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Dependency and Termination Proceedings in California—Standards of Proof

By David V. Otterson*

Few interpersonal relationships have found greater protection in the law than those between parents and their children.1 Unfortunately, the state must intervene into those relationships on occasion to protect a child who has been the victim of parental neglect or abuse.2 In California, the state may intercede on behalf of such children through two distinct proceedings.3 Dependency proceedings are instituted to allow a court to supervise the care and custody of mistreated children and may ultimately result in the child being temporarily removed from the home and placed in foster care.4 Termination proceedings, on the other hand, permanently sever the parent-child relationship and terminate all parental rights,5 and are designed to free children for adoption after they have been in foster care for prescribed periods of time. The goal of this proceeding is not to punish erring parents, but rather to liberate children who previously have been neglected or abused from the insecurity inherent in foster care and to provide them with the sta-

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1. "The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, . . . the Equal Protection Clause of the Fourteenth Amendment, . . . and the Ninth Amendment . . . ." Stanley v. Illinois 405 U.S. 645, 651 (1972) (citations omitted).

2. As used in this Note, the term "neglect" refers to both intentional and unintentional conduct on the part of a parent or parents which is alleged to have brought about some type of harm to a child.

3. There are, however, at least eight different types of child custody proceedings in California. See Bodenheimer, The Multiplicity of Child Custody Proceedings—Problems of California Law, 23 Stan. L. Rev. 703 (1971).

4. As used in this Note, the term "foster care" refers to a system of care and supervision outside the child's home, whether provided by a foster family, group home, or residential care facility.

5. Parental rights include the right to "possession" of the child, to visit, to determine nationality and domicile, to choose the child's name, to control education, religious upbringing and medical treatment, to consent or withhold consent to the child's adoption or marriage, and to appoint a legal guardian to act in the child's behalf. Parental rights also include the right to the child's services and, in some cases, support. See Eekelaar, What are Parental Rights?, 89 Law Q. Rev. (1973).
bility of an adoptive home.\textsuperscript{6} Dependency proceedings commence in the juvenile court by the filing of a petition to declare a child a dependent of that court pursuant to California Welfare and Institutions Code section 300.\textsuperscript{7} If the factual allegations of the petition are proven, the child is deemed within the court’s dependency jurisdiction.\textsuperscript{8} The court may then make any order necessary to protect the child, including an order for temporary removal of the child from the home and placement in foster care.\textsuperscript{9} The court may only make such an order, however, if it has first made a finding that the child’s welfare requires his removal\textsuperscript{10} or that returning the child would be “detrimental” to the child.\textsuperscript{11} Once a child is taken from the home and placed in foster care, such care may continue as long as the circumstances which led to the removal continue to exist.\textsuperscript{12}

When a child has been subject to the juvenile court’s jurisdiction for a prescribed period of time and the parents have not yet rehabilitated themselves, or if the parents are “unfit” because of mental illness, mental deficiency, or the heinous nature of their past criminal acts, termination proceedings may be instituted by the filing of a petition in Superior Court pursuant to Civil Code section 232.\textsuperscript{13} Before parental rights may be terminated and the parent-child relationship permanently severed, the petitioner must prove both the factual allegations of the petition and that returning the child to the parents would be “detrimental” to the child.\textsuperscript{14}

In recent years, a dispute has arisen in the California courts of appeal over the proper standards of proof to be applied in making the factual determinations under either Welfare and Institutions Code section 300 or Civil Code section 232.\textsuperscript{15} Some courts have stated that the standard of proof necessary to prove that a child falls within the provisions of either of those statutes is the normal civil standard\textsuperscript{16} of “by a preponderance of the evidence”\textsuperscript{17}; others have held the more stringent

\begin{itemize}
  \item \textsuperscript{6} See text accompanying notes 145-46 infra.
  \item \textsuperscript{7} \textit{Cal. Welf. \\& Inst. Code} § 300 (West Supp. 1978). For the text of this statute, see note 25 infra.
  \item \textsuperscript{8} \textit{Id.} § 355 (West Supp. 1978).
  \item \textsuperscript{9} \textit{Id.} § 362.
  \item \textsuperscript{10} \textit{Id.} §§ 361, 726.
  \item \textsuperscript{12} A yearly hearing is held to determine whether the court should continue to maintain its jurisdiction over the child. \textit{Cal. Welf. \\& Inst. Code} § 366 (West Supp. 1978).
  \item \textsuperscript{13} \textit{Id.} § 232 (West Supp. 1978). For text of this statute see note 88 infra.
  \item \textsuperscript{14} See notes 97-98 \\& accompanying text infra.
  \item \textsuperscript{15} See notes 47-50, 109-10 \\& accompanying text infra.
  \item \textsuperscript{16} \textit{See Cal. Evid. Code} § 115 (West 1966).
  \item \textsuperscript{17} The most accepted meaning of the expression “by a preponderance of the evidence” is evidence which leads the trier of fact to find that the existence of the contested fact
“clear and convincing evidence”\textsuperscript{18} standard applicable.\textsuperscript{19} It is important that this dispute be resolved. Specific legal standards are necessary to insure that adjudicatory procedures are not applied arbitrarily and to reduce the potential for such abuses of judicial discretion.\textsuperscript{20} The Supreme Court of California recently expressed its concern that prescribed standards be applied to procedures where children are subject to removal from their homes because, the court stated, “[W]here fundamental rights are affected by the exercise of discretion by the trial court, we recognize that such discretion can only be truly exercised if there is no misconception by the trial court as to the legal basis for its action.”\textsuperscript{21}

In order to achieve a systematic and sensible process for state intervention on behalf of a neglected or abused child, the standards of proof for the termination of parental rights must be consistent with the standards used to adjudicate a child dependent of the court and temporarily remove the child from the home.\textsuperscript{22} This Note analyzes and compares Welfare and Institutions Code section 300 and Civil Code section 232 and, in doing so, attempts to expose misconceptions which have led to substantial judicial confusion over the proper standards of proof necessary to support findings made pursuant to these statutes. A case by case analysis shows that much of this confusion results from the appellate courts’ failure to evaluate critically the reasoning of earlier cases which, in certain instances, were litigated under circumstances clearly distinguishable from those being reviewed.

The discussion will demonstrate that despite judicial interpretations to the contrary, neither the practical application of section 300 or section 232, nor prevailing social policies support the conclusion that higher than normal evidentiary standards are required to make the factual determinations required by these statutes. Finally this Note sug-

\textsuperscript{18} See notes 47-50, 109-10 & accompanying text infra.
\textsuperscript{19} See notes 47-50, 109-10 & accompanying text infra.
\textsuperscript{20} See notes 47-50, 109-10 & accompanying text infra.
\textsuperscript{21} See notes 47-50, 109-10 & accompanying text infra.
gests some proposals for legislative reform to more fully protect each of
the competing interests in those proceedings of state intervention.

The Dependency Proceeding

Whenever a peace officer has reasonable cause to believe a child
has been a victim of parental neglect, abuse or abandonment, that offi-
cer may, without a warrant, take the child into temporary protective
custody. The officer may then, in his discretion, either release the
child, serve notice on both the parent and the child to appear before the
county probation department, or turn the child over to the probation
department for further processing. If the child is sent to the probation
department, a probation officer is required to conduct an investigation
into the circumstances leading to the child's removal. Unless the inves-
tigation reveals that the child falls within the provisions of Welfare and
Institutions Code section 300, the probation officer must return the
child to the parents. A child will fall within one of the descriptive cate-
gories of that statute if found to be "in need of proper parental care or
control," "destitute" or without "a home or suitable place of

23. CAL. WELF. & INST. CODE § 305 (West Supp. 1978). Children who are removed
are usually placed in Juvenile Hall or some other institutional detention facility (which usu-
ally operates under a euphemistic name such as "Youth Guidance Center" or "Dependent
Shelter"). Thereafter, attempts are made to place such children, especially younger children,
in short term care with foster families. CAL. LEGIS., ASSEMBLY OFFICE OF RESEARCH, CALI-
FORNIA CHILDREN—WHO CARES? A PROGRESS REPORT ON THE CALIFORNIA ASSEMBLY
SYMPOSIUM ON SERVICES TO CHILDREN AND YOUTH, X-25 to 26 (1974) [hereinafter cited as
CALIFORNIA CHILDREN—WHO CARES?].


25. Id. § 309. CAL. WELF. & INST. CODE § 300 (West Supp. 1978) provides that:
   "Any person under the age of 18 years who comes within any of the following
descriptions is within the jurisdiction of the juvenile court which may adjudge such
person to be a dependent of the court:
   "(a) Who is in need of proper and effective parental care or control and has
no parent or guardian, or has no parent or guardian willing to exercise or capable
of exercising such care or control, or has no parent actually exercising such care or
control. No parent shall be found to be incapable of exercising proper and effec-
tive parental care or control solely because of a physical disability, including, but
not limited to, a defect in the visual or auditory functions of his or her body, unless
the court finds that the disability prevents the parent from exercising such care or
control.
   "(b) Who is destitute, or who is not provided with the necessities of life, or
who is not provided with a home or suitable place of abode.
   "(c) Who is physically dangerous to the public because of a mental or physi-
cal deficiency, disorder or abnormality.
   "(d) Whose home is an unfit place for him by reason of neglect, cruelty,
depravity, or physical abuse of either of his parents, or of his guardian or other
person in whose custody or care he is."

abode;" 27 physically dangerous to society because of physical or mental impairment; 28 or neglected or abused. 29

In the event a child fits one of the statutory descriptions, the probation officer has two alternative courses of action. If the investigation reveals that the interests of the child may be served without further detention, the probation officer may return the child to the home upon agreement by the family to undergo temporary supervision by the probation department. 30 If, however, the probation officer discovers that the child's safety requires that the child remain in protective custody, the probation officer must, within forty-eight hours of the initial removal, file a petition with the juvenile court to declare the child a dependent of the court. 31 Within one day after filing such a petition, a "detention hearing" must be held in the juvenile court to determine whether the child's welfare mandates that the child remain in protective custody pending the outcome of the dependency proceedings or whether the child may safely be returned home. 32

Regardless of the outcome of the detention hearing, a further hearing will be held later to determine whether the court may invoke its jurisdiction to declare the minor a dependent child. 33 This proceeding requires the courts to determine whether the child fits one of the prescribed "descriptions" of Welfare and Institutions Code section 300 as alleged in the petition. 34 It is important to bear in mind that dependency proceedings are bifurcated; section 300 applies exclusively to the jurisdictional phase of the proceeding, 35 while other statutes govern the dispositional stage. 36 If the petitioner is unable to affirmatively show that the child meets one of the descriptions of section 300, the petition

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27. Id. § 300(b).
28. Id. § 300(c).
29. Id. § 300(d).
30. Id. § 330. Services rendered by the Dependency Supervision worker include referral to local psychiatric and mental health counseling, group therapy, medical treatment, and parenting classes. The goal of such services is to maintain a unified natural family, resolve existing problems and avoid further problem situations. CALIFORNIA CHILDREN—WHO CARE?, supra note 22, at X-35.
32. Id. § 315. At this hearing, unless it is found that further detention is "a matter of immediate and urgent necessity for the protection of the minor," or unless some other statutory grounds for ordering continued detention are found the court must return the child to the parents. Id. § 319.
33. Id. § 334. This section provides that the jurisdictional hearing must be held no later than 15 days after removal from the home, or within 30 days if the child has not been removed.
34. Id. § 355.
35. Id.
36. Id. §§ 361-362. See also CAL. CIV. CODE § 4600 (West Supp. 1978).
must be dismissed for lack of jurisdiction and the child returned home. A child who comes within the provisions of the statute, however, will be adjudged a dependent of the court. The court will "then proceed to hear evidence on the question of the proper disposition to be made of the minor." After hearing all the pertinent evidence, the judge or referee may allow the parents to retain or regain custody of the child if the parents agree to supervision by the probation department. If the court deems it necessary to remove a child who is not currently placed in protective custody, the court must first make a separate finding that the "welfare of the minor" requires his removal.

In situations where the child is in protective custody, a similar finding must be made under Civil Code section 4600 that returning the child to his parents would be "detrimental" to the child.

**Standards of Proof**

The burden of proof at both the jurisdictional and dispositional stages of the dependency proceeding is on the state. The standard of proof which must be adduced to support a finding of jurisdiction under Welfare and Institutions Code section 300, as prescribed by statute, is "a preponderance of the evidence." Nonetheless, at least three recent cases have cast doubt on the propriety of that standard. The standard

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38. Id. § 360.
39. Id. §§ 356, 358.
40. Id. § 362.
41. Id. § 361; see id. § 726.
42. CAL. CIV. CODE § 4600 (West Supp. 1978) provides, in part:

> "In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of such child during his minority as may seem necessary or proper. . . .

> 

> "Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child."


44. Id.
of proof required to make the finding of "detriment" under Civil Code section 4600 is not prescribed by statute, but it is widely accepted that the standard of proof is by clear and convincing evidence.46

Since 1976, four California Court of Appeal decisions have discussed the standards of proof involved in dependency proceedings.47 Of these, only one case held that a "preponderance" standard should be uniformly applied to invoke jurisdiction under Welfare and Institutions Code section 300.48 Two other cases held that the standard of proof at the jurisdictional stage of the proceeding depends upon whether or not the child might be removed from the home at the dispositional stage.49 The earliest case, In re Robert P.,50 held that clear and convincing evidence is required to make the jurisdictional finding.

Much of the confusion which abounds in the more recent court opinions dealing with proper evidentiary standards in removal proceedings has evolved from the In re Robert P. decision. In that case, a petition51 was filed to declare two-year old Robert P. a dependent of the court on the grounds that he had been neglected52 by his teenaged mother and that he had not been provided with a suitable home.53 There was testimony at the juvenile court that the motel room in which Robert lived with his mother was filthy and littered with empty beer and wine bottles and stank of spoiled food. The only edible food in the room was a can of condensed milk. Robert apparently slept on a dirty mattress which was shoved under a bureau during the day. Several witnesses also testified that Robert's mother had developed a pattern of leaving Robert with friends or casual acquaintences and then disappearing for days at a time.

The California Court of Appeal, First Appellate District, reversed the order of the juvenile court placing the child in temporary foster

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51. The petition was filed pursuant to CAL. WELF. & INST. CODE § 600 (current version at CAL. WELF. & INST. CODE § 300 (West Supp. 1978)).
52. CAL. WELF. & INST. CODE § 300(d) (West Supp. 1978).
53. Id. § 300(b).
care because the juvenile court failed to make a finding of "detriment" under Civil Code section 4600. The appellate court also held that, despite the unequivocal statutory mandate that the standard of proof required to invoke dependency jurisdiction is the "preponderance" standard, the decision of the California Supreme Court in In re B.G.\textsuperscript{55} and that of the federal court in Alsager v. District Court of Polk County, Iowa\textsuperscript{56} required the more stringent "clear and convincing" standard to be applied. The holding of In re Robert P., however, unnecessarily goes beyond either that of B.G. or Alsager by requiring clear and convincing evidence in situations where it is not mandated by either of the latter cases.\textsuperscript{57}

In re B.G.\textsuperscript{58} involved a custody dispute between B.G.'s mother and his foster parents. B.G. and his sister, ages five and six, respectively, at the time a dependency petition\textsuperscript{59} was brought, were born in Czechoslovakia. Their father fled the country with his two children shortly after the 1968 Soviet occupation. The children's mother neither consented to their departure from the country, nor was she even aware of it until she arrived home from work on the day that they left. Shortly after arriving in California, the father died and the children were declared dependents of the court and placed in foster care. When the mother arrived in this country two years later seeking to regain custody of her children, the juvenile court held that it would not be in the "best interests" of the children to return them to their mother. The California Supreme Court reversed,\textsuperscript{60} holding that a "best interests" test\textsuperscript{61} would not suffice in making a dispositional order placing a child in the custody of a

\textsuperscript{54} 61 Cal. App. 3d at 317 n.5, 132 Cal. Rptr. at 9. The footnote refers to the standard of proof required by Welfare and Institutions Code § 701, which deals with both wardship and dependency proceedings. Section 355, which deals exclusively with dependency proceedings, was enacted in 1976. Cal. Stat. (1976), ch. 1068, § 9, at 4769. Both statutes require a "preponderance" standard.

\textsuperscript{55} 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974).

\textsuperscript{56} 406 F. Supp. 10 (S.D. Iowa 1975), aff'd per curiam, 545 F.2d 1137 (8th Cir. 1976).


\textsuperscript{58} 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974).

\textsuperscript{59} The petition was brought pursuant to former CAL. WELF. & INST. CODE § 600 (current version at CAL. WELF. & INST. CODE § 300 (West Supp. 1978)).

\textsuperscript{60} 11 Cal. 3d 679, 523 P.2d 244, 144 Cal. Rptr. 444 (1974).

\textsuperscript{61} This test was first clearly enunciated in Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925). By 1968 it had gained almost universal recognition by the courts. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 172 (1968). In recent years, however, the test has come under increasing criticism. See Wald, supra note 20, at 649-50; Note, In the Child's Best Interests: Rights of the Natural Parents in Child Placement Proceedings, 51 N.Y.U. L. REV. 446, 456-58 (1976); Note, State Intrusion into Family Affairs: Justifications and Limitations, 26 STAN. L. REV. 1383, 1390-94.
nonparent. Instead, the court held that an award of custody of a child to a nonparent against the claim of a parent, could be made only “upon a clear showing that such award is essential to avert harm to the child.” The court noted that the adoption of Civil Code section 4600 reflected a legislative intent to shift judicial attention from the “fitness” of the parent to the effect upon the child of leaving him with his parents and required “a finding that an award of custody to a parent would be detrimental to the child.”

The court of appeal seized upon the phrase “clear showing,” and in its opinion in *In re Robert P.* held:

> While in *In re B.G.*, our Supreme Court was not explicitly dealing with the proper standard of proof to be applied pursuant to a section [300] proceeding, the language quoted above is susceptible to the reasonable interpretation that clear and convincing evidence is the proper standard of proof pursuant to both section [300] and Civil Code section 4600.

Thus, without explicitly invalidating the statutory “preponderance” standard required to make findings under section 300, the *Robert P.* court expanded *B.G.* to require the application of the clear and convincing standard not only to a dispositional finding made under Civil Code section 4600, but also to the jurisdictional phase of the dependency proceeding. To further support its holding that clear and convincing evidence is required to make a finding under Welfare and Institutions Code section 300, the court relied heavily on *Alsager v. District Court of Polk County, Iowa.* In *Alsager*, a petition, filed pursuant to section 232.41 of the Code of Iowa to free five of the six Alsager

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62. 11 Cal. 3d at 698-99, 523 P.2d at 258, 114 Cal. Rptr. at 458 (emphasis added).
63. *Id.* at 697, 523 P.2d at 257, 114 Cal. Rptr. at 457. In analyzing the legislative intent behind § 4600, the court quoted from the *Assembly Journal*: “The important point is that the intent of the Legislature is that the court consider parental custody to be highly preferable. Parental custody must be clearly detrimental to the child before custody can be awarded to a nonparent.” (emphasis in original). *Id.*
64. 61 Cal. App. 3d 310, 132 Cal. Rptr. 5 (1976).
65. *Id.* at 318, 132 Cal. Rptr. at 10.
67. At the time the petition was filed the provision read in pertinent part:

> “The court may upon petition terminate the relationship between parent and child:
> 
> 2. If the court finds that one or more of the following conditions exist:
> 
> (b) That the parents have substantially and continuously or repeatedly refused to give the child necessary parental care and protection.
children from their parents' custody and control, was granted by a state court. The petition had alleged that the parents were "unfit" under subdivision 2(b) of the statute and had refused to give the children "necessary parental care and protection" under subdivision 2(d). Three years after the order of the trial court was entered, the parents sought in federal district court a declaratory judgment that the Iowa termination statute was unconstitutionally vague.

Granting declaratory relief after remand from the Court of Appeals for the Eighth Circuit, the district court found the Iowa statute unconstitutional on the grounds that its vagueness constituted a violation of the due process clause of the fourteenth amendment.

The Alsager court further held, after analogizing the rights involved in a termination proceeding to the rights at stake in an involuntary civil commitment where clear and convincing evidence is required, that "the fundamental right to family integrity deserves an equal standard." Interestingly, the court supported this holding by making the observation that, unlike California, Iowa required, by statute, a standard of clear and convincing evidence in dependency adjudications and, thus "[t]he state would not be unduly burdened to treat parental termination adjudications in a similar fashion."

While the court in In re Robert P. recognized the differences be-

(d) That the parents are unfit by reason of debauchery, intoxication, habitual use of narcotic drugs, repeated lewd and lascivious behavior, or other conduct found by the court likely to be detrimental to the physical or mental health or morals of the child. IOWA CODE § 232.41(2) (1969) (repealed by 1976 Iowa Acts (66 G.A.) ch. 1229, § 38, eff. Jan. 1, 1977).

Alsager v. District Court of Polk County, Iowa, 518 F.2d 1160 (8th Cir. 1975). In their initial appearance before the federal courts, the Alsagers were denied declaratory relief. Alsager v. District Court of Polk County, Iowa, 384 F. Supp. 643 (S.D. Iowa 1975).

406 F. Supp. at 15. The court also held that due process requires the state to "show that the consequences, in harm to the children, of allowing the parent-child relationship to continue, are more severe than the consequences of termination." Id. at 23; accord, Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976). This requirement very nearly parallels that of "detriment" mandated by In re B.G.

The application of the Iowa termination statute was also violative of due process, according to the district court, because of the state's failure to pursue "less drastic" alternatives to termination, namely by obtaining temporary protective custody through a dependency proceeding. 406 F. Supp. at 21-22.


406 F. Supp. at 25. The Iowa statutory scheme is relevant because in California a statutory "preponderance" standard is used to prove that a child comes within the juvenile court's dependency jurisdiction. See note 44 & accompanying text, supra.

74. 61 Cal. App. 3d. 310, 318, 132 Cal. Rptr. 5 (1976).
between the Iowa termination statute in Alsager and California dependency proceedings under Welfare and Institutions Code section 300,\textsuperscript{75} the court apparently did not consider them significant enough to affect its decision. Perhaps the most critical difference between the Iowa statute and California's section 300, is that the Iowa statute allowed \textit{summary termination} upon the mere finding of neglect by a preponderance of the evidence, which, as the court in Alsager pointed out, violated the parents' due process rights.\textsuperscript{76} In California, however, there are added safeguards to insure the parents due process. Not only must the petitioner in a California dependency proceeding prove by a preponderance of the evidence that the child has been neglected, abused, or abandoned, but also he must make a "clear showing" that returning the child to the parents would be "detrimental" to the child's welfare.\textsuperscript{77}

Although the First Appellate District has gained considerable following for its holding in \textit{Robert P.} that the "clear showing" language of B.G. mandates a standard of clear and convincing evidence to applied to Civil Code section 4600,\textsuperscript{78} its conclusion that such a standard is also necessary to make the simple finding of dependency jurisdiction under Welfare and Institutions Code section 300 has not been widely accepted.

The Third District has failed to resolve the issue despite two recent attempts. In \textit{In re Christopher B.},\textsuperscript{79} the court held:

\begin{quote}
We are of the opinion the clear and convincing proof is required \textit{only} when the final result is to sever the parent-child relationship and award custody to a nonparent. We do not believe the clear and convincing proof is required when the court is simply making the determination of dependency under section 300.\textsuperscript{80}
\end{quote}

While the opinion is not clear in regard to the stage at which it would require clear and convincing evidence, a more recent decision by the court has resolved that ambiguity. In \textit{In re Fred J.},\textsuperscript{81} the court held that the clear and convincing standard is required "in a section 300 hearing that \textit{may result} in removal of a child from its parents."\textsuperscript{82} The problem with this conclusion should appear obvious. Since, by stat-

\begin{itemize}
\item \textsuperscript{75} \textit{Id.} at 318, 132 Cal. Rptr. at 10.
\item \textsuperscript{76} 406 F. Supp. at 25.
\item \textsuperscript{77} \textsc{CAL. CIV. CODE} § 4600 (West Supp. 1978).
\item \textsuperscript{79} 82 Cal. App. 3d 608, 147 Cal. Rptr. 390 (1978).
\item \textsuperscript{80} \textit{Id.} at 617, 147 Cal. Rptr. at 395.
\item \textsuperscript{81} 89 Cal. App. 3d 168, 152 Cal. Rptr. 327 (1979).
\item \textsuperscript{82} \textit{Id.} at 174, 152 Cal. Rptr. at 329 (emphasis added).
\end{itemize}
ute, the juvenile court may make "any and all reasonable orders" at the disposition stage of the dependency proceeding, every dependency adjudication "may result" in removal if, in the sound discretion of the court, such removal is justified. Basing the standard of proof to be applied at the jurisdictional stage of the proceeding on what the dispositional order might be, requires the judge to not only presuppose the facts and evidence that will be presented at the disposition hearing, but also to effectively predetermine what the dispositional order will be.

In In re Lisa D., the Second District presents what is perhaps the best analysis of the issue of the proper standard of proof under Welfare and Institutions Code section 300. In confronting the holding of In re Robert P., the court recognized that a requirement of clear and convincing evidence at both the jurisdictional and dispositional stages of the dependency proceeding is a misapplication of the supreme court's holding in In re B.G.:

The discussion of In re (Robert) P. . . . sets up a strawman. There the court was concerned with the standard of proof necessary to support an award of custody to a nonparent against the claim of a parent which, under the holding in In re B.G. . . ., could be done only upon a clear showing that such an award was essential to avert harm to the child. Here, the trial court was simply talking about the standard of proof necessary to support the factual allegations of dependency under section 300 of the Welfare and Institutions Code which, under section 355 of the same code is "proof by a preponderance of evidence . . . ." . . . Questions concerning a more stringent standard do not arise until a finding of dependency results in a disposition which severs the parental-child relationship either temporarily or permanently.

By a careful reading of In re B.G. and Civil Code section 4600, it becomes readily apparent that, as pointed out in In re Lisa D., it is the dispositional finding of "detriment" which requires clear and convincing evidence, not the mere finding of jurisdiction. Section 4600 provides that the detriment finding is required "[b]efore the court makes any order awarding custody to a person" other than a parent. Similarly, the discussion of the detriment requirement in the B.G. opinion comes under the subheading "The Dispositional Order". As recognized in In re Lisa D., neither the legislature nor the supreme court intended a higher than normal standard of proof to be applied to make a finding pursuant to Welfare and Institutions Code section 300.

85. Id. at 196, 146 Cal. Rptr. 178 (1978).
86. CAL. CIV. CODE § 4600 (West Supp. 1978).
87. 11 Cal. 3d at 693, 523 P.2d at 254, 114 Cal. Rptr. at 454.
While the effects of *In re Robert P.* will not be totally nullified until the issues raised are finally decided by the California Supreme Court, it seems apparent that the only sound view is to reaffirm the statutory "preponderance" standard in findings under Welfare and Institutions Code section 300. Unfortunately, the *Robert P.* decision has also caused substantial confusion as to the proper standard of proof necessary in termination proceedings instituted under Civil Code section 232.

The Termination Proceeding

Proceedings to declare a child permanently free from parental custody and control are in some ways quite similar to dependency proceedings. Like Welfare and Institutions Code section 300, Civil Code section 23288 allows a petition to be brought if the child fits one of

88. **CAL. CIV. CODE** § 232 (West Supp. 1978) provides:
   
   "(a) An action may be brought for the purpose of having any person under the age of 18 years declared free from the custody and control of either or both of his parents when such person comes within any of the following descriptions:

   "(1) Who has been left without provision for his identification by his parent or parents or by others or has been left by both of his parents or his sole parent in the care and custody of another for a period of six months or by one parent in the care and custody of the other parent for a period of one year without any provision for his support, or without communication from such parent or parents, with the intent on the part of such parent or parents to abandon such person. Such failure to provide identification, failure to provide, or failure to communicate shall be presumptive evidence of the intent to abandon. Such person shall be deemed and called a person abandoned by the parent or parents abandoning him. If in the opinion of the court the evidence indicates that such parent or parents have made only token efforts to support or communicate with the child, the court may declare the child abandoned by such parent or parents. . . .

   "(2) Who has been cruelly treated or neglected by either or both of his parents, if such person has been a dependent of the juvenile court, and such parent or parents deprived of his custody for the period of one year prior to the filing of a petition praying that he be declared free from the custody and control of such cruel or neglectful parents.

   "(3) Whose parent or parents suffer a disability because of the habitual use of alcohol, or any of the controlled substances specified in Schedules I to V, inclusive, of Division 10 (commencing with Section 11000) of the Health and Safety Code, except when such controlled substances are used as part of a medically prescribed plan, or are morally depraved, if such person has been a dependent child of the juvenile court, and the parent or parents deprived of his custody because of such disability or moral depravity, for the period of one year continuously immediately prior to the filing of the petition praying that he be declared free from the custody and control of such parent or parents. As used in this subdivision, "disability" means any physical or mental incapacity which renders the parent or parents unable to adequately care for and control the child.

   "(4) Whose parent or parents are convicted of a felony, if the facts of the
several "descriptions" outlined in the statute. A petition will be warranted if the child has been abandoned, abused, or neglected, if the parent is "morally depraved" or debilitated by alcohol or drug abuse, if the parent has been convicted of a particularly heinous crime, if the parent is declared mentally ill or deficient, or is incapable of supporting or controlling the child because of the parent's mental illness or deficiency. In most cases, the children for whom the petition has been filed have previously been declared dependents of the court.

Before the parent-child relationship may be permanently and irrevocably severed, two distinct findings are required at the hearing. First, an affirmative showing must be made that the child comes within one of the "descriptions" of section 232; then the court must make the added finding required by Civil Code section 4600 that an award of custody to his parents would be "detrimental" to the child. While termination proceedings, unlike dependency proceedings, are not formally characterized as bifurcated, the practical effect of requiring both the finding of neglect under section 232 and that of detriment under section 4600 is closely analogous to the requirements of the jurisdictional and dispositional stages of the dependency proceeding. By view-
ing the findings made pursuant to sections 232 and 4600 as jurisdictional and dispositional respectively, the issues involved in determining the proper standards of proof required in termination proceedings can be analyzed more effectively.

Standards of Proof

The cases decided prior to \textit{In re B.G.},\footnote{11 Cal. 3d 685, 523 P.2d 244, 114 Cal. Rptr. 444 (1974).} show that petitions brought under Civil Code section 232 were adjudicated summarily. If the child was found to come within the provisions of the statute, the parents’ rights could be immediately terminated.\footnote{See, e.g., \textit{In re Neal}, 265 Cal. App. 2d 482, 489, 71 Cal. Rptr. 300, 305 (1968); \textit{In re Bisenius}, 173 Cal. App. 2d 518, 522, 343 P.2d 319, 321 (1959). In Bisenius, the court held that “the question is one of determining whether or not the child has been abandoned within the meaning of said section [232], and is not one of making a wise selection between the petitioner and the children’s mother.” \textit{Id.}} Indeed, one case held that the welfare of the child was not even a consideration in the adjudication.\footnote{"The future welfare of the child . . . and the best interests of the child are not issues in this proceeding.” \textit{In re Bisenius}, 173 Cal. App. 2d 518, 521-22, 343 P.2d 319, 321 (1959).}

In 1963, however, Civil Code section 232.5,\footnote{CAL. CIV. CODE § 232.5 (West Supp. 1978).} which provided that the termination statute should be “liberally construed to serve and protect the interests and welfare of the child,” was added to insure that the interests of the child are the prime consideration in a determination under section 232. \textit{In re B.G.} reinforced this concept by requiring a showing that severing parental ties is the disposition which will be the “least detrimental” to the child’s welfare.\footnote{While the \textit{B.G.} decision did not specifically indicate that the “detriment” showing should be made in a termination proceeding, Civil Code § 4600 applies in “any proceeding” where a court makes “any order awarding custody to a person or persons other than a parent.” Although § 4600 was enacted in 1969, it was not applied to termination proceedings until after the \textit{B.G.} decision. The finding made pursuant to § 4600 has now become known as the “B.G. finding.” \textit{See In re Rose G.}, 57 Cal. App. 3d 406, 417, 129 Cal. Rptr. 338, 345 (1976).}

Whether or not one labels the findings under section 232 “jurisdictional”\footnote{The likely legislative intent behind § 232 was to apply that statute only to make an affirmative finding that a child came within a court’s jurisdiction. Like Welfare & Institutions Code § 300, § 232 outlines several “descriptions” of children for whom a petition may be brought. Also, as originally enacted § 232(a) read, in pertinent part: “When any person under the age of 21 years has been left by either or both of his parents in the care and custody of another without any provision for his support, or without communication from either or both of his parents for the period of six months, the petition provided for in Section 233 may be filed with respect to such person. The \textit{jurisdiction} of the court extends to such} and those made pursuant to section 4600 “dispositional”,\footnote{"When any person under the age of 21 years has been left by either or both of his parents in the care and custody of another without any provision for his support, or without communication from either or both of his parents for the period of six months, the petition provided for in Section 233 may be filed with respect to such person. The \textit{jurisdiction} of the court extends to such}
is clear that both of these findings must be made before termination of
the parent-child relationship can occur.106 Furthermore, the trend of
recent cases seems to indicate that a specific finding of fact should be
made for both the "neglect" and the "detriment" elements, regardless
of whether such findings are requested.107

At present, while most recent cases recognize that the separate
findings in dependency proceedings require different standards of
proof, none of the courts considering the issue has discussed requiring
different standards of proof for the separate findings in termination
proceedings. Instead, most of the cases talk of "the" standard of
proof108 required in termination proceedings and, for the most part,
seem to confuse the standard required for removal under Civil Code
section 4600 with the standard required to make the threshold finding
of "neglect" pursuant to section 232.

Since 1976, the courts of appeal have decided seven cases dealing
with standards of proof in termination proceedings.109 Of these, the six
most recent cases hold the "clear and convincing" standard applicable
to findings under Civil Code section 232.110
These opinions have created confusion regarding the proper standards of proof in termination proceedings by incorrectly assuming that Robert P.’s holding, as to the proper standard of proof to invoke dependency jurisdiction, is also applicable in determining the standard of proof to be utilized in making a finding under Civil Code section 232. This erroneous assumption has resulted in unfounded conclusions about the applicable standard.

Typical is dictum in In re George G. which stated that since Robert P. required clear and convincing evidence to show that a child comes within a court’s dependency jurisdiction, “[a] fortiori, such a standard would apply to parental termination pursuant to Civil Code section 232.” For the reasons discussed earlier, the court’s reliance on In re Robert P. is simply not justified; the standard of proof to invoke dependency jurisdiction is, by statute, a preponderance of the evidence.

What was implied in George G. was more explicitly stated in In re Cynthia K. Relying on Robert P.’s holding that clear and convincing evidence is required to make a finding pursuant to Welfare and Institutions Code section 300, the court held:

[W]e can find no reason why a less stringent standard of proof should be applied to a freedom from custody hearing where rights are totally and permanently terminated, than would be applicable to a dependency hearing under Welfare and Institutions Code section [3]00, where temporary custody only is involved.

. . . .

. . . The relative permanency of rights taken by a Welfare and Institutions Code section [3]00 proceeding compels us to reject the (preponderance of the evidence) standard . . . . The importance of rights being terminated by this proceeding and the language of In re B.G. . . . demand we call for the burden of proof to be clear and convincing . . . .

It is not certain what conclusion the court would have reached had it not relied upon the erroneous holding of In re Robert P. as its underlying premise. At least one inference that can be drawn by applying the court’s reasoning, however, is that since the court is not calling for

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Cal. Rptr. 263 (1978) as controlling. 91 Cal. App. 3d at 194, — Cal. Rptr. at —. Because this issue is discussed only cursorily in the opinion, the case will not be discussed at length in this Note.

12. Id. at 165 n.14, 137 Cal. Rptr. at 213.
13. See text accompanying notes 50-87 supra.
16. Id. at 85-86, 141 Cal. Rptr. at 877-78.
higher standards than those in dependency proceedings, the standard of proof under Civil Code section 232 should be, like Welfare and Institutions Code section 300, a preponderance of the evidence.

The Third District's decision in In re Terry D.\textsuperscript{117} is unusual in that it apparently recognized that section 232 deals only with grounds upon which a court may assert its jurisdiction, yet it too held the clear and convincing standard applicable. Acknowledging that a finding under section 232 involves a "finding of the simple and single concept of cruel treatment or neglect\textsuperscript{118} and does not necessarily mean that parental rights will be terminated, the court goes on to hold that B.G. and Al-sager require a finding under section 232 to be proven by clear and convincing evidence. The court analogized a finding of neglect under section 232(a)(2) with the finding of detriment under section 4600, but, like the In re Cynthia K. and In re George G. decisions, seemed to justify its holding because of the permanent nature of a termination proceeding.\textsuperscript{119}

In In re Heidi T.,\textsuperscript{120} the First District, noting the "serious consequences" of a termination proceeding and the number of recent cases that required clear and convincing evidence pursuant to section 232, held merely that "we are persuaded that the holdings in Cynthia K., George G., and Robert P. are soundly reasoned and should be followed."\textsuperscript{121} Unfortunately, both George G. and Cynthia K. relied upon Robert P.'s rather unsound reasoning.

Unlike the more recent cases, the Second District opinion in In re Rose G.\textsuperscript{122} held that the standard of proof to be applied to prove the factual allegation of "abandonment" pursuant to section 232(a)(1) is "by a preponderance of the evidence."\textsuperscript{123} As authority for this position, Judge Jefferson cites Evidence Code section 115 which provides that "[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."\textsuperscript{124} The phrase "by law," however, refers to decisional law as well as to statutory law,\textsuperscript{125} so the split of authority in the appellate courts has effectively ruled out a definitive ruling on this ground.

The other argument in support of the "preponderance" standard

\textsuperscript{117} 83 Cal. App. 3d 890, 148 Cal. Rptr. 221 (1978).
\textsuperscript{118} Id. at 896, 148 Cal. Rptr. at 224.
\textsuperscript{119} Id. at 898, 148 Cal. Rptr. at 225.
\textsuperscript{120} 87 Cal. App. 3d 864, 151 Cal. Rptr. 263 (1978).
\textsuperscript{121} Id. at 870, 151 Cal. Rptr. at 265. Accord, In re David B., 91 Cal. App. 3d 184, 194, — Cal. Rptr. —, — (1979).
\textsuperscript{123} Id. at 420, 129 Cal. Rptr. at 346.
\textsuperscript{124} CAL. EVID. CODE § 115 (West 1966).
\textsuperscript{125} See id., Comment by the Assembly Committee on Judiciary.
made in the opinion is arguably more persuasive. Judge Jefferson points out that although the legislature provided for an explicit standard of proof under section 232(a)(7), which applies only to children placed in foster care homes for two or more consecutive years, no standard was set for the other subsections and, therefore, the legislature must have intended the normal civil standard of proof to apply to them. Indeed, what makes this argument even more persuasive is that since 1976 when the In re Rose G. opinion was filed, the legislature has changed the standard of proof for section 232(a)(7) three times—from beyond a reasonable doubt, to clear and convincing, back to beyond a reasonable doubt and, finally, back to clear and convincing. It would seem that if the legislature had intended section 232, subsections (a)(1)-(a)(6) to require anything other than the preponderance standard, it had ample opportunity to so provide.

Arguments for Applying the “Preponderance” Standard to Section 232

There are several arguments concerning both the practicality of applying a standard of clear and convincing evidence to findings under section 232 and the social policies underlying that statute which should be addressed in light of the recent appellate cases calling for the higher standard. The impracticality of requiring clear and convincing evidence to make a finding of “neglect” under Civil Code section 232 can be demonstrated in many ways. For example, the recent California Supreme Court case of In re Carmaleta B. reiterated the holdings of several appellate courts that held that the circumstances which originally led to a finding of dependency under Welfare and Institutions Code section 300 must be reviewed in light of subsequent events, to

129. Cal. Stat. 1977, ch. 1252, § 75 (effective July 1, 1978). This amendment was apparently a clerical error.
131. This argument was raised on appeal in a recent unreported case. See Brief for Respondents at 13, In re Thelma M., No. 1 Civ. 43, 588 (Cal. App., District One, filed Aug. 28, 1978).
determine whether these circumstances still persist at the time that the section 232 petition is filed.\(^{134}\)

In *Carmaleta B.*, Carmaleta and her brothers and sisters were declared dependent children of the juvenile court under Welfare and Institutions Code section 600 (now 300), subdivision (d) because the children had been “neglected” and “cruelly treated.” The petition to terminate parental custody and control was filed over one year later. The Supreme Court concluded that in order to make a finding of abuse and neglect at the termination proceeding, the trial court must consider whether the circumstances of the parent which initially led to the child being declared a dependent still exist.

The clear implication of *Carmaleta B.* is that the finding of “neglect” or “abuse” is essentially the same finding that is made initially by the juvenile court during the jurisdictional stage of the dependency proceeding. Although it is necessary to take into account the parents’ current circumstances, it seems unreasonable to require in a section 232 proceeding any evidentiary standards other than those used in making a finding of jurisdiction under Welfare and Institutions Code section 300.

In certain instances, the very language of Civil Code section 232 makes the application of the clear and convincing standard impractical. For example, under subsection (a)(5), a petition may be brought to terminate parental rights if the parent or parents “have been declared by a court of competent jurisdiction . . . to be mentally deficient or mentally ill” and if “the superintendent of the hospital of which, if any, such parent or parents are inmates or patients certify that such parent or parents . . . will not be capable of supporting or controlling the child in a proper manner.”\(^{135}\)

This subsection requires only the simple findings that the parent has previously been declared mentally ill or deficient by a court, and that a hospital administrator certify that the parent is “unfit.” Requiring a higher than normal standard of proof for these findings is unwarranted. Because of the varying educational and training experiences among different psychiatrists,\(^{136}\) if the findings under subsection (a)(5) is required to be proved by clear and convincing evidence, adjudication under that subsection is likely to turn into a “battle of the experts.”\(^{137}\)

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134. 21 Cal. 3d at 494, 570 P.2d at 521, 146 Cal. Rptr. at 630.
The language of subsection (a)(5) however, expresses a legislative intent to avoid just that.

Perhaps the most common and persuasive argument in the recent appellate court opinions which require a clear and convincing standard to be applied under section 232 is that which advocates the higher standard because of the more “permanent” and “drastic” nature of a termination proceeding. There can be no dispute that an order which terminates parental rights has a more permanent effect than an order made during a dependency proceeding which only temporarily severs the relationship, nor can there by any doubt that termination “must be viewed as a drastic remedy which should be resorted to only in extreme cases.” The consideration of this drastic effect is, however, a factor to be utilized in weighing the competing interests to determine whether parental rights should be terminated; it should not be a consideration in making the finding of whether the child fits one of the “descriptions” of section 232. The determination of the extent to which severance of parental rights will prove to have a drastic effect necessarily involves a finding of whether returning the child to his parents would be “detrimental” to the child’s best interests and, thus, should come into play only during the finding under section 4600, not during the preliminary finding of neglect or abuse made pursuant to section 232.

The legislature has clearly expressed that the purpose of a termination proceeding is “to extend adoption services for the benefit of children residing in foster homes at public expense by facilitating legal actions required for adoption so that these children may be placed in adoptive homes where they will have the benefits of stability and security.” While termination is indeed a drastic remedy, foster care can have even more serious consequences for the child than had he remained with his “unfit” parents. One of the problems with foster care is that it is inherently temporary, and thus children in this position

138. See text accompanying notes 116-21 supra.
139. See note 97 supra.
141. The competing interests in any removal proceeding include those of the parents, those of the child, and those of the state as *parens patriae*. See Areen, *Intervention Between Parent and Child: A Reappraisal of the State’s Role in Child Neglect and Abuse Cases*, 63 Geo. L.J. 887, 890 (1975).
142. It costs up to five times as much to rear a child born in 1970 in foster homes as it would if the child were raised by natural or adoptive parents. CALIFORNIA CHILDREN—WHO CARES, supra note 23, at X-32.
144. Wald, supra note 20, at 642 n.94.
will likely "feel the impermanency and insecurity of the arrangement which clashes with [their] need for emotional constancy."145 The child's emotional development is likely to suffer also because, according to statistics, at least half of those children placed in foster homes will experience more than one placement with at least 20% experiencing three placements or more.146 A shortage of qualified, knowledgeable families who can offer the nurturance which the neglected or abused child so desperately needs compounds the problem.147

By granting a petition to free a child from the custody and control of his parents, the court may be simply terminating a relationship in law which has already ended in fact.148 Termination will quite often be substantially less detrimental to the child than subjecting him to what most probably seems to him to be an unending parade of probation officers, social workers, and foster parents.

The application of a clear and convincing standard to the "jurisdictional" finding of neglect under section 232 unnecessarily inhibits a process by which a neglected or abused child can be freed for adoption by parents better able or more willing to provide adequate care and supervision. Perhaps this can best be demonstrated by an example. If the statutorily mandated preponderance standard were to be upheld by the California Supreme Court as the proper standard required to invoke dependency jurisdiction, a child who is declared to be a dependent child due to parental neglect and is thus removed from the home pursuant to Welfare and Institutions Code section 300(d) faces a potentially serious problem. If at the end of one year, a petition is brought under Civil Code section 232(a)(2) to terminate parental rights because of continued neglect by the parents, the conflict of the two standards becomes evident. Although the evidence of neglect at the jurisdictional phase of the dependency proceeding may have been sufficient to meet the preponderance standard, and even though the evidence of neglect at the termination hearing may be nearly identical, if the clear and convincing standard is applied at the latter hearing, the evidence of neglect may not be considered substantial enough to meet the higher standard. The result is that the termination petition may be dismissed. Despite the dismissal of this petition, the juvenile court may well decide that the child's welfare requires that court to continue its dependency jurisdiction. The effect of all this is to maintain the child in limbo—the

148. See Wald, supra note 20, at 688.
state is under a duty to protect children from neglectful parents, yet it is unable to provide the child with the stability of a permanent home. Thus, what was intended to be a short-term removal for the protection of the child becomes long-term custodial care.

The application of the preponderance standard to Civil Code section 232 not only more aptly suits the practical application of that statute, but also is consistent with prevailing social policies which mandate that the state, as parens patriae, intervene on behalf of children who have been neglected or abused. Finally, the preponderance standard in all likelihood reflects the California Legislature’s intent behind the original enactment of section 232 and also meets the recent recommendations of the National Council of Juvenile Court Judges.149

Proposals for Legislative Reform

In order to make the intervention system work more fairly and efficiently, the legislature should take several steps not only to settle the question of the proper standards of proof in removal proceedings, but also to solve several tangentially related problems as well. The most important step would be to prescribe specific standards of proof for Civil Code section 232. Such legislation would end the confusion in this area and would provide necessary guidelines for both the judiciary and the parties involved in proceedings under the statute.

Secondly, the legislature should adopt a statutory presumption of abuse in termination proceedings where a child has suffered a physical injury or harmful condition and it is apparent that the injury or condition is the result of the abusive or neglectful acts of the parent. This presumption should parallel those which already exist in connection with dependency proceedings.150 A statutory provision to this effect is essential because of the perilous, often deadly results of child abuse and the intrinsic difficulty of producing solid evidence of such abuse.

Child abuse is now the major killer of children in the United

149. Lincoln, Model Statute for Termination of Parental Rights, 27 JUV. CT. JUDGES J., Nov. 1976, at 3, 6. See also INSTITUTE OF JUDICIAL ADMINISTRATION & AMERICAN BAR ASSOCIATION, JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO ABUSE AND NEGLECT (tent. draft 1977). The Standards provide for automatic termination of parental rights, in most cases, after the child has been removed from home for a prescribed period. At the initial removal proceeding, the petitioner must show both the abuse or neglect and that the child would be “endangered” if allowed to remain in the home (in effect, the “detriment” finding). In cases of abuse these findings are to be proved by a preponderance of the evidence; in nonabuse cases the “clear and convincing” standard is to be utilized. If these standards were adopted in California, the necessity of applying a clear and convincing standard to the “B.G. finding” would be abrogated in cases of physical abuse.

Like most states, California provides for mandatory reporting by physicians of suspected abuse, yet it is often quite difficult for a doctor to determine whether an injury was intentionally inflicted. Since most incidents of abuse or neglect occur in the privacy of the home, there are seldom outsiders able or willing to testify. When a child is a victim of an abusive or neglectful parent or parents, he is quite often likely to be too frightened or too immature to provide competent information about the incident. The difficulty of producing solid, credible evidence of abuse or neglect is often compounded by the fact that many county probation offices are overworked and understaffed and effective and timely investigations of complaints cannot be conducted.

Apparently in recognition of the difficulty of proof inherent in removal proceedings, the California Legislature has adopted statutes which incorporate the tort doctrine of res ipsa loquitur in dependency proceedings to establish, with the aid of expert testimony, prima facie evidence that a child has been neglected or abused by the parents.

151. R. Kalmar, Child Abuse: Perspectives on Diagnosis, Treatment and Prevention iii (1977). Child abuse is estimated to cause as many as 50,000 deaths per year. Id.

152. Cal. Penal Code § 11161.5 (West Supp. 1979). The statute provides that the following persons report by telephone and in writing within 36 hours after having observed a child who has been a victim of child abuse to both the police and juvenile probation department, or to either the county health department or welfare department: physicians, dentists, residents, interns, podiatrists, chiropractors, religious practitioners, school nurses, teachers, school principals, licensed day care workers, day camp administrators, social workers, and probation officers. Failure to report is a misdemeanor; however, underreporting by these professionals appears to be a serious problem. See Goodpaster & Angel, Child Abuse and the Law: The California System, 26 Hastings L.J. 1081, 1094-1116 (1975).

153. Wald, State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards, 27 Stan. L. Rev. 985, 1010 (1975). Where an incident of child abuse goes undiscovered it is estimated that in 25% to 50% of such cases, the child will be permanently injured or killed in the next several months. See Helfer, The Responsibility and Role of the Physician, in The Battered Child, 43, 51 (Helfer & Kempe eds. 1968).


156. Cal. Welf. & Inst. Code §§ 355.1-355.4 (West Supp. 1978). Section 355.1 is typical of its companion statutes. It reads: "Where the court finds, based upon competent professional evidence, that an injury, injuries, or detrimental condition sustained by a minor, of such a nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent, the guardian, or other person who has the care or custody of the minor, such evidence shall be prima facie evidence of the minor's need of proper and effective parental care, and such proof shall be sufficient to support a finding that the minor is described by subdivision (a) of Section 300." The rebuttable presumptions created by these statutes affect the burden of producing evidence. Id. § 355.6.
Unfortunately, there is no statute creating similar presumptions in termination proceedings. As previously discussed, the finding of abuse or neglect during a section 232 proceeding is, in most cases, essentially the same finding made pursuant to Welfare and Institutions Code section 300. Thus, the same evidentiary standards, including the use of circumstantial evidence to create a presumption that a child has been neglected or abused in cases where the child has suffered a nonaccidental physical injury, should be applied at both hearings.

The legislature should facilitate the finding of detriment under section 4600 in a similar manner in cases of child abuse. Once it has been proven by a preponderance of the evidence that a child has been physically harmed by an abusive or neglectful parent in either a proceeding commenced under Civil Code section 232 or Welfare and Institutions Code section 300, a presumption should arise that returning custody of the child to the parents would be detrimental to the child’s welfare and best interests. The application of this common sense inference is justified where a child has been harmed by the abusive or neglectful acts of the parents because of the inherent relationship between the harm suffered by the child and the legal determination of whether the home environment is detrimental to the child.

A fourth proposal involves amending Civil Code section 232 to require under all subsections of that statute that, before parental rights can be terminated, a showing be made that prior to the filing of the petition the child had been a dependent of the court and placed in foster care for at least one year. At present, subsections (1), (2), and (3) of section 232(a) include this requirement, but subsections (4) through (6), which deal with children whose parents are convicted felons, mentally ill or mentally deficient, do not require that the child for whom the petition has been brought has previously been removed from parental custody.

Because of the high degree of speculation that is involved in the

158. See text accompanying notes 132-34 supra.
159. Professor Wald suggests a lower standard of proof should be applied where physical abuse has occurred. See Wald, supra note 19, at 654. Because of the split of authority concerning the standards of proof in California removal proceedings, however, it seems that implementation of this proposal to the existing removal statutes could create even more confusion than already exists. The effect of both proposals is, of course, similar.
160. Because of the social policy of protecting children from abusive parents, this presumption should probably be one affecting the burden of proof. See CAL. EVID. CODE § 605 (West Supp. 1979).
161. See note 88 supra.
latter subsections concerning what effect the parents' present status will have on the child in the future, and the corresponding degree of subjectivity inherent in making a determination under those subsections, it seems that allowing termination without first placing the child in temporary foster care "in most cases is too drastic a policy."162

Finally, the legislature should consider redrafting those statutes which allow the state to intervene on behalf of neglected children, in order to guard against constitutional challenges similar to those raised in Alsager v. District Court of Polk County, Iowa.163 Both Welfare and Institutions Code section 300 and Civil Code section 232 tend to be extremely broad and vague regarding the bases for intervention. For example, under section 300, a petition may be brought to declare a child a dependent of the court if he or she is "destitute" or not provided with a "suitable place of abode."164 Similarly, under Civil Code section 232, a petition may be brought to terminate parental rights if the child's parents are "morally depraved"165 or if they have been convicted of a felony of "such nature as to prove the unfitness of such parent or parents . . . ."166 The deficiencies in this language are manifest; the ability of these provisions to withstand a constitutional challenge seems questionable. Furthermore, rather than defining jurisdiction in terms of specific harms to the child, both of the statutes focus on parental behavior despite the apparent shift in emphasis in recent years from the "unfitness" of the parent to the detrimental consequence of returning the child to the home.167

Conclusion

Some California courts of appeal have erroneously concluded that the standard of proof necessary to make a finding under Civil Code section 232 is the "clear and convincing evidence" standard. Since the standards for termination of parental rights should relate to the standards for temporary removal of the child and because, in most instances, the findings made under either Welfare and Institutions Code section 300 or Civil Code section 232 will be essentially the same, the "preponderance" standard should be the standard of proof used to determine

162. Wald, supra note 20, at 693. In Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd per curiam, 545 F.2d 1137 (8th Cir. 1976), the order of the state court was held unconstitutional, in part, because of the state's failure to consider "less drastic" alternatives to termination. See note 69 & accompanying text supra.
163. 406 F. Supp. 10 (S.D. Iowa 1975), aff'd per curiam, 545 F.2d 1137 (8th Cir. 1976).
164. CAL. WELF. & INST. CODE § 300(b) (West Supp. 1978).
166. Id. § 232(a)(4).
167. See text accompanying note 63 supra.
whether the child fits the "descriptions" of those statutes. The application of the "clear and convincing" standard is simply not practical in some instances. Further, such a standard is not warranted under prevailing social policies.

The drastic nature of state intervention into family relationships mandates that the statutes governing the removal of a child from his home be drafted with such clarity and specificity that there can be no doubt regarding the grounds upon which the state may intervene on behalf of a neglected child. To achieve this end, the legislature should closely scrutinize the language of Welfare and Institutions Code section 300 and Civil Code section 232 and should enact new legislation to insure that evidentiary matters do not condemn a child to remaining in a family environment which endangers his welfare.