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## The Case for Clear and Convincing Evidence: Do our Laws Value Property over Children?

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## **The Case for Clear and Convincing Evidence: Do our Laws Value Property over Children?**

Laws are an expression of the values held by a society. We value human life, and in turn choose to criminalize the act of murder. We value the exchange of promises, therefore we uphold the making of contracts. In addition, our laws often reflect protection for certain groups of citizens that we believe are vulnerable. This paper seeks to address the question whether or not our laws value property more than children?

It seems perfectly clear that laws should protect children from harm. Children are young and vulnerable. Their status as children requires the need for protections only afforded by the law. This is especially true in domestic cases where a child's parents are involved in a custody dispute and one parent has been found to be a perpetrator of domestic violence.

The use of violence, including domestic violence has a profound and deleterious effect on children. Studies show that children are affected by the climate of violence in their homes. "Even children who do not directly witness spousal abuse are affected by the climate in their homes and experience shock, fear, guilt, long lasting impairment of self esteem and impairment of developmental and socialization skills." (1)

A child placed in the custody of a perpetrator of domestic violence is a child at risk. “More than fifty percent of perpetrators who batter their spouses will also batter their children and the pattern of spousal abuse usually precedes abuse of a child.”(2)

Given these statistics, the State of North Dakota, a state leading the way in domestic violence policy, created a statute to protect children in custody battles where domestic violence was present. It is the position of North Dakota legislators that a perpetrator of domestic violence is “not generally the proper person to have custody of children because children are seriously and detrimentally affected by exposure to a parent who uses violence to exert control over family members.”(3)

To protect children, the North Dakota legislature passed a statute that required a high level of proof from a parent requesting custody of a child, where that parent has been found to use domestic violence. To require this level of proof the legislature embraced a standard known as “clear and convincing evidence. Clear and convincing evidence is a legal standard. The standard is considered an intermediate degree of proof, that “produces in the mind of the trier of fact a solid conviction or belief as to the allegations sought to be established.” (4) This standard of proof requires that a Court essentially be convinced by the evidence in support of the parent (perpetrator of domestic violence) that it is in the best interests of a child to be placed with that parent. In other words, the court requires convincing evidence before placing a child with a parent known to use violence in the past.

North Dakota, is the only state to pass a child custody statute, with the clear and convincing evidence standard. In fact, the other 24 states that have passed similar legislation have chosen a lower standard of proof, because the clear and convincing standard is often seen as an impediment to passage.

If clear and convincing evidence is too high a standard, then what types of cases do legislatures demand this heightened degree of proof? For one, cases of adverse possession. The law of adverse possession allows a person(s) to acquire title to land, that they do not own. Under the laws of most states, if a party wishes to acquire land that is owned by another, a party must establish adversity for a period of more than 21 years. In a successful case of adverse possession, the holder of title to land forfeits ownership to an adverse and likely hostile party without compensation. In other words, where a homeowner wishes to take title to property owned by an adjacent land owner, he must prove by clear and convincing evidence that he has used and taken care of this property for a period of 21 years without any opposition. Where the court is convinced this to be true, the court will award the property from its legal owner to the neighbor without any compensation.

Most individuals would agree that before a Court would consider taking title of property from the owner and giving it to an adverse party, the Court should be convinced by clear and convincing evidence. Surely, we require at least the same standard of proof as we do for property ownership when we determine custody of children for safe placements? Perhaps higher? Not even close.

If we value the safe placement of our children, then why are many state legislatures refusing to pass statutes that embody the clear and convincing evidence standard?

The Court in Heck, explained how application of the clear and convincing evidence standard operates, “proof of rehabilitation in conjunction with the passage of time involving no acts of domestic violence could be a start.” Such evidence, according to the Court, “may support a finding that future domestic violence was unlikely.” (5) In such a case, a parent with a finding of domestic violence may overcome the clear and convincing evidence standard by proof of rehabilitation, no acts of domestic violence over a period of time.

What do our laws say about our values? So far, 24 states have passed similar legislation to North Dakota, addressing custody of children where one parent has been found to use domestic violence. Of those states, none other than North Dakota has been successful at including the clear and convincing evidence standard. This author suggests that looking at the laws of these various states and looking at the disparate treatment of children to property – it is clear by our public policy what we value. Perhaps if communities and legislators recognized the disparate treatment of our most vulnerable members of society, the importance of drafting appropriate policy to protect children like we protect our property would be both clear and convincing.

## References

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4. Cross v. Ledford , 161 Ohio St. 469 (1954)
5. 529 N.W. 2d 155 (1995)