

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF _____

_____ JUDICIAL DISTRICT

<p>,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>,</p> <p style="text-align: center;">Defendant.</p>	<p>Case No. _____</p> <p style="text-align: center;">BRIEF IN SUPPORT OF MOTION TO MODIFY PRIMARY RESIDENTIAL RESPONSIBILITY</p>
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Subject to a few exceptions, a party may not move to modify an order for primary residential responsibility earlier than two years after the date of entry of an order establishing primary residential responsibility. N.D.C.C. § 14-09-06.6. One of the exceptions provides that the two year time limitation does not apply if “the primary residential responsibility for the child has changed to the other parent for longer than six months. Id. § 14-09-06.6 (3)(c). Section 14-09-06.6(4) of the North Dakota Century Code provides that a party seeking to modify primary residential responsibility shall serve and file motion papers and supporting affidavits and shall give notice to the other party in the proceedings who may serve and file a response and opposing affidavit. The Court is then to consider the motion on briefs and without argument or evidentiary hearing to determine if the moving party has established a prima facie case justifying a modification. Id. If a prima facie case is established, the Court shall set a date for an evidentiary hearing. Id. A moving party is entitled to an evidentiary hearing if “the party brings a prima facie case by alleging, with supporting affidavits, sufficient facts which, if uncontradicted, would support a custody modification.” Lawrence v. Delkamp, 2003 ND 53, ¶ 7, 658 N.W.2d 758 (citing O’Neill v. O’Neill, 2000 ND 200, ¶ 5, 619 N.W.2d 855.

“[A] request to modify the custody award requires the determination of not one, but two issues in chronological order: (a) whether there has been a significant change of circumstances since the original divorce decree and custody award; and if so (b) whether those changes are such that the best interests of the child would be served by a change in custody.” Wright v. Wright, 431 N.W.2d 301, 303 (N.D. 1988) (citations omitted). “‘Changed circumstances’ have been described as new facts which were unknown to the moving party at the time the decree was entered.” Id. Here, the supporting affidavit filed by Defendant establishes a prima facie case for modification of primary residential responsibility in that there has been a significant change in circumstances since the original Judgment, and that a modification of primary residential responsibility would serve the children’s best interests.

Judgment establishing primary residential responsibility was entered in _____. The Judgment (include relevant facts supporting motion).

In the case at hand, the allegations made by the Defendant considered as a whole, are sufficient to prove a prima facie case. The North Dakota Supreme Court has stated: “A prima facie case does not require facts which, if proved, would mandate a change of custody as a matter of law. A prima facie case only requires facts which, if proved at an evidentiary hearing, would support a change of custody that could be affirmed if appealed. . . . A prima facie case is only ‘enough evidence to allow the fact-trier to infer the fact at issue and rule in the party’s favor.’ . . . It is a bare minimum.” Tank v. Tank, 2004 ND 15, ¶ 12, 673 N.W.2d 622, 627.

CONCLUSION

Defendant respectfully requests that the Court enter an Order consistent with her Motion.

Dated this _____ day of _____, 2010.

BY: _____

ATTORNEYS FOR DEFENDANT