

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

Viviana J. Lovett,)	
)	Supreme Court No. 20210198
Appellant & Plaintiff)	
)	Case No. 51-2017-DM-00200
vs.)	
)	
Antonio R. Lovett,)	
)	
Appellee & Defendant)	
)	
and)	
)	
State of North Dakota, Statutory Real)	
Party in Interest)	

APPELLANT'S BRIEF

Appeal from Order Denying Prima Facie Case
Entered on June 29, 2021
In District Court, Ward County, State of North Dakota
The Honorable Stacy J. Louser

Christene A. Reiersen #06176
Reiersen Law Office, P.C.
600 22nd Ave NW
Minot ND 58703
(701) 839-7585
reiersonlaw@gmail.com
Attorney for Plaintiff/Appellant

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[¶1] **TABLE OF AUTHORITIES**

<u>Cases</u>	<u>Paragraph</u>
<u>Green v. Green</u> , 2009 ND 162, 772 N.W.2d 162	17
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[¶2] STATEMENT OF THE ISSUE

[¶3] I. Whether the District Court erred in denying a finding a prima facie case had been made in Plaintiff's Motion to Modify Residential Responsibility.

[¶4] STATEMENT OF THE CASE

[¶5] A divorce Judgment was issued by the Ward County District Court on November 26, 2018. (Judgment, docket sheet No. 36; Appellant's Appendix ("A.") 10). On January 8, 2020, an Order was issued by the Ward County District Court addressing Antonio Lovett's Motion for Contempt and Motion to Modify Primary Residential Responsibility. (Order, docket sheet No. 68; A. 30). A Judgment and Decree was issued by the Ward County District Court on April 20, 2020. (Judgment and Decree, docket sheet No. 97; A. 32).

[¶6] On April 6, 2021, Antonio Lovett filed and served upon Viviana Lovett a motion to relocate outside of the state of North Dakota with the minor children of the parties. (Notice of Motion to Relocate, Motion to Relocate, Brief in Support of Motion to Relocate, and Affidavit of Antonio Lovett, Service Document, docket sheet Nos. 100-104). On April 23, 2021, Viviana Lovett filed and served her response in objection to Antonio Lovett's motion to relocate. (Brief in Response to Motion to Relocate, Affidavit of Viviana Lovett, Service Document, docket sheet Nos. 108-110). In addition to her response to Antonio Lovett's motion to relocate, Viviana Lovett filed and served upon Antonio Lovett a motion to modify residential responsibility. (Notice of Motion to Modify Residential Responsibility, Motion to Modify Residential Responsibility, Brief in Support of Motion to Modify Residential Responsibility, Affidavit of Viviana Lovett, Service Document, docket sheet Nos. 105-107, 109-110; A. 40, 41, 42). Antonio Lovett filed a response opposing Viviana Lovett's Motion to Modify Residential Responsibility. (Response in

Opposition to Motion to Modify Primary Residential Responsibility, docket sheet No. 113, A. 48). Viviana Lovett filed a reply brief to Antonio Lovett's response. (Reply Brief in Support of Motion to Modify Residential Responsibility, docket sheet No. 114; A. 51).

[¶7] On June 29, 2021, the District Court issued its Order Denying Prima Facie Case. (Order Denying Prima Facie Case, docket sheet No. 120; A. 55). On July 16, 2021, Viviana Lovett filed her Notice of Appeal. (Notice of Appeal, docket sheet No. 125; A. 58). On July 27, 2021, the North Dakota Supreme Court issued an Order of Remand temporarily remanding the matter to the District Court for the limited purpose of the district court's consideration and disposition of the pending motion to relocate. A hearing on Antonio Lovett's motion to relocate was held on August 2, 2021. On August 3, 2021, the District Court issued an Order Denying Motion to Relocate. (Order Denying Motion to Relocate, docket sheet No. 143). On August 16, 2021, the parties in this matter were advised that the remand issues had been resolved and a briefing schedule was issued.

[¶8] **STATEMENT OF THE FACTS**

[¶9] Viviana Lovett and Antonio Lovett were granted a divorce, per the stipulated terms of the parties, on November 26, 2018. (Judgment, A. 10). Viviana Lovett and Antonio Lovett have two minor children, KIL, born 2011, and KRL, born 2012. (Petition, A. 8, ¶3). Per the terms of the Judgment, the parties were granted equal residential responsibility for the minor children. (Judgment, A. 11, ¶5). The parties further stipulated that upon certain events occurring, the parties would review their parenting plan. (Judgment, A. 18, ¶15). It was agreed that if any of the following circumstances occurred, the parties would revisit their parenting plan: the oldest child reaching the age of ten (10); if either parent intends to move more than fifty (50) miles from his or her current residence; upon verified

chemical abuse/relapse; upon an agency or Court finding of child abuse or neglect by one or both parties; upon a court finding of domestic violence by one or both parties; or prolonged lack of contact with the child. (Judgment, A. 18, ¶15).

[¶10] In September of 2019, Antonio Lovett filed and served a Motion to Modify Residential Responsibility and a Motion for Contempt. (Notice of Motion for Contempt, Motion for Contempt, Brief in Support of Motion for Contempt, Notice of Motion to Modify Primary Residential Responsibility, Motion to Modify Primary Residential Responsibility, Brief in Support of Motion to Modify Primary Residential Responsibility, and Affidavit of Antonio Lovett, docket sheet Nos. 40-46). As a result of these motions, in January of 2020, the District Court issued an Order denying the Motion for Contempt and granting Antonio Lovett's Motion to Modify Primary Residential Responsibility. (Order, A. 30). Antonio Lovett was awarded primary residential responsibility for KIL and KRL. (Order, A. 30, ¶2). Following a subsequent evidentiary hearing, a Judgment and Decree was issued by the District Court in April of 2020. (Judgment and Decree, A. 32). The Judgment and Decree modified specific paragraphs of the Judgment previously entered on November 26, 2018. (Judgment and Decree, A. 32). The Judgment and Decree states "All other provisions of the parenting plan entered as incorporated with the Judgment entered on November 26, 2018 that do not conflict with the terms agreed upon shall remain unchanged." (Judgment and Decree, A. 39, ¶17).

[¶11] On April 6, 2021, Antonio Lovett filed and served upon Viviana Lovett a motion to relocate outside of the state of North Dakota with the minor children of the parties. (Notice of Motion to Relocate, Motion to Relocate, Brief in Support of Motion to Relocate, and Affidavit of Antonio Lovett, Service Document, docket sheet Nos. 100-104). On April

23, 2021, Viviana Lovett filed and served her response in objection to Antonio Lovett's motion to relocate, along with motion to modify residential responsibility. (Brief in Response to Motion to Relocate, Affidavit of Viviana Lovett, Service Document, Notice of Motion to Modify Residential Responsibility, Motion to Modify Residential Responsibility, Brief in Support of Motion to Modify Residential Responsibility, docket sheet Nos. 105-110; A. 40, 41, 42). Viviana Lovett argued in her motion to modify residential responsibility that she was not subject to the limitation on post-judgment modification of primary residential responsibility outlined in Section 14-09-06.6 of the North Dakota Century Code because the parties agreed, in writing, to review the parenting plan if one of the following circumstances occurred: the oldest child reached the age of ten (10); if either parent intended to move more than fifty (50) miles from his or her current residence; upon verified chemical abuse/relapse; upon an agency or Court finding of child abuse or neglect by one or both parties; upon a court finding of domestic violence by one or both parties; or prolonged lack of contact with the child. (Brief in Support of Motion to Modify Residential Responsibility, A. 43, ¶5). Specifically, Viviana Lovett argued that Antonio Lovett's Motion to Relocate with the minor children to Japan triggered the review of the parenting plan outside of the two-year moratorium.

[¶12] Antonio Lovett filed a response opposing Viviana Lovett's Motion to Modify Residential Responsibility. (Response in Opposition to Motion to Modify Primary Residential Responsibility, A. 48). Antonio Lovett argued that the Judgment and Decree did not provide a provision mandating review of residential responsibility if one parent relocates. (Response in Opposition to Motion to Modify Primary Residential Responsibility, A. 48, ¶2). Antonio Lovett also argued that Viviana Lovett did not allege

any of the exceptions to the limitations on post-judgment modification of primary residential responsibility. (Response in Opposition to Motion to Modify Primary Residential Responsibility, A. 48-49, ¶2).

[¶13] Viviana Lovett filed a reply brief to Antonio Lovett's response. (Reply Brief in Support of Motion to Modify Residential Responsibility, A. 51). Viviana Lovett again reiterated that she was not subject to the limitation on post-judgment modification of primary residential responsibility based upon Paragraph 15 of the Judgment. (Reply Brief in Support of Motion to Modify Residential Responsibility, A. 53-54, ¶7). Viviana Lovett further pointed out the Judgment and Decree, which modified residential responsibility and was entered in April of 2020, incorporated by reference all of the terms of the Judgment entered on November 26, 2018, which were not in conflict with the terms of the Judgment and Decree, including reviewing the parenting plan if one of the circumstances in Paragraph 15 of the Judgment occurred. (Reply Brief in Support of Motion to Modify Residential Responsibility, A. 51-52, ¶¶ 3-4).

[¶14] On June 29, 2021, the District Court issued its Order Denying Prima Facie Case. (Order Denying Prima Facie Case, A. 55). The District Court cited the statutory authority for modifying primary residential responsibility found in Section 14-09-06.6 of the North Dakota Century Code. (Order Denying Prima Facie Case, A. 56, ¶6). The District Court held that it was barred from modifying primary residential responsibility for a period of two years absent one of the provisions set forth in subsection 3 of Section 14-09-06.6 of the North Dakota Century Code. (Order Denying Prima Facie Case, A. 56, ¶7). The District Court then found that Viviana Lovett had not alleged any of the provisions to allow modification of primary residential responsibility during the two year moratorium set forth

in Section 14-09-06.6 of the North Dakota Century Code. (Order Denying Prima Facie Case, A. 57, ¶8).

[¶15] LAW AND ARGUMENT

[¶16] I. Standard of Review

[¶17] “. . . [T]he appropriate standard of review to be applied when reviewing the denial of an evidentiary hearing on a change of custody is de novo.” Green v. Green, 2009 ND 162, ¶ 5, 772 N.W.2d 612. “De novo is the appropriate standard of review because a party moving to change custody, when less than two years has passed, is required to establish a prima facie case.” Id. “. . . [T]he determination whether a prima facie case has been established is a question of law.” Id. “Questions of law are reviewed de novo.” Id.

[¶18] II. Whether the District Court erred in denying a finding a prima facie case had been made in Plaintiff’s Motion to Modify Residential Responsibility.

[¶19] North Dakota law states

Unless agreed to in writing by the parties, or if included in the parenting plan, no motion for an order to modify primary residential responsibility may be made earlier than two years after the date of entry of an order establishing primary residential responsibility, except in accordance with subsection 3.

N.D. Cent. Code § 14-09-06.6(1). North Dakota law further states “Unless agreed to in writing by the parties, or if included in the parenting plan, if a motion for modification has been disposed of upon its merits, no subsequent motion may be filed within two years of disposition of the prior motion, except in accordance with subsection 5.” N.D. Cent. Code § 14-09-06.6(2).

[¶20] In this case, the parties stipulated to a divorce utilizing the self-help forms provided on the North Dakota Supreme Court website. The Judgment that was entered in this matter was also the fill in the blank self-help forms located on the North Dakota Supreme Court

website. As part of the stipulation and Judgment, Viviana and Antonio Lovett agreed, in writing, and it was included in the parties' parenting plan, that they would review the parenting plan upon the oldest child reaching the age of ten (10); if either parent intends to move more than fifty (50) miles from his or her current residence; upon verified chemical abuse/relapse; upon an agency or Court finding of child abuse or neglect by one or both parties; upon a court finding of domestic violence by one or both parties; or prolonged lack of contact with the child. For purposes of this appeal, the two circumstances that are present are the oldest child turning ten (10) years old and Antonio Lovett's intent to move more than fifty (50) miles from his current residence.

[¶21] The District Court found that Viviana Lovett had not met the criteria to overcome the two-year moratorium on post-judgment modification of primary residential responsibility. In this case, Viviana Lovett was not required to show any of the exceptions outlined in subsections 3 or 5 of Section 14-09-06.6 of the North Dakota Century Code to overcome the two-year moratorium on post-judgment modification of primary residential responsibility because Viviana and Antonio Lovett agreed, in writing, to review their parenting plan, and it was part of the parenting plan to review the parenting plan, when the parties' oldest child reached age ten (10) or if either parent intended to move more than fifty (50) miles from his or her current residence.

[¶22] The District Court also found that Viviana Lovett's Motion to Modify Residential Responsibility was premature because it "assumes Antonio has already moved to Japan." The plain reading of Paragraph 15 of the Judgment shows parties agreed to review the parenting plan and residential responsibility "if either parent *intends* to move more than fifty (50) miles from his or her current residence." (emphasis added). There was no

requirement to show that Antonio Lovett actually relocated, rather, just the intent to relocate triggers the ability to review the parenting plan and residential responsibility.

[¶23] Antonio Lovett argued in his opposition to Viviana Lovett’s Motion to Modify Residential Responsibility that the Judgment and Decree, which amended the original Judgment, did not provide a provision mandating review of residential responsibility if one parent relocates. This argument is contradicted by the plain language of the Judgment and Decree. Paragraph 17 of the Judgment and Decree states “All other provisions of the parenting plan entered as incorporated with the Judgment entered November 26, 2018 that do no conflict with the terms agreed upon shall remain unchanged.” The parties specifically identified the paragraphs of the Judgment they were modifying. The Judgment and Decree does not modify or change Paragraph 15 of the Judgment. As such, Paragraph 15 is incorporated by reference in the Judgment and Decree and continues to provide for modifications of the parenting plan and residential responsibility should any of the outlined occurrences present itself.

[¶24] Viviana Lovett anticipates that Antonio Lovett will argue that the appeal is moot due to the District Court denying Antonio Lovett’s request to relocate with the minor children. However, this Court has a de novo standard of review. In this case, although Antonio Lovett was denied the ability to relocate with the minor children, there is still one circumstance that the parties agreed would trigger a review of their parenting plan and residential responsibility, the oldest child turning ten (10) years old. KIL has now turned ten (10) years old. Based upon the District Court’s previous Order Denying Prima Facie Case, the District Court believes that there is a two-year moratorium on reviewing the parenting plan and has disregarded the Judgment and written parenting plan which allows

for review upon the outlined circumstances. Viviana Lovett will likely face the same determination from the District Court should she file another motion to modify residential responsibility based upon the oldest child turning ten (10) years old or if Antonio Lovett receives new orders from the United States Air Force requiring him to relocate outside of the state of North Dakota.

[¶25] The District Court erred in denying Viviana Lovett’s Motion to Modify Residential Responsibility and by not finding a prima facie case warranting an evidentiary hearing. The District Court’s Order Denying Prima Facie Case should be reversed and this matter should be remanded for an evidentiary hearing on Viviana Lovett’s Motion to Modify Residential Responsibility.

[¶26] **CONCLUSION**

[¶27] Viviana Lovett respectfully requests this Court reverse the District Court’s Order Denying Prima Facie Case and remand this matter to the District Court for an evidentiary hearing on Viviana Lovett’s Motion to Modify Residential Responsibility.

[¶28] **CERTIFICATE OF COMPLIANCE**

[¶29] I, Christene A. Reiersen, hereby certify that the number of pages contained in this Appellant’s Brief complies with Rule 32, N.D.R.App.P., and consists of twelve (12) pages.

[¶30] Respectfully submitted this 15th day of September, 2021.

/s/ Christene A. Reiersen
Christene A. Reiersen #06176
Reiersen Law Office, P.C.
600 22nd Ave NW
Minot ND 58703
(701) 839-7585
reiersonlaw@gmail.com
Attorney for Plaintiff/Appellant

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)	Supreme Court No. 20210198
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)	Case No. 51-2017-DM-00200
Antonio R. Lovett,)	
)	
Defendant/Appellee.)	

I, Christene A. Reiersen, attorney for Viviana J. Lovett, Plaintiff/Appellant, do hereby certify that a true and correct copy of the following documents:

- 1) APPELLANT'S BRIEF; and
- 2) APPELLANT'S APPENDIX

were, on September 15, 2021, electronically served upon Kyle R. Craig, attorney for the Defendant/Appellee, at: kcraig@kylecraiglaw.com.

Dated this 15th day of September, 2021.

REIERSON LAW OFFICE, P.C.

BY: /s/ Christene A. Reiersen

Christene A. Reiersen (ID 06176)

Attorney for Plaintiff/Appellant

Northland Professional Building

600 22nd Avenue N.W.

Minot, ND 58703-0986

(701) 839-7585

E-mail: reiersonlaw@srt.com

E-serve: reiersonlaw@gmail.com

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I, Christene A. Reiersen, attorney for Viviana J. Lovett, Plaintiff/Appellant, do hereby
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- 2) APPELLANT'S APPENDIX

were, on September 15, 2021, electronically served upon the State of North Dakota, Statutory
Real Party in Interest, at: minotcse@nd.gov.

Dated this 15th day of September, 2021.

REIERSON LAW OFFICE, P.C.

BY: /s/ Christene A. Reiersen

Christene A. Reiersen (ID 06176)

Attorney for Plaintiff/Appellant

Northland Professional Building

600 22nd Avenue N.W.

Minot, ND 58703-0986

(701) 839-7585

E-mail: reiersonlaw@srt.com

E-serve: reiersonlaw@gmail.com