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STATE OF MINNESOTA

COUNTY OF CARVER

DISTRICT COURT
FIRST JUDICIAL DISTRICT
PROBATE DIVISION

In Re:

Estate of Prince Rogers Nelson,
Decedent,

And

Tyka Nelson,

Petitioner.

Case Type: Special Administration
Court File No.: 10-PR-16-46
Judge: Kevin W. Eide

NON-EXCLUDED HEIRS' MEMORANDUM OF LAW IN RESPONSE TO BRIANNA NELSON'S AND V.N.'S LEGAL BASIS FOR HEIRSHIP

Omarr Baker, Alfred Jackson, John Nelson, Norrine Nelson, Sharon Nelson, and Tyka Nelson (the "Heirs") hereby respond to the Memorandum of Law of Brianna Nelson and V.N. (the "Intervenors") Regarding Legal Basis for Heirship as follows:

INTRODUCTION

A purported parent-child relationship must meet the requirements of the Minnesota Parentage Act or Probate Code for purposes of inheriting by intestacy. Under these requirements genetics, adoption, assisted reproduction, or one of the established presumptions of the Parentage Act can establish a valid parent-child relationship. However, Intervenors admit that none of these methods apply to their claim. Instead, Intervenors ask the Court to casually sweep aside these well-established tenets of Minnesota law and instead seek to base their claim entirely on behavioral and anecdotal evidence of a purported parent-child relationship between John L. Nelson and Duane J. Nelson and which they contend is supported by a single case, *Estate of James A. Palmer*, 658 N.W.2d 197 (Minn. 2003). The Intervenors are wrong on the law and meaning of the *Palmer* case.

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Even if the Intervenors are correct in their interpretation of the law (which they are not), they cannot meet the burden established *Palmer*, which requires clear and convincing evidence of a *genetic* relationship—not just a relationship in which the parties "held out" as parent and child.

The Intervenors have no genetic relationship to John L. Nelson (Prince's father) or to Mattie Baker, nee Shaw (Prince's mother). Therefore, as a matter of law, they are excluded as heirs.

Intervenors have requested additional discovery and an evidentiary hearing that will be a substantial time and financial burden to the Estate, the Heirs, and the Court, without meeting the burden of demonstrating the need for additional discovery. The Intervenors' strained claim, which has been ongoing for five months and continued to change, continues to drain the Estate's resources—and is not in the best interest of the Estate. For these reasons, the Heirs respectfully request the Court deny the Intervenors' request and reaffirm its July 29, 2016 Order, find the Intervenors are not heirs to the Estate, and preclude additional discovery or an evidentiary hearing on this issue.

FACTUAL AND PROCEDURAL BACKGROUND

The Intervenors, Brianna Nelson and V.N., are the daughter and granddaughter, respectfully, of one Duane J. Nelson. Duane is the biological child of Vivian Nelson. (*See* Affidavit of Thomas P. Kane ("Kane Aff."), Ex. 1, Deposition of Norrine Nelson ("N. Nelson Dep."), 32:20-52:15.) Vivian had five children in total, four of whom share John L. Nelson (Prince's father) as their father. One child, Lorna, died in 2006. Three of these children are Non-Excluded Heirs: John, Norrine, and Sharon. Vivian's fifth child is Duane.

Duane did *not* share a father with Vivian's other children (and he did *not* share a father with Prince). Duane's father was Joseph Griswold. (*See* N. Nelson Dep. 8:21-8:22; Kane Aff., Ex.

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2, Deposition of Sharon Nelson ("S. Nelson Dep."), 15:2-16:12; Declaration of Adam P. Gislason ("Gislason Decl."), Ex. D, Deposition of John Nelson ("J. Nelson Dep."), 37:21-41:21.) Duane was born in 1958, more than one year after Vivian and John L.[1] ended their relationship—and the same year Prince was born to John L. Nelson and Mattie Shaw. (*See* N. Nelson Dep. 46:22-47:23.) John L. Nelson is not Duane's biological father, or his adoptive father. It is uncertain whether John L. knew of Duane at all. (*See id.*, 47:11-47:23.)

On August 25, 2001, John L. Nelson died intestate. Two months later, Prince filed an Application for Informal Appointment of Personal Representative (Intestate) in *In re Estate of John Louis Nelson,* Court No. PO-01-1660, State of Minnesota, District Court Probate Division of Carver County.[2] The Application, which was apparently signed under penalties of perjury by Prince and his counsel at the time, Traci Bransford Bullock, identified the following persons as the sons and daughters of John L. Nelson:

- Lorna Nelson;
- Sharon Blakley (Nelson);
- Norrine Nolen (Nelson);
- John R. Nelson;
- Prince Rogers Nelson; and
- Tyka Nelson

Duane Nelson was not identified as a son of John L.

On November 7, 2002, Prince and his counsel filed a Petition for an Order Allowing for Final Account and Settling Estate and Order of Distribution, again signed under the penalty of perjury by Prince.[3] In his Petition, Prince again identified the six siblings as the only sons and daughters of John L. Nelson; Duane was again, not identified. On February 2, 2003, the Carver

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1 In this memorandum, all references to "John L." refer to John L. Nelson, Prince's father.

2 (*See* Exhibit I of S. Nelson Affidavit of Heirship previously filed with the Court, July 20, 2016).

3 (*See* Exhibit K of S. Nelson Affidavit of Heirship).

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County judge signed and issued an Order Allowing Final Accounting and Settling Estate and Order for Distribution, granting Prince's Petition, which identified the six siblings as the only sons and daughters of John L.[4] According to the Carver County District Court, Duane Nelson was not determined to be the son of John L.

Despite the fact that Duane has no genetic connection to Prince,[5] the Intervenors' claim to the Estate of Prince Rogers Nelson is based squarely on a purported parent-child relationship between John L. (Prince's presumptive father) and Duane (the Intervenors' father and grandfather). The Intervenors filed with the Court a Motion to Intervene as Interested Parties on May 18, 2016. (*See* Intervenors' 5/18/16 Motion.) On July 29, 2016, the Court ordered the Intervenors undergo genetic testing pursuant to the terms of the Genetic Testing Protocol. (*See Order Regarding Genetic Testing Protocol and Heirship Claims Following the June 27, 2016 Hearing and Judgment* dated July 29, 2016, pp. 13-14, 18.)

The Intervenors refused to submit for genetic testing, and provide no valid reason for doing so. Instead, they assert their claim for heirship is based not on any genetic or adoptive relationship between John L. and Duane, but rather on behavioral and anecdotal evidence of the interactions between John L. and Duane. (*See generally* Intervenors' 5/18/16 Motion, 10/4/16 Memorandum of Law.)

The Intervenors submitted a schedule requesting robust discovery on the relationships between Duane and various members of the Nelson family, as well as expert discovery. Recently, they advised Heirs' counsel that they seek to serve deposition and document subpoenas on multiple

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[4] (*See* Exhibit L of S. Nelson Affidavit of Heirship).

[5] All parties (including the Intervenors) agree that John L. Nelson is *not* Duane's biological father. (*See* Intervenors' 10/3/16 Memorandum, p. 2.)

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third-parties, some of whom apparently reside outside of the Court's jurisdiction. (Gislason Decl. ¶ 3 and Exs. A-C). However, to the extent that is relevant, this discovery has not provided any evidence to bolster Intervenors' claims. To the contrary, all of the evidence has demonstrated John L. and Duane did not have a parent-child relationship. In their Memorandum of Law, the Intervenors request permission from the Court to continue the discovery and for an evidentiary hearing. Responding to this discovery has and will continue to be expensive and time-consuming and most importantly, needless, given that all parties agree that the Intervenors have no genetic relation to Prince. As such, the Heirs respectfully request the Court disregard the Intervenors' legal basis for heirship and deny the same.

ARGUMENT AND AUTHORITIES

The Probate Code and the Parentage Act provide the *only* basis for claiming heirship in intestate succession. There is no alternative. As established below, the Intervenors' argument for heirship fails for three basic reasons: First, the Intervenors have stipulated that they are *not* genetic heirs and therefore fail the requirements for intestacy under the Probate Code and Parentage Act. Second, there is no evidence (whether clear and convincing, or less) that the Intervenors *are* genetic heirs. Third, no other legal doctrine exists that allows Intervenors to inherit. This should be end of the argument.

However, the Intervenors have stretched their already-strained claim by requesting the Court admit evidence not of a genetic relationship between John L. and Duane, but rather that John L. "held himself out" as Duane's father, and vice versa. (*See* Intervenors' Memorandum, pp. 2-3.) In other words, the Intervenors seek to admit behavioral evidence. If an heirship claim could rely on behavior alone as a basis, it would open the floodgates to individuals claiming they were treated

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"like a brother" or "like a son."[6] But this is not the law for intestate succession. Prince died without a will. Therefore, the only way the Intervenors can claim heirship is under one of the above two statutes.

In their memorandum, the Intervenors do not base their claim on any of the recognized alternatives in the Probate Code. They further admit that their heirship claim is not based on the Parentage Act. As an alternative, the Intervenors elected to sweep aside both the Probate Code and the Parentage Act, admit their thin behavioral evidence, and declare that one case—*Estate of Palmer*, 658 N.W.2d 197 (Minn. 2003)—is **the** "controlling case" for this issue. (*See* Intervenors' Memorandum, p. 10.) Respectfully, this misstates the law.

The Court should disregard the Intervenors' legal basis for heirship because (1) there was no parent-child relationship between John L. and Duane; and (2) even if a parent-child relationship existed, the evidence the Intervenors present to prove such a relationship is far from clear and convincing, and fails as a matter of law.

A. Minnesota Law Does Not Provide for the Establishment of a Parent-Child Relationship that is Not Based on Genetics, Adoption, Assisted Reproduction, or the Parentage Act

The relevant Minnesota law and procedure for determining a parent-child relationship for the purposes of Minnesota intestacy is has been previously briefed in great detail by the Special Administrator and other parties.[7]

Minnesota law does not support Intervenors' request to establish a parent-child relationship between Duane Nelson and John L. Nelson based on behavioral and anecdotal evidence *without*

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[6] The Special Administrator similarly acknowledged this flaw in the Intervenors' argument in its Submission Re: Case Management Issues. *See* 8/31/16 Submission, p. 4 n.2.

[7] *See, e.g.*, Special Administrator's Memorandum of Law in Response to Darcell Gresham Johnston's Objection to Protocol and Prior Genetic Testing (June 24, 2016); Special Administrator's Submission Regarding Case Management Issues Pertaining to Claims of Brianna and V.N. (August 31, 2016).

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first establishing a familial link through genetics, adoption, assisted reproduction, or the Parentage Act. The current Probate Code, amended in 2010, establishes the only methods by which a parent-child relationship may be established—and behavioral and anecdotal evidence (without an accompanying familial link) is not one of them.

When a person, like Prince Rogers Nelson, dies intestate (i.e., without a will), the Probate Code provides in pertinent part:

> (a) The intestate estate of the decedent consists of any part of the decedent's estate not allowed to the decedent's spouse or **descendants** under sections 524.2-402, 524.2-403, and 524.2-404, and not disposed of by will. The intestate estate passes by intestate succession to the decedent's **heirs** as prescribed in this chapter, except as modified by the decedent's will.

Minn. Stat. § 524.2-101(a) (emphasis added). Many terms are defined by the Probate Code, including, "descendant," which is defined as "all of the individual's descendants of all generations, with the relationship of parent and child at each generation **being determined by the definition of child and parent contained in this section**, Minn. Stat. § 524.2-201(11) (emphasis added) and "heirs," which is defined as "those persons, including the surviving spouse, who are entitled **under the statutes of intestate succession** to the property of a decedent." Minn. Stat. § 524.2-201(28) (emphasis added). It is clear by these definitions alone, that the determination of who inherits an intestate estate is determined by Minnesota statutes, namely the Probate Code and the Parentage Act (by incorporation).

Minnesota's Uniform Probate Code provides that "if a parent-child relationship exists or is established under this part, the parent is a parent of the child and the child is a child of the parent for the purpose of intestate succession." Minn. Stat. § 524.2-116. Accordingly, a parent-child relationship must be legally established pursuant to the requirements of the Probate Code before the child will be considered an intestate heir of the parent. The Probate Code provides several

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alternative ways to establish such a relationship. First, a parent-child relationship exists between a child and the child's genetic parents. Minn. Stat. § 524.2-117. Next, a parent-child relationship exists between an adoptee and the adoptee's adoptive parent or parents. Minn. Stat. § 524.2-118. Finally, there are special rules for children conceived by assisted reproduction. Minn. Stat. § 524.2-120. Alternatively, a parent-child relationship may be established under the Minnesota Parentage Act. Minn. Stat. § 257.52 *et seq*. Under Minn. Stat. § 257.554, if a father and child relationship is established under a presumption of the Parentage Act, the father is determined to be the child's "genetic father" for purposes of the Probate Code.

The Intervenors rely exclusively on the *Palmer* decision as their legal basis for their heirship claims. As previously set forth by the Special Administrator in response to other heirship claims in this matter,[8] *Palmer* was based on the Probate Code as it existed prior to 2010.[9] In *Palmer*, the Court based its decision on undisputed facts and a now-repealed section of the Probate Code stating that "a person is the child of the person's parents regardless of the marital status of the parents and the parent and child relationship *may* be stablished under the Parentage Act." *Palmer*, 658 N.W.2d at 199-200 (emphasis added). Consequently, the Court interpreted this section to mean that a parent-child relationship could be established not only under the Parentage Act, but *also* by clear and convincing evidence of their relationship. *Id.* at 198.[10] Based on the

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[8] *See* Special Administrator's Memorandum dated June 24, 2016 and Special Administrator's Submission dated August 31, 2016.

[9] The Intervenors acknowledge the 2010 amendment, and note that they retained Professor Susan N. Gary as "an expert on the definition of family for the purposes of inheritance." (*See* Intervenors' Memorandum, p. 5 and Exhibit 2.) However, the affidavit submitted from Professor Gary—which the Intervenors also cite in support of their evidence—is legal argument. It is not an expert affidavit. A judge, as the factfinder, is obligated to make findings for the Court. He cannot rely on the proposed findings of the lawyers.

[10] This code provision was what the Minnesota Supreme Court used to distinguish the *Palmer* decision from its prior decision two years ago in *Witso v. Overby*, 627 N.W.2d 63 (Minn. 2001). While *Witso* was a paternity, not probate, case, it is relevant in this case. In *Witso*, the Court held that the Parentage Act "provides the exclusive bases for standing to bring an action to determine paternity." *Id*. at 65-66. Aside from *Palmer*, the decision in *Witso* has not

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undisputed evidence submitted in that matter affirmed the district court's holding that a genetic, parent-child relationship was proven to exist.

The standard for this evidence is explicit: it must be *clear* and *convincing*. Contrary to the Intervenors' assertions, *Palmer* does not allow them to rely exclusively on behavioral and anecdotal evidence of a supposed parent-child relationship, while simultaneously denying the existence of a genetic relationship. The evidence had to be clear and convincing *to establish a genetic relationship*—not clear and convincing to establish a parent-child relationship without a genetic relationship.[11] The Court in *Palmer* held that the now-revoked statutory language allowed for the establishment of a parent-child relationship through clear and convincing evidence. But the current version of the Probate Code, passed in 2010, does not have language similar to the provision interpreted in *Palmer*. Instead, the current Probate Code has a specific, finite list of ways that a parent-child relationship may be established: genetics, adoption, or assisted reproduction. None of these connections exist. If the Intervenors want to establish a parent-child relationship between John L. and Duane Nelson, they must comply with the specific requirements of the Probate Code—they may not misconstrue *Palmer* to create another method, not supported by the statute, of establishing a familial link.

According to the Intervenors, the sole argument of the Heirs and the Special Administrator is "that the Parentage Act is the litmus test for determining parentage under the Probate Code." (*See* Intervenors' Memorandum, p. 12.) But this is not the Heirs' argument. Minnesota law is clear that parentage may be determined under the Parentage Act, the Probate Code, or both acting

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been overturned. It is good law, and has been cited favorably since the 2010 amendments to the Probate Code. *See, e.g.*, *In re Estate of Dircz*, No. A12-1452, 2013 Minn. App. Unpub. LEXIS 401, n.1 (Minn. Ct. App. May 6, 2013).

[11] In this context, a genetic relationship is used to refer to (1) genetics, (2) formal adoption, (3) assisted reproduction, or (4) presumption under the Parentage Act. The parties are in agreement that no genetic relationship existed between John L. Nelson and Duane Nelson.

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together. (*See* n.2, *supra*.) The Heirs rightfully point out that under Minnesota law, a parent-child relationship must be established through one of two ways: (a) through genetics, evidence of adoption, or an assisted reproductive connection between them, as recognized under the Probate Code; or (b) presumptions recognized under the Parentage Act. In this case, the Intervenors make no attempt to do either.

The Intervenors admit that John L. Nelson "was not Duane's biological (or genetic) father and he never formally adopted Duane." (*See* Intervenors' Memorandum, p. 2.) To circumvent this point, the Intervenors argue that while there was no formal adoption or genetic connection, John L. Nelson "assumed and embraced his role as Duane's father and Brianna's grandfather." (*See id.*) Even if this were true, this alone is not enough to establish a parent-child relationship for the purposes of intestacy.

Palmer does *not* allow for a parent-child relationship to be established solely based on behavioral evidence. Rather, the *Palmer* court was assessing whether the evidence presented by the purported child was clear and convincing support of a *biological* or *genetic* parent-child relationship. Indeed, the factors that court reviewed hold that there must be clear and convincing evidence of a genetic relationship—not just a person "holding out" as a parent. *See Palmer*, 658 N.W.2d at 198 (legal admission of illegitimacy, change of birth certificate, and active relationship between father and son). The *Palmer* court did **not** suggest that the child could deny the existence of a genetic parent-child relationship, and yet somehow establish the existence of a parent-child relationship for intestate succession based solely on the decedent's treatment of the child. However, that is precisely what the Intervenors seek to do with their claim.

Since *Palmer*, Minnesota courts have held that genetic evidence, not behavioral evidence, is determinative in establishing a parent-child relationship. In *Estate of Martignacco*, the court

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found that a parent-child relationship had been established (outside of the Parentage Act, as allowed by *Palmer*) based *solely* on genetic evidence of a biological father-son relationship. *Estate of Martignacco*, 689 N.W.2d 262 (Minn. Ct. App. 2004). The father's brothers argued that genetics should not be determinative in establishing a parent-child relationship when the father had not treated the child as his child during his lifetime. The district court disagreed, noting "**biology—and not family relationship—was the only issue to be considered**," and the Court of Appeals affirmed. *Id.* at 266, 268 (emphasis added).

The Minnesota Court of Appeals interprets *Palmer* as authorizing a purported child to present only a specific type of clear and convincing evidence—of a biological or genetic relationship. *Martignacco*, 689 N.W.2d at 268. Any behavioral or anecdotal evidence of the parties' interactions is irrelevant, *unless* it provided clear and convincing evidence of a biological relationship. This makes the Intervenors' reliance on *Palmer* misplaced. Unlike in *Palmer*, in which the court held at the trial court (and the Minnesota Supreme Court confirmed) that biological and genetic relationship existed, here the Intervenors begin their claim by stating upfront that there is *no* genetic link—which as a matter of law, defeats their claim. The Intervenors then attempt to establish a parent-child relationship through the most scant behavioral and anecdotal evidence, while refusing to participate in the Court's ordered genetic testing. This argument is unsupported under *Palmer*, and more broadly is unsupported under the Probate Code or the Parentage Act.

In short, the Intervenors' legal theory has no support under Minnesota law. Minnesota law simply does not give a person the opportunity to establish a parent-child relationship when he or she makes no attempt to establish the relationship through: (a) genetics, evidence of adoption, or an assisted reproductive connection between them, as recognized under the Probate Code; or (b)

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presumptions recognized under the Parentage Act. Intervenors' Motion should therefore be dismissed.

B. The Intervenors Have Failed to Present Clear and Convincing Evidence a Parent-Child Relationship between John L. Nelson and Duane Nelson

Even if the Intervenors are correct in their interpretation of *Palmer* (which they are not), they cannot meet the "clear and convincing" burden established by the Minnesota Supreme Court. First, and as outlined above, there is no genetic link between John L. and Duane. In Minnesota, as well as most other jurisdictions, the "clear and convincing evidence" standard is generally understood to be an intermediate one:

> The preponderance of the evidence standard requires that to establish a fact, it must be more probable that the fact exists than that the contrary exists." *City of Lake Elmo v. Metro. Council*, 685 N.W.2d 1, 4 (Minn.2004). In contrast, the clear-and-convincing standard of proof "requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. Clear and convincing proof will be shown where the truth of the facts asserted is 'highly probable.'" *Weber v. Anderson,* 269 N.W.2d 892, 895 (Minn.1978).

Khosa v. Crandall, No. A04-2487, 2005 WL 2277286, at *2 (Minn. Ct. App. Sept. 20, 2005).[12]

Second, even a casual look at the behavioral and anecdotal evidence submitted shows, at best, scant basis that John L. treated Duane as a son. John L. was not with Duane in his childhood, he was not with Duane at any crucial points in his life, John L.'s other children do not support any type of parent-child relationship between them, John L. did not support Duane (financially or

[12] The U.S. Supreme Court has defined clear and convincing evidence as factual contentions that are "highly probable" when weighed against counter-evidence. *See Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) ("The Court made clear that [the party's] proof would be judged by a clear-and-convincing-evidence standard. In contrast to the ordinary civil case, which typically is judged by a 'preponderance of the evidence' standard" the clear-and-convincing-standard requires the party to "place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are 'highly probable.' This would be true, of course, only if the material it offered instantly tilted the evidentiary scales in the affirmative when weighed against the evidence . . . offered in opposition") (internal citations omitted); *see also Hussain v. U.S. Citizenship & Immigration Svcs.*, 541 F. Supp.2d 1082, n.2 (D. Minn. 2008).

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otherwise), and John L. did not live with Duane. In fact, the evidence is clear and convincing that John L. and Duane had no relationship at all.[13]

In support of their claim under *Palmer*, the Intervenors submit a series of behavioral and anecdotal pieces of evidence—none of which rise to establish to a clear and convincing standard by the most minimal evidentiary standard the presence of a parent-child relationship. (*See* Intervenors' Memorandum, p. 3.) The evidence submitted by the Intervenors is pure hearsay, and in many cases, not probative. As the Court knows, hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to "prove the truth of the matter asserted." MINN. R. EVID. 801(c); *State v. Litzau*, 650 N.W.2d 177, 182-83 (Minn. 2002). Absent an applicable exception, hearsay is inadmissible. MINN. R. EVID. 802; *State v. Greenleaf*, 591 N.W.2d 488, 502 (Minn. 1999). Nearly all of the evidence the Intervenors submitted to the Court is based on classic levels of hearsay, frequently double and triple hearsay. None of the applicable exceptions apply. By definition, this cannot meet the "clear and convincing" standard, because once Minnesota Rules of Evidence 401, 402, 404, and 801, *et seq.* are applied, the Intervenors have almost no admissible evidence.

The following sections address the primary evidentiary claims and exhibits proffered by Intervenors to support each evidentiary claim. As demonstrated below, most if not all Intervenors' proffered exhibits lack foundation, constitute hearsay, and are therefore, inadmissible.

Exhibit	**Description**	**Bases for Inadmissibility**
Ex. 1	Statements of Brianna Nelson and Jeannie Halloran	Lack of foundation, MINN. R. EVID. 602, 901; Inadmissible hearsay, MINN. R. EVID. 801; Hearsay within hearsay, MINN. R. EVID. 805
Ex. 2	Declaration of Susan N. Gary	Inadmissible hearsay, MINN. R. EVID. 801; Hearsay within hearsay, MINN. R.

[13] *See* N. Nelson Dep. 46:22-47:23; S. Nelson Dep. 33:9-35:10.

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		EVID. 805; Improper expert opinion evidence, MINN. R. EVID. 701, 702, and 703.
Ex. 4	Memorandum of Law, and Amended Complaint, and LexisNexis copy of reported decision in *Nelson v. Nelson*. Civ. Action No. 4-87-722	Inadmissible hearsay, MINN. R. EVID. 801; Hearsay within hearsay, MINN. R. EVID. 805
Ex. 5	Various correspondence and purported John L. Nelson will (June 1, 1986) and "DRAFT" John L. Nelson will (undated and unsigned); various handwritten notes.	Lack of foundation, MINN. R. EVID. 602, 901; Inadmissible hearsay, MINN. R. EVID. 801; Hearsay within hearsay, MINN. R. EVID. 805
Ex. 6	Discogs printout of "John L. – Father's Song (CD)	Lack of foundation, MINN. R. EVID. 602, 901; Inadmissible hearsay, MINN. R. EVID. 801; Hearsay within hearsay, MINN. R. EVID. 805
Ex. 7	Obituary of Duane Nelson, Sr.	Inadmissible hearsay, MINN. R. EVID. 801; Hearsay within hearsay, MINN. R. EVID. 805
Ex. 8	9/29/2016 printout titled "Nelson Finds It 'Hard to Become Known'"	Lack of foundation, MINN. R. EVID. 602, 901; Inadmissible hearsay, MINN. R. EVID. 801; Hearsay within hearsay, MINN. R. EVID. 805
Ex. 9	LexisNexis printout of reported decision in *In Re Estate of Palmer*, C7-02-182 (Minn. March 20, 2003)	Lack of foundation, MINN. R. EVID. 602, 901; Inadmissible hearsay, MINN. R. EVID. 801; Hearsay within hearsay, MINN. R. EVID. 805

Similarly, most of the factual allegations highlighted in Intervenors' memorandum as important to their heirship claims lack foundation, are not supported by admissible evidence, and/or are not relevant to any material fact. As laid out below, the evidence unequivocally fails to meet the clear and convincing standard needed:

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- *John L. Nelson and his daughter Lorna identified Duane as the son of John L. Nelson in a copyright infringement lawsuit*

Lorna's statement in her complaint is hearsay: it is a statement, not made by the declarant, to prove the truth of the matter. *See* MINN. R. EVID. 801(c). Because this evidence is hearsay, the Intervenors lack foundation to bring in this evidence. Lorna, who is deceased, did not sign the complaint, nor can she substantiate the claim now. *See* MINN. R. EVID. 602, 901. The Intervenors have no way of bringing this evidence before the Court.

Not only is the statement hearsay, it is not probative. "Evidence must have some probative value or it should not be admitted." MINN. R. EVID. 401, Committee Comment. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by . . . confusion of the issues." MINN. R. EVID. 403. The issue before the Court relates to whether the Intervenors have any probative evidence *of their own claim*. The copyright infringement complaint that Intervenors submit is from Lorna Nelson, who is deceased. John and Duane did not file the complaint or the amended complaint. (*See* Ex. 4 to the Intervenors' Memorandum.) The Intervenors did not file the complaint. The Eighth Circuit did not address the issue of their relationship at all. (*See id.*) The evidence is not probative and should not be admitted.

- *John L. Nelson identified Duane as one of his children in a 1989 draft will and related correspondence*

The draft will of John L. Nelson is just that: a *draft*. It was not signed, and it has no legal effect. To be valid, a will must be: (1) in writing; (2) signed by the testator . . .; and (3) signed by at least two individuals, each of whom signed within a reasonable time after witnessing . . . the signing of the will. . ." Minn. Stat. § 524.2-502. If evidence concerning execution of an attested will which is not self-proved is necessary in contested cases, the testimony of at least one of the attesting witnesses, if within the state competent and able to testify, is required. Due execution of

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a will may be proved by other evidence. Minn. Stat. § 524.3-406(a). The same requirements must be met to prove due execution of a will when the instrument is not physically present before the district court. *Sandstrom v. Wahlstrom (In re Estate of Sandstrom)*, 252 Minn. 46, 57, 89 N.W.2d 19, 26 (1958). In this case, the draft will was not signed by John L., and it was not signed by any witnesses. (*See* Ex. 5 to Intervenors' Memorandum.) The draft will is an out-of-court statement used to prove the truth of the matter—it is hearsay. *See* MINN. R. EVID. 801(c). There is no evidence that John L. Nelson himself prepared this will, and there is no individual who can testify as to the foundation of the draft will. *See* MINN. R. EVID. 602, 901. Therefore, the evidence from the draft will is inadmissible.

- *John L. Nelson held himself out as Duane's father and Duane held himself out as John L. Nelson's son;*
- *John L. Nelson referred to himself as Brianna's grandfather and treated Brianna as his grandchild;*
- *Duane and John L. Nelson saw each other at family events and spoke affectionately about Duane's deceased mother, Vivian Nelson;*
- *John L. Nelson, along with Lorna and Norrine, took Duane to the University of Wisconsin-Milwaukee where he attended college on a basketball scholarship;*
- *John L. Nelson made other visits to see Duane at college with Lorna and/or Norrine to watch Duane play basketball and to attend Duane's graduation ceremony;*
- *Duane and Brianna were devastated to not be invited to the funeral of John L. Nelson (in 2001) and to be omitted from John L. Nelson's obituary; Brianna still made the trip from Milwaukee to the Twin Cities in order to attend the funeral;*

In the statements above, the Intervenors attempt to paint the picture of Duane and John L. as having a close father-son relationship. In the first statement, for example, the Intervenors state that John L. "held himself out as" Duane's father. There are several problems with this statement. First, the testimony of Sharon, John, and Norrine Nelson in their depositions belie the claim that John L. held Duane out as a son. (*See* N. Nelson Dep. 46:22-47:23; S. Nelson Dep. 33:9-35:10.) Second, as established above, "holding out" or publicly presenting a parent-child relationship is not the standard in Minnesota. Unless the Intervenors can prove under the Probate Code or under

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the Parentage Act that a parent-child relationship existed, they are not entitled, as Duane's descendants, to heirship. Third, and most importantly, the Intervenors cite to no testimony, either oral or written, to support this. In fact, for *all* of the above statements (taken verbatim from the Intervenors' memorandum), there is no citation to any admissible witness testimony or documents to support the statements. This is significant.

Without citations, these statements are completely unsubstantiated. The Heirs and the Court have no way of assessing their relevance, truthfulness, or probative value of this evidence. In explanation, the Intervenors seem to state "discovery is not complete." (*See* Intervenors' Memorandum, p. 14.) Respectfully, this is not enough. The Court required the Intervenors to submit a Memorandum of Law demonstrating their legal basis for heirship. These unsubstantiated statements, are, at most, what the Intervenors hope will support their strained claim.

These statements demonstrate—at most—that Duane and John L. viewed each other affectionately. But John L. attending Duane's basketball games and Duane attending family events is not enough to establish a parent-child relationship. Duane and John L. speaking "affectionately" of their deceased mother and ex-wife, respectively, do not demonstrate a parent-child relationship between the two of them.[14] Being "devastated" about not being invited to a funeral does not show a parent-child relationship. Again, the standard is whether there exists clear and convincing evidence of a parent-child relationship. The evidence above is not even substantiated, let alone clear and convincing. It lacks foundation, and it is hearsay. It is not even probative of the issue.

[14] The interactions of John and Duane with Vivian are not probative of a parent-child relationship between John and Duane. The Intervenors state that "John L. Nelson was in contact with Vivian Nelson and spoke of her affectionately with Duane after her death." (*See* Intervenors' Memorandum, p. 3 n.3; Exhibit 3.) But for the purposes of determining intestate heirship, the importance in this case is whether a parent-child relationship existed between John and Duane—not whether a marital relationship existed between John and Vivian. This affection is not probative of the Intervenors' legal basis for heirship. *See* MINN. R. EVID. 401, 403. There is scant evidence—let alone clear and convincing—that John held Duane out as his child.

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See MINN. R. EVID. 401, 402, 403. Therefore, the unsubstantiated evidence in the points above is inadmissible.

- *Norrine Nelson identified John L. Nelson as Duane's father in Duane's obituary/funeral program (in 2011)*

An obituary or other news publication is hearsay, without exception. *See Lariat Cos. v. Baja Sol Cantina EP, LLC*, 2013 Minn. App. Unpub. LEXIS 756, at *13 (Minn. Ct. App. Aug. 19, 2013); *United States v. Saada*, 212 F.3d 210, 222 n.13 (3d Cir. 2000); *Hearts with Haiti, Inc. v. Kendrick*, No. 2:13-CV-00039-JAW, 2015 U.S. Dist. LEXIS 86212, at *6-7 (D. Me. July 2, 2015). The Intervenors cannot use this as evidence of any parent-child relationship, and certainly not as clear and convincing evidence of a genetic relationship between John and Duane. Additionally, just a few weeks ago, Norrine testified that John L. is *not* Duane's father. (*See* N. Nelson Dep., 32:20-52:15.) As a result, the evidence to which the Intervenors cite for this (*see* Ex. 3, 7 to Intervenors' Memorandum) is hearsay. *See* MINN. R. EVID. 801(c).

- *Prince referred to Duane as his brother in high school (see Ex. 3, 8 to Intervenors' Memorandum)*
- *Prince and Duane had a sibling relationship in their teens and as adults*

These statements relate to interactions between Duane and Prince. However, the Intervenors miss the point. In order to receive heirship in the Estate, the Intervenors must demonstrate whether *John L.* and *Duane* had a parent-child relationship—*not* whether Duane and Prince treated each other like brothers. Additionally, the basis for this evidence is an article published in a high school newspaper from 1976. (S*ee* Ex. 8 to Intervenors' Memorandum.) What Prince said in a high school newspaper is rank hearsay with no exception. *See Lariat*, 2013 Minn. App. Unpub. LEXIS 756, at *13; *Am. Home Assur. Co. v. Greater Omaha Packing Co.,* 819 F.3d 417, 429 (8th Cir. 2016); *Crews v. Monarch Fire Prot. Dist.,* 771 F.3d 1085, 1092 (8th Cir. 2014). The evidence in the above statements is hearsay and inadmissible.

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As established above, the evidence submitted is inadmissible. For all the foregoing reasons, the extraneous evidence submitted by the Intervenors is not probative and does not provide clear and convincing evidence under *Palmer* that Duane was John L.'s biological child.

C. Protracted Discovery and an Evidentiary Hearing Will Significantly Strain All Parties—Including the Estate, the Heirs, and the Court—and Needlessly Use Valuable Resources and Time

Finally, the Intervenors request an evidentiary hearing and further discovery, in addition to what has already been served. As established above, the Intervenors lack legal ground to bring their claim. An evidentiary hearing and further discovery does nothing to help this strained claim. In fact, it is nothing more than a continued burden to the Estate and does not serve the best interests of the Estate.

CONCLUSION

For all the foregoing reasons, Omarr Baker, Alfred Jackson, John Nelson, Norrine Nelson, Sharon Nelson, and Tyka Nelson respectfully request the Court deny Brianna Nelson's and V.N.'s heirship claims and requests for additional discovery and an evidentiary hearing on their claims.

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