact (either judge or jury) to return a judgment in favor of the petitioner if the petitioner can show that a particular fact or event was more likely than not to have occurred. Some sources define the preponderance of the evidence standard as requiring a finding that at least 51 percent of the evidence favors the plaintiff's outcome. Under Montana

law "in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory, the decision must be made according to the preponderance of the evidence[.]" §26-1-403, MCA.

### **Clear and Convincing Evidence**

In some civil cases, the burden of proof is elevated to a higher standard called "clear and convincing evidence." This burden of proof requires the petitioner or plaintiff to prove that a particular fact is substantially more likely than not to be true. Clear and convincing evidence is not a mere preponderance of evidence but a preponderance of evidence that is definite, clear, and convincing. Clear and convincing does not mean unanswerable or conclusive evidence or evidence beyond a reasonable doubt. In re G.M., 2008 MT 200, P 23, 344 Mont. 87, P 23, 186 P.3d 229, P 23.

This standard sets a higher threshold than the preponderance of the evidence standard, but it does not rise to the widely recognized standard used in criminal cases, known as "beyond a reasonable doubt." In Montana, a clear and convincing standard of proof is statutorily required in punitive damage claims while the underlying negligence case (or most other civil claims that may form the basis for a punitive claim) require preponderance of the evidence. §27-1-221, MCA. §27-1-221(5), MCA, states:

All elements of the claim for punitive damages must be proved by clear and convincing evidence. Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is more than a preponderance of evidence but less than beyond a reasonable doubt.

Clear and convincing evidence is also required, by way of example, in parental termination of rights cases §40-6-1001, MCA, and in the workers' compensation setting for determining the liability of the employer or fellow employee for intentional or deliberate acts. §39-71-413, MCA.