

# An Appellate Judge Discusses Genealogical Evidence

## 1. Introduction

## 2. Thinking Like a Judge

### a. The probable cause model

1. The mind set: why should I believe what I'm hearing?

2. The questions to ask:

- how new is the information?
- how detailed is the information?
- how trustworthy is the informant?
- how does the informant know?
- does informant have an axe to grind?
- is the information logical & does it make sense?
- does the information fit with other information?

### b. Relating the probable cause model to genealogical research

1. Mental shift – why should I believe this source?

2. “Judge Each Item of Evidence - Test of the Four "Cs":

- Closeness (in place and time).
- Credibility (of the person who made the record)
- Causality (why the record was made)
- Corroboration (with other evidence).”

(from Examining Evidence to Prove a Pedigree by Myra Vanderpool Gormley, C.G., )

## 3. The Best Evidence Rule

a. A rule of evidence that demands that the original of any document, photograph or recording be used as evidence at trial, rather than a copy. A copy will be allowed into evidence only if the original is unavailable.

### b. “Best” Genealogical Evidence – some examples

1. U.S. Census - scanned images (but not tabular extracts)

2. Marriage certificate (but not summaries, newspaper accounts or data in a ancestry.com's marriage index)

3. NEVER the best evidence: IGI, Ancestral File, Pedigree Resource File, ancestry.com's One World Tree, etc. (these are great sources of information and clues but must be verified by better evidence!)

#### 4. Direct vs. Circumstantial Evidence

- a. Direct Evidence - evidence that stands on its own to prove a fact
- b. Circumstantial Evidence - evidence inferred from other facts

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1870 U.S. Census for Douglas, Worcester County, Massachusetts; National Archives microfilm series M593, roll 652; Lauandersville Post Office, page 620 (stamped), page 4 (written), dwelling #14, family #32, lines 33-38, enumerated 2 August 1870:

Frank Lambert	50 MW	ax polisher \$250	Canada
Julia Lambert	39 FW	keeping house	Canada
Edward Lambert	12 MW	at school	Mass
Charles Lambert	10 MW	at school	Mass
Malinda Lambert	6 FW	at school	Mass
Zoe Lambert	2 FW		Mass

## **5. Hearsay Evidence Rule and Its Many Exceptions**

a. Definition: "Hearsay" is a statement, other than one made by the declarant, offered in evidence to prove the truth of the matter asserted.

b. "I saw the red car hit the blue car" vs. "George told me the red car hit the blue car"

c. Most everything written is hearsay; consequently, many exceptions developed.

d. Common hearsay exceptions relevant to genealogy

1. Public Records Exception
2. Absence of Public Records
3. Records of Religious Organizations
4. Marriage, Baptismal and Similar Certificates
5. Business Records Exception
6. Absence of Business Records
7. Family Records Exception

"Statements of fact containing personal or family history contained in family bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tomb stones, or the like."

8. Residual Hearsay Exception

## **6. Documenting and Justifying Conclusions**

- a. Why judges write opinions
- b. Why genealogists should write
  - 1. to document sources of information
  - 2. to explain conclusions
  - 3. to alert others to research problems
- c. Genealogical “justification”- documenting sources
- d. Genealogical “opinions” - writing a factual statement and conclusions

## **7. The Hierarchy of Standards of Proof**

- a. Proof to a Mathematical Certainty - attainable in science
- b. Proof Beyond a Reasonable Doubt
  - 1. The criminal law standard
  - 2. Imperfect definitions
- c. Proof by Clear and Convincing Evidence
  - 1. The civil law standard – when loss of important interests are at stake (loss of parental rights, removal of feeding tubes, etc.)
  - 2. “Substantially more likely than not”
- d. Proof by a Preponderance of the Evidence
  - 1. The civil standard used in most civil cases
  - 2. “More likely than not”

## **8. How the Genealogical Community Views Evidence**

- a. Types of evidence – primary and secondary
- b. Evolution of Proof Standards Within the Genealogical Community

1. Until 1979 – no generally accepted standards
2. Noel Stevenson’s book “Genealogical Evidence” (1979)
3. “Preponderance of the Evidence” – until recently
4. “Genealogical Proof Standard” (GPS) - since 1997 (actually, more of a methodology than a standard of proof). Five Elements of the GPS:
  - a. a reasonably exhaustive search;
  - b. complete and accurate source citations;
  - c. analysis and correlation of the collected information;
  - d. resolution of any conflicting evidence; and,
  - e. a soundly reasoned, coherently written conclusion.

## 9. Conclusion

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### Some sources for additional reading:

#### BOOKS

- Rose, Christine, Genealogical Proof Standard – Building a Solid Case: Dexter, MI, Thompson Shore, Inc., pub., (3<sup>rd</sup> edition, October 2009)
- Mills, Elizabeth Shown, Evidence! Citation and Analysis for the Family Historian: Baltimore, Genealogical Publishing Co., 1997 (reprinted 2001).
- Stevenson, Noel, Genealogical Evidence – A Guide to the Standards of Proof Relating to Pedigrees, Ancestry, Heirship and Family History: Laguna Hills, CA, Aegean Park Press, 1979

#### WEB SITES

- RootsWeb’s Guide to Tracing Family Trees, <http://www.rootsweb.com/~rwwguide/lesson12.htm>
- Powell, Evidence or Proof? How to Apply the Genealogical Proof Standard to Your FamilyTree, <http://genealogy.about.com/cs/citing/a/proof.htm>
- Pence, Understanding Sources, Citations, Documentation And Evaluating Evidence In Genealogy, <http://www.pipeline.com/~richardpence/classdoc.htm>
- Wright, Evaluating Written and Oral Evidence, <http://www.genealogy.com/tip12.html>
- Mulcahy, How to Evaluate Genealogical Evidence, <http://www.uwm.edu/People/baugrud/helpfiles/evidence.html>
- Albro, Evidence and Proof, <http://www.albrojournal.com/evidence.htm>
- Daughters of the American Revolution – acceptable forms of evidence required to support a membership application <http://www.dar.org/natsociety/content.cfm?id=92&hd=n&pf=n>
- Genealogy Research Process, [www.olliatauburn.org/download/genealogy\\_research\\_map.pdf](http://www.olliatauburn.org/download/genealogy_research_map.pdf)

# Genealogical Standards & Guidelines

## Standards For Sound Genealogical Research

*Recommended by the National Genealogical Society*

Remembering always that they are engaged in a quest for truth, family history researchers consistently—

- record the source for each item of information they collect.
- test every hypothesis or theory against credible evidence, and reject those that are not supported by the evidence.
- seek original records, or reproduced images of them when there is reasonable assurance they have not been altered, as the basis for their research conclusions.
- use compilations, communications and published works, whether paper or electronic, primarily for their value as guides to locating the original records, or as contributions to the critical analysis of the evidence discussed in them.
- state something as a fact only when it is supported by convincing evidence, and identify the evidence when communicating the fact to others.
- limit with words like "probable" or "possible" any statement that is based on less than convincing evidence, and state the reasons for concluding that it is probable or possible.
- avoid misleading other researchers by either intentionally or carelessly distributing or publishing inaccurate information.
- state carefully and honestly the results of their own research, and acknowledge all use of other researchers' work.
- recognize the collegial nature of genealogical research by making their work available to others through publication, or by placing copies in appropriate libraries or repositories, and by welcoming critical comment.
- consider with open minds new evidence or the comments of others on their work and the conclusions they have reached.

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[http://www.ngsgenealogy.org/cs/standards\\_for\\_sound\\_genealogical\\_research](http://www.ngsgenealogy.org/cs/standards_for_sound_genealogical_research)

## The Genealogical Proof Standard

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Proof is a fundamental concept in genealogy. In order to merit confidence, each conclusion about an ancestor must have sufficient credibility to be accepted as "proved." Acceptable conclusions, therefore, meet the Genealogical Proof Standard (GPS). The GPS consists of five elements:

- a reasonably exhaustive search;
- complete and accurate source citations;
- analysis and correlation of the collected information;
- resolution of any conflicting evidence; and
- a soundly reasoned, coherently written conclusion.

Each element contributes to a conclusion's credibility in a different way, described in the table below, but all the elements are necessary to establish proof.

Element of the GPS	Contribution to Credibility
Reasonably exhaustive search	<ul style="list-style-type: none"> <li>• Assumes examination of a wide range of high quality sources</li> <li>• Minimizes the probability that undiscovered evidence will overturn a too-hasty conclusion</li> </ul>
Complete and accurate citation of sources	<ul style="list-style-type: none"> <li>• Demonstrates the extent of the search and the quality of the sources</li> <li>• Allows others to replicate the steps taken to reach the conclusion. (Inability to replicate the research casts doubt on the conclusion.)</li> </ul>
Analysis and correlation of the collected information	<ul style="list-style-type: none"> <li>• Facilitates sound interpretation of the data contributed by <i>each</i> source</li> <li>• Ensures that the conclusion reflects <i>all</i> the evidence</li> </ul>
Resolution of conflicting evidence.	<ul style="list-style-type: none"> <li>• Substantiates the conclusion's credibility. (If conflicting evidence is not resolved, a credible conclusion is not possible.)</li> </ul>
Soundly reasoned, coherently written conclusion.	<ul style="list-style-type: none"> <li>• Eliminates the possibility that the conclusion is based on bias, preconception, or inadequate appreciation of the evidence</li> <li>• Explains how the evidence led to the conclusion</li> </ul>

- from the Board for the Certification of Genealogists web site at <http://www.bcgcertification.org/resources/standard.html>