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STATE OF NORTH DAKOTA

THE SUPREME COURT
STATE OF NORTH DAKOTA

Robert Martin Heidt, Plaintiff/Appellee, v. Trina Ann Iverson, f.k.a. Trina Ann Heidt, f.k.a Trina Ann Heller, Defendant/Appellant.	SUPREME COURT NO. 20180250 Civil No.: 50-2012-DM-00037

ON APPEAL FROM ORDERS DATED SEPTEMBER 8, 2016,
DECEMBER 8, 2016, AND APRIL 24, 2018, AND THE
SECOND AMENDED JUDGMENT DATED MAY 24, 2018

WALSH COUNTY DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT
HONORABLE ANTHONY SWAIN BENSON

BRIEF OF APPELLEE

Respectfully submitted this 8th day of November, 2018.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

STATUTES AND RULES

STATEMENT OF ISSUES

I. Whether the Walsh County District Court correctly determined, as a matter of law, that Trina failed to present a prima facie case for the modification of primary residential responsibility regarding G.O.H. and G.I.H.?

II. Whether the Walsh County District Court correctly denied Trina's motion to amend Findings and Order?

STATEMENT OF THE CASE

[¶1] On May 5, 2012, the Appellee, Robert Martin Heidt, (hereinafter referred to as "Robert"), brought an action for divorce against the Appellant, Trina Ann Iverson f/k/a Trina Ann Heidt, f/k/a Trina Ann Heller, (hereinafter referred to as "Trina"). The parties had been married for a number of years and had seven (7) children as a result of their marriage. After reaching an agreement by stipulation, the parties agreed that Robert would have primary residential responsibility of all of the minor children and they would reside with him at the family home in Grafton, North Dakota, while Trina moved to Fargo, North Dakota. A Judgment and Decree of Divorce was entered on October 10, 2012, reflecting this stipulation.

[¶2] On June 29, 2016, Trina submitted a motion to modify primary residential responsibility. The district court determined that of the five (5) children that were residing with Robert, only two (2) of them had fallen into the category of change of circumstances to go forward with a hearing for the motion to modify primary residential responsibility. After a denied motion to amend that decision, the district court determined that the previous primary residential responsibility order would be amended to a split residential responsibility order with Robert having primary residential responsibility of R.H.H., G.O.H. and G.I.H., while Trina having primary residential responsibility of J.J.H. and V.E.H.

[¶3] That after this determination was filed on May 24, 2018, Trina brought this decision on appeal to the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶4] On May 8, 2012, Robert filed a Summons and Complaint in this matter for a divorce from Trina. (DN 1, 2). The case concluded by agreement for Robert to have primary residential responsibility of the parties minor children, which included: T.R.H.; A.I.H.; R.H.H.; V.E.H.; J.J.H.; G.I.H.; and G.O.H. (DN 43, 46).

[¶5] The divorce was finalized on October 10, 2012, with a Judgment and Decree of Divorce speaking to the agreement of the parties with Robert having primary residential responsibility of the children in Grafton, North Dakota. Id. Following the entry of the Judgment, the parties had the Judgment amended on October 3, 2013, and again with the Corrected Amended Judgment on January 3, 2014. (DN 204, 230).

[¶6] After divorcing, Robert remarried on April 12, 2014, to Patricia Lynn Heidt, (hereinafter referred to as "Patricia"). (DN 69). Shortly after the marriage, Patricia moved into the home of Robert and this children, along with Patricia, she brought three children from her previous marriage. Id.

[¶7] On June 29, 2016, Trina submitted a Motion to Modify Primary Residential Responsibility alleging that there had been a change in material circumstances based on the children's preference and the remarriage of Robert. (App 027). Along with her own affidavit (App 034-041), Trina also submitted the affidavits of V.E.H. (App 042-043), J.J.H. (App 044-047), A.I.D. (048-049) and R.H.H. (App 050-051). These affidavits alleged that there was nothing but fighting and discord in the home of Robert and Patricia and that it was in the best interest of the

children, namely J.J.H. and V.E.H. that they live with their mother in Fargo so they could make everyone happy (App 042) and not have gross food (App 045).

[¶8] In addition to needs of J.J.H. and V.E.H., there was a passing mention of the youngest two Heidt children, G.O.H. and G.I.H., having expressed an interest in living with Trina in Fargo. However, there was no direct evidence of this, as Trina did not want to involve them in this action. (App 036).

[¶9] During this action there was another minor child residing with Robert, R.H.H., the child specifically indicated, that she did not wish to live with her mother, mainly due to wanting to finish her last two years of school in Grafton, and that she had a good relationship with her father, and she is not subject to this appeal. (App 051).

[¶10] In response to the Motion submitted by Trina, Robert submitted his own affidavit (App 057-068), as well Patricia's (App 069-074), Norma Heidt (App 075-076) and James Heidt (App 077). In his response, Robert stated that not only had Trina failed to prove a prima facie case to even allow the court to hold an evidentiary hearing, and in the alternative, that even if the court found that she had met the minimum standard, it was only to J.J.H. and V.E.H., and not G.O.H. and G.I.H. (App 078).

[¶11] After reviewing the briefs, affidavits and other supporting papers submitted by the parties, the court properly applied the law and concluded that a prima facie case for rehearing had been met as to J.J.H. and V.E.H., but not for R.H.H., G.O.H. and G.I.H. (App 080). The district court reasoned that the preference of a

mature child to live with one parent can constitute a material change of circumstances, taking into account certain circumstances such as: maturity of the child, preference of the child, and reliable reasons for the preference. (App 079). With this in mind, the district court found a prima facie case based on the affidavits of V.E.H. and J.J.H. However, any preference as to the younger children was irrelevant due to their age.

[¶12] With regard to R.H.H., the court specifically ruled that her preference to remain with her father, based on her wish to finish school and because of the strong relationship with her father, that no prima facie case had been presented on her and that she would remain with Robert. (App 080). As for the younger children, G.O.H. and G.I.H., the district court held that, while Trina indicated they expressed an interest to live with her, she did not want to have them involved. Id.

[¶13] Further, the district court found that, in addition to Trina's statement, that although there was some allegations of dissatisfaction of G.I.H. and G.O.H. as to residing in Robert's household, the simple remarriage of a custodial parent and vague statements about the desires to live with Trina are not sufficient in the current situation to support a finding of a prima facie case to warrant an evidentiary hearing regarding the younger children. Id.

[¶14] After such a determination by the district court, Trina brought a motion to amend the findings of the court to include that a prima facie case had been brought with regard to G.O.H. and G.I.H. (App 082). Trina argued that the district court made a wrong decision based on North Dakota's disfavor of split custody and that

the low burden of the prima facie standard had been met.

[¶15] The district court denied the motion of Trina and reaffirmed its decision that Trina had failed to present a prima facie case to warrant an evidentiary hearing with regard to G.O.H. and G.I.H. (App 093). The district court then further explained its decision and stated that while J.J.H. and V.E.H. had presented, through affidavit, that they had a strongly expressed preference to live with Trina and that some discord had caused problems with J.J.H. and that these circumstances were enough to find a prima facie case to go forward with a hearing. Id. However, there was nothing similar or even remotely indicative that suggested the younger children had the same desire as their older siblings to reside with their mother. Id.

[¶16] The district court reasoned that had the personal affidavits of J.J.H. and V.E.H. not been present, that the court would have likely found that no prima facie case existed even to them. Id. Further, the district court found that even though there is bare minimum standard when trying to reach the prima facie threshold, it is still a standard that has to be overcome with competent and reasonable evidence. Id.

[¶17] The district court also held, that while split custody is disfavored in North Dakota, it is not prohibited, and would be taken into consideration by the court at the time of the hearing, but the district court ultimately denied Trina's motion. Id.

[¶18] Following the denial of Trina's motion, an evidentiary hearing was held and the district ordered that Trina have primary residential responsibility of V.E.H. and

J.J.H. (App 156) and Robert have primary residential responsibility of R.H.H., G.I.H. and G.O.H. Id.

[¶ 19] This second amended judgment was entered on May 24, 2018, at which time, all decisions came up for appeal, and Trina brought an appeal as to the questions and issues proposed in her brief.

LAW AND ARGUMENT

I. THE WALSH COUNTY DISTRICT COURT CORRECTLY DETERMINED AS A MATTER OF LAW, THAT TRINA FAILED TO PRESENT A PRIMA FACIE CASE FOR THE MODIFICATION OF PRIMARY RESPONSIBILITY REGARDING G.O.H. AND G.I.H.

A. Standard of Review.

[¶20] Whether a party presented a prima facie case for a change of primary residential responsibility is a question of law, which this court reviews de novo. Green vs. Green, 2009 ND 162, ¶5, 772 N.W.2d 621.

[¶21] Under the North Dakota Century Code § 14-09-06.6(6) provides for post-judgment modification of primary residential responsibility more than two (2) years after entry of the prior order establishing primary residential responsibility. In order to modify primary residential responsibility two (2) years after the date of the underlying order establishing primary residential responsibility, the court must find that: 1) a material change has occurred in the child or parties circumstances, and 2) modification is necessary to serve the child's best interests.

[¶22] Under the North Dakota Century Code § 14-09-06.6(4), which 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 proceeding, who may serve and file a response and opposing affidavit(s). After the service of such documents, the trial 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 the modification. Id. If a prima facie case is established, the trial court should set a date for an evidentiary hearing. Id.

[¶23] In determining whether a prima facie case has been established, the district court must accept the truth of the moving party's allegations. Schumacker vs. Schumacker, 2011 ND 75, ¶8, 796 N.W.2d 636. The party opposing the motion may attempt to rebut a prima facie case by presenting evidence conclusively

demonstrating that the moving party is not entitled to modification, but when the opposing party's evidence merely creates conflicting issues of fact, the court may not weigh the conflicting allegations when deciding whether a prima facie case has been established. Jensen vs. Jensen, 2013 ND 144, ¶9, 835 N.W.2d 819-821. Only when the opposing party presents counter-affidavits that conclusively show the allegations of the moving party have no credibility or when the movant's allegations are on their face, insufficient to satisfy custody modification, may the district court decide the moving party has not established a prima facie case and deny the motion without an evidentiary hearing. Id.

[¶24] A moving party's allegations, as to warrant a modification of custody, must be competent and admissible evidence to support such a motion and will create a prima facie case unless: 1) the opposing party's counter affidavits conclusively establish that the moving party's allegations have no credibility; or 2) the moving party's allegations are insufficient on their face, even if uncontradicted to justify modification. Id. Thus, under this standard, the opposing party's counter affidavits are not relevant to the extent that they conclusively establish the movant's allegations have no credibility. Id.

[¶25] A prima facie case is a bare minimum and requires facts, if proved at an evidentiary hearing, would support a change of custody that could be affirmed if appealed. Ehli vs. Joyce, 2010 ND 199, ¶7, 789 N.W.2d 560, 563. In addition, the North Dakota Supreme Court has held that a prima facie case requires only enough evidence to permit a factfinder to infer the fact at issue and rule in the moving party's favor. Solwey vs. Solwey, 2016 ND 246, ¶11, 888 N.W.2d 756, 760. While allegations alone do not establish a prima facie case, affidavits must include competent information, which usually require the affiant to have personal knowledge; affidavits are not competent if they fail to show a basis for actual personal knowledge or if they state conclusions without support of evidentiary facts. Thompson vs. Thompson, 2012 ND 15, ¶6, 908 N.W.2d 331.

B. Trina failed to meet the bare minimum evidence requirement to show that Robert's marriage and home environment constitute a material change in circumstance with regard to G.O.H. and G.I.H.

[¶26] As stated in North Dakota Century Code § 14-09-06.(6), in order to modify primary residential responsibility, there is a two prong test in which the court must find that: 1) a material change has occurred in the child or the parties circumstances and 2) modification is necessary to serve the child's best interest.

[¶27] This court has stated a material change in circumstances is an important new fact that was not known at the time of the prior custody decree. Haag v. Haag, 2016 ND ¶ 9, 875 N.W.2d 539. Whether an alleged change in circumstances is material depends on the circumstances of the case. Forster v. Flaagan, 2016 ND ¶ 11, 873 N.W.2d 904.

[¶28] It has previously been held by this Court that a parent moving in with their significant other may be viewed as a significant change of circumstances. Solwey, 2016 ND at ¶17 citing to Gietzen vs. Gietzen, 1999 ND 70, ¶10, 575 N.W.2d 924. The facts of Gietzen, involve a parent moving in with her significant other and would be analogous to the case at hand, however the circumstances involve the parent, with primary residential responsibility, moving in with their significant other, by moving from Bismarck to Minot. 1999 ND at ¶5. Without a modification, the child indicated that he would not be able to continue school, continue friendships or participate in any of the extra-curricular activities and church activities that they had grown accustomed to in Bismarck. Id. This set of circumstances differs greatly from how Trina sets them out by over generalizing this issue and indicating that a parent moving in with a significant other is a significant change of circumstances all on its own and not encompassing the facts that influenced the court in making its decision.

[¶29] Trina again tries to generalize this statement by attempting to show some similarities between the case at hand and the case of Mosbrucker vs. Mosbrucker, 1997 ND 72, ¶10, 562 N.W.2d 390, 393. In Mosbrucker, a child seeking to live

with a different parent indicated that her grades were slipping and that she was unable to sleep after the remarriage of her father and the introduction of the new spouse into his home. Id. at ¶10. This Court found that such events and circumstances were in deed a change of circumstances in the living arrangement and preference of the mature child. Id. This is distinguishable from the case at hand, as there is no indication that G.O.H. and G.I.H. have made any allegations as to their performance in school and their inability to sleep and have presented nothing to the district court or the record to indicate that there is a change of circumstance that would force the Court to modify the primary residential responsibility order from Robert to Trina.

[¶30] Again, Trina relies on a statement from Mosbrucker which states that the remarriage of one parent may create a significant change in circumstances, quoting from Johnson vs. Schlotman, 502 N.W.2d 832, 834, where the facts set out that it was in the best interest and welfare of a child for custody to be modified so that the daughter may live with her father. The facts surrounding Johnson, are that the daughter explained that her mother refused to listen and attend to her needs and that she was embarrassed to be around her mother, and that she was afraid that her mother and her partner would display their affection publicly and that she wanted to continue to live in her hometown with her friends and school and maintain the strong relationship that she had with her father. Id. at 834. The blanket statement used by Trina to indicate that a parent moving in with a significant other differs greatly from the facts of Johnson in which there is testimony and evidence that the child had a strong preference not to live with the mother and that the reason for such strong expression was identified through specific examples. That is not the case at hand for G.O.H. and G.I.H. There maybe times when it is a change, but this court has never ruled that every remarriage constitutes such a change.

[¶31] While the court found that there is a strong indication from J.J.H. and V.E.H. as to their desire to live with Trina, there is no indication that these expressions are reciprocated to the two younger children and the district court has made a note of

this in its decision.

[¶32] Apart from the statements by Trina, as to indicate that a significant change has occurred with Robert's marriage to Patricia, there is also an issue as to the admissibility as to the statements of G.O.H. and G.I.H. though other parties. The statements that are attempted to be brought in from G.O.H. and G.I.H. from their mother and siblings are a classic example of hearsay as it is an attempt to prove the truth of the matter asserted that these two younger children wish to reside with their mother in Fargo. As such those statements do not constitute credible admissible evidence.

[¶33] Under the North Dakota Rules of Evidence, Rule 802(c) hearsay means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement. These statements provided by Trina and the older Heidt children allude to vague statements that are not properly before the court and have not testified or declared under oath at any time during any of the hearings in this matter. In addition, Trina is seeking to offer these vague inadmissable statements as truth that she should be awarded primary residential responsibility of G.O.H. and G.I.H. because of their statements of wanting to move to Fargo. Her allegation that a change in circumstance has occurred, mainly because there is a preference by the children to live in Fargo with their mother. This alleged preference is at the heart of this case and the truth that is attempted to be asserted by Trina. Because of these statements, both for the purpose of being not made under oath or at trial, along with being offered to prove the truth, these statements are inadmissable.

[¶34] Therefore, Trina has failed to establish that because of Robert's marriage and home environment, that a change of circumstances has occurred in the lives of G.O.H. and G.I.H. and that change warrants a change to serve their best interests. Further, that vague and inadmissible statements are not enough to carry even the limited burden to establish a prima facie case. Therefore, Robert hereby requests that this court uphold the district court's decision and find that Trina has failed to

meet her burden of proof.

C. Trina failed to meet the minimum burden standard and did not provide the district court with any sufficient evidence that an adverse affect or significant factor had taken place to constitute a change in circumstance for G.O.H. and G.I.H.

[¶35] Under § 14-09-06.6(4) of the North Dakota Century Code, a party seeking to modify the primary residential responsibility shall serve and file motions and papers and supporting affidavits and shall give notice to the other party who then has a chance to respond. Id. After the service of such documents, the court is then to consider the motion on brief and without argument or evidentiary hearing to determine if the moving party has established a prima facie case for modification. Id.

[¶36] When considering whether this threshold for a prima facie case has been met, the Court has two options to consider. The first of these options is that the opposing party present counter-affidavits that conclusively show that the allegations of the moving party have no credibility. Jensen, 2013 ND at ¶9. The next option that the Court has, and the factor that was taken in the district court's decision, is that the movant's allegations on their face are insufficient to satisfy custody modification and because of this unsatisfactory evidence, the Court has the right to deny that a prima facie case has been established and can therefore deny the motion. Id.

[¶37] Trina again argues that because G.I.H. and G.O.H. have indicated a preference to live with her in Fargo, that there has been a material change of circumstance to justify a change in primary residential responsibility and that it has been proven by a persuasive reason according to the precedent from Mosbrucker. However, the Court has previously established that for there to be a change in circumstances argument, the change of circumstances must be one that adversely affects the child. Delzer vs. Winn, 491 N.W.2d 741, 744 (N.D. 1992) and Blotske vs. Leidholm, 487 N.W.2d 607, 609 (N.D. 1992).

[¶38] The standard for modification based on preference is not solely at the whim of the child wishing to change residence, but must be accompanied by a reasonable change in circumstance. To allow such a blind switch without a significant change of circumstances to justify the order would be to place the key's of the courtroom into the hands of children. Alvarez v. Carlson, 524 N.W.2d 584, 592 (N.D. 1994).

[¶39] Following the allegations and affidavits submitted by Trina and the older Heidt children, it is clear to see that the movant's allegations on their face are wholly insufficient, as determined by the district court. There was that no material change in circumstance to the degree as alleged by Trina, and no adverse affect was demonstrated.

[¶40] Trina argues that she has satisfied her burden by presenting persuasive evidence based on her submitted affidavits that G.O.H. and G.I.H. would be better situated in Fargo because they have indicated such a desire. However, she has failed to put forth any specific incidents or any type of adverse harm that has taken place to the two youngest child that would give the court any indication that there has been a material change in circumstances or adverse effects to go forward with an evidentiary hearing. There is no evidence to suggest that G.O.H. and G.I.H. are experiencing social suffering[1], disruptive behavior[2] or poor performance in school[3] while in their father's care.

[¶41] Further, Trina argues that the district court was incorrect in its determination in regard to G.I.H. and G.O.H., because of their age and not having submitted affidavits of their own. Trina again relies on an erroneous impression that a child's preference can give rise to a change in circumstances. However, this Court has ruled that although age is not the exclusive indicator of a child's maturity and capacity to make an intellectual choice, generally a child's preference is entitled to

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[1] Jensen, 2013 ND at ¶15.

[2] Solwey, 2016 ND at ¶22.

[3] Forster, 2016 at ¶3.

more weight as he or she grows older. Barstad vs. Barstad, 499 N.W.2d 584, 588 (N.D. 1993).

[¶42] While there is no magic age that this Court has eluded to for a sense of maturity, there is definitely a realm of ages that the Supreme Court and district courts have held to be of sufficient maturity to modify primary residential responsibility. In Schlieve vs. Schlieve, a fourteen (14) year old and a seventeen (17) year old were of sufficient age and maturity to make an intelligent decision to decide where they would reside. 2014 ND 107, ¶18, 864 N.W.2d 733. In addition, the court has affirmed that reliance on the age and maturity of a thirteen (13) year old in Loll vs. Loll, is of sufficient age and maturity to take into consideration her preference in determining where she wished to live. 1997 ND 51, ¶15, 561 N.W.2d 625.

[¶43] While the child's preference may be taken into consideration depending on age, the child's preference may be highly relevant if it is based upon a factor that itself constitutes a significant change of circumstances. Alvarez, 524 N.W.2d at 590. Thus if the child's preference to live with a non-custodial parent stems from allegations of abuse against the custodial parent, discord among the members of the new step-family or severe problems at school or in the community, the child's preference coupled with related evidence may demonstrated a significant change in circumstances. Id.

[¶44] While the district court ruled that J.J.H. and V.E.H. had indeed passed the prima facie test to determine whether or not there was an evidentiary hearing to be held with regard to the modification of primary residential responsibility to their request, that same result was not seen with regard to G.O.H. and G.I.H.

[¶45] As suggested in Alvarez, the preference even if appropriate must be coupled with a change of circumstance to effectuate such a decision. While there is evidence from the affidavits of J.J.H. and V.E.H. that there is minor discord among the family, coupled with their desire to live with their mother in Fargo and further coupled with their age and maturity that the district court correctly determined that

there was a prima facie case for them to go forward on such motion. However, as stated by the district court, the vague testimony in all of Trina's affidavits do not indicate or rise to the bare minimum level that is spelled out in Alvarez to make a factfinder infer that there has been an adverse affect or a significant change in circumstances to infer that G.O.H. and G.I.H. need to be placed with their mother. While there has been testimony as to some family discord, there is nothing that rises to the level of a change of circumstance based on the vague and unspecific testimony of Trina's parties with regard to G.O.H. and G.I.H.

[¶46] Trina attempts to extend the district court's decision of J.J.H. and V.E.H. on to G.O.H. and G.I.H. because this Court has previously been cautious when seeking to divide custody of siblings. While the Court disfavors the splitting up of siblings, it is not prohibited as previously mentioned in the decision by the district court. As a general rule, the Courts do not look favorably upon separating siblings in a custody case. BeauLac vs. BeauLac, 2002 ND 126, ¶16, 649 N.W.2d 210. The Supreme Court however has not prohibited the separation of children in every case and has affirmed the separation of siblings in a number of cases where child of sufficient maturity have stated preferences. Id. Loll v. Loll, 1997 ND 51, 561 N.W.2d 625; Freed v. Freed, 454 N.W.2d 516 (N.D. 1990).

[¶47] Therefore, because of the insufficiency of the testimony and affidavits regarding the preferences of G.O.H. and G.I.H., the district court made the correct decision when denying that Trina had conclusively established a prima facie case with regard to a material change of circumstances pertaining to the youngest children. There has been no evidence of any adverse circumstance that would allow the youngest children's preference to be noted with as much weight as the older children. As well, when considered in conjunction with previous cases before the Supreme Court, the youngest children lack a level of maturity that would entitle them to be given the same deference as J.J.H. and V.E.H. Further, that the splitting of custody between these four children, between Robert and Trina, while generally disfavored, is not out of the question and has been done when such

preference has been indicated by older children, as in this case at hand. Therefore, because Trina has failed to demonstrate that there has been any adverse affect or significant change of circumstances with Robert's marriage and home that would couple the preference of the younger children, she has failed to meet her burden of proof for this matter to be brought on for an evidentiary hearing. Therefore, Robert hereby request this court uphold the decision of the district court.

D. The district court correctly determined that Trina failed to present sufficient evidence to support the prima facie case to modify primary residential responsibility of G.O.H. and G.I.H.

[¶48] Trina argues that Robert did not conclusively establish that Trina's allegations have no credibility and that he presented conflicting evidence to rebut the prima facie case established by Trina.

[¶49] When considering whether a movant has established a prima facie case, a court may not weigh conflicting allegations to resolve conflicts, assess credibility or effectively engage in a mini-trial by affidavit. Charvat vs. Charvat, 2013 ND 145, ¶12, 835 N.W.2d 843, 850. However, the standard as spelled out in Jensen, the court may rely on one of two standards: 1) the opposing party presents counter-affidavits that conclusively show the allegations of the moving party have no credibility or 2) when the movant's allegations are on their face insufficient to satisfy custody modifications. When either of the these two are met, the court has the right to establish that a prima facie case has not been established and they may deny the motion.

[¶50] The district court never called into question the sufficiency of Robert's affidavits, it only made comment to those of Trina's and did not engage in the mini-trial as alleged by Trina. The district court ruled that although there are allegations of dissatisfaction of the youngest children with the Robert and Robert's household, simply a remarriage by a custodial parent and vague statements about the desires of the youngest two children as alleged by Trina are not sufficient in this situation to support a finding of a prima facie case or warrant an evidentiary

hearing regarding G.I.H. and G.O.H.

[¶51] While the decision by the district court makes no indication that Robert has failed to conclusively establish that Trina's allegations are without credibility, that is a question for the Court to decide on its de novo review.

[¶52] Therefore, the contention that Robert has failed to provide any conclusive statement that calls into question Trina's credibility is a question for a factfinder to infer as according to § 14-09-06.6(4) of the North Dakota Century Code. Therefore, Robert hereby requests that this Court uphold the district court's determination that Trina's motion and supporting papers are insufficient.

II. THE DISTRICT COURT RULED CORRECTLY WHEN IT DENIED TRINA'S MOTION TO AMEND FINDINGS AND ORDER

A. Standard of Review.

[¶53] This Court reviews a district court's finding of fact under a clearly erroneous standard. Schaffner vs. Schaffner, 2017 ND 170 ¶8, 898 N.W.2d 428, 430. A finding of fact is clearly erroneous if (1) it is induced by an erroneous view of the law, (2) if no evidence exists to support the finding or (3) if, on the entire record we are left with a definite and firm conviction the trial court made a mistake. Id. That during its review, the Supreme Court views child custody determinations as a finding of fact. Weber vs. Weber, 512 N.W.2d 723, 726 (N.D. 1994). On appeal, findings of fact are not disturbed unless clearly erroneous as according to Rule 52(a) of the North Dakota Rules of Civil Procedure. A finding of fact is clearly erroneous if the reviewing Court is left with a definite and firm conviction that a mistake has been made, or if the finding was induced by an erroneous view of the law, Reede vs. Steen. 461 N.W.2d 438, 440 (N.D. 1990).

B. The District Court correctly determined that Trina had failed to present a prima facie case to satisfy the evidentiary hearing requirement.

[¶54] Only when the opposing party presents counter-affidavits that conclusively show that the allegations of the moving party have no credibility or when the movant's allegations are on their face, insufficient to satisfy custody modification

may the district court decide the moving party has not established a prima facie case and deny the motion without an evidentiary hearing. Jensen, 2013 ND at ¶9.

[¶55] While the prima facie case is a bare minimum and requires facts in accordance with Ehli, it is a standard nonetheless as quoted by the district court in this matter and still is a burden for the moving party to overcome. 2010 ND at ¶7. (App 083).

[¶56] The district court has made a sound judgment as to the brief and supporting papers of Trina and has declared that because of the lack of credible evidence and the lack of an adverse change of circumstances, the court was not able to find a prima facie case to warrant an evidentiary hearing in regard to G.O.H. and G.I.H.

[¶57] The district court justifies its decision in two detailed orders; first denying the motion and second in its order to deny the motion to amend. The district court correctly determined that a prima facie case existed for J.J.H. and V.E.H. based on their age and strong preference. However, in regard to G.O.H. and G.I.H. the court reasonably concluded that without lack of specifics and Trina's indication not to get them involved, there was no evidence to hold a hearing for the younger children. Further, the court established that without these affidavits, which were so strongly worded with preference, that the court would not have reached this determination with regard to J.J.H. and V.E.H. The district court again stands by its decision and indicates that it made no erroneous finding and that it was comfortable with its decision that R.H.H., G.I.H., and G.O.H. were not experiencing the level of difficulties or the change of circumstances as alleged by Trina.

[¶58] In accordance with the standards set in Reede, this Court should not disturb the findings of fact by the district court as there has been no erroneous view of the law and the decision of the district court has been spelled out in great detail as to its denial of the motion in regard to G.O.H. and G.I.H.

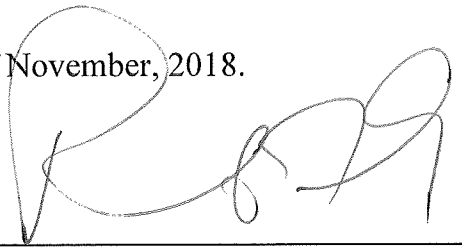
[¶59] Therefore, because of the reasons stated by the district court and Trina's inability to provide sufficient evidence for the modification, Robert hereby

requests that this court uphold the district court's decision to deny the motion to amend.

CONCLUSION

[¶60] Based on the above mentioned law and argument, Robert hereby respectfully requests that this Court find that the Walsh County District Court correctly denied the prima facie case in regard to G.O.H. and G.I.H. and that the district court correctly denied Trina's motion to amend that decision and the this Court take those decisions into consideration in their de novo review of this case and affirm the district court's ruling.

Respectfully submitted this 8th day of November, 2018.



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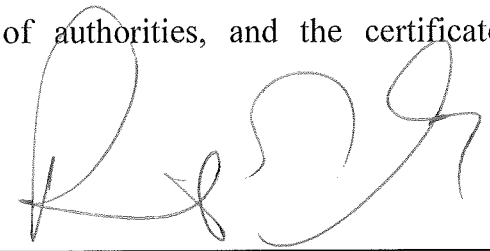
CERTIFICATE OF COMPLIANCE

[¶61] The undersigned, as attorney for Appellee in the above matter, and as the author of the above brief, hereby certifies, in compliance with Rule 32(a)(8) of the North Dakota Rules of Appellate Procedure, the above brief was prepared with proportional type face and the number of words in the above brief, excluding words in the table of contents, table of authorities, and the certificate of compliance, total 5,897 words.



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THE SUPREME COURT
STATE OF NORTH DAKOTA

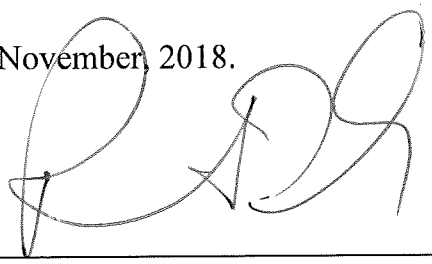
Robert Martin Heidt, Plaintiff/Appellee, v. Trina Ann Iverson, f.k.a. Trina Ann Heidt, f.k.a Trina Ann Heller, Defendant/Appellant.	SUPREME COURT NO. 20180250 Civil No.: 50-2012-DM-00037

ON APPEAL FROM ORDERS DATED SEPTEMBER 8, 2016, DECEMBER 8, 2016, AND APRIL 24, 2018, AND THE SECOND AMENDED JUDGMENT DATED MAY 24, 2018

WALSH COUNTY DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT
HONORABLE ANTHONY SWAIN BENSON

APPENDIX OF APPELLEE

Respectfully submitted this 8th day of November, 2018.



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[¶1] The Appellee, Robert Martin Heidt, hereby adopts the appendix as submitted by the Appellant, Trina Ann Iverson, f.k.a. Trina Ann Heidt, f.k.a Trina Ann Heller, for its reference in the accompanying brief, as well as all docketed filings with the district court.

THE SUPREME COURT
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HONORABLE ANTHONY SWAIN BENSON

AFFIDAVIT OF ELECTRONIC SERVICE BY E-MAIL

STATE OF NORTH DAKOTA

COUNTY OF PEMBINA, ss

[¶1] Tamara J. Bucholz, being first duly sworn, deposes and says: that I am of legal age, a citizen of the United States, is not a party to nor an interested person in the above-entitled caption; that on November 8th, 2018, I electronically served a true and correct copy of the following documents filed in the above-entitled matter.

- Brief of Appellee with Appendix

Electronically emailed to the following:

Supreme Court Clerk of Court at supclerkofcourt@ndcourts.gov

Jerilynn Brantner Adams at jbrantneradams@vogellaw.com

To the best of my knowledge, information, and belief such address as given above

was the actual email address of the party intended to be so served. That the above document was duly served in accordance with the provisions of the North Dakota Rules of Civil Procedure and the North Dakota Rules of Appellate Procedure.

Dated this 8th day of November, 2018.

Tamara J. Bucholz

Signed and sworn to before me this 8th day of November, 2018, by Tamara J. Bucholz.

DUSTIN J. SLAAMOD
Notary Public
State of North Dakota
My Commission Expires Feb. 21, 2020

(Notary Stamp)

Notary Public