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**IN THE SUPREME COURT OF NORTH DAKOTA**

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Lisa D. Solwey, n.k.a. Lisa Hilbert,	)	
	)	Supreme Court No. 20170379
Appellee/ Plaintiff,	)	Foster Co. No. 2013-DM-00010
	)	
vs.	)	
	)	<b>PETITION FOR REHEARING</b>
Thomas J. Solwey,	)	
	)	
Appellant/ Defendant.	)	
	)	

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THE DEFENDANT and APPELLANT

SUBMITS AN APPEAL FROM AN ORDER,

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT,

AND FIRST AMENDED JUDGMENT

IN THE SOUTHEAST JUDICIAL DISTRICT

COUNTY OF FOSTER

STATE OF NORTH DAKOTA

BY THE HONORABLE JAMES D. HOVEY

Dated: April 4, 2018

Timothy C. Lamb (ND ID #06820)  
P.O. Box 5562  
305 S. 4th Street  
Grand Forks, ND 58206-5562  
701-330-1575  
[lamb-law@earthlink.net](mailto:lamb-law@earthlink.net)  
Attorney for the Appellant

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## **ARGUMENT**

¶1 The Appellant, Tom Solwey (“Tom”), respectfully submits this Petition for Rehearing pursuant to Rule 40, N.D.R.App.P.

¶2 This Petition addresses the issue of commencement of the modified child support order at the time of the district court’s ruling rather than applying the general rule at the time of the filing of the motion to modify.

¶3 First, there is no specific requirement in the statute to specify that the movant is to make a motion to modify the child support obligation under NDCC § 14-09-06.6(4), (6). Tom properly made a motion for modification. Doc. 46. Therein, he stated: “Pursuant to the North Dakota Rules of Civil Procedure and NDCC § 14-09-06.6(4), (6), the Defendant, Thomas J. Solwey, [...] moves the court under a prima facie case for an evidentiary hearing on this Motion to Modify Divorce Judgment.” *Id.* The statute is silent on any requirement to specify a motion to modify child support, since it is implied in a motion to modify a divorce judgment under the statute.

¶4 Second, the Court’s Opinion neglected to recognize that Tom had primary or shared residential responsibility of the twin children, since the time the motion to modify was filed. He paid Lisa the full child support payment under the original divorce decree during this time. The Court did not mention this fact. It is a material fact and should have been recognized. This fact alone places a significant emphasis on the outcome of a de novo standard of review in this instance.

¶5 The twin children, C.T.S. and K.E.S., have been under the primary care and responsibility of Tom since November 2015, when he filed his motion to modify, on a 100% and 50% basis, respectively. App. 7, 16. It is unfair to him not to have commenced

the child support in concert with his caregiving of the two children. There is a significant cost at stake here, and the Court should have recognized it in its Opinion.

¶6 Finally, the Court’s reliance on Marchus v. Marchus, 2006 ND 81, ¶ 8, 712 N.W.2d 636 “(holding a vested child support obligation cannot be retroactively modified, and setting an effective date for a modified child support obligation on a date before a motion to modify is made is an impermissible retroactive modification)” (Order, at ¶ 14, emphasis added), is wholly misguided and misapplied.

¶7 In Marchus, the district court set the effective date of the order modifying child support to “a date **before** [the party] made [a] motion to modify.” 2006 ND 81, at ¶ 9, emphasis added. In this instance, the district ignored the fact that the motion to modify was filed nearly two years before the court ruled on the motion. Thus, the application of retroactively modifying the child support order does not apply as it did in Marchus.

¶8 It should be underscored that in Marchus, this Court recognized the general rule that commencement of the child support order is at the time of filing. *Id.* at ¶ 8. Therein, this Court held: “Generally, a modification of child support should be made effective from the date of the motion to modify, absent good reason to set other date, and the ‘court retains discretion to set some later effective date, but its reasons for doing so should be apparent or explained. Geinert v. Geinert, 2002 ND 135, ¶ 10, 649 N.W.2d 237 (emphasis added).” *Id.*

¶9 If the application of the fundamental rule that this country is a land where court’s rely on the law, then this Court should reconsider its ruling under this Petition for Rehearing. Otherwise, this ruling sets a bad precedent for child support cases.

## CONCLUSION

¶10 For the reasons aforementioned, the Court should issue another appropriate order in line with the law and facts in this case, that is, commencing the modification at the time of the filing of the motion. The costs for any other expenses should be itemized and shared between the parties regarding school lunches and other educational needs.

¶11 Dated this 4th day of April, 2018.

RESPECTFULLY SUBMITTED,

*/s/ Timothy C. Lamb*

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Timothy C. Lamb (ND ID #06820)  
P.O. Box 5562  
305 S. 4th Street  
Grand Forks, ND 58206-5562  
701-330-1575  
[lamb-law@earthlink.net](mailto:lamb-law@earthlink.net)  
Attorney for the Appellant

**CERTIFICATE OF SERVICE**

I, Timothy C. Lamb, ESQ., a licensed attorney in the State of North Dakota and officer of the court, do hereby certify that on this date a true and correct copy of the following papers:

**Petition for Rehearing,**

was properly served by e-mail on the opposing party's counsel as shown below:

Steven T. Ottmar  
office@ottmarlaw.com

Dated this 4th day of April, 2018.

*/s/ Timothy C. Lamb*

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Timothy C. Lamb (ND ID #06820)  
P.O. Box 5562  
305 S. 4th Street  
Grand Forks, ND 58206-5562  
701-330-1575  
[lamb-law@earthlink.net](mailto:lamb-law@earthlink.net)  
Attorney for the Appellant