

CLEAR AND CONVINCING EVIDENCE STANDARD

Clear and convincing evidence is a legal standard of proof used by judicial systems across the United States. The clear and convincing standard is referenced throughout the North Dakota Century Code and is applied to numerous areas of law. This memorandum provides common examples of the application of the clear and convincing evidence standard under state law.

JUDICIAL INTERPRETATION

In *Colorado v. New Mexico*, 467 U.S. 310, 2437 (1984), the Supreme Court of the United States held, "clear and convincing" means the evidence is highly and substantially more likely to be true than untrue.

In *State v. Schneider*, 550 N.W.2d 405, 409 (N.D. 1996), the challenging party argued the phrase "firm and abiding conviction," as used in jury instructions to describe "reasonable doubt," was erroneous. *Id.* The challenging party argued the phrase "firm and abiding conviction" described "clear and convincing evidence," not the criminal standard of "proof beyond a reasonable doubt." *Id.* The North Dakota Supreme Court in *Schneider* opined and ultimately held:

We acknowledge the phrase "firm and abiding conviction" used in the jury instruction on reasonable doubt could be likened to the phrase "firm belief or conviction" associated with the lesser standard of clear and convincing evidence. However, seemingly consistent phrases can take on different connotations depending upon the context in which they are used. *Id.*

The North Dakota Supreme Court in *Schneider* held, "[T]he phrase 'firm and abiding conviction' does not lead a jury to find guilt at a standard of proof below that required by the Constitution." *Id.* at 410. In essence, the court found that the phrase "firm and abiding conviction" describes the criminal standard of "proof beyond a reasonable doubt," not "clear and convincing evidence."

According to the *Illinois Pattern Jury Instructions, Criminal*, No. 4.19 (4th ed. 2000), "The phrase clear and convincing evidence means that degree of proof which, considering all the evidence in the case, produces the firm and abiding belief that it is highly probable that the proposition on which the defendant has the burden of proof is true."

STATUTORY EXAMPLES

Agency

When determining if an agency relationship exists under North Dakota Century Code Section 3-02-02, the North Dakota Supreme Court held in *Farmers Union Oil Co. v. Wood*, 301 N.W.2d 129 (N.D. 1980), "Where the existence of an agency relationship is denied, the burden of proof is upon the party who affirms its existence to establish such existence by clear and convincing evidence."

Fraud

When determining if the elements of "actual fraud" under Section 9-03-08 are met, the United States Bankruptcy Court for the District of North Dakota held in *In re Valeu*, 53 B.R. 549 (Bankr. D.N.D. 1985), "Fraud is never presumed, but must be proved by clear and convincing evidence."

Deceit

When discussing if the elements of "deceit" under Section 9-10-02 are met, the United States Court of Appeals for the Eighth Circuit held in *Macquarie Bank Ltd. v. Knickel*, 793 F.3d 926, 934 (8th Cir. 2015), "Deceit and fraud claims must be proved by clear and convincing evidence."

Contracts

When determining if the terms of a contract may be reformed or if a mutual mistake exists, the North Dakota Supreme Court held in *Motter v. Traill Rural Water Dist.*, 2017 ND 267, 903 N.W.2d 725, 729:

The party seeking reformation of a written instrument must establish by clear and convincing evidence that the document does not state the parties' intended agreement... [and] Courts grant the high remedy of reformation only upon the certainty of error.

Domestic Relations

When determining parental rights and responsibilities under Section 14-09-06.2, 13 factors must be considered. Two of those factors relate to the preference of the child and the rebuttable presumption associated with domestic violence. Section 14-09-06.2(1)(i)(j) states:

- i. If the court finds by clear and convincing evidence that a child is of sufficient maturity to make a sound judgment, the court may give substantial weight to the preference of the mature child. The court also shall give due consideration to other factors that may have affected the child's preference, including whether the child's preference was based on undesirable or improper influences.
- j. Evidence of domestic violence. In determining parental rights and responsibilities, the court shall consider evidence of domestic violence. If the court finds credible evidence that domestic violence has occurred, and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding, this combination creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded residential responsibility for the child. This presumption may be overcome only by clear and convincing evidence that the best interests of the child require that parent have residential responsibility. The court shall cite specific findings of fact to show that the residential responsibility best protects the child and the parent or other family or household member who is the victim of domestic violence. If necessary to protect the welfare of the child, residential responsibility for a child may be awarded to a suitable third person, provided that the person would not allow access to a violent parent except as ordered by the court. If the court awards residential responsibility to a third person, the court shall give priority to the child's nearest suitable adult relative. The fact that the abused parent suffers from the effects of the abuse may not be grounds for denying that parent residential responsibility. As used in this subdivision, "domestic violence" means domestic violence as defined in section 14-07.1-01. A court may consider, but is not bound by, a finding of domestic violence in another proceeding under chapter 14-07.1.

In *Queen v. Martel*, 2022 ND 178, 980 N.W.2d 914, the North Dakota Supreme Court held:

In an action concerning residential responsibility for a minor child, the district court erred by failing to make sufficient findings of fact under N.D.C.C. § 14-09-06.2(1)(j), regarding whether the presumption that a parent who has perpetrated domestic violence may not be awarded residential responsibility for the child had been overcome by clear and convincing evidence that the best interests of the child required that parent have residential responsibility, citing specific findings of fact to show that the residential responsibility best protected the child and the parent or other family or household member who was the victim of domestic violence.

Involuntary Admission

When determining if an individual is a "person requiring treatment" under Section 25-03.1-02(13), the North Dakota Supreme Court held in *In Interest of T.A.*, 472 N.W.2d 226, 227 (N.D. 1991), "Involuntary commitment is authorized only upon clear and convincing evidence that a respondent requires treatment."

When determining if a court may authorize involuntary treatment with prescribed medication under Section 25-03.1-18.1, clear and convincing evidence must be demonstrated. In *In re B.L.S.*, 2006 ND 218, 723 N.W.2d 395, the North Dakota Supreme Court held:

Clear and convincing evidence supported conclusion that forced treatment with psychotropic medications was required to treat inmate who had been found to be mentally ill and requiring treatment; after psychiatrist filed request to treat with medication, another physician certified that use of medications to treat inmate was clinically appropriate and necessary, and that there was a reasonable expectation that, if inmate was not treated with medications, his condition would create a serious risk of harm to his person, and that inmate had been offered medication, but had refused it.

When determining if a court may commit a sexually dangerous individual under Section 25-03.3-13, the North Dakota Supreme Court held in *In re P.F.*, 2006 ND 82, 712 N.W.2d 610:

Respondent was properly committed as a sexually dangerous individual because he had a history of sexually predatory conduct and numerous mental diseases that made him likely to re-offend, and the State carried its burden to show by clear and convincing evidence that the respondent was a sexually dangerous individual.

Guardianships

When determining if a court may appoint a guardian of a child under Section 27-20.1-11, in addition to other factors, the court may appoint a guardian of a child if the court finds by clear and convincing evidence that the appointment is in the child's best interest. In *Interest of Guardianship of A.D.*, 2021 ND 205, 966 N.W.2d 540, the North Dakota Supreme Court held:

The juvenile court did not err by granting a guardianship for the child because it found the father had abandoned the child. The juvenile court found by clear and convincing evidence that the father had not provided care for or had any contact with the child since 2007 or 2008 and had not made any significant attempts to locate the child or have the child placed in his care.

When determining if a court may appoint a guardian of an incapacitated individual under Section 30.1-28-04, the North Dakota Supreme Court held in *Matter of Guardianship of Braaten*, 502 N.W.2d 512 (N.D. 1993), "The guardianship law mandates that the trial court find incapacity, lack of an alternative resource plan, and necessity of guardianship supervision, all by clear and convincing evidence, then select the least restrictive form of intervention."

Adverse Possession

When determining if a claim for adverse possession is valid under Section 28-01-04, the North Dakota Supreme Court held in *Benson v. Taralseth*, 382 N.W.2d 649 (N.D. 1986), "The burden of proving adverse possession rests with the person alleging it and must be established by clear and convincing evidence."

Firearm Restoration

Section 62.1-02-01.1(2) states:

2. The district court may restore the right of an individual to possess a firearm if the court determines, by clear and convincing evidence, that all of the following circumstances exist:
 - a. The individual has paid all fines imposed for the violation resulting in the prohibition;
 - b. The individual has served all terms of imprisonment imposed for the violation resulting in the prohibition;
 - c. The individual has successfully completed all conditions of probation or parole imposed for the violation resulting in the prohibition; and
 - d. The individual's record and reputation are such that the individual is not likely to act in a manner dangerous to the safety of others.