



MODIFYING PRIMARY RESIDENTIAL RESPONSIBILITY

A Research Guide for a North Dakota Civil Court Process

The North Dakota Legal Self Help Center provides resources to people who represent themselves in civil matters in the North Dakota courts.

The information provided in this research guide IS NOT a complete statement of the law. This information is intended as a starting point for your research into modifying primary residential responsibility in an order of a North Dakota district court. The information provided in this research guide is not intended for legal advice and cannot replace the advice of competent legal counsel licensed in the state.

The self-represented individual must make all decisions about how to proceed.

References to non-ND Legal Self Help Center resources are included for your convenience only. Including these references does not mean the ND Legal Self Help Center endorses, warrants, or accepts responsibility for the content or uses of the resource. Use at your own risk.

(Primary residential responsibility means a parent with more than 50% of the residential responsibility. Please note that in 2009 the North Dakota State Legislature changed the term "custody" to "residential responsibility" and changed the term "visitation" to "parenting time.")

OVERVIEW OF MODIFYING PRIMARY RESIDENTIAL RESPONSIBILITY:

When a North Dakota district court awarded residential responsibility in a family law case, such as divorce, legal separation, or other action to establish parenting rights and responsibilities, either parent may ask the court to modify primary residential responsibility in the existing case, if certain requirements are met.

Time limitations when a final order establishing primary residential responsibility has not been modified:

The parent requesting modification has the burden of proving requirements are met for modifying primary residential responsibility.

In general, neither parent may request changes to primary residential responsibility until two (2) years after the date of entry of the final order establishing primary residential responsibility.

Exceptions to the two (2) year time limit are:

1. The parents agree in writing to modifications to primary residential responsibility;
2. A shorter timeframe for modification to primary residential responsibility is included in the parenting plan; or

3. The court finds one (or more) of the following:

- The persistent and willful denial or interference with parenting time;
- The child's present environment may endanger the child's physical or emotional health or impair the child's emotional development; or
- The primary residential responsibility for the child has changed to the other parent for longer than six months.

The parent requesting modification to primary residential responsibility after the two (2) year time limitations must prove:

1. On the basis of facts that have arisen since the prior order, which were unknown at the time of the prior order, a material change has occurred in the circumstances of the child(ren) or the parties; and
2. The modification is necessary to serve the best interests of the child(ren).

Time limitations when a final order establishing primary residential responsibility has been modified:

The parent requesting modification has the burden of proving the requirements are met for modifying primary residential responsibility.

In general, neither parent may request additional modifications to primary residential responsibility until two (2) years after the date the final order modifying primary residential responsibility was entered.

Exceptions to the two (2) year time limit are:

1. The parents agree in writing to modifications to primary residential responsibility;
2. A shorter timeframe for modification to primary residential responsibility is included in the parenting plan; or
3. The court finds modification is in the best interests of the child(ren) and one (or more) of the following:
 - The persistent and willful denial or interference with parenting time;
 - The child's present environment may endanger the child's physical or emotional health or impair the child's emotional development; or
 - The primary residential responsibility for the child has changed to the other parent for longer than six months.

The court may modify a prior order concerning primary residential responsibility at any time if the court finds a stipulated (settlement) agreement by the parties to modify the order is in the best interests of the child.

*****Motions to Modify Primary Residential Responsibility Are a Two-Step Process*****

STEP ONE: The parent requesting modification to primary residential responsibility must establish a written prima facie case for modification in their motion documents:

The parent asking for modification must establish, in writing, a prima facie case for modification of primary residential responsibility.

“Prima facie case” is not defined in the laws enacted by the North Dakota Legislature related to modifying primary residential responsibility. You will need to research court opinions to define prima facie case and interpret for your situation. (See below for researching case law.)

STEP TWO: If the parent requesting modification establishes a written prima facie case for modification in their motion documents, the court will schedule an evidentiary hearing where the parent requesting modification must prove the allegations in their motion.

The court will review the motion documents served and filed by the parent asking for modification and the response to the motion documents served and filed by the other parent.

If the court determines that the parent requesting modification established a prima facie case for modification within the documents, the court will schedule an evidentiary hearing.

If the parent requesting modification does not establish a prima facie case, the court will dismiss the motion.

Within 30 days of entry of the court’s order for an evidentiary hearing, the parents and their attorneys, if any, must meet in person or by electronic means to prepare a joint informational statement. The joint informational statement must be filed with the court within seven (7) days after the meeting.

The parent asking for modification to primary residential responsibility has the burden of proving they meet all of the legal requirements for modification.

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LEGAL RESEARCH RESOURCES

NORTH DAKOTA STATUTES RELATED TO MODIFYING PRIMARY RESIDENTIAL RESPONSIBILITY:

(North Dakota statutes are found in the North Dakota Century Code (NDCC). The North Dakota Century Code contains the laws enacted by North Dakota Legislature. The NDCC is found online at www.legis.nd.gov/general-information/north-dakota-century-code.)

Chapter 14-05 **Divorce** www.legis.nd.gov/cencode/t14c05.html

Chapter 14-09 **Parent and Child** www.legis.nd.gov/cencode/t14c09.html

- See specifically, Section 14-09-06.6: Limitations on post-judgment modifications of primary residential responsibility.
- See also, Section 14-09-06.2: Best interests and welfare of child – Court considerations – Factors.

Chapter 14-14.1 **Uniform Child Custody Jurisdiction and Enforcement Act**

www.legis.nd.gov/cencode/t14c14-1.html

NORTH DAKOTA CASE LAW RELATED TO MODIFYING PRIMARY RESIDENTIAL RESPONSIBILITY:

(When the decision of a case is appealed from a North Dakota District Court to the North Dakota Supreme Court, the Supreme Court writes their opinion to explain how and why they interpreted the laws or rules to decide the appeal the way they did. The opinions are case law and are followed by North Dakota courts deciding later cases with similar facts and issues.)

Review the North Dakota Supreme Court opinions related to NDCC Section 14-09-06.6. The opinions include interpretations of “prima facie case,” “material change in circumstances,” and circumstances that met the requirements for modification less than two years from the final order.

One way to research case law related to NDCC Section 14-09-06.6, is to use the print version of the North Dakota Century Code to find the short summaries of case law after each Section of the Century Code. The case law summaries are located directly following the text of the Century Code Section. To view the full text of the opinion, go to www.ndcourts.gov, click on the “Supreme Court Opinions” link and enter the case name or case citation.

Another way to research case law related to modifying primary residential responsibility, is to search by topic at www.ndcourts.gov. Click on the “Supreme Court Opinions” link, the “Topic” link, and the on the link for “Child Cust. & Support (Div.\Other).”

NORTH DAKOTA COURT RULES RELATED TO MODIFYING PRIMARY RESIDENTIAL RESPONSIBILITY:

(Court rules govern how a dispute makes its way to court and how the dispute is conducted. All of the court rules are found online at www.ndcourts.gov/legal-resources/rules.)

Rule 6 of the North Dakota Rules of Civil Procedure: Computing and Extending Time; Time for Motion Papers. www.ndcourts.gov/legal-resources/rules/ndrcivp/6

Rule 3.2 of the North Dakota Rules of Court: Motions. www.ndcourts.gov/legal-resources/rules/ndrct/3-2

Rule 8.1 of the North Dakota Rules of Court: Family Mediation Program.
www.ndcourts.gov/legal-resources/rules/ndrct/8-1

- See Section 8.1(c)(1) for clerk referrals in post-judgment proceedings.

Rule 8.3.1 of the North Dakota Rules of Court: Case Management (Determination of Parental Rights or Change of Residential Responsibility). www.ndcourts.gov/legal-resources/rules/ndrct/8-3-1

- See 8.3.1(c) for the requirements and process to request a waiver of the Rule 8.3.1 requirements.
- See Appendix L of the North Dakota Rules of Court for the form for the Rule 8.3.1 Joint Informational Statement.

LAWS CONSTANTLY CHANGE THROUGH LEGISLATION, ADMINISTRATIVE RULE AND RULINGS, AND COURT DECISIONS.

To determine how a law applies to your situation, review the applicable law or laws, administrative rules and rulings, and case law.

Legal advice can only be given by a lawyer licensed to practice in North Dakota who has agreed to represent you. Legal advice includes interpreting how the laws and rules apply to your circumstances.

LIBRARY RESOURCES: (Not all legal resources are available online.)

ODIN is a shared library database of many North Dakota academic, public, state agency, and special libraries. Search ODIN for resources that may be available in a North Dakota library near you. (www.odin.nodak.edu)

If the book is available for interlibrary loan through ODIN, ask the librarian or library staff of your local North Dakota library how to request the book.

Following are library resources that may be of interest to you:

A Short & Happy Guide to Evidence, Sydney Beckman, West Academic Publishing, 2018.

The Legal Answer Book for Families, Emily Duskow, Marcia Stewart, NOLO, 2014.

Represent Yourself in Court: How to Prepare & Try a Winning Case, Paul Bergman, Sara Berman, NOLO, 2016.

North Dakota Century Code Annotated, Lexis Nexis, Creation Date c1959 – present.

North Dakota Court Rules Annotated, Lexis Nexis, Creation Date c1990 – present.

OTHER LEGAL RESEARCH RESOURCES:

How to Research a Legal Problem: A Guide for Non-Lawyers, American Association of Law Libraries. (www.aallnet.org)

REVIEW YOUR NORTH DAKOTA COURT ORDER:

Review your North Dakota court order that established residential responsibility and parenting time.

Your North Dakota court order may include requirements for modifying primary residential responsibility.

Your court order may also require you to take certain steps, such as mediation, to resolve disputes before you ask the court to resolve the dispute.

Review your order carefully!

BASIC COURT PROCESS FOR A MOTION FOR AN ORDER TO MODIFY PRIMARY RESIDENTIAL RESPONSIBILITY

Modifying primary residential responsibility is a complex process. The ND Legal Self Help Center does not have forms or instructions available for making a motion to modify primary residential responsibility. It is strongly recommended that you consult an attorney.

When asking the court for an order in an existing case, it is done in writing in the form of a motion.

For information about making a motion: www.ndcourts.gov/legal-self-help/making-a-motion.

For information about answering a motion: www.ndcourts.gov/legal-self-help/answering-a-motion.

Documents to Make a Motion to Modify Primary Residential Responsibility:

- Notice of motion
 - A required written notice that tells all parties that a request for an order will be made to the court.
- Motion
 - A required short, written request to the Court in an existing case for an order for a specific purpose.
- Brief in support of motion
 - A required written explanation of why the court should grant the request. A brief takes the specific rules and laws that support the request and explains how they apply to the facts of the particular situation. Facts referred to in the brief should also appear in the affidavit.
 - **Important! The brief is where the parent making the motion makes their prima facie case for modification of primary residential responsibility.**
- Affidavit to support the motion
 - A written statement made under oath in front of an authorized officer. Facts referred to in the brief should also appear in the affidavit. The affidavit must be signed in the presence of a notary public or clerk of court by the individual making the statement.
 - **Important! Your affidavit is also where the parent making the motion makes their prima facie case for modification of primary residential responsibility.**
- Other supporting documents (settlement agreements, other affidavits, exhibits, etc.)
- Proof of service of the motion documents on the other parties.

If the parent making the motion does not make a prima facie case in their motion documents, the court will dismiss the motion to modify primary residential responsibility.

Documents to Answer a Motion to Modify Primary Residential Responsibility:

- Answer brief to motion
 - A required written document that takes the rules and laws that support the response to the other parent's request and explains how the version of the facts in the answer applies to the situation that led to the motion. Facts referred to in the answer brief should also appear in the affidavit in support of the answer brief.
- Affidavit to support the answer brief
 - A written statement made under oath in front of an authorized officer. Facts referred to in the answer brief should also appear in the affidavit. The affidavit must be signed in the presence of a notary public or clerk of court by the individual making the statement.
- Other supporting documents (settlement agreements, other affidavits, exhibits, etc.)
- Proof of service of the answer to motion documents on the other parties.

If the parent requesting modification establishes a written prima facie case for modification in their motion documents, the court will schedule an evidentiary hearing.

The court will review the motion documents served and filed by the parent asking for modification and the answer to the motion documents served and filed by the other parent.

If the court determines that the parent requesting modification established a prima facie case for modification within the documents, the court will schedule an evidentiary hearing.

Within 30 days of entry of the court's order for an evidentiary hearing, the parents and their attorneys, if any, must meet in person or by electronic means to prepare a joint informational statement. The joint informational statement must be filed with the court within seven (7) days after the meeting.

The parent asking for modification to primary residential responsibility has the burden of proving they meet all of the legal requirements for modification.

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GENERAL-USE TEMPLATE FORMS

The North Dakota Legal Self Help Center has forms or instructions available for modifying primary residential responsibility for common, uncomplicated circumstances.

Go to www.ndcourts.gov/legal-self-help/custody to review the form sets. You will need to determine if any of the available form sets suit your circumstances. The ND Legal Self Help Center cannot advise you.

If the available form sets do not suit your circumstances, you will need to create your own legal documents, or retain an attorney to do so.

The following General-Use template forms are available at www.ndcourts.gov/legal-self-help/general-use-forms. You may find the General-Use template forms useful as a starting point for creating your own legal documents.

- Making a Motion - Checklist
- Notice of Motion form
- Notice of Hearing on Motion form
- Motion form
- Brief in Support of Motion form
- Answering a Motion - Checklist
- Answer Brief to Motion form
- Affidavit form
- Caption and Signature form

The Guide to a Civil Action is available at [Guide to a District Court Civil Action](#).

Legal Services of North Dakota created a Family Law Manual for lawyers. The Family Law Manual is available at www.legalassist.org/?id=128&page=ND+Family+Law+Manual. There are examples of documents available under the "Adoption" section. You may find the examples of interest for general formatting purposes.

(The reference to the Legal Services of North Dakota Family Law Manual is for formatting only. Including this reference does not mean the ND Legal Self Help Center endorses, warrants, or accepts responsibility for the content or uses of the Family Law Manual. Use at your own risk.)

If you would like assistance creating your legal documents, consult a lawyer licensed to practice in North Dakota.

Ask the lawyer about Limited Legal Representation. Resources for finding an attorney and more information about Limited Legal Representation follows on the next page.

ATTORNEY RESOURCES AND LIMITED LEGAL REPRESENTATION

You are not required to hire an attorney to access the state court system. If you decide to represent yourself, you must follow all of the rules, laws and procedures that an attorney is required to follow.

Attorney Resources

If you decide to find an attorney to represent you, you may find the following options of interest.

- Legal Services of North Dakota is a non-profit organization, providing free legal assistance to North Dakota residents in a variety of matters based on income. Legal Services of North Dakota can also determine whether an applicant meets the income requirements for the Volunteer Lawyers program that offers low-cost legal assistance based on income. The phone number is (800) 634-5263 and the website is www.legalassist.org.
- The State Bar Association provides a lawyer referral service to match paying clients in need of legal services with lawyers. The phone number is (866) 450-9579 and the website is www.sband.org.
- For a list of all lawyers who are licensed to practice in North Dakota, go to the North Dakota Supreme Court website at www.ndcourts.gov/Lawyers. You can narrow your search by name or location.

Limited Legal Representation

Attorneys licensed to practice in North Dakota may provide Limited Legal Representation in civil actions. Limited Legal Representation (sometimes called “unbundling”) is a way that an attorney can help you with part of your case while you do the rest of your case. You pay for the part of the case the attorney handled. For example:

- You may want an attorney to give you an expert opinion about your options, or your legal rights and responsibilities;
- You can consult with an attorney to prepare or review your paperwork, but attend hearings yourself;
- You can represent yourself through the whole case, and periodically consult with an attorney who can coach you on the law, procedures and strategy;
- You can do the preparation yourself and hire an attorney just to make the court appearance for you.

You and the attorney must agree in writing to Limited Legal Representation.