

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Zachary Lewis Johnshoy,)	
)	Supreme Court Case No.: 20200263
Plaintiff/Appellee,)	
)	
v.)	District Court Case No.
)	51-2020-DM-00400
Amanda Sue Johnshoy,)	
n/k/a Amanda Sue Fry,)	
)	
)	
Defendant-Appellant.)	

APPEAL FROM

Order Denying Motion at Index #166, Dated August 11, 2020

THE HONORABLE GARY H. LEE PRESIDING
NORTH CENTRAL JUDICIAL DISTRICT

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

Respectfully submitted by:

/s/ Bonnie Paradis Humphrey
Attorney for Plaintiff/Appellee
N.D. License #: 04991
HUMPHREY LAW OFFICE, P.C.
1344 South Main Street
P.O. Box 2045
Minot, ND 58702-2045
(701) 852-5777 office
bonnie@ndfamilylaw.com

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JURISDICTION

[¶1.] The district court had jurisdiction under N.D. Const. art. VI, § 8, N.D. Cent. Code § 27-05-06, and N.D. Cent. Code Ch.14-09. This Court has jurisdiction under N.D. Const. art. VI, §§ 2, 6, N.D. Cent. Code § 28-27-01 and N.D. Cent. Code § 28-27-02 (1). The parties and the children continue to reside in North Dakota.

STATEMENT OF THE ISSUES

- I. The trial court correctly determined that Amanda failed to establish a prima facie case and accordingly denied an evidentiary hearing regarding primary residential responsibility.**
- II. The trial court did not need to consider evidence from Zachary's supportive pleadings as part of the determination that Amanda had not made a prima facie case.**
- III. The trial court's Orders at Index #166 dated August 11, 2020, were sufficient to support its determination and denial of Amanda's Motion at Index #151.**

STATEMENT OF THE CASE

[¶2.] The parties were divorced after a trial, with a Memorandum Decision entered at Index #105 in Stark County, North Dakota. An Order Clarifying Judgment was entered at Index #107, and Order for Parenting Plan, Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment were entered accordingly at Index #114-116 on November 17, 2014. The Judgment is at Appendix, p. 1 ("App.") Neither party appealed.

- [¶3.] Zachary filed his Motion to Amend Judgment and Relocate Children and supporting pleadings on June 2, 2020 at Index #128-139 (Appellee's Appendix, p. 3 ("App. A.")). Amanda responded to Zachary's at Index #150 and filed her Motion to Modify "Custody" and/or Parenting Time and supporting pleadings at Index #151-155 (App. 10). Zachary filed his Response to Amanda's Motion and supporting pleadings at Index #156-159 (App. 22).
- [¶4.] The venue was changed by agreement from Stark County to Ward County, North Dakota by Stipulation at Index #160, and the Court signed the Order to Change Venue on July 2, 2020 at Index #163. Thereafter, the Court entered Orders at Index #166, denying Amanda's Motion, and granting Zachary an evidentiary hearing regarding his Motion to Relocate only, with the hearing scheduled for December 21, 2020 (Index #167). Amanda filed her Notice of Appeal at Index #169 on October 1, 2020 (App. p. 55). This Court then remanded the matter back to the District Court for the evidentiary hearing on Zachary's Motion to Relocate, which was held on the date scheduled. The Court then denied Zachary's Motion to Relocate by Order dated January 25, 2021 at Index #193. To date, neither party has appealed from that Order.
- [¶5.] The Notice of Filing the Notice of Appeal was filed at Index #170, and the Clerk's Certificate on Appeal was filed October 29, 2020 at Index #174. The Clerk's Supplemental Certificate on Appeal was filed January 11, 2021 at Index #186; the 2nd Supplemental Certificate on Appeal was filed January 19, 2021 and the Third Supplemental Certificate on Appeal was filed January 25, 2021.

STATEMENT OF FACTS

- [¶6.] The parties were divorced on November 17, 2014. The parties were awarded joint decisionmaking. Zachary was awarded primary residential responsibility of the parties' children, whose initials and years of birth are N.L.J, born in 2010, and S.J.J., born in 2013. Zachary also has a child from another relationship, whose initials are Z.L.J., born in 2019, for whom he has decisionmaking and primary residential responsibility. Amanda has remarried and has one child from a relationship prior to that with Zachary, and one child with her current husband. Amanda pays child support but did not provide anything else for the children as of the date of Zachary's Motion at Index #129 (App. A. p. 3). Thereafter, she indicated that health insurance would be available for the children during pendency of these proceedings. Index #154, ¶1 (App. 15).
- [¶7.] Zachary has maintained a stable and consistent home for the children over six years, moved to Minot because that was where the union hall for his electrician training was located, furthered his education significantly during the time since the divorce, and will be taking his journeyman's electrician testing soon. He has worked hard to better the children's lives because he knew that the children's mothers were not going to cover the children's expenses other than any child support ordered and paid. Index #131, ¶5, ¶9 (App. A. p.24). In his Affidavit at Index #157 he states that he has moved the same number of times since the divorce as Amanda did and that the children did not have rooms at Amanda's house. Id., ¶11. (App. p. 25) He noted that the children's grades have been good, and they do not have behavioral problems. Id., ¶18.

[¶8.] As indicated in Zachary's Affidavit at Index #131, Amanda's path with Jeffrey has been less than "fantastic" as referenced in Amanda's Appellate Brief at ¶10. Zachary cited several credible examples which showed his concerns when the children are with Amanda, along with exhibits. Zachary also referenced Amanda's admission to him that the children were afraid of their stepfather, which would be admissible as an admission against interest. Zachary gave specific, relevant examples, including Amanda's admission against interest that she did not feel safe at one point and did not go home to her shared residence with Jeffrey. She had a sexual relationship with another, and Zachary cited to Jeffrey's messages with that other man. Index #131, ¶17-20. (App. A. p. 24). Further, Zachary's motion requested that the trial court address his concerns about Amanda's care of the children and conditions of her home, with referenced exhibits. (Index #129, #131, ¶24, ¶27, P32, ¶33; #134-136). (App. A. p. 3, 24). Despite his concerns about the children's care while at Amanda's residence, he continued to facilitate parenting time for her and requested safety provisions be followed, including that the children be removed from any person or situation that would be a threat to their well-being. See, e.g., Index #137, his proposed Order, ¶9. (App. A., p. 36). Amanda did not provide adequate evidence regarding her care of the children, her home environment, and other issues to refute Zachary's allegations.

[¶9.] Contrary to Amanda's Appellate Brief at ¶23, Zachary was not assaulted by his ex-girlfriend; **it was by the ex-girlfriend's two brothers**; it was not a situation he created. Index #131, ¶36 (App. A. p. 24); Index #157, ¶19 (App. 25). Amanda's attitude toward the incident showed a lack of care and concern for the children's

father. Index #131, ¶36 (App. A. p. 24). Further, one incident in which Zachary was the **victim** does not add up to a prima facie finding or consideration under the best interest factors. N.D. Cent. Code § 14-09-06.2 (1)(j).

STANDARD OF REVIEW

[¶10.] This Court has held that the determination whether a prima facie case has been established is a question of law. O'Neill v. O'Neill, 2000 ND 200, P 8, 619 N.W.2d 855. Questions of law are reviewed de novo. Interest of J.K., 2009 ND 46, P 14, 763 N.W.2d 507.

LAW AND ARGUMENT

I. The trial court correctly determined that Amanda failed to establish a prima facie case and accordingly denied an evidentiary hearing regarding primary residential responsibility.

[¶11.] The Court retains jurisdiction to make orders regarding residential responsibility and parenting time for minor children after a judgment is entered. N.D. Cent. Code § 14-09-06.6. It has been over two years since entry of the Judgment herein, and therefore the standard in N. D. Cent. Code §14-09-06.6(6) applies:

6. The court may modify the primary residential responsibility after the two-year period following the date of entry of an order establishing primary residential responsibility if the court finds:

a. On the basis of facts that have arisen since the prior order or which were unknown to the court at the time of the prior order, a material change has occurred in the circumstances of the child or the parties; and

b. The modification is necessary to serve the best interests of the child.

[¶12.] Allegations alone do not establish a prima facie case for modification. Affidavits must have firsthand, competent information. Ehli v. Joyce, 2010 ND 199, 789

N.W.2d 560. Conclusory statements do not show the Court a reason to reopen the matter or justify an evidentiary hearing for modification, even if Zachary's Motion to Amend Judgment and Relocate Children was pending before the Court. There must be at least enough evidence presented to merit further exploration into the allegations and infer that the Court should rule in the moving party's favor. Lausen v. Hertz, 2006 ND 101, 714 N.W.2d 57.

[¶13.] The trial court may consider evidence from both parties before deciding whether there is a prima facie case. "A party seeking custody modification under N.D. Cent. Code § 14-09-06.6(4) 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 in favor of that party. O'Neill v. O'Neill, 2000 ND 200, P5, 619 N.W.2d 855, quoted in Lawrence v. Delkamp, 2003 ND 53, 658 N.W.2d 758, ¶7.

[¶14.] See also Volz v. Peterson, 2003 ND 139 at ¶8: "A party seeking custody modification under N.D. Cent. Code § 14-09-06.6(4) 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 in favor of that party. Generally, the opposing party must rebut a prima facie case by going forward with evidence showing the moving party is not entitled to the relief requested. Where the opposing party presents counter-affidavits which conclusively establish that the allegations of the moving party have no credibility or where the movant's allegations are, on their face, insufficient, even if uncontradicted, to justify custody modification, the court, under N.D. Cent. Code §

14-09-06.6(4), can find the moving party has not brought a prima facie case and deny the motion without an evidentiary hearing."

[¶15.] A court may conclude the moving party failed to establish a prima facie case for modification of primary residential responsibility only if: (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. Charvat v. Charvat 2013 ND 145, 835 N.W.2d 846, at ¶11.

[¶16.] Zachary's Affidavit at Index #157 shows credible evidence of how Amanda's situation has not gotten better, but in fact, worse, while Zachary has continually worked to improve the children's situation, and his own, again showing that there are no material changes in circumstances under N. D. Cent. Code §14-09-06.6. Stanhope v. Phillips-Stanhope, 2008 ND 61, 747 N.W.2d 79, 2008 N.D. LEXIS 61 (N.D. 2008). (App. 25). If the trial court believed that Zachary's filings showed that Amanda's allegations had no credibility, that would also be an appropriate reason to deny an evidentiary hearing. See, e.g., Forster v. Flaagan, 2016 ND 12, 873 N.W.2d 904.

[¶17.] The Affidavit of N.L.J, age 10, was properly considered by the Court and failed to meet the threshold for a prima facie case. (Index #155, App. p. 20). Amanda did not request the appointment of a parenting investigator or guardian ad litem, under N.D. Cent. Code §14-09-06.4. She did not offer anything which would tend to show that there were legitimate concerns for the children when with Zachary. She also did not follow the best interest factors in her filings, which would have been useful

to the trial court's determination. "A prima facie case justifying a modification of primary residential responsibility and, therefore, an evidentiary hearing, is established by a material change in circumstances 'which either "requires" a change of custody for the child's best interests or "fosters" or "serves" the child's best interests.'" Schroeder v. Schroeder, 2014 ND 106, ¶ 7, 846 N.W.2d 716 (citing Blotske v. Leidholm, 487 N.W.2d 607, 609 (N.D. 1992)). "A material change in circumstances means important new facts that were unknown at the time of the prior custodial decree." Id. (citing Schumacker v. Schumacker, 2011 ND 75, ¶ 10, 796 N.W.2d 636). "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." Id. (citing Schumacker, 2011 ND 75, ¶ 6, 796 N.W.2d 636) ", cited in Ritter v. Ritter, 2016 ND 16 ¶6, 873 N.W.2d 899, 901. Blaming the trial court for not conducting a full best-interest analysis when Amanda failed to conduct the same analysis shifts the burden to the court rather than the moving party. Ref. Appellant's Brief, ¶24.

[¶18.] Zachary indicated in Index #131 at ¶37 that Amanda was interfering with the children's statements to him and telling them what to say to him; Amanda filed the child's Affidavit at Index #155 **after** Zachary's filing; this can be seen as direct evidence of Amanda's interference since the Affidavit appears to have been coached, was made by an immature child, and is therefore, not credible evidence sufficient for a prima facie finding by the Court. Id. ¶1, (App. A. p. 24, App. p. 20). Zachary further indicated in Index #157, ¶6-8, and ¶30 and throughout his filings concerns about Amanda involving the child by way of Affidavit, which the trial

court was able to consider. (App. 25). As indicated in Amanda's Appellant Brief at ¶19, "a court may refuse to consider a child's preference for custody if the child is not mature," quoting Tishmack v. Tishmack, 2000 ND 103, ¶22, 611 N.W.2d 204. Part of that refusal may be that the Court determines from the face of the filing that the child is not mature and should not be subjected to having to testify in court regarding a preference. There is no reason to **require** the trial court to address the preference factor in a child younger than twelve. The trial court's determination that the child's Affidavit was not enough to show a prima facie case was appropriate given the circumstances.

II. The trial court did not need to consider evidence from Zachary's supportive pleadings as part of the determination that Amanda had not made a prima facie case.

[¶19.] Even accepting Amanda's allegations on their face, there was not enough shown to justify a prima facie finding by the Court. Wald v. Holmes 2013 ND 212, 839 N.W.2d 820. There was no proof that a material change in circumstances directly affecting the children had occurred, or that any possible modification would serve the children's best interests. Rudnick v. Rode 2012 ND 167, 820 N.W.2d 371.

[¶20.] As indicated in Schroeder v. Schroeder, broad, generalized, conclusory allegations without a sufficient evidentiary basis or a showing of actual firsthand knowledge are not enough to show a prima facie case for modification; assertions about improvements in the moving party's life, and the increased instability in the opposing party's life, are not enough to "be sufficient to show a significant change in circumstances." Schroeder, quoting Miller v. Miller, 2013 ND 103, ¶ 9, 832

N.W.2d 327. Similarly, to establish a prima facie case that modification is necessary to serve the children's best interests requires more than the improved circumstances of the party moving to modify primary residential responsibility. To establish a prima facie case, affidavits must provide competent admissible evidence. The facts must establish how these new facts adversely impact the children's well-being. See Alvarez v. Carlson, 524 N.W.2d at 588-89; Blotske v. Leidholm, 487 N.W.2d 607 at 609. The moving party's affidavits fail to adequately address the best interest factors under N.D. Cent. Code § 14-09-06.2(1). The affidavits provided ... failed to establish a prima facie case that modification of primary residential responsibility is necessary for the best interests of the children. Schroeder, 2014 ND 106, 846 N.W.2d 716 at ¶20-22.

[¶21.] The trial court cannot be expected to speculate regarding evidence not properly supported but must proceed to decide on the record before it under N.D. Cent. Code 14-09-06.6. The trial court's statement at Index #166, ¶30 details the areas in Amanda's filings that led to the decision to deny a prima facie case, based on her Affidavits. (App. p. 39). The decision was well-reasoned and indicated a further need to develop the reasons for the motion at the outset, especially when trying to get your foot into the courthouse and establish a prima facie case. Since the circumstances by which one may be granted an evidentiary hearing are limited, fact-based filings are crucial; they may need to include appropriate exhibits or other evidence to support the motion. See, e.g., Hankey v. Hankey, 2015 ND 70, 861 N.W.2d 479 at ¶13.

III. The trial court's Orders at Index #166 dated August 11, 2020, were sufficient to support its determination and denial of Amanda's Motion at Index #151.

[¶22.] It is noted that Amanda did not directly deny Zachary's allegations and the incidents at Index #3, 4, 5 regarding his Motion to Amend Judgment and to Relocate Children. Therefore, those allegations could have been deemed admitted by the Court. Further, the trial court denied any consideration of Zachary's Motion to Amend, and only set a hearing regarding his motion for relocation, denying both parties an evidentiary hearing on the merits regarding all other issues.

[¶23.] It is argued that reviewing all the evidence before making a prima facie finding would overall save time and expense for the parties and avoid a potentially unnecessary, stressful, and costly modification hearing, precisely the purpose of N.D. Cent. Code §14-09-06.6. This does not mean that the trial court improperly considered conflicting allegations in affidavits. Solwey v. Solwey, 2016 ND 246, 888 N.W.2d 756. Further, in the trial court's Order at Index #193, ¶54, the trial court indicated that a compelling factor in the Court's decisionmaking is to maintain stability and continuity in a child's life, without harm to the child. It is no less compelling when making a prima facie determination.

CONCLUSION

[¶24.] The trial court had an obligation to consider the stable environment provided by Zachary as it affected the children. As stated in the Orders from the Court, there was no evidence from Amanda showing that the children were in any way harmed by the events she set forth. Amanda failed to meet her burden of proof, and the

Court correctly denied her Motion. Further, anything regarding the Motion to Relocate is no longer relevant since the trial court denied Zachary's motion and he does not intend to appeal that decision, essentially awarding Amanda the "minimum" relief requested in her Affidavit at Index #154, ¶8. (App. p. 15).

[¶25.] The Honorable Gary H. Lee's Orders were appropriate to the situation at hand and fell within the Court's discretion. Therefore, the decision of the trial court should stand.

[¶26.] Oral argument is requested if allowed by the Court via reliable electronic means. Since Appellant requested oral argument, it would be appropriate for both parties to be heard and address any inquiries from the Court.

Respectfully submitted this 29th day of March, 2021.

/s/ Bonnie Paradis Humphrey
Attorney for Plaintiff/Appellee
N.D. License #: 04991
HUMPHREY LAW OFFICE, P.C.
1344 South Main Street
P.O. Box 2045
Minot, ND 58702-2045
(701) 852-5777 office
bonnie@ndfamilylaw.com

CERTIFICATE OF COMPLIANCE

[¶27.] The undersigned as the attorney representing Appellant, and the author of the Brief of Appellant hereby certifies that said brief complies with N.D. R. App. P. 32(a)(8)(A), in that the brief was prepared with roman typeface and that the total number of pages does not exceed 16 through the signature block.

Dated this 29th day of March, 2021.

/s/ Bonnie Paradis Humphrey

Attorney for Plaintiff/Appellee

N.D. License #: 04991

HUMPHREY LAW OFFICE, P.C.

1344 South Main Street

P.O. Box 2045

Minot, ND 58702-2045

(701) 852-5777 office

bonnie@ndfamilylaw.com

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Zachary Lewis Johnshoy, Plaintiff/Appellee, vs. Amanda Sue Johnshoy, n/k/a Amanda Sue Fry, Defendant/Appellant.	Supreme Court Case No. 20200263 Ward County Case No. 51-2020-DM-00400 CERTIFICATE OF SERVICE
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I certify that a copy of the following were served to the individual(s) indicated on the date below:

Plaintiff/Appellee's Brief (corrected)

on:

Kyle Richard Craig
kcraig@ackrelaw.com

an ECF participant to their preferred email address for service through the North Dakota Supreme Court's electronic portal for service and by courtesy email with read and delivery receipts requested.

Dated this 29th day of March, 2021.

HUMPHREY LAW OFFICE, P. C.



Bonnie P. Humphrey, ND ID #04991

Attorney for Plaintiff/Appellee
1344 South Main Street
Post Office Box 2045
Minot, ND 58702-2045
(701) 852-5777 Office
bonnie@ndfamilylaw.com