

A04-2224

STATE OF MINNESOTA  
IN SUPREME COURT

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Gail Lewis-Miller,

Respondent,

v.

Christopher Ross,

Appellant.

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REPLY BRIEF OF  
APPELLANT CHRISTOPHER ROSS

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**TABLE OF CONTENTS**

RESPONSE TO RESPONDENT’S STATEMENT OF THE FACTS ..... 1

RESPONSE TO RESPONDENT’S LEGAL ARGUMENT ..... 2

    A. Standard of Review ..... 3

    B. The Court of Appeals Erred in Its Interpretation of § 257C.03 ..... 3

        1. The Statute Contains No Prima Facie Standard ..... 3

        2. Under a Prima Facie Standard, the Court Must Still  
           Look to the Petitioner’s Ultimate Burden ..... 4

        3. In re Kayachith Is Not Presently Applicable or Binding  
           Authority in This Court ..... 5

        4. Aunt’s Interpretation of § 257C.03 Does Not Fit  
           With the Law’s Purpose ..... 6

    C. Aunt Has Not Presented “Competent Evidence” to Support  
       Her Petition ..... 7

CONCLUSION ..... 12

CERTIFICATION OF BRIEF LENGTH ..... 13

## TABLE OF AUTHORITIES

### Statutes:

Minn. Stat. § 179.01 .....	8
Minn. Stat. § 179.231 .....	8
Minn. Stat. § 257C.03 .....	2, 3
Minn. Stat. § 259.24 (2005) .....	9
Minn. Stat. § 507.23 (1972) .....	9
Minn. Stat. § 595.02 (2005) .....	10
Minn. Stat. § 645.17 (2005) .....	8

### Rules:

Minn. R. Evid. 602 .....	10
--------------------------	----

### Cases:

<u>Angell v. Hennepin County</u> .....	8
565 N.W.2d 475 (Minn. Ct. App. 1997), <u>aff'd</u> , 578 N.W.2d 343 (Minn. 1998)	
<u>Blumberg v. Palm</u> .....	5
238 Minn. 249, 56 N.W.2d 412 (1953)	
<u>Brookfield Trade Center, Inc. v. County of Ramsey</u> .....	3
584 N.W.2d 390 (Minn. 1998)	
<u>In re Custody of N.A.K.</u> .....	2
649 N.W.2d 166 (Minn. 2002)	
<u>Frauenschuch v. Giese</u> .....	1
599 N.W.2d 153 (Minn. 1999)	
<u>In re Kayachith</u> .....	5, 6
683 N.W.2d 325 (Minn. Ct. App. 2004), <u>rev. denied</u>	
<u>Silbaugh v. Silbaugh</u> .....	1
543 N.W.2d 639 (Minn. 1996)	
<u>State v. Iverson</u> .....	9
664 N.W.2d 346 (Minn. 2003)	

TMG Life Ins. Co. v. County of Goodhue ..... 3  
540 N.W.2d 848 (Minn. 1995)

**Other Authorities:**

Black’s Law Dictionary 598 (8th ed. 2004) ..... 5

Minn. Sen., Floor Debate on S.F. 2673, 84th Leg. Sess. (Mar. 19 2002) ..... 6

## RESPONSE TO RESPONDENT'S STATEMENT OF THE FACTS

An appellate court's review of custody determinations is limited to determining whether the district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law. Silbaugh v. Silbaugh, 543 N.W.2d 639, 641 (Minn. 1996). Findings are reviewed for clear error; the record is reviewed in a light most favorable to the findings. Frauenschuh v. Giese, 599 N.W.2d 153, 156 (Minn. 1999). The trial court did issue detailed findings. To the extent Respondent Gail Lewis-Miller (Aunt) takes issue with the trial court's findings, the record on appeal must be viewed in a light most favorable to the findings.

Appellant Christopher L. Ross (Father) does take specific issue with Aunt's rendition of what is contained in the Family Court Report dated July 30, 2004. The trial court addressed this report in its Findings of Fact 9 and 10. (A. 11.)

Contrary to Aunt's contention, there is no evidence in the evaluator's memo that the evaluator believed Father's parental fitness needed to be assessed because of his involvement with Child Protection, as Aunt has argued. (See Respondent Aunt's Brief, p. 5.) The evaluator stated in her memo that "[s]ince my evaluation involves the Respondent (biological father) and the Petitioner (maternal aunt), it is this evaluator's understanding that, in considering the Petitioner as a potential custodial parent, the Respondent's fitness is an indispensable part of my study." This understanding is not a

reflection of any particular view about Father, as urged by Aunt, but is more likely based on the evaluator's understanding of the law regarding third-party custody cases.<sup>1</sup>

Likewise, Aunt's statement on page 6 of her brief that "the Guardian ad Litem also found that Ross admitted he had not complied with any of the several urinalyses ordered by child protection or court services" is not accurate. The court and child protection never ordered Father to submit to urinalysis, as the trial court recognized in Finding of Fact 28. (A. 18.)

### **RESPONSE TO RESPONDENT'S LEGAL ARGUMENT**

The interpretation of Minn. Stat. § 257C.03 advanced by Aunt requires that words "prima facie" be imputed into the statute, that the procedure described therein encompass two different evidentiary stages never anticipated by the Legislature, and that the ultimate evidentiary burden be ignored in the process. In so doing, Aunt relies upon non-binding authority that addresses a different issue and contravenes the Legislature's stated intention in passing the law in the first place. Additionally, Aunt insists that any evidence that she actually does present need not be admissible in a court of law. The clear shortcomings in this construction require reversal.

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<sup>1</sup> The evaluator's statements that the fitness of a biological parent is an indispensable part of a third-party custody case is likely a reference to this Court's decision in In re Custody of N.A.K., 649 N.W.2d 166 (Minn. 2002).

**A. Standard of Review.**

Whether or not Minn. Stat. § 257C.03 contains an implied two-stage process and the proper meaning of the term “competent evidence” are questions of statutory construction that should be reviewed de novo. Brookfield Trade Center, Inc. v. County of Ramsey, 584 N.W.2d 390, 393 (Minn. 1998). It is well-settled, however, that the decision to admit or exclude evidence rests with the trial court, and its ruling is not disturbed absent indications of an erroneous legal view or abuse of discretion. TMG Life Ins. Co. v. County of Goodhue, 540 N.W.2d 848, 851 (Minn. 1995).

**B. The Court of Appeals Erred in Its Interpretation of § 257C.03.**

**1. The Statute Contains No Prima Facie Standard.**

Despite her best efforts to do so, Aunt cannot insert words into Chapter 257C. The words “prima facie” do not appear anywhere within the chapter. Section 257C.03, subd. 7 does set forth factors in the burden of proof, though it does not restrict the courts to consider those factors only in the context of an evidentiary hearing. The statute does not even guarantee a hearing, though it does dictate dismissal of a petition for custody if the court finds that the petitioner does not “establish” at least one of the factors in subd. 7(a). Nothing in the statute suggests a “prima facie” standard at the petition stage.

Aunt maintains that the two-tiered is the only “practical” interpretation of the statute. (Respondent’s Brief at 13.) She argues that it would be impossible for an interested third party to successfully file a petition for custody due to the lack of

discovery and the lack of a hearing. (Respondent's Brief at 15-16.) This confuses Father's argument. Without the words "prima facie" anywhere in the statute, there is no indication that a trial court should not also consider evidence given by the Father as well. If, after examining the supporting affidavits of both sides, the judge can conclude that there is no conceivable way that the petition can succeed, the court is required under § 257C.03, subd. 8 to dismiss.<sup>2</sup> Moreover, the reason behind a high burden being placed on third parties seeking custody is to prevent such parties from coming in with flimsy, unsupported allegations and then allowing a fishing expedition through the discovery process.

**2. Under a Prima Facie Standard, the Court Must Still Look to the Petitioner's Ultimate Burden.**

Furthermore, Aunt misreads Father's argument that under her two-tiered "prima facie" approach, she would still be required to show the factors listed in Subdivision 7(a) "by clear and convincing evidence" in her petition. She states that a system applying the burden of proof at both stages is illogical and that it would defeat the purpose of a two-stage process. But if the petition is examined for a prima facie showing of clear and convincing evidence, then the court would not take opposing evidence into consideration at the petition stage. Still, to justify a hearing, a petitioner must first show that her

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<sup>2</sup> For example, in her petition Aunt states that prior to the children's mother's death, the children resided with Aunt during a portion of each year. (A. 150.) That is not true. (A. 33, 43-44, 71.) But under Aunt's view of the law, no weight is given to the subsequent factual development as long as her petition alleges to the contrary.

evidence unrebutted could meet the ultimate evidentiary standard. If the court then determines that even in the absence of contrary evidence petitioner cannot meet the “clear and convincing” threshold, then a hearing would be a waste of the court’s resources and the petitioner would not be so entitled.

“Prima facie” is not a quantum of evidence. Rather, the term describes 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). A court cannot determine under a prima facie standard whether a petitioner’s evidence by itself would “justify a judgment in the petitioner’s favor” without considering the ultimate evidentiary burden. The burden established by the Court of Appeals eviscerates the rule. If, at the petition stage, the district court is not to consider evidence disputing the petition’s allegations and is also prevented from considering the ultimate evidentiary burden, then literally any evidence or allegation will entitle a petitioner to a hearing. This non-standard is entirely contrary to the law’s very purpose.

**3. In re Kayachith Is Not Presently Applicable or Binding Authority in This Court.**

Aunt’s reliance upon the Court of Appeals’s decision in In re Kayachith, 683 N.W.2d 325 (Minn. Ct. App. 2004), rev. denied, is unfounded as the case does not address any evidentiary burden under § 257C.03, nor is that case binding on this Court. There, the court dismissed the interested third party petition because the petitioners failed

to even allege a substantial relationship with the child. Without even so much as a proper allegation of a substantial relationship with the child, a court cannot reach the question of whether or not either “competent evidence” or “clear and convincing” evidence of that relationship existed. Father is fully willing to grant that a petitioner must at least make allegations regarding her relationship in the petition, but Kayachith does not (and logically, could not) reach the questions at issue presently.

**4. Aunt’s Interpretation of § 257C.03 Does Not Fit with the Law’s Purpose.**

Aunt does not take issue with Father’s characterization of the Legislature’s intent, but instead contends that her interpretation of the statute is consistent with it. The effect intended by the Legislature is entirely contrary to Aunt’s argument. As explained in Father’s original brief, the Legislature intended “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. (Mar. 19, 2002). (Appellant’s Appendix [A.] 142-43). The statute is supposed to make it more difficult for petitioners to gain recognition as “interested third parties.”

Aunt contends that her interpretation fits this mold because “Now, petitioners must allege and support with competent evidence fifteen separate categories of information in order to file the petition with the court.” (Respondent’s Brief at 18.) Under Aunt’s interpretation of the statute, however, this is not the case. She claims that the statute “implies” an unrebutted prima facie standard without consideration for her ultimate

burden (Respondent's Brief at 12) and that her evidence need not necessarily be admissible in a court of law (Respondent's Brief at 23-26). This does not sound like the heightened standard that Aunt agrees was intended by the Legislature. Only Father's interpretation is truly consistent with this purpose.

**C. Aunt Has Not Presented "Competent Evidence" to Support Her Petition.**

Aunt claims that the term "competent evidence" is a statutory ambiguity that must be interpreted according to canons of statutory construction. This would be entirely unnecessary given that the term has historically always had the same definition. Regardless, even if this Court were to examine the legislature's intended meaning, it would arrive at the same conclusion.

Aunt first contends that the historical definition of "competent evidence" as admissible evidence other than hearsay (see Appellant's Brief at 21-23) could not possibly be the Legislature's desired meaning because it "creates a third-party-custody process [that] is ineffective and unreasonable" because it would force a petitioner to fully develop the evidence at the petition stage. (Respondent's Brief at 23.) As noted above, both parties acknowledge in their respective briefs that the legislative purpose behind § 257C.03 is the creation of a more stringent process for third party petitioners, especially interested third parties. (Appellant's Brief at 14-15; Respondent's Brief at 17-19.)

It is hardly unusual for a court to expect that the allegations set forth in the petition will be backed by evidence that could be presented in a court of law. This is not a

particularly difficult standard for a petitioner to meet. The standard does, however, screen out petitioners who rely upon rumors heard from a custodial parent's neighbors. (A. 14, ¶¶ 18, 19; A. 35, ¶¶ 12, 13, 15.) It is not outside the realm of possibility that the Legislature intended for the petition to be backed by relevant, first-hand knowledge. This result is far from "absurd, impossible of execution, or unreasonable." Minn. Stat. § 645.17 (2005). Therefore, this Court should give effect to the Legislature's clear intent.

Even assuming *arguendo* that the term is ambiguous, this Court should arrive at the same conclusion. This is not a term that the legislature created specifically for the purpose of this statute, but rather one that has been used both in other statutes and case law. Courts presume that the Legislature will use 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). The Minnesota Statutes already provide a definition for this term in both the Minnesota Labor Democracy Act and the Minnesota Labor Relations Act, as noted previously. Minn. Stat. §§ 179.231 and 179.01 (defining "competent evidence" as "evidence admissible in a court of equity and other such 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"). As Father has already demonstrated at length, Minnesota case law and the case law of other

jurisdictions all echo this same definition in various evidentiary contexts.<sup>3</sup> The only logical conclusion in the present case is that the Legislature intended the same meaning.

Still, Aunt has advanced the hypothesis that the term “competent evidence” really means “evidence given by competent witnesses.” This Court should note initially that there is no evidence whatsoever that Minnesota or any other jurisdiction has given the term such a restrictive meaning. Also, if this were the Legislature’s intention, then it would simply have used the term “competent witness” as it has in Minn. Stat. § 259.24 (2005) (execution of consents in an adoption must be before two competent witnesses), § 507.23 (1972) (prior to its 1973 amendment, required proof of conveyance by a competent witness) and countless other statutes. The Legislature’s clear language focuses this Court’s analysis upon the nature of the evidence given by the witness, not just the witness’s competency. The nature of the evidence is hearsay and is therefore incompetent.

Regardless, Aunt does not meet the requirements of the very definition she proposes. Granted, while the term “competent evidence” would seem to imply that a

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<sup>3</sup> Aunt states in her brief that “[n]early all of the authorities that Ross cites in support of his interpretation of competent evidence misstate or misrepresent the language and context of the cited authorities.” This allegation is false and unsupported. Father cites State v. Iverson, 664 N.W.2d 346, 350-51 (Minn. 2003), for this Court’s holding that absent a statutory definition, a court must rely on the obvious meaning of a term. Despite directing this statement at “nearly all” of Father’s authorities, this is the only authority that she takes issue with. Father is confident that this Court will find practically the same definition in each referenced authority and that all are accurately cited.

witness giving evidence must be competent to do so under the rules of evidence, there is no reason to presume that this is the extent of the term's meaning. As Aunt notes, every person of "sufficient understanding" with "personal knowledge of the matter" is competent to testify. Minn. Stat. § 595.02 subd. 1 (2005); Minn. R. Evid. 602 (emphasis added). Aunt therefore concludes that whereas she is neither an infant nor a "person of apparently weak intellect," her affidavit is competent evidence. Conveniently, she forgets the second part: "personal knowledge of the matter," i.e., admissible, non-hearsay evidence. As the district court found, Aunt's petition was almost entirely based upon allegation and suspicion. This is not an adequate basis for a potentially traumatic custody hearing. The district court's determination that her petition did not provide admissible evidence is not an abuse of discretion and should be upheld presently.

Aunt alternatively asserts that she prevails under the correct definition of "competent evidence." First, she claims that Father did not object to the admissibility of Aunt's evidence and second, that the trial court did not assess the admissibility of each piece of Aunt's evidence. She is incorrect on both accounts. Father objected both in a memorandum of law to the district court and in an August 26, 2004 hearing:

As I pointed out in my memorandum of law . . . the petition must be established by competent evidence. And there's no competent evidence here that she's established an adequate basis for jurisdiction. She's made several conclusory allegations including such allegations as the fact that my client is a drug dealer and that there are guns around the children. There's no competent evidence that goes to that point.

(A. 114:4-13.)

As discussed at length in Father's brief, the trial court rejected Aunt's allegations by either stating that they were unsupported or hearsay. (A. 14-17.) Father's objections and the Court's rulings are a matter of record.

Aunt also then claims that "many of the allegations in Lewis-Miller's petition and subsequent affidavits" are admissible. She gives no support for this statement. Under an abuse of discretion standard, there is no choice but to affirm the District Court's conclusions in its order regarding the absence of admissible evidence.

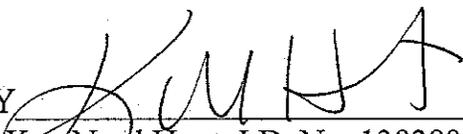
In order to apply a definition that might achieve her ends, Aunt had to create one out of thin air. Even then, her petition fails as competent evidence. This fact, along with the unrivaled bulk of authority characterizing the term as admissible non-hearsay should lead this Court to conclude that Aunt failed to support her petition with competent evidence.

**CONCLUSION**

Aunt's construction of this statute requires too many added words, implied stages, and brand new definitions for terms that have undisputed meanings. Father respectfully requests that this Court give effect to the Legislature's clear purpose by reversing the Court of Appeals decision and reinstate the district court-ordered dismissal of Aunt's petition.

Dated: November 7, 2005

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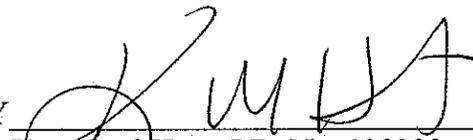
**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 2,874 words. This brief was prepared using Word Perfect 10.

Dated: November 7, 2005

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