

A04-2224

STATE OF MINNESOTA  
IN SUPREME COURT

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Gail Lewis-Miller,

Respondent,

v.

Christopher Ross,

Appellant.

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BRIEF AND APPENDIX OF  
APPELLANT CHRISTOPHER ROSS

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## STATEMENT OF THE ISSUES

- I. DOES MINN. STAT. § 257C.03 CONTEMPLATE A TWO STAGE PROCESS, EACH WITH A DIFFERENT EVIDENTIARY STANDARD: A PRELIMINARY STAGE, WHERE THE STATUTORY STANDARD OF CLEAR AND CONVINCING IS IRRELEVANT, FOLLOWED BY AN EVIDENTIARY HEARING STAGE WHERE THE INTERESTED THIRD-PARTY STATUS MUST BE PROVEN BY THE STATUTORY STANDARD OF CLEAR AND CONVINCING EVIDENCE?

The Court of Appeals so construed. Based on its construction, the Court of Appeals then reversed the district court's dismissal of Respondent's petition and remanded for an evidentiary hearing.

Minn. Stat. § 257C.03

Swenson v. Emerson Elec. Co., 374 N.W.2d 690 (Minn. 1985), cert. denied, 476 U.S. 1130 (1986)

In re Custody of N.A.K., 649 N.W.2d 166 (Minn. 2002)

- II. DOES THE TERM COMPETENT EVIDENCE FOR MINN. STAT. § 257C.03, SUBD. 2(B) PURPOSES MEAN EVIDENCE THAT WOULD BE ADMISSIBLE IN A COURT OF LAW AND, IF SO, DID RESPONDENT PRESENT COMPETENT EVIDENCE?

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Angell v. Hennepin County, 565 N.W.2d 475 (Minn. Ct. App. 1997), aff'd, 578 N.W.2d 343 (Minn. 1998)

State ex rel. Sime v. Pennebaker, 215 Minn. 75, 9 N.W.2d 257 (1943)

## STATEMENT OF THE CASE AND FACTS

### **A. The Parties and Their Relationship.**

Appellant Christopher Ross (“Father”) is the father of two minor children, “C.R.,” born in 1994, and “M.R.,” born in January 2003. The children’s mother, Debra A. Lewis (“Mother”), suddenly died in October 2003. (A.43 at ¶ 4.) Although they never married, Father and Mother considered one another domestic partners, and Father was included on Mother’s benefits and health insurance. (A. 60 at ¶ 4.) Just prior to her death, Mother had dictated and signed a note stating, “I want my sister Gayle Lewis-Miller and Christopher Ross to have joint physical and legal custody of my children . . . .” (A. 154.) Two months after Mother’s death, Respondent Gail Lewis-Miller (“Aunt”), served Father with a petition for sole custody of his children. (A. 149-154.)

Father and Mother lived together and raised C.R. and M.R. as a family throughout most of their relationship. (A. 42 at ¶ 2.) When their first child, C.R., was born on November 27, 1994, Father and Mother promptly signed a Recognition of Parentage for C.R. They were living together at the time. (A. 42 at ¶ 2; A. 166.) When their second child, M.R. was born on January 2, 2003, Father and Mother were living together and again signed a Recognition of Parentage for M.R. after his birth. (A. 43 at ¶ 6; A. 165.) The address listed on M.R.’s Recognition is the same address that the family was residing at when Mother died. (A. 54; A. 165.)

While there was a brief period from the end of 1996 through 1998 during which Mother and Father were not living together, Father maintained a very close relationship with Mother and C.R. (A. 43 at ¶ 4.) One reason for the separation was so that Father could undertake in-patient chemical dependency treatment. (A. 44 at ¶ 10.) During this time, C.R. and Mother lived with Aunt for a few months. (A. 10 at ¶ 4.) Except for Mother and C.R.'s brief stay about nine years ago, C.R. has never lived with Aunt. Since then, C.R. has seen Aunt only on the occasional visit. (A. 43 at ¶ 5.)

Mother and Father resumed living together as a family in approximately 1998 and lived together until Mother's death. (A. 43 at ¶ 4.) Mother and Father had M.R. during this time, approximately one-and-a-half years after Mother herself went through chemical dependency treatment for alcohol abuse. (A. 44 at ¶ 10.) M.R. has never lived with Aunt and has always resided with Father. (A. 10 at ¶ 4, 5.) Prior to Aunt's Motion for Temporary Custody, Aunt's only contact with M.R. consisted of a few visits. (A. 112 at ¶ 4; A. 71 at ¶ 6.) She had never spent any time alone with M.R. (A. 43 at ¶ 7.)

After Mother's death, Father immediately became and continues to be the sole caretaker for C.R. and M.R. (A. 10 at ¶ 5.) Father was unable to pay the rent on the family's apartment after Mother's death because Mother had been the primary source of financial support for the family. While she worked outside of the home, Father provided the daily care for the children. (A. 46 at ¶ 16.) After losing their apartment, Father and the children temporarily moved into Mary's Place, a shelter that provides transitional

apartments for families, until Father obtained a two-bedroom apartment for himself and the children. (A. 46-47 at ¶ 17.)

Just prior to moving himself and the children out of Mary's Place, Father was served with Aunt's petition for sole physical and sole legal custody of the children. (A. 46 at ¶ 15.) Aunt had told Father that if they did not move out of the shelter before Christmas, Aunt would take the children from Father. (A. 46 at ¶ 15.)

**B. Aunt Petitions for Custody of C.R. and M.R.**

Aunt's petition stated that an emergency existed because she believed Father was preparing to move out of Minnesota. (A. 151 at ¶ 14.) The petition alleged that, upon her information and belief, Father used drugs around the children and surrounded his children with drug dealers, and that Father was evicted from his apartment due to Father's drug-related activities. (A. 35 at ¶¶ 13, 15; A. 151 at ¶¶ 12, 13.) Aunt's petition also alleged that the children resided with her during a portion of each year and spent considerable amounts of time with her. (A. 150 at ¶ 9.)

Prior to the first hearing on Aunt's petition, Child Protection had contacted Father regarding concerns about C.R. missing school. (A. 48 at ¶ 23.) Father was involved with Child Protection's Alternative Response program, where he willingly received additional help in securing an apartment for himself and the children, obtaining furniture, and getting back on his feet after Mother's death. (A. 48 at ¶ 23.) Child Protection also received a report concerning Father's provision of food for the children. (A. 48-49 at ¶

24.) Child Protection investigated these concerns and, on May 19, 2004, sent Father a letter stating that they found no maltreatment. (A. 67.)

The first hearing on Aunt's petition, an Initial Case Management Conference scheduled by the trial court, was held on February 23, 2004. (A. 77.) At that time, Father voluntarily agreed to allow Aunt temporary visitation with the children once a month, agreed to the permissive appointment of a Guardian ad Litem, and agreed to the Early Neutral Evaluation process ("ENE"), a quick dispute resolution mechanism. (A. 77-83.) The ENE process faltered, and thereafter the district court ordered a custody evaluation. (A. 93; A. 11 at ¶ 8.)

Family Court Services did not perform a custody evaluation as ordered. On July 30, 2004, the evaluator sent a memo to the district court and both parties indicating that, in the evaluator's opinion, Family Court Services could not undertake a custody evaluation in this case. (A. 167-69.) The memo included a summary of correspondence with the Child Protection worker who was attempting to engage Father in voluntary services. (A. 167-69). It failed to convey any information that the evaluator had gathered from Father and Aunt, although the evaluator had met with Father and the children, as well as with Aunt, and had gathered documentary evidence, as is clearly documented in the Guardian ad Litem's report. (See A. 167-69; 84-89.)

After Aunt received the evaluator's notice that she was closing the Family Court Services' file, Aunt immediately brought a motion for temporary custody. (A. 70, ¶ 1; A.

12 at ¶ 11.) Aunt added several allegations regarding Father, although most were vague, speculative, or regarded events far in the past. (A. 70-75.) Responding to Aunt's motion, Father brought a motion to dismiss the petition for lack of standing on the grounds that (1) Aunt had failed to provide any competent evidence that supported her allegations of harm, and (2) Aunt failed to allege or establish that she has a substantial relationship with the children. (A. 12 at ¶¶ 11, 12.) Attached to Father's affidavit in support of his motion were 11 exhibits, including housing court records, a recent in-depth medical report on M.R., medical insurance cards for the children, C.R.'s report card, and Child Protection records. (A. 52-69.)

The district court had two motions before it at the hearing on August 26, 2004: Aunt's motion for immediate temporary custody and Father's motion to dismiss Aunt's petition for custody. (A. 97.) Since the Guardian ad Litem was not able to appear at this hearing, the district court continued the hearing to September 15, 2004. (A. 97-98.) Before doing so, however, the district court put Father under oath and inquired about drug use. (A. 100; T. at 2.) Father admitted to use of marijuana and occasional use of crack-cocaine even though, as the district court noted, a drug test probably would not have shown either. (A. 100-1; T. at 2-3) Father added that he had never used drugs in front of his children and stated that "they've never been exposed to or around me at any time under those circumstances." (A. 102; T. at 4.) Father also testified that he had received a referral for a fatherhood program and was scheduled to meet with the program regarding

treatment. (A. 102; T. at 4.) Father agreed to Aunt's request to submit to an immediate chemical dependency evaluation, and the court so ordered. (A. 98.) The district court continued the custody of the children in Father's care. (A. 98.) The court also took under advisement for the next hearing, and planned to review in camera, the question of the release and admissibility of the Child Protection files which Aunt had sent to the district court through subpoena. (A. 97.)

By the September 15, 2004 hearing, the district court had received Father's chemical dependency evaluation completed by Family Court Services, as well as the Guardian ad Litem's report, and reviewed the entire Child Protection file. (A. 9-21; A. 105-6; T. at 5, 7-8.) The court determined that the materials within the Child Protection files were, for the most part, duplicative of other materials, and contained information already available to counsel. (A. 105-6; T. at 7-8.) In addition to these documents, the affidavits and attached exhibits of the parties, and the Family Court Services memo, the court took oral recommendations from the Guardian ad Litem, asked questions of Aunt and Father, and heard argument from counsel for Father and Aunt. (A. 102-30; T. at 4-32.) Aunt did not ask for oral testimony at this hearing nor did she object to the lack of opportunity to present or cross-examine witnesses.

**C. Trial Court Dismisses Aunt's Petition.**

On October 14, 2004, the district court, having heard from the Guardian ad Litem, read the Family Court Services memo, reviewed over 200 pages of Child Protection

records, considered Aunt's petition, affidavits and exhibit, as well as the affidavit and exhibits of Father, and all of the arguments of counsel and testimony adduced, issued its Findings of Fact, Conclusions of Law, and Order, dismissing Aunt's petition for custody of Father's children for failure to establish standing under Minn. Stat. §§ 257C.01 and 257C.03, and vacated its prior orders. (See A.9-21.) The Order listed the allegations in Aunt's petition and found each to be lacking of any supporting evidence, inadmissible hearsay or completely irrelevant to the proceeding. The trial court therefore concluded (1) that Aunt had failed to establish that she has an existing substantial relationship with Father's children under § 257C.01 and (2) that she had failed to establish in her petition the required factors for third party custody as set forth in Minn. Stat. § 257C.03, subd. 7(a), and that the trial court was legally obligated to dismiss the petition under subd. 8. (A. 9-21.)

**D. Aunt's Appeal Resulting in Reversal and Remand By the Court of Appeals For an Evidentiary Hearing.**

Aunt appealed the decision, challenging the trial court's interpretation of Minn. Stat. § 257C.03 and asserting that based on this record she is entitled to an evidentiary hearing. At no time did Aunt contend that she met the clear and convincing evidence standard. According to Aunt and the Court of Appeals, there is a "distinction between a petitioner's evidentiary burden at the petition stage -- to allege various facts supported by competent evidence -- and her ultimate burden to show third-party status by clear and convincing evidence and prove by a preponderance of the evidence that granting custody

would be in the child's best interests." (A. 6.) Aunt argued that each stage has a differing evidentiary standard -- "a preliminary prima facie showing, which if sufficient, is followed by an evidentiary hearing to determine the ultimate merit of the allegations in the petition." (A. 6.) The Court of Appeals agreed, setting forth the following two-tier procedure:

To be viable under the statute, it is sufficient that a petition alleging a person to be an 'interested third party' assert certain facts which, if true, would show that the petitioner meets the definition of such a party as set forth in Minn. Stat. § 257C.03, subd. 7(a)(1). Whether those assertions are actually true is to be resolved at the subsequent hearing, where the district court must consider the factors set forth in Minn. Stat. § 257C.03, subd. 7(b). Thus, although the factors are germane to the content of the petition, the "clear and convincing evidence" burden of proof, by which the assertions must be proved, is not.

(A. 7-8.)

The Court of Appeals held that Aunt's petition for custody "accompanied by an affidavit including five paragraphs detailing her allegations concerning her relationship with the children . . . as verified by her and supported by competent evidence are sufficient as a matter of law to meet the evidentiary standard applicable to petitions." (A. 7.) The case was remanded for an "evidentiary hearing to prove [Aunt's] interested third-party status by the statutory burden." (A. 8.)

Father sought further review with this Court, which was granted by order dated September 28, 2005.

## ARGUMENT

**BASED ON THE FACTS OF RECORD, AS APPLIED TO MINN. STAT. § 257C.03, THE TRIAL COURT'S DISMISSAL OF AUNT'S PETITION SHOULD BE REINSTATED.**

**A. Standard of Review.**

District courts have broad discretion to determine matters of custody. In re Custody of N.A.K., 649 N.W.2d 166, 174 (Minn. 2002). This Court has applied an abuse of discretion standard in reviewing the denial by the trial court of a custody modification motion without an evidentiary hearing. Nice-Petersen v. Nice-Petersen, 310 N.W.2d 471, 472 (Minn. 1981).

Appellate review of custody determinations has generally been limited to whether the district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law. Rogers v. Moore, 603 N.W.2d 650, 656 (Minn. 1999) (citation omitted). However, interpretation and construction of statutes are questions of law, to which this Court has de novo review. Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984).

**B. The Court of Appeals Incorrectly Engrafts Its "Two-Tier" System Analysis Onto § 257C.03.**

**1. Minn. Stat. § 257C.03 Governs the Requirements and Standards for Third-Party Nonparent Child Custody Proceedings.**

The procedural and evidentiary requirements for third-party, nonparent child custody proceedings are governed by Minn. Stat. Chapter. 257C. (A. 22.) Specifically

Minn. Stat. § 257C.03 (2005) states the procedure for a de facto custodian or an interested third party to seek custody of a child. (A. 23.) The terms “de facto custodian” and “interested third party” are defined in Minn. Stat. § 257C.01. (A. 22.) A “de facto custodian” is generally an individual who has been the primary caretaker for a child who has resided with the individual without a parent present. Minn. Stat. § 257C.01, subd. 2. (A. 22.) An “interested third party” is “an individual who is not a de facto custodian but who can prove that at least one of the factors in section 257C.03, subd. 7, paragraph (a) is met.”<sup>1</sup> (A. 23.) Aunt claims she is an interested third party.

A person seeking custody of a child as an “interested third party” must file a petition alleging certain information, including the petitioner’s relationship to the child, the child’s current custodial status, and that it is in the best interests of the child that the petitioner have custody, as well as other information relating to the child. Minn. Stat. § 257C.03, subd. 2(a). (A. 24.) Subdivision 2(b) requires that the petition be verified by the petitioner and that its allegations be established by “competent evidence.” (A. 25.)

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<sup>1</sup> Minn. Stat. § 257C.03, subd. 7(a), states: (a) To establish that an individual is an interested third party, the individual must:

- (1) show by clear and convincing evidence that one of the following factors exist:
    - (i) the parent has abandoned, neglected, or otherwise exhibited disregard for the child’s well-being to the extent that the child will be harmed by living with the parent;
    - (ii) placement of the child with the individual takes priority over preserving the day-to-day parent-child relationship because of the presence of physical or emotional danger to the child, or both; or
    - (iii) other extraordinary circumstances; and
  - (2) prove by a preponderance of the evidence that it is in the best interests of the child to be in the custody of the interested third party.
- (A. 26-27.)

To establish that the petitioner is an interested third party, the petitioner must show, by clear and convincing evidence, the existence of one of the following factors:

- (i) the parent has abandoned, neglected, or otherwise exhibited disregard for the child's well-being to the extent that the child will be harmed by living with the parent;
- (ii) placement of the child with the individual takes priority over the day-to-day parent-child relationship because of the presence of physical or emotional danger to the child, or both; or
- (iii) other extraordinary circumstances;

(A. 26-27.) And petitioner must "prove by a preponderance of the evidence that it is in the best interests of the child to be in the custody of the interested third party." Minn. Stat. § 257C.03, subd. 7(a)(2). (A. 27.) Minn. Stat. § 257C.03, subd. 7(b), sets forth eight factors the trial court must consider in determining the third party's petition. (A. 27.)

The trial court must dismiss the petition if the court finds that "the petition does not establish at least one of the factors in subdivision 7, paragraph (a) or 'placement of the child with the petitioner is not in the best interests of the child.'" Minn. Stat. § 257C.03, subd. 8(a)(2) and (3). (A. 27.)

The trial court dismissed Aunt's petition for custody finding that Aunt failed to demonstrate by clear and convincing evidence any of the factors listed in § 257C.03, subd. 7(a)(1). (A. 20 at ¶ 3.)

**2. The Statute, as Written, Does Not Provide For the Two-Tier System Enunciated By the Court of Appeals.**

“The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16. The first task in interpreting a statute is simply to examine the language of the statute and “[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.” Swenson v. Emerson Elec. Co., 374 N.W.2d 690, 699 (Minn. 1985), cert. denied, 476 U.S. 1130 (1986). “[W]here the statute is unambiguous and its provisions are couched in plain and simple language, a court is bound to give effect to the statute as written.” McCarty v. Village of Nashwauk, 286 Minn. 240, 175 N.W.2d 144, 147 (1970). Extrinsic aids to determine legislative intent may only be used if ambiguity exists. Christopherson v. Fed. Land Bank of St. Paul, 388 N.W.2d 373, 374 (Minn. 1986).

As written, the statute does not provide that a petitioner need only meet a minimal burden to gain an evidentiary hearing and it is only at that point the “clear and convincing evidence” statutory standard comes into play. The statute does not even contain the term “prima facie.” Nor does the statute provide that a trial judge should assume the truth of the petitioner’s claims while ignoring or failing to weigh the opponent’s response.

The Legislature made clear that to establish an individual is an interested third party the individual must show by clear and convincing evidence that one of the factors set forth in § 257C.03, subd. 7(a)(1) exists. In seeking reversal by the Court of Appeals, Aunt did not claim that she had met that burden. Since the trial court found, on this

record, Aunt did not meet her statutory burden, the district court's dismissal of this action should be reinstated.

**3. Legislative History Does Not Support Court of Appeals' Decision.**

If the statute is deemed ambiguous and the Court turns to extrinsic evidence, the legislative history also does not support the Court of Appeals' construction. In the original version of the bill that would become Minn. Stat. § 257C.03, the burden of proof described in Section 3, subd. 6(a) for a de facto custodian was "a preponderance of the evidence that it is in the best interests of the child to live with the de facto custodian." Minn. H.F. 2596, 82d Leg. Sess. 7:20-22 (Dec. 10, 2001) (A. 135). Those petitioning as interested third parties were also required to prove "by a preponderance of the evidence that the respondent has abandoned, neglected, or otherwise exhibited disregard for the child's well-being[.]" *Id.* at 7:23-26 (A. 135). Both would also be required to prove that the change of custody is in the best interests of the child. *Id.* at 7:20-22, 32-33 (A. 135).

As is reflected in the final version of the bill, it was eventually amended to heighten the burden for those petitioning the court as an "interested third party." Such a person now would be required to "show by clear and convincing evidence" that one of the three listed factors exists. Floor remarks by the bill's Senate sponsor demonstrate that this change reflected not only the legislature's desire to create a heightened burden of proof for interested third parties, but also to set a higher standard at the petition stage as well.

What this bill does is first attempt to codify everything in a single part of the statute. Second, it sets forth a unified process in dealing with two different types of concerns[:] one would be defacto custodian...The other kind of situation that the bill deals with is the interested third party...This already exists currently in the Court system. What this bill does is to set the standard of proof based upon the best interest of the child and making [sic] that determination but also sets to that a higher standard to have...the interested third party identified and allowed to petition the Court.”

Minn. Sen., Floor Debate on S.F. 2673, 84th Leg. Sess. (March 19, 2002). (A. 142-43; emphasis added).

Nothing in the legislative history implies, as the Court of Appeals concludes, that the courts are to place the petition in a vacuum, isolated from the heightened burden needed to succeed. At the very least, the language of the statute shows that the Legislature intended a “higher standard” for an interested third party than for a de facto custodian. The Court of Appeals’ construction of a two-tier system in which a petitioning party need do no more than allege at the petition stage in order to become entitled to a hearing is clearly contrary to this intention.

**4. Standard Enunciated by the Court of Appeals Is Not Consistent with the Standard of Prima Facie Evidence and Contrary to Legislative Intent.**

Moreover, the standard created by the Court of Appeals is below the standard of prima facie evidence, as that term is commonly understood. Prima facie evidence is admissible evidence that, if uncontradicted, would be sufficient to justify a judgment in the presenting party’s favor. Blumberg v. Palm, 238 Minn. 249, 56 N.W.2d 412, 415

(1953); Black's Law Dictionary 598, 1228 (8th ed. 2004). Here the statutory standard is clear and convincing evidence but, according to the Court of Appeals, a petitioner need not meet that standard to present a prima facie case. In effect, the Court of Appeals holds that much less than prima facie evidence is necessary to entitle a moving party to an evidentiary hearing.

The burden now established by the Court of Appeals is so low that it is difficult to imagine anyone who will be unable to persuade a court to order a hearing. This approach is not consistent with § 257C.03 and its ramifications are enormous.

The Court cannot lose sight of the financial and psychological impact of such hearings. As Justice Kennedy emphasized in his dissent in Troxel v. Granville, 530 U.S. 57, 101 (2000), the mere bringing of a proceeding "can constitute state intervention that is so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated."

Evidentiary hearings are costly, and financial resources are needed to support such legal battles. The parent may lack sufficient financial resources needed to support such a custody battle. Preparing for such a hearing is no different than preparing for trial. Because the psychological character of the participants is often involved, psychologists and other mental health workers must be employed to provide testimony. Doctors, neighbors, teachers and others must be contacted and perhaps deposed.

During the process families and friends might turn on each other and the children are caught in the middle. Judith L. Shandling, Note, The Constitutional Constraints on Grandparents' Visitation Statutes, 86 Colum. L. Rev. 118, 124 (1986) (that it is clear from psychological literature that such disputes often create extreme anxiety and dislocation for the child). One cannot ignore the effect such proceedings have on children caught in the middle of the dispute. Litigation over custody is inconsistent with the child's welfare. As Joseph Goldstein, Anna Freed and Albert Solmut, co-authors of several books on child development theory and its relation to custody law have stated:

Children . . . react even to temporary infringement of parental autonomy with anxiety, diminishing trust, loosening of emotional ties, or an increasing tendency to be out of control . . . . [A]t no stage should intrusion on any family [which the author defines as conducting a hearing] be authorized unless probable cause for the coercive action has been established in accord with limits prospectively and precisely defined by the legislature.

Joseph Goldstein, et al., Before the Best Interests of the Child 25 (1979).

The Legislature mandated the "clear and convincing" standard for a reason. The Legislature obviously wanted to prevent unwarranted litigation over a child. The Court of Appeals' prima facie standard and resulting two-tiered approach is inconsistent with the statute's very purpose because it fails to protect a parent and his or her children from unwarranted litigation.

**5. If a Two-Tier System is To Be Engrafted Onto the Statute, the Petitioner Must Meet the Heightened Burden at Both Stages.**

If this Court concludes that a case should proceed to an evidentiary hearing if the moving party presents prima facie evidence, that evidence must be admissible evidence that if uncontradicted would be sufficient to justify a judgment in the presenting party's favor. In other words, the petitioner must meet the clear and convincing standard by competent evidence.

This is in accord with other areas of law which have applied the heightened burden in determining whether a prima facie case has been made. See Swanlund v. Shimano Indus. Corp., Ltd., 459 N.W.2d 151, 154 (Minn. Ct. App.1990); see, e.g., Chafoulias v. Peterson, 668 N.W.2d 642, 654 (Minn. 2003) (applying clear and convincing standard to summary judgment analysis on claim subject to heightened burden of proof); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986) (substantive evidentiary standard must be applied in ruling on motion for summary judgment).

Minnesota's punitive damages statute is instructive in this regard. Like § 257C.03, § 549.20, subd. 1(a), also contains a heightened "clear and convincing" standard as the moving party's ultimate burden. It states, "punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others." Minn. Stat. § 549.20, subd. 1(a) (2005). When a plaintiff moves to amend her complaint to claim punitive damages, she "must include the applicable legal basis and one or more affidavits setting forth the

factual grounds supporting issuance of punitive damages.” Williamson v. Prasciunas, 661 N.W.2d 645, 653 (Minn. Ct. App. 2003), citing Minn. Stat. § 549.191. The amendment is not granted where the motion and affidavits “*do not reasonably allow a conclusion that clear and convincing evidence will establish the defendant acted with willful indifference[.]*” McKenzie v. Northern States Power Co., 440 N.W.2d 183, 184 (Minn. Ct. App. 1989) (emphasis added).

In summary, if the Court is going to engraft a two-tiered procedure onto the statute, the heightened standard of clear and convincing evidence should be applied at both steps.

C. **Based On the Record Before the District Court, the Trial Court Did Not Abuse Its Discretion in Dismissing Aunt’s Petition.**

As previously stated, Aunt did not contend that she presently met the clear and convincing evidence standard. Therefore the trial court’s dismissal of this action should be affirmed. Moreover, the Court of Appeals did not explain how the evidence submitted by Aunt met the “competent evidence” requirement.

Minn. Stat. § 257C.03, subd. 2(b), mandates that “the petition must be verified by the petitioner . . . and its allegations established by competent evidence.” (A. 25.) The Court of Appeals failed wholesale to consider whether Aunt’s affidavit even constitutes “competent evidence” as envisioned by the statute. Despite the extensive factual findings that support was either altogether absent from Aunt’s affidavit or based upon inadmissible hearsay, the Court of Appeals states without comment that the affidavits

detailing her allegations “as verified by [Aunt] and supported by competent evidence, are sufficient as a matter of law to meet the evidentiary standard applicable to petitions.” (A. 7.)

The affidavit submitted by Aunt in support of her petition is rife with hearsay and assertions for which she gives no basis whatsoever, including allegations that (i) Father uses drugs in the presence of his children; (ii) he deals drugs; (iii) he hangs out with drug dealers; (iv) said drug dealers likely carry firearms; (v) he has failed to meet his children’s basic needs; and (vi) he has allowed his children to miss school. (A. 5 at ¶ 14; A. 34-35 at ¶¶ 8-10, 12, 13, 15.) The district court found no evidence to support a finding of drug use around the children (A. 14 at ¶ 18), no evidence that Father deals drugs, no evidence that he associates with drug dealers or others who carry firearms (A. 14 at ¶ 19), that Aunt’s evidence supporting her claim of malnutrition is hearsay (A. 14-15 at ¶ 20), that Aunt’s allegations of improper supervision are also hearsay (A. 16 at ¶¶ 23-24), and that many of the absences from school described by Aunt were attributable to the death of the children’s mother (A. 17 at ¶ 25).

Any petition submitted under § 257C.03, subd. 2, must be verified by the petitioner and “its allegations established by competent evidence.” Chapter 257C itself does not define the term “competent evidence” though definitions elsewhere in Minnesota law and other jurisdictions all share one common factor. Competent evidence is, at the very least, evidence that would be admissible in a court of law. State v. Iverson, 664 N.W.2d 346,

351 (Minn. 2003) (in the absence of a statutory definition, court must rely on the obvious meaning of the terms).

Courts presume that the Legislature uses the same words the same way, even in different statutes. Angell v. Hennepin County, 565 N.W.2d 475, 479 (Minn. Ct. App. 1997), aff'd, 578 N.W.2d 343 (Minn. 1998). Other Minnesota statutes are instructive on this issue. For example, under the Minnesota Labor Union Democracy Act, Minn. Stat. § 179.18, et seq., § 179.231 prescribes the procedure for determining when a labor organization has failed to comply with the Act's requirements. A party to the dispute "has the right to offer competent evidence and to be heard on the issues before an order is made by the referee." Minn. Stat. § 179.231, subd. 3 (2005). Section 179.18, subd. 6, defines "competent evidence" as "evidence admissible in a court of equity and such other evidence other than hearsay as is relevant and material to the issue and is of such character that it would be accepted by reasonable persons as worthy of belief." The Minnesota Labor Relations Act also recites this definition for purposes of resolving disputes arising under the Act. Minn. Stat. § 179.01, subd. 12.

Other states employ almost identical definitions to the one set forth in the Minnesota statutes. In North Dakota, affidavits must be competent in order to fulfill the legislative requirement of showing prima facie evidence before the moving party is entitled to an evidentiary hearing. Lagro v. Lagro, 703 N.W.2d 322, 327 (N.D. 2005). Affidavits are not competent when "they do not show a basis of actual personal

knowledge, or they are conclusory, stating conclusions without the support of evidentiary facts.” Id. Competence generally requires that the witness have first hand knowledge. Witnesses are not competent to testify as to what they “suspect” or “secretly hope” the facts are. Id.

The Nebraska courts describe the term as “evidence that is admissible and relevant on the point in issue.” Hammann v. City of Omaha, 417 N.W.2d 323, 325 (Neb. 1987). Also, in Georgia, “‘competent evidence’ means evidence which is admissible” in a court of law. Macon-Bibb County Bd. of Tax Assessors v. J.C. Penney Co., Inc., 521 S.E.2d 234, 235 (Ga. App. 1999). Texas, Louisiana, and Arkansas require competent evidence to be “that which the very nature of the thing to be proved requires, as the fit and appropriate proof in the particular case,” in addition to requirements of admissibility. J. L. Williams & Sons v. Smith, 170 S.W.2d 82, 86 (Ark. 1943). See also Clifton v. Arnold, 87 So.2d 386, 389 (La. App. 1 Cir. 1956) and Horbach v. State, 43 Tex. 242, 249 (1875).

As applied in Minnesota, hearsay evidence is not regarded as competent. In State ex rel. Sime v. Pennebaker, 215 Minn. 75, 9 N.W.2d 257 (1943), this Court rejected the affidavit of the plaintiff’s attorney as it asserted facts on behalf of the plaintiff without any personal knowledge. Where there was no affidavit from the plaintiff herself, the Court had nothing more than hearsay proof. “Claims founded upon mere hearsay and

assertions without proof,” the Court held, “cannot be accepted in lieu of competent evidence.” Id. at 259.

Aunt has made the same mistake in the present case as the plaintiff’s attorney in Sime. Aunt submitted an August 12, 2004 affidavit to accompany her December 14, 2003 petition, finally complying with the requirements of § 257C.03, subd. 2(b). The affidavit, however, is riddled with assertions and allegations of which Aunt has no personal knowledge whatsoever. In her first affidavit, Aunt asserts that Father’s children are being exposed to illegal drug use. To support this allegation, she states that “[t]he neighbors at Debra’s apartment have told me that they have seen people using crack cocaine on the front porch” and that she “believe[s] this type of behavior has continued at Chris’s new residence.” (A. 35 at ¶ 13.) Aunt also makes unbacked assertions regarding the children’s schooling (A. 34 at ¶ 10), “strangers” visiting the Ross residence (A. 35 at ¶ 12), and fraternization with “known and suspected drug dealers” who likely “have both guns and enemies” (A. 35-36 at ¶ 15). She makes these allegations with no more support than her own suspicion, prefacing most with the caveat, “I believe.” These allegations are not competent as envisioned by statute and certainly do not afford a basis for denying a parent custody of his own children.

There are, of course, exceptions to the hearsay rule. Hearsay evidence may be competent if it falls within one of the exceptions to Minnesota Rule of Evidence 802’s

general exclusion of such evidence. The assertions provided by Aunt, however, do not remotely approach any exception listed in Rule 803 of the Minnesota Rules of Evidence.

The law demands that a petitioning party provide competent evidence before a court will entertain a petition for custody. Both statute and case law make clear that unfounded hearsay allegations do not fall within the purview of "competent evidence."

Here, the trial court thoroughly reviewed the record before it. On this record, as applied to Chapter 257C, the trial court did not abuse its discretion in denying Aunt's petition for custody of C.R. and M.R.

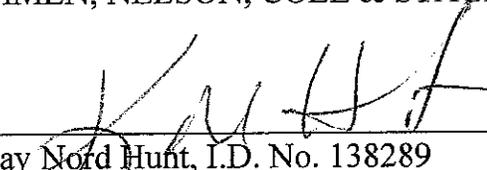
**CONCLUSION**

The district court was correct in its determination that Minn. Stat. § 257C.03 required a showing of "clear and convincing evidence" and therefore did not err in its dismissal of Respondent's petition. Whereas the Court of Appeals has incorrectly disregarded Respondent's ultimate burden and authorized the use of incompetent evidence in custody proceedings, Appellant respectfully requests that this Court reverse the Court of Appeals ruling in this matter and reinstate the district court ordered dismissal.

Dated: August 11, 2005

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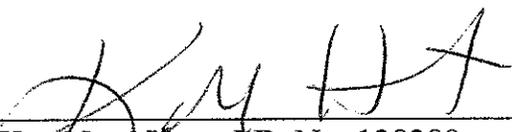
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**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6188 words. This brief was prepared using Word Perfect 10.

Dated: October 13, 2005      LOMMEN, NELSON, COLE & STAGEBERG, P.A.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).