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Robert E. Oliphant

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REDEFINING A STATUTE OUT OF EXISTENCE: MINNESOTA'S VIEW OF WHEN A CUSTODY MODIFICATION HEARING CAN BE HELD

Robert E. Oliphant†

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I. INTRODUCTION

This article is about a black foster family who became embroiled in a custody modification dispute in Minnesota. It is also about Minnesota Statute section 518.185 and how Minnesota's appellate courts have interpreted, reinterpreted, and sometimes redefined portions of this statute out of existence. The statute in relevant part reads as follows:

A party seeking . . . modification of a custody order shall submit together with moving papers an affidavit setting forth facts supporting the . . . modification and shall give notice, together with a copy of the affidavit, to other parties to the proceeding, who may file opposing affidavits.

The statute contains no procedural guidance other than to allow the parties to submit sworn affidavits in support of, or in opposition to, a custody modification motion. Without specific statu-

† Professor of Law, William Mitchell College of Law
1. This was a pro bono case handled by the author.
2. MINN. STAT. § 518.185 (1998).
tory guidance, the preliminary decision to order or deny a full custody hearing turns entirely on the weight a trial judge gives to the information provided in affidavits submitted by the parties.4

Under present Minnesota law, a full custody hearing is ordered if the trial judge concludes that prima facie evidence shows that a change has occurred in the circumstances of the child or the parties, and that the modification is necessary to serve the best interests of the child.5 This prima facie evidence consists of facts that have arisen since the prior child custody order or facts unknown to the court at the time of the prior order.6

In rare cases, the moving party's affidavit may contain information such as police or child protection reports that negate the claim that custody should be modified. Nevertheless, some trial court judges have disregarded the contrary information and ordered full custody hearings.7

The procedural vacuum left by the statute and two decades of creative interpretation of it by various Minnesota appellate panels has created a perplexing situation for lawyers and judges faced with assessing whether a modification request should or will proceed. The uncertainty makes it difficult at this critical juncture of a modification dispute to predict with any degree of accuracy the weight a court will give to competing information before it. Furthermore, because trial judges have not received clear procedural guidance from the appellate courts, they may render inconsistent rulings.

The thesis of this article is that Minnesota's legal system has done a poor job of explaining and applying Minnesota Statute section 518.185. First, the appellate courts have failed to adhere to the original legislative purpose of Minnesota Statute section 518.185, which is found in the Uniform Marriage and Divorce Act

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5. See MINN. STAT. § 518.18(d) (1998). In applying these standards the court shall retain the custody arrangement established by the prior order, unless "the child’s present environment endangers the child’s emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child." Id. In this dispute, prima facie evidence of improper touching of a sexual nature comes within the scope of this provision. See Francis v Francis, No. C3-97-1569, 1998 WL 61992, at *2 (Minn. Ct. App. Feb. 17, 1998) (holding prima facie evidence established that mother’s new husband was convicted of child molestation).

6. See MINN. STAT. § 518.18(d).

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and calls for a restrictive view of ordering modification hearings. Second, there is no evident explanation for the judicial system’s decision to abandon the UMDA philosophy. Third, contradictory views expressed by various appellate panels about how to view competing affidavits have created uncertainty and confusion engulfing this area of the law.

This article’s conclusion contains suggestions for change. If adopted, the changes will help bring greater certainty and uniformity to the decision making process at the initial stage of a custody modification dispute and restore the original purpose of the legislation to Minnesota law.

II. THE MODIFICATION DISPUTE

As noted earlier, the catalyst for this article involved a black foster family and their custody dispute while living in a predominantly white, affluent suburb in the Twin Cities of Minneapolis and St. Paul, Minnesota. The husband and wife were experienced foster parents who had parented minority children for more than a dozen years. Many of the children placed with them had gone on to become successful, outstanding and contributing citizens in the community. A few, unfortunately, were unable to shed the problems that first brought them into foster care.

The dispute was heart wrenching. In the middle, stood a twelve-year-old female child whose legal and physical custody was taken from her biological mother five years earlier and placed with the foster family. The child’s biological mother is a twice-convicted sex offender whose crimes involved minor children. The child’s biological father’s rights were terminated after he abandoned her.

When the court issued the original order placing the child’s physical and legal custody with the black foster parents, it contained a provision that permitted, albeit encouraged, occasional

11. The foster family received sole physical and legal custody of the child, who was almost seven years old at the time.
contact between the child and her biological family. Despite the foster family’s concern about continuing contact with the biological mother, she was allowed occasional, supervised visits. The child was also allowed to visit other blood relatives, some of whom resided outside the state.  

During the five years the child lived with the foster family, she became an integral part of it. The environment was stable, loving and disciplined. Doctor and dental appointments were kept, school and church attendance became important, and the child, although troubled, grew.

During the spring of the child’s fifth year of residence with the foster family, the child’s blood relatives began to pressure the foster family to transfer custody to an aunt. By this time the foster family had formed a natural bond of parental affection with the child and treated her as though she was their natural issue. In addition, the family was extremely concerned that a transfer of custody to the aunt would significantly increase the chances for unsupervised contact with the biological mother. The foster family adamantly rejected the transfer requests. Unknown to the foster family, the child apparently fell under the influence of her blood relatives and began to formulate a plan to join them.

In the early summer of the fifth year, the child’s biological mother lodged a complaint with local authorities. She asserted that the child informed her during a telephone conversation that on one recent occasion her foster father inappropriately touched her. Upon receiving the complaint, and without warning to the foster family, the child protection unit assisted by the local police, immediately seized and removed the child from the home. Simultaneously, child protection removed the foster family’s own children from the home.

The foster parents were stunned and shaken by the seizure of the children, all of who were put in temporary shelters. They were baffled by the allegation regarding inappropriate touching.

The local authorities initiated an aggressive investigation into the allegation. They interviewed the child, the foster family’s chil-

12. It was apparently the view of the social workers assigned to the case that this was in the best interests of the child.

13. Of interest may be the fact that five years earlier the aunt was given the opportunity to take custody of the child but refused.

14. Notes and writings in the child’s handwriting, which were subsequently obtained by investigators, confirmed this fact.

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dren, the foster parents, and others. After a month-long inquiry by all relevant agencies, they unanimously concluded that the allegation could not be substantiated. With tears of joy the foster parents welcomed the children back home.

However, the official investigation and return of the children to the foster family did not end the matter. Four weeks after the authorities closed the case, the biological mother filed legal papers in juvenile court and served them on the foster family demanding the foster family transfer the child’s custody to the out-of-state aunt. However, shortly after the filing, the juvenile court dismissed the action stating it lacked subject matter jurisdiction to hear the dispute.

The foster family's legal nightmare had not yet ended. Approximately two weeks following the juvenile court dismissal, a new modification motion was served on the foster family, this time ve- nued in family court. The basis for the proposed custody change, according to the motion, was the allegation of inappropriate touching, originally reported to authorities by the biological mother. The biological mother attached, and therefore incorporated to the affidavit, copies of relevant investigative reports prepared by local authorities. In her motion the biological mother conceded that the police, child protection and the local county attorney’s office had concluded that the touching claim could not be substantiated. Moreover, the motion failed to explain or suggest that the original investigation was deficient. It also did not suggest that any “new” evidence had come to light supporting the motion.

In response to the motion, the foster family prepared affidavits that explained the circumstances surrounding the false allegation. The foster family informed the court that the child, in a confused and immature effort to satisfy what she perceived as demands that she live with her blood relatives, had fabricated the allegation. The foster family also stated that the child had recanted her story to third parties.

With this information before it, the matter came on for a hearing to determine whether a trial-like, full custody evidentiary hearing should be held. To the surprise and dismay of the foster family, the trial judge ruled that the biological mother’s affidavits were “sufficient for purposes of going forward with an evidentiary hearing on the motion.”

Of possible interest is the fact that the trial judge, in her order, briefly alluded to the contrary factual information contained in the
foster family's documents and the material that explained the false allegation in the responsive affidavits. There was nothing, however, to indicate that the judge did anything more than to narrowly assume the allegation in the moving party's affidavit was true and order a full custody hearing. The foster family was once again stunned by the legal system's decision.

III. THE HIGH COST OF AN EVIDENTIARY HEARING

The financial and psychological impact on a custodial family when a full custody hearing is ordered is enormous and devastating to the child in the middle of the dispute. The family must scramble to find sufficient financial resources to support the legal battle it is being forced to undergo. A second and possibly third mortgage on the family home may be the only avenue open to cover the legal costs. In addition, the custodial family and the child whose custody is in doubt may suffer psychologically as they attempt to maintain balance in their relationship while the custody modification war swirls around them. In some cases the relationship between the child and all of the adults involved in the custody war may forever be scarred.

For a lawyer, getting ready for a full custody modification hearing is little different from preparing for trial. Depositions must be taken and fees associated with court reporters that record and transcribe the depositions paid. Because the psychological character of the participants usually needs exposure by experts, psychologists, psychiatrists, and other mental health workers must be employed to provide this testimony. Teachers, the family doctor, dentist, neighbors and the family's clergy must be contacted and statements

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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.


16. See Alison Richey McBurney, Note, Bitter Battles: The Use Of Psychological Evaluations In Child Custody Disputes In West Virginia, 97 W. VA. L. REV. 773, 778-82 (1995); see also Rex Julian Beaber, Custody Quagmire: Some Psycholegal Dilemmas, 10 J. PSYCHIATRY & L. 309, 313 (1982) (stating that parents are skilled at misrepresenting facts to accomplish their goals).
obtained from them. \footnote{17} Adequate trial preparation takes time, which only adds to the financial and psychological anxiety experienced by the custodial family. Witness fees, subpoena and service costs all are added to the expenses associated with the custody war. If a guardian \textit{ad litem} is ordered, which is customary where allegations of abuse are made, the guardian's expenses will have to be paid. \footnote{18} Tension among family members mounts as the family's financial resources dwindle. \footnote{19}

The psychological strain during the weeks leading to the full custody hearing can be enormous. During depositions the contestants may glare at each other while exchanging subtle, angry looks and gestures. Their actions telegraph the message that they are prepared to "fight" to the bitter end over who is going to continue raising the child whose custody is in issue.

The costs may never seem to end, especially to a custodial parent who has solidly bonded with a minor child. \footnote{20} After the decision following the full custody modification hearing, should it be adverse to the custodian, there is likely to be an appeal. If the court of appeals finds against the bonded custodian, there is often a petition to the Minnesota Supreme Court for review. All of the legal maneuvering is costly and delays only increase the uncertainty prevalent in a custody battle. \footnote{21} During the process families and friends may turn against each other as alliances are formed and battle lines drawn; the normal family life of the child over whom

\footnote{17} Parenthetically, it appears that in many of these disputes neither party has sufficient financial resources to support a full-fledged custody battle. The result is that the matter proceeds without the extensive, serious investigation needed to get at the truth of the allegations and to provide a platform for an informed decision by the trial judge.

\footnote{18} In Minnesota, it is apparently common practice for the guardian \textit{ad litem}'s expenses to be shared on a 50/50 basis.

\footnote{19} The litigation costs associated with effectively meeting a custody modification hearing may well reduce the standard of living of a custodial family. See generally Lenore J. Weitzman, \textit{The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America} 339 (1985) (stating that women experience a 73% decline in their post-divorce standard of living).

\footnote{20} See Johnson v. Smith, 374 N.W.2d 317, 321 (Minn. Ct. App. 1985) (holding that the trial court erred by removing child from custodial parent where it failed to properly account for the fact that the child had been with that parent for eight years).

\footnote{21} The legal maneuvering delays for child custody modifications are represented by Autenreith v. Terrazas, No. CX-96-2482, 1997 WL 509414, at *1 (Minn. Ct. App. June 10, 1997), where the time from motion to modify through review denial by the Supreme Court, extended to 15 months.
they struggle may well be shattered.

The child may understand little about the struggle other than that the contestants are bitingly hostile to each other. Caught in the middle of the furor, a child may become confused, depressed, or angry. The child may view all sides as hating each other, even though the contestants may in the future make an effort never to say negative things about the custodian again. There is little that could be more disruptive to the continuity and stability of a child’s environment than a modification hearing. There is nothing in the American legal system that could be more destructive to a custodial foster family than such a hearing.

IV. STATUTORY INTENT

Minnesota Statute section 518.185 was passed into law by the 1978 Minnesota Legislature and became effective March 1, 1979. The statute was amended in 1986 to remove all nonsubstantive gender specific references contained in it. No substantive changes have been made in the statute since it became effective.

The Minnesota Supreme Court provides a starting point for analysis of the statute in Nice-Petersen v. Nice-Petersen, where it said that the provision is “consistent with section 410 of the Uniform Marriage and Divorce Act, from which section 518.185 was largely taken.” If one agrees with this observation, then an understand-


24. See GOLDSERET AL., supra note 15, at 31-35 (1973); see also Hummel v. Hummel, 304 N.W.2d 19, 21 (Minn. 1981) (stating that such hearings have a “disruptive impact” on minor children).


27. 310 N.W.2d 471 (Minn. 1981); see also MINN. STAT. § 645.16 (1992) (stating that in construing statutes, courts must ascertain and give effect to the legislature’s intention).

28. Nice-Petersen, 310 N.W.2d at 472; see also Chris Ford, Untying the Relocation Knot: Recent Developments and a Model for Change, 7 COLUM. J. GENDER & L. 1, 50 (1997) (stating that the Minnesota UMDA version parallels the original UMDA Act); Laura Beresh Taylor, Note, C.R.B. v. C.C. and B.C.: Protecting Children’s Need
ing of the philosophy of UMDA is important to a proper application of Minnesota's statute in concrete disputes.

The National Conference of Commissioners on Uniform State Laws approved section 410 of the UMDA in 1970 and amended by that body in 1971 and 1973. The philosophy of the UMDA regarding custody modification is unambiguous. The statute portrays the conviction that finality in custody decrees is of the utmost importance and it places a premium on stability and continuity in a child's life.

The UMDA sought to discourage noncustodians from punishing or manipulating the custodian by the use of frequent modification motions. It took the standard best interest test that existed in most jurisdictions at the time and tightened the test considerably.


30. See Joan G. Wexler, Rethinking the Modification of Child Custody Decrees, 94 Yale L.J. 757, 774 (1985) (noting the importance of ensuring the finality of custody decrees to promote the child's interests); see also Erhardt v. Erhardt, 554 P.2d 758, 759 (Mont. 1976) ("[L]egislative intent [is] to provide some stability for custody arrangements.").


32. See id.

33. The UMDA standard provides:

[T]he court shall not modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interest of the child.
declaring, for example, that the movant must show by affidavit “that there is reason to believe the child’s present environment may endanger seriously his physical, mental, moral, or emotional health.” 54 It required that courts find, before ordering any change in custody, “the harm likely to be caused by a change of environment is outweighed by its advantages to [the child].” 55

Repeatedly, one finds in the UMDA a determination to prevent litigation over a child. Minnesota modeled Minnesota Statute section 518.185 after section 410 of the UMDA, 56 and absent local legislative history to the contrary, Minnesota’s treatment of this statute should be consistent with the UMDA. Unfortunately, that is not the case.

For example, nothing in the UMDA suggests a noncustodian need only meet the minimal prima facie burden standard to gain a full hearing. 57 Furthermore, nothing in the UMDA suggests a trial judge should assume the truth of one party’s claims while ignoring or failing to weigh the opponent’s response.

Unfortunately, either the Minnesota legislature and courts never understood or, if they did understand, they have abandoned the UMDA philosophy regarding custody modification. As discussed more fully in the next section, the result is that Minnesota has vested almost unchecked power in the trial court over the decision whether to order a full custody hearing and has maximized the

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Id. § 409(b), 9A U.L.A. 439 (1998). This is a restatement of the traditional best interests test. See also Wexler, supra note 30, at 774. In the next sentence, however, significant new limitations were added:

In applying these standards the court shall retain the custodian appointed pursuant to the prior decree unless:

(1) the custodian agrees to the modification;
(2) the child has been integrated into the family of the petitioner with consent of the custodian; or
(3) the child’s present environment endangers seriously his physical, mental, moral, or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages to him.

UNIF. MARRIAGE & DIVORCE ACT § 409(b) (1)-(3), 9A U.L.A. 439. The Act also provides that attorneys’ fees and costs shall be assessed against a party seeking modification if the court finds that the modification action is vexatious and constitutes harassment. See id. § 409(c), 9A U.L.A. 439.

34. UNIF. MARRIAGE & DIVORCE ACT § 409(a), 9A U.L.A. 439.
35. Id. § 409(b) (3) 9 U.L.A. 439 (1998).
37. This is presently Minnesota’s standard of proof. See id; see also discussion infra Part V.
potential for manipulation by the noncustodian, especially where vague sex abuse claims are made. Noncustodians are fully aware that for some judges a single claim of improper sexual contact will probably trigger a full custody hearing, regardless of the response from the custodian. This is not what the drafters of the UMDA intended.

V. COMMON LAW STANDARDS EMERGE

One of its principles, says the Minnesota Supreme Court, is "where language used is clear, explicit, and unambiguous . . . the courts must give [the statute] the ordinary meaning of the words used." It has also said, "if the language of the provision is unambiguous, it must be given its literal meaning—there is neither the opportunity nor the responsibility to engage in creative construction." Unfortunately, these principles have sometimes eluded the Minnesota court system when it has considered Minnesota Statute section 518.185. The result is a judicial system that has pretty much abandoned the original intent of the statute and a series of common law rulings that are difficult, if not possible, to reconcile. This has left the law in the area uncertain, confusing, and without a clear purpose.

When in September 1981, Minnesota’s Supreme Court examined Minnesota Statute section 518.185 in Nice-Peterson v. Nice-Peterson v. Nice-

40. Minnesota’s appellate courts have also been plagued with uncertainty over the question of the correct standard of review. The courts have applied an abuse of discretion standard to a district court’s dismissal of a modification petition without an evidentiary hearing, stating that the appellate court is relying on the trial court’s general broad discretion in custody matters. See Geibe v. Geibe, 571 N.W.2d 774, 777 (Minn. Ct. App. 1997). Compare Ross v. Ross, 477 N.W.2d 753, 755-56 (Minn. Ct. App.1991) (applying de novo standard), with Geibe, 571 N.W.2d at 777-78 (discussing Ross but applying abuse of discretion standard). Ross held that a de novo standard was applicable because, when deciding whether to hold an evidentiary hearing, the district court does not make findings of fact and, as a result, “there is no occasion . . . for deference to trial court assessment of conflicting evidence.” Ross, 477 N.W.2d at 755. Geibe notes that post-Ross decisions have used an abuse of discretion standard and also notes that Ross did not address the use of the abuse of discretion standard used in Nice-Peterson. See Geibe, 571 N.W.2d at 778. Although the Minnesota Supreme Court has not explicitly resolved this discrepancy, it has applied an abuse of discretion standard in reviewing whether a district court properly denied a request for an evidentiary hearing. See Valentine v. Lutz, 512 N.W.2d 868, 872 (Minn. 1994).
Peterson, it conceded that the statute as enacted is consistent with section 410 of the Uniform Marriage and Divorce Act. Unfortunately, the court failed in the opinion to share the unambiguous philosophical basis supporting the statute found in the UMDA. Rather, it left open for future common law rulings the question of the procedures to use when a noncustodian brings a modification motion.

The following excerpt from a recent unpublished opinion illustrates the uncertainty surrounding application of the present standard and captures the various vague principles that have emerged since Nice-Peterson:

The party seeking a child custody modification should submit an affidavit asserting the facts on which the motion is based. The district court then determines whether petitioner has established a prima facie case by alleging facts that, if true, would provide sufficient grounds for a modification. The district court must accept the facts in the moving party's affidavits as true without independent substantiation. Minn. Stat. § 518.185 also grants the opposing party the right to file affidavits, and the court may consider all affidavits in making its determination. As appellant correctly points out, the district court is required to accept appellant's allegations as true and to disregard any directly contrary statements in respondent's affidavit; the court may only "take note of statements in [respondent's] affidavit that explain the circumstances surrounding the accusations." If the facts asserted by the moving party are sufficient to support modification, the district court must hold an evidentiary hearing. A hearing is strongly encouraged when there are allegations of present endan-

41. See Nice-Peterson, 310 N.W.2d at 472. It is this paragraph that triggered the view that the moving party must establish a prima facie case before a hearing is to be held.

42. In Jordan v. Jordan, No. C1-94-1331, 1995 WL 6444, at *1 (Minn. Ct. App. Jan.10, 1995), the panel suggested the following as the reason for the statute: "The affidavit provides a readily accessible summary for the court, functions as a notice to the opposing party of what is at issue, and ensures that the specific reasons advanced by the proponent are called to the court's attention."

43. Note that in Taflin v. Taflin, 366 N.W.2d 315, 320 (Minn. Ct. App. 1985), the court observed: "The statute, [Minn. Stat. § 518.18] however, does not . . . establish procedural guidelines to be followed when a court is presented with a petition for modification." Id. (citing Hegerle v. Hegerle, 355 N.W.2d 726, 731 (Minn. Ct. App. 1984)).
germent to health or emotional well being. In reviewing a modification petition dismissed without an evidentiary hearing, we will not reverse absent an abuse of discretion.44

The prima facie burden is created: The first piece of creative construction involving the statute came with the birth of the prima facie standard.45 This extremely low standard does not appear in the UMDA and has no support in the commentary to it. The prima facie standard is inconsistent with the UMDA because it fails to protect the custodian from unwarranted exposure to an evidentiary hearing. This burden is so low that it is difficult to imagine that a trial lawyer, even with a minimal drafting ability, will be unable to persuade a court to order a hearing.46 As the dispute involving the black foster family illustrates, a single allegation of abuse is sufficient for some judges to trigger a full custody evidentiary hearing.

Although the court's opinion in Nice-Peterson is commonly credited with establishing the prima facie standard of proof,47 no specific language in the opinion supports this view. In fact, it was not until May 1985 that the prima facie phrase appears in an appellate decision, *Pogreba v. Pogreba*,48 which is a memorandum opinion issued by the Minnesota Court of Appeals. In affirming the denial of a custody modification hearing, the court stated, without explanation or authority other than a citation to Nice-Peterson, that "[t]he trial court need not grant a hearing on respondent's custody claim unless he presents affidavits making a prima facie case on the issue."49

The prima facie language in *Pogreba* was discovered by the editors of West Publishing Company and appears in the head notes to

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46. The prima facie standard is notoriously low in a number of different contexts. *See Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 165-66 (1st Cir. 1998) (stating that there is a "low threshold showing necessary to establish a prima facie case"); *Chalwest (Holdings) Ltd v. Ellis*, 924 F.2d 1011, 1013 (11th Cir. 1991) (stating that the prima facie burden is low); *Cully v. Milliman & Robertson, Inc.*, 20 F. Supp. 2d 636, 641 (S.D.N.Y. 1998) (stating that the prima facie burden is "low," requiring only an explanation).
49. *Id.* at 679.
that opinion in West's Northwest Reporter series. Thus, ever so quietly and politely was born this low threshold for deciding when a full custody evidentiary hearing is warranted.

Confirmation of the prima facie burden came in Morey v. Peppin, where the Minnesota Supreme Court observed, while rejecting a father’s request for a custody modification hearing, that:

In any future motion for modification of the award of child custody in this matter an evidentiary hearing shall be scheduled if, by affidavits submitted in support of the motion, the movant makes a prima facie showing of circumstances justifying modification pursuant to the provisions of Minn. Stat. § 518.18 (1984).

Since these decisions, the prima facie burden of proof has been applied without question to custody modification motions.

In contrast to Minnesota's view, when the Washington Court of Appeals considered the question of the proof needed before a full custody hearing is warranted, it established a higher standard. Washington’s view is consistent with the philosophy expressed in the UMDA, which is to protect the custodial family from unwarranted harassment by the noncustodian. In Roorda v. Roorda, the court declared:

There is a strong presumption… in favor of custodial continuity and against modification…. We observe a related policy expressed in the statute of preventing harassment of the custodial parent and providing stability for the child by imposing a heavy burden on a petitioner, which must be satisfied before a hearing, is convened. Another purpose of the statute is to discourage a noncus-

50. See id. at 677.
51. 375 N.W.2d 19 (Minn. 1985); see also Downey v. Zigart, 378 N.W.2d 639, 642 (Minn. Ct. App. 1985).
52. Morey, 375 N.W.2d at 25. This was followed by the Court of Appeals decision in Axford v. Axford, 402 N.W.2d 143, 145 (Minn. Ct. App. 1987) (“Minn. Stat. § 518.18 requires the moving party to present sufficient evidence by affidavit which, if true, would make a prima facie case for modification…. The affidavit must make a prima facie case before an evidentiary hearing is required.”).
tiodial parent from filing a petition to modify custody. The oft-repeated touchstone of any custody decision is "the best interests of the child". Litigation over custody is inconsistent with the child's welfare. "Adequate cause," therefore, requires something more than prima facie allegations which, if proven, might permit inferences sufficient to establish grounds for a custody change.

Other state courts that have considered the UMDA have adopted the adequate cause standard, which as noted in Roorda, requires something more than allegations which, if proven, might permit inferences sufficient to establish grounds for a custody change. The "adequate cause" standard comports with section 410 of the Uniform Marriage and Divorce Act, which states:

A party seeking a temporary custody order or modification of a custody decree shall submit together with his moving papers an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other parties to the proceeding, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.

Sometimes, but not always, Minnesota's appellate courts have indicated that trial judges are to weigh relevant negative information. Minnesota's courts have been inconsistent when considering affidavits submitted by a party opposing a modification hearing. Sometimes the courts have indicated that the opposing affidavits and other relevant negative information should be considered. However, at other times the courts have indicated it should not. On rare occasions the court may attempt to accommodate both

55. Id. at 796 (citation omitted); see also Vasterling, supra note 28, at 933.
56. See Pridgeon v. Superior Court, 655 P.2d 1, 4-5 (Ariz. 1982) (stating that the court shall deny a motion to modify custody unless it finds that the pleadings establish adequate cause for hearing the motion); Betzer v. Betzer, 749 S.W.2d 694, 695 (Ky. Ct. App. 1988) (stating that if the trial court determines that the affidavits fail to establish adequate cause for a hearing, the motion for modification of custody shall be denied without a hearing).
views simultaneously.\textsuperscript{58}

The view that the adverse information should be considered appears most often where the appellate court is justifying a denial by the trial court of a modification hearing request. For example, in \textit{Krogstad v. Krogstad},\textsuperscript{59} the court affirmed the denial of a custody modification request saying the noncustodial parent did not meet the burden necessary for a "change of custody" hearing.\textsuperscript{60} The ruling was based in part on information provided in a court services study.\textsuperscript{61} Other information considered by the court suggested that the children's problems stemmed from their feelings about visiting their father; that a minor child was sexually abused while in the father's care; that the children's behavior was unrelated to the custodian, and that the custodial parent had dealt with the problems through appropriate counseling.\textsuperscript{62}

Three other decisions are worthy of comment in terms of the judiciary's willingness to accept adverse information when denying a full custody evidentiary hearing. In \textit{Moyers v. Dobbins},\textsuperscript{63} the Minnesota Court of Appeals affirmed a district court denial of an evidentiary hearing, noting that a report from the county child protection agency failed to substantiate any child abuse.\textsuperscript{64}

In \textit{Geibe v. Geibe},\textsuperscript{65} the court of appeals stated that the trial judge did not abuse its discretion when denying, without a full evidentiary hearing, a motion to transfer custody of the moving party's late husband's 17-year-old daughter and to allow visitation with her husband's other children.\textsuperscript{66} In reaching its decision, the court analyzed the competing information contained in affidavits submitted to the trial judge by all parties to the dispute.\textsuperscript{67} The court observed

\textsuperscript{58.} See, e.g., Denk v. Denk, No. C1-92-1471, 1992 WL 383452, at *2 (Minn. Ct. App. Dec. 29, 1992). The court stated, "Minn. Stat. § 518.185(1990) requires that affidavits be submitted 'together with moving papers' in order to give the opposing side an opportunity to respond with counteraffidavits." \textit{Id.} However, the court then went on to declare that "[a]s the goal is the establishment of a prima facie case, it is not necessary (or even proper) to consider the allegations of counter-affidavits. Arguments concerning the relative strength of the affidavits are best considered at the evidentiary hearing." \textit{Id.}

\textsuperscript{59.} 388 N.W.2d 376 (Minn. Ct. App. 1986).

\textsuperscript{60.} \textit{See id.} at 383.

\textsuperscript{61.} \textit{See id.}

\textsuperscript{62.} \textit{See id.}


\textsuperscript{64.} \textit{See id.} at *2.

\textsuperscript{65.} 571 N.W.2d 774 (Minn. Ct. App. 1997).

\textsuperscript{66.} \textit{See id.} at 780.

\textsuperscript{67.} In part, writes the court:
that "section 518.185 grants other parties to the proceeding the right to file opposing affidavits, and the court may consider evidence from sources other than the moving party's affidavits in making its determination." 68

Recently, a Court of Appeals panel in C.S.B. v. C.R.H. 69 applied the Giebe view. 70 The noncustodian argued unsuccessfully that the trial judge erred when it accepted untimely affidavits opposing modification and considered them when deciding not to order a full hearing. 71 The court said that Minnesota Statute section 518.185 permits a trial judge to consider and weigh the opposing documents submitted by the custodial parent in making its decision. 72

Ma Donna's [custodial parent's] affidavit characterizes the issue as a conflict between a headstrong 17-year-old and a religious, fairly strict mother, saying that F.G. found Barbara's home an attractive alternative because of her more liberal lifestyle. She also indicates a belief that Barbara has promised F.G. a share of Charles's life insurance proceeds for college if F.G. comes to live with her. Ma Donna denies ever insulting F.G or calling her "too fat," noting that she, as a school nurse, regularly deals with teenagers with eating disorders. She also denies any intent to cut the children off from their paternal relatives.

Id. at 776.

68. Id. at 777.
70. See id. at *1-2.
71. See id. at *1.
72. See id. at *2. Observed the court: "We conclude the district court did not err when it considered Brinker's [custodian] allegation that Hoppe's [noncustodian] own actions are endangering C.R.H.'s emotional health and well-being." Id. at *1 (citation omitted). In Chafin v. Rude, No. C1-88-543, 1988 WL 56305, at *2 (Minn. Ct. App. June 7, 1988), the court, in denying a motion for modification, considered the custodian's affidavits and supporting documents. The court in commenting on them, said:

Rude's affidavit and supporting documents suggest that a modification would not be in the child's best interests. Dr. Jane McNaught, Garrett's therapist, has recommended that Garrett have no unsupervised contacts with his mother. Based on her observations and those of the father, Rude, and those of Garrett's teachers, she concluded that "Garrett's mother's level of anger and animosity toward Mr. Rude makes it impossible for her to interact with her son in a way that does not jeopardize Garrett's emotional functioning." Chafin has provided no affidavit or documentary evidence that would tend to cast doubt on Dr. McNaught's conclusion that Chafin's actions were causing or contributing to Garrett's emotional problems. She bears the burden of establishing this.

Id. (citation omitted).
Sometimes, but not always, Minnesota’s appellate courts have indicated that trial courts are to disregard negative information. Confusion over the statutory procedure is evident when several decisions are considered where the appellate panels have indicated that contrary evidence submitted by the custodial parent must be disregarded. This view is often found in cases that the appellate court has decided to reverse and order an evidentiary hearing.

For example, in Thesing v. Thesing,73 the court ruled that the trial judge erred in not ordering a modification hearing and stated:

The moving party must submit affidavits setting forth facts supporting the requested modification. The district court must grant an evidentiary hearing if the affidavits make out a prima facie case for modification. In making this determination, the district court must regard the allegations contained in the moving party’s affidavits as true and disregard contrary evidence.74

Similarly, in Schuman v. Schuman,75 where the panel reversed the trial judge who had refused to set an evidentiary hearing, the court stated:

The party seeking modification must submit affidavits setting forth facts supporting the requested modification. The district court may grant an evidentiary hearing if the affidavits make out a prima facie case for modification. In making this determination, the district court, assuming that the allegations contained in the moving party’s affidavits are true, must disregard contrary evidence.76

The suggestion that a trial court must accept a moving party’s allegations as true first appears in Taflin v. Taflin,77 and is restated in Abbott v. Abbott.78 In ordering a hearing in Abbott, the court

74. Id. at *1 (citations omitted).
76. Id. at *2 (citation omitted).
77. 366 N.W.2d 315, 320 (Minn. Ct. App. 1985). The court, in denying the nonmovants claim that allegations in the movant’s affidavits were insufficient, stated, “[b]ased on our review of the father’s affidavit, we believe that he has alleged facts, which if true, would establish a significant change in circumstances based on emotional endangerment.” Id. at 320 (emphasis added).
Although respondent claims that appellant would not provide a safe and reasonable environment for Jenny, appellant’s prima facie case is not affected by these claims. Appellant’s evidence must be viewed as true, and respondent can offer rebuttal at the evidentiary hearing. Appellant has made a prima facie case that any harm in removing Jenny from respondent would be outweighed by the benefits to her. The affidavits submitted in support of appellant’s motion make out a prima facie case for modifying the custody of both girls. Therefore, the trial court erred in refusing to grant an evidentiary hearing to determine whether custody should be modified. 79

Abbott suggests that the unambiguous language in Minnesota Statute section 518.185, which provides a custodial parent with an opportunity to counter the noncustodian’s allegations, is irrelevant to a determination of whether a case should go forward. Contradictory information is left to the full evidentiary hearing. 80 These decisions have redefined that portion of the statute allowing opposing affidavits out of existence.

Sometimes the appellate court has encouraged hearings where particular allegations are made. Another piece of creative construction of this statute appears in a few opinions where appellate panels have begun encouraging trial judges to hold evidentiary hearings because of the nature of the allegations made in the modification motion. The statute, of course, does not distinguish between degrees of allegations and does not suggest different standards for ordering a hearing be to be applied depending on the type of allegation made.

For example, in Ross v. Ross 81 the court stated that “[w]e remanded [certain cases] for an evidentiary hearing, stressing that

79. Id. at 870.
80. See Harkema v. Harkeman, 474 N.W.2d 10, 13-14 (Minn. Ct. App. 1991) (finding prima facie showing of endangerment where affidavits alleged statements by children that their step-parent scared them by “yelling, throwing things, hitting walls, and driving the car like a maniac”); see also Taflin, 366 N.W.2d at 320 (finding prima facie showing of endangerment where children had lived with their grandparents for two years and had limited contact with the custodial parent, who had provided no emotional support and used child support money for her own needs).
hearings are strongly encouraged where allegations are made of present endangerment to a child’s health or emotional well-being.”

VI. CONCLUSION

The law surrounding the treatment courts should afford competing affidavits prepared pursuant to Minnesota Statute section 518.185 is confused, inconsistent and in need of repair. The claim involving the foster family, discussed earlier in this article, is a case-in-point. The case took more than four months and many hours of work before it was concluded. Both informal and formal discovery confirmed the facts contained in the foster family’s sworn statements submitted to the judge at the outset of the dispute. As most knew by the time of the initial hearing, the child had manufactured a claim to satisfy a perceived request from her blood relatives that she should now live with them. The matter was dismissed with prejudice on the day of the hearing pursuant to an agreement with the noncustodian’s attorney.

In addition to the psychological devastation the foster family endured because of the claim, they also incurred legal costs, even with pro bono representation. They were forced to pay filing fees and share in the costs of the guardian ad litem, who was appointed by the court without the family’s involvement or consent. But for the pro bono effort, and an agreement regarding the discovery procedures, the costs for this legal battle would be estimated in excess of $7,500. Worse, their lives are forever scarred.

This then is Minnesota’s legal system at work. The prima facie burden fails to adequately protect a child’s need for stability or a custodial family from exploitation. The burden for ordering a hearing leaves unchecked power in the hands of trial courts and acts as a minor barrier to an experienced trial lawyer representing the noncustodian. This approach to custody modification is not consistent with the UMDA.

To repair the damage and reduce the confusion, the legislature should address Minnesota Statute section 518.185 and modify the statute along the lines of the following suggestions.

First, legislation should make it clear that a custody modifica-

82. Id. at 756 (citations omitted).
83. It was agreed the noncustodial parent could visit with the child under supervision once a month.

http://open.mitchellhamline.edu/wmlr/vol26/iss3/5
tion is not to be ordered absent adequate cause. Second, adequate cause should be defined as requiring something more than allegations, which, if proven, might permit inferences sufficient to establish grounds for custody change. Third, legislation should direct that trial courts weigh and consider all of the relevant facts contained in all of the affidavits submitted. Fourth, trial courts should be cautioned against assuming the falsity of any affidavits submitted to them. Fifth, trial courts should be directed to give equal weight to all claims. Sixth, if a trial court finds by a preponderance of the evidence that adequate cause for a hearing is warranted, it should be directed to set one up. Seventh, if a trial court judge is uncertain about whether to order a hearing, the judge should not order one. Eighth, if a modification hearing is ordered, the trial court should be required to issue specific findings of fact justifying the decision. Ninth, if a modification hearing is not ordered, the trial court should be required to issue a short explanation justifying the result. Tenth, the Minnesota Supreme Court should decide whether the appellate standard for reviewing a challenge to granting or denying an evidentiary hearing is de novo or abuse of discretion.

With these changes, reasonable certainty in the procedures to follow at the outset of a modification proceeding will be restored and the original philosophy of maximizing finality of custody decisions, which was intended by the drafters of the UMDA, will be returned to Minnesota law. Courts will have far more guidance than they have today when handling these difficult issues and the results of modification motions will be far more predictable by the legal community. Everyone will benefit!